No. 22-1096

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STATE OF DELAWARE, ex rel. KATHLEEN JENNINGS, ATTORNEY GENERAL OF THE STATE OF DELAWARE,

Plaintiff-Appellee,

v.

BP AMERICA INC., BP PLC, CHEVRON CORP., CHEVRON USA INC., CONOCOPHILLIPS, CONOCOPHILLIPS CO., PHILLIPS 66, PHILLIPS 66 CO., EXXON MOBIL CORP., EXXONMOBIL OIL CORP., XTO ENERGY INC., HESS CORP., MARATHON OIL CORP., MARATHON PETROLEUM CORP., MARATHON PETROLEUM CO. LP, SPEEDWAY LLC, MURPHY OIL CORP., MURPHY USA INC., ROYAL DUTCH SHELL PLC, SHELL OIL CO., CITGO PETROLEUM CORP., TOTAL SA, TOTALENERGIES MARKETING USA INC., OCCIDENTAL PETROLEUM CORP., DEVON ENERGY CORP., APACHE CORP., CNX RESOURCES CORP., CONSOL ENERGY INC., OVINTIV INC., AMERICAN PETROLEUM INSTITUTE,

Defendants-Appellants.

On Appeal from an Order of the United States District Court
for the District of Delaware (20-cv-1429)

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 & 29(c)(1), amicus curiae Public Citizen, Inc. states that it has no parent corporation and issues no stock; therefore, no publicly held corporation owns 10 percent or more of it.

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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

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[1] All parties have consented to the filing of 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 intended to fund the brief's preparation or submission, nor did any person other than the amicus curiae, its members, or its counsel.

[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).

under state law for actions that threaten public health 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 recent or pending cases, defendants as diverse as meatpacking companies, nursing-home operators, and multinational oil companies have asserted that, in the conduct of their private enterprises, they are acting on behalf of the federal government and entitled to invoke federal officer removal.

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 has also submitted amicus briefs in other cases concerning federal officer removal in the courts of appeals, including four cases discussed in this brief in which courts of appeals have recently rejected substantially the same arguments the oil industry makes in 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.*, 551 U.S. 142, 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 id.* 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.

These key limitations found in the text of section 1442(a)(1) reflect the statute's purpose of providing federal actors with an unbiased federal forum in which to present federal immunity defenses against state-law claims asserted against them. The paradigmatic case for application of the statute is one where a federal agent is sued or prosecuted under state law for carrying out federal functions, and asserts federal-law immunity defenses related to his federal role or functions. *See Mesa v. California*, 489 U.S. 121, 139 (1989); *Arizona v. Manypenny*, 451 U.S. 232, 243 (1981).

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 historical 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. So far, four courts of appeals have considered the argument that oil companies can remove the kinds of claims at issue here under section 1442(a)(1), and all four have rejected that argument. *See Cty. of San Mateo v. Chevron Corp.*, __ F.4th __, 2022 WL 1151275 (9th Cir. April 19, 2022); *Mayor & City Council of Baltimore v. BP P.L.C.*, __ F.4th __, 2022 WL 1039685 (4th Cir. April 7, 2022); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (2022); *Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50 (1st Cir. 2020), *vacated on other grounds*, 141 S. Ct. 2666 (2021). This Court should likewise reject the oil companies' claims that they are being sued for performing federal government functions.

Although, under some circumstances, a contractual relationship may bring a private party within the ambit of section 1442(a)(1), *see*, *e.g.*, *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 812 (3d Cir. 2016), 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 the contract helps "fulfill … basic governmental tasks." *Watson*, 551 U.S. at 153, and the contractor assists in carrying out government functions, typically under the "subjection, guidance, or control" of a governmental superior. *Id.* 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 id.* 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).

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 might be surprised to learn that oil companies being 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.

A. 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 execution of unpopular trade restrictions. *See Watson*, 551 U.S. at 148. 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. Again, Congress acted out of concerns about state-court interference with the performance of the often-unpopular duties of such officers, including collection of tariffs and other taxes, *see Watson*, 551 U.S. at 148, as well as 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.

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.'" *Id.* 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." *Watson*, 551 U.S. at 150.

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 ground that he had acted in the discharge of his duties as a federal officer

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

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 is essential to the vindication of federal authority. *Id.* at 263. The Court has since then 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; *Manypenny*, 451 U.S. at 241 n.16; *Willingham*, 395 U.S. at 406.

