No. 19-1330

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, *ET AL.*,

Plaintiffs-Appellees,

v.

SUNCOR ENERGY (U.S.A.) INC., *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Colorado
No. 18-cv-01672-WJM-SKC
Hon. William J. Martinez, U.S.D.J.

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF APPELLEES AND AFFIRMANCE

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

January 6, 2020

Attorneys for Amicus Curiae

DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, a nonprofit consumer advocacy organization with members in every state, appears before Congress, administrative agencies, and courts on a wide range of issues. Climate change and the need for effective measures to hold accountable those whose activities play a substantial role in contributing to it are major concerns of Public Citizen. In addition, Public Citizen has a longstanding interest in the proper construction of statutory provisions defining the jurisdiction of federal trial and appellate courts. Public Citizen has frequently appeared as amicus curiae in cases involving significant issues of federal jurisdiction, including questions of original, removal, and appellate jurisdiction.[2] Removal jurisdiction is of particular concern to Public Citizen because it implicates the authority of state courts to provide remedies under state law for actions that threaten public health

---

[1] Public Citizen has moved for leave to file this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

[2] *E.g.*, *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81 (2014); *Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014).

and safety. Public Citizen is concerned that defendants often improperly invoke removal jurisdiction, including federal officer removal under 28 U.S.C. § 1442(a)(1), in litigation involving matters of significant public concern to deny plaintiffs their choice of forum and escape liability under state law.

In furtherance of these interests, Public Citizen filed amicus curiae briefs at both the petition and merits stage in *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007), a case in which, as here, the defendants invoked federal officer removal to derail state-court litigation over alleged misrepresentations about the dangers of their products. Public Citizen also submitted amicus briefs in other cases concerning federal officer removal in the courts of appeals, including cases currently pending in the Ninth Circuit, *County of San Mateo v. Chevron Corp.*, Nos. 18-15499, 18-15502, 18-15503, 18-16376, the Fourth Circuit, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 19-1644, and the First Circuit, *State of Rhode Island v. Shell Oil Prods. Co.*, No. 19-1818, which raise substantially the same issues as this case. Public Citizen submits this brief to assist the Court in understanding the degree to which such invocations of section 1442(a)(1) distort its language and purpose.

SUMMARY OF ARGUMENT

In *Watson v. Philip Morris Cos.*, two plaintiffs sued cigarette manufacturers for fraudulently marketing cigarettes as "light" to deceive smokers into believing that smoking them would deliver lower levels of tar and nicotine than other cigarettes and present less danger of disease. Although the manufacturers' self-interested commercial behavior did not in any way involve carrying out official functions of the United States government, they invoked section 1442(a)(1) and removed the action on the ground that they were "acting under" a federal officer because (they claimed) the federal government regulated the way they tested the tar and nicotine levels of their cigarettes. *See* 551 U.S. at 154–56.

The Supreme Court unanimously rejected the manufacturers' invocation of section 1442(a)(1). *Id.* at 147. Emphasizing the statute's purpose of protecting against state interference with "'officers and agents' of the Federal Government 'acting … within the scope of their authority,'" *id.* at 150, the Supreme Court stated that "the statute authorized removal by private parties 'only' if they were 'authorized to act with or for [federal officers or agents] in affirmatively executing duties under … federal law,'" *id.* at 151. The Court therefore held that self-interested

commercial entities that acted under compulsion of federal regulation but had been given no authority to act "on the Government agency's behalf," *id*. at 156, did not "act under" a federal officer within the meaning of the law and were not entitled to invoke the statute, *id*. at 153.

In this case, major oil companies are alleged to have concealed their knowledge of the climate effects of their global enterprises, preventing consumers from understanding the dangers of the companies' products. Notwithstanding the unanimous holding in *Watson*, the oil companies invoke section 1442(a)(1) on the theory that some of their production and sale activities involved contractual relationships with the federal government and that they "acted under" a federal officer in complying with the terms of their contracts.

