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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

COUNTY OF MULTNOMAH, Plaintiff, v. EXXON MOBIL CORP., SHELL PLC F.K.A. ROYAL DUTCH SHELL PLC, SHELL U.S.A., INC., EQUILON ENTERPRISES LLC DBA SHELL OIL PRODUCTS US, BP PLC, BP AMERICA, INC., BP PRODUCTS NORTH AMERICA, INC., CHEVRON	Case No. 3:23-cv-1213 DEFENDANTS CHEVRON CORPORATION'S AND CHEVRON U.S.A., INC.'S NOTICE OF REMOVAL

CORP., CHEVRON U.S.A., INC., CONOCOPHILLIPS, MOTIVA ENTERPRISES, LLC, OCCIDENTAL PETROLEUM F.K.A. ANADARKO PETROLEUM CORP., SPACE AGE FUEL, INC., VALERO ENERGY CORP., TOTALENERGIES, S.E. F.K.A. TOTAL S.A., TOTALENERGIES MARKETING USA F.K.A. TOTAL SPECIALTIES USA, INC., MARATHON OIL COMPANY, MARATHON OIL CORP., MARATHON PETROLEUM CORP., PEABODY ENERGY CORP., KOCH INDUSTRIES, INC., AMERICAN PETROLEUM INSTITUTE, WESTERN STATES PETROLEUM ASSOCIATION, MCKINSEY AND COMPANY, INC., MCKINSEY HOLDINGS, INC., and DOES 1-250 INCLUSIVE,

Defendants.

PLEASE TAKE NOTICE THAT Defendants Chevron Corporation and Chevron U.S.A., Inc. (together, the "Chevron Defendants") remove this action—with reservation of all defenses and rights—from the Circuit Court of the State of Oregon for the County of Multnomah, Case No. 23CV25164, to the United States District Court for the District of Oregon, pursuant to 28 U.S.C. §§ 1331, 1332, 1441(a), and 1442. All other defendants that have been properly joined and served (collectively, "Defendants") have consented to this Notice of Removal.

This action is removable for three independent reasons: (1) the requirements of 28 U.S.C. § 1332 for diversity jurisdiction are met; (2) this Court has original federal question jurisdiction pursuant to the Federal Officer Removal Statute, 28 U.S.C. § 1442; and (3) the Complaint presents substantial federal questions under 28 U.S.C. §§ 1331 and 1441(a). Defendants also maintain (4) that the Complaint necessarily arises under federal law and thus is removable under 28 U.S.C. §§ 1331 and 1441(a); although the Ninth Circuit has rejected that argument,

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Defendants raise it solely to preserve it for potential U.S. Supreme Court review. This Court has supplemental jurisdiction under 28 U.S.C. § 1367(a) over any claims against the properly joined defendants for which it does not have original federal question jurisdiction because they form part of the same case or controversy as those claims over which the Court has original jurisdiction.

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I. INTRODUCTION

For more than a century, the United States federal government has expressly recognized the fundamental strategic importance of oil and gas to the Nation's economic well-being and national security. It is not a coincidence that the United States Department of Defense ("DOD") is the single largest consumer of energy in the United States and one of the world's largest users of petroleum fuels. In fact, for vital security and economic reasons, every Administration since Franklin D. Roosevelt has taken active steps to increase U.S. oil production. Even as the concerns related to global climate change have spurred an increased focus on alternative sources of energy, petroleum remains the backbone of U.S. energy policy.

Now, however, Plaintiff asks the Court to find that this same petroleum production contributes to, among other things, an unlawful "public nuisance" and "trespass" under Oregon state law. Under various theories, the Complaint seeks to hold Defendants liable as extractors, producers, refiners, manufacturers, promoters, marketers, and/or sellers of fossil fuel products. Plaintiff seeks a "[c]ompensatory award for past damages in the amount of $50,000,000" for costs Multnomah County claims to have incurred to protect against alleged impacts of climate change, "an order that will abate the nuisance by the establishment of an abatement fund remedy to be paid for by the Defendants in the amount of at least $50 Billion," and a "[c]ompensatory award for future damages in the amount of no less than $1.5 Billion," among other things. First Amended Complaint ("Compl."), Declaration of Joshua D. Dick ("Dick Decl."), Ex. 1, at 203–04 (Prayer for Relief).

Although the Ninth Circuit has considered similar lawsuits presenting related jurisdictional issues, including *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020) ("*City of Oakland*"), *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022) ("*San*

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Mateo"), and *City & County of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022) ("*Honolulu*"), this case presents several removal arguments that those cases did not address.

First, there is diversity jurisdiction. The sole non-diverse Defendant in this action, Space Age Fuel, Inc. ("Space Age"), has been fraudulently joined, and procedurally misjoined, in a transparent attempt to avoid the jurisdiction of this Court. Plaintiff has no possibility of establishing a cause of action against Space Age, a family-owned business that owns and operates twenty-one retail fuel and convenience stores and fifteen truck and trailers that supply retail and wholesale fueling facilities. Space Age is not alleged to have engaged in any fossil fuel production, is not alleged to have made any false or misleading statement, is not alleged to have had any special knowledge about any alleged negative effects of fossil fuels, and is not alleged to have participated in any purported campaign of disinformation. Moreover, because Space Age's circumstances are so different from those of the other Defendants, its misjoinder violates the Federal Rules of Civil Procedure. Once Space Age's citizenship has been properly disregarded under either of these doctrines, there is complete diversity of citizenship for purposes of federal jurisdiction.

Second, there is jurisdiction under 28 U.S.C. § 1442(a)(1), the federal officer removal statute. Plaintiff's claims depend on Defendants' production, distribution and/or sale of oil and gas that create greenhouse gas emissions when combusted by end users. Because Plaintiff seeks damages for harms allegedly caused by global greenhouse gas emissions, Plaintiff does not—and cannot—limit its claims to harms allegedly caused by oil and gas extracted, produced, distributed, sold, marketed, or used in Oregon. Instead, Plaintiff's claims expressly target Defendants' nationwide and *global* activities. In fact, Plaintiff's claims sweep even more broadly—they depend on the activities of billions of oil and gas consumers, including not only

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entities like the U.S. government and military, but also countless hospitals, schools, manufacturing facilities, and individual households around the world. Indeed, Plaintiff itself is a frequent consumer and user of fossil fuels, emitting millions of tons of CO_2 through its own consumption alone.[1]

The scope of Plaintiff's theory is breathtaking—it would reach the sale of oil and gas anywhere in the world, such as all past and otherwise lawful sales, including sales to the federal government. As explained below, a significant portion of Defendants' production and sales activities, including the production of large amounts of specialized, noncommercial grade fuels for the U.S. military, and extensive federally directed activities during World War II, were undertaken at the direction of federal officers. Those activities necessarily relate to Plaintiff's lawsuit and alleged injuries, thereby allowing removal under the federal officer removal statute. This evidence was not before the Ninth Circuit in *City of Oakland* or *San Mateo* and was not considered by the Ninth Circuit in *Honolulu.*

Third, to the extent that Plaintiff's claims involve Defendants' speech by challenging alleged misrepresentations, they are removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), another argument that the Ninth Circuit has not addressed in a climate-change-related case. Plaintiff cannot prevail on its Complaint to the extent it identifies alleged misrepresentations as a step in the causal chain leading to its claimed injuries, without first satisfying its burden of establishing the prerequisites to liability mandated by the First Amendment. Plaintiff's claims therefore necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment, making

[1] City of Portland Bureau of Plan. and Sustainability, Summary of 2020 Multnomah County Carbon Emissions and Trends at 4 (July 2022), https://www.portland.gov/bps/climate-action/documents/multnomah-county-2020-carbon-emissions-and-trends/download#.

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them removable under *Grable*. To the extent Plaintiff's claims attempt to suppress Defendants' speech on climate change, an issue of national and international importance that implicates federal authority over foreign affairs and domestic environmental and economic policy, those claims are undeniably "substantial" and removable under *Grable*.

Fourth, solely for purposes of preserving the argument for potential U.S. Supreme Court review, Defendants maintain that Plaintiff's Complaint is removable because, as a matter of federal constitutional law and structure, Plaintiff's claims necessarily arise under federal law, not state law. Defendants recognize that the Ninth Circuit has rejected this argument; Defendants raise it solely to preserve it for potential U.S. Supreme Court review.

Accordingly, Plaintiff's Complaint should be heard in this federal forum.

II. TIMELINESS OF REMOVAL

Plaintiff filed a Complaint against the Chevron Defendants and other named Defendants in the Circuit Court of the State of Oregon for the County of Multnomah, Case No. 23CV25164, on June 22, 2023. On August 8, 2023, Plaintiff filed a First Amended Complaint ("Complaint" or "Compl."). A copy of all process, pleadings, or orders in the possession of the Chevron Defendants are attached as Exhibit 1 to the Declaration of Joshua D. Dick, filed concurrently herewith.

This Notice of Removal is timely under 28 U.S.C. § 1446(b) because it is filed within 30 days after service. 28 U.S.C. § 1446(b). Chevron Corporation was served on July 20, 2023. Dick Decl. ¶ 3; *id*. Ex. 1. The consent of the other Defendants is not required because removal does not proceed "solely under section 1441(a)." 28 U.S.C. § 1446(b)(2)(A). The Chevron Defendants remove this action to federal court on several bases, including, for example, 28 U.S.C. § 1442(a)(1). Nevertheless, all properly joined and served Defendants have consented to

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removal. Dick Decl. ¶ 4. Consent is not required from any Defendant that has not been served. *See* 28 U.S.C. § 1446(b)(2)(A).[2]

III. SUMMARY OF ALLEGATIONS AND GROUNDS FOR REMOVAL

Plaintiff brings claims against Defendants seeking damages and equitable relief for harms allegedly caused by "fossil fuel induced weather extremes." *See, e.g.*, Compl. ¶ 21. Plaintiff asserts the following claims: Public Nuisance, Negligence, Fraud and Deceit, and Trespass. In addition to compensatory and future damages, in its request for relief, Plaintiff seeks the establishment of an abatement fund. Compl. at 203–04, Prayer for Relief.

It is unclear whether Plaintiff's claims are based on the production of oil and gas or alleged misstatements by Defendants about climate change. Indeed, the Complaint alleges that Plaintiff's claims focus on Defendants' worldwide "*extraction*, *production*, *manufacturing*, *refining*, *distribution*, [] *marketing*," Compl. ¶¶ 31, 78, 85, 128, 144 (emphases added), and *consumption* of oil and natural gas that Plaintiff alleges caused an "extreme heat events." Compl. ¶ 16 (emphases added). If Plaintiff opposes removal, it should make its theory of its case clear to Defendants and the Court. In any event, while Plaintiff purports to allege certain misrepresentations, Plaintiff also broadly targets the production, distribution, and use of fossil fuels generally. Under Plaintiff's theory of relief—and the global causal mechanism upon which it depends—alleged misrepresentations matter for Plaintiff's tort claims only insofar as they purportedly led to a marginal increase in greenhouse gas emissions. If Plaintiff's tort claims were

[2] In filing this Notice of Removal, the Chevron Defendants, and all other Defendants, do not waive, and expressly preserve, any right, defense, affirmative defense, or objection, including, without limitation, lack of personal jurisdiction, insufficient process, and/or insufficient service of process. A number of Defendants contend that personal jurisdiction in Oregon is lacking over them, and these Defendants intend to preserve that defense and move to dismiss for lack of personal jurisdiction at the appropriate time. *See, e.g.*, *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 409 (1929) (removal to federal court does not waive right to object to personal jurisdiction).

