APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY & COUNTY OF HONOLULU, *Plaintiff-Appellee,* v. SUNOCO LP; ALOHA PETROLEUM, LTD.; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; SHELL PLC; SHELL USA, INC.; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORPORATION; CHEVRON USA INC.; BHP GROUP LIMITED; BHP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA, INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66 COMPANY; ALOHA PETROLEUM LLC, *Defendants-Appellants,* and DOES, 1 through 100 inclusive, *Defendant.*	No. 21-15313 D.C. No. 1:20-cv-00163-DKW-RT

COUNTY OF MAUI,

Plaintiff-Appellee,

v.

CHEVRON USA INC.; CHEVRON CORPORATION; SUNOCO LP; ALOHA PETROLEUM, LTD.; ALOHA PETROLEUM LLC; DOWN MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; SHELL PLC; SHELL USA, INC.; SHELL OIL PRODUCTS COMPANY LLC; BHP GROUP LIMITED; BHP GROUP PLC; BHP HAWAII INC.; BP PLC; BP AMERICA, INC.; MARATHON PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66 COMPANY,

Defendants-Appellants,

and

DOES, 1 through 100 inclusive,

Defendant.

No. 21-15318

D.C. No. 1:20-cv-00470-DKW-KJM

OPINION

Appeal from the United States District Court
for the District of Hawaii
Derrick Kahala Watson, District Judge, Presiding

Argued and Submitted February 17, 2022
Submission Vacated February 22, 2022
Resubmitted June 29, 2022
Honolulu, Hawaii

Filed July 7, 2022

Before: Michael Daly Hawkins, Ryan D. Nelson, and
Danielle J. Forrest, Circuit Judges.

Opinion by Judge R. Nelson

SUMMARY*

Climate-Related Claims / Federal Jurisdiction

Affirming the district court's order remanding to state court climate-related claims against numerous oil and gas companies, the panel held that defendants could not show federal jurisdiction.

Plaintiffs alleged that the oil and gas companies knew about climate change, understood the harms energy exploration and extraction inflicted on the environment, and concealed those harms from the public. Plaintiffs sued in Hawaii state court, asserting state-law public and private nuisance, failure to warn, and trespass claims. The complaints asserted that defendants' deception caused harms from climate change, like property damage from extreme weather and land encroachment because of rising sea levels.

The panel held that removal from state court was not proper under federal officer jurisdiction, which required defendants to show that they were "acting under" federal officers, that they could assert a colorable federal defense, and that plaintiffs' injuries were for or relating to defendants' actions. The panel held that defendants did not act under federal officers when they produced oil and gas during the Korean War and in the 1970s under the Defense Production Act, when they repaid offshore oil leases in kind and contracted with the government to operate the Strategic Petroleum Reserve, when they conducted offshore oil operations, or when they operated the Elk Hills oil reserve, an oil field run jointly by the Navy and Standard Oil.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel further held that defendants did not assert a colorable federal defense by citing the government-contractor defense, preemption, federal immunity, the Interstate and Foreign Commerce Clauses, the Due Process Clause, the First Amendment, and the foreign affairs doctrine. The panel concluded that most of these defenses failed to stem from official duties, and the government-contractor and immunity defenses were not colorable.

The panel held that defendants did not establish federal enclave jurisdiction because they could not show that activities on federal enclaves directly caused plaintiffs' injuries. The panel explained that plaintiffs' claims were not about defendants' oil and gas operations, and defendants' activities on federal land were too remote and attenuated from plaintiffs' injuries.

Finally, the panel held that defendants did not establish jurisdiction under the Outer Continental Shelf Lands Act because their activities on the Outer Continental Shelf were too attenuated from plaintiffs' injuries.

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OPINION

R. NELSON, Circuit Judge:

The City and County of Honolulu and the County of Maui (Plaintiffs) seek to bring climate-related claims against numerous oil and gas companies (Defendants). The question before us has nothing to do with the merits of those claims, but only whether they belong in federal court.

We do not write on a blank slate. Various oil company defendants have sought removal four times in similar climate change suits, including in this Court. *See County of San Mateo v. Chevron Corp. (San Mateo II),* 32 F.4th 733 (9th Cir. 2022); *Rhode Island v. Shell Oil Prods. Co.,* 35 F.4th 44 (1st Cir. 2022); *Mayor of Baltimore v. BP P.L.C. (Baltimore 11),* 31 F.4th 178 (4th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.,* 25 F.4th 1238 (10th Cir. 2022). Similar to here, defendants in those cases contended that removal was proper under jurisdiction for federal officers, federal enclaves, and the Outer Continental Shelf Lands Act (OCSLA). Following precedent and consistent with our sister circuits, we reject these arguments. Because Defendants cannot show federal jurisdiction, we affirm.

I

Plaintiffs allege that oil and gas companies knew about climate change, understood the harms energy exploration and extraction inflicted on the environment, and concealed those harms from the public. Plaintiffs sued in Hawaii state court, asserting state-law public and private nuisance, failure to warn, and trespass claims. The Complaints assert that Defendants' deception caused harms from climate change,

like property damage from extreme weather and land encroachment because of rising sea levels.

Defendants removed, asserting eight jurisdictional grounds. Plaintiffs sought to remand. After addressing the three removal grounds at issue before us, the district court remanded. Defendants now appeal and we have consolidated the two appeals.

II

We have jurisdiction to review the district court's remand order under 28 U.S.C. §§ 1291, 1447(d). *BP P.L.C. v. Mayor of Baltimore,* 141 S. Ct. 1532, 1538 (2021). We review the district court's decision de novo. *Canela v. Costco Wholesale Corp.,* 971 F.3d 845, 849 (9th Cir. 2020).

III

Defendants' arguments lack merit. For federal officer jurisdiction, Defendants must show: (1) they were "acting under" federal officers, (2) they can assert a colorable federal defense, and (3) Plaintiffs' injuries were for or relating to Defendants' actions. Most arguments fail the first prong, and all fail the second. For federal enclave jurisdiction, Defendants cannot show that activities on federal enclaves directly caused Plaintiffs' injuries. And for jurisdiction under OCSLA, Defendants' activities on the Outer Continental Shelf (OCS) are too attenuated from Plaintiffs' injuries. We address each argument in turn.

A

The federal officer removal statute allows defendants to remove a "civil action . . . that is against or directed to . . . [t]he United States or any agency thereof or any officer (or any person acting under that officer)

. . . in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). Exercising "prudence and restraint," "we strictly construe the removal statute against removal jurisdiction." *Hansen v. Grp. Health Coop.,* 902 F.3d 1051, 1056-57 (9th Cir. 2018) (citation omitted). To establish federal jurisdiction, a defendant must show that (a) "it is a person within the meaning of the statute"; (b) "it can assert a colorable federal defense"; and (c) "there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and [the] plaintiff's claims." *San Mateo II,* 32 F.4th at 755 (citing *Riggs v. Airbus Helicopters, Inc.,* 939 F.3d 981, 986-87 (9th Cir. 2019)). Because the parties agree that corporations are persons, the disputes are (1) whether Defendants acted under federal officers, (2) whether Defendants can assert colorable federal defenses, and (3) whether the lawsuits are for or relating to Defendants' actions. We need only address prongs one and two.