Although, under some circumstances, a contractual relationship may bring a private party within the ambit of section 1442(a)(1), *see*, *e.g.*, *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249 (2017), not every contractual relationship transforms a private entity into a person "acting under" federal officers in carrying out "actions under color of [federal] office." 28 U.S.C. § 1442(a)(1). The relationship must be one where a contractor assists in carrying out government functions under the "subjection,

guidance, or control" of a governmental superior. *Id.* at 255 (quoting *Watson*, 551 U.S. at 141).

Here, the contractual relationships cited by the oil companies do not establish that the companies were acting on the government's behalf to assist government officers in carrying out their legal duties, as the statute requires. *See Watson*, 551 U.S. at 152–57. And because no federal officer directed the defendants to engage in their worldwide enterprises of extracting and selling oil while concealing the hazards posed by fossil fuels, the oil companies have also failed to carry their burden of showing that they are being sued "for" or "relating to" anything they ostensibly did under the direction of a federal officer, as the statute additionally requires. 28 U.S.C. § 1442(a)(1).

For similar reasons, the defendants have not shown that they have a colorable federal immunity defense against any of the claims asserted against them. Permitting adjudication of such immunity defenses in federal court is a principal reason for federal officer removal, s*ee Wyoming v. Livingston*, 443 F.3d 1211, 1222, 1224 (10th Cir. 2006), and removal is proper only where the removing party asserts such a defense, *Mesa v. California*, 489 U.S. 121, 139 (1989).

ARGUMENT

I. The federal officer removal statute's application is limited by its language, context, history, and purposes.

Section 1442(a)(1) provides:

> (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.

An ordinary English speaker and reader might be surprised to learn that oil companies sued for the way they have conducted their private enterprises, and in particular for concealing their knowledge of the climate impacts of their products while promoting expanded use of fossil fuels, would claim to fall within the scope of the statute. An understanding of the statute's history and application by the Supreme Court would strongly reinforce that reaction.

The earliest predecessor of section 1442(a)(1) was enacted during the War of 1812 to provide for removal of cases brought against federal

customs officers, and those assisting them in performing their duties, because of widespread efforts of state-court claimants to interfere with the execution of unpopular trade restrictions. *See Watson*, 551 U.S. at 148; *Livingston*, 443 F.3d at 1223. In statutes enacted in 1833 and 1866, Congress extended removal rights to include revenue officers and persons acting under their authority. *See Watson*, 551 U.S. at 148; *Livingston*, 443 F.3d at 1223. Again, Congress acted out of concerns about state court interference with the performance of the often-unpopular duties of such officers, including the collection of tariffs and other taxes, *see Watson*, 551 U.S. at 148, as well as the enforcement of liquor laws, which often met with local resistance. *See id*. at 149. Finally, in 1948, Congress extended removal to all federal officers acting under color of their office, as well as other persons who assisted in such actions under their direction. *See id*. at 148; *Livingston*, 443 F.3d at 1224.

As the Supreme Court explained in *Watson*, animating all the variants of the statute has been the "'basic' purpose … [of] protect[ing] the Federal Government from the interference with its 'operations' that would ensue were a State able, for example, to 'arres[t]' and bring 'to trial in a State cour[t] for an alleged offense against the law of the State,'

'officers and agents' of the Federal Government 'acting ... within the scope of their authority.'" 551 U.S. at 150 (quoting *Willingham v. Morgan*, 395 U.S. 402, 406 (1969)). The statute serves as a check against "'local prejudice' against unpopular federal laws or federal officials," as well as against efforts by "States hostile to the Federal Government [to] … impede … federal revenue collection or the enforcement of other federal law." *Id*.

For example, in May 1878, federal internal revenue agent James Davis raided a moonshine still in the hills near Tracy City, Tennessee. Before he and his companion could destroy the still, seven armed men attacked them. Returning fire, Davis killed one of his assailants, wounded another, and captured a third, but he was forced to retreat without destroying the still. According to a contemporary newspaper account, the raid caused "intense excitement" in the neighborhood.[3] A local grand jury indicted Davis for murder. With the support of the Attorney General of the United States, Davis invoked the predecessor to 28 U.S.C. § 1442(a)(1) and removed the case to federal court on the

[3] www.tngenweb.org/monroe/news3.txt (reproducing newspaper report dated May 29, 1878).

ground that he had acted in the discharge of his duties as a federal officer and was immune from state prosecution. In *Tennessee v. Davis*, 100 U.S. 257 (1880), the Supreme Court affirmed the removal, holding that because the federal government "can act only through its officers and agents," the ability to remove state-court actions brought against federal officers and agents for actions within the scope of their duties was essential to the vindication of federal authority. *Id.* at 263.