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based *solely* on misrepresentations, the requested relief sought would look much different—for example, the difference in value between a product purchased and one that a consumer would have purchased but for the alleged misrepresentation. At most, the asserted remedies for those claims would necessarily be limited to injuries from any marginal increase in greenhouse gas emissions supposedly caused by an alleged "campaign of deception." But Plaintiff's Complaint includes *no such limitation*. Plaintiff's allegations refer to Defendants' total production and its alleged cumulative impact, and Plaintiff seeks damages for all alleged effects in Multnomah County of all global greenhouse gas emissions.

If Plaintiff intends to argue that its claims are based solely on misrepresentations and/or "deception"—which it cannot plausibly do given the nature of its alleged claims, injuries, and theory of causation—Plaintiff should, at a minimum, represent that the damages it seeks are limited to those resulting from the incremental amount (if any) by which emissions increased as a result of any alleged misrepresentations and omissions. If Plaintiff does not represent that its damages are so limited, then Plaintiff should be foreclosed from arguing in support of remand that its claims are limited to Defendants' alleged misrepresentations and deception. Plaintiff cannot have it both ways.

The Chevron Defendants deny that any Oregon court has personal jurisdiction over it and further deny any liability as to Plaintiff's claims. The Chevron Defendants expressly reserve all rights in this regard. For purposes of meeting the jurisdictional requirements for removal only, however, the Chevron Defendants submit that removal is proper on at least four independent and alternative grounds.

First, removal is authorized under 28 U.S.C. § 1332 because diversity jurisdiction exists where there is complete diversity of citizenship. Here, Plaintiff is a citizen of Oregon, none of the

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properly joined Defendants is a citizen of Oregon, and Plaintiff alleges damages in excess of $75,000. The sole Defendant that is a citizen of Oregon has been fraudulently joined and/or procedurally misjoined to avoid federal jurisdiction, and should be disregarded for purposes of diversity jurisdiction.

Second, Defendants are authorized to remove this action under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). Despite Plaintiff's purported disclaimers, *see* Compl. ¶ 17, multiple Defendants: (1) were "acting under" a federal officer; (2) have claims asserted against them that relate to acts under color of federal office; and (3) can assert colorable federal defenses. *See*, *Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017) (citing *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006)). The Complaint expressly alleges that the cumulative impact of Defendants' *global* extraction and production activities over the past several decades—which necessarily include Defendants' substantial activities under the direction, supervision and control of federal officers—contributed to the *global* greenhouse gas emissions that Plaintiff claims caused its alleged injuries. *See, e.g.*, Compl. ¶¶ 210–13.

Third, removal is authorized under 28 U.S.C. § 1331 and § 1441(a) because this action necessarily raises disputed and substantial federal questions that a federal forum may entertain without disturbing a congressionally approved balance of responsibilities between the federal and state judiciaries. *See Grable*, 545 U.S. at 314.

Fourth, solely for purposes of preserving the argument for potential U.S. Supreme Court review, Defendants maintain that this case is removable because Plaintiff seeks damages for interstate and international emissions and its claims thus must be governed by federal law; the

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issues presented by the Complaint are exclusively federal in nature and state law simply has no role to play.

Defendants will address each of these grounds in additional detail below. Should Plaintiff challenge this Court's jurisdiction, Defendants reserve the right to further elaborate on these grounds and will not be limited to the specific articulations in this Notice. *Cf., e.g.*, *Betzner v. Boeing Co.*, 910 F.3d 1010, 1014–16 (7th Cir. 2018) (holding that district court erred by requiring evidentiary submissions by defendant in the notice of removal, in advance of briefing on a motion to remand). Indeed, the Supreme Court has upheld removal where jurisdictional facts required to support the removal were found in later-filed affidavits rather than in the notice of removal. *See, e.g.*, *Yarnevic v. Brink's, Inc.*, 102 F.3d 753, 755 (4th Cir. 1996) (citing *Willingham v. Morgan*, 395 U.S. 402, 407 n.3 (1969)). "[T]he Court is not limited to an examination of the original [removal] petition in determining jurisdictional questions." *Giangola v. Walt Disney World Co.*, 753 F. Supp. 148, 153 n.5 (D.N.J. 1990) (citation and internal quotation marks omitted); *see generally Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 83–84 (2014) (discussing requirement that notice of removal need contain only a short and plain statement of basis for removal, to be elaborated on if a remand motion is filed).

Defendants do not waive, and expressly reserve, all rights to submit additional arguments and evidence to show that this action is properly removable on the grounds discussed herein.

IV. THE ACTION IS REMOVABLE BECAUSE THE ONLY OREGON DEFENDANT IS FRAUDULENTLY JOINED AND PROCEDURALLY MISJOINED, AND THUS THERE IS COMPLETE DIVERSITY

This action is removable because the requirements of 28 U.S.C. § 1332 for diversity jurisdiction are met. There is complete diversity of citizenship for purposes of federal jurisdiction. Plaintiff is a citizen of Oregon, and none of the properly joined Defendants is a

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citizen of Oregon. The Complaint also alleges damages in excess of $75,000, thereby satisfying the amount-in-controversy requirement.

For diversity purposes, local governments are citizens of the state in which they are located. *See, e.g.*, *Great Am. Ins. Co. of N.Y. v. Jackson Cnty. Sch. Dist. No. 9*, 478 F. Supp. 2d 1227, 1230 (D. Or. 2007) (J. Panner) ("[A] political subdivision of a State . . . is a citizen of the State for diversity purposes.") (quoting *Moor v. Cnty. of Alameda*, 411 U.S. 693, 717 (1973)). Accordingly, Plaintiff is a citizen of Oregon.

The Complaint names twenty-five individual Defendants. Compl. ¶¶ 23–175. Based on the allegations in the Complaint and this Notice of Removal, twenty-four of these Defendants are incorporated and have their principal places of business outside of Oregon or, to the extent they are limited liability corporations, do not have any members who are citizens of Oregon).[3] *See id.* ¶ 25 (Exxon Mobil Corp.), ¶ 41 (Shell plc),[4] ¶ 42 (Shell USA, Inc.), ¶ 43 (Equilon Enterprises LLC),[5] ¶ 57 (Chevron Corporation), ¶ 59 (Chevron U.S.A. Inc.), ¶ 72 (BP plc), ¶ 73 (BP America, Inc.), ¶ 74 (BP Products North America, Inc.),[6] ¶ 88 (ConocoPhillips), ¶ 98 (Motiva Enterprises, LLC),[7] ¶ 109 (Occidental Petroleum),[8] ¶ 120 (Valero Energy Corporation), ¶ 127 (Koch Industries, Inc.), ¶ 137 (TotalEnergies, S.E.), ¶ 138 (TotalEnergies Marketing USA, Inc.), ¶ 145

[3] "[A]n LLC is a citizen of every state of which its owners/members are citizens." *Johnson v. Columbia Props. Anchorage*, LP, 437 F.3d 894, 899 (9th Cir. 2006).
[4] Contrary to the allegation in the Amended Complaint, Shell plc's headquarters is in England, not the Netherlands.
[5] Equilon Enterprises LLC's members are Shell Oil Products Company LLC and TMR Company LLC. Shell Oil Products Company LLC's member is Shell USA, Inc. TMR Company LLC's member is Shell USA, Inc. Shell USA, Inc. is incorporated in Delaware with its principal place of business in Texas.
[6] BP Products North America, Inc. is incorporated in Maryland with its principal place of business in Illinois.
[7] Motiva Enterprises LLC's members, Aramco Financial Services Company and Saudi Refining, Inc., are both incorporated in Delaware and both have their principal place of business in Texas.
[8] Occidental Petroleum Corporation is incorporated in Delaware with its principal place of business in Texas.

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(Marathon Oil Company); ¶ 143 (Marathon Oil Corporation), ¶ 147 (Marathon Petroleum Corporation), ¶ 167 (Peabody Energy Corporation), ¶ 186 (American Petroleum Institute),[9] ¶ 192 (Western States Petroleum Association),[10] ¶ 197 (McKinsey & Company, Inc.), ¶ 198 (McKinsey Holdings, Inc.). Only one Defendant is alleged to be a citizen of Oregon: Space Age Fuel, Inc. *Id*. ¶¶ 158–66.

Space Age is, however, fraudulently joined and procedurally misjoined in a transparent effort to avoid federal jurisdiction, and its citizenship should therefore be disregarded for the purpose of determining diversity jurisdiction. *See*, *e.g.*, *Richards for Est. of Ferris v. U-Haul Int'l, Inc*., 2023 WL 4146185, at *6 (D. Or. June 22, 2023) (M. Hernández) (finding fraudulent joinder of the only non-diverse Oregon defendant and denying motion to remand because "Defendants have met their burden to establish there is no possibility that a state court would find that the [Second Amended Complaint] states a cause of action against" the Oregon defendant).[11]

In this action, Plaintiff has sued—by its own account—"*multinational* oil and gas corporation[s]" and some of the "*world's largest* oil companies," which are "engaged in every aspect of the oil industry" around the globe. Compl. ¶¶ 26, 63, 61 (emphases added). Plaintiff has also sued "the *second largest* privately held company in the United States," *id*. ¶ 127 (emphasis added), the country's "*largest* oil trade association," *id*. ¶ 189 (emphasis added), and "one of the *world's largest* and most influential consulting companies." *Id*. ¶ 200 (emphasis added). The reason, of course, is that Plaintiff will presumably take the position that these

[9] American Petroleum Institute is incorporated in the District of Columbia with its principal place of business in the District of Columbia.
[10] Western States Petroleum Association is a nonprofit corporation incorporated in California with its principal place of business in California.
[11] For the same reason, Space Age's citizenship should be disregarded for purposes of the "forum defendant rule," which ordinarily prevents removal based on diversity jurisdiction if one or more defendants are citizens of the forum state. *See Ekeya* v. *Shriners Hosp. for Children, Portland*, 258 F. Supp. 3d 1192, 1199–1201 (D. Or. 2017) (J. Simon).

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companies and associations are indirectly responsible for a substantial portion of greenhouse gas emissions.

Space Age meets none of these characteristics or features. Indeed, it is a "family owned," father-and-son-operated, Oregon business.[12] The motivation behind Plaintiff's decision to sue a small family-owned business for the alleged consequences of global climate change is obvious—to bring in an Oregon corporation in an attempt to keep this case out of federal court, where it most naturally belongs. Indeed, of the more than two dozen similar climate change lawsuits that have been brought in recent years by States and municipalities around the country, this is the only one in which Space Age has been named as a Defendant.

