No. 22-523

IN THE
Supreme Court of the United States

SUNOCO LP, ET AL.,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a strong interest in both questions presented, each of which warrants certiorari review. The first question presented concerns the test for federal-officer removal under 28 U.S.C. § 1442. Many of the Chamber's members serve as federal contractors or otherwise work closely with federal agencies and officials—particularly during times of national emergency, such as the COVID-19 pandemic. Indeed, private industry is often the most efficient way for the federal government to obtain important goods and services, including goods and services the government would otherwise have to produce itself. In many instances, private businesses make products designed to meet government specifications, such as the specialized fuels that petitioners in this case produced for the military. When companies are sued in state court for these activities, they frequently remove

[1] Amicus curiae timely provided notice of intent to file this brief to all parties. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

the litigation to federal court and assert federal-law defenses, including defenses such as preemption that may or may not be specific to their governmental responsibilities. The Chamber has an interest in ensuring that such lawsuits proceed in federal court, so that private parties working for the federal government are not subject to the vagaries of state procedure and potentially inhospitable state courts.

The Chamber also has an interest in the second question presented, which concerns the availability of federal-question jurisdiction under 28 U.S.C. § 1331 over claims related to the effect of transboundary greenhouse gas emissions on the global climate. The Chamber believes that the Court should review that question as well, as the Chamber has already explained in supporting another petition for certiorari currently pending before the Court, *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550. This amicus brief, however, discusses only the first question presented by petitioners here, which is not presented in *Suncor*.

SUMMARY OF ARGUMENT

I. The question presented is important, because it can affect any federal-officer removal case. The Ninth Circuit held that even where a defendant qualifies as a federal officer, or as a person acting under a federal officer, *and* even where the suit relates to the defendant's work for the federal government, *and* even where the defendant has a colorable federal defense, the defendant will not be able to remove to federal court unless that defense *also* "flows from" the defendant's official duties. That counterintuitive holding materially weakens the protection that Congress provided.

The import of the court of appeals' holding is no small matter. The question presented affects a broad and diverse array of private businesses that perform duties that the federal government cannot perform for itself. Congress accorded such businesses the protection of federal-officer removal, as the lower courts have recognized in a wide variety of contexts, because their work can and often does provoke litigation. Performing work for the federal government can paint a target on a contractor's back. Weakening the protection of federal-officer removal will make businesses less willing to take on those tasks.

II. Splitting with other circuits, the Ninth Circuit's decision misapplies the plain statutory text, this Court's cases construing it, and the background principles of Article III jurisdiction. The statute requires that the *action* "relate to" the defendant's federal duties; that is the only germaneness requirement. There is no requirement that a colorable federal defense "flow from" the defendant's official duties, and this Court has upheld officer removal (in a case involving officers of the judicial branch) even where the federal defense is a general one rather than one arising from the officers' specific duties.

Rather, this Court has always recognized that a colorable federal defense ensures that there will be at least some federal question raised in the federal courts after removal. That Article III requirement is satisfied if there is a colorable federal defense. Nothing in the Constitution, the statute, or the Court's cases requires remanding a federal officer's colorable federal defenses to be adjudicated by a potentially hostile state court, as the Ninth Circuit insisted.

ARGUMENT

I. The question presented is important because it implicates whether federal courts may remand a suit against a federal officer (or a party working under a federal officer), relating to the defendant's official functions, even when a colorable federal defense is presented.

By design, the federal-officer removal statute, 28 U.S.C. § 1442, provides federal officers, and private parties working under federal officers, with an important protection: a federal forum for litigation relating to their federal work. And although this Court has held that the statute does not authorize removal of cases that involve "absolutely no federal question," *Mesa v. California*, 489 U.S. 121, 138 (1989), the circuits are now split on whether only certain *kinds* of federal questions will do.

That question is important, because the effect of the court of appeals' interpretation can be felt in *any* federal-officer case. In other words, the court of appeals' rule will send cases back to state court even when the suit undisputedly is against a federal officer or a person acting under a federal officer.