The Supreme Court has repeatedly pointed to *Davis* as exemplifying the core purposes of section 1442(a)(1)'s authorization for removal of cases by federal officers and persons acting under them who are sued in state court for the performance of official acts. *See*, *e.g.*, *Mesa*, 489 U.S. at 126–27 (1989); *Arizona v. Manypenny*, 451 U.S. 232, 241 n.16 (1981); *Willingham*, 395 U.S. at 406; *see also Livingston*, 443 F.3d at 1223. Those purposes, however, are subject to a significant limitation: The statute permits removal only when federal officers or persons assisting them in carrying out federal law have "a colorable defense arising out of their duty to enforce federal law." *Willingham*, 395 U.S. at 406–07; *see also Mesa*, 489 U.S. at 129; *Livingston*, 443 F.3d at 1223–24.

Thus, the principal way in which the statute serves the policies underlying it is by "assuring that an impartial setting is provided in which the federal defense of immunity can be considered during prosecution under state law." *Manypenny*, 451 U.S. at 243. Only where such a federal defense is available does the statute also serve to "permit a trial upon the merits of … state-law question[s] free from local interests or prejudice." *Id.* at 242. For this reason, the statute expressly limits removal to circumstances where the defendant is sued in relation to the performance of official duties—"act[s] under color of … office." 28 U.S.C. § 1442(a)(1); *Mesa*, 489 U.S. at 134–35. An action removed under the statute must relate to "acts done by the defendant as a federal officer under color of his office." *Maryland v. Soper (No. 1)*, 270 U.S. 9, 33 (1926) (holding removal improper in a murder prosecution where the federal defendants did not explain how the victim's death was connected to performance of their duties); *see also Livingston*, 443 F.3d at 1211 (noting agreement of parties that defendant was acting "under color of federal office"); *Me. Ass'n of Interdependent Neighborhoods v. Comm'r, Me. Dep't of Human Servs.*, 876 F.2d 1051, 1055 (1st Cir. 1989) (removal improper where defendant was not acting "under color of federal office").

Within the limits imposed by the statute's language and purposes, the Supreme Court has stated that section 1442(a)(1) must be "liberally construed," *Colorado v. Symes*, 286 U.S. 510, 517 (1932), so that the policies it is intended to serve are not "frustrated by a narrow, grudging interpretation," *Manypenny*, 451 U.S. at 242. Thus, the statute must be given a reading "broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Livingston*, 443 F.3d at 1224 (quoting *Symes*, 286 U.S. at 517). As that statement implies, however, the Supreme Court has recognized that the statute's "broad language is not limitless," and that "a liberal construction nonetheless can find limits in a text's language, context, history, and purposes." *Watson*, 551 U.S. at 147. When, as in *Watson*, the Supreme Court has faced attempts to stretch the statute beyond its intent, the Court has declined to construe it expansively. *See Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72 (1991); *Mesa*, 489 U.S. at 139. As the Court stated in *Mesa*, respect for state courts dictates that the "language of § 1442(a) cannot be broadened" beyond its "fair construction." *Id.* at 139 (quoting *Maryland v. Soper (No. 2)*, 270 U.S. 36, 43–44 (1926)). Section 1442(a)(1) removal remains "an

'exceptional procedure' which wrests from state courts the power to try" cases under their own laws, and, therefore, "the requirements of the showing necessary for removal are strict." *Screws v. United States*, 325 U.S. 91, 111–12 (1945) (opinion of Douglas, J.) (citing *Soper (No. 2)*, 270 U.S. at 42).

