UNITED STATES DISTRICT COURT

DISTRICT COURT 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 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 & COMPANY, INC., MCKINSEY HOLDINGS, INC., and DOES 1-250 INCLUSIVE, Defendants.	Case No. 3:23-cv-1213 **PLAINTIFF'S MOTION TO REMAND, EXPEDITED HEARING REQUESTED** **Pursuant to Fed. R. Civ. P. 26(c)(1) Request for Oral Argument**

PLEASE TAKE NOTICE THAT Plaintiff County of Multnomah ("Plaintiff"), pursuant to 28 U.S.C. § 1447, moves this Court to remand this action to the Circuit Court of the State of Oregon for the County of Multnomah, for the reasons set forth herein and in the supporting memorandum. In compliance with LR 7-1, the parties made a good faith effort to resolve the

question of remand and the question of expedited hearing and have been unable to do so. Defendants are currently opposed to an expedited hearing but have requested additional time to consider that opposition.

Plaintiff brought this action in state court on June 22, 2023, asserting common law claims for intentional and negligent creation of public nuisance, negligence, fraud and deceit, and trespass.[1] (Doc. No. 2-1.) Plaintiff seeks damages and equitable relief for its injuries caused by Defendants' decades-long campaign to discredit the science of global heating, conceal the dangers posed by their fossil fuel products while simultaneously emitting harmful greenhouse gases into the air that caused and exacerbated a disastrous multi-day extreme heat event in Multnomah County in 2021. Defendants Chevron Corporation and Chevron U.S.A., Inc. (hereafter "Defendants") removed this matter on August 18, 2023, pursuant to 28 U.S.C. §§ 1331 (federal question), 1332 (diversity of citizenship), 1441(a) and 1442 (federal officer). (Doc. No. 1.)

As the parties seeking removal, Defendants bear the burden of establishing federal jurisdiction exists and that removal was proper. *Abraham v. NCAA*, No. CV-11-359-ST, 2011 U.S. Dist. LEXIS 39218, at *2 (D. Or. Apr. 11, 2011) (citing *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004)). "The removal statute is strictly construed against removal jurisdiction" and "[w]here doubt regarding the right to removal exists, a case should be remanded to state court." *Cal. ex rel. Lockyer,* 375 F.3d at 838; *Matheson v. Progressive Specialty Ins, Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003); *see also Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

[1] Plaintiff filed its First Amended Complaint ("Amended Complaint") on August 8, 2023. (Doc. No. 2-1, at 177-381.)

First, Defendants have failed to establish complete diversity of citizenship. Defendants assert that in-state Defendant Space Age Fuel, Inc. ("Space Age") was improperly joined, but they fail to meet their burden of showing that Space Age was added to defeat jurisdiction. Plaintiff pled colorable claims against Space Age with supporting data specific to that Defendant, and therefore there is a substantial possibility Plaintiff will recover against Space Age.

Second, Defendants should be estopped from relitigating their federal officer removal and First Amendment theory of *Grable* jurisdiction arguments under the doctrine of offensive non-mutual collateral estoppel. The same arguments have been fully litigated and repeatedly rejected in similar cases.

Third, Defendants have failed to show that this case is removable under the federal officer removal statute. Defendants have not shown they acted under federal officers or that any such acts have a causal nexus with Plaintiff's claims. Moreover, Defendants have not asserted a colorable federal defense.

Fourth, Defendants have failed to identify a substantial issue of federal law that must necessarily be decided in ruling on Plaintiff's claims so as to invoke the *Grable* doctrine of jurisdiction.

Defendants' arguments are meritless, and this case should be remanded to state court, where it belongs, and Plaintiff should be awarded just costs and fees.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND

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INTRODUCTION

County of Multnomah ("Plaintiff") filed suit in the Circuit Court of the State of Oregon for the County of Multnomah asserting state-law claims against 25 fossil fuel companies and organizations. (*See* Doc. No. 2-1.) Plaintiff alleges that Defendants have substantially contributed to greenhouse gas pollution, global warming, and climate change by marketing, distributing, extracting, refining, transporting, and selling fossil fuel products, while deceiving consumers and the public about dangers associated with those products. (Doc. No. 2-1, at 185, ¶15; 234-245, ¶¶176-185; 251-55, ¶¶208-218; 302-362, ¶¶345-468.) Plaintiff further alleges Defendants executed their scheme knowing that carbon pollution emitted by their products into the atmosphere would likely cause deadly extreme heat events like the one that devastated Multnomah County in 2021. (*Id*. at 178, ¶1.) As a result of Defendants' conduct, Plaintiff claims that it has suffered and will continue to suffer "extreme and destructive heat events, degraded air quality from wildfire, increased medical costs for fire and heat-related services, increased burden on the County infrastructure, drought, loss of agricultural production, loss of snowpack and water resources." (*Id*. at 372-73, ¶¶500-501.)

Plaintiff's Amended Complaint asserts four causes of action, all indisputably based on Oregon law: (1) intentional and negligent creation of public nuisance, (2) negligence, (3) fraud and (4) trespass. (*Id*. at 373-80, ¶¶502-532.) Plaintiff seeks monetary damages and equitable relief. (*Id*. at 178, ¶1; 362-73, ¶¶469-501.) Plaintiff expressly *disclaims* any cause of action or claim for relief that would exist only under federal law: "**All of Plaintiff's claims for relief arise under Oregon state law. Plaintiff seeks no remedy under Federal law and expressly disclaims all theories of recovery, if any, that may exist exclusively under Federal law**." (*Id*. at 180-81, ¶5.)

Defendants Chevron Corporation and Chevron U.S.A., Inc. (collectively "Defendants")

removed the case, asserting three grounds for federal jurisdiction: (1) diversity jurisdiction based on the fraudulent joinder of the only Oregon defendant; (2) the Federal Officer Removal statute, 28 U.S.C. § 1442; and (3) under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). (Doc. No. 1, at 2, 6-8.). Defendants' arguments are meritless.

Diversity Jurisdiction: Defendants fail to carry their heavy burden in a fraudulent joinder challenge, as Plaintiff has substantially more than a mere possibility of prevailing in its claims against the in-state defendant.

Federal Officer Jurisdiction: Defendants fail to show by a preponderance of the evidence that they were "acting under" a federal officer. The acts Defendants identify either constitute arm's-length contractual relationships or involve simple compliance with the law, which are both insufficient for federal officer jurisdiction. Moreover, the acts do not have a causal nexus with Plaintiff's claims. Finally, Defendants fail to assert a colorable federal defense.

***Grable* Jurisdiction**: Defendants' First Amendment theory of *Grable* jurisdiction is baseless and entirely unsupported. No substantial First Amendment issues must necessarily be decided in ruling on Plaintiff's claims, as federal defenses do not create removal jurisdiction.

Further, Defendants should be estopped from relitigating their federal officer and First Amendment *Grable* jurisdiction theories as they have been fully litigated in several similar climate-deception cases, and the courts have universally rejected them.

Defendants also contend that the case is removable based on federal question jurisdiction because Plaintiff's claims are governed by federal common law though they correctly concede the Ninth Circuit has already rejected that argument. (Doc. No. 1, at 2, 8.)

This Court should join the unanimous tide of decisions rejecting Defendants' baseless attempts to remove nearly identical cases and remand this case to state court. Because Defendants

had no objectively reasonable basis for believing that this case was removable, Plaintiff asks the Court to award just costs and attorney's fees pursuant to 28 U.S.C. § 1447(c).

BACKGROUND

Plaintiff's case does not stand alone. Since 2017, over twenty states and local governments across the country have brought comparable state law claims against fossil fuel industry actors. Six years later, the judicial discourse on these cases still largely centers around whether federal courts have jurisdiction over the claims despite repeated and consistent rulings from courts across the country that they do not.

The defendants have removed every case filed in state court, offering up at least eight grounds for federal court jurisdiction: (1) federal common law, (2) federal question jurisdiction under *Grable*, (3) Clean Air Act preemption, (4) Outer Continental Shelf Lands Act, (5) federal officer removal statute, (6) "federal enclaves," (7) bankruptcy law, and (8) original admiralty jurisdiction. *See, e.g., Mayor & City Council of Baltimore v. BP P.L.C. (Baltimore I)*, 388 F. Supp. 3d 538 (D. Md. 2019). Each of these jurisdictional bases has been rejected by courts across the country, including the First, Third, Fourth, Eighth, Ninth and Tenth Circuit Courts.[2] The United States Supreme Court denied the defendants' multiple petitions for writ of certiorari.[3]

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[2] *Rhode Island v. Shell Oil Prods. Co., L.L.C.*, 35 F.4th 44 (1st Cir. 2022); *City of Hoboken v. Chevron Corp. (Hoboken II)*, 45 F.4th 699 (3d Cir. 2022); *Mayor & City Council of Balt. v. BP P.L.C. (Baltimore III)*, 31 F.4th 178 (4th Cir. 2022); *Minnesota v. API*, 63 F.4th 703 (8th Cir. 2023); *City & Cty. of Honolulu v. Sunoco LP (Honolulu II)*, 39 F.4th 1101 (9th Cir. 2022); *Cty. of San Mateo v. Chevron Corp. (San Mateo II)*, 32 F.4th 733, 757 (9th Cir. 2022); *City of Oakland v. BP Pub. Ltd. Co. (Oakland III)*, 969 F.3d 895, 901 (9th Cir. 2020); *Bd. Of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc. (Boulder III)*, 25 F.4th 1238 (10th Cir. 2022).