According to the Complaint, Space Age "owns a retail chain of fuel and convenience stores." Compl. ¶ 160. The company operates twenty-one locations and fifteen truck and trailers; it also supplies an additional number of retail and wholesale fueling facilities.[13]

Space Age is not alleged to be involved in the exploration, production, or refining of fossil fuels. Space Age is not alleged to have made any statement or communication, or engaged in any marketing—false or otherwise—regarding climate change or the environment; indeed, *the Complaint attributes no statements or communications to Space Age at all*. Space Age is not alleged to have participated in any scheme of deception or misinformation, in any public relations campaign, or in any political advocacy or lobbying. Space Age is not alleged to have had any early or superior knowledge or understanding of climate-change science compared to the general public, nor does the Complaint provide any basis for concluding that it might have had such knowledge. Space Age is not alleged to have been a member of the American Petroleum

[12] *About Space Age Fuel*, Space Age, http://spaceagefuel.com/ (last visited July 28, 2023).

[13] *See supra* note 12.

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Institute, the Western States Petroleum Association, the Global Climate Coalition ("GCC"), or any other industry association or group mentioned in the Complaint, or to have ever been involved or associated with such organizations.

Critically, and tellingly, after the Complaint introduces Space Age (Compl. ¶¶ 158-66), the company is mentioned *nowhere else* in the 203-page pleading. That Plaintiff transparently included a single Oregon defendant without even attempting to allege any facts as to how it could possibly be liable should be dispositive.

Moreover, although Plaintiff's claims are premised on "*global* GHG emissions" from fossil fuels, which "polluted the *world's* atmosphere," Compl. ¶¶ 23, 24 (emphasis added), the Complaint includes no allegations as to what proportion of Defendants' total global production and sales are supposedly attributable to Space Age, let alone how Space Age's production and sales compare to the global total, or the level of global emissions that are purportedly attributable to Space Age. And notably, the Complaint's allegations regarding emissions from fossil fuel production omit Space Age entirely. *Id.* ¶ 182.

What Space Age *is* alleged to be is a citizen of Oregon—a status for which it now finds itself hauled into court merely so that Plaintiff may evade the jurisdiction of the federal courts. But the doctrines of fraudulent joinder and procedural misjoinder allow this Court to exercise diversity jurisdiction notwithstanding Plaintiff's transparent efforts to avoid it.

"When 'determining whether there is complete diversity, district courts may disregard the citizenship of a non-diverse defendant who has been fraudulently joined.'" *Richards*, 2023 WL 4146185, at *4 (denying remand because non-diverse defendant was fraudulently joined, and quoting *Grancare, LLC v. Thrower by and through Mills*, 889 F.3d 543, 548 (9th Cir. 2018)). A removing defendant may establish the fraudulent joinder of a non-diverse defendant by showing

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the "inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1044 (9th Cir. 2009). "[T]he party seeking removal is entitled to present additional facts that demonstrate that a defendant has been fraudulently joined." *Grancare*, 889 F.3d at 549.

Here, Space Age has been fraudulently joined because Plaintiff has not asserted a claim against Space Age that could possibly survive dismissal under Oregon state law. *See Hunter*, 582 F.3d at 1044. Plaintiff brings four state law claims against Defendants, including Space Age. *See* Compl. ¶¶ 502–32. The Complaint alleges that Defendants executed a "scheme to rapaciously sell fossil fuels and deceptively promote them as harmless to the environment, while they knew that carbon pollution emitted by their products into the atmosphere" would, in fact, be harmful. *Id*. ¶ 1; *see also id*. ¶ 10 ("Defendants have known and foreseen for decades that their fossil fuel pollution would cause widespread and catastrophic harm throughout the world . . . but they lied and cynically sought to sow 'scientific' and public doubt in furtherance of their ceaseless, ravenous quest for more wealth.").

But, as noted, the Complaint is bereft of any allegation that Space Age, a family-owned Oregon business, has made any statement or communication, false or otherwise, of any relevance to this action; that Space Age in any way participated in any alleged scheme or campaign of deception; or that Space Age knew or had any basis to be aware of the potential negative consequences of fossil fuels on any level greater than the general public. In the absence of any such allegations, Plaintiff is plainly unable to establish any cause of action against Space Age.

Instead of any specific allegations, Plaintiff resorts to group pleading, lumping in Space Age with the alleged conduct of the "world's largest" "multinational" oil and gas "Defendants" without providing any factual grounds to do so. For example, Plaintiff alleges that "[b]y the

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1950s, the Fossil Fuel Defendants [a category that Plaintiff defines to include Space Age] . . . discovered that climate change would present dangerous risks to the world's population," Compl. ¶ 284. But Space Age *did not even exist until 1982*.[14] Elsewhere, the Complaint alleges that the Fossil Fuel Defendants "converged and formed the [GCC] to fund and coordinate a . . . misinformation campaign," *id*. ¶ 345, but Space Age is never alleged to have been a member of the GCC, or to have been otherwise involved in the GCC's activities. Group pleading is impermissible and cannot hide the deficiencies in any claim against Space Age, particularly given that Plaintiff brings an explicit claim for fraud. *See id*. ¶¶ 518–24. It is well established that a complaint alleging fraud may not "lump multiple defendants together." Rather, Plaintiff must "differentiate [its] allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007) (cleaned up).[15]

If the Complaint's bare, conclusory allegations against Space Age were sufficient to support a claim against Space Age under Oregon law, then any company involved in the sale, distribution, or transportation of gasoline, diesel, or any other fossil fuel products could be sued for alleged damages caused by climate change, even if its operations were *de minimis* and even if

[14] *See supra* note 12.

[15] *See also, e.g.*, *Potter v. Dark Horse Comics, Inc.*, 2017 WL 2642973, at *2 (D. Or. May 17, 2017) (S. Beckerman) ("Plaintiff's complaint should be dismissed because it makes undifferentiated allegations against multiple defendants and, therefore, fails to provide Defendants with the notice required under Fed. R. Civ. P. 8."), *report and recommendation adopted*, 2017 WL 2642276 (D. Or. June 16, 2017) (J. Hernández); *Sizer v. New England Fin.*, 2010 WL 5101531, at *4–5 (D. Or. Sept. 22, 2010) (P. Papak) (finding resident defendant had been fraudulently joined, where "plaintiffs[] generally allege the elements of fraud against all defendants collectively" and where only allegation of fraud against resident defendant was that "Defendants and each of them, made material representations related to the terms and conditions," and "do not allege any facts on the face of the complaint indicating [resident defendant] committed fraud"), *report and recommendation adopted*, 2010 WL 5099484 (D. Or. Dec. 8, 2010) (J. Haggerty); *Ingram v. Carlton Lumber Co.*, 77 Or. 633, 637 (Or. 1915) (holding that "facts upon which fraud is predicated must be specifically pleaded").

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the company *never made a statement about climate change at all*. Indeed, on this theory, any entity or individual that sold, promoted, distributed, or used fossil fuels would be liable for contributing to global climate change—including the independent owner of a gas station or the motorists who pumped gas into their cars.

The inclusion of Space Age as a Defendant, alleged to be liable for the impacts of global climate change on Multnomah County, is an obvious attempt to evade this Court's jurisdiction over claims that go far beyond any conduct that could possibly be alleged against a modest, family-owned Oregon business. Accordingly, the Court should ignore the naming of Space Age in the lawsuit for purposes of determining diversity, resulting in complete diversity of citizenship for federal-jurisdiction purposes.

For similar reasons, Space Age is also procedurally *mis*joined. The doctrine of procedural misjoinder permits a court to sever claims against non-diverse defendants when "the joinder of the non-diverse Defendants does not comply with the Federal rules," permitting the Court to retain diversity jurisdiction over the remainder of the case. *Green v. Wyeth*, 344 F. Supp. 2d 674, 683 (D. Nev. 2004); *see also, e.g.*, *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000). Procedural misjoinder occurs when joinder would not be permissible under the applicable rules of civil procedure; here, Federal Rule of Civil Procedure 20 and Oregon Rule of Civil Procedure 28. *Green*, 344 F. Supp. 2d. at 685. Under both the federal and state joinder rules, claims must "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" to be properly joined. Fed. R. Civ. P. 20(a)(1)(A); ORCP 28(A); *see also Warner v. Stryker Corp.*, 2009 WL 1773170, at *1 (D. Or. June 22, 2009) (A. Aiken) (explaining that "the mere existence of common questions of law or fact does not satisfy the same transaction or

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occurrence requirement").

As explained *supra,* the Complaint cannot possibly state a cognizable claim against Space Age. But even if the claim is cognizable, it does not arise out of the same transaction or occurrence as the claims alleged against the other Defendants.[16] Space Age is a family-owned business that owns and operates twenty-one retail fuel and convenience stores and fifteen truck and trailers that supply retail and wholesale fueling facilities.[17] Space Age is not alleged to be involved in the exploration, production, or refining of fossil fuels. Space Age is also not alleged to have made any statement or communication regarding climate change or the environment. Space Age is not alleged to have been a member of either the Global Climate Coalition or the American Petroleum Institute. Thus, any claims against Space Age necessarily would fail to satisfy the standard for joinder—that the claim arise from the same transaction or occurrence. As this Court has explained in the past, claims against one group of defendants for production of a product do not "involve the same transactions and occurrences" as claims against another group of defendants for "acquisition and retail sales" of that product. *C.f. Underwood v. 1450 SE Orient, LLC*, 2019 WL 1245805, at *4 (D. Or. Jan. 28, 2019) (J. Russo) (granting a motion to sever "retail defendants" under Rule 20(a), because claims against them did not involve the "same transactions and occurrences" as claims against "producer defendants"), *report and recommendation adopted*, 2019 WL 1246194 (D. Or. Mar. 18, 2019) (J. Simon). Because the claims against Space Age are not properly joined under the applicable rules of civil procedure, those claims are "procedurally misjoined" and should be severed from this case and disregarded for removal purposes. As the *Green* court explained, the doctrine of procedural misjoinder

[16] Defendants maintain that the claims against them are also not cognizable and fully reserve their rights to contest their adequacy.
[17] *See supra* note 12.

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should be applied where, as here, "the joinder is procedurally inappropriate and clearly accomplishes no other objective than the manipulation of the forum, and where the rights of the parties and interest of justice is best served by severance." *Green*, 344 F. Supp. 2d at 685.

Finally, the amount in controversy exceeds $75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a); *see* Compl. at 203–04 (seeking $50 million in alleged compensatory past damages, $1.5 billion in alleged compensatory "future damages," and an abatement fund "in the amount of at least" $50 billion).[18]

Based on the allegations in the Complaint, Plaintiff claims that Defendants are liable for damages in excess of $75,000. Although Defendants deny all of these allegations and fully reserve their rights to contest their adequacy for pleading purposes or otherwise, the value of Plaintiff's claims meets the amount-in-controversy requirement of 28 U.S.C. § 1332. Accordingly, this action is removable under 28 U.S.C. § 1441(a) and (b)(2).

V. THE ACTION IS REMOVABLE UNDER THE FEDERAL OFFICER REMOVAL STATUTE

The federal officer removal statute allows removal of an action against "any officer (or any person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). A party seeking removal under section 1442 must show: (1) that it "act[ed] under" a federal officer; (2) that the plaintiff's claims are "for or relating to" the defendant's federally directed actions; and (3) that

[18] Defendants do not concede—and in fact deny—that Plaintiff is entitled to any of the relief it seeks. A plaintiff's claim "fixes the right of the defendant to remove" whether "well or ill founded in fact." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938); *see also* 14B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3702.1 (4th ed. 2020) ("[A] defendant who seeks to prove that the amount in controversy is greater than the jurisdictional amount does not automatically concede that the jurisdictional amount is recoverable.").