Invocation of section 1442(a)(1) is subject to the significant limitation that the statute applies only when federal officers or persons assisting them in carrying out federal law have "a colorable defense" to claims that they are liable under state law for their actions under color of federal law. *Willingham*, 395 U.S. at 406–07; *see also Mesa*, 489 U.S. at 129. 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 a colorable 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." *Manypenny*, 451 U.S. at 242. The statute expressly limits removal to circumstances where the defendant is sued in relation to the kinds of actions most likely to give rise to such defenses—"act[s] under color of … office." 28 U.S.C. § 1442(a)(1); *Mesa*, 489 U.S. at 134–35; *see 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).

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 serves are not "frustrated by a narrow, grudging interpretation," *Manypenny*, 451 U.S. at 242. At the same time, however, the 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; *see also Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393, 404 (3d Cir. 2021) ("The phrase ['acting under'] is not boundless."); *Holdren v. Buffalo Pumps, Inc.*, 614 F. Supp. 2d 129, 141 (D. Mass. 2012) (noting that the Supreme Court's warnings "against an unduly narrow view of federal officer removal" came in cases "where the federal character of the disputed act [was] hardly in doubt"). When, as in *Watson*, the Supreme Court has faced attempts to stretch the statute beyond its scope, 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 (explaining that respect for state courts dictates that the "language of § 1442(a) cannot be broadened" beyond its "fair construction") (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 the defendant must meet "the requirements of the showing necessary for removal." *Screws v. United States*, 325 U.S. 91, 111–12 (1945) (opinion of Douglas, J.) (citing *Soper (No. 2)*, 270 U.S. at 42).

B. The extension of section 1442(a)(1) in 1948 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 acting "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 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).

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 those "authorized to act with or for [federal officers or agents] in affirmatively executing duties under … federal law," *id.* at 151 (cleaned up), 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. Entities that "do not assist or help carry out the duties of a federal superior" and "are not delegated federal authority" to do so are not acting under federal officers for removal purposes." *Maglioli*, 16 F.4th at 405.

In its decision holding that the Federal Community Defender was entitled to invoke the statute because it acted under a federal officer, *In re Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457 (3d Cir. 2015) (*Defender Ass'n*), this Court

emphasized the importance of delegation of federal authority. The Court explained that the "Federal Community Defender is a non-profit entity created through the Criminal Justice Act that is delegated the authority to provide representation under" that Act. *Id.* at 469. "Through this relationship, the Federal Community Defender 'assists' and helps the A[dministrative] O[ffice] to 'carry out [ ] the duties or tasks of a federal superior.'" *Id.* (quoting *Watson*, 551 U.S. at 152). "Unlike the companies in *Watson*, the Federal Community Defender provides a service the federal government would itself otherwise have to provide." *Id.*

As *Defender Ass'n* reflects, a private entity's entitlement to remove under section 1442(a)(1) depends on both the degree of governmental control over its actions and the nature of the authority it exercises. Only where the authority is that of a federal officer—acting "under color of" federal office—does section 1442(a)(1) apply. To qualify for federal officer removal, the relationship needs to be one where the private actor is both subject to federal law and effectively assumes the role of the government—one where the federal government has, in effect, "deputize[d] … private-sector workers as federal officers." *Maglioli*, 16 F.4th at 406. As the Tenth Circuit recently put it, a private person

invoking federal officer removal "must stand in for critical efforts the federal superior would need to undertake itself in the absence of a private contract," or point to "explicit contractual delegation of legal authority to act on the federal superior's behalf." *Boulder*, 25 F.4th at 1253.

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

In light of the governing Supreme Court precedent, this Court has held, consistent with federal appellate and trial court decisions from other circuits, that to remove under section 1442(a)(1), "(1) the defendant must be a 'person' within the meaning of the statute; (2) the plaintiff's claims must be based upon the defendant 'acting under' the United States, its agencies, or its officers; (3) the plaintiff's claims against the defendant must be 'for or relating to' an act under color of federal office; and (4) the defendant must raise a colorable federal defense to the plaintiff's claims." *Maglioli*, 16 F.3d at 404. The second and third parts of the test 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 plaintiff's 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 fourth part of the test reflects the statute's purpose of allowing the validity of federal immunity defenses to be determined in federal court, *see Manypenny*, 451 U.S. at 243, and also serves to conform the statute to Article III limits on jurisdiction over cases "arising under" federal law, *see Mesa*, 489 U.S. at 136–37.

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 "the party asserting federal jurisdiction in a removal case bears the burden of showing, at all stages of the litigation, that the case is properly before the federal court." *Frederico v. Home Depot*, 507 F.3d 188, 193 (3d Cir. 2007), 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.