1

The first prong is "acting under" federal officers. 28 U.S.C. § 1442(a)(1). "The words 'acting under' are broad, and . . . the statute must be 'liberally construed.'" *Watson v. Philip Morris Cos.,* 551 U.S. 142, 147 (2007) (quoting *Colorado v. Symes,* 286 U.S. 510, 517 (1932)). In *San Mateo II,* we identified four factors to determine whether a person was "acting under" a federal officer: (1) working under an officer "in a manner akin to an agency relationship"; (2) being "subject to the officer's close direction, such as acting under the . . . 'guidance, or control' of the officer" or having an "unusually close" relationship "involving detailed regulation, monitoring, or supervision"; (3) helping fulfill "basic governmental tasks";

and (4) conducting activities "so closely related to the government's implementation of its federal duties that the . . . person faces 'a significant risk of state-court prejudice.'" 32 F.4th at 756-57 (citing *Watson,* 551 U.S. at 151-53).

We gave several examples in *San Mateo II*. We noted that a private party acts under the government when the party is a contractor given detailed specifications and ongoing supervision to help fight a war. *San Mateo II,* 32 F.4th at 757 (citing *Watson,* 551 U.S. at 153-54 (citing *Winters v. Diamond Shamrock Chem. Co.,* 149 F.3d 387, 399-400 (5th Cir. 1998), *overruled on other grounds by Latiolais v. Huntington Ingalls, Inc.,* 951 F.3d 286 (5th Cir. 2020))). On the other hand, neither "an arm's-length business arrangement with the federal government" nor "suppl[ying] it with widely available commercial products or services" are enough to show "acting under" a federal officer. *Id.* Compliance with the law and obeying federal orders are also not enough, "even if the regulation is highly detailed and . . . the private firm's activities are highly supervised and monitored." *Id.* (quoting *Watson,* 551 U.S. at 153). Finally, we said that courts "may not interpret [the removal statute] so as to 'expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries.'" *Id.* (quoting *Watson,* 551 U.S. at 153).

Defendants argue that they acted under federal officers in six ways. Two arguments fail because they set out only normal commercial or regulatory relationships that do not involve detailed supervision. We rejected two in *San Mateo II*, and Defendants' new factual points do not change the outcome. And we need

not reach the last two. Even if Defendants acted under federal officers, they still fail the colorable federal defense prong.

a

Defendants did not act under federal officers when they produced oil and gas during the Korean War and in the 1970s under the Defense Production Act (DPA). DPA directives are basically regulations. *See* Michael H. Cecire & Heidi M. Peters, Cong. Rsch. Serv., R43767, The Defense Production Act of 1950: History, Authorities, and Considerations for Congress 4-7 (2020). When complying, Defendants did not serve as government agents and were not subject to close direction or supervision. The government sometimes invoked the DPA in wartime, but unlike *Winters,* Defendants' compliance with the DPA was only lawful obedience. *See Watson,* 551 U.S. at 153 (citing *Winters,* 149 F.3d at 387). That is not enough. *See San Mateo II,* 32 F.4th at 759-60.

b

Next, Defendants argue that they acted under federal officers when they repaid offshore oil leases in kind and contracted with the government to operate the Strategic Petroleum Reserve (SPR). Their argument fails because Defendants did not act as government agents, there was not close direction or supervision, and Defendants' actions were more like an arm's-length business deal.

The SPR is a federally owned oil reserve created after the 1973 Arab oil embargo. Heather L. Greenley, Cong. Rsch. Serv., R46355, The Strategic Petroleum Reserve: Background, Authorities, and Considerations 1-2 (2020). Many Defendants pay for offshore leases in oil and deliver it to the SPR. Another

Defendant leases and operates the SPR and by contract must support the government if there is a drawdown on the reserve.

But Defendants cannot show "acting under" jurisdiction for SPR activities. First, payment under a commercial contract—in kind or otherwise—does not involve close supervision or control and does not equal "acting under" a federal officer. Second, operating the SPR involves a typical commercial relationship and Defendants are not subject to close direction. *See San Mateo II,* 32 F.4th at 756-57. Relative to *Winters,* 551 U.S. at 153, the government's directions here are more general and involve fewer detailed specifications and less ongoing supervision.

c

Defendants also did not act under federal officers when conducting offshore oil operations. Under OCSLA, the federal government offers private parties leases for offshore fossil fuel exploration, development, and production. 43 U.S.C. §§ 1331-1356b. But in *San Mateo II* we rejected "acting under" for offshore oil and gas operations under these federal leases. 32 F.4th at 759-60. We reasoned that "[t]he leases do not require that lessees act on behalf of the federal government, under its close direction, or to fulfill basic governmental duties," there was not a significant risk of state court prejudice, and the leases' obligations "largely track[ed] statutory requirements." *Id.* (citing *Watson,* 551 U.S. at 152).

Using new factual arguments, Defendants try to surmount *San Mateo II*. They contend that Congress studied creating a national oil company and that offshore oil resources are a national security asset. And

they show how the government controls offshore oil operations under federal leases.

Yet Defendants break no new ground. Congress endorsed oil operations and considered making a national oil company, but that does not show that oil production was a basic governmental task. Government oversight for offshore leases is not enough to transform activities that *San Mateo II* rejected into ones showing "close direction." *Id.* at 759.

Defendants rely on a history professor who specializes in oil exploration. The professor chronicles offshore oil leases and government control over such operations, which Defendants contend show a high degree of supervision. But the government orders show only a general regulation applicable to all offshore oil leases. Indeed, Defendants' expert portrays the "OCS orders" as "directions and clarifications to all operators on how to meet the requirements in the C.F.R." General government orders telling Defendants how to comply are not specific direction and supervision, which the removal statute requires. *Cf., e.g., Leite v. Crane Co.,* 749 F.3d 1117, 1123 (9th Cir. 2014) ("[T]he Navy issued detailed specifications governing the form and content of all warnings . . . on the equipment itself and in accompanying technical manuals.").

Defendants also argue that government "regional supervisor[s] still had to make adaptive and discretionary decisions" pertaining to individual operations. But these were decisions like approving certain actions on a well or giving specific waivers to excuse compliance with regulations, not directing or supervising operations generally. The government also set overall production levels for wells. Yet the orders were general regulations that applied to everyone rather than "unusually close" direction or supervision.

See Watson, 551 U.S. at 153. We agree with the district court that the leases do not show sufficient direction to meet the "acting under" prong. *City of Honolulu v. Sunoco LP,* No. 20-cv-00163, 2021 WL 531237, at *5-6 (D. Haw. Feb. 12, 2021).

d

Finally, Defendants did not act under federal officers in operating the Elk Hills oil reserve. Elk Hills was an oil field run jointly by the Navy and Standard Oil, a predecessor of Chevron. *See United States v. Standard Oil Co.,* 545 F.2d 624, 626-28 (9th Cir. 1976). Because of interconnected underground oil, the parties agreed to coordinate. *San Mateo II,* 32 F.4th at 758. And "[b]ecause the Navy sought to limit oil production . . . in the event of a national emergency, the . . . agreement required that both Standard [Oil] and the Navy curtail their production and gave the Navy 'exclusive control over the exploration, prospecting, development, and operation of the Reserve.'" *Id.* at 758-59.

In *San Mateo II,* we rejected the "acting under" argument for Standard Oil's Elk Hills operations. *Id.* at 759-60. Rather than acting for the government, Standard Oil and the Navy had "reached an agreement that allowed them to coordinate their use of the oil reserve in a way that would benefit both parties," and so "Standard [Oil] was acting independently." *Id.* at 759.

