

No. 24-1557

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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RICHARD D. LONG,

*Plaintiff-Appellee,*

v.

FOSTER WHEELER ENERGY CORPORATION,

*Defendant-Appellant,*

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On Appeal from the United States District Court  
for the District of Oregon  
Case No. 3:23-cv-01325-AR  
Hon. Karin J. Immergut, United States District Judge

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**APPELLEE'S ANSWERING BRIEF**

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## INTRODUCTION

To avoid interference with the operations of the federal government, the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), provides a federal forum for claims against persons who are sued for actions undertaken at the behest of a federal officer. Where a plaintiff is *not* seeking to recover for any such actions, though, the statute does not apply. Because plaintiff-appellee Richard D. Long, since he commenced this action, has consistently disavowed any attempt to recover for actions that defendant-appellant Foster Wheeler may have performed under direction of a federal officer, the district court correctly held that his state-law action to recover for *other* acts taken by Foster Wheeler and other manufacturers and distributors of asbestos and asbestos-containing products does not trigger federal-officer removal jurisdiction.

Jurisdiction under 28 U.S.C. § 1442(a)(1) requires a private defendant to show that: “(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 those claims. *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 755 (9th Cir. 2022). In assessing these



requirements, the Court's focus is on the particular claims that a plaintiff has brought—including the challenged acts underlying those claims and any federal defenses to those claims. In this case, Mr. Long does not challenge any acts taken under a federal officer's direction, and there is no federal defense to the claims he has alleged.

Mr. Long suffers from mesothelioma. In this state-law action for product liability and negligence against Foster Wheeler and other defendants, Mr. Long alleges that his illness is the result of exposure to asbestos and asbestos-containing products that he encountered in his work in Oregon shipyards and in working on personal and family-owned automobiles. His state-court complaint explicitly states that he is *not* bringing any claims based on exposures at federal government sites, enclaves, or under the direction of any federal employee or contractor. *See* ER1059. Since the action was filed, he has repeatedly reaffirmed that he is not bringing any claims based on asbestos exposures connected to Naval or Coast Guard vessels. Even though Mr. Long does not challenge any acts connected with Foster Wheeler's work as a federal contractor, Foster Wheeler removed this case pursuant to the federal-officer removal statute. The district court correctly remanded the action given the lack

of a causal nexus between the acts at issue in the case and any actions directed by a federal officer.

On appeal, Foster Wheeler argues that Mr. Long's failure to challenge any federal-officer-connected acts is irrelevant for two reasons. First, it argues that, for purposes of the causal nexus requirement, the Court should look to whether Mr. Long's *injury*—here, mesothelioma—has some connection to an act taken under federal-officer direction. Precedent is clear, however, that the causal nexus requirement focuses on the acts that the plaintiff has chosen to challenge. Accordingly, courts of appeals have repeatedly rejected arguments, like Foster Wheeler makes here, that where a plaintiff challenges acts that contributed to a purportedly “indivisible” injury, the causal nexus requirement is satisfied if that injury has a connection to a federal-officer relationship.

Second, Foster Wheeler argues that Mr. Long *must* be challenging acts taken under direction of a federal officer and that his repeated disclaimers (both pre- and post-removal) that he is not doing so should be disregarded. But Foster Wheeler provides no valid legal or policy reason why Mr. Long's disclaimers should be deemed ineffective. That a plaintiff chooses not to seek liability for actions taken under federal-officer

direction does not offend the policies underlying the federal-officer removal statute. That an entity like Foster Wheeler may be subject to state-court proceedings challenging actions that it took unrelated to its federal contracting relationship is a feature, not a bug, of federal-officer removal.

Foster Wheeler also contends that removal was proper under admiralty law. This Court has long held, however, that admiralty jurisdiction alone cannot provide a basis for removal jurisdiction in light of the savings-to-suitors clause of 28 U.S.C. § 1333(1). Thus, the action was properly remanded to Oregon state court.

### **STATEMENT OF JURISDICTION**

The district court lacked subject-matter jurisdiction over this action under either 28 U.S.C. § 1442(a)(1), the federal-officer removal statute, or 28 U.S.C. § 1333(1), which provides for non-exclusive original jurisdiction over admiralty cases.

Under 28 U.S.C. § 1447(d), this Court has appellate jurisdiction to review the district court's remand order.

## STATUTORY PROVISIONS INVOLVED

Relevant statutory authorities appear in the Addendum to this brief.

## ISSUES PRESENTED

1. Whether the federal-officer removal statute provides for jurisdiction where none of the challenged acts were taken under the direction of a federal officer.
2. Whether the federal-contractor defense provides a colorable federal defense when a plaintiff is not bringing any claims as to which that defense would apply.
3. Whether a federal district court has mandatory jurisdiction over a claim filed in state court under the “savings to suitors” clause of 28 U.S.C. § 1333(1), absent any valid basis for removal jurisdiction.

## STATEMENT OF THE CASE

### I. Background

Mr. Long worked as a laborer and foreman from the early 1970s through the early 2000s, at shipyards and on ships located in shipyards in Oregon. ER1057–58. In the course of this work, he was exposed to asbestos, asbestos dust, and asbestos fibers. *Id.* He was also exposed to

asbestos-containing friction products during various times throughout his life while performing maintenance on his personal vehicles and his family's vehicles. ER1058–59.