[3] *See Shell Oil Prods. Co., L.L.C. v. Rhode Island*, 143 S. Ct. 1796 (2023); *Chevron Corp. v. City of Hoboken*, 143 S. Ct. 2483 (2023); *BP p.l.c. v. Mayor of Balt.*, 143 S. Ct. 1795 (2023); *Chevron Corp. v. City of Oakland*, 141 S. Ct. 2776 (2021); *Sunoco LP v. City & Cty. of Honolulu*, 143 S. Ct. 1795 (2023); *Chevron Corp. v. San Mateo Cty.*, 143 S. Ct. 1797 (2023); *Suncor Energy (U.S.A.) Inc. v. Bd. of Cty. Comm'rs of Boulder Cty.*, 143 S. Ct. 1795 (2023). The Supreme Court granted certiorari on the defendants' first petition in *Baltimore*, but it simply vacated the Fourth Circuit's

Federal courts have repeatedly and universally[4] rejected Defendants' numerous attempts to remove well-pleaded state-law claims from state court to federal court. Yet, Defendants persist, buoyed by an unlimited litigation budget, in repeatedly advancing the same meritless arguments.

ARGUMENT

Federal courts are "courts of limited jurisdiction" that "possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). There is a strong presumption against removal jurisdiction so the burden of establishing federal jurisdiction is on the removing party and "the court resolves all ambiguity in favor of remand to state court." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) (citation omitted); *see also Franchise Tax Bd. Of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 21 n.22 (1983) ("considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it."). Plaintiff is master of its complaint, and Defendants cannot "create the prerequisites to removal by ignoring the set of facts" pleaded "and argu[e] that there are different facts [Plaintiff] might have alleged that would have constituted a federal claim." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 396-97 (1987).

I. THIS COURT LACKS DIVERSITY JURISDICTION IN THIS ACTION.

A civil action may be removed from state court to federal court "when the action initiated in state court is one that could have been brought, originally, in a federal district court." *Lincoln*

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opinion and remanded, holding that the appellate court had erred by reviewing only the federal officer basis for jurisdiction and failing to consider the other rejected grounds for removal. *BP p.l.c. v. Mayor of Balt.*, 141 S. Ct. 1532, 1533 (2021). Notably, the Court did not decide whether the court erred in rejecting federal officer removal jurisdiction. *Id.*

[4] The defendants' singular success was fleeting, and has been overturned by the Ninth Circuit. *See City of Oakland v. BP PLC (Oakland II)*, 960 F.3d 570 (9th Cir. 2020), vacating and remanding *City of Oakland v. BP p.l.c. (Oakland I)*, No. C 17-06011 WHA, 2018 U.S. Dist. LEXIS 126258 (N.D. Cal. July 27, 2018).

Prop. Co. v. Roche, 546 U.S. 81, 83 (2005). However, where removal is predicated on the diversity of citizenship of the parties, removal is permissible "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which [the] action [was] brought." *Id.* at 83-84; 28 U.S.C. § 1441(b)(2).

Fraudulent joinder can be established in two ways: "1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Hunter*, 582 F.3d at 1044 (quoting *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004)). If the plaintiff clearly fails to state a cause of action against the defendant according to the settled rules of the state, the defendant is fraudulently joined. *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir.1987). However, "if there is a *possibility* that the state court would find that the plaintiff states a cause of action against any resident defendant," the federal court must find joinder proper and remand the case back to state court." *Grancare, LLC v. Thrower*, 889 F.3d 543, 548 (9th Cir. 2018) (emphasis in original); *see also Hunter*, 582 F.3d at 1046. The defendant claiming fraudulent joinder bears a heavy burden for "[i]f there is any doubt as to the right of removal, a federal court must reject jurisdiction and remand the case to state court." *Reyes v. FCA US LLC*, No. 1:20-cv-00833-DAD-SKO, 2020 U.S. Dist. LEXIS 230587, *4 (E.D. Cal. Dec. 8, 2020); *see also Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1091 (9th Cir. 2003).

A. Defendants Failed To Meet Their Burden To Prove Space Age Was Fraudulently Joined. Complete Diversity Does Not Exist.

Defendants assert diversity jurisdiction, claiming Plaintiff fraudulently joined in-state Defendant Space Age Fuel, Inc. ("Space Age"). (Doc. No. 1, at 12-19.) Defendants do not allege "actual fraud in [Plaintiff's] pleading of jurisdictional facts," nor can they. *Hunter*, 582 F.3d at 1044. Instead, they seek to establish fraudulent joinder by demonstrating the "inability of the

plaintiff to establish a cause of action against the non-diverse party in state court." (Doc. No. 1, at 17.) Defendants fail to carry this "heavy burden."

In analyzing a claim of fraudulent joiner, the proper inquiry is whether a plaintiff states, "a cause of action against a resident defendant." *McCabe*, 811 F.2d at 1339. Fraudulent joinder is established only where a diverse defendant shows that the non-diverse defendant "cannot be liable on any theory." *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). The claim of fraudulent joinder "must be proven by clear and convincing evidence." *Hamilton Materials, Inc., v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). "Doubt arising from merely inartful, ambiguous, or technically defective pleadings should be resolved in favor of remand." *Lewis v. Time Inc.*, 83 F.R.D. 455, 460 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983). A plaintiff's intent when including a resident defendant in a cause of action is not relevant to an analysis of fraudulent joinder. *Selman v. Pfizer, Inc.*, No. 11-CV-1400-HU, 2011 U.S. Dist. LEXIS 145019, *19-37 (D. Or. Dec. 16, 2011). To shift the focus of the inquiry "from an examination of the factual and legal bases for a plaintiff's claims as pled to an examination of the plaintiff's motives . . . is unsupported by existing case law, is contrary to the law stated in the Ninth Circuit and would be unworkable in practice." *Id*.

Plaintiff's Amended Complaint alleges specific facts establishing viable claims against Space Age, an Oregon defendant. (*See* Doc. No. 2-1, at 229, ¶158.) Plaintiff alleges that:

> Carbon emissions attributable to this Defendant are individually and collectively (with the other Defendants) a cause of enormous harm to Plaintiff for which this Defendant is individually and jointly and severally liable to Plaintiff. This Defendant's refusal to disclose that its fossil fuel activities could cause substantial damage to Plaintiff and deadly consequences to the County's inhabitants was individually and collectively (with the other Defendants) a cause of enormous harm to Plaintiff for which this Defendant is individually and jointly and severally liable to Plaintiff. (*Id*. at 231, ¶166.)
>
> The State of Oregon requires mandatory annual greenhouse gas (GHG) emissions reporting

by "large emitters" including "facilities with air quality permits, fossil fuel suppliers, electric utilities and landfills"—information available on the official Oregon state's website. (*See id.* at 231, n.98.) As a "large emitter" of GHGs, and as pled in Plaintiff's Amended Complaint, "[d]uring the years 2010 through 2021, **Space Age Fuel contributed 7,601,219 metric tons of CO2 greenhouse gas emissions in Oregon**. These numbers were self-reported [by Space Age] to the Oregon Department of Environmental Quality" (DEQ). (*Id*. at 231, ¶166, n.98) (emphasis added). The following is an excerpt from a table listing emissions reported to the Oregon DEQ under the mandatory greenhouse gas reporting requirement during the 2016 calendar year for all companies importing fuel resulting in over 25,000 MTCO2e in ascending order:[5]

Emissions reported from fuel imported into Oregon (MTCO2e)

Company Name	Anthropogenic Emissions
Associated Petroleum Products	129,559
Byrnes Oil Company, Inc.	131,675
McCall Oil & Chemical Corp	185,315
Space Age Fuel Inc.	1,721,864
Chevron USA Inc.	2,631,883
Phillips 66 Company	3,168,314
Vitol Inc	3,196,299
Shell Oil Products US	3,507,202
Tesoro Refining and Marketing Company	3,928,745
BP West Coast Products LLC	5,052,314
Total emissions from companies reporting over 25,000 MTCO2e	**25,320,857**
Total emissions from all companies reporting under 25,000	**322,287**
Total emissions from all fuel reported in 2016	**25,643,144**

(*See id*. at n.98.) Plaintiff alleges "Space Age is responsible for substantial GHG emissions from 1982-2023 in both direct emissions from their storage, transportation and end use of their product." (*Id*. at 230, ¶165.) Just based on the 2016 numbers, Space Age, along with the other defendants in

[5] There are an additional 27 companies on the list preceding Associated Petroleum Products with anthropogenic emissions between 27,102 and 128,328 MTCO2e. *See* WG 3 - List of Potentially Regulated Entities under SB 1070 (2017).pdf at oregonlegislature.gov (last visited 9/27/23).

this case, contributed over 90% of the total reported anthropogenic emissions in Oregon.