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

As this Court recently stated, "[t]he phrase 'acting under' is broad, and we construe it liberally. But the phrase is not boundless. Merely complying with federal laws and regulations is not 'acting under' a federal officer for purposes of federal-officer removal." *Maglioli*, 16 F.4th at 404–05. Here, the defendants' claim to have been "acting under" federal officers in performing acts under color of federal office rests on sales of products to the federal government and other contractual relationships unrelated to (and in some cases long preceding) the actions giving rise to plaintiff's state-law claims. Appellants Br. 49–55. Those relationships, including sales of fuel, leases of offshore oilfields from the federal government, one company's operation of the Elk Hills Reserve, and supplying crude oil to the Strategic Petroleum Reserve, do not

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

1. 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.*

In *Papp*, this Court 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. The Court stated: "When, as occurred in this instance, the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete, that contractor is 'acting under' the authority of a federal officer." 842 F.3d at 813 (internal quotation marks omitted); *id.* at 814 (stating that the plaintiff's allegations were directed at actions that the defendant took "while working under a federal contract to produce an item the government needed, to wit, a military aircraft, and that the government otherwise would have been forced to produce on its own").

Likewise, the Fourth Circuit in *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249 (4th Cir. 2017), held that a government contractor supplying military equipment to the government could 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.'" *Id.* 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 in *Goncalves by & Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237 (9th Cir. 2017), 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). *Id.* at 1245. Thus, in that case, 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, courts have held that, absent 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 under the "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.

Similarly, the well-reasoned district court opinion in *L-3 Commc'ns Corp. v. Serco Inc.*, 39 F. Supp. 3d 740 (E.D. Va. 2014), 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. 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.* at 750.

In short, 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.

2. Here, the contracts on which the oil companies rely 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; They are not contracts under which the companies "*assist*, or help *carry out*, the duties or tasks of the federal superior," *Maglioli*, 16 F.4th at 404–05 (quoting *Watson*, 551 U.S. at 152), or, in most cases, even ones where they are "helping the Government to produce an item that it needs," *Watson*, 551 U.S. at 153.

Specifically, the oil companies rely primarily on the oil and gas leases that allow them to extract resources from the federally owned Outer Continental Shelf. Appellants Br. 49–51. Far from helping government officers perform "basic governmental tasks," *Watson*, 551 U.S. at 153, however, the leases allow the companies to extract resources from federal property for their own commercial benefit, with payment of royalties to the government. In extracting and selling that oil, they carry on their own businesses for their own purposes. The government's willingness to make public property available, for a price, to private companies who wish to use it for their own profit-making purposes does not delegate to private persons authority to act on behalf of the

government or otherwise transform those persons 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, Appellants Br. 49–50, subject to government regulation, that regulation involves limitations on the companies' 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. As the district court explained, "[w]hat Defendants identify as 'substantial control and oversight' over their operations is no more than a set of requirements that Defendants, like all other OCS lessees, must comply with; specifically, federal statutes and regulations concerning operation, safety, and environmental impacts." *Delaware v. BP Am.*, 2022 WL 58484, *12 (D. Del. Jan. 5, 2022) (citing 43 U.S.C. § 1337(a)(1)). That the companies, by entering into the leases, chose to subject themselves to detailed regulation of activities on the leaseholds likewise does not, under *Watson*'s reasoning, transform them into persons 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).

In addition, the oil companies' assert that they were acting on behalf of the government by selling fuel to the government based on government specifications, contending that the government "otherwise would have been forced to produce on its own." Appellants Br. 45 (quoting *Papp*, 842 F.3d at 813). The production and marketing of fossil fuels, however, is not a governmental "job" under our political and economic system. The unsupported speculation that it would have become one if private businesses were not eager to take advantage of the opportunity

to sell fuel to the government does not support the counterintuitive conclusion that the companies, 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—were performing governmental functions under color of federal authority. Rather, in selling oil products to the government—as in their other petroleum production and marketing activities—the companies remained private enterprises and acted in that capacity, not under color of federal office. *Cf. Me. Ass'n of Indep. Neighborhoods v. Comm'r, Me. Dep't of Human Servs.*, 876 F.2d 1051, 1055 (1st Cir. 1989) (holding removal improper where the defendant, although subject to federal regulation, did not act under color of than federal office).

The companies briefly rely on a contract between Standard Oil and the Navy concerning petroleum reserves at Elk Hills. Appellants Br. 53–54. This contract, too, does not approach the threshold for showing that the company was "acting under" a federal officer.