The extension of section 1442(a)(1) to "person[s] acting under" officers of the United States supports the statute's predominant concern: protecting vulnerable individual officers and employees of the federal government against prosecution or suit in state courts for the performance of their official duties. The primary function of that language is to include federal employees who fall outside the definition of "officers of the United States"—a term of art referring to federal officers who exercise significant authority. *See Primate Prot.*, 500 U.S. at 81 (discussing limited meaning of the term "officers of the United States"). Thus, including persons "acting under" officers was essential to achieve the statutory purpose of "apply[ing] to all officers and employees of the United States and any agency thereof." H.R. Rep. No. 80-308, at A134 (1947), *quoted in Primate Prot.*, 500 U.S. at 84. As the Supreme Court has recognized, the term "person" also extends to a private person

who "acts as an assistant to a federal official in helping that official to enforce federal law." *Watson*, 551 U.S. at 151. The paradigmatic case for application of the statute to such a person was *Soper (No. 1)*, where the Court pointed out that a private individual hired to drive and assist federal revenue officers in busting up a still "had 'the same right to the benefit of' the removal provision as did the federal agents." *Watson*, 551 U.S. at 150 (quoting *Soper (No. 1)*, 270 U.S. at 30); *see also Livingston*, 443 F.3d at 1214, 1225 (noting that one of the removing parties was a federal contractor who was assisting in wolf reintroduction efforts under the supervision of a federal agent); *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989) (upholding removal by telephone companies and individuals who assisted federal law enforcement officers in carrying out electronic surveillance and were entitled to immunity under federal law for providing that assistance).

By contrast, the vast majority of persons and entities in this country who, in going about their daily business, obey directions from federal officers do not qualify. *See Watson*. 551 U.S. at 152–53. Only persons who are "authorized to act with or for [federal officers or agents] in affirmatively executing duties under … federal law," *id*. at 151 (brackets

by the Court; citation omitted), and whose conduct "involve[s] an effort to *assist*, or to help *carry out*, the duties and tasks of the federal superior," *id.* at 152, fall within the language and purposes of the statute.

II. The defendants have not demonstrated that they meet the prerequisites for removal under section 1442(a)(1).

In light of the governing Supreme Court precedent, federal appellate and trial court decisions, including those cited by the defendants in this case, are in general agreement that a private defendant seeking to remove a case under section 1442(a)(1), must show: "(1) that it acted under the direction of a federal officer; (2) that there is a causal nexus between the plaintiff's claims and the acts the private corporation performed under the federal officer's direction; and (3) that there is a colorable federal defense to the plaintiff's claims." *Greene v. Citigroup, Inc.*, 215 F.3d 1336, 2000 WL 647190, at *2 (10th Cir. May 19, 2000) (unpublished). The first and second parts of the test, which are principally at issue in this case, reflect the statutory language permitting removal only by a person "acting under" a federal officer in performing some "act under color of [federal] office," and only when there is a sufficient relationship between the performance of that official action and the plaintiffs' claims—that is, in the statute's words, when the action or

prosecution is one "for or relating to" an official act. 28 U.S.C. § 1442(a)(1). The third part of the test not only reflects the statute's purpose of allowing the validity of federal immunity defenses to be determined in federal court, *see Livingston* 443 F.23 at 1222, but also serves to conform the statute to Article III limits on jurisdiction over cases "arising under" federal law, s*ee Mesa*, 489 U.S. at 136–37; *Livingston*, 443 F.3d at 1223.

In cases satisfying these requirements, section1442(a)(1) both allows removal and creates a basis for federal jurisdiction over cases that would otherwise fall outside the original jurisdiction of the federal courts: It is "a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant." *Mesa*, 489 U.S. at136. The normal principles that "the party asserting federal jurisdiction when it is challenged has the burden of establishing it," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006), and, specifically, that "parties removing [a] case to federal court ... bear the burden of establishing jurisdiction by a preponderance of the evidence," *Dutcher v. Matheson,* 733 F.3d 980, 985 (10th Cir. 2013), are thus fully applicable to federal officer removal cases. *See*, *e.g.*, *Bartel v.*

Alcoa S.S. Co., 805 F.3d 169, 172 (5th Cir. 2015); *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 728 (9th Cir. 2015). Here, the oil companies have failed to carry the burden of demonstrating that they are being sued for or in relation to anything they did while acting under federal officers in carrying out federal law, or that they have a colorable federal defense based on their claimed duties under federal law.