This case does not ask the Court to decide who is a federal officer; the court of appeals assumed petitioners could satisfy that requirement. But in assessing the importance of the question presented, this Court should take into account the wide variety of private businesses that the lower courts have held to satisfy the statutory requirements for federal-officer removal. The question presented therefore is one that affects a wide range of business defendants that are named in

lawsuits related to their work under the supervision of federal officers. Narrowing their ability to remove to federal court—or allowing removal to depend on where suit is filed—would undermine one of the important reassurances that the government provides to private businesses considering whether to take on government assignments.

A. The question presented can affect any federal-officer removal case.

This Court has consistently read § 1442 to allow removal when a defendant can satisfy three requirements. First, the defendant must be a federal agency or officer, including an officer of the federal courts or of either house of Congress, or a person acting under a federal officer. 28 U.S.C. § 1442(a)(1), (3), (4). Second, the suit must be "for or relating to" actions taken in that capacity. *Id.* And third, the defendant must raise a "colorable federal defense." *E.g.*, *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999). The question presented here affects only the third requirement.

In this case, the court of appeals assumed that petitioners could show that they "were 'acting under' federal officers." Pet. App. 9a, 11a-12a. It did not definitively resolve that question. Rather, the court of appeals concluded that petitioners could not avail themselves of § 1442 removal, because they had failed to establish a "colorable federal defense" that "stem[s] from official duties." *Id.* at 16a-17a.[2] That was the only ba-

[2] Although the court of appeals did reach and reject some of petitioners' arguments that they were "acting under" federal officers, Pet. App. 11a-16a, the court did not dispose of the entire case on that ground and moved on to the "colorable federal defense" prong. *Id.* at 9a, 11a-12a, 16a-18a.

sis on which it rejected removal under § 1442 and affirmed the remand. *Id.* at 9a.

As a result, the court of appeals' holding will be binding in future federal-officer cases in the Ninth Circuit—even cases in which it is clear or undisputed that the removing defendant either *was* a federal officer or acted under one. Under that holding, such a defendant will not be able to remove a lawsuit directly targeting her performance of federal duties, even if she has a robust federal defense, unless the *defense* specifically stems from the federal duties as well.

B. The availability of federal-officer removal is a significant question for the wide variety of businesses that can act under federal officers.

The availability of removal to federal officers and those acting under them is an issue with broad nationwide significance. As this Court has long recognized, the removal statute protects persons working for the federal government from state courts that may be hostile to the work they are doing. The federal government "can act only through its officers and agents, and they must act within the States." *Willingham v. Morgan*, 395 U.S. 402, 406 (1969) (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1880)). The question presented—what kind of federal defense is enough to justify removal?—is one that arises in a wide variety of contexts, because persons acting under federal officers regularly are targets of litigation.

1. "The federal officer removal statute has had a long history." *Willingham*, 395 U.S. at 405. The statute's earliest predecessor was a customs law enacted during the War of 1812, when several New England

states opposed efforts to embargo trade with England. *Id.* The statute included a removal provision designed "to protect federal officers from interference by hostile state courts," permitting customs officers "to remove to the federal courts any suit or prosecution commenced because of any act done 'under colour' of the statute." *Id.* Similar statutes protecting customs and revenue officers were passed in the 1833 (in the face of state nullification efforts) and again during the Civil War. *Id.* at 405-06. The current statute was enacted in 1948, *see id.* at 406, and was amended as recently as 2011 to broaden its scope, *see* Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545.

"The purpose of all these enactments is not hard to discern": to ensure robust access to federal court for the "officers and agents" through whom the federal government must act. *Willingham*, 395 U.S. at 406. In cases where those officers and agents stand charged with liability for acts undertaken "within the scope of their authority," "if their protection must be left to the action of the State court," then "the operations of the general government may at any time be arrested at the will of one of its members." *Id.* (quoting *Davis*, 100 U.S. at 263).