As with the OCS leases, Defendants try to sidestep *San Mateo II.* They offer a different contract between the parties ("Operating Agreement"), which is separate from the "Unit Production Contract" in *San Mateo II.* Defendants argue that the Navy had "exclusive control" over the time and rate of exploration, and

over the quantity and rate of production at Elk Hills. And Defendants uncovered evidence showing that the Navy employed Standard Oil.

We reject Defendants' arguments. While one could read the language about the Navy's "exclusive control" as detailed supervision, what instead happened was the Navy could set an overall production level or define an exploration window, and Standard Oil could act at its discretion. The agreement gave Standard Oil general direction—not "unusually close" supervision. *Sunoco,* 2021 WL 531237, at *6.

Besides, we have already held that a similar arrangement did not meet the "acting under" prong. *See Cabalce v. Thomas E. Blanchard & Assocs., Inc.,* 797 F.3d 720, 727-29 (9th Cir. 2015). In *Cabalce,* we studied a relationship between the government and a contractor in which the contractor had to act "as prescribed and directed by" the government. *Id.* at 724. Yet we held that the defendant was not "acting under" federal officers. *Id.* at 730. We noted that "the contract define[d] [the defendant's] duties . . . in general terms," and the contractor was the one who decided how to fulfill those duties. *Id.* at 728. The same logic applies here. The contract gave Standard Oil duties in general terms, and Standard Oil was free to fulfill them as desired. Such an arrangement does not rise to the level of "acting under."

2

Prong two requires Defendants to "assert a colorable federal defense." *San Mateo II,* 32 F.4th at 755 (citing *Riggs,* 939 F.3d at 986-87). The defense must "aris[e] out of [defendant's] official duties." *Arizona v. Manypenny,* 451 U.S. 232, 241 (1981). And in assessing whether a defense is colorable, we must not be

"grudging." *Jefferson County v. Acker,* 527 U.S. 423, 431 (1999). The Supreme Court even held that a rejected federal defense could be colorable. *Id.; see Stirling v. Minasian,* 955 F.3d 795, 801 (9th Cir. 2020) ("We do not express a view on whether this defense is 'in fact meritorious'; we hold only that it is 'colorable.'" (citing *Leite,* 749 F.3d at 1124)).

To satisfy this prong, Defendants cite the government-contractor defense, preemption, federal immunity, the Interstate and Foreign Commerce Clauses, the Due Process Clause, the First Amendment, and the foreign affairs doctrine. For some of these, as the district court put it, Defendants have "simply assert[ed] a defense and the word 'colorable' in the same sentence." *Sunoco,* 2021 WL 531237, at *7 (citation omitted). Overall, the defenses fail to stem from official duties or are not colorable.

Most defenses do not flow from official duties. For instance, Defendants argue that they cannot be "held liable consistent with the First Amendment for alleged 'roles in denialist campaigns to misinform and confuse the public.'" Even if this defense is colorable, it does not arise from official duties, as Defendants do not contend that the government ordered their allegedly deceptive acts. Defendants' due process, Interstate and Foreign Commerce Clauses, foreign affairs doctrine, and preemption defenses similarly do not arise from official duties.

That leaves the government contractor and immunity defenses. But Defendants do not show that these defenses are colorable. On the government contractor defense, Defendants cite two cases that dealt with design defect claims, not failure to warn claims. *See Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988); *Gertz v. Boeing Co.,* 654 F.3d 852 (9th Cir. 2011). And

for their immunity defense, Defendants argue that because they produced oil and gas "at the direction of the federal government, . . . they are immune from liability for any alleged injuries." *Sunoco,* 2021 WL 531237, at *7.

It is true that we must not be "grudging" in assessing whether asserted federal defenses are colorable, *Acker,* 527 U.S. at 431, and a defendant "need not win his case before he can have it removed." *Willingham v. Morgan,* 395 U.S. 402, 407 (1969). Still, Defendants' conclusory statements and general propositions of law do not make their defenses colorable. Thus, we reject federal officer jurisdiction.

B

Federal enclave jurisdiction refers to the principle that federal law applies in federal enclaves. *San Mateo II,* 32 F.4th at 748-49 (citing U.S. Const. art. I, § 8, cl. 17). When the federal government buys state land, unless one of three narrow exceptions apply (none of which are relevant here), federal law governs. *Id.* at 749 (citing *Mater v. Holley,* 200 F.2d 123, 124 (5th Cir. 1952)). This means a federal court may have federal question jurisdiction based on injuries arising from conduct on the enclave. *Id.*; *see Alvares v. Erickson,* 514 F.2d 156, 160 (9th Cir. 1975) (noting that there is federal jurisdiction if the claim's locus is in a federal enclave); *cf. Lake v. Ohana Mil. Cmtys., LLC,* 14 F.4th 993, 1003 (9th Cir. 2021) (noting that federal jurisdiction is not exclusive if there is concurrent state jurisdiction).

We invoke the doctrine of federal enclave jurisdiction narrowly. *See San Mateo II,* 32 F.4th at 749-50 (finding no jurisdiction where plaintiffs raised state-law claims arising from injury to local property);

Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1250 (9th Cir. 2006) (finding jurisdiction for asbestos exposure on a federal enclave). A claim must allege that an injury occurred on a federal enclave or that an injury stemmed from conduct on a federal enclave. *San Mateo II,* 32 F.4th at 749-50. And the connection between injuries and conduct must not be "too attenuated and remote." *Id.* at 750. For example, a defendant cannot use activities on federal enclaves to create instant jurisdiction for a state-law claim. *See, e.g., Lake,* 14 F.4th at 1002 ("[T]here is no reason to treat the resulting state laws as if they were assimilated into federal law."); *Allison v. Boeing Laser Tech. Servs.,* 689 F.3d 1234, 1238 (10th Cir. 2012) ("[N]o federal statute yet allows the broad application of state employment, tort, and contract law to federal enclaves.").

In *San Mateo II,* the defendants asserted that energy companies had engaged in activities on federal enclaves possibly leading to global warming and rising seas. 32 F.4th at 750. But while the defendants identified some conduct on federal enclaves, any connection between that conduct and the plaintiffs' alleged injuries was too remote. *Id.* The plaintiffs' claims asserted property damage in local areas. *Id.* at 749-50. So we rejected the idea that the plaintiffs' injuries arose from fossil fuel operations on federal enclaves. *Id.* at 750-51 (citing *Gunn v. Minton,* 568 U.S. 251, 258 (2013)).

Defendants do not satisfy federal enclave jurisdiction. Plaintiffs' claims are not about Defendants' oil and gas operations, and Defendants' activities on federal enclaves are too remote and attenuated from Plaintiffs' injuries.

Like *San Mateo II,* the Complaints do not attack Defendants' underlying conduct. *See* 32 F.4th at 744. Yet Defendants try to recharacterize the claims from deceptive practices to activities on federal enclaves. *Sunoco*, 2021 WL 531237, at *8. But "[t]he plaintiff is 'the master of the claim.'" *San Mateo II,* 32 F.4th at 746 (quoting *City of Oakland v. BP PLC,* 969 F.3d 895, 904 (9th Cir. 2020)). We agree with the district court: "[i]t would require the most tortured reading of the Complaints to find" jurisdiction. *Sunoco*, 2021 WL 531237, at *8.