Defendants attempt to minimize Space Age's role in its contribution to GHG emissions by painting it as "father-and-son-operated," a "small family-owned business" or as "a modest, family-owned Oregon business" (the descriptor "family-owned" appears five times within Defendants' Notice of Removal) based on information pulled from Space Age's company website. Plaintiff did not, as Defendants contend, select 24 defendants who comprise some of the world's largest oil companies and then toss Space Age into the mix solely because it is an Oregon resident. The emissions data speaks for itself. In any case, argument regarding Plaintiff's intent is speculative and misplaced. As stated above, a plaintiff's intent is irrelevant in determining whether a party was fraudulently joined. *Selman*, 2011 U.S. Dist. LEXIS 145019 at *22-24. The relative size and wealth of defendants is also not instructive in determining whether Plaintiff states a cause of action against Space Age. *See Cty. of Multnomah v. Mortg. Elec. Registration Sys.*, No. 3:13-cv-00144-HZ, 2013 U.S. Dist. LEXIS 200604, at *10 (D. Or. Apr. 18, 2013); *see also generally Berger v. Devereaux*, 2008 U.S. Dist. LEXIS 51816 (C.D. Cal. June 6, 2008) (court did not consider the fact that the plaintiff only asserted a single claim against the resident defendant, an individual, in comparison to multiple claims against the non-resident defendant corporation). Additionally, as Plaintiff pled, Space Age boasts on its webpage that: "Over the years Space Age Fuel Inc. has experienced **rapid growth**. Space Age Fuel Inc. is **one of the largest independent marketers in the State of Oregon**." (Doc. No. 2-1, at 229-30, ¶161 and n.97) (emphasis added). Defendants cannot downplay Space Age's breadth of business by cherry-picking portions of Plaintiff's Amended Complaint and ignoring full context. (*See id*. at 130, ¶¶162-164.)

Next, Defendants argue that "Plaintiff has not asserted a claim against Space Age that could possibly survive dismissal under Oregon state law," focusing their argument almost exclusively

on Plaintiff's Third Claim for fraud and citing for support a number of cases dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (Doc. No. 1, at 17-18, n.15.) Those assertions are a challenge to Plaintiff's claims on the merits that cannot be resolved in a jurisdictional motion. As explained by the Ninth Circuit, the standards for fraudulent joinder and for failure to state a claim under Rule 12(b)(6) are not equivalent. *C.T. v. Fosberg*, No. 3:22-cv-00637, 2022 U.S. Dist. LEXIS 171431, at *6 (D. Or. Sep. 22, 2022) (citing *GranCare,* 889 F.3d at 549). The standard for fraudulent joinder is broader. *Mike-Price v. Toshiba Lifestyle Prods. & Servs. Corp.*, No. 2:23-02214-SPG-MAA, 2023 U.S. Dist. LEXIS 94770, *8 (C.D. Cal. May 31, 2023). "A standard that equates fraudulent joinder with Rule 12(b)(6) conflates a jurisdictional inquiry with an adjudication on the merits . . . [the fraudulent joinder standard] . . . is similar to the 'wholly insubstantial and frivolous' standard for dismissing claims under Rule 12(b)(1) for lack of federal question jurisdiction." *Olsen v. GEICO Gen. Ins. Co.*, No. 3:22-cv-01610-HZ, 2023 U.S. Dist. LEXIS 20225, at *16 (D. Or. Feb. 6, 2023) (quoting *GranCare,* 889 F.3d at 549). The Ninth Circuit has upheld rulings finding fraudulent joinder in cases where the plaintiff's claim against the defendant was barred by the statute of limitations, the defendant's conduct was privileged under state law, and where the plaintiff's claims were all predicated on a contract to which the defendant was not a party. *GranCare,* 889 F.3d at 548. Nothing close to those circumstances exists here.

Further, Plaintiff set forth extensive facts within its Amended Complaint of the misinformation campaign created by the defendants to downplay and/or outright deny the causal relationship between their GHG emissions and extreme weather events. (*See* Doc. No. 2-1, at 277-360, ¶¶282-466.) Plaintiff alleges that from 1969 to present, all Defendants, individually and through both legitimate and illegitimate means, engaged in a nationwide marketing campaign and civil conspiracy with the purpose and intent to make material representations that were false and

Defendants made these representations knowing they were false, intended for Plaintiff to rely on those misrepresentations and continue to consume their products, that Plaintiff did so rely and that reliance led to Plaintiff's damages. (*Id.* at 376-77, ¶¶518-523.) These allegations apply to Space Age. For example, Space Age filed a lawsuit in September 2020 in Oregon Circuit Court against then-Oregon governor Kate Brown alleging that Governor Brown's executive order directing state agencies to reduce greenhouse gas emissions violated separation of powers principles in the Oregon Constitution.[6] *See Space Age Fuel v. Brown*, 2020 Ore. Cir. Ct. Pleadings LEXIS 767. Space Age has been an active participant in downplaying the need to reduce GHG emissions, and Plaintiff has properly pled a fraud claim against Space Age.

Defendants also make much of the fact that Plaintiff "lumped" Space Age with other defendants by alleging misconduct against all defendants collectively. (Doc. No. 1, at 17-18.) "Because these arguments go to the sufficiency of the complaint, rather than to the possible viability of [Plaintiff's] claims against [Space Age], they do not establish fraudulent joinder." *GranCare,* 889 F.3d at 552; *see also Miotke v. Corizon Health, Inc.*, No. 3:20-cv-00125-SB, 2020 U.S. Dist. LEXIS 107589, at *14 (D. Or. May 22, 2020). Plaintiff asserts claims for (1) intentional and negligent creation of public nuisance, (2) negligence, (3) fraud and (4) trespass against Space Age. The fact that Plaintiff asserts these same claims against all Fossil Fuel and Coal Defendants does not negate their validity. Not only are many of Plaintiff's factual allegations identical against Space Age and the non-resident defendants, but Plaintiff alleges Space Age and the non-resident defendants are liable both individually *and collectively*. (Doc. No. 2-1, at 185, ¶16; 189, ¶23; 231,

[6] While Plaintiff did not include this information within its Amended Complaint, pleading deficiencies alone cannot establish fraudulent joinder and if there is "at least a possibility that [Plaintiff] could amend [its] complaint to state a claim" the court cannot find fraudulent joinder. *Miotke,* 2020 U.S. Dist. LEXIS 107589, *16.

¶166; 235, ¶177; 237, ¶180; 245, ¶185; 285, ¶¶229-30; 344, ¶423.)

Even if Defendants are correct and Plaintiff's allegations do not allege facts sufficient to support a claim for fraud against Space Age, which Plaintiff denies, Plaintiff still has properly pled claims against Space Age for public nuisance, negligence, and trespass. "Under Oregon law, there are two ways to establish a claim for a nuisance: (1) as a nuisance per se, occasioned by a defendant's violation of a statute that defines such a violation as a public nuisance; and (2) as a public nuisance, which requires the plaintiff to plead and prove four elements (substantial interference; unreasonable interference; culpable conduct; and causation)." *State v. Monsanto Co.*, 2019 Ore. Cir. LEXIS 264, *15-16 (citing *Hay v. Stevens*, 271 Or 16, 20-21, 530 P2d 37 (1975); *Jacobson v. Crown Zellerbach Corp.*, 273 Or 15, 19, 539 P2d 641 (1975); *Raymond v. Southern Pacific Co.*, 259 Or 629, 634, 488 P2d 460 (1971); *Gronn v. Rogers Constr., Inc.*, 221 Or 226, 239, 350 P2d 1086 (1960)). "Liability for the infliction of a nuisance may arise from an intentional, negligent, or reckless act, or from the operation of an abnormally dangerous activity." *Jacobson*, 273 Or at 18. So, even if Space Age was only negligent in its promotion, marketing and sales of fossil fuel-based consumer products in Multnomah County and elsewhere, Plaintiff alleges Space Age substantially polluted the atmosphere with the GHGs that super heat the planet's surface and catalyze extreme heat events, that such negligent acts resulted in the 2021 extreme weather event, it knew or should have known that the GHGs it emitted would lead to extreme heat events that are an unreasonable interference with a public right common to the public, and Plaintiff suffered and will continue to suffer harm as a result. (Doc. No. 2-1, at 189, ¶23; 373-76, ¶¶502-517.)

Plaintiff also alleges that Space Age's actions have caused and contributed to climate change causing airborne particulate pollution from extreme wildfires, as well as waters from extreme rain events and excessive snowpack melting, to enter Plaintiff's real property, amounting

to an invasion of Plaintiff's real property, and that these invasions are now occurring and will continue to occur causing harm to the County. "[A]n actionable invasion of a possessor's interest in the exclusive possession of land is a trespass." *Carvalho v. Wolfe*, 207 Or App 175, 178 (2006).

There is nothing "wholly insubstantial and frivolous" about Plaintiff's claims against the resident defendant. *GranCare*, 889 F.3d at 549. Space Age is not a "sham" defendant, Plaintiff properly pled colorable claims against Space Age, and therefore there is a substantial possibility Plaintiff will recover against Space Age. Defendants fail to carry their burden of persuasion in showing that Space Age was fraudulently joined and added to defeat jurisdiction. As a result, removal was not proper, and remand is required.