On July 10, 2023, Mr. Long commenced an action in the Multnomah County Circuit Court against fifty-two corporate defendants that he alleged “regularly engaged in manufacturing, marketing, selling, distributing, applying, installing, and/or rebranding asbestos-containing materials and products.” ER1057. His complaint included two claims for relief under Oregon state law: one for product liability and one for negligence. ER1060–63. It also stated:

None of Plaintiff's claims herein against any Defendant are for exposures at any United States governmental sites or enclaves, or under the direction of any United States government employee, administration, or contractor.

ER1059.

Defendant Foster Wheeler was served with the complaint on July 19, 2023. *See* ER1032, 1066. On August 14, 2023, Mr. Long, through counsel, produced all of his medical records to the defendants. *See* ER1031. Those records referenced Mr. Long's work on naval ships. *See, e.g.,* ER1068, 1070, 1071. Mr. Long also confirmed this fact in a deposition. *See* ER1026; 1033. During those same depositions, Mr. Long's

counsel reiterated that Mr. Long had “disclaimed any Navy exposure.” ER1019; *see also* ER1026.

## **II. District court proceedings**

On September 12, 2023, Foster Wheeler removed the state court action to the United States District Court for the District of Oregon. ER1031. The only basis for jurisdiction invoked in its Notice of Removal was the federal-officer removal statute. Specifically, Foster Wheeler argued that there was “a causal nexus between Plaintiff’s claims” and its “manufacture and sale of allegedly defective products for the U.S. Navy, which it asserted occurred under the direction of a federal officer, and gave rise to “a colorable federal ‘government contractor’ defense.” ER1033. Foster Wheeler also asserted that removal was timely as it “occur[red] within thirty (30) days of the service of the Complaint on Foster Wheeler.” ER1032. In fact, the complaint had been served on Foster Wheeler on July 19, 2023—55 days before the filing of the removal notice. *See* ER 1066 (proof of service).

Mr. Long filed a timely motion to remand in which he argued both that removal was untimely pursuant to 28 U.S.C. § 1447(c) and that removal was improper because the elements of federal-officer removal

jurisdiction were not satisfied. *See* ER997. In so doing, Mr. Long noted the pre-removal disclaimer in his complaint of any claims based on exposure connected to any work taken under the direction of a federal officer and his counsel’s pre-removal disclaimer of any Navy-related exposures during depositions. *Id.* He also, once again, “disclaim[ed], forevermore, any and all causes of action for any exposures of any kind to asbestos dust while Richard Long was working on Navy vessels (i.e., Navy ships and ferries), and further disclaim[ed], forevermore, any and all causes of action that arise from the direction of a federal officer and/or from a federal enclave.” ER997–98. At oral argument on the remand motion, Mr. Long, via counsel, again disclaimed that he was seeking any relief based on “any exposure on Navy, Coast Guard, or other government-commissioned vessels.” ER7.

The Magistrate Judge issued Findings and a Recommendation that the remand motion should be granted. *See* ER4. First, citing district court decisions from around the Circuit reaching the same conclusion in other asbestos-based injury cases, the court found no causal nexus between Mr. Long’s claims and actions taken under federal-officer direction in light of Mr. Long’s repeated waiver of any claims arising out of such actions.

ER10 (citing *Coury v. Air & Liquid Sys. Corp.*, 2020 WL 3405838 (D. Or. May 22, 2020), *report and recommendation adopted*, 2020 WL 3405204 (D. Or. June 19, 2020); *Viveros v. Asbestos Corp.*, 2014 WL 12572926 (C.D. Cal. Feb. 25, 2014); *Fisher v. Asbestos Corp.*, 2014 WL 3752020 (C.D. Cal. July 30, 2014); and *Pratt v. Asbestos Corp.*, 2011 WL 4433724, (N.D. Cal. Sept. 22, 2011)). Mr. Long’s disclaimer of “any claim stemming from exposure while working on Navy, Coast Guard, or United States government-commissioned vessels,” the court explained, “does not require a state court to evaluate the substance of the federal contractor defense” and “clarifies that there is no causal nexus between his claim and the actions Foster Wheeler took under a federal officer’s direction.” ER11.

The court rejected Foster Wheeler’s argument that Mr. Long’s deposition testimony and disclosures “contradict[ed] his assertion that he is not bringing any claims based on Navy exposure.” ER12. Noting that discovery related to government-commissioned vessels “may well be relevant” to proving exposure on commercial ships or “when it comes time to determine fault and/or allocate damages among the various defendants,” the court explained that this possibility did not mean that



Mr. Long was bringing “any claims for asbestos exposure on Navy vessels.” ER13. Moreover, the court noted that denying remand would lead to an “absurd result” of “affirm[ing] Foster Wheeler’s right to assert a defense against a claim that does not exist.” *Id.* (quoting *Fisher*, 2014 WL 3752020, at \*3; alterations omitted).

The court next turned to Foster Wheeler’s arguments that admiralty jurisdiction barred discretionary remand pursuant to 28 U.S.C. § 1367(c). The court found that, because, “removal was improper at the time it occurred,” 28 U.S.C. § 1367(c) was irrelevant and remand was mandatory. ER15. In the alternative, had removal been proper at the time it occurred, the court found that remand would be in its discretion because there was “no longer a basis for removal jurisdiction” and the relevant factors weighed in factor of remand here. ER16–17.