Defendants try another ploy. They argue that because some conduct happened on federal enclaves, the conduct relates to injuries from Defendants' deceptive practices. We reject such a broad application. Under *San Mateo II,* Defendants' alleged tortious conduct is too attenuated from Plaintiffs' claimed injuries. Federal enclave jurisdiction needs a direct connection between the injury and conduct. *San Mateo II,* 32 F.4th at 750. As in *San Mateo II,* there is no link. Even if much of Defendants' oil and gas operations occurred on federal enclaves, that still does not transform Plaintiffs' claims about deceptive practices into claims about the conduct itself *See Suncor,* 25 F.4th at 1272 ("[A]lleged climate alteration by [the Energy Companies] . . . does not speak to the nature of [the plaintiffs'] alleged injuries." (citation omitted)).

Plaintiffs' claims do not implicate federal enclave activities. Nor is Defendants' conduct tied directly to Plaintiffs' claimed injuries. Following *San Mateo II,* we rebuff Defendants' arguments.

C

OCSLA permits federal jurisdiction over actions "arising out of, or in connection with" operations on

the OCS "involv[ing] exploration, development, or production." 43 U.S.C. § 1349(b)(1). But to achieve jurisdiction, one must show more than "but-for" causation. Jurisdiction must be based on conduct. The phrase "aris[e] out of, or in connection with" permits federal jurisdiction for tort claims "only when those claims arise from actions or injuries occurring on the [O]uter Continental Shelf." *San Mateo II,* 32 F.4th at 753. A test requiring only some connection between a tort and OCS activities has no limiting principle. *Id.* at 751 (citing *Maracich v. Spears,* 570 U.S. 48, 60 (2013)).

Other circuits have applied a broad "but-for" standard. Yet these cases dealt with claims having a "direct physical connection to an OCS operation" or a "contract or property dispute directly related to an OCS operation." *E.g., id.* at 754 (citing *Suncor,* 25 F.4th at 1273). Courts have also required a "sufficient nexus to an operation on the OCS," *id.* (citing *Suncor,* 25 F.4th at 1273), and denied a 'mere connection' between a claimant's case" and OCS operations, *id.* (quoting *Baltimore II,* 31 F.4th at 221).

In *San Mateo II,* we rejected jurisdiction under OCSLA. The defendants contended that the plaintiffs' injuries—allegedly caused by fossil fuel products, wrongful promotion, concealment of hazards, and failure to seek safer alternatives—were due in part to "cumulative fossil-fuel extraction," some of which occurred on the OCS. *Id.* at 751. Even acknowledging that the removal statute does not require "but-for" causation strictly, we held that the connection between the limited OCS activities and the plaintiffs' injuries was "too attenuated." *Id.* at 754. The alleged injuries occurred in local jurisdictions. *Id.* at 749-50. And the complaints did not refer to OCS activities;

they targeted the nature of the defendants' products, knowledge of harm, and concealment. *Id.* at 750.

Defendants' sporadic OCS activities cannot shoehorn OCSLA jurisdiction for just any tort claim. The parties agree that some Defendants engaged in exploration, development, and production on the OCS. *Sunoco,* 2021 WL 531237, at *3. If that were the test, then Defendants might have an argument. Yet federal jurisdiction does not exist because oil and gas companies' OCS activities are too attenuated and remote from Plaintiffs' alleged injuries.

Plaintiffs contend that oil and gas companies created a nuisance when they misled the public. But just because Defendants were allegedly trying to hoodwink the public about harm from oil and gas operations—partially occurring on the OCS—does not mean that OCS activities caused Plaintiffs' injuries. The connection is too tenuous.

Indeed, Plaintiffs' claimed injuries from Defendants' deceptive practices do not stem from activities on the OCS, even if OCS-produced oil accounts for 30% of annual domestic production, as Defendants assert. As the district court stated, "failing to warn and disseminating information about the use of fossil fuels have nothing to do with such direct acts or acts in support" of OCS operations. *Id.*

Ruling for Defendants would "dramatically expand [OCSLA]'s scope" because "'[a]ny spillage of oil or gasoline involving some fraction of OCS-sourced oil' or 'any commercial claim over such a[n OCS-sourced] commodity'" could lead to removal. *Suncor,* 25 F.4th at 1273. A statute about OCS fossil fuel should not let oil and gas companies remove nearly every suit, no matter how remote the tie to the OCS. *See San Mateo*

II, 32 F.4th at 752 (citing *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 479 n.7 (1981)); *Baltimore II,* 31 F.4th at 232 ("Any connection between fossil-fuel production on the OCS and the conduct alleged in the Complaint is simply too remote."); *Shell Oil,* 35 F.4th at 60 (noting that the broad OCSLA jurisdiction the energy companies advocated was "a consequence too absurd to be attributed to Congress").

Defendants ask us to build a bridge too far to reach federal jurisdiction under OCSLA. Because such a construction would lead to unstable results, we refuse.

IV

This case is about whether oil and gas companies misled the public about dangers from fossil fuels. It is not about companies that acted under federal officers, conducted activities on federal enclaves, or operated on the OCS. Thus, we decline to extend federal jurisdiction.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

CITY AND COUNTY OF HONOLULU, Plaintiff, vs. SUNOCO LP, *et al.*, Defendants.	Case No. 20-cv-00163-DKW-RT **ORDER (1) GRANTING MOTION TO REMAND AND (2) REMANDING ACTION TO STATE CIRCUIT COURT**

COUNTY OF MAUI, Plaintiff, vs. CHEVRON U.S.A. INC., *et al.*, Defendants.	Case No. 20-cv-00470-DKW-KJM **ORDER (1) GRANTING MOTION TO REMAND AND (2) REMANDING ACTION TO STATE CIRCUIT COURT**

In these cases, Plaintiffs seek to have their claims remanded to State Court, arguing that this Court lacks subject matter jurisdiction over the same. For their part, Defendants, a roll call of "energy" companies, removed those same claims to this Court, arguing that subject matter jurisdiction exists here on numerous grounds. Since the first of these actions, No. 20-cv-163, was removed, some of those grounds have become less persuasive due to binding Ninth Circuit Court of Appeals precedent. Nonetheless, in their oppositions to Plaintiffs' motions to remand, Defendants

continue to advance three principal reasons for why these cases should remain in federal court: (1) Plaintiffs' claims are related to Defendants' activities on the Outer Continental Shelf; (2) Defendants acted under the direction of federal officers for decades while engaging in activities related to Plaintiffs' claims; and (3) Plaintiffs' claims arise on federal enclaves.[1]

While, at first-blush, these cases, which allegedly involve "Defendants' exacerbation of global warming . . . ," may seem to include subject matter appropriate for this federal forum, upon closer inspection, the claims Plaintiffs have elected to pursue in these cases reveal that federal jurisdiction is lacking on the grounds advanced by Defendants. The principal problem with Defendants' arguments is that they misconstrue Plaintiffs' claims. More specifically, contrary to Defendants' contentions, Plaintiffs have chosen to pursue claims that target Defendants' alleged concealment of the dangers of fossil fuels, rather than the acts of extracting, processing, and delivering those fuels. When viewed in this light, Plaintiffs' claims simply do not relate to Defendants' activities on the Outer Continental Shelf, under the direction of federal officers, or on federal enclaves because there is no contention that Defendants' alleged acts of concealment implicate those spheres. As a result, with no basis for federal jurisdiction existing over the claims Plaintiffs have chosen to pursue, the Court GRANTS Plaintiffs'

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[1] As mentioned with further specificity below, the Court acknowledges that Defendants persist in raising three other grounds for removal in order to preserve those grounds for appellate review.

motions to remand and REMANDS these cases to the State Courts from which they came.[2]

