No. 21-1752

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF MINNESOTA,

Plaintiff-Appellee,

v.

AMERICAN PETROLEUM INSTITUTE; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; KOCH INDUSTRIES, INC.; FLINT HILLS RESOURCES LP; AND FLINT HILLS RESOURCES PINE BEND LLC,

Defendants-Appellants,

On Appeal from the United States District Court
for the District of Minnesota
No. 0:20-cv-01636-JRT-HB
Hon. John R. Tunheim, U.S.D.J.

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

Scott L. Nelson
Adam R. Pulver
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

August 25, 2021

CORPORATE 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

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. The federal officer removal statute's application is limited by its language, context, history, and purposes. 7

II. The oil companies have not demonstrated that they meet the prerequisites for removal under section 1442(a)(1). 16

A. The contractual relationships that the oil companies cite do not bring them within the federal officer removal statute. 18

B. The oil companies have not shown the requisite connection between this case and the acts they claim were taken under the direction of federal officers. 25

C. The oil companies do not attempt to show that they have a colorable federal immunity defense. 29

CONCLUSION 32

CERTIFICATE OF COMPLIANCE 33

CERTIFICATE OF SERVICE 34

TABLE OF AUTHORITIES

Cases **Page(s)**

Arizona v. Manypenny,
451 U.S. 232 (1981) 6, 10, 11, 12, 17, 29, 30

Baker v. Atlantic Richfield Co.,
962 F.3d 937 (7th Cir. 2020) 28, 29

Bd. of County Comm'rs of Boulder County v. Suncor Energy (U.S.A.) Inc.,
965 F.3d 792 (10th Cir. 2020),
vacated, 2021 WL 2044533 (U.S. May 24, 2021) 4, 15, 25

Boyle v. United Techs. Corp.,
487 U.S. 500 (1988) 30

Cabalce v. Thomas E. Blanchard & Assocs., Inc.,
797 F.3d 720 (9th Cir. 2015) 17, 20, 21, 28

Camacho v. Autoridad de Telefonos de Puerto Rico,
868 F.2d 482 (1st Cir. 1989) 14

Colorado v. Symes,
286 U.S. 510 (1932) 11

County of San Mateo v. Chevron Corp.,
960 F.3d 586 (9th Cir. 2020),
vacated, 2021 WL 2044534 (U.S. May 24, 2021) 4, 23, 24

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 17

Fair v. Norris,
480 F.3d 865 (8th Cir. 2007) 18

Goncalves by & Through Goncalves v. Rady Children's Hosp. San Diego,
865 F.3d 1237 (9th Cir. 2017) 20, 26, 27

Holdren v. Buffalo Pumps, Inc.,
614 F. Supp. 2d 129 (D. Mass. 2012) 12

Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund,
500 U.S. 72 (1991) 12, 13

Isaacson v. Dow Chem. Co.,
517 F.3d 129 (2d Cir. 2008) 28

Jacks v. Meridian Res. Co., LLC,
701 F.3d 1224 (8th Cir. 2012) ..... *passim*

Latiolais v. Huntington Ingalls, Inc.,
951 F.3d 286 (5th Cir. 2020) 26, 29

L-3 Commc'ns Corp. v. Serco Inc.,
39 F. Supp. 3d 740 (E.D. Va. 2014) 21

Maryland v. Soper (No. 1),
270 U.S. 9 (1926) 11, 14

Maryland v. Soper (No. 2),
270 U.S. 36 (1926) 12

Mayor & City Council of Baltimore v. BP P.L.C.,
952 F.3d 452 (4th Cir. 2020),
vacated, 141 S. Ct. 1532 (2021) 4, 23, 24, 28

Mays v. City of Flint, Mich.,
871 F.3d 437 (6th Cir. 2017) 17

Mesa v. California,
489 U.S. 121 (1989) 6, 10, 11, 12, 17

Rhode Island v. Shell Oil Prods. Corp.,
979 F.3d 50 (1st Cir. 2020),
vacated, 2021 WL 2044535 (U.S. May 24, 2021) 5, 28

Sawyer v. Foster Wheeler LLC,
860 F.3d 249 (4th Cir. 2017) 16, 20, 26, 27, 29, 30