Foster Wheeler filed objections to the Magistrate Judge’s Findings and Recommendation. The District Judge nonetheless adopted those Findings and Recommendation in full and remanded the action to state court. ER2–3.

## SUMMARY OF ARGUMENT

The district court properly remanded this case because Foster Wheeler failed to establish the elements of federal-officer removal jurisdiction and because admiralty jurisdiction does not confer an independent basis for removal jurisdiction.

I. As the district court recognized, there is no causal nexus between any act Foster Wheeler took under a federal official's direction and Mr. Long's claims. The causal nexus inquiry focuses on the relationship between the challenged acts giving rise to a plaintiff's claims and federal-officer direction. Foster Wheeler's suggestion that the court should focus instead on the injury for which he seeks to recover is contrary to the text of the statute and precedent from this Court and other courts of appeals. Whether or not Foster Wheeler is correct that Mr. Long cannot recover on his claims tied to his mesothelioma without challenging every asbestos exposure is a merits question, and one of state law. That issue does not satisfy the causal-nexus requirement required for federal-officer jurisdiction.

None of Foster Wheeler's arguments as to why the Court should disregard Mr. Long's repeated disavowal of any claims arising out of work

performed under military contracts has merit. Since the filing of his complaint, Mr. Long has repeatedly made clear that he is not bringing any such claims. His acknowledgment in discovery that he has worked on naval ships does not change the fact that he is not bringing any claims based on asbestos exposure during that work. And there is nothing improper about Mr. Long’s disclaimers—either as a policy matter or in form. That a plaintiff can avoid federal-officer removal jurisdiction by not suing for actions taken under direction of a federal officer flows naturally from the standard for removal under section 1442(a)(1). And given that, as with federal subject-matter jurisdiction generally, the burden on establishing the causal-nexus element lies with the removing defendant, there is no basis for requiring a plaintiff to meet specific procedural requirements to prove that he is *not* bringing claims with such a causal nexus.

Arguing that the district court improperly found that post-removal disclaimers “divested” the court of jurisdiction that previously existed, Foster Wheeler misstates the record. The district court, correctly, held that Foster Wheeler failed to meet its burden of establishing the elements of federal-officer jurisdiction based on the record at the time of removal.

Mr. Long's post-removal reaffirmance that he is not, and never has, brought claims did not "divest" the court of jurisdiction; it simply confirmed that such jurisdiction never existed.

For much the same reasons, Foster Wheeler cannot show the presence of any colorable federal defense. Because Mr. Long is not bringing any claims arising out of acts performed under a federal contract, a federal government contractor defense would not be colorable.

**II.** Foster Wheeler's admiralty jurisdiction argument rests on the misstatement that the district court held that federal-officer removal jurisdiction existed at the time of removal. The court expressly held otherwise. Since, as Foster Wheeler concedes, the admiralty jurisdiction statute does not itself provide a basis for removal jurisdiction, the Court need not go any further to reject Foster Wheeler's admiralty argument. Moreover, even if (counter-factually) federal-officer removal jurisdiction had existed at some earlier point in the case, remand would have been proper given the district court's analysis of the section 1367(c) factors. Foster Wheeler's argument that removal converted Mr. Long's claims into admiralty claims independently giving rise to federal jurisdiction is inconsistent with circuit precedent and the admiralty statute's saving-to-

suitors clause, which preserves a plaintiff's right to elect between remedies at-law and remedies at admiralty.

### STANDARD OF REVIEW

The Court reviews a district court's remand for a lack of subject-matter jurisdiction de novo. *San Mateo*, 32 F.4th at 746. "The defendant has the burden of proving by a preponderance of the evidence that the requirements for removal jurisdiction have been met." *Id.* (citing *Leite v. Crane Co.*, 749 F.3d 1117, 1122 (9th Cir. 2015)).

### ARGUMENT

#### **I. This action was not removable under the federal-officer removal statute.**

The district court correctly held that Foster Wheeler failed to establish all the elements of federal-officer removal jurisdiction. While there is no dispute that Foster Wheeler is a "person" that at some points in time took actions under the direction of a federal officer, those actions have no causal connection to Mr. Long's claims. Similarly, because Mr. Long is not seeking to recover for any act Foster Wheeler undertook in its capacity as a federal contractor, Foster Wheeler lacks a colorable federal defense.

**A. The acts challenged by Mr. Long lack a causal connection to acts taken by Foster Wheeler under federal-officer direction.**

To demonstrate a causal nexus for purposes of federal-officer removal, a private defendant “must show (1) that [it] 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.*” *San Mateo*, 32 F.4th at 755 (quoting 28 U.S.C. § 1442(a)(1); emphasis added). To satisfy this standard, a defendant must show “that the challenged acts ‘occurred *because of* what [it] w[as] asked to do by the government.”” *Goncalves By & Through Goncalves v. Rady Children’s Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017) (quoting *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008)). Here, Mr. Long has not challenged any acts that occurred because of what Foster Wheeler did for the government. Therefore, the causal nexus requirement is not satisfied.