RELEVANT PROCEDURAL BACKGROUND

On April 15, 2020, in No. 20-cv-163 (Honolulu Action), Defendants Chevron Corporation and Chevron U.S.A., Inc. (collectively, Chevron) removed Plaintiff City and County of Honolulu's (Honolulu) Complaint from the First Circuit Court of the State of Hawai'i (First Circuit). In the notice of removal, Chevron asserted eight grounds for federal jurisdiction: (1) the Outer Continental Shelf Lands Act (OCSLA); (2) federal officer jurisdiction; (3) federal enclave jurisdiction; (4) federal common law; (5) *Grable*[3] jurisdiction; (6) federal preemption; (7) bankruptcy jurisdiction; and (8) admiralty jurisdiction. On September 11, 2020, Honolulu filed a motion to remand its case to the First Circuit. Dkt. No. 116.[4] On October 9, 2020, Defendants[5] filed a consolidated opposition to the

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[2] Although Defendants request oral argument on the motions to remand, *see, e.g.*, Dkt. No. 117 at 10, the Court finds that resolution of these matters would not be advanced by oral argument, given the more than adequate written record on file. Therefore, pursuant to Local Rule 7.1(c), the Court elects to decide the motions to remand without a hearing.

[3] *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

[4] References to Dkt. No. __ shall be to filings in No. 20-cv-163. References to Dkt. No. __* shall be to filings in No. 20-cv-470.

[5] Defendants in the Honolulu Action are: Sunoco LP; Aloha Petroleum, Ltd.; Aloha Petroleum LLC; Exxon Mobil Corporation; Exxonmobil Oil Corporation; Royal Dutch Shell PLC; Shell Oil Company; Shell Oil Products Company LLC; Chevron Corporation; Chevron U.S.A., Inc.; BHP Group Limited; BHP Group PLC; BHP Hawaii Inc.; BP PLC; BP America Inc.; Marathon

motion to remand, Dkt. No. 117, to which Honolulu replied on October 30, 2020. Dkt. No. 121.[6]

Also on October 30, 2020, in No. 20-cv-470 (Maui Action), Chevron removed Plaintiff County of Maui's (Maui and, with Honolulu, Plaintiffs) Complaint from the Second Circuit Court of the State of Hawai'i (Second Circuit). In the notice of removal, Chevron asserted six grounds for federal jurisdiction: (1) OCSLA; (2) federal officer jurisdiction; (3) federal enclave jurisdiction; (4) federal common law; (5) *Grable* jurisdiction; and (6) federal preemption. With the filing of the notice of removal in the Maui Action, the Court stayed the Honolulu Action, pending anticipated remand briefing in the former. On November 25, 2020, Maui filed a motion to remand its case to the Second Circuit. Dkt. No. 74*. On December 22, 2020, Defendants[7] filed a consolidated opposition to the motion to remand. Dkt. No. 96*. And on January 20, 2021, Maui filed a reply in support of its motion to remand. Dkt. No. 98*.

RELEVANT LEGAL PRINCIPLES

Pursuant to Section 1441(a) of Title 28, any civil action brought in a State court may be removed to federal court by a defendant provided that the federal

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Petroleum Corporation; ConocoPhillips; ConocoPhillips Company; Phillips 66; and Phillips 66 Company (collectively, Defendants).

[6] Although mentioned in the notice of removal filed in the Honolulu Action, Defendants do not again argue the applicability of bankruptcy or admiralty jurisdiction in their brief opposing the motion to remand. Therefore, the Court finds those grounds to have been abandoned, and does not further address them herein.

[7] Defendants in the Maui Action are the same as those in the Honolulu Action and, thus, are also collectively referred to herein as Defendants.

court would have original jurisdiction over the action. Original jurisdiction can be obtained in various ways. As argued in the briefing before the Court, three ways are relevant here.

First, in pertinent part, OCSLA provides federal courts with jurisdiction over any case "arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals . . . ." 43 U.S.C. § 1349(b)(1).

Second, the removal statute allows cases commenced in State court to be removed by, among others, "[t]he United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or any agency thereof, in an official or individual capacity, for or relating to any act under color of such office . . . ." 28 U.S.C. § 1442(a)(1) (emphasis added).

> In order to invoke § 1442(a)(1), a private person must establish: (a) it is a person within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and the plaintiff's claims; and (c) it can assert a colorable federal defense. To demonstrate a causal nexus, the private person must show: (1) that the person was acting under a federal officer in performing some act under color of federal office, and (2) that such action is causally connected with the plaintiffs' claims.

Cty. of San Mateo v. Chevron Corp., 960 F.3d 586, 598 (9th Cir. 2020) (quotations, citations, and alteration omitted).

Third, "[f]ederal courts have federal question jurisdiction over tort claims that arise on federal enclaves." *Durham v. Lockheed Martin Corp*., 445 F.3d 1247, 1250 (9th Cir. 2006) (quotation omitted).

Finally, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). The burden of establishing this court's subject matter jurisdiction "rests upon the party asserting jurisdiction[,]" *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 377 (1994), which, here, means Defendants, *Corral v. Select Portfolio Servicing, Inc.*, 878 F.3d 770, 773 (9th Cir. 2017). "[A]ny doubt about the right of removal requires resolution in favor of remand." *Moore-Thomas v. Alaska Airlines, Inc*., 553 F.3d 1241, 1244 (9th Cir. 2009).

DISCUSSION

The Court addresses, in turn, the three principal grounds for removal at issue here: (1) jurisdiction under the OCSLA; (2) federal officer removal; and (3) federal enclave jurisdiction.[8]

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[8] As an initial matter, the Court acknowledges that, in both notices of removal and in their opposition briefs, Defendants assert that jurisdiction is proper in federal court under (1) federal common law, (2) federal preemption, and (3) *Grable*. The Court also observes, however, that, in both opposition briefs, Defendants themselves acknowledge that these bases for federal jurisdiction have been recently rejected by the Ninth Circuit. *See, e.g*., Dkt. No. 117 at 8 n.1 . Thus, while acknowledging that these bases have been raised in both the Honolulu and Maui Actions, the

1. OCSLA

As mentioned, in pertinent part, jurisdiction rests under the OCSLA over any case "arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals . . . ." 43 U.S.C. § 1349(b)(1). Thus, for jurisdiction to lie, (1) an "operation" involving "exploration, development, or production" must be conducted on the outer Continental Shelf, and (2) the case must arise out of or in connection with that operation. *Id*. While OCSLA does not define the term "operation," the terms "exploration, development, or production" are defined as follows. "Exploration" "means the process of searching for minerals," such as surveys and drilling. 43 U.S.C. § 1331(k). "Development" is described as "those activities which take place following discovery of minerals in paying quantities," such as drilling, platform construction, and onshore support facilities. *Id*. § 1331(*l*). "Production" "means those activities which take place after the successful completion of any means for the removal of minerals," such as the transfer of minerals to shore, monitoring, and work-over drilling. *Id*. § 1331(m).

Here, the parties do not dispute that Defendants, at least to some extent, engage in operations of exploration, development, or production on the outer Continental Shelf. The real dispute between them, instead, is whether this case arises out of or in connection with that operation. While the Ninth Circuit has

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Court does not discuss them further beyond rejecting them in light of binding Ninth Circuit authority. *See City of Oakland v. BP PLC*, 969 F.3d 895, 906-908 (9th Cir. 2020).

not clarified the scope of the jurisdictional reach of the OCSLA, the Court finds that this case does not arise out of or in connection with Defendants' operations on the outer Continental Shelf.