B. The Ninth Circuit Does Not Recognize The Doctrine Of Procedural Misjoinder.

In addition to fraudulent joinder, Defendants also argue that Space Age was procedurally misjoined in this action to avoid federal jurisdiction. The plaintiff is considered the master of the complaint, naming whomever they choose to sue as a defendant, subject only to the rules of joinder of necessary parties. *Lincoln*, 546 U.S. at 91.

The district court in *Kocher v. Hilton Worldwide Holdings, Inc.* noted that the Eleventh Circuit seems to be the only circuit to recognize the misjoinder doctrine[7] and, finding that there was no controlling authority recognizing the misjoinder doctrine in the Ninth Circuit, declined to apply it in that case. No. 3:18-cv-00449-SB, 2018 U.S. Dist. LEXIS 220081, at *12 (D Or Nov. 9, 2018). Indeed, most district courts within the Ninth Circuit have declined to apply the doctrine. *See*, *e.g.*, *Doe v. Medalist Holdings, L.L.C.*, No. EDCV-17-1264-MWF, 2017 U.S. Dist. LEXIS 142398, *4 (C.D. Cal. Sep. 1, 2017) (rejecting the doctrine of fraudulent misjoinder); *J.S. v. Vill.*

[7] The terms "procedural misjoinder" and "fraudulent misjoinder" are used interchangeably by the courts. *Greene v. Wyeth*, 344 F.Supp.2d 674, 684 (D. Nev. 2004); *Doe v. Medalist Holdings, L.L.C.*, No. EDCV-17-1264-MWF, 2017 U.S. Dist. LEXIS 142398, *9 (C.D. Cal. Sep. 1, 2017).

Voice Media Holdings, LLC, No. 3:12-CV-06031-BHS, 2013 U.S. Dist. LEXIS 29881, *8 (W.D. Wash. Mar. 5, 2013) (noting that the doctrine is not recognized in the Ninth Circuit); *see also Hampton v. Holper*, 319 F. Supp. 3d 1204, 1210-11 (D. Nev. 2018) (citing the numerous Ninth Circuit district courts that have "repeatedly and consistently pooh-poohed the doctrine"). Consequently, courts in this district have also declined to apply the doctrine. *See*, *e.g.*, *Selman*, 2011 U.S. Dist. LEXIS 145019 at *40 (noting the split among district courts in the Ninth Circuit and declining to consider the doctrine because defendants had failed to establish any sort of misjoinder); *Leif's Auto Collision Ctrs. v. Progressive Halcyon Ins. Co.*, No. CIV. 05-1958-PK, 2006 U.S. Dist. LEXIS 54057, *3 (D. Or. July 21, 2006) ("The doctrine of procedural misjoinder should not be adopted in this case . . . ").

The case Defendants rely on, *Greene v. Wyeth*, 344 F.Supp.2d 674 (D. Nev. 2004), has been highly criticized within the Ninth Circuit as one of only a few decisions from within the Ninth Circuit that applied the misjoinder doctrine, with courts finding "the reasoning of the majority of cases in this District [refusing to recognize the doctrine] more persuasive." *Gleicher v. Hartford Underwriters Ins. Co.*, No. CV 17-0773 FMO (GJSx), 2017 U.S. Dist. LEXIS 54759, at *8 n.2 (C.D. Cal. Apr. 10, 2017); *see also Apilado v. Bank of Am., N.A.*, No. 19-00285 JAO-KJM, 2019 U.S. Dist. LEXIS 145454, at *15 n.5 (D. Haw. Aug. 27, 2019).

Additionally, some courts have held that the fraudulent misjoinder doctrine fails because it "relies on circular logic." *Hampton*, 319 F. Supp. 3d at 1214. The misjoinder doctrine asks the court to "consult FRCP 20 (or corresponding state law) at the outset," before it has jurisdiction over the case. *Apilado*, 2019 U.S. Dist. LEXIS 145454 at *14. Only by finding fraudulent misjoinder and removing the misjoined parties can the court obtain jurisdiction; however, the court cannot sever or remove parties without having jurisdiction first. *Id.*; *see also Perry v. Luu*, No.

1:13-CV-00729-AWI, 2013 U.S. Dist. LEXIS 93829, *14 (E.D. Cal. July 3, 2013) ("The Court finds the concept of fraudulent misjoinder to be faulty. The Court is confounded by the concept's circular logic in that it requires the Court first—in full recognition of the lack of diversity jurisdiction—[to] sever part of the case and only then find it has jurisdiction. However, the authority to sever misjoined claims or defendants under Rule 20 presumes the Court has jurisdiction to act.") The doctrine also goes against the "social interest in the efficient administration of justice and the avoidance of multiple litigation" ascribed by the Supreme Court. *Republic of Philippines v. Pitmentel*, 553 U.S. 851, 870 (2008).

This Court should follow majority Ninth Circuit precedent and its own prior rulings and decline to apply the doctrine of misjoinder in this case. Furthermore, Defendants' argument that Plaintiff's claims against Space Age do not "arise out of the same transaction or occurrence as the claims alleged against the other Defendants" are without merit, and joinder was appropriate.

II. DEFENDANTS SHOULD BE ESTOPPED FROM RELITIGATING THEIR FEDERAL OFFICER REMOVAL AND *GRABLE* JURISDICTION THEORIES.

"Offensive non-mutual collateral estoppel is a version of the doctrine [of collateral estoppel] that arises when a plaintiff seeks to estop a defendant from relitigating an issue which the defendant previously litigated and lost against another plaintiff." *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 775 (9th Cir. 2003) (citing *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 (1979)). The doctrine applies "where (1) the issue sought to be litigated is sufficiently similar to the issue presented in an earlier proceeding and sufficiently material in both actions to justify invoking the doctrine, (2) the issue was actually litigated in the first case, and (3) the issue was necessarily decided in the first case." *Id.* at 774 (citing *United States v. Weems*, 49 F.3d 528, 532 (9th Cir. 1995)). Courts have broad discretion to determine whether offensive collateral estoppel should be applied. *Parkland Hosiery Co.*, 439 U.S. at 331. It should be applied here.

Defendants have fully litigated the same federal officer removal and First Amendment theory of *Grable* jurisdiction issues in multiple courts, and their arguments have been universally rejected. The Northern District of California recently considered and rejected the same "new" federal officer and *Grable* arguments that Defendants make here. (Doc. No. 1, at 24, n.21); *City of Oakland v. BP P.L.C. (Oakland IV)*, No. C 17-06011 WHA, 2022 U.S. Dist. LEXIS 193512, at *1 (N.D. Cal. Oct. 24, 2022).[8] The Third Circuit did the same in a case where plaintiffs Delaware and Hoboken, New Jersey both asserted state-law tort claims very similar to those asserted by Plaintiff against largely the same group of defendants. *Hoboken II*, 45 F.4th at 706 (plaintiffs claimed that the defendants had worsened climate change by "produc[ing], marketing, and s[e]l[ling] fossil fuels," and sought damages for the environmental harm they had suffered and injunctions to stop future harm). The defendants argued that the cases belonged in federal court under *Grable* because the state-law claims raised substantive First Amendment issues, and because they were acting under federal officers. *Id*. at 706, 709. Both the New Jersey and Delaware District Courts rejected the defendants' federal officer and *Grable* jurisdictional theories[9], and the Third Circuit affirmed, ordering the cases remanded to state court. *Id.* at 709, 712-713. The defendants filed a petition for a writ of certiorari with the United States Supreme Court, arguing that the Third Circuit erred in rejecting their *Grable* jurisdictional argument because, in part, the plaintiff's state-law claims "necessarily raise important First Amendment issues."[10] The Supreme Court denied certiorari.

[8] *Oakland III* also discussed whether the Outer Continental Shelf Lands Act and federal enclaves provided a basis for federal jurisdiction, deciding that they did not. *Oakland III*, 2022 U.S. Dist. LEXIS 193512, at *12-21.

[9] *City of Hoboken v. Exxon Mobil Corp. (Hoboken I)*, 558 F. Supp. 3d 191 203-205 (D.N.J., Sept. 8, 2021) (rejecting First Amendment *Grable* jurisdiction); *id.* at 206-209 (rejecting federal officer jurisdiction). *Delaware ex rel. Jennings v. BP America, Inc.*, 578 F. Supp. 3d 618, 631-634 (D. Del., Jan. 5, 2022) (rejecting First Amendment *Grable* jurisdiction); *id*. at 634-639 (rejecting federal officer jurisdiction).

[10] *See* **Exhibit 1,** Petition for Writ of Certiorari, at 10, 26.

Chevron Corp. v. City of Hoboken, 143 S. Ct. 2483. These courts are not alone—others have similarly rejected the arguments Defendants are asserting here. [11]

Application of offensive non-mutual collateral estoppel to Defendants' federal officer and First Amendment *Grable* jurisdictional arguments would be fair. Defendants have fully and fairly litigated the same arguments in multiple other jurisdictions, including within the Ninth Circuit[12], always with the same result. Applying the doctrine here would serve its purpose of promoting judicial economy by preventing further needless litigation and protecting Plaintiff from the burden of relitigating an identical issue. *Parklane Hosiery*, 439 U.S. at 326. Supported by deep pockets, Defendants advance the same frivolous arguments in case after case. As foreseen by Justice Sotomayor in her dissent in *Baltimore II*, Defendants have again asserted a meritless federal-officer claim to keep open a back door to appellate review that would otherwise be closed so that they may continue to delay litigation on the merits[13]:

> A federal-officer claim can be so weak it is not worth pursuing on appeal, but not so meritless as to warrant sanctions. Again, look to this case.