Screws v. United States,
325 U.S. 91 (1945) 12, 13

Tennessee v. Davis,
100 U.S. 257 (1880) 10

Washington v. Monsanto Co.,
274 F. Supp. 3d 1125 (W.D. Wash. 2017),
aff'd, 738 F. Appx. 554 (9th Cir. 2018) 29

Watson v. Philip Morris Cos.,
551 U.S. 142 (2007) ..... *passim*

Willingham v. Morgan,
395 U.S. 402 (1969) 9, 10, 30

Wyoming v. Livingston,
443 F.3d 1211 (10th Cir. 2006) 8

Statutes

28 U.S.C. § 1442(a)(1) ..... *passim*

Other

H.R. Rep. No. 80-308 (1947) 13

www.tngenweb.org/monroe/news3.txt 9

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.

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 and safety. Public Citizen is concerned that defendants often improperly invoke removal

[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 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.

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 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.*, 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. 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 Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1532 (2021); *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020), *vacated on other grounds*, 2021 WL 2044534 (U.S. May 24, 2021); *Bd. of County Comm'rs of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 965

F.3d 792 (10th Cir. 2020), *vacated on other grounds*, 2021 WL 2044533 (U.S. May 24, 2021); *Rhode Island v. Shell Oil Prods. Corp.*, 979 F.3d 50 (1st Cir. 2020), *vacated on other grounds*, 2021 WL 2044535 (U.S. May 24, 2021). This Court should likewise reject the oil companies' claims that they are somehow 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.*, *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224 (8th Cir. 2012), 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 involves "delegation of legal authority," *Jacks*, 701 F.3d at 1233, to help "fulfill … basic governmental tasks," *id*. at 1232 (quoting *Watson*, 551 U.S. at 153), under "close supervision" by a governmental superior, *id*. at 1232.

The contractual relationships cited by the oil companies do not establish that they acted 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 the reason for federal officer removal, s*ee Arizona v. Manypenny*, 451 U.S. 232, 243 (1981), and removal is proper only where the removing party asserts a colorable defense, *Mesa v. California*, 489 U.S. 121, 139 (1989). Here, the defendants claim no immunity defense, and their conclusory assertion of non-immunity defenses does not establish that the district court erred in finding they failed to meet their burden of showing *colorable* federal defenses.

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 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 strongly reinforces 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 execution of unpopular trade restrictions. *See Watson*, 551 U.S. at 148; *Wyoming v. Livingston*, 443 F.3d 1211, 1223 (10th Cir. 2006). 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 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 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)); *see also Jacks*, 701 F.3d at 1231. 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; *Jacks*, 701 F.3d at 1231.

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.[2] A local grand jury indicted Davis for murder. With the support of the Attorney General of the United States, Davis invoked the predecessor to

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

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 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 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; *Manypenny*, 451 U.S. at 241 n.16; *Willingham*, 395 U.S. at 406. 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.

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; *see also Jacks*, 701 F.3d at 1231. 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. For this reason, the statute expressly limits removal to circumstances where the defendant is sued in relation to the performance of official duties that potentially create such defenses—"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).

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 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. 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 acting "as an assistant to a federal official in helping that official to enforce federal law." *Watson*, 551 U.S. at 151; *accord Jacks*, 701 F.3d at 1231. 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. As this Court has emphasized, *Watson* requires a relationship in which a private person essentially steps into the government's shoes, exercising "delegated" authority to help federal

officers fulfill governmental functions under "close supervision" from those officers. *Jacks*, 701 F.3d at 1233, 1232.

In *Jacks*, this Court emphasized the importance of delegation of federal authority in finding that a health insurance provider under the Federal Employees Health Benefits Plan, administered by the Office of Personnel Management (OPM), was acting under a federal officer. The Court found the provider was fulfilling "the basic *governmental task* of providing health benefits for [the government's] employees." *Id.* (emphasis added). That is, rather than creating a Medicare-like program or directly providing health care following the Veterans Administration model, the government chose to act through private health insurers.