The reason is the nature of the cases Plaintiffs bring here—in particular, the alleged conduct of Defendants targeted in the Complaints. Specifically, the essence of those Complaints is that Defendants have allegedly created a public nuisance. The important part for this analysis is *how* the Defendants allegedly created that nuisance. Contrary to Defendants' assertions, it is *not* through their "fossil fuel production activities," *see* Dkt. No. 117 at 14, but through their alleged *failure to warn* about the hazards of using their fossil fuel products and *disseminating* misleading information about the same, *see* Dkt. No. 1-2 at ¶ 157; Dkt. No. 1-2* at ¶ 207.[9] When viewed in this light, these cases simply have nothing to do with the "exploration, development, or production" of minerals from the outer Continental Shelf, as those terms are defined in the statute. Notably, each of those defined terms involve examples of activities requiring either some direct act on the outer Continental Shelf, such as drilling, or acts in support of an act thereon, such as platform construction. As alleged in the Complaints, failing to warn and disseminating

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[9] Defendants' citation to the Complaints here reveals the fault in their argument. The relevant paragraph alleges that "Defendants' acts and omissions as alleged herein are indivisible causes of the City's injuries and damages . . . ." Dkt. No. 117 at 14 (citing Dkt. No. 1-2 at ¶ 170). The important phrase is "as alleged herein . . . [,]" which, as discussed, is the alleged failure to warn and dissemination of misleading information, *not* fossil fuel production.

information about the use of fossil fuels have nothing to do with such direct acts or acts in support.

Therefore, while the Court acknowledges that the Ninth Circuit has not clarified the jurisdictional reach of OCSLA, based upon this Court's reading of the statute, these cases do not arise out of or in connection with "any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals . . . ." *See* 43 U.S.C. § 1349(b)(1).[10]

2. Section 1442(a)(1)/Federal Officer Removal

As mentioned, Section 1442(a)(1) permits removal when, among other things, (1) there is a causal nexus between a defendant's actions, taken pursuant to a federal officer's direction, and the plaintiff's claims, and (2) there is a colorable federal defense. *San Mateo*, 960 F.3d at 598. For there to be a causal nexus, a defendant must show that (A) it was acting under a federal officer in performing some act under color of federal office, and (B) such action is causally connected to the plaintiff's claims. *Id*.

To begin, the Court observes that this case hardly operates on a clean slate on the topic presented: whether Defendants, including the ones here, acted under a federal officer's direction. This is because the

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[10] The Court notes that both parties cite various non-binding cases that discuss the jurisdictional reach of the OCSLA. *See* Dkt. No. 116-1 at 23-24 & nn.10-11; Dkt. No. 117 at 11-12. Only Plaintiffs, however, cite cases that have considered the specific issue of OCSLA jurisdiction in the context of an action like this one, and every one of those cases has found that jurisdiction does not lie. *See* Dkt. No. 116-1 at 24 n.11.

Ninth Circuit recently addressed that exact same issue in a similar lawsuit. *See id.* at 598-603. Put succinctly, the Ninth Circuit did not answer the question in Defendants' favor, *i.e.*, it affirmed a district court's finding that Section 1442(a)(1) did not provide jurisdiction over a dispute very similar to the one here.

Undaunted, Defendants again press the same argument. In doing so, Defendants contend that, in these cases, they have provided "substantial additional evidence" that they acted under federal officers, which they, for whatever reason, did not present to the district court or to the Ninth Circuit in *San Mateo*. Dkt. No. 117 at 17; *see also* Dkt. No. 96* at 18 n.10. Bearing in mind the tinged canvas upon which the Court writes, the Court first addresses whether Defendants acted under a federal officer, then whether any such action is causally connected to Plaintiffs' claims, and, finally, whether a colorable federal defense has been stated.

A. Acting Under

In determining whether a private person acted under a federal officer, a court should consider at least four factors. *San Mateo*, 960 F.3d at 599. First, whether the person is acting in a manner akin to an agency relationship. Second, whether the person is subject to an officer's "close direction" or in an "unusually close" relationship involving detailed regulation, monitoring, or supervision. *Id.* (quotation omitted). Third, whether the person is assisting in fulfilling "basic government tasks that the Government itself would have had to perform if it had not contracted with a private firm." *Id.* (quotation omitted). And finally, whether the person's activity is "so closely related to the government's implementation of its federal duties that the private person faces a significant

risk of state-court prejudice" and may have difficulty in raising an immunity defense. *Id.* (quotation and internal quotation omitted).

In their opposition briefs, Defendants first contend that "securing an adequate supply of oil and gas is an essential government function." Dkt. No. 117 at 19-23; Dkt. No. 96* at 22-27. Defendants argue that the federal government created agencies to "control" the petroleum industry, directed the production of certain products, supervised and encouraged the domestic production of oil and gas, and procured millions of barrels of fuel products for the military. Defendants assert that, in this light, they have a "special relationship" with the federal government, justifying jurisdiction here.

The Court is unmoved. Among other deficiencies, Defendants fail to explain how the matters they address in this argument satisfy any of the factors that the Ninth Circuit only recently determined should be considered when addressing whether a private person acted under a federal officer for purposes of Section 1442(a)(1). Instead, Defendants rely on broad policy goals and announcements of various political administrations, interlaced with occasional reference to "supervis[ion][,]" "control[,]" and "military specifications[.]" No explanation is made, though, as to why any of this constitutes an agency-type relationship, close direction, the fulfillment of basic government tasks, or the risk of state-court prejudice. Therefore, the Court rejects that the alleged "special relationship" between the federal government and Defendants results in Defendants acting under a federal officer for purposes of Section 1442(a)(1).

Defendants next argue that they acted under federal officers in producing and supplying specialized

fuels for the military. Dkt. No. 117 at 23-33; Dkt. No. 96* at 27-36. More specifically, Defendants point to the supply of specialized fuels during World War II, the Korean War, the Cold War, and between 1983 and 2011 to the Department of Defense. For present purposes, the Court will assume Defendants acted under a federal officer in (1) suppling specialized fuels to, and constructing pipelines for, the federal government during World War II, (2) supplying specialized fuels for certain spy or reconnaissance planes during the Cold War, and (3) supplying specialized jet fuels for the Department of Defense between 1983 and 2011 (*see* Dkt. No. 117 at 31-32). However, with respect to fuel supplied during the Korean War and the 1973 Oil Embargo, other than "directives" to increase or ensure the supply of oil, *see id*. at 28-29, Defendants provide no information as to why this constituted the sort of "unusually close" relationship required. *See San Mateo*, 960 F.3d at 599, 601-602.

Defendants next argue that they produced oil on federal lands pursuant to leases governed by federal statutes, such as the OCSLA. Dkt. No. 117 at 33-40; Dkt. No. 96* at 37-45. As Plaintiffs point out, though, the Ninth Circuit has already addressed the question of whether leases to produce oil on the outer Continental Shelf cause entities the same as, or similar to, Defendants to act under a federal officer. *See* Dkt. No. 121 at 17; Dkt. No. 98* at 13-14. Like many other questions, that one was resolved *against* Defendants when the Ninth Circuit held that the leases "do not require that lessees act on behalf of the federal government, under its close direction, or to fulfill basic governmental duties." *San Mateo*, 960 F.3d at 602-603.