A. The contractual relationships that the defendants cite do not bring them within the federal officer removal statute.

The defendants' claims to have been acting under federal officers in performing acts under color of federal office rest entirely on a single set of contractual relationships briefly discussed by the oil companies following their lengthy argument that the plaintiffs' state-law claims arise under federal law. Appts. Br. 37–43.[4] Those commercial relationships, which consist solely of ExxonMobil's leases of offshore oilfields from the federal government, do not involve actions under

[4] The companies have, under this Court's precedents, waived reliance on any other contractual relationships not asserted in their opening brief or on aspects of the contracts mentioned that are not explained in the opening brief. *See Livingston*, 443 F.3d. at 1216 ("Wyoming did not address this issue in its opening appellate brief. The issue is therefore waived.").

federal officers, or under color of federal office, within the meaning of the statute.

In *Watson*, the Supreme Court reserved the question whether a contractual relationship between a private company and the federal government could ever serve as a basis for removal under section 1442(a)(1). The Court noted, however, that some lower courts had "held that Government contractors fall within the terms of the federal officer removal statute, at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." 551 U.S. at 153. The Court noted that such results were "at least arguably" justifiable where contractors were assisting in performing governmental functions, *id.* at 154, but it declined to determine "whether and when particular circumstances may enable private contractors to invoke the statute," *id.*

Several courts have subsequently determined that a private contractor could remove under section 1442(a)(1) where the nature of the relationship established by the contract satisfied the criteria laid out in *Watson* to distinguish circumstances in which a private person acts under a federal officer in performing actions under color of federal office from

those in which it does not. For example, the Fourth Circuit held in *Sawyer*, cited by the defendants, that a government contractor supplying military equipment to the government can be found to act under a federal officer "where the government exerts some 'subjection, guidance, or control,' … and where the private entity engages in 'an effort to assist, or to help carry out, the duties or tasks of the federal superior.'" *Sawyer*, 860 F.3d at 255 (quoting *Watson*, 551 U.S. at 151, 152). Applying these principles, *Sawyer* held that a defense contractor acted under federal officers when it manufactured boilers for Navy ships to meet "highly detailed ship specifications and military specifications," *id.* at 253, and when the warnings that it provided concerning potential hazards associated with the boilers were likewise "dictated or approved" by the government, *id.* at 256.

Similarly, the Ninth Circuit held that private contractors that assist or carry out duties of a federal superior, and are under the subjection, guidance or control of a federal officer in doing so, act under a federal officer for purposes of section 1442(a)(1). *Goncalves by & Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017). Thus, in *Goncalves*, nongovernmental entities that

administered federal health insurance plans and had been "delegated" authority by the government "to act 'on the Government agency's behalf'" in pursuing subrogation claims were entitled to remove under section 1442(a)(1) when they were sued for such actions. *Id.* at 1247 (quoting *Watson*, 551 U.S. at 156).

By contrast, in the absence of circumstances indicating that a contractor is engaged to exercise delegated authority to assist federal officers in performing official functions and is subject to their supervision or control, a federal contractor does not act under a federal officer or under color of federal office. In *Cabalce*, for instance, the Ninth Circuit held that a company that contracted with the federal government to dispose of fireworks was not entitled to remove an action against it under section 1442(a)(1), where it failed to show that it was sufficiently under "subjection, guidance, or control" of a federal officer in implementing the contract, 797 F.3d at 728, and where the contract made clear that the contractor was an independent actor rather than acting as an agent of the government, *see id.* at 728–29. As a result, the company's actions "were not acts of a government agency or official." *Id.* at 729.

Similarly, a well-reasoned district court opinion in another case concluded that a government contractor was not "acting under" federal officers in its dealings with subcontractors where federal officials exerted no control over its management of the subcontractors. *L-3 Commc'ns Corp. v. Serco Inc.*, 39 F. Supp. 3d 740, 750 (E.D. Va. 2014). As the court explained, a contractor does not act under a federal officer merely because it is engaging in commercial activity under the "general auspices" of a federal contract in the absence of control over the contractor's activity by a federal officer. *Id.* Not every federal contract, or every action taken by a company that has such a contract, transforms the contractor into a person "acting under" a federal officer.