**1. Any connection between Mr. Long’s injury and Naval or Coast Guard-related asbestos exposure does not satisfy the causal nexus requirement.**

Foster Wheeler first argues that it has satisfied the causal nexus requirement because Mr. Long “was injured from his exposure to asbestos during his shipyard career, including during his maintenance

and repair work aboard Navy and Coast Guard vessels.” Appellant Br. 25. This argument erroneously focuses on Mr. Long’s injury, rather than on the acts challenged by Mr. Long as wrongful. To establish a basis for removal, however, Foster Wheeler has the burden to show a causal nexus between the challenged acts and its work under federal-officer direction.

“The ‘causal connection’ element stems from the requirement in § 1442(a)(1) that the person seeking removal is being sued ‘for or relating to any act under color of such office.’” *Graves v. 3M Co.*, 17 F.4th 764, 769 (8th Cir. 2021). Thus, “[i]t is the ‘act’ for which the defendant is being sued—not the plaintiff’s entire civil action in a general sense—that must relate to the asserted federal duty.” *Anne Arundel Cnty. v. BP P.L.C.*, 94 F.4th 343, 348 (4th Cir. 2024); *see also Georgia v. Meadows*, 88 F.4th 1331, 1344 (11th Cir. 2023) (“[T]he ‘act’ anchoring removal must be defined by the ‘claim’ brought against the defendant.”).

Accordingly, this Court has consistently focused the causal nexus inquiry on the challenged acts. *See DeFiore v. SOC LLC*, 85 F.4th 546, 557 (9th Cir. 2023) (holding that, to satisfy causal nexus requirement, defendants “need to show that the actions they took which gave rise to the [plaintiffs’] claims resulted from their work” under federal direction);

*Lake v. Ohana Mil. Cmtys., LLC*, 14 F.4th 993, 1005 (9th Cir. 2021) (holding that “the central issue in the causal nexus analysis” is “whether a federal officer directed the defendant to take the action challenged”); *Goncalves*, 865 F.3d at 1245; *Leite*, 749 F.3d at 1124 (finding the nexus requirement satisfied where “the very act that forms the basis of plaintiffs’ claims ... is an act that [the defendant] contends it performed under the direction of the Navy”). The Supreme Court has as well, requiring a defendant to show a nexus “between the charged conduct and asserted official authority.” *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999) (quoting *Willingham v. Morgan*, 395 U.S. 402, 409 (1969)); *see also Maryland v. Soper (No. 1)*, 270 U.S. 9, 32 (1926) (holding that a federal officer could remove a criminal prosecution only if his “acts or his presence at the place in performance of his official duty constitute the basis ... of the state prosecution”).

Despite this rule, *Foster Wheeler* focuses on whether Mr. Long’s *injury* may have a connection to other acts—not those alleged in the complaint—taken under federal-officer direction. Appellant Br. 25–26. It claims that the causal nexus requirement is satisfied because Mr. Long is “continuing to seek a recovery for an indivisible harm allegedly caused



in part by [Naval or Coast Guard-related] exposures.” *Id.* at 26. But Mr. Long does not make that allegation; to the contrary, he has disclaimed any claim or remedy based on injury from those exposures. Because the causal nexus analysis focuses on the challenged act, Foster Wheeler’s argument provides no basis for federal-officer removal,

Although not precedential, this Court’s opinion in *Young v. Tyco Fire Products, LP*, No. 21-15912, 2022 WL 486632 (9th Cir. Feb. 17, 2022), is instructive. There, a plaintiff brought suit in Arizona state court, alleging that his exposure to aqueous film-forming foams (AFFFs) in products that he used as a firefighter led him to develop testicular cancer. *Id.* at \*1. A defendant invoked the federal-officer removal statute on the ground that the plaintiff likely was also exposed to military-grade (“MilSpec”) AFFFs at a military base for which it had produced products under direction of a federal officer. The plaintiff, however, had “expressly disavowed” any claims based on exposure at the base. *Id.* at \*1–2. Affirming the district court’s remand, this Court ruled that the defendant’s “alternative theory of causation” did not satisfy the causal nexus requirement because the plaintiff had not brought a claim based on that exposure, and the claim that he *did* bring—that “exposure to

commercial AFFFs as a firefighter caused his cancer”—had “no causal nexus” to the defendant’s actions in connection with the military base. *Id.* at \*2.

Several other courts of appeals have similarly held that an *unchallenged* act under a federal officer, even if it may have played a role in causing the plaintiff’s injury, does not satisfy the causal nexus requirement. *See Anne Arundel*, 94 F.4th 343; *District of Columbia v. Exxon Mobil Corp.*, 89 F.4th 144 (D.C. Cir. 2023); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022). In each of these cases, municipalities sued energy companies, arguing that conduct in the development, sale, or marketing of fossil fuels that contributed to climate change violated state law. The companies removed the actions on the theory (among others) that there was federal-officer jurisdiction because some fossil-fuel production had occurred under federal contracts. Each court of appeals rejected this argument, in relevant part, on the ground that no acts under those contracts formed the basis for the plaintiffs’ claims, even if it was impossible to “separate harm caused by military fuel use from harm caused by civilian fuel use.” *Hoboken*, 45 F.4th at 713. *See, e.g., Anne Arundel*, 94 F.4th at 348 (rejecting the argument that the

inquiry should focus on “a broader class of actions than the specific tortious conduct the [plaintiffs] challenge[d]”); *D.C.*, 89 F.4th at 156 (rejecting the argument “that the relevant question is not the District’s theory of liability but the harm that gives rise to the relevant damages”); *Hoboken*, 45 F.4th at 713 (holding that the nexus requirement was not satisfied where the plaintiffs were “not suing over emissions caused by fuel provided to the federal government”).