> In brief, Standard owned one-fifth and the Navy owned four-fifths of the approximately 46,000 acres comprising the Elk Hills reserves. As is common in the oil exploration and production industry, the two landowners entered into a unit agreement to coordinate operations in the oil field and production of the oil. Because the Navy sought to limit oil production in order to ensure

> the availability of oil reserves in the event of a national emergency, the unit agreement required that both Standard and the Navy curtail their production and gave the Navy "exclusive control over the exploration, prospecting, development, and operation of the Reserve." To compensate Standard for reducing production, the unit agreement gave Standard the right to produce a specified amount of oil per day (an average of 15,000 barrels per day). Both parties could dispose of the oil they extracted as they saw fit, and neither had a "preferential right to purchase any portion of the other's share of [the] production."

San Mateo, 2022 WL 1151275, at *14.

Even more briefly, the oil companies suggest that supplying and managing the Strategic Petroleum Reserve qualifies as "acting under" a federal officer. Appellants Br. 55. As one district court has persuasively explained, supplying a standard commodity, crude oil, to the government is a "regular business [relationship]," not one sufficient to satisfy § 1442(a)(1). *City & Cty. of Honolulu v. Sunoco LP*, 2021 WL 531237, at *6 (D. Haw. Feb. 12, 2021). The companies have "provide[d] no explanation as to any type of control the government may wield over them" in relation to transactions involving the Strategic Petroleum Reserve. *Id.* at *6. Nor do the companies explain the nature of their "management" activities or how they involved performance of governmental tasks under federal direction (let alone how the claims in this case relate to any such governmental action).

B. The companies 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, under color of that officer's office, and that the case being removed was brought against it "for or relating to" that act. This Court has characterized this aspect of the statute as requiring "a connection or association between the act in question and the federal office." *Papp*, 842 F.3d at 813.

In *Papp*, for example, Boeing asserted that the aircraft at issue was manufactured "for the United States Armed Forces under the direct supervision, control, order, and directive of federal government officers acting under the color of federal office" and that the government's control extended to "the content of written materials and warnings associated with such aircraft." *Id*. (record citations omitted). This Court found that those alleged facts satisfied the "for or relating to" requirement, "as they demonstrate a direct connection or association between the federal government and the failure to warn" alleged by the plaintiff. *Id*. Similarly, in *Sawyer*, 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* 860 F.3d at 258; *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 the 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); *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).

Here, as the plaintiff's brief demonstrates, the companies have not made that showing. Rather, the claims against the oil companies rest on the companies' 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 the companies were "asked to do by the government," *Goncalves*, 865 F.3d at 1245, or on anything that the government "dictated," *Sawyer*, 860 F.3d at 258. Indeed, as the district court noted, "Plaintiff has, in its complaint, expressly disclaimed any "injuries arising on federal property and those that arose from Defendants' provision of fossil fuel products to the federal government." *Delaware*, 2022 WL 58484, *10. And nothing in the contractual relationships cited by the companies demonstrates that the companies exercised any federal-government "discretion," *id*., related to the alleged concealment of the climate risks posed by their products, their promotion of fossil fuels notwithstanding that knowledge, or, more generally, their mass production and marketing of products that were

allegedly defective in that they were not as safe as the companies led ordinary consumers to understand.[4]

The oil companies contend that decisions about how much oil to produce and market from offshore leases were attributable to the federal government because the government reserved the right to dictate rates of production, Appellants Br. 49, but they do not argue that the government in fact did so. *See Boulder*, 25 F.4th at 1254. Moreover, even if the companies might lose their leases if they failed to produce oil from them, that consequence that hardly amounts to legal compulsion to produce and market oil, let alone to do so at levels that the companies knew would result in environmental harm. Thus, any connection between the federal contracts and the claims in this case is too attenuated to supply the connection between the plaintiff's claims and any supposed official action carried out under direction of federal officers.

[4] For like reasons, the companies' conclusory assertion that they have federal defenses does not establish that those defenses have any colorable connection to the companies' claimed role as federal actors. This Court has held that a colorable defense need not arise out of the defendants' asserted "duty" to act, but the defenses it has recognized as sufficient are all connected to the defendants' claimed *role* as a person acting under federal direction. *See Defender Ass'n*, 790 F.3d at 473–74.

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief of Plaintiff-Appellee, this Court should affirm the order of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 21, 2022, a true and correct copy of the foregoing brief was served on all parties to this appeal, via CM/ECF, pursuant to Third Circuit Rule 25.1(b), because counsel for all parties are ECFUsers who will be served electronically by the Notice of Docket Activity.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF BAR MEMBERSHIP

I certify that I, Scott L. Nelson, counsel for amici curiae, am a member of the Bar of this Court.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and volume limitations set forth in Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5), 32(a)(6), and 32(a)(7)(B) as follows: The typeface is fourteen-point Century Schoolbook font, and the word count is 6481.

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I certify that the electronic file of this brief was scanned with Windows Defender anti-virus software and that no virus was detected.

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