As *Jacks* holds, a private entity's entitlement to remove under section 1442(a)(1) depends not only on the degree of governmental control over its actions, but also on 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 not only subject to federal law, but effectively assumes the role of the government. As the Tenth Circuit recently put it, a private person

invoking federal officer removal "must stand in for critical efforts the federal superior would be required to undertake itself in the absence of a private contract," or point to "explicit delegation of legal authority to act on the federal superior's behalf." *Boulder*, 965 F.3d at 823.

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 a private defendant seeking to remove a case under § 1442(a)(1) must show that: "(1) [the] defendant has acted under the direction of a federal officer, (2) there was a … connection between the defendant's actions and the official authority, (3) the defendant has a colorable federal defense to the plaintiff's claims, and (4) the defendant is a 'person,' within the meaning of the statute." *Jacks*, 701 F.3d at 1230; *see also*, *e.g.*, *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017) (describing similar test). The first and second 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 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 Manypenny*, 451 U.S. at 243, 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.

In cases satisfying these requirements, section 1442(a)(1) both allows removal and creates a basis for federal jurisdiction over cases that would otherwise fall outside the federal courts' original jurisdiction: 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. at 136. The normal principle 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), is thus fully applicable to federal officer removal cases. *See*, *e.g.*, *Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017); *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 arising out of any such action.

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

The oil companies' claims to have been acting under federal officers in performing acts under color of federal office rest entirely on a small set of contractual relationships briefly discussed in a three-page section of their brief. Appts. Br. 41–44.[3] The commercial relationships they describe—and, in particular, those that existed at the time of the conduct challenged in this lawsuit—do not involve actions under 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

[3] The companies have, under this Court's precedents, waived reliance on any contractual relationships not asserted in their opening brief or on aspects of the contracts mentioned that are not explained in the opening brief. *See Fair v. Norris.*, 480 F.3d 865, 869 (8th Cir. 2007) (stating that appellant waived arguments "by failing to raise them in her opening brief").

1442(a)(1). The Court recognized, 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 stated that such results were "at least arguably" justifiable where contractors assisted 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.*

This Court and others have subsequently determined that a private contractor may remove under section 1442(a)(1) where the relationship established by the contract satisfies the criteria laid out in *Watson* to identify circumstances in which a private person acts under a federal officer in performing actions under color of federal office. In *Jacks*, for example, the contractual arrangement at issue set up a "partnership" between the government and the contractor, 701 F.3d at 1233, under which the contractor was delegated authority to act on the government's behalf, subject to tight supervision, in carrying out the governmental function of administering health benefits for government employees, *see*

id. at 1231–34. Similarly, the Ninth Circuit held in *Goncalves by & Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017), that nongovernmental entities that administered federal health insurance plans had been "delegated" authority by the government "to act 'on the Government agency's behalf'" in pursuing subrogation claims and 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). Applying the same principles in the realm of defense contracting, the Fourth Circuit in *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.

By contrast, in the absence of circumstances indicating that a federal contractor is engaged to exercise delegated authority to assist federal officers in performing official functions and is subject to their supervision or control, the 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 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. As another court has put it, 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. *L-3 Commc'ns Corp. v. Serco Inc.*, 39 F. Supp. 3d 740, 750 (E.D. Va. 2014). 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. *See Jacks*, 701 F.3d at 1231.

The contracts on which the oil companies rely here do not establish the kind of relationship that supports characterizing the companies' self-interested business activities as exercises of delegated authority to act on behalf of the government at the direction of federal officers. The

obligations imposed on the companies by the contracts were limitations on their 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. None of the contracts on which the companies rely supports the counterintuitive conclusion that the companies, in producing and selling fossil fuel products over the past fifty years—and promoting them to the public while allegedly concealing knowledge of their damaging effects on the global climate—were helping to perform governmental tasks under color of federal authority.

The companies focus primarily on claims that they acted under government officers in supplying fuel to the armed forces during World War II and the Korean conflict, well before they engaged in the conduct that is the subject of the complaint. Even as to that period, however, the companies fail to demonstrate how their commercial relationship with the government as providers of basic commodities brought them within the scope of section 1442(a)(1) as construed in *Watson*, *Jacks*, and other cases. Although the companies claim that they were compelled to produce

fuel and sell it to the government, they offer no explanation of how the direction to which they were subject constituted a *delegation of authority to act on the government's behalf*, as *Watson* and *Jacks* require.