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[11] Numerous district courts have similarly rejected Defendants' First Amendment Grable jurisdiction argument and/or the federal officer jurisdiction argument based on the production of specialized jet fuels for the military and acting under the direction of the federal government during World War II. *See Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-1555 (JCH), 2021 U.S. Dist. LEXIS 111334, at *27-31 (D. Conn. June 2, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020); *City & Cty. of Honolulu v. Sunoco LP*, No. 20-cv-00163-DKW-RT, 2021 U.S. Dist. LEXIS 27225, at *30 n.14 (D. Haw. Feb. 12, 2021); *City of Annapolis v. BP P.L.C.*, No. SAG-21-00772, 2022 U.S. Dist. LEXIS 178848, at *29-32 (D. Md. Sep. 29, 2022); *City of Charleston v. Brabham Oil Co.*, No. 2:20-cv-03579, Order and Opinion (July 5, 2023), attached as **Exhibit 2**.

[12] The Northern District of California District Court's opinion in *Oakland IV* is a "final judgment" for estoppel purposes, notwithstanding Defendants' pending appeal. *See Collins v. D.R. Horton, Inc.,* 505 F.3d 874, 882 (9th Cir. 2007) ("[A] final judgment retains its collateral estoppel effect, if any, while pending appeal."); *Tripati v. Henman,* 857 F.2d 1366, 1367 (9th Cir. 1988) (stating that a pending appeal does not affect a judgment's finality for preclusion purposes).

[13] The continued delay of these state-law cases increases the risk that key witnesses formerly employed by defendants, who are now in their 70s and 80s and infirm, will be unable to testify, resulting in the loss of critical testimony about what defendants knew, when they knew it, and the steps they took to deny, delay and deceive the public.

> Petitioners no longer advance their argument under §1442, calling it only "substantial." Yet that argument somehow opens a back door to appellate review that would otherwise be closed to them. Meanwhile, Baltimore, which has already waited nearly three years to begin litigation on the merits, is consigned to waiting once more.

Baltimore II, 141 S. Ct. at 1546-47 (Sotomayor dissenting) (internal citation omitted). The Court should estop Defendants from relitigating federal officer and *Grable* jurisdiction and delaying litigation on the merits.

III. THIS COURT LACKS FEDERAL OFFICER JURISDICTION.

In order to invoke federal officer jurisdiction, Defendants must establish that (a) there is a causal nexus between their actions, taken pursuant to a federal officer's directions, and Plaintiff's claims; and (b) it can assert a colorable federal defense.[14] *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099 (9th Cir. 2018). 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 plaintiff's claims against it. *See Goncalves v. Rady Child.'s Hosp. San Diego*, 865 F.3d 1237, 1244-50 (9th Cir. 2017). Defendants have the "burden of proving by a preponderance of the evidence that [they were] 'acting under' a federal officer." *Grosch v. Tyco Fire Prods. LP*, No. CV-23-01259-PHX-DWL, 2023 U.S. Dist. LEXIS 164460, at *19-20 (D. Ariz. Sep. 15, 2023) (quoting *San Mateo II*, 32 F.4th at 760).

The Ninth Circuit rejected the federal officer removal arguments Defendants made in *San Mateo* and *Honolulu.* Now, Defendants offer two different theories that they claim have the Ninth Circuit has not yet addressed—but that have been rejected by other courts (*see supra* at II.). Specifically, Defendants contend that federal officer jurisdiction exists because the defendants (1) supplied specialized fuel to the military and (2) acted under the direction of the federal government

[14] Plaintiff does not dispute that Defendants are "persons" within the meaning of 28 U.S.C § 1442.

during World War II. (Doc. No. 1, at 24.) Defendants were not "acting under" federal officers when conducting these activities. Moreover, there is no nexus between Plaintiff's claims and this conduct. Nor have Defendants asserted a colorable federal defense. Defendants cannot satisfy any of the prongs of federal officer removal, much less all three.

A. Defendants Fail To Show They Were "Acting Under" A Federal Officer.

The Ninth Circuit has identified four factors to determine whether a person was "acting under" a federal officer for jurisdictional purposes: (1) whether the person is acting in a manner akin to an agency relationship; (2) whether the person is subject to an officer's close direction or in an unusually close relationship involving detailed regulation, monitoring, or supervision; (3) 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; and (4) 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. *San Mateo II*, 32 F.4th at 756-57 (citing *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151-53 (2007)). "[N]either 'an arm's-length business arrangement with the federal government' nor 'suppl[ying] it with widely available commercial products or services'" is sufficient "to show 'acting under' a federal officer." *Honolulu II*, 39 F.4th at 1107 (quoting *San Mateo II*, 32 F.4th at 757); *see also Lake v. Ohana Mil. Cmtys., LLC*, 14 F.4th 993, 999, 1004-05 (9th Cir. 2021). Moreover, compliance "with the law and obeying federal orders [is] also not enough, 'even if the regulation is highly detailed and . . . the private firm's activities are highly supervised and monitored.'" *Honolulu II*, 39 F.4th at 1107 (quoting *San Mateo II*, 32 F.4th at 757).

Defendants contend that the federal government has required, relied upon, and controlled the oil and gas industry, and has required and promoted the production of oil and gas for decades

to meet U.S. military and national economic and security needs, such that defendants "engaged in 'an effort to *assist*, or help *carry out*, the duties or tasks of the federal superior.'" (Doc. No. 1 at 26 (emphasis in original).) More specifically, Defendants argue that they have a "special relationship" with the federal government, justifying jurisdiction, because the government exerted extensive "subjection, guidance or control" over defendants' fossil fuel production, directed the production of certain products, and procured millions of barrels of fuel products for the military. (Id. at 26-27.) Defendants' arguments lack merit. Most glaringly, Defendants did not—and cannot—show that any federal officer instructed, directed, or ratified their decisions to lie or conceal that their fossil fuel activities would harm Plaintiff in the way they did. Defendants' decisions to defraud and/or mislead Plaintiff about foreseeable harm were entirely their own.

1) Supply of "Highly Specialized Jet Fuel for Military Use"

Defendants assert that "many" of the defendants acted under federal officers by "producing and supplying highly specialized, noncommercial-grade fuels for the military" pursuant to "detailed requirements" and in accordance with guidelines promulgated by DOD. (Doc. No. 1, at 28.) Notably, much of their argument focuses on the industry's importance generally, not specific actions undertaken by the defendants in this case while "acting under" a federal officer. (*See id*. at 29-30, 33.) Indeed, Defendants only directly reference Shell Oil Company and BP entities as having sold specialized jet fuel to the federal government.[15] (*See id*. at 28-33.)

Specifically, Defendants state that Shell "developed and produced for the federal government specialized jet fuel to meet the unique performance requirement of the U-2 spy plane

[15] Under the clear language of 28 U.S.C.S. § 1442, the entity acting under a federal officer may remove the case. The removing Chevron Defendants have not alleged, much less met their burden of proving, that *they* meet the requirements for federal officer jurisdiction under the federal officer removal statute. *See Goncalves*, 865 F.3d at 1244 (explaining that the "entity seeking removal" under § 1442(a)(1) bears the burden of showing it acted under a federal officer).

and later the OXCART and SR-71 Blackbird programs." (*Id.* at 29.) However, the evidence Defendants provided to support this allegation indicates that Shell worked with third parties, *not* under the direction, control or guidance of the federal government. "To get the U-2 aircraft ready to fly, Lockheed … need[ed] a fuel that would not boil off and evaporate at the very high altitudes for which the aircraft was designed," and a Shell vice president arranged for Shell to develop a fuel for the craft (Doc. No. 2-7, at 2-3.) Similarly, "Pratt & Whitney Aircraft together with the Ashland, Shell and Monsanto Companies took on the task of developing" a new fuel and chemical lubricant to meet the temperature requirements of the Blackbird. (Doc. No. 2-8, at 23.) Again, there is no indication that Shell was subjected to a federal officer's close direction, guidance or control, that it had an unusually close or an agency relationship with a federal officer, or that it was helping to fulfill a basic government task. Indeed, the excerpt of *Skunk Works: A Personal Memoir of My Years at Lockheed* attached to Defendants' Notice of Removal emphasizes how little involvement the federal government had in the design of the Blackbird, describing how the Air Force Chief of Staff "whisked in with his entourage and a shopping list" and the Secretary of Defense visited Lockheed asking questions about the Blackbird's unique navigational system and "want[ing] to know all about it." (Doc. No. 2-9, at 2-3.) Defendants have failed to show that Shell was "acting under" a federal officer when developing and producing specialized jet fuel.