The result is the same here. Foster Wheeler’s suggestion that it is impossible to separate harm caused by military asbestos exposure from harm caused by civilian asbestos exposure, Appellant Br. 26, is irrelevant to the causal nexus analysis. Rather, as the district court recognized, ER10, this point goes to the question whether Mr. Long may prevail on his theory of liability based on the acts that he *does* challenge. To the extent that Foster Wheeler has a “defense” against liability for the acts that are challenged based on acts that are not, that defense may be raised as a merits defense in the state court. It does not, however, satisfy the causal nexus requirement.

**2. The assertion that Mr. Long is challenging acts performed under federal-officer direction is belied by the record.**

Foster Wheeler also argues that, contrary to Mr. Long's repeated disclaimers and waivers, the Court must conclude that Mr. Long is challenging exposures tied to Naval and Coast Guard vessels. None of its reasons for disregarding Mr. Long's representations has merit.

**a. Mr. Long's disavowal of Naval and Coast Guard-related claims has been consistent.**

Since this action was filed in state court, Mr. Long has consistently disavowed any claims tied to military vessels. His complaint included an explicit disclaimer. *See* ER1059. When Foster Wheeler asked about naval exposure during Mr. Long's deposition, his counsel confirmed he was not bringing any claims based on such exposures. *See* ER1019, 1026. And, after the case was removed, he reaffirmed his waiver of any such claims to eliminate any ambiguity. *See* ER997–98. These repeated statements are similar to those on which the courts of appeals have relied in other cases as showing that a plaintiff is not pursuing claims connected to acts under federal officers. *See, e.g., D.C.*, 89 F.4th at 156–57 (accepting plaintiff's counsel's "commit[ment]" at oral argument limiting scope of claims); *Young*, 2022 WL 486632, at \*2 (relying on plaintiff's "express[]

disavowal” of removing defendant’s alternate exposure theory); *see also Bd. of Cnty. Comm’rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1272 (10th Cir. 2022) (in context of federal enclave removal, relying on the plaintiffs’ “express[] disclaime[r]” of relief for injuries to or occurring on federal lands).

To the extent that Foster Wheeler suggests that evidence adduced in discovery calls these express statements into question, *see, e.g.*, Appellant Br. 33–35, it is wrong. This evidence, at most, shows that Mr. Long may have been exposed to asbestos on Navy and/or Coast Guard vessels; it does not undercut his repeated statements that he is not asserting any claims based on such potential exposures.

**b. Mr. Long’s disclaimer of claims is appropriate and effective.**

Foster Wheeler also suggests that the Court was required to disregard Mr. Long’s waiver of federal-officer related claims for various reasons. None of the proffered reasons has any support in relevant statutory analysis or precedent.

First, Foster Wheeler’s argument that Mr. Long cannot disclaim relief based on certain exposures because “he suffered an indivisible injury from cumulative exposure,” Appellant Br. 36, is a restatement of

its attempt to shift the focus of the causal nexus inquiry from the acts challenged by the plaintiff to the injury suffered by the plaintiff, as discussed above. Whether Mr. Long can successfully pursue claims based only on non-Naval/Coast Guard disclosures goes to the merits of those claims; it does not indicate that Mr. Long is bringing any other claim.

Second, Foster Wheeler suggests that Mr. Long's waiver is an ineffective "jurisdictional waiver," rather than a waiver of claims. *Id.* at 37. As support, it cites *Fisher*, 2014 WL 3752020, and *McMann v. Air & Liquid Systems Corp.*, 2014 WL 1794694 (W.D. Wash. May 6, 2014), for the proposition that "technical legal waivers" to avoid federal jurisdiction are prohibited. Appellant's Br. 37. In *Fisher*, the district court *granted* a motion to remand based on language in a post-removal notice waiving claims "arising out of plaintiff's asbestos exposure at military and federal government jobsites or from U.S. military vessels or equipment." 2014 WL 3752020, at \*2. There is no meaningful distinction between this language and the language at issue in this case. Foster Wheeler, however, rather than focusing on the holding in *Fisher*, focuses on the court's distinction of the facts in that case with the facts in *McMann*. In *McMann*, the complaint was, explicitly, based *only* on Naval exposures

directed by the federal government, but purported to disclaim “any claim subject to a government contractor defense.” *McMann*, 2014 WL 1794694, at \*1. As explained in *Fisher*, the court viewed *those* facts as “a technical legal disclaimer” and “the kind of ‘artful pleading’ which no court is inclined to treat favorably.” *Id.*<sup>1</sup> Whether or not remand was appropriate in that scenario has no applicability here, where the facts resemble those in *Fisher*, not in *McMann*. Moreover, Mr. Long’s decision *not* to bring claims arising out of acts conducted under the auspices of the federal government is consistent with the interest furthered by section 1442, which protect[s] the Federal Government from the interference with its operations.” *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007). *Cf.* *Wood v. Crane Co.*, 764 F.3d 316, 321–22 (4th Cir. 2014) (rejecting the argument that purported forum manipulation provided a basis for exercising supplemental jurisdiction where, post-removal, the plaintiff