The companies have even less to say in support of their assertion that they acted under federal officers within the period relevant to this lawsuit. They say only that they continue to supply fossil-fuel products, including jet fuel, to the military, and that those products must meet the military's specifications. But not all requirements that commercial products meet contractual specifications turn their suppliers into the equivalent of arms of the government. Rather, "a person is not 'acting under' a federal officer when the person enters into an arm's-length business arrangement with the federal government or supplies it with widely available commercial products or services." *San Mateo*, 960 F.3d at 600. In such cases, contractual specifications "are typical of any commercial contract," and "are incidental to sale and sound in quality assurance." *Baltimore*, 952 F.3d at 464. In supplying such products to the government, the companies act in their own interest, not on behalf of the government.

Similarly, the companies' oil and gas leases on the Outer Continental Shelf do not establish the requisite delegation of authority to perform governmental tasks. They involve the purchase by private actors of leaseholds on federal property from which they extract resources for their own commercial uses, with payment of royalties to the government. 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 authority to act on behalf of the government or otherwise transform private enterprises into public actors assisting government officers in "fulfill[ing] … basic governmental tasks." *Watson*, 551 U.S. at 153. "The leases do not require that lessees act on behalf of the federal government, under its close direction, or to fulfill basic government duties." *San Mateo*, 960 F.3d at 602–03; *see also Baltimore*, 952 F.3d at 465–66. That the government requires some part of its royalties for the leases to be paid "in kind," Appts. Br. 44, does not transform the relationship into one involving "delegation" of governmental authority as required by *Jacks*, 701 F.3d at 1233.

Moreover, although the companies claim that the federal government has "directed" them to "explore, develop, and produce oil and

gas … pursuant to leases," Appts. Br. 44, they make no claim that they were forced to bid on the leases or that they did so on the government's behalf. That the companies, by entering into leases in their own self-interest, have chosen to subject themselves to regulation of their activities on the leaseholds cannot, under *Watson*'s reasoning, transform them into persons acting under federal officers. *See* 551 U.S. at 153; *see also Boulder*, 965 F.3d at 825 (rejecting the argument "that 'simple compliance' with the statutory and regulatory requirements embedded in these standard-form, boilerplate lease terms satisfies the 'acting under' relationship"). 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).

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

Removal under section 1442(a)(1) requires that a defendant show not only that it acted under a federal officer, but also that the action or

prosecution 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; *see also Jacks*, 701 F.3d at 1230, 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.*

The companies fault the district court for imposing a causation standard because it stated at one point in its opinion that they must demonstrate that they are being sued "at least in part 'because of what they were asked to do by the Government.'" Add. 24a. That statement, however, hardly reflects adherence to a "direct causal nexus" test of the type rejected in *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 291–92 (5th Cir. 2020). Rather, the district court made clear that it recognized that the "for or relating to" language imposes a "low bar" and that "all that is required is that the case relates to an official act." Add. 24a.

That required relationship is wholly absent. 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 the companies were "asked to do by the government," *Goncalves*, 865 F.3d at 1245, anything that the government "dictated," *Sawyer*, 860 F.3d at 258, or anything that they did as part of any relationship in which they acted on behalf of the government, as in *Jacks*, 701 F.3d at 1230 n.3.

Specifically, the companies' concealment of their knowledge of climate effects of fossil fuel production and consumption over the past half century has nothing at all to do to with the claimed government directives that the companies supply fuel to the military decades earlier during World War II and the Korean conflict. Even if those requirements meant that the companies acted under the direction of federal officers in some of their wartime activities, "the acts that form the predicate" of Minnesota's claim did not, unlike in *Jacks*, "occur[] while [the companies] performed … duties under the direction of a federal officer or agency." *Jacks*, 701 F.3d at 1230 n.3. The only "relationship" is that some of the defendants were oil companies during World War II and still were in the

business at the time of the events giving rise to this case. But that does not establish a relationship between the claims asserted here and the *acts* the companies allegedly performed under color of law decades earlier. The companies' invocation of their wartime activities fails the requirement that removing defendants "establish that the act that is the subject of Plaintiffs' attack … occurred *while* Defendants were performing their official duties." *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008), *quoted in Baker v. Atlantic Richfield Co.*, 962 F.3d 937, 945 (7th Cir. 2020).