Defendants next point to various solicitations to supply specialized fuel and contracts Shell or its affiliates and BP entities entered with the government to supply fuel and construct facilities, arguing that the contracts show that Shell and BP were acting under federal officers and helping the government produce an essential item it needed for national defense purposes. However, Defendants are relying upon negotiated contracts, granted after bids were solicited, and requests for proposals. (Doc. Nos. 2-10 – 2-17, "Negotiated Contracts" and amendments; Doc. Nos. 2-19 -

2-20, "Solicitations for Commercial Items"; Doc. Nos. 2-21 – 2-24, procurement records for JP-5 and JP-8 fuel reflecting "full and open competition" and "negotiated proposal/quote" of a "commercial item"; Doc. Nos. 2-25 – 2-27, summaries of awarded bids.) Nothing in these records is indicative of anything but arms-length business transactions between the oil companies and the government. In fact, the BP contracts provided by Defendants explicitly state: "*This contract was negotiated and awarded pursuant to Competition in Contracting Act of 1984 (CICA), P.L. 98-369, FAR Subpart 6.1, Full and Open Competition."* (*See* Doc. No. 2-30, at 13, 18, 24, 30, 51, 59, 64, 77, 82, 94, 104, 106, 118, 140, 154, 165, 215, 220, 224, 232, 236.) The Ninth Circuit has made clear that arms-length business transactions are not sufficient to show a contractor was acting under a federal officer. *San Mateo II*, 32 F.4th at 757.

Defendants point to "DOD's detailed specifications for the makeup of military jet fuels" (Doc. Nos. 2-28, 2-29), arguing that specifications and "'the compulsion to provide the product to the government specifications' establish the required 'acted under' relationship between Defendants and the government." (Doc. No. 1, at 31.) However, the fact that there were specifications for the fuel supplied under the contracts does not suggest an agency or unusually close relationship between Shell, BP, or any defendant and the federal government. *See Grosch v. Tyco Fire Prods.*, 2023 U.S. Dist. LEXIS 164460, at *21-23 (holding that the formulation and manufacture of a product governed by rigorous military specifications created and administered by the DOD did not fall with the scope of "acting under" a federal official). Instead, the specifications fall into the category of "regulation," and "[a] private firm's compliance … with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official' … even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id.* (quoting *Watson*, 551 U.S. at 153). Shell

and BP simply chose to supply a product that met the government's specifications. They were not "acting under" a federal officer.

Defendants ignore the Ninth Circuit's recent opinion in *San Mateo II*.[16] In that case, the defendants pointed to contractual requirements in fuel supply agreements that they asserted established they "acted under" a federal officer, including (1) specifications that required compliance with specified American Society for Testing and Material Standards and required that a qualified independent source analyze the product for compliance; (2) provisions that gave the Navy the right to inspect delivery, site and operations; and (3) branding and advertising requirements. 32 F.4th at 758. The Court rejected the defendants' argument, holding that they were not "'acting under' a federal officer when entering into an arm's-length business arrangement with the federal government or suppl[ying] it with widely available commercial products or services." *Id.* at 757. The same holding applies here. The exhibits to Defendants' removal notice reveal that the defendants' supply of jet fuel to the federal government were arms-length transactions. Moreover, the "specialized" JP-5, JP-8 and F-76 military jet fuels supplied by Shell and BP have been globally standardized and are not specifically designed for the United States military:

> Since these early days, military jet fuel standardization has been obtained and maintained through the Air Standardization Coordinating Committee (ASCC), composed of the United States, United Kingdom, Canada, Australia, and New Zealand, and the North Atlantic Treaty Organization (NATO). Today the three standard NATO jet fuels are F-34 (JP-8), F-40 (JP-4), and F-44 (JP-5). The worldwide use of American, British, French, Canadian, Dutch, and other western nations' aircraft and engines has

[16] Defendants instead cite to inapposite cases from the Fifth and Seventh Circuit. The cases cited by Defendants provide no guidance. Defendants' business dealings with the military differ in kind from the government-contractor relationships in *Baker v. Atlantic Richfield Co.*, where the defendant was subject to "continuous federal supervision." 962 F.3d 937, 943 (7th Cir. 2020). Likewise, unlike the contractors in *Winters v. Diamond Shamrock Chem. Co.*, the government did not maintain strict control over the development and production of the fuel. 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).

> further aided the standardization of military jet fuels. The International Air Transport Association (IATA) and similar organizations have helped to standardize commercial jet fuels, which are very similar to military jet fuels.

(Doc. No. 2-32, at 8.) The government solicits bids and awards contracts to multiple companies to supply the jet fuel. (Doc. Nos. 2-24-25, Bid Summaries of Award Information.) The products that Shell and BP contracted with the DOD's Defense Logistics Agency to provide are not proprietary to defendants. In fact, the government set-aside 46.22% of its JP-8 procurement for small business. (Doc. No. 2-19 at 2, ¶ 1.) The products are essentially "commercially available".

Defendants have failed to show that they were acting under a federal officer when supplying specialized fuel for military use.

2) Acting Under Federal Officers During World War II

Defendants argue that "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." (Doc. No. 1, at 34.) Defendants focus primarily on the Petroleum Administration for War (PAW), claiming that it issued directives, instructing refiners about what products to make, how to make them, how much to make, what quality to make, and where to deliver them, and threatening "disciplinary measures" for non-compliance. (Doc. No. 1, at 35-37.) But "[c]ompliance 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.'" *Honolulu II*, 39 F.4th at 1107 (quoting *San Mateo II*, 32 F.4th at 757); *Watson*, 551 U.S. at 153.

Moreover, PAW's own description of its relationship with the oil industry provides a more qualified understanding. In *Oakland IV*, the court took note of PAW's Deputy Petroleum Administrator Ralph K. Davies' statement:

> In all the functional fields that cover the vast and complex business of supplying oil for an oil-powered war — production, natural gas, refining, transportation, and marketing — measures of control were necessary to assure coordination, efficiency, and success. We kept these controls at a minimum; so far as possible we relied on the cooperation of the industry rather than on orders and directives.

2022 U.S. Dist. LEXIS 193512, at *26-27. In the excerpt of *A History of the Petroleum Administration for War 1941-1945* attached to Defendants' notice of removal, the lack of governmental control over the industry was confirmed:

> The oil industry produced the oil that produced results. ***No Government agency had to compel them to do the job.*** In production, as in every other oil function, the job was done largely by cooperation among the team members—the Petroleum Administration for War, the Petroleum Industry War Council, the district committees, and, perhaps more important than them all, the individual producer who went into the field and put together the brains and brawn and money and machinery that got the oil out of the ground.

(Doc. No. 2-37, at 4 (emphasis added).)

Defendants' evidence that they and the other defendants were "acting under" a federal officer in the 1940s are general statements from the time – often without much context. They reference broad policy goals and/or sweeping announcements from various time periods regarding the government's use of fuel, peppering in an occasional reference to "control," "dictate" and "direct." (Doc. No. 1, at 34-39.) No argument is made that this constitutes an agency-type relationship, close direction, the fulfillment of basic government tasks, or that it risks state-court prejudice. While Defendants claim that the government "dictated where and how to drill, rationed essential materials, and set statewide minimum levels for production,"[17] they fail to offer proof that such directives were directed to Defendants or that they, or any of the other defendants in this case, followed the directives or were in any way affected by them. Defendants have not shown that

[17] Defendants' exhibit does not include the cited pages. (*See* Doc. No. 2-37 (Exhibit 36).)

a "special relationship" existed between the defendants in this case and the federal government or that defendants were "acting under" a federal officer during World War II.

Defendants have failed to show they "acted under" a federal officer as required by §1442.

B. Defendants Fail To Show A Causal Nexus Between Their Actions Under A Federal Officer And Plaintiff's Claims.

Even if Defendants were able to show that they "acted under" a federal officer, Defendants must also 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 II*, 960 F.3d at 598. They must show that the acts challenged by Plaintiff occurred because of what they were asked to do by the government. *Cal. ex rel. San Diego Comprehensive Pain Mgmt. Ctr., Inc. v. Eisengrein*, No. 22-cv-1648-BAS (WVG), 2023 U.S. Dist. LEXIS 96910, at *21 (S.D. Cal. June 2, 2023). Defendants cannot do so. Plaintiff's claims hinge on Defendants' culpable conduct in deceptively promoting and concealing the dangers of fossil fuel use, not simply their production and sale of fossil fuels. *See, e.g., Jacobson*, 273 Or at 18 ("Liability for the infliction of a nuisance may arise from an intentional, negligent, or reckless act, or from the operation of an abnormally dangerous activity"):

> This is a case that seeks damages and equitable relief for harm caused to Multnomah County (hereafter, "County" or "Plaintiff"), by Defendants' execution of a scheme to rapaciously sell fossil fuel products and deceptively promote them as harmless to the environment, while they knew that carbon pollution emitted by their products into the atmosphere would likely cause deadly extreme heat events like that which devastated Multnomah County in late June and early July 2021.

(Doc. No. 2-1, at 178, ¶1.)[18] Plaintiff further alleges that Defendants' deliberate concealment of the foreseeable impact of the use of their fossil fuel products on the climate and the associated harms to people and communities "exponentially increased the sales of [defendants'] products, expanded consumer demand for them, and built an energy monopoly." (*Id.* at 307, ¶355.)