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<sup>1</sup> The “artful pleading” doctrine refers to attempts to “disguise[] federal claims as state ones.” *Hoboken*, 45 F.4th at 713; *see also San Mateo*, 32 F.4th at 748. The term thus appears to have been loosely used in *Fisher*, and, in any event, does not apply here, where no party has suggested that Mr. Long’s claims arise under federal law. *See Hoboken*, 45 F.4th at 713 (explaining why disclaimer did not implicate artful pleading doctrine).

amended the complaint to disclaim any damages arising out of military-related asbestos exposure).

Foster Wheeler also asserts that the repeated waivers and disclaimers are ineffective because one of them was stated by Mr. Long's counsel, rather than Mr. Long. Specifically, Foster Wheeler objects that Mr. Long's counsel disclaimed pursuing such claims on Mr. Long's behalf during his deposition and during subsequent oral arguments. Appellant Br. 36. But counsel's statement mirrored that in the complaint, and Mr. Long is bound by the representations made by his counsel as to what acts he is and is not challenging. *See, e.g., Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004) ("As a general rule, parties are bound by the actions of their lawyers[.]"); *cf. D.C.*, 89 F.4th at 156–57 (relying on counsel's representation at oral argument).

In addition, Foster Wheeler suggests that Mr. Long was required to "provide[] [a] factual basis for Navy or Coast Guard-related claims to be waived." Appellant Br. 36. Foster Wheeler offers no support for the novel proposition that a plaintiff must provide a factual basis for choosing *not* to pursue a given claim. *Cf. Fed. R. Civ. P. 11(b)* (requiring attorneys and



unrepresented parties to have a legal and factual basis for claims that they *do* bring).

Finally, Foster Wheeler states that Mr. Long's disclaimer was insufficiently specific or impermissibly "circular." Appellant Br. 38–40. While a disclaimer may in some instances be ambiguous as to whether a plaintiff is bringing claims based on particular conduct, the disclaimers here were not. The statements in the record are very clear that Mr. Long is not challenging acts connected to exposure on Navy, Coast Guard, or other United States government-commissioned vessels or shipyards. *See supra* pp. 6–7.

**3. The district court did not hold that post-removal actions divested it of jurisdiction.**

Foster Wheeler attacks a straw man when it argues that the district court erred by "holding that it could be divested of 28 U.S.C. § 1442(a)(1)-based jurisdiction by Plaintiff's counsel's post-removal amendment, disclaimer, or waiver." Appellant Br. 27. The district court did not make any such holding. Rather, the court stated that Foster Wheeler did not meet "its burden of proving—either *at the time of removal* or post-removal—the requisite nexus between Long's claims and any actions that Foster Wheeler took under a federal officer's direction." ER13 (emphasis

added). “Because Long *never* brought any claims for Navy, Coast Guard, or other government-commissioned vessel exposure, removal was improper at the time it occurred.” ER15 (emphasis added). As explained above, the court was correct. *See supra* pp. 21–25.

Notably, Mr. Long did not amend his complaint post-removal to eliminate a claim or allegation giving rise to federal jurisdiction; he also did not disclaim any federal claims for the first time after removal. Rather, both in his complaint and in affirmative representations by his counsel pre-removal, Mr. Long made clear that he was not basing his claims on any actions connected to the performance of a federal duty. *See* ER1019, 1026, 1059. Foster Wheeler focuses on a post-removal statement of Mr. Long’s counsel. That statement, however, was a response to Foster Wheeler’s suggestion that Mr. Long’s discovery responses created ambiguity. In responding, Mr. Long’s counsel confirmed that the claims, *at the time of removal*, were not based on Naval or Coast Guard-related exposures. *See* ER997–98 (summarizing pre-removal statements and issuing a further disclaimer “to clarify” that Mr. Long was not making claims based on Naval exposures). Although unnecessary, there was nothing improper about the district court’s consideration of Mr. Long’s

clarification “out of an abundance of caution,” which was consistent with the record pre-removal. ER12. *Cf. D.C.*, 89 F.4th at 156–57 (relying on statements at oral argument, post-removal, as evidence plaintiff was not bringing claims with causal nexus); *Amoche v. Guar. Trust Life Ins. Co.*, 556 F.3d 41 (1st Cir. 2009) (distinguishing between an “impermissible effort to defeat federal jurisdiction by narrowing the pleadings post-removal” and a “fleshing out” of the language in a complaint).