Nor do Minnesota's claims relate to the defendants' compliance with specifications for jet fuel sold to NATO or the terms of their Outer Continental Shelf Leases, or to their asserted use of Strategic Petroleum Reserve Infrastructure to pay in-kind royalties to the government. As the First Circuit concluded in the *Rhode Island* case, "[t]here is simply no nexus between anything for which [the state] seeks damages and anything the oil companies allegedly did at the behest of a federal officer." 979 F.3d at 60; *accord Baltimore*, 952 F.3d at 468. [4]

[4] *See also Cabalce*, 797 F.3d at 728–29 (holding required connection lacking because the acts for which the defendant was sued were unrelated to any direction it had received from federal officers);

The claims here thus fail the test the companies themselves advocate: The state's allegations are not "directed at the relationship between the Companies and the federal government." *Baker*, 962 F.3d at 945 (cleaned up), *quoted in* Appts. Br. 46. By contrast, in the cases the companies cite, actions taken at federal direction formed some part of the basis of the plaintiffs' claims. *See*, *e.g.*, *Sawyer*, 860 F.3d at 25657 (Navy directed use of asbestos and accompanying warnings); *Latiolais*, 951 F.3d at 296 (Navy directed installation of asbestos that injured plaintiff); *Baker*, 962 F.3d at 944–45 (federal government directed production of chemicals that were the subject of plaintiffs' claims). The oil companies point to nothing comparable here.

C. The oil companies do not attempt to show that they have a colorable federal immunity defense.

In light of section 1442(a)(1)'s function of permitting an unbiased forum for adjudicating "official immunity defense[s]" against claims implicating performance of federal functions, *see Manypenny*, 451 U.S. at

---

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).

243, it is striking that the oil companies make no effort to "raise a colorable defense *arising out of their duty to enforce federal law*," *Willingham*, 395 U.S. at 406–07 (emphasis added). Unlike the defendants in *Jacks*, they neither claim that their purported acts under color of federal office provide them an official immunity defense against Minnesota's claims nor invoke the government-contractor immunity defense recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). *Cf. Jacks*, 701 F.3d at 1235. Indeed, although the companies rely on contractual relationships as the basis for invoking section 1442(a)(1), a *Boyle* defense would be untenable because they do not contend that the wrongful conduct alleged by the state was required to comply with specific contractual specifications or requirements. *See Sawyer*, 860 F.3d at 256. Neither in concealing climate risks they allegedly knew their products posed nor in marketing defective products to the general public were the companies even arguably carrying out federal contract terms that would provide a defense under *Boyle*.

Instead of asserting an immunity defense, the oil companies claim to have "multiple meritorious (and certainly plausible) federal defenses," Appts. Br. 47, but they identify only two—Clean Air Act preemption and

the foreign-affairs doctrine—both of which are unrelated to their claimed status as agents of the federal government. Assuming such defenses qualify under section 1442(a)(1), *see Jacks*, 701 F.3d at 1235 (citing a preemption defense in addition to immunity defenses), the oil companies provide nothing beyond conclusory assertions to support their contention that the district court erred in holding that they had not demonstrated that the defenses were colorable. The companies' analysis consists principally of a cross-reference to pages of their brief that neither mention the Clean Air Act nor explain how a foreign-affairs defense would be triggered by the state's allegations. *See* Appts. Br. 19–22.

* * *

The oil companies' token attempt to identify colorable federal defenses underscores how far this case is from section 1442(a)(1)'s heartland. The case bears none of the hallmarks of one where removal is necessary to provide an unbiased forum to protect federal actors. In the unlikely event that the oil companies' defenses do not receive a fair hearing in the Minnesota courts, it will not be because anyone mistakes oil companies for federal agents.

CONCLUSION

This Court should affirm the order of the district court.

Respectfully submitted,

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

Attorneys for Amicus Curiae
Public Citizen, Inc.

August 25, 2021

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 for Microsoft 365 MSO, is 6,475, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court. The brief has been scanned for viruses using Windows Defender and is virus-free.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on August 25, 2021, 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