The contracts on which the oil companies rely here—lease agreements permitting ExxonMobil to engage in offshore oil production—do not establish the kind of relationship that supports characterizing the companies' self-interested business activities as acts on behalf of the government at the direction of federal officers. The contractual relationships cited by the oil companies are not ones in which the ExxonMobile "*assist[s]*, or help[s] *carry out*, the duties or tasks of the

federal superior," *Watson*, 551 U.S. at 152, or even where ExxonMobil is "helping the Government to produce an item that it needs," *id*. at 153.

Far from establishing a relationship in which ExxonMobil helps government officers perform "basic governmental tasks," *id*., ExxonMobil's offshore oil and gas leases allow it to extract resources from federal property for their own commercial benefit, with payment of royalties to the government. In extracting and selling that oil, ExxonMobil carries on its own business for its own purposes. The government's willingness to make public property available, for a price, to private interests who wish to use it for their own profitable purposes does not delegate to private persons authority to act on behalf of the government or otherwise transform them into public actors assisting government officers in "fulfill[ing] … basic governmental tasks." *Watson*, 551 U.S. at 153.

Thus, although offshore oil production under the lease arrangements is, as the companies point out, Appts. Br. 39, subject to government regulation, that regulation involves limitations on ExxonMobil's essentially private conduct, more akin to the regulatory limitations that *Watson* held insufficient to justify invocation of section

1442(a)(1) than to the delegation of authority to act "on the Government agency's behalf" that was lacking in *Watson*. 551 U.S. at 156. That ExxonMobil, by entering into the leases, has chosen to subject itself to detailed regulation of its activities on the leaseholds likewise cannot, under *Watson*'s reasoning, transform it into a person acting under federal officers: "A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official.' And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *See* 551 U.S. at 153. If the companies' contrary view were correct, any number of companies and individuals who have paid for the right to extract resources from federal lands subject to the terms established by the laws, regulations, and contracts governing their activities—timber companies, miners and prospectors, grazers—would likewise qualify for removal under section 1442(a)(1).

The oil companies' assertion that ExxonMobil was acting on behalf of the government because it was performing "a job that, in the absence of a contract with a private firm, the [g]overnment itself would have had

to perform," Appts. Br. 38 (quoting *Watson*, 551 U.S. at 153–54), does nothing to advance the oil companies' cause. The production and marketing of fossil fuels is not a governmental "job" under our political and economic system, and the suggestion that it would have become one if private businesses were not eager to take advantage of the opportunity to exploit oil resources on federal lands is nothing more than speculation. Such speculation cannot support the counterintuitive conclusion that ExxonMobil, in producing and selling fossil fuel products—and promoting them to the public while allegedly concealing knowledge of their damaging effects on the global climate—was performing governmental functions under color of federal authority. Rather, in producing oil from offshore leases—as in its other petroleum production and marketing activities—ExxonMobil remained an essentially private enterprise and acted in that capacity, not under color of federal office. *Cf. Me. Ass'n*, 876 F.2d at 1055 (removal improper where defendant, though subject to federal regulation, did not act under color of than federal office).

B. The defendants have not shown the requisite connection between this action and the acts they claim were taken under the direction of federal officers.

Removal under section 1442(a)(1) requires that a defendant show both that it did something that constituted an act under a federal officer, and under color of that officer's office, and that the case being removed was brought against it "for or relating to" that act. Courts have variously characterized this aspect of the statute as requiring that claims be "causally related" to the acts performed under the direction of a federal officer, *Goncalves*, 865 F.3d at 1244, or as requiring a "connection or association" but not a "*strict causal connection*" between the claims in the case and the acts performed under a federal officer, *Sawyer*, 860 F.3d at 258. Under either formulation, the statute requires a "relationship sufficient to connect the plaintiffs' claims" with the acts taken under federal direction or supervision. *Id.*