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it can assert a colorable federal defense. *Id.*; *see also, e.g.*, *Goncalves*, 865 F.3d at 1244.[19] So long as federal officer jurisdiction can be exercised as to one Defendant, the entire action is properly removed. *See* 28 U.S.C. § 1367. Defendants meet these criteria.[20]

A. The Courts Construe The Federal Officer Removal Statute Broadly In Favor Of Removal

The "Supreme Court has made clear that the [federal officer removal] statute must be liberally construed," and courts must "pay heed to [their] duty to interpret Section 1442 broadly in favor of removal." *Goncalves*, 865 F.3d at 1244–45 (cleaned up). Indeed, "defendants enjoy much broader removal rights under the federal officer removal statute than they do under the general removal statute." *Leite v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014).

At this stage, a defendant's allegations "in support of removal" need only be "facially plausible," and the defendant receives the "benefit of all reasonable inferences from the facts alleged." *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 941, 945 (7th Cir. 2020). A federal court must "credit the defendant's theory of the case," *Leite*, 749 F.3d at 1124, and "construe the facts in the removal notice in the light most favorable to the" existence of federal jurisdiction. *In re Commonwealth's Mot. to Appoint Couns. Against or Directed to Def. Ass'n of Philadelphia,* 790 F.3d 457, 466 (3d Cir. 2015) ("*Def. Ass'n of Philadelphia*"); *see also id.* at 474 ("[W]e must accept the [defendant's] theory of the case at this juncture."); *Baker*, 962 F.3d at 947 ("Our role at this stage of the litigation is to credit only the [defendant's] theory."). Defendants need not

[19] The party seeking removal must also show that it is a "'person' within the meaning of the statute." *Goncalves*, 865 F.3d at 1244 (cleaned up). The removing parties here are corporations, *see* Compl. ¶¶ 57–59, and "corporations are 'person[s]' under § 1442(a)(1)." *Goncalves*, 865 F.3d at 1244.

[20] The Complaint improperly conflates the activities of Defendants with the activities of their separately organized predecessors, subsidiaries, and affiliates. Although Defendants reject Plaintiff's erroneous attempt to attribute the actions of predecessors, subsidiaries, and affiliates to the named Defendants, for purposes of this notice of removal only, Defendants describe the conduct of certain predecessors, subsidiaries, and affiliates of certain Defendants to show that Plaintiff's Complaint, as pleaded, can and should be removed to federal court.

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affirmatively prove that they will prevail on the merits of any federal issue because the sole issue is *where* such merits will be adjudicated. *See Willingham*, 395 U.S. at 407 (holding that a defendant invoking section 1442(a)(1) "need not win his case before he can have it removed"). In *Jefferson County, Alabama v. Acker*, for example, the Supreme Court "credit[ed] the [defendants'] theory of the case for purposes of [all] elements of [the] jurisdictional inquiry and conclude[d] that the [defendants] made an adequate threshold showing that the suit is 'for a[n] act under color of office.'" 527 U.S. 423, 432 (1999). Plaintiff's alleged injuries are alleged to have arisen from global climate change, a phenomenon that purportedly arises from Defendants' production, marketing and sales activities (as well as emissions from and activities of innumerable other sources). Plaintiff's Complaint alleges that greenhouse gas emissions caused by billions of consumers' use of fossil fuels worldwide—which were produced, in part, at the federal government's direction—allegedly resulted in Plaintiff's purported harms. Plaintiff's claims thus implicate *all* of Defendants' oil and gas production, regardless of place or time, including that undertaken for the federal government. In *County Board of Arlington County, Virginia v. Express Scripts Pharmacy, Inc.*, the Fourth Circuit recently held that the defendants' provision of opioids pursuant to Department of Defense contracts was sufficient to establish federal officer removal jurisdiction, even though the complaint there "did not even mention the distribution of opioids to veterans, the DOD contract, or the operation of the [military pharmacy]." 996 F.3d 243, 256 (4th Cir. 2021). So too here. Plaintiff's claims encompass alleged harms from all greenhouse gas emissions, just as the plaintiff in *Arlington County* targeted "every opioid prescription" filled by the defendants there. *Id.* To ignore the fact that emissions are caused by oil and gas products produced for and sold to the federal government would improperly "elevate form over substance." *Id.*

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Where "[b]oth the [plaintiff] and the [defendants] have reasonable theories of this case," the court's role is "to credit only the [defendants'] theory so long as the theory is 'plausible.'" *Baker*, 962 F.3d at 941, 947. Defendants' theory is more than plausible and should be credited by this Court.

B. Defendants Satisfy All Elements Of The Federal Officer Removal Statute

Defendants satisfy all three elements of the federal officer removal statute. *First*, Defendants have acted under federal officers by repeatedly performing critical and necessary functions for the U.S. military to further the national defense and pursuant to government mandates, leases, and contracts under which they assisted the federal government in achieving federal objectives under federal direction, supervision, and control. Defendants have acted under federal officers in numerous ways *that have not been addressed by the Ninth Circuit*, including by: (1) producing specialized fuels for the military, and (2) acting under the direction of the federal government during World War II. *Second*, Plaintiff's claims relate to these acts under federal officers because there is "a connection or association between the act[s] in question and the federal office." *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017) (citations omitted). Plaintiff has brought suit for the alleged downstream effects of all global combustion of oil and gas and the resulting emissions of greenhouse gases, which necessarily includes the combustion of products created for and at the direction of the federal government. *Third*, Defendants have "colorable federal defenses," including the government-contractor defense.[21]

[21] These removal arguments, and also Defendants' removal argument under *Grable*, described below, are pending before the Ninth Circuit in *City of Oakland v. B.P. P.L.C., et al.*, No. 22-16810 (9th Cir.).

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1. Defendants "Acted Under" Federal Officers

Federal officer removal is appropriate when the government "require[s]" a defendant to manufacture contracted products "according to detailed federal specifications." *Baker*, 962 F.3d at 940, 945. As Professor Mark Wilson, a professor of history at the University of North Carolina, has explained in declarations submitted in similar climate change cases: "Over the last 120 years, the U.S. government has relied upon and controlled the oil and gas industry to obtain oil supplies and expand the production of petroleum products, in order to meet military needs and enhance national security." Dick Decl. Ex. 2 ("Wilson Decl.") ¶ 2.

The federal government has required and promoted the production of oil and gas for decades to meet U.S. military and national economic needs, even as the public and the world increasingly recognized the potential link between greenhouse gas emissions and global climate change.[22] Indeed, the federal government continues to promote domestic production of fossil fuels through a variety of lease programs, grants, loan guarantees, tax provisions, and contracts. *See Juliana v. United States*, 947 F.3d 1159, 1167 (9th Cir. 2020) ("The government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal

[22] For example, the federal government took a number of other actions to promote the domestic production of oil and gas to protect important state interests. These include the Energy Petroleum Allocation Act of 1973, Pub L. No. 93-159, 87 Stat. 627 (1973) and the Federal Energy Administration ("FEA") Act of 1974, Pub. L. No. 93-275, 88 Stat. 96 (1974). A report published pursuant to the FEA Act stated, "Prospects for large, new discoveries of onshore oil and gas deposits in the lower 48 States are small. For this reason, it is proposed that leasing of the Federal OCS be accelerated, to include frontier areas of Alaska, the Atlantic and Pacific coasts, and the Gulf of Mexico." Dick Decl. Ex. 3, at 1012 (H.R. Doc. No. 93-406). The report further noted that "there would be strategic foreign policy and national security advantages in having energy sources which are not susceptible to interruption by a foreign power." *Id.* More recent administrations have continued to promote the development of oil and gas on the OCS through, *e.g.*, the Energy Policy Act of 2005, which, among other things, sought "to promote oil and natural gas production from the [OCS] and onshore Federal lands under lease by providing royalty incentives to use enhanced recovery techniques." Pub. L. No. 109-58, § 357(a)(2)(B), 119 Stat. 594 (2005).

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land."). For example, the Office of Fossil Energy states that the government seeks American energy dominance, which "promotes U.S. domestic homegrown energy development to achieve energy security and jobs in energy and technology around the world."[23]

Just last year, the White House called on energy companies to "invest in production right now" in order to "help[ ] . . . improve U.S. energy security and bring down energy prices that have been driven up" by the conflict in Ukraine.[24]

Defendants "acted under" federal officers because the government exerted extensive "subjection, guidance, or control" over Defendants' fossil fuel production and because Defendants engaged in "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 143, 152 (2007); s*ee also St. Charles Surgical Hosp., LLC v. Louisiana Health Serv. & Indem. Co.*, 990 F.3d 447, 454–55 (5th Cir. 2021) ("In order to satisfy the 'acting under' requirement, a removing defendant need not show that its alleged conduct was precisely dictated by a federal officer's directive. . . . Instead, the 'acting under' inquiry examines the *relationship* between the removing party and relevant federal officer, requiring courts to determine whether the federal officer 'exert[s] a sufficient level of subjection, guidance, or control' over the private actor.").

"The words 'acting under' are broad." *Watson,* 551 U.S. at 147. While "simply *complying* with the law" is not enough, the "acting under" requirement is satisfied when a defendant engages in an "effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior," such as when the contractor is "helping the Government to produce an item that it

[23] U.S. Dep't of Energy, Off. of Fossil Energy, 2018-2022 Strategic Vision, https://www.energy.gov/sites/prod/files/2019/12/f69/FE%20Strategic%20Vision.pdf.
[24] *See* FACT SHEET: President Biden to Announce New Actions to Strengthen U.S. Energy Security, Encourage Production, and Bring Down Costs, White House Briefing Room (Oct. 18, 2022), https://tinyurl.com/2p8z6mee.

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needs" or "helps officers fulfill other basic governmental tasks." *Id.* at 152–53 (emphases in original). Such "basic governmental tasks" include those jobs that, "in the absence of a contract with a private firm, the Government itself would have had to perform." *Id.* at 153–54. The wartime provision of military supplies is a "classic case" of "when [a] private contractor acted under a federal officer or agency because the contractors helped the Government to produce an item that it needed." *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 812 (3d Cir. 2016) (cleaned up). Where, as here, a private party has specifically contracted with "the Government to produce an item that [the Government] needs," such assistance "goes beyond simple compliance with the law" and satisfies the "acting under" prong. *Baker*, 962 F.3d at 942.

For decades, Defendants have acted under the direction, supervision, or control of federal officers in two crucial ways: (1) producing specialized fuels for the military, and (2) acting under the direction of the federal government during World War II. Under these circumstances, 28 U.S.C. § 1442(a)(1) affords Defendants a right to insist that any claims based on this "special relationship" be heard in federal court. *Baker*, 962 F.3d at 941–42 (holding that "[t]he crux of the ['acting under'] inquiry . . . is whether there was a special relationship between the defendant and the federal government," which exists where an entity "provide[s] the federal government with materials that it need[s]"—particularly during wartime).