[18] *See also* Doc. No. 2-1, at 185, ¶15 (describing defendants' alleged culpable conduct).

Defendants have failed to show "a nexus" or "causal connection" between Plaintiff's claims and some defendants' supply of specialized fuel to the federal government or their actions during WWII. The supply agreements did not require the alleged fraudulent marketing, misleading representations, and deliberate concealment that gave rise to Plaintiff's claims. Nor did any directives from the federal government during WWII. Indeed, with respect to the latter, Defendants do not—and cannot—explain how their conduct during WWII relates to Plaintiff's claims, which are explicitly related to Defendants' activities from 1965 forward. (Doc. No. 2-1, at 190, ¶24 (Defendants "are directly responsible for the majority of global GHG emissions from 1965-present"); *id*. at 376, ¶520 ("From 1969 to present, Defendants, individually and through both legitimate and illegitimate means, engaged in a nationwide—including in Oregon—marketing campaign and civil conspiracy with the purpose and intent to make material representations that were false").) Defendants do not—and cannot—explain how their conduct during WWII relates to the climate-deception campaigns waged or emissions released decades later. *See Hoboken I*, 558 F. Supp. 3d at 208 (production of fossil fuels "during World War II . . . predates [p]laintiff's allegations" of climate deception); *Delaware*, 578 F. Supp. 3d at 635.

C. Defendants Failed To Assert A Colorable Federal Defense.

This Court need not reach the "colorable federal defense" prong of Section 1442 because Defendants fail to satisfy the arising-under and/or causal nexus prongs. *See San Mateo II*, 32 F.4th at 760. Nevertheless, Defendants' effort to conjure a colorable federal defense that applies to Plaintiff's claims fails.

To satisfy this prong, Defendants cite the government-contractor defense, arguing that the Ninth Circuit's decision in *Honolulu* does not foreclose the defense. In *Honolulu II*, the Court held that the defendants had not shown the government contractor defense was colorable because they

relied upon cases that dealt with design defect claims, not failure to warn claims, *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) and *Getz v. Boeing Co.*, 654 F.3d 852 (9th Cir. 2011). *Honolulu II*, 39 F.4th at 1110. But, again, Defendants cannot establish that their proposed government-contractor defense applies to Plaintiff's claims.

Defendants cannot establish that their proposed government-contractor defense applies to claims grounded in the wrongful promotion of a hazardous product. As in *Honolulu II*, Defendants recite and apply the established elements of a government-contractor defense to *design-defect* claims set forth in *Boyle*,[19] even though liability under Plaintiff's claims hinges on defendants' wrongful promotion and concealment of the dangers of fossil fuel use, *not* simply their production and sale of fossil fuels. *See Jacobson*, 273 Or at 18. The cases cited by Defendants that involved nuisance claims similarly targeted the distribution of allegedly harmful products, not wrongful promotion. *See Cnty. Bd. of Arlington Cnty., Virginia v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 255 (4th Cir. 2021) (finding colorable government-contractor defense where defendants "plausibly alleged that they distributed opioid medications pursuant to reasonably precise specifications found in the DOD contract"); *In re Nat'l Prescription Opiate Litig.)*, No. MDL 2804, 2023 U.S. Dist. LEXIS 6183, at *78-79 (N.D. Ohio Jan. 12, 2023) (targeting defendant's "process[ing] [of] prescription claims and dispens[ing] [of] pharmaceuticals to TRICARE beneficiaries"). As in *Honolulu II,* Defendants have not carried their burden of establishing a colorable defense that applies to Plaintiff's claims. *See Honolulu II*, 39 F.4th at 1110 (citations to government-contractor cases involving design defect claims were insufficient to establish colorable contractor defense to failure-to-warn claims).

[19] *See Boyle,* 487 U.S. at 502 ("This case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect."); *Cabalce v. Thomas E. Blanchard & Assocs., Inc.,* 797 F.3d 720, 731 (9th Cir. 2015); *Getz v. Boeing Co.*, 654 F.3d at 861.

Defendants have not established the requirements for federal-officer removal. The Court should reject Defendants' recycled arguments on federal-officer removal.

IV. PLAINTIFF'S CLAIMS ARE NOT REMOVABLE UNDER *GRABLE*.

"*Grable* jurisdiction" exists in only a "special and small category" of cases with state-law claims that "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; *Gunn v. Minton*, 568 U.S. 251, 258 (2013); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006). "'Only a few cases' have ever fallen into this narrow category." *San Mateo II,* 32 F.4th at 746 (citing *Oakland III*, 969 F.3d at 904).

Defendants argue that Plaintiff's claims arise under federal law for purposes of *Grable* jurisdiction because they necessarily raise federal constitutional elements imposed by the First Amendment. (Doc. No. 1, at 48-51). Indeed, Defendants' theory is meritless and has been rejected by every other court to consider it. *See supra* at I.

A. Plaintiff's Claims Do Not Necessitate Adjudication via the First Amendment.

As a threshold matter, "the First Amendment does not shield fraud," and Plaintiff asserts state law claims against Defendants for fraud. *See United States v. Hansen*, 143 S. Ct. 1932, 1939 (2023) (quoting *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.,* 538 U.S. 600, 612 (2003). More broadly, a federal issue is raised only "where the vindication of a right under state law necessarily turned on some construction of federal law." *Franchise Tax Bd.*, 463 U.S. at 9. The element of *necessity* is essential to this analysis. The best example to demonstrate this point is *Grable* itself. In that case, the IRS seized and sold Grable's property to satisfy his tax liability. *Grable*, 545 U.S. at 310. Grable tried to invalidate the sale by filing a quiet title claim in

state court, arguing that the buyer's title was invalid because the IRS did not follow the notice requirements prescribed by federal law. *Id.* at 311. The buyer promptly removed to federal court. *Id.* Although Grable pled a purely state-law claim, the dispositive issue of whether the IRS had valid title over the property depended entirely on whether the IRS followed those federal notice requirements. *Id.* at 315-16. Because the dispositive state-law issue ultimately depended on the resolution of a federal-law issue—the notice requirements—the Supreme Court held that the quiet-title claim arose under federal law. *Id.* In other words, while state law provided the mechanism for the lawsuit, the legal questions central to the case were exclusively federal.

A federal issue is necessarily raised when it "is a *necessary* element of one of the well-pleaded state claims" in the plaintiff's complaint. *Franchise Tax Bd.*, 463 U.S. at 13 (emphasis added); *see also Boulder III*, 25 F.4th at 1266 ("To determine whether an issue is 'necessarily' raised, the Supreme Court has focused on whether the issue is an 'essential element' of a plaintiff's claim." (citation omitted)). "This inquiry demands precision." *Minnesota v. API*, 63 F.4th at 711 (quoting *Cent. Iowa Power Coop v. Midwest Indep. Transmission Sys. Oper., Inc.*, 561 F.3d 904, 914 (8th Cir. 2009)). "A removing defendant 'should be able to point to the specific elements of [the plaintiff's] state law claims' that require proof under federal law." *Id.* (quoting *Cent. Iowa Power Coop*, at 914). Defendants fail to do so nor can they. There is no federal law, including but not limited to the First Amendment, that compels, authorizes, ratifies, or immunizes Defendants' decisions to make intentional or negligent misrepresentations to Plaintiff, which caused harm in ways for which Oregon state law provides remedies. Nor is there any federal law, whether it be Constitutional, statutory, federal common law, that *must* be adjudicated to determine if Plaintiff's proof satisfies the elements of the state law claims it asserts against Defendants.

Plaintiff's state-law claims do not "necessarily raise" any question of federal law, "disputed" or otherwise. As the master of its complaint, Plaintiff has not alleged a First Amendment claim. Nevertheless, Defendants contend that First Amendment issues are "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." (Doc. No. 1 at at 49.) However, the cases relied upon by Defendants generally address the constitutional limits of state law claims for defamation or libel, where First Amendment *defenses* are raised—they do not hold that the Constitution supplies a necessary element for Plaintiff's state-law claims. *See Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (holding that statement of "opinion" reasonably implying false and defamatory facts is subject to same culpability requirements as statement of facts); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (holding that public figures may not recover for intentional infliction of emotional distress by reason of publication without showing both falsity and actual malice); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774-75 (1986) (holding that private figure plaintiff alleging defamation must prove falsity in cases involving media defendant's speech on matters of public concern); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that public figures may recover for defamation only when they can prove both falsity of statement and that statement was made with actual malice).

If Plaintiff must eventually demonstrate comportment with the First Amendment, it would only need to do so in response to Defendants' objection. "[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense . . . even if the defense is anticipated in the plaintiff's complaint." *Franchise Tax Bd.,* 463 U.S. at 14. "It is not enough that 'federal law becomes relevant only by way of a defense to an obligation created entirely by state law.'" *See Baltimore I,* 388 F. Supp. 3d at 558 (quoting *Franchise Tax Bd.,* 463 U.S. at 13).