Nonetheless, in their opposition briefs, Defendants attempt to explain why *San Mateo* does not control. They argue that additional paragraphs in the leases, ones that presumably were there when the Ninth Circuit reviewed the same leases, "provide significantly more detail about government control over federal mineral lessees like Defendants than the factual record at issue in the cases upon which Plaintiff relies." Dkt. No. 117 at 33. Defendants further argue that "their performance under the leases fulfilled an essential governmental purpose" that the Ninth Circuit presumably ignored. *Id*. at 34. Defendants, at least in the Maui Action, also rely on the opinion of Richard Priest, an Associate Professor of History and Geographical and Sustainability Sciences at the University of Iowa, that the leases are "not merely commercial transactions between the federal government and the oil companies. They reflect the creation of a valuable national security asset for the United States over time." Dkt. No. 96* at 37 (citing Dkt. No. 96-1 at ¶ 7(1)).

This Court is unconvinced that any of the supposedly additional or new arguments presented here alter the Ninth Circuit's holding that the leases do not give rise to an unusually close relationship with the federal government for purposes of Section 1442(a)(1). Principally, while Defendants appear to have taken a new approach in presenting the leases—describing them as securing an essential governmental purpose—ultimately, they have merely rearranged the deckchairs. The leases are the same leases the Ninth Circuit reviewed less than a year ago. Defendants may now be highlighting different provisions in those leases than what they brought to the court's attention in *San Mateo*, but that hardly means the Ninth Circuit ignored or did not appreciate Defendants' new

focus. Nothing has changed in the cited relationship with the government over the last year, and oil is still oil (whether or not Defendants now wish to describe it as a "valuable national security asset"). Still further, the newly cited lease provisions show nothing more than what the Ninth Circuit described as "largely track[ing] legal requirements" and evidencing a high degree of regulation. *See San Mateo*, 960 F.3d at 603. As such, in light of *San Mateo*, the Court does not agree that Defendants acted under a federal officer with respect to oil and gas leases with the government.

A similar result is true of Defendants' reliance on their operation for the federal government of National Petroleum Reserve No. 1 in Elk Hills. Dkt. No. 117 at 41-44; Dkt. No. 96* at 45-48. Notably, this argument was also addressed by the Ninth Circuit in *San Mateo*, and it too was rejected as a basis for federal officer removal. *See San Mateo*, 960 F.3d at 601-602. Despite the Ninth Circuit's ruling, Defendants largely sidestep the same, asserting only that this case is different because an oil company, Standard Oil, was hired to "operate" Elk Hills and, in one of the operating agreements with the government, was stated as "in the employ" of the Navy. Dkt. No. 117 at 41; Dkt. No. 96* at 46. The Court is, again, unconvinced that the cited operating agreement rendered Standard Oil as acting under a federal officer. While the agreement states, without explaining, that Standard Oil was "in the employ" of the Navy, nothing else in the agreement, and certainly nothing to which Defendants cite, sets forth the kind of "unusually close" relationship that is necessary. Instead, the agreement provides only general direction regarding the operation of Elk Hills. *See*

Dkt. No. 119-11 at § 4 (at 189-190).[11] Therefore, in light of *San Mateo*, the Court does not agree that Defendants' Elk Hills operations constituted "acting under" a federal officer.

Defendants' final argument in this regard is that they acted under a federal officer in supplying oil to, and managing, the strategic petroleum reserve (SPR). Dkt. No. 117 at 44-46; Dkt. No. 96* at 48-50. They argue that 162 million barrels of crude oil have been supplied to the SPR through a royalty-in-kind program, those barrels have been delivered to the SPR under contract with the government, they have operated some of the SPR's infrastructure, and they are subject to government control when the President calls for an emergency drawdown of the SPR. The Court disagrees that the foregoing represents a relationship sufficient under Section 1442(a)(1). Defendants provide no explanation as to any type of control the government may wield over them, instead only conclusorily stating that they "acted at the direction of federal officers" when supplying oil or operating infrastructure. At best, the relationship Defendants describe is a regular business one.[12] Therefore, the

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[11] For example, the agreement merely states that operating Elk Hills will include, among other things, "drilling of wells," "exploration and prospecting[,]" and the "maintenance" of facilities. *See* Dkt. No. 119-11 at § 4(e). None of these tasks include anything close to the "detailed regulation, monitoring, or supervision" required. *See San Mateo*, 960 F.3d at 599 (quotation omitted).

[12] Further, the Court agrees with Plaintiffs' argument regarding the applicability of *San Mateo* here. *See* Dkt. No. 121 at 29; Dkt. No. 98* at 24-25. Specifically, in *San Mateo*, the Ninth Circuit observed that the oil and gas leases discussed earlier included terms for Defendants to pay royalties to the government.

Court does not find that Defendants acted under a federal officer with respect to the SPR.

B. Causal Connection

As mentioned, in order for federal officer removal to be appropriate, Defendants must further show that "there is a causal nexus between [their] actions, taken pursuant to a federal officer's directions, and the plaintiff's claims." *San Mateo*, 960 F.3d at 598 (quotation and alteration omitted).

Here, Defendants argue that there is a causal connection between their acts under federal direction and Plaintiffs' claims because those claims relate to Defendants' production and supply of oil and gas to the federal government, something which Defendants go so far as to describe as the "core" of Plaintiffs' claims. Dkt. No. 117 at 47; Dkt. No. 96* at 51. This Court disagrees. As discussed earlier, in their Complaints, Plaintiffs have chosen to target Defendants alleged failure to warn and/or disseminate accurate information about the use of fossil fuels. While it does not take a geologist to know that fossil fuels must go through a process of production and supply before they can be used, this does not mean that Plaintiffs' claims rely on or even relate to Defendants' information-related activities. The Court further disagrees that Plaintiffs' claims rest upon the "cumulative production of petroleum products . . . ." Dkt. No. 96* at 51 (emphasis omitted). Instead, as stated in the Complaints, Plaintiffs' claims focus on Defendants' alleged "*exacerbation* of global warming . . . ." Dkt. No.

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960 F.3d at 602. As discussed, the Ninth Circuit did not find the leases sufficient under Section 1442(a)(1). Thus, if the leases *in toto* do not create a Section 1442(a)(1) relationship, the Court cannot see how a part of those leases—royalties—could either.

1-2 at ¶ 41; Dkt. No. 1-2* at ¶ 51 (emphasis added). In other words, Plaintiffs do not claim that no petroleum products would have been used, only that Defendants made the use worse. *See* Black's Law Dictionary 679 (10th ed. 2014) (defining "exacerbate" as "[t]o make worse").

This is true even though Defendants rely upon the Ninth Circuit's statement that a defendant's "theory of the case" should be credited in assessing causal connection. Dkt. No. 117 at 47 (citing *Leite v. Crane Co.*, 749 F.3d 1117, 1124 (9th Cir. 2014)); Dkt. No. 96* at 51 (same). Defendants' theory of the case is not a theory for *this* case, like the one in *Leite*. In *Leite*, the defendant was accused of failing to warn the plaintiffs of the hazards posed by asbestos. 749 F.3d at 1119-20. As a defense, the defendant argued that it provided warnings required by the federal government. *Id.* at 1123. The Ninth Circuit concluded that the defendant had established a causal connection because "the very act that forms the basis of plaintiffs' claims—Crane's failure to warn about asbestos hazards—is an act that [defendant] contends it performed under the direction of the [government]." *Id.* at 1124. Nothing remotely similar exists here.