Each of the following illustrative examples demonstrates that Defendants have produced or supplied oil and gas under the direction, supervision, and control of the federal government. Any of them alone is sufficient to support federal officer removal, and each demonstrates the strong federal interest in petroleum production, which Plaintiff now seeks to disrupt.[25]

[25] The examples provided in this section, and other sections, of this Notice of Removal are meant to be illustrative only. These examples are by no means an exhaustive collection of the factual bases that support the grounds for removal asserted herein. Defendants expressly reserve all

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a. Defendants Acted Under Federal Officers By Supplying Highly Specialized Fuels For Military Use

Many of the Defendants have produced and supplied to the U.S. military highly specialized petroleum products required for national defense and wartime efforts. Federal officer removal precisely "covers situations, like this one, where the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete." *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012). Defendants acted under federal officers by producing and supplying highly specialized, noncommercial-grade fuels for the military that continue to be the "lifeblood of the full range of Department of Defense capabilities." Dick Decl. Ex. 4. As in *Arlington County*, these specialized fuels have "detailed requirements" pursuant to DOD contracts and must be produced "in accordance with the guidelines promulgated by DOD." 996 F.3d at 252. To this day, Defendants supply the DOD with highly specialized fuels to meet its need to power planes, ships, and other vehicles, and to satisfy other national defense requirements. U.S. Navy Captain Matthew D. Holman recently explained that "[f]uel is truly the lifeblood of the full range of DOD capabilities, and, as such, must be available on specification, on demand, on time, every time. In meeting this highest of standards, we work hand-in-hand with a dedicated team of Sailors, civil servants, *and contractors* to deliver fuel to every corner of the world, ashore and afloat." Dick Decl. Ex. 5 (emphasis added). "By 2010, the U.S. military remained the world's biggest single purchaser and consumer of petroleum products" and, "[a]s it had for decades, the military continued to rely on oil companies to supply it under contract with specialty fuels, such as JP-5 jet aviation fuel and other jet fuels, F-76 marine diesel, and Navy Special Fuel." Wilson Decl. ¶ 40.

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rights to include additional support for any and all grounds for removal in any further briefing should Plaintiff challenge removal.

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For example, during the Cold War, Shell Oil Company (now known as Shell USA, Inc.) developed and produced for the federal government specialized jet fuel to meet the unique performance requirements of the U-2 spy plane and later the OXCART and SR-71 Blackbird programs.[26] Shell Oil Company produced millions of gallons of "Processing Fluid (PF-1)" under government contracts with specific testing and inspection requirements, as well as packaging that mandated "no other identification."[27] Shell Oil Company also constructed "special fuel facilities" to handle and store PF-1, including a hangar, pipelines, and storage tanks at Air Force bases at home and abroad, and "agreed to do this work without profit" under special security restrictions per detailed government contracts for the OXCART program.[28] Under the OXCART program,

[26] *See* Dick Decl. Ex. 6, at 61–62 (Gregory W. Pedlow & Donald E. Welzenbach, The Central Intelligence Agency and Overhead Reconnaissance: The U-2 and OXCART Programs, 1954-1974 (1992)), https://www.archives.gov/files/declassification/iscap/pdf/2014-004-doc01.pdf ("Gen. James H. Doolittle (USAF, Ret.) . . . arranged for Shell to develop a special low-volatility, low-vapor-pressure kerosene fuel for the craft. The result was a dense mixture, known as LF-1A, JP-TS (thermally stable), or JP-7, with a boiling point of 300°F at sea level. Manufacturing this special fuel required petroleum byproducts."); *id.* Ex. 7 (CIA Doc. No. CIA-RDP90B00170R000100080001-5, Clarence L. Johnson, Development of the Lockheed SR-71 Blackbird (Aug. 3, 1981)) ("The Government stated that the need for the 'Blackbird' was so great that the program had to be conducted despite the risks and the technological challenge. . . . The extreme environment presented a severe cooling problem. . . . A new fuel and a chemical lubricant had to be developed to meet the temperature requirements. . . . Shell, and [other] [c]ompanies[,] took on the task of developing these fluids."); *see also id.* Ex. 8 (Ben Rich & Leo Janis, Skunk Works 127, 205 (1994)).

[27] Dick Decl. Ex. 9 (CIA Doc No. CIA-RDP67B00074R000500400016-2, Contract No. AF33(657)-8577 (SH-511) (Aug. 14, 1962)); *see id.* Ex. 10 (CIA Doc. No. CIA-RDP67B00074R000500400012-6, Amendment No. 2 to Contract No. AF33(657)-5577 (SH-511) (Aug. 26, 1963)).

[28] Dick Decl. Ex. 11 (CIA Doc. No. CIA-RDP67B00074R000500440005-0, Concurrence in Contract No. SH-515 with Shell Oil Company, Project OXCART (Sept. 20, 1963)); *see id.* Ex. 12 (CIA Doc. No. CIA-RDP67B00074R000500450004-0, Contract No. AF33(657)-13272 (SH-516) (June 30, 1964)); *id.* Ex. 13 (CIA Doc. No. CIA-RDP67B00074R000500440006-9, Contract No. AF33(657)-12525 (SH-515) (Sept. 20, 1963)); *id.* Ex. 14 (CIA Doc. No. CIA-RDP67B00074R000500430003-3, Concurrence in Contract No. SH-514 with Shell Oil Company, New York, N.Y. (June 28, 1963)); *id.* Ex. 15 (CIA Doc. No. CIA-RDP67B00074R000500420006-1, Contract No. AF33(657)10449 (SH-513) (Feb. 25, 1963)); *id.* Ex. 16 (CIA Doc. No. CIA-RDP67B00074R000500410006-2, Contract No. AF33(657)-8582 (SH-512) (Sept. 13, 1962)).

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Shell Oil Company also "tested" "refinery procedures" to ensure fuels were "up to standard."[29] In providing specialized fuel and facilities under contracts for the federal government's overhead reconnaissance programs, Shell Oil Company acted under federal officers, *see, e.g.*, Dick Decl. Ex. 11 ("This work is under the technical direction of Colonel H. Wilson."), and helped the government to produce an essential item that it needed for national defense purposes. *See Watson*, 551 U.S. at 153 (explaining that contractors are "acting under" federal officers when the "assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks").

As another example, from at least 2010 to 2013, Shell Oil Company or its affiliates entered into billion-dollar contracts with the DOD's Defense Logistics Agency ("DLA") to supply specialized JP-5 and JP-8 military jet fuel. *See* Dick Decl. Exs. 18–26. The DOD's detailed specifications for the makeup of the military jet fuels require that they "shall be refined hydrocarbon distillate fuel oils" made from "crude oils" with "military unique additives that are required by military weapon systems." *See* Dick Decl. Ex. 27, at 5, 10, §§ 3.1, 6.1; *id.* Ex. 28 at 5, 11, §§ 3.1, 6.1.

Similarly, BP entities contracted with the DLA to provide approximately 1.5 billion gallons of specialized military fuels for the DOD's use in the years from 2016 to 2020 alone. Dick Decl. Ex. 29, at 5. Since 2016, BP entities have entered into approximately 25 contracts to supply various military-specific fuels, such as JP-5, JP-8, and F-76. DLA required that the fuels contain specialized additives, including fuel system icing inhibitor ("FSII"), corrosion inhibitor/lubricity improver ("CI/LI"), and, for F-76 fuels, lubricity improver additives ("LIA"). *See generally id*. Such additives are essential to support the high performance of the military

[29] Dick Decl. Ex. 17 (CIA Doc. No. CIA-RDP63-00313A000500130031-9, Summary of OSA Activities for Week Ending 21 August 1963 (Aug. 23, 1963)).

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engines they fuel. FSII is required to prevent freezing caused by the fuels' natural water content when military jets operate at ultra-high altitudes, which can potentially lead to engine flameout, while CI/LI and LIA are used to avoid engine seizures and to ensure fuel handling system integrity when military fuels are stored for long periods, as on aircraft carriers. *See* Dick Decl. Ex. 30; *id*. Ex. 31.

The DOD's and the DLA's detailed specifications for the makeup of the military jet fuels and "the compulsion to provide the product to the government's specifications" establish the required "acted under" relationship between Defendants and the government. *See Baker*, 962 F.3d at 943 (holding that the government's detailed specifications for the makeup of materials and the compulsion to provide the product to the government's specifications demonstrated the necessary "acted under" relationship to support federal officer removal). These specialized jet fuels are designed specifically to assist the military in fulfilling its unique and essential missions and thus fall into the category of specialized military products that support federal officer jurisdiction. *See, e.g.*, *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 399 (5th Cir. 1998), *recognizing standard modified by statute*, *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020) (affirming propriety of removal where the "evidence indicates that the government maintained strict control over the development and subsequent production of Agent Orange"); *Latiolais*, 951 F.3d at 296 (5th Cir. 2020) ("Avondale performed the refurbishment and, allegedly, the installation of asbestos pursuant to directions of the U.S. Navy. Thus, this civil action relates to an act under color of federal office."); *Baker*, 962 F.3d at 942–43 (holding that Atlantic Richfield "acted under federal authority" where it had "provided the federal government with materials that it needed to stay in the fight at home and abroad" and, without this aid, "the government would have had to manufacture the relevant items on its own"); *see also Broussard v.*

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Huntington Ingalls, Inc., 2020 WL 2744583, at *5 (E.D. La. May 27, 2020) (explaining that "numerous courts [of appeals] have found that the [acting under] requirement is satisfied where a plaintiff's allegations are directed at a private entity's actions undertaken while executing a contractual duty to produce an item for the federal government which, absent a contract with a private firm, the government would have been forced to produce on its own") (collecting cases); *compare Watson*, 551 U.S. at 157 (holding that the federal-officer jurisdiction did not apply to Philip Morris's compliance with federal regulations controlling the testing and sale of cigarettes to the general public).

For federal officers, ensuring the national defense is a constitutional requirement, not a discretionary option. *See The Prize Cases*, 67 U.S. (2 Black) 635 (1862). If the United States did not obtain oil and gas from Defendants for military purposes, it would have to produce the specialized fuel on its own. For example, after December 7, 1941, the U.S. government had no practical alternative but to obtain oil to fuel the war against the Axis Powers. It could have nationalized the oil industry to do so, as is common in many other countries. Wilson Decl. ¶ 12. Instead, the federal government largely relied on private contractors, including Defendants, to "fulfill a basic governmental task, under the government's control or subjection, that the government would otherwise have to perform itself." *W. Va. State Univ. Bd. of Governors v. Dow Chem. Co.*, 23 F.4th 288, 301–02 (4th Cir. 2022).

Similarly, before the age of spy satellites, the U.S. government needed to fuel specialized reconnaissance planes in order to monitor Soviet activities. *Cf.* Serhii Plokhy, *Nuclear Folly: A History of the Cuban Missile Crisis* 129–31 (2021) (explaining how a pause in U-2 overflights of Cuba allowed the Soviet Union to construct nuclear missile bases undetected). In the absence of

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private contractors producing specialized fuels for these reconnaissance planes, the government would have had to find a way to fuel these planes itself.