**B. Foster Wheeler has no colorable federal defense to Mr. Long’s claims.**

For similar reasons, Foster Wheeler has not met the colorable federal defense requirement.<sup>2</sup> To meet its burden, Foster Wheeler must show a colorable federal defense to the claims actually brought in this case—not to hypothetical claims that have not been brought. *See, e.g.*,

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<sup>2</sup> Foster Wheeler incorrectly states that Mr. Long has “at no point” argued “that it failed to assert a colorable defense under 28 U.S.C. § 1442(a)(1).” Appellant Br. 14. In fact, Mr. Long explicitly asserted that Foster Wheeler lacked a colorable federal defense in his motion to remand. ER 707, 1003, 1005. Regardless, the principle that “subject-matter jurisdiction ... can never be forfeited or waived,” *United States v. Cotton*, 535 U.S. 625, 630 (2002), applies to the elements of federal-officer removal jurisdiction. *See, e.g., Golden v. N.J. Inst. of Tech.*, 934 F.3d 302, 309 (3d Cir. 2019) (stating that the court of appeals has an independent obligation to ensure that the elements of federal-officer removal jurisdiction are present).

*Leite*, 749 F.3d at 1123 (analyzing colorability of federal-contractor “defense in the context of plaintiffs’ failure-to-warn claims”); *DeFiore*, 85 F.4th at 560 (assessing whether defendant had “a colorable federal defense to the [plaintiff]s’ breach of contract claim”). It has failed to do so.

The only federal defense that Foster Wheeler identified in its removal notice is the “government contractor” defense. ER1033.<sup>3</sup> That “defense protects government contractors from tort liability that arises as a result of the contractor’s compliance with the specifications of a federal government contract.” *Cabalce v. Thomas E. Blanchard & Assocs.*, 797 F.3d 720, 731 (9th Cir. 2015) (quoting *Getz v. Boeing Co.*, 654 F.3d 852, 860 (9th Cir. 2011)). Here, though, Mr. Long is not seeking to hold Foster Wheeler liable for any action taken in its capacity as a federal contractor. As a consequence, this case concerns no claim as to which a

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<sup>3</sup> To the extent that Foster Wheeler’s brief on appeal frames its “indivisible harm” argument as a “defense,” *e.g.*, Appellant Br. 27, that argument does not constitute a “federal defense,” colorable or otherwise. A “federal defense” is one that “depends on federal law,” *DeFiore*, 85 F.4th at 554, and “stem[s] from official duties,” *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1110 (9th Cir. 2022). Foster Wheeler’s argument that Mr. Long cannot recover based on the actions that he *does* challenge is simply a question of causation and damages under Oregon law.

government contractor defense would apply. As the district court noted, it would be “absurd” to deny remand based on “a defense against a claim that does not exist.” ER13. Because adjudication of the claims that Mr. Long has brought will not require the adjudication of any federal legal question at all, federal jurisdiction is lacking here. *See Mesa v. California*, 489 U.S. 121, 136 (1989) (holding that it is a colorable federal defense “that constitutes the federal law under which the action against the federal officer arises for Art. III purposes” in cases removed pursuant to section 1442(a)).

## **II. Admiralty jurisdiction does not provide a basis for jurisdiction in this case.**

In addition to its federal-officer removal jurisdiction argument, Foster Wheeler argues that the district court had mandatory jurisdiction over this case under the admiralty jurisdiction statute, 28 U.S.C. § 1333(1). Both below and in this Court, Foster Wheeler premised this argument on the proposition that federal-officer removal jurisdiction was proper at the time of removal. *See* Appellant Br. 40. As explained above, *supra* pp. 14–30, however, and as the district court agreed, ER15, the district court did not have jurisdiction under the federal-officer removal statute. Accordingly, because admiralty jurisdiction does not itself

provide a basis for removal jurisdiction of claims brought in state court, *see San Mateo*, 32 F.4th at 763, the Court need not further consider Foster Wheeler’s admiralty argument. *See also* ER15 (district court recognition there was no need for it to consider Foster Wheeler’s argument any further). Moreover, as the district court explained, if federal-officer jurisdiction had existed at the time of removal but later had been eliminated, the court would have had discretion to remand Mr. Long’s state-law claims pursuant to 28 U.S.C. § 1367(c). In that situation—which is not presented here—“economy, convenience, fairness, and comity” would weigh in favor of a remand. ER16.<sup>4</sup>

To start, the admiralty jurisdiction statute provides district courts with “original jurisdiction, exclusive of the courts of the States, of ... [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.” 28 U.S.C. § 1333(1). The final clause of that provision, known as the “savings to suitors” clause, allows a plaintiff to seek a remedy at law (rather than in admiralty) for a maritime claim by filing the claim in state court. *See*

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<sup>4</sup> Foster Wheeler does not challenge the district court’s analysis of the section 1367(c) factors.

*Ghotra ex rel. Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054 (9th Cir. 1997).<sup>5</sup> If the plaintiff does so, the action will not be removable to federal court on the basis of that claim, although it may be removable on some other basis. *See San Mateo*, 32 F.4th at 763. Similarly, a plaintiff can also bring savings-clause claims “in an action ‘at law’ in the federal district court” where a non-admiralty basis for federal jurisdiction exists. *Ghotra*, 113 F.3d at 1054; *see Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 380–81 (1959) (recognizing that district court may exercise pendent jurisdiction over maritime claims brought at law where other basis for jurisdiction exists).

For claims under the savings to suitors clause, the plaintiff’s “long-recognized choice of remedies” is dispositive, even if the plaintiff *could* have pleaded those claims as admiralty claims. *Coronel v. AK Victory*, 1 F. Supp. 3d 1175, 1187–89 (W.D. Wash. 2014). “[A] plaintiff’s election to sue at common law in state court ‘forever prevents the federal district courts from obtaining admiralty jurisdiction.’” *Vincent v. Regions Bank*,

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<sup>5</sup> Mr. Long has consistently asserted that maritime law does not apply to his claims. *See* ER720–27. As explained herein, even if it did apply, those claims would not properly be treated as claims brought in admiralty as to create jurisdiction.