Here, Defendants' assert their theory of the case as: "Plaintiff's alleged harms resulted from decades of greenhouse gas emissions caused by billions of consumers' use of fossil fuels that were produced, in part, for the federal government and/or under federal government directives and control." Dkt. No. 117 at 18; Dkt. No. 96* at 21. While that may be a perfectly good theory in the abstract or as part of some other case, here, "the very act that forms the basis of plaintiffs' claims" is not "billions of consumers' use of fossil fuels . . . ." Instead, it is Defendants' warnings and

information (or lack thereof) about the hazards of using fossil fuels—something noticeably absent from Defendants' stated theory. Put simply, if Defendants had it their way, they could assert any theory of the case, however untethered to the claims of Plaintiffs, because this Court must "credit" that theory. To do so, though, would completely ignore the requirement that there must be a causal connection *with the plaintiff's claims*. *See San Mateo*, 960 F.3d at 598.

In this light, even if Defendants had done all of the acts discussed above at the direction of a federal officer, including those acknowledged as such by the Court, none of them are causally connected to Plaintiffs' claims. Those claims concern the alleged failure to warn and/or to disseminate accurate information about the hazards of fossil fuels, and Defendants make no argument that they failed to warn or disseminate accurate information at the direction of a federal officer. Therefore, the Court does not find that a causal connection exists between the claims here and any acts Defendants may have taken at the direction of a federal officer.[13]

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[13] Even if the Court was willing to accept Defendants' strained "theory of the case," that theory has nothing to do with the supply of specialized fuels to, and constructing pipelines for, the federal government during World War II, the supply of specialized fuels for certain spy or reconnaissance planes during the Cold War, or the supply of specialized jet fuels for the Department of Defense between 1983 and 2011—the only bases for federal direction that the Court assumed may exist here. As mentioned, Defendants' theory concerns "billions of *consumers*' use of fossil fuels . . . ," something which has nothing to do with supplying specialized fuels to the *military*.

C. Colorable Federal Defense

The Court also finds that Defendants have failed to show a colorable federal defense exists here. In the Honolulu Action, in one paragraph, Defendants assert that a variety of federal defenses are colorable. Dkt. No. 117 at 50. Defendants appear to *assume* they are right since they never take the time to set forth the elements of any of the cited defenses, let alone attempt to explain why the defenses are colorable. The Maui Action fares no better. While Defendants expand the discussion from one paragraph to two, Dkt. No. 96* at 53-55, the additional space they devote only cites general propositions of law and once again omits any explanation of why any of the asserted defenses are colorable. Conclusory assertions do not make it so. *See id*. at 54 ("Here, Defendants produced oil and gas at the direction of the federal government, and thus have a colorable argument that they are immune from liability for any alleged injuries resulting therefrom."). Thus, while the Court acknowledges that the meaning of "colorable" in this context is not precisely defined and the Supreme Court has instructed that courts should not be "grudging" in their interpretation, *see Jefferson Cty. v. Acker*, 527 U.S. 423, 431 (1999), something more than simply asserting a defense and the word "colorable" in the same sentence must be required, *see Cabalce v. Thomas E. Blanchard & Assocs., Inc*., 797 F.3d 720, 731-732 & n.6 (9th Cir. 2015) (holding that a defendant "did not demonstrate by a preponderance of the evidence a colorable government contractor defense" after failing to proffer any evidence supporting the defense).

3. Federal Enclave

Defendants argue that jurisdiction exists here because Plaintiffs' claims arise on federal enclaves. Dkt.

No. 117 at 50-52; Dkt. No. 96* at 55-56. More specifically, Defendants argue that they produced and refined oil and gas on federal enclaves.

As mentioned, federal courts have jurisdiction over tort claims that "arise" on federal enclaves. *Durham*, 445 F.3d at 1250. It would require the most tortured reading of the Complaints to find that standard met here. As discussed, contrary to Defendants' assertions, the relevant conduct here, let alone "all" of it, is not the production or refining of oil and gas. *See* Dkt. No. 96* at 56. It is, instead, the warning and disseminating of information about the hazards of fossil fuels. It is from that conduct that Plaintiffs claims arise, and there is no dispute such conduct did not occur on a federal enclave. Moreover, as Plaintiffs explain, in their Complaints, they disavow relief for injuries to federal property. Dkt. No. 116-1 at 39-42; Dkt. No. 74-1 at 48-51; see also Dkt. No. 1-2 at ¶ 14; Dkt. No. 1-2* at ¶ 14. Therefore, like every other court to have addressed this issue, the Court finds that federal enclave jurisdiction does not exist over Plaintiffs' claims. *See, e.g., Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018); *Bd. of Cty. COMM 'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 974-975 (D. Colo. 2019); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 152 (D.R.I. 2019); *Mayor & City Council of Baltimore v. BP P.L.C.,* 388 F. Supp. 3d 538, 564-566 (D. Md. 2019).[14]

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[14] In their opposition briefs, Defendants ask this Court to find "irrelevant" Plaintiffs' allegations about "misrepresentations" and "concealment[,]" arguing that "there can be no liability under Plaintiff's theory but for Defendants' production and sale of fossil fuels." Dkt. No. 117 at 52; Dkt. No. 96* at 57-58. There are many

CONCLUSION

Because Defendants have failed to carry their burden of establishing subject matter jurisdiction over these cases, the motions to remand (Dkt. No. 116 in Case No. 20-cv-163 and Dkt. No. 74 in Case No. 20-cv-470) are GRANTED.

Case No. 20-cv-163, *City & County of Honolulu v. Sunoco LP, et al.*, is hereby REMANDED to the First Circuit Court for the State of Hawai'i, pursuant to Section 1447(c) of Title 28. The Clerk is instructed to mail a certified copy of this Order to the clerk of the First Circuit Court and then CLOSE the case.

Further, Case No. 20-cv-470, *County of Maui v. Chevron U.S.A. Inc., et al.*, is hereby REMANDED to

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problems with this argument. First, given that each of Plaintiffs' claims concern Defendants' alleged warning and information practices, Defendants essentially ask this Court to find the entire case "irrelevant[,]" which would seem an odd request to make at this procedural juncture. Second, the Court does not see why Defendants can only be liable for producing and selling fossil fuels, as they appear to suggest. That assumes Defendants have done nothing else worthy of liability—something which the Complaints allege is not the case. Third, Defendants' argument is simply an attempt to argue the *merits* of Plaintiffs' claims. That is, however, not the purpose of this instant endeavor. Finally, in a footnote at the end of their opposition brief in the Maui Action, Defendants argue, for the first time, that, even if Plaintiffs' claims rely on "alleged misrepresentations," this case is still removable because it involves First Amendment speech. *See* Dkt. No. 96* at 57 n.19. Putting aside that this is the only time in either of their opposition briefs that Defendants acknowledge the actual claims being brought in these cases, this argument does not appear to have been properly raised (or even preserved). *See City of Oakland*, 969 F.3d at 911 n.12. It also appears to be premised upon *Grable*, which, as explained, Defendants acknowledge has been rejected by the Ninth Circuit as a basis for removal. *See id.* at 906-907; Dkt. No. 96* at 6 n.1.

the Second Circuit Court for the State of Hawai'i, pursuant to Section 1447(c) of Title 28. The Clerk is instructed to mail a certified copy of this Order to the clerk of the Second Circuit Court and then CLOSE the case.

IT IS SO ORDERED.

Dated: February 12, 2021 at Honolulu, Hawai'i.

/s/ Derrick K. Watson
Derrick K. Watson
United States District Judge