As two former Chairmen of the Joint Chiefs of Staff explained, "to achieve its paramount goal of protecting our national security, the military demands highly specialized fuels . . . . The [U.S.] military has not, and does not, have the knowledge or experience to produce these specialized products on its own. It relies on the private companies, many of which are Defendants in these lawsuits [and in this action], to manufacture these fuels. Given the vital importance of these fuels, the military has, and continues to, closely direct and supervise these private parties and demands that the fuels meet the exact specifications required for military operations." Amici Br. of General R. Myers & Admiral M. Mullen, at 21–22, *City & Cnty. of Honolulu v. Sunoco LP*, No. 21-15313, Dkt. 49 (9th Cir. July 26, 2021). This is exactly the type of conduct that satisfies the "acting under" requirement.

These unique fuels are designed for military use and thus fall into the category of specialized military products that support federal jurisdiction. *See Watson*, 551 U.S. at 154 ("providing the Government with a product that it used to help conduct a war" supports removal). "[I]n the absence of [these] contract[s] with [the Defendants], the Government itself would have had to perform" these essential tasks to meet the critical DOD fuel demands. *Baker*, 962 F.3d at 942 (quoting *Watson*, 551 U.S. at 154); *see also Agyin v. Razmzan*, 986 F.3d 168, 175 (2d Cir. 2021) ("[A] private company acting pursuant to a contract with the federal government has this [federal-officer] relationship."). These federally directed activities therefore satisfy the "acting-under" prong of federal officer removal.

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b. Defendants Acted Under Federal Officers During World War II

The federal government also exerted comprehensive control over Defendants, including their predecessors and affiliates, during World War II by fundamentally reshaping the industry to guarantee the production and availability of fuel supplies for wartime efforts. These activities independently satisfy the "acting-under" prong.

World War II confirmed petroleum's role as a key American resource and underscored the government's interest in maintaining and managing it. *See* Dick Decl. Ex. 32 (Statement of Ralph K. Davies, Deputy Petroleum Administrator of War, Special Committee Investigating Petroleum Resources, S. Res. 36, at 4 (Nov. 28, 1945)) ("Our overseas forces required nearly twice as many tons of oil as arms and armament, ammunition, transportation and construction equipment, food, clothing, shelter, medical supplies, and all other materials together. In both essentiality and quantity, oil has become the greatest of all munitions."); Dick Decl. Ex. 33 (National Petroleum Council, *A National Oil Policy for the United States* at 1 (1949)) ("A prime weapon of victory in two world wars, [oil] is a bulwark of our national security."). As the United States prepared for war in 1941, its need for large quantities of oil and gas to produce high-octane fuel for planes ("avgas"), oil for ships, lubricants, and synthetic rubber far outstripped the nation's current capacity. The government created agencies to control the petroleum industry, including Defendants, *see infra* at XX; to build refineries; to direct the production of certain petroleum products; and to manage scarce resources for the war effort. "No one who knows even the slightest bit about what the *petroleum industry* contributed to the war can fail to understand that it was, without the slightest doubt, *one of the most effective arms of this Government* . . . in bringing about a victory." Dick Decl. Ex. 34, at 1 (Statement of

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Senator O'Mahoney, Chairman, Special Committee Investigating Petroleum Resources, S. Res. 36 (Nov. 28, 1945)) (emphases added).

In 1941, President Roosevelt created the Office of Petroleum Coordinator and designated Interior Secretary Harold Ickes as the Petroleum Coordinator for National Defense.[30] President Roosevelt explained that:

> [r]ecent significant developments indicate the need of coordinating existing Federal authority over oil and gas and insuring that the supply of petroleum and its products will be accommodated to the needs of the Nation and the national defense program . . . One of the essential requirements . . . which must be made the basis of our petroleum defense policy . . . is the development and utilization with maximum efficiency of our petroleum resources and our facilities, present and future, for making petroleum and petroleum products available, adequately and continuously, in the proper forms, at the proper places, and at reasonable prices to meet military and civilian needs.[31]

The Office of Petroleum Coordinator promptly began issuing a number of "directives" and "recommendations" to the oil and gas industry, requiring refineries to prioritize the production of aviation fuel.

In 1942, President Roosevelt established several *agencies* to oversee wartime production. Among those with authority over petroleum production were the War Production Board ("WPB") and the Petroleum Administration for War ("PAW"). The WPB established a nationwide priority ranking system to identify scarce goods, prioritize their use, and facilitate their production; it also limited the production of nonessential goods. The PAW centralized the government's petroleum-related activities. It made policy determinations regarding the construction of new facilities and allocation of raw materials, had the authority to issue production orders to refineries and contracts that gave extraordinary control to federal officers,

[30] *See Exxon Mobil Corp. v. United States*, 2020 WL 5573048, at *10 (S.D. Tex. Sept. 16, 2020).
[31] *Id.*

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and "programmed operations to meet new demands, changed conditions, and emergencies." *See generally United States v. Shell Oil Co.*, 294 F.3d 1045, 1049 (9th Cir. 2002) ("*Shell I*") (discussing federal control). The "PAW told the refiners what to make, how much of it to make, and what quality."[32] *See* Dick Decl. Ex. 32 (Statement of Ralph K. Davies, Deputy Petroleum Administrator of War, S. Res. 36 at 11 (Nov. 28, 1945)) ("The supply of crude to each refinery, the finished and intermediate products to be made in each plant, and the disposition of the products were all closely scheduled, by daily telegraphic directives when necessary."); Dick Decl. Ex. 35 (Statement of George A. Wilson, Director of Supply and Transportation Division, Wartime Petroleum Supply and Transportation, Petroleum Administration for War, Special Committee Investigating Petroleum Resources, S. Res. 36 at 212 (Nov. 28, 1945)) ("PAW was further expected to designate for the military forces the companies in a given area from which the product could be secured, as well as the amount to be produced by each company and the time when the product would be available."). The Office of the Petroleum Coordinator for National Defense stated that "[i]t is *essential*, in the national interest that the supplies of all grades of aviation gasoline for military, defense and essential civilian uses *be increased immediately to the maximum*."[33]

The government dictated where and how to drill, rationed essential materials, and set statewide minimum levels for production. Dick Decl. Ex. 36 at 171, 177–78, 184. As Professor Wilson explains: "PAW instructed the oil industry about exactly which products to produce, how to produce them, and where to deliver them." Wilson Decl. ¶ 11. Professor Wilson

[32] *Shell Oil Co. v. United States*, 751 F.3d 1282, 1286 (Fed. Cir. 2014) ("*Shell II*") (quoting John W. Frey & H. Chandler Ide, *A History of the Petroleum Administration for War, 1941-1945*, at 219 (1946)).
[33] *Shell II*, 751 F.3d at 1286 (quoting Office of Petroleum Coordinator for National Defense Recommendation No. 16) (emphases added in opinion)).

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establishes that "[s]ome directives restricted the use of certain petroleum products for high-priority war programs; others dictated the blends of products; while others focused on specific pieces of the industry, such as the use of individual pipelines." *Id.*

The PAW's directives to Defendants were often coercive. The PAW's message to the oil and gas industry was clear: It would "get the results" it desired, and if "we can't get them by cooperation, then we will have to get them some other way."[34] The PAW also maintained "disciplinary measures" for noncompliance, including "restricting transportation, reducing crude oil supplies, and withholding priority assistance."[35] In sum, the federal government deployed an array of directions, threats, and sanctions to ensure Defendants complied with PAW's production directives.

The Court in *Exxon Mobil Corp. v. United States* acknowledged the long history of federal government control over Defendants' lawful oil production-related activities in finding that the government was responsible for certain environmental response costs under CERCLA: "By controlling the nation's crude oil supply, the federal government controlled the nation's petroleum industry." 2020 WL 5573048, at *11. The *Exxon Mobil* court rejected the argument that private refiners "voluntarily cooperated" and instead found that they had "no choice" but to comply with the federal officer's direction. *Id.* at *11–12 (J. Howard Marshall, the former Chief Counsel for the Petroleum Administration for War, testified that "companies that 'weren't making essential war materials' were simply not able to run their refineries"). In fact, the federal government "insiste[d] on having the plants operate 24 hours a day, 7 days a week, year round."

[34] Dick Decl. Ex. 37 (Secretary Harold Ickes, Conference of Petroleum Industry Chairmen, 8 (Aug. 11, 1941)).
[35] Dick Decl. Ex. 38 (Telegram from P.M. Robinson, PAW Assistant Director of Refining, to Ralph K. Davies, PAW Deputy Administrator, Refiners Who Did Not Reply to the Gasoline Yield Reduction Telegrams (Aug. 12, 1942)).

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Id. at *8. Put simply, the federal government "exerted significant control over the operations of refinery owners or operators that contracted to manufacture avgas, synthetic rubber, and other war materials." *Id.* at *14. Certain Defendants or their predecessors or subsidiaries also produced toluene, a component of the explosive TNT, under direct contract with the Army Ordnance Department.[36]

The United States DOD is the United States' single largest consumer of energy, and one of the world's largest users of petroleum fuel. *See* Dick Decl. Ex. 39; G.J. Lengyel, Colonel, USAF, *Department of Defense Energy Strategy: Teaching an Old Dog New Tricks* (August 2007), http://military-gospel.tygae.org.za/pdf/2007-08_USAF-B_DoD-EnergyStrat-OldDogNewTricks-LengyelCol.pdf. For more than a century, "these products [have been] used for the war effort," including "many 'ordinary' products [that are] *crucial* to the national defense, such as . . . fuel and diesel oil used in the Navy's ships; and lubricating oils used for various military machines." *Exxon Mobil Corp.*, 2020 WL 5573048, at *31 (emphasis added); *see also id.* at *47 (noting the "value of [the] petroleum industry's contribution to the nation's military success"). In fiscal year 2019 alone, the DOD purchased 94.2 million barrels of fuel products in compliance with military specifications, totaling $12.1 billion in procurement actions.[37] As two former Chairmen of the Joint Chiefs of Staff explained, the "history of the Federal Government's control and direction of the production and sale of gasoline and diesel to ensure that the military is 'deployment-ready'" spans "more than a century," and during their tenure, petroleum products were "crucial to the success of the armed forces." Dick Decl. Ex. 40, at 2–3 (Amici Curiae Brief of General (Retired) Richard B. Myers and Admiral (Retired) Michael G. Mullen, in Support of

[36] *See Exxon Mobil Corp.*, 2020 WL 5573048, at *13; Harold Nockolds, *The Engineers*, 28 (1949).
[37] Dick Decl. Ex. 39, Def. Logistics Agency Fact Book.

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Petitioners, *BP p.l.c. v. Mayor and City Council of Baltimore*, No. 19-1189 (U.S. Nov. 23, 2020)). "Because armed forces have used petroleum-based fuels since the 1910s, oil companies have been essential military contractors, throughout the last century." Wilson Decl. ¶ 2. The "U.S. government has controlled and directed oil companies in order to secure and expand fuel supplies for its military forces and those of its allies, both in wartime and in peacetime." *Id.*

2. Defendants' Activities Are Related To Plaintiff's Claims

For the federal officer removal statute to apply, the plaintiff 's lawsuit also must be "for or relating to" the defendant's federally directed action. 28 U.S.C. § 1442(a)(1). This is *not* a heavy burden. In 2011, Congress amended the statutory text to permit removal even of lawsuits that merely "relat[e] to" a federally directed action. Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2(b)(1)(A), 125 Stat. 545. The amendment thus "broadened federal officer removal to actions, not just causally connected, but alternatively connected or associated, with acts under color of federal office." *Latiolais*, 951 F.3d at 292; *see also Baker*, 962 F.3d at 943–44; *Sawyer*, 860 F.3d at 258; *Def. Ass'n of Philadelphia*, 790 F.3d at 471.