In *Sawyer*, for example, the Fourth Circuit found that the plaintiffs' claims that a contractor failed to provide adequate warnings about the dangers of asbestos were related to the Navy's exercise of "discretion," *id.*, in dictating and approving warnings given by the contractor acting under its detailed supervision, *see id.*; *see also id.* at 256–57 (describing

nature of the Navy's role with respect to warnings about the products at issue). By contrast, in *Cabalce*, the Ninth Circuit found the required connection lacking because the acts for which the defendant was sued were unrelated to any direction it had received from federal officers. *See* 797 F.3d at 728–29 (holding nexus between claims and official actions insufficient where plaintiffs challenged government contractor's negligence in destroying illegal fireworks seized by the government, and the contract did not include specifications controlling the manner in which it destroyed the fireworks).[5]

Here, as the plaintiffs demonstrate in their brief, the companies have not made that showing. Rather, the claims against the oil companies rest on their concealment of their knowledge of the climate hazards posed by their activities, and their mass, worldwide production and marketing of defective products; they do not relate to anything that ExxonMobil was "asked to do by the government," *Goncalves*, 865 F.3d at 1245, or on anything that the government "dictated," *Sawyer*, 860 F.3d

[5] *See also Washington v. Monsanto Co.*, 274 F. Supp. 3d 1125, 1131 (W.D. Wash. 2017) (finding no "nexus" between federal contracts to purchase PCBs and claims that a manufacturer concealed the hazards of PCBs where federal officials did not "direct [the manufacturer] to conceal the toxicity of PCBs"), *aff'd*, 738 F. Appx. 554 (9th Cir. 2018).

at 258. Nothing in the contractual relationships cited by the companies demonstrates that they involved any exercises of federal-government "discretion," *id.*, related to ExxonMobil's alleged concealment of its knowledge of the climate risks posed by its products, its promotion of fossil fuels notwithstanding that knowledge, or, more generally, its mass production and marketing of products that were allegedly defective in that they were not as safe as it had led ordinary consumers to understand.

The oil companies contend that ExxonMobil's decisions about how much oil to produce and market were attributable to the federal government because the government reserved the right to dictate rates of production, Appts. Br. 40, but they do not argue that the government in fact instructed ExxonMobil how much oil it must sell. Moreover, as the district court noted, the consequence if ExxonMobil failed to develop leased properties was that it might lose the leases—a consequence that hardly amounts to legal compulsion to produce and market oil, let alone to do so at levels that ExxonMobile knew would result in environmental harm. The district court thus correctly held that any connection between the federal contracts and the claims in this case was too attenuated to

supply the connection between the plaintiffs' claims and any official action carried out under direction of federal officers.

C. The oil companies have not shown that they have a colorable federal immunity defense satisfying the requirements of the federal officer removal statute.

With respect to the requirement that a party invoking federal officer removal statute "raise a colorable defense arising out of their duty to enforce federal law," *Livingston*, 443 F.3d at 1224 (quoting *Symes*, 286 U.S. at 517), the oil companies assert that "ExxonMobil has multiple such defenses." Appts. Br. 43. The companies briefly list certain defenses ExxonMobil "intends to assert," including "that plaintiffs' claims are preempted by federal law, … that the government-contractor defense applies, … and that plaintiffs' claims are barred by the Commerce Clause, the Due Process Clause, and the First Amendment." *Id*. But they offer no further explanation of how these defenses satisfy the requirements for removal under section 1442(a)(1).

This omission is important because not every defense under federal law that a defendant might offer against a claim necessarily satisfies section 1442(a)(1)'s requirements. As the Supreme Court has repeatedly emphasized, the type of federal defense contemplated under

section 1442(a)(1) is one that "arise[s] out of [the defendant's] duty to enforce federal law." *Willingham*, 395 U.S. at 406–07; *accord*, *Mesa*, 489 U.S. at 966–67; *see Livingston*, 443 F.3d at 1224. In the words of both *Mesa* and this Court in *Livingston*, section 1442(a)(1)'s requirements are satisfied by the assertion of a federal defense of *immunity*. *See Mesa*, 489 U.S. at 967; *Livingston*, 443 F.3d at 1224.