Indeed, Defendants do not cite a single case where federal subject-matter jurisdiction was premised on a defendant's asserted First Amendment rights. Four of Defendants' cited cases were litigated in state courts and came before the U.S. Supreme Court on direct appeal or by writ of certiorari. *See Milkovich*, 497 U.S. at 10 (Ohio); *Phila. Newspapers,* 475 U.S. at 771 (Pennsylvania); *Sullivan*, 376 U.S. at 263–64 (Alabama); *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 345 (2019) (District of Columbia). One was filed in federal court on diversity grounds. *See Hustler*, 485 U.S. at 48. Another was filed in federal court, with subject-matter jurisdiction premised on claims brought under federal statutes. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2462 (2018) (claim under 42 U.S.C. § 1983). The only case that was removed was done so pursuant to the bankruptcy removal statutes, 28 U.S.C. §§ 1334(b) and 1452, and discussed the First Amendment only in adjudicating a motion to dismiss or for judgment on the pleadings. *See In re Enron Corp. Sec., Derivative & "ERISA" Litig.,* 511 F. Supp. 2d 742, 761–64, 809–15 (S.D. Tex. 2005). These decisions provide no support for First Amendment *Grable* jurisdiction.

To the contrary, courts in this circuit have repeatedly rejected the notion that First Amendment defenses provide a basis for removal. For example, in *California v. Sky Tag, Inc.*, the defendants argued that state-law claims brought by the Los Angeles City Attorney to "compel removal of illegal supergraphic signs" were removable under *Grable* because the action would impose a prior restraint on the defendants' speech. No. CV 11-8638 ABC (PLAx), 2011 U.S. Dist. LEXIS 137500, at *1 (C.D. Cal. Nov. 29, 2011). The court rejected that theory, explaining that even if the City would eventually bear the burden of justifying a prior restraint,

> [t]hat does not . . . transform Defendants' defense of a First Amendment violation into an element of the City's claims. As the master of its complaint, the City has not alleged any First Amendment claim, and, if it must eventually demonstrate that an injunction in this case would comport with the First Amendment, it need only do so in response to Defendants' objection.

Id. at *8-9. *See also Nevada v. Culverwell*, 890 F. Supp. 933, 937 (D. Nev. 1995) (no removal of state-law claims based on First Amendment defense); *Cardtoons, L.C. v. Major League Baseball Players Ass'n,* 95 F.3d 959, 965 (10th Cir. 1996) ("[T]he First Amendment as a defense does not constitute a basis for federal jurisdiction"); *Troung v. Am. Bible Soc'y*, 171 F. App'x 898, 898 (2d Cir. 2006) ("First Amendment defenses . . . cannot establish federal question jurisdiction."). The burden-shifting framework that applies to certain First Amendment defenses does not inject affirmative federal-law elements into Plaintiff's state-law claims nor does it "transform" a First Amendment defense "into an element of the [plaintiff's state-law] claims." *Sky Tag,* 2011 U.S. Dist. LEXIS 137500, at *8. *See also, e.g., Hoboken I*, 558 F. Supp. 3d at 204; *Connecticut*, 2021 U.S. Dist. LEXIS 111334, at *27-28; *Delaware*, 578 F. Supp. 3d at 631-34.

State and local governments routinely litigate nuisance and similar claims that purportedly "target speech on matters of public concern" in state court. Defendants cite no authority for the proposition that the First Amendment converts Oregon state-law causes of action that may involve speech into federal causes of action for purposes of assessing jurisdiction. Indeed, many of the decisions Defendants rely upon were litigated to judgment in state courts, and then subsequently reviewed by the Supreme Court. While Defendants may choose to raise First Amendment defenses to Plaintiff's state-law claims, Defendants have failed to demonstrate that a federal issue is "necessarily raised" by Plaintiff's claims. Thus, removal jurisdiction does not exist on this basis.

B. The Federal Question Defendants Rely On Is Not "Substantial," And The Federal-State Balance Favors Adjudication Of These Oregon State-Law Claims In Oregon's Own Courts.

Even if Defendants were able to show that Plaintiff's claims "necessarily raised" a federal issue, they must also satisfy *Grable*'s "substantial" prong; "it is not enough that the federal issue be significant to the particular parties in the immediate suit." *Gunn*, 568 U.S. at 260. "The

substantiality inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole." *Id.; see Grable*, 545 U.S. at 310.

Defendants argue that Plaintiff's state-law tort claims raise substantial First Amendment concerns because they target speech on "a subject of national and international importance." (Doc. No. 1 at 49.) The Third Circuit disagreed:

> [T]hough the First Amendment limits state laws that touch speech, those limits do not extend federal jurisdiction to every such claim. State courts routinely hear libel, slander, and misrepresentation cases involving matters of public concern. The claims here arise under state law, and their elements do not require resolving substantial, disputed federal questions.

Hoboken II, 45 F.4th at 709. Moreover, the Ninth Circuit has held that the overarching question asked by Plaintiff's claims also does not raise a substantial federal question:

> The question whether the Energy Companies can be held liable for public nuisance based on production and promotion of the use of fossil fuels and be required to spend billions of dollars on abatement is no doubt an important policy question, but it does not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331.

Oakland III, 969 F.3d at 907.

Importance to the system can be evaluated by assessing whether the federal issue "would be controlling in numerous other cases." *Boulder III,* 25 F.4th at 1268, *cert. denied*, 143 S. Ct. 1795 (2023) (quoting *McVeigh*, 547 U.S. at 700). For example, "*Grable* presented a nearly 'pure issue of law,' one 'that could be settled once and for all and thereafter would govern numerous … cases.'" *McVeigh*, 547 U.S. at 700 (internal citation omitted). Cases with claims that are "fact-bound and situation-specific" are insufficiently substantial because they do not have this precedential effect. *Id.* at 701.

Here, unlike in *Grable*, Plaintiff's claims do not present a "nearly pure issue of [federal] law." *McVeigh*, 547 U.S. at 700. Rather, the resolution of Plaintiff's state-law claims promises to

be "fact-bound"—because it is dependent on analyzing the production and promotion activities of Defendants over years—and "situation-specific"—because it is dependent on establishing the damage to Multnomah County due to climate change. *See Boulder III*, 25 F.4th at 1268-69; *McVeigh*, 547 U.S. at 701. Even if First Amendment issues are injected into the proceedings, at most, "a fact-specific application of rules that come from both federal and state law" would be required. *See Boulder III*, 25 F.4th at 1269. As a result, the resolution of Plaintiff's state-law claims would not have widespread precedential effect, and the important national interest test for substantiality is not satisfied. Rather, it is likely that state issues will still predominate. *See id.*; *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 910-11 (7th Cir. 2007).

Moreover, Defendants' theory would dramatically expand *Grable* and federal subject matter jurisdiction generally, wherein any state-law tort claim that touches on matters of public concern would be removable if a defendant might assert a First Amendment defense. Such an expansive holding would run counter to the mandate for federal courts to strictly construe removal, raising federalism concerns and upsetting the federal-state balance approved by Congress, which favors the County's ability to litigate claims under Oregon law in Oregon courts. *See Gunn v. Minton*, 568 U.S. at 258; *Oregon v. Strasser*, No. 3:20-cv-01742-SI, 2020 U.S. Dist. LEXIS 188467, at *3 (D. Or. Oct. 9, 2020). Federalism concerns weigh strongly in favor of adjudication of Plaintiff's claims in state court. *Franchise Tax Bd.*, 463 U.S. at 21 n.22 ("considerations of comity make [courts] reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it").

V. PLAINTIFF'S CLAIMS ARE NOT GOVERNED BY FEDERAL COMMON LAW.

Defendants correctly concede that the Ninth Circuit has foreclosed the argument that Plaintiff's claims are necessarily governed by federal common law in *San Mateo II,* 32 F.4th at

748 and *Oakland III,* 969 F.3d at 906, yet they raise it again here "for the sole purpose of preserving it for potential Supreme Court review." (Doc. No. 1 at 51.) However, the Supreme Court has denied certiorari on this jurisdictional issue. *Baltimore IV*, 143 S. Ct. 1795.

VI. THE COURT SHOULD AWARD PLAINTIFF JUST COSTS AND FEES.

Defendants' removal of this case was objectively unreasonable and justifies an award of Plaintiff's fees and expenses, including attorneys' fees. The Court may "require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal" in an order remanding this case to state court. 28 U.S.C. § 1447(c). The fee-shifting provision is designed to "deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005). An award of fees is appropriate where "the removing party lacked an objectively reasonable basis for seeking removal." *Id.* at 141. As discussed *supra*, Defendants' federal officer and Grable jurisdiction arguments have been unanimously rejected, and Defendants had no reasonable basis to believe this case would be different. Moreover, it was similarly unreasonable to remove based on fraudulent joinder when, as here, the complaint contained detailed allegations against the purported "sham" defendant. *GranCare*, 889 F.3d at 552.

CONCLUSION

For the foregoing reasons, Plaintiff requests this Court remand this action to the Circuit Court of the State of Oregon for the County of Multnomah and award Plaintiff just costs and fees.

Dated this 2nd day of October 2023.

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CERTIFICATE OF SERVICE

I do hereby certify that on October 2, 2023, a true and correct copy of the above and foregoing document was electronically served on all counsel of record, in accordance with the Federal Rules of Civil Procedure.

Respectfully,

/s/ Raymond F. Thomas
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