It is not necessary "that the complained-of conduct *itself* was at the behest of a federal agency"; rather, it is "sufficient" if Plaintiff's "allegations are directed at the relationship between the [Defendants] and the federal government" for at least *some* of the time frame relevant to Plaintiff's claims. *Baker*, 962 F.3d at 944–45; *accord Def. Ass'n of Philadelphia*, 790 F.3d at 470–71; *Papp*, 842 F.3d at 805. For instance, in *Baker*, the federal officer removal statute applied where certain products that allegedly contributed to the plaintiffs' purported pollution-based harms had, at times, been "critical wartime commodities" subject to "price control[s]," detailed federal oversight, and mandatory orders "setting aside" a portion of the defendants' products for

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the government's own use. *Baker*, 962 F.3d at 940–41, 945.[38] The defendants did not have to show that federal officers directed the alleged pollution itself, or even the defendants' storage and waste disposal practices. Rather it was "enough for the present purposes of removal that at least some of the pollution arose from the federal acts." *Id.* at 945. Similarly, in *Defender Association of Philadelphia*, the "for or relating to" element was satisfied even though the Federal Community Defender was *not* directed by the government to perform the specific conduct at issue in the suit (representing defendants in state post-conviction proceedings) because that conduct was "related to" acts that were done under federal direction (representing defendants in federal habeas proceedings). 790 F.3d at 471–72. And in *Papp*, the "for or relating to" element was satisfied in a failure-to-warn lawsuit where the defendant established a "connection" between manufacturing aircraft for the federal government and the plaintiffs' alleged asbestos exposure, even though the government had not directly prohibited the defendants from issuing asbestos-related warnings. 842 F.3d at 812–813. Most recently, in *Arlington County*, the Fourth Circuit held that nuisance claims premised on the defendants' distribution of opioids were sufficiently "related to" the defendants' federally directed distribution of opioids, even though the plaintiffs' allegations did not reference any federal distribution, which was just a subset of the distribution at issue. 996 F.3d at 251–52, 257.[39]

Numerous federal activities are encompassed in Plaintiff's Complaint and relate to Plaintiff's causes of action, especially construing the allegations "in the light most favorable to

[38] *See also Williams v. Todd Shipyards Corp.*, 154 F.3d 416, 1998 WL 526612, at *1, *6 (5th Cir. 1998) (per curiam) (federal officer removal was proper where the plaintiff was exposed to asbestos while working for the defendant, even though the defendant also did "commercial work for private parties" in addition to working under government contract on ships owned or operated by the federal government).

[39] The Ninth Circuit has not yet addressed whether Defendants' activities undertaken under the direction and supervision of the federal government are related to Plaintiff's global climate change claims.

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the" existence of federal jurisdiction, *Def. Ass'n of Philadelphia*, 790 F.3d at 466, and giving Defendants the "benefit of all reasonable inferences from the facts alleged," *Baker*, 962 F.3d at 945.

Plaintiff alleges that Defendants' production and sale of oil and gas—which necessarily includes production and sales under the direction, supervision and control of federal officers as described above—led to the combustion of these oil and gas products, which led to the release of greenhouse gases by end users, including the federal government. Critically, the oil and gas upon which Plaintiff bases its claims include the *very same* oil and gas that Defendants extracted and produced under the direction, supervision, and control of the federal government. Moreover, the federal government directed, supervised, and controlled Defendants' production, sale, and distribution of oil and gas to help it accomplish critical domestic and foreign policy objectives. Indeed, Plaintiff's sweeping allegations in the Complaint span through World War II to the present. *See e.g.*, Compl. ¶ 282.

Accordingly, Plaintiff seeks to hold Defendants liable for the very activities Defendants performed in the implementation of federal policy initiatives under the direction, supervision, and control of federal officers. Plaintiff's claims "necessarily include[] activity that is directly connected to" federal contracts. *Arlington County*, 996 F.3d at 257. This is more than enough to satisfy the nexus element of the federal officer removal statute, which requires only "a connection or association between the act in question and the federal office." *Sawyer*, 860 F.3d at 258; *Def. Ass'n of Philadelphia*, 790 F.3d at 474 (same). At a minimum, a clear connection or association exists between the Defendants "acting under" federal officers, by extracting and producing oil and gas pursuant to federal contracts and specifications, and Plaintiff's attempt to impose liability on Defendants for that very same conduct. The Court must credit Defendants' reasonable theory of

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the case in assessing whether the nexus element is satisfied. *See Leite*, 759 F.3d at 1124 ("In assessing whether a causal nexus exists, we credit the defendant's theory of the case."); *Acker*, 527 U.S. at 432; *Def. Ass'n of Philadelphia*, 790 F.3d at 474.

Plaintiff's allegations regarding Defendants' alleged misrepresentations and "deception" do not change the analysis in any way. This is because, as explained above, Plaintiff's claims, as pleaded, do not rely on misrepresentations alone but rest on the alleged combination of deception and production, and they necessarily depend on the premise that it was the cumulative impact of Defendants' total *production* of fossil fuels that caused Plaintiff's alleged injuries. Compl. ¶ 210. Defendants have demonstrated that they acted under the direction, supervision, and control of federal officers in producing oil and gas for decades, and therefore this case is removable to federal court.

Similarly, Plaintiff's attempt to disclaim "all theories of recovery, if any, that may exist exclusively under Federal law" is ineffective and cannot defeat removal. Compl. ¶ 17. This disclaimer is nothing more than a transparent attempt to artfully plead around removal. Courts consistently reject attempts to frustrate federal removal with disclaimers where, as here, Defendants' federal officer defenses are still applicable to one or more of Plaintiff's claims. *See Rhodes v. MCIC, Inc.*, 210 F. Supp. 3d 778, 786 (D. Md. 2016) ("[Plaintiffs] have cited no authority that allows such language to bar the assertion of the federal officer defense where it is otherwise applicable. . . . [T]hey are clearly keeping in play a claim against Defendants who could legitimately assert the federal officer defense."); *Ballenger v. Agco Corp.*, 2007 WL 1813821, at *1 n.2, *4 (N.D. Cal. June 22, 2007) (finding disclaimer ineffective where the plaintiff waived claims for exposure committed at the direction of a federal officer but nonetheless sought relief for exposure aboard Navy vessels). Moreover, the disclaimer is inappropriate in the present case

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because, as the Supreme Court has recognized, greenhouse gases cannot be traced to any particular source or any particular jurisdiction. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011) ("Greenhouse gases once emitted become well mixed in the atmosphere."). Plaintiff's claims are thus based on *global* emissions that are impossible to trace to any particular source or time. Accordingly, Plaintiff has no basis on which to carve out fuel extraction and production at the direction of the federal government.

For similar reasons, the Western District of Michigan rejected an attempt by a group of plaintiffs to avoid federal officer removal that went even further than Plaintiff's disclaimer attempts here. The plaintiffs in *Nessel v. Chemguard, Inc.* alleged injuries caused by environmental contamination from fire suppressant agents sold for both military and civilian purposes. 2021 WL 744683, at *3 (W.D. Mich. Jan. 6, 2021). The *Nessel* plaintiffs attempted to avoid removal with respect to civilian production and sales by *filing two separate complaints*—one for injuries resulting from chemicals produced for the military, and one for the commercially produced versions of those same agents. The Court found that it had federal officer removal jurisdiction over the commercial-only complaint because the plaintiffs did not establish that injuries from commercial chemicals and military chemicals "will be distinguishable." *Id.* at *3. It explained that despite plaintiffs "divid[ing] the two complaints," "[t]he Court . . . will likely have to engage in a detailed fact-finding process to determine whether the injuries . . . can be distinguished" and that "right now, there is not clear evidence either way. It is entirely possible that Plaintiffs' injuries occurred from actions taken while Defendants were acting under color of federal office." *Id.* Plaintiff here does not even try to separate its claims and injuries into two separate complaints—rather, Plaintiff flatly asserts that its injuries are caused by the cumulative production and combustion of *all* oil and gas production for decades. Compl. ¶ 5; *see also Nessel*,

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2021 WL 744683, at *3 ("Plaintiffs' artful pleading does not obviate the facts on the ground" demonstrating that "Defendants were at least plausibly acting under color of federal office during the relevant timeframe").

3. Defendants Have Colorable Federal Defenses

The third and final prong of the federal officer removal statute is that Defendants have colorable federal defenses. *See Riggs v. Airbus Helicopters*, 939 F.3d 981, 987 (9th Cir. 2019). Defendants intend to raise several meritorious federal defenses, including the government-contractor defense. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–14 (1988); *Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67, 70 (3d Cir. 1990). Under this defense, liability related to allegedly defective products made for the government cannot be imposed when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Boyle*, 487 U.S. at 512. This defense allows government contractors, like Defendants here, to receive the benefits of sovereign immunity when a contractor complies with the specifications of a federal government contract. *Id.* at 511–12.

Boyle is analogous. In *Boyle*, the Supreme Court applied a federal common-law government contractor defense in a state-law product liability action because (1) the suit involved a unique federal interest and (2) a state law holding government contractors liable for design defects in military equipment would present a significant conflict with federal policy. 487 U.S. at 504–13. In addition, as the Court acknowledged in *Campbell-Ewald v. Gomez*, "[w]here the Government's 'authority to carry out the project was validly conferred,'" a contractor "who simply performed as the Government directed" may be immune from liability. 577 U.S. 153, 167

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(2016) (quoting *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 20 (1940)). Here, Defendants produced oil and gas at the direction of the federal government, and thus have a more than colorable argument that they are immune from liability.

The Ninth Circuit's decision in *Honolulu* does not foreclose this argument. While the Ninth Circuit found that the government contractor defense was not colorable in that case because the defendants did not cite any cases that involved "failure to warn claims," as were asserted there, 39 F.4th at 1110, here Plaintiff does not bring a separate failure-to-warn claim. Rather, Plaintiff alleges that the production, refining, extraction, processing, and sales of fossil fuels were also wrongful, and it has brought claims for public nuisance, negligence, fraud and deceit, and trespass. And courts have applied the government-contractor defense in cases where the plaintiff brings such claims. *See*, *e.g.*, *Arlington Cnty.*, 996 F.3d at 254–57 (applying government-contractor defense to claims including public nuisance and concluding that removal under federal officer statute was appropriate); *In re Nat'l Prescription Opiate Litig.*, 2023 WL 166006, at *7 (N.D. Ohio Jan. 12, 2023) (applying government-contractor defense to claims including public nuisance and denying motion to remand); *cf. Minnesota v. Am. Petroleum Inst.*, 63 F.4th 703, 715, n.11 (8th Cir. 2023) (stating that "a nuisance claim creates a stronger case for federal jurisdiction" in evaluating similar arguments).

The *Honolulu* Court also rejected the government-contractor defense because the defendants in that case presented only "conclusory statements and general propositions of law," rather than presenting a complete articulation of the argument. 39 F.4th at 1110. Here, however, Defendants make a more than "colorable" case for the government-contractor defense.