Most of the defenses the defendants discuss do not meet this criterion. The defendants' brief makes clear that their principal claimed federal defense is implied preemption. But in contrast to the immunity defense that was the subject of this Court's opinion in *Livingston*, the oil companies' broad assertions of preemption do not set forth a defense based on any duties to carry out federal law associated with their claims to have acted under federal officers in connection with the offshore leases described in their brief: The merit (or lack of merit) of their preemption claims is not affected by the companies' claimed status as persons acting under federal officers to perform official functions. That the defendants are likely to assert defenses of preemption, therefore, should not by itself

support removal under section 1442(a)(1).[6] The defendants' conclusory references to First Amendment, Commerce Clause, and Due Process defenses likewise do not assert defenses of immunity related to their claims of having acted under color of federal office, let alone establish that the defenses are colorable.

As for the companies' reliance on ExxonMobil's intent to assert the government-contractor defense recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), a number of courts have recognized that that defense can satisfy the federal officer removal statute's requirement of a colorable federal immunity defense in circumstances where a federal contractor acts under a federal officer and the claims against it are for or relating to its official actions in that capacity. *See Sawyer*, 860 F.3d at 255; *Holdren v. Buffalo Pumps, Inc.*, 614 F. Supp. 2d 129, 142–49 (D. Mass. 2012). That holding reflects the view that although the *Boyle* defense is derived from preemption principles, it is, where applicable, a form of immunity against claims

[6] A few courts have accepted such general preemption defenses as satisfying the requirements of federal officer removal. *See*, *e.g.*, *Goncalves*, 865 F.3d at 1249. That position is at odds with the description of the types of federal defenses that satisfy section 1442(a)(1) in *Mesa*, *Willingham*, and *Livingston*.

based on the contractor's performance of its duties under federal law, and thus meets the requirements of section 1442(a)(1) as described by *Mesa*, *Willingham*, and *Livingston*. But a *colorable* claim of immunity under *Boyle* requires more than a bare reference to the existence of contracts and a citation to *Boyle*: It requires some explanation of how, in performing the actions that are the basis of the plaintiff's claims, the defendant was in fact complying with specific contractual specifications or requirements, such as providing warnings "dictated or approved" by the government under the contract. *See Sawyer*, 860 F.3d at 256; *Holdren*, 614 F. Supp. 2d at 142–49. Absent such a showing, a court "cannot conclude that defendants have met even the … threshold" of showing a colorable defense. *Id.*

The oil companies nowhere attempt to explain how *Boyle* would give ExxonMobil a colorable defense of immunity to even a single one of the claims asserted in the complaint. Neither in concealing the climate risks it allegedly knew its products posed nor in marketing defective products to the general public have the defendants demonstrated that ExxonMobil was carrying out specific federal contract terms that would provide a colorable immunity defense under *Boyle*. In defaulting on the

requirement of showing a colorable federal defense, as in failing to demonstrate that ExxonMobil took actions under the direction of a federal officer to which the claims relate, the oil companies have fallen far short of establishing an entitlement to invoke the federal officer removal statute.

CONCLUSION

For the foregoing reasons, as well as those set forth in the briefs of the plaintiff-appellee, this Court should affirm the order of the district court.

Respectfully submitted,

/s/ Scott L. Nelson
Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae
Public Citizen, Inc.

January 6, 2020

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 32(a)(7)(B) and 29 as follows: The type face is fourteen-point Century Schoolbook font, and the word count, as determined by the word-count function of Microsoft Word 2016, is 6,284, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF DIGITAL SUBMISSION

I certify, pursuant to the requirements of this Court's ECF User Manual, that:

(1) All required privacy redactions have been made in this brief;

(2) The hard copies of this brief to be submitted to the Court are exact copies of the version submitted electronically; and

(3) That the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender Antivirus version 1.307.1778.0, updated Jan. 5, 2020, and found to be free of viruses.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on January 6, 2020, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case, including all parties required to be served.

/s/ Scott L. Nelson
Scott L. Nelson