No. 808-CV-1756-T-23EAJ, 2008 WL 5235114, at \*1 (M.D. Fla. Dec. 15, 2008) (quoting *J. Aron & Co. v. Chown*, 894 F. Supp. 697, 699 (S.D.N.Y. 1995)). A district court “does not have discretion to maintain jurisdiction over an admiralty case where the plaintiff has elected to proceed in state court and there is no independent basis for federal jurisdiction.” *Island Ventures, LLC v. K-Mar Supply II, LLC*, No. CV 20-2263, 2020 WL 6269136, at \*8 (E.D. La. Oct. 26, 2020).

This principle is not limited to cases where there is no independent basis for federal jurisdiction at the time of removal, but also where such a basis existed and has been eliminated. Thus, in *Trentacosta v. Frontier Pacific Aircraft Industries, Inc.*, 813 F.2d 1553, 1559 (9th Cir. 1987), the plaintiff brought Jones Act and maritime-law claims against several defendants, invoking federal-question jurisdiction over the Jones Act claims and pendent jurisdiction over the maritime-law (i.e., savings-clause) claims. *Id.* at 1555, 1559. After dismissing the Jones Act claims against most defendants, the district court dismissed without prejudice the maritime claims against the same defendants because the elimination of the federal claims eliminated any basis for continued subject-matter jurisdiction. *Id.* On appeal, this Court agreed, explaining



that the fact that the plaintiff had chosen “to invoke jurisdiction on the ‘law side’ of the court (as opposed to the ‘admiralty side,’ 28 U.S.C. § 1333(1)),” such that federal jurisdiction was premised solely on the Jones Act, barred recharacterization of his maritime-law claims as admiralty claims. *See id.* at 1559, 1560, 1561 n.6.

*Trentacosta* forecloses Foster Wheeler’s argument that “the District Court had an obligation to exercise its original admiralty jurisdiction over Plaintiff’s claims.” Appellant Br. 43. Like the plaintiff in *Trentacosta*, Mr. Long elected to bring claims at law in state court, rather than to invoke the admiralty jurisdiction of the federal courts. The district court was required to respect that election, even if those claims *could* have been brought in admiralty. *See Trentacosta*, 813 F.2d at 1560–61.

Without citing *Trentacosta*, Foster Wheeler argues that, after removal, if the plaintiff’s complaint presents a basis for federal jurisdiction, a district court lacks discretion to remand for lack of subject-matter jurisdiction. *See* Appellant Br. 41. That proposition is irrelevant in this case, which lacks a basis for federal jurisdiction. The cases on which Foster Wheeler relies are thus readily distinguishable. For

instance, Foster Wheeler primarily relies on *Williams v. Costco Wholesale Corp.*, 471 F.3d 975 (9th Cir. 2006) (per curiam), but that case is inapplicable. There, the Court held remand was improper because the operative “amended complaint presented an independent jurisdictional basis for the state law claims.” *Id.* at 977. Here, though, no such independent jurisdictional basis exists.

Finally, *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061 (9th Cir. 2001), cited by Foster Wheeler, Appellant Br. 44, is likewise inapposite. That case reflects that a waived “defect in the court’s removal jurisdiction” will not justify setting aside a final judgment because, post-judgment, the question “is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.” *Id.* at 1068 (quoting *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702 (1972)). This appeal, however, arises from a remand order, not an appeal post-judgment. Moreover, the holding in *Morris* that a plaintiff “may waive the improper removal of a savings clause claim,” 236 F.3d at 1069, has no application here, where the plaintiff challenged the removal in a timely motion to remand.

## CONCLUSION

For the foregoing reasons, the district court's remand order should be affirmed.

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July 16, 2024

## STATEMENT OF RELATED CASES

Appellee is aware of the following related cases within the meaning of Ninth Circuit Rule 28-2.6 currently pending in this Court. In each case, a defendant-appellant asserts that federal-officer removal jurisdiction exists despite the plaintiff-appellee's explicit disclaimer of any claims arising out of the defendant-appellant's conduct taken under federal-officer direction.

- 23-55597 (c/w 23-55599) – *California v. CaremarkPCS Health LLC* (oral argument held July 11, 2024)
- 24-1972 – *California v. Express Scripts, Inc.*

July 16, 2024

/s/ Adam R. Pulver  
Adam R. Pulver

## CERTIFICATE OF COMPLIANCE

1. This brief contains 7,042 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

2. I certify that this brief complies with the word limit of Cir. R. 32-1.

July 16, 2024

/s/ Adam R. Pulver  
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## **ADDENDUM**

## **ADDENDUM OF PROVISIONS INVOLVED**

### **28 U.S.C. § 1333 Admiralty, maritime, and prize cases**

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

- (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

...

### **28 U.S.C. § 1442 Federal officers or agencies sued or prosecuted**

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

- (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

...

## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Case Management System.

I certify that all participants in this case are registered ACMS users and that service will be accomplished by the ACMS system.

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