As explained above, to establish a government-contractor defense, a defendant must demonstrate that "'(1) the United States approved reasonably precise specifications; (2) the

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equipment conformed to those specifications; and (3) the supplier warned the United States about [any] dangers in the use of the equipment that were known to the supplier but not to the United States.'" *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 731 (9th Cir. 2015) (*quoting Boyle*, 487 U.S. at 512). To satisfy the first prong, "a contractor must demonstrate that the government approved reasonably precise specifications" and did more than rubberstamp the design. *Getz v. Boeing Co.*, 654 F.3d 852, 861 (9th Cir. 2011) (internal quotations marks omitted). And the third prong can be satisfied when the federal government is "already aware of [a] particular risk." *Id.* at 865.

Defendants here have submitted evidence colorably establishing each of these prongs. *First*, as demonstrated at length above, *see supra* at 24–29, Defendants have submitted evidence showing that the U.S. government ordered—and continues to order—military-grade fuels from Defendants with exacting specifications for the U.S. military.

Second, Defendants have submitted evidence demonstrating that they followed these instructions, producing highly specialized, noncommercial fuel for the military that conforms to the government's exacting specifications. *See supra* at 24–29.

Third, the government has been aware of the climate-related risks of using oil and gas for decades, yet—as the continued production of specialized military fuels demonstrates—it has continued to order substantial amounts of fuel from Defendants. *See Juliana*, 947 F.3d at 1164 ("the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change"). Since at least the 1950s, federal lawmakers have been informed of the potential climatic effects of burning fossil fuels and emitting greenhouse gases. For example, in 1956, Dr. Roger Revelle, a leading U.S. scientist, testified before the U.S. House Appropriations Subcommittee that "[b]ased on figures given out by the United Nations[,] . . . by

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the year 2010, we will have added something like 70 percent of the present atmospheric carbon dioxide to the atmosphere. This is an enormous quantity. . . . [I]t may, in fact, cause a remarkable change in climate." Second Supplemental Appropriation Bill: Hearing on H. Doc. 330 Before the Subcomm. of the Comm. on Appropriations, 84th Cong. 472–73 (1956).

The next year, Dr. Revelle again testified before the Subcommittee, observing that: "More or less, in spite of ourselves, we are adding carbon dioxide to the atmosphere in large quantities." National Science Foundation: Review of First Eleven Months of International Geophysical Year: Hearings Before the Subcomm. of the Comm. on Appropriations, 85th Cong. 75 (1958). In all, the U.S. Congress has directed intense and extended focus on climate change, holding 246 Congressional hearings on the topic involving 1,595 congressional testimonies between just 1976 and 2007. *See* Hyung Sam Park et al., *Framing Climate Policy Debates: Science, Network, and U.S. Congress, 1976-2007*, at 5 (2010), https://bit.ly/3LZSLa0. Indeed, the U.S. Supreme Court has observed that the federal government began devoting particularly serious attention to climate change policy by the "late 1970's." *Massachusetts v. EPA*, 549 U.S. 497, 507 (2007).

Likewise, the Executive Branch has been aware of the potential effects of greenhouse-gas emissions for decades. For example, in 1965, President Lyndon B. Johnson announced "a steady increase in carbon dioxide from the burning of fossil fuels." President Lyndon Baines Johnson, *Special Message to the Congress on Conservation and Restoration of Natural Beauty*, Feb. 8, 1965, The American Presidency Project, https://bit.ly/40OYALK. That same year, President Johnson's Science Advisory Committee reported that "[b]y the year 2000 the increase in atmospheric CO2 will be close to 25%" and may be "sufficient to produce measurable and perhaps marked changes in climate," including "almost certainly caus[ing] significant changes in the temperature and other properties of the stratosphere." The White House, *Restoring the*

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Quality of Our Environment: Report of the Environmental Pollution Panel, President's Sci. Advisory Comm. 112, 126–27 (1965).

This and other federal defenses are more than colorable, and thus satisfy the test for federal officer removal under the statute. *See Willingham*, 395 U.S. at 407 (defendant invoking § 1442(a)(1) "need not win his case before he can have it removed"). Accordingly, removal under Section 1442 is proper.

VI. THE ACTION IS REMOVABLE BECAUSE PLAINTIFF'S CLAIMS NECESSARILY RAISE DISPUTED AND SUBSTANTIAL FEDERAL ISSUES

Federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The Supreme Court has held that suits alleging only state-law causes of action nevertheless "arise under" federal law, even if not exclusively governed by federal law, if the "state-law claim[s] necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314. Applying this test "calls for a common-sense accommodation of judgment to [the] kaleidoscopic situations that present a federal issue." *Id.* at 313 (internal quotation marks omitted) (alteration in original).

To the extent that Plaintiff's claims involve Defendants' statements about climate change, Plaintiff's claims necessarily include federal constitutional elements. The Supreme Court has made clear that where nominally state-law tort claims target speech on matters of public concern like climate change, the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action, including factual falsity, actual malice, and proof of causation of actual damages. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774–76 (1986) (explaining that state common-law standards "must similarly fall here to a constitutional requirement that the

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plaintiff bear the burden of showing falsity, as well as fault, before recovering damages"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 285–86 (1964) (holding public officials have the burden of proving with "convincing clarity" that a "statement was made with 'actual malice'"); *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) ("[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.").

These First Amendment issues are not "defenses" but rather constitutionally required elements of the claim on which Plaintiff bears the burden of proof—by clear and convincing evidence—as a matter of federal law. *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 53, 56 (1988) (extending First Amendment substantive requirements beyond the defamation context to other state-law attempts to impose liability for allegedly harmful speech); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 511 F. Supp. 2d 742, 811 (S.D. Tex. 2005) ("First Amendment protections and the actual malice standard . . . have been expanded to reach . . . breach of contract, misrepresentation, and tortious interference with contract or business.").

While most state-law misrepresentation claims are not removable because they typically do not implicate the broader federal interests at issue in this case, as shown above, those federal interests are themselves unquestionably "substantial" under *Grable*. So is the speech that Plaintiff is trying to suppress because its claims address a subject of national and international importance that falls within the purview of federal authority over foreign affairs and domestic economic, energy, and security policy. "Climate change has staked a place at the very center of this Nation's public discourse," and "its causes, extent, urgency, consequences, and the appropriate policies for addressing it" are "hotly debated." *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 347–48 (2019) (Alito, J., dissenting from denial of certiorari); *see Janus v. Am. Fed'n of State, Cnty., & Mun.*

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Emps., Council 31, 138 S. Ct. 2448, 2476 (2018) (reasoning that "climate change," among other topics, is a "controversial subject[]" and "sensitive political topic[]" that is "undoubtedly [a] matter[] of profound value and concern to the public," and that "such speech occupies the highest rung of the hierarchy of First Amendment values and merits special protection" (internal quotations and citations omitted)). Moreover, Plaintiff is a public entity seeking to use the machinery of its own state courts to impose *de facto* regulations on Defendants' nationwide speech on issues of national public concern. *Cf. Sullivan*, 376 U.S. at 264 ("[An] action brought by a public official against critics of his official conduct" "require[s]" "safeguards for freedom of speech."). But "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Falwell*, 485 U.S. at 56 (internal quotation marks and citation omitted). First Amendment interests are at their apex where, as here, it is a governmental entity that seeks to use state-law claims to regulate speech on issues of "public concern." *Hepps*, 475 U.S. at 774. Given the compelling federal interests at stake here, federal courts may entertain the claims at issue in this case "without disturbing any congressionally approved balance of federal and state judicial responsibilities," making removal appropriate. *Grable*, 545 U.S. at 314.

Indeed, freedom of speech is "most seriously implicated . . . in cases involving disfavored speech on important political or social issues," and "[c]limate change" is "one of the most important public issues of the day." *Mann*, 140 S. Ct. at 344, 346 (Alito, J., dissenting) (noting recourse to a federal forum is especially warranted in suits "concern[ing] a political or social issue that arouses intense feelings," because "a plaintiff may be able to bring suit in whichever jurisdiction seems likely to have the highest percentage of jurors who are sympathetic to the plaintiffs' point of view" (citing *Keeton*, 465 U.S. at 781)). Plaintiff's attempt to regulate

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Defendants' speech on the important public matter of climate change through litigation thus necessarily raises substantial First Amendment questions that belong in federal court.

VII. THE ACTION IS REMOVABLE BECAUSE PLAINTIFF'S CLAIMS ARE GOVERNED BY FEDERAL COMMON LAW

Removal is also appropriate, in Defendants' view, on the ground that Plaintiff's claims necessarily are governed by federal common law and, under our federal constitutional system, state law cannot apply. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011); *Int. Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021); *see also* Pet. for Writ of Cert., *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, No. 21-1550 (U.S. Jun 8, 2022). Defendants recognize that this argument is foreclosed by recent Ninth Circuit precedent. *See San Mateo*, 32 F. 4th at 748; *City of Oakland*, 969 F.3d at 906. Defendants assert this ground for the sole purpose of preserving it for potential Supreme Court review.

VIII. THIS COURT HAS JURISDICTION AND REMOVAL IS PROPER

Based on the allegations in the Complaint, this Court has original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1332, 1441(a), and 1442. Accordingly, removal of this action is proper under 28 U.S.C. §§ 1441(a) and 1446.

The United States District Court for the District of Oregon is the appropriate venue for removal pursuant to 28 U.S.C. § 1441(a) because it embraces the place where Plaintiff originally filed this case, in the Circuit Court of the State of Oregon for the County of Multnomah. *See* 28 U.S.C. § 1441(a).

All Defendants that have been properly joined and served have consented to the removal of the action, *see* Dick Decl. ¶ 4, and there is no requirement that any party not properly joined and served consent. *See* 28 U.S.C. § 1446(b)(2)(A) (requiring consent only from "all defendants

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who have been properly joined and served").[40] Copies of all process, pleadings, and orders from the state-court action being removed to this Court that are in the possession of the Chevron Defendants are attached hereto as Exhibit 1 to the Dick Declaration. Pursuant to 28 U.S.C. § 1446(a), this constitutes "a copy of all process, pleadings, and orders" received by the Chevron Defendants in the action. Upon filing this Notice of Removal, Defendants will furnish written notice to Plaintiff's counsel, and will file and serve this Notice upon the Clerk of the Circuit Court of the State of Oregon for the County of Multnomah, pursuant to 28 U.S.C. § 1446(d).

Accordingly, Defendants Chevron Corporation and Chevron U.S.A., Inc. remove to this Court the above action pending against it in the Circuit Court of the State of Oregon.

DATED: August 18, 2023.

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[40] In addition, the consent of all defendants is not required for federal officer removal under 28 U.S.C. § 1442. *See Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1253 (9th Cir. 2006) ("Whereas all defendants must consent to removal under section 1441, . . . a federal officer or agency defendant can unilaterally remove a case under section 1442.") (citation omitted).

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **NOTICE OF REMOVAL** on the following:

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Attorneys for Plaintiff

to be sent by the following indicated method or methods, on the date set forth below:

[ ] by **sending via the court's electronic filing system**

[x] by **email**

[x] by **mail**

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