Historically, all of these statutes provided a federal forum not just to federal officers themselves, but also to private parties assisting them. *See Watson v. Philip Morris Cos.*, 551 U.S. 142, 147-49 (2007) (discussing history of current statute and its predecessors). Well over a century ago, this Court recognized that "the protection which the law thus furnishes to the marshal and his deputy, also shields all who lawfully assist him in the performance of his official duty." *Davis v. South Carolina*, 107 U.S. 597, 600 (1883); *see also Maryland*

v. Soper, 270 U.S. 9, 30 (1926) (citing *Davis* for the proposition that a private individual "acting as a chauffeur and helper to [federal] officers under their orders" had "the same right to the benefit of [the removal statute]" as the officers themselves).

Today's statute extends to "any officer (*or any person acting under that officer*) of the United States or of any agency thereof." 28 U.S.C. § 1442(a)(1) (emphasis added). "The words 'acting under' are broad" on their face, and this Court has made clear that they must be "'liberally construed.'" *Watson*, 551 U.S. at 147 (quoting *Colorado v. Symes*, 286 U.S. 510, 517 (1932)). As a result, its protection extends to many different types of persons working for the federal government.

2. Private businesses working with the government have long relied on the federal-officer removal statute's protections in a remarkable variety of different contexts. *See generally* Wright & Miller, 14C Fed. Prac. & Proc. Juris. § 3726 (4th ed. 2022) ("[T]he statute has been applied in cases involving a wide spectrum of civil and criminal substantive contexts, and the right to remove has been invoked by a tremendous variety of federal officers and persons acting under the direction of federal officers.") (footnotes omitted).

Federal contractors of various stripes frequently remove lawsuits relating to their work for government under § 1442. As this Court acknowledged in *Watson*, "lower courts have 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.

Military contractors in particular have invoked the federal-officer removal statute in numerous cases (for example, asbestos and other toxic tort litigation). Such contractors include manufacturers of military hardware such as helicopters, submarines, and warships;[3] manufacturers of chemicals and chemical components of other supplies;[4] administrators of military health care programs;[5] and other providers of services to the military,[6] including banks that operate

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[3] *See Moore v. Elec. Boat Corp.*, 25 F.4th 30, 32 (1st Cir. 2022) (submarines); *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 289 (5th Cir. 2020) (naval vessels); *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 252 (4th Cir. 2017) (boilers for naval vessels); *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 809 (3d Cir. 2016) (aircraft); *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1178 (7th Cir. 2012) (turbines for naval vessels); *Gordon v. Air & Liquid Sys. Corp.*, 990 F. Supp. 2d 311, 314 (E.D.N.Y. 2014) (turbines and steam generators for warships); *Malsch v. Vertex Aerospace, LLC*, 361 F. Supp. 2d 583, 584 (S.D. Miss. 2005) (helicopters); *Akin v. Big Three Indus., Inc.*, 851 F. Supp. 819, 823-24 (E.D. Tex. 1994) (jet engines); *Fung v. Abex Corp.*, 816 F. Supp. 569, 573 (N.D. Cal. 1992) (submarines).

[4] *See, e.g.*, *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 939-41, 942, 946-47 (7th Cir. 2020) (various "critical wartime commodities" during World War II, including zinc oxide and lead carbonate); *Genereux v. Am. Beryllia Corp.*, 577 F.3d 350, 353-54, 357 & n.9 (1st Cir. 2009) (beryllium oxide ceramics used in nuclear weapons, radar tubes, jet brake pads, and jet engine blades); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 138-39 (2d Cir. 2008) (Agent Orange).

[5] *Holton v. Blue Cross & Blue Shield of S.C.*, 56 F. Supp. 2d 1347, 1350-52 & n.3 (M.D. Ala. 1999) (administrator of medical program for dependents of military personnel).

[6] *See Hagen v. Benjamin Foster Co.*, 739 F. Supp. 2d 770, 773 (E.D. Pa. 2010) (civilian contractor that employed machinist who worked on Navy vessel); *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1192 (M.D. Fla. 2006) (contractor that flew planes for Department of Defense in Afghanistan).

on military bases.[7]

Another notable category of cases concerns private businesses working with federal health care programs outside the military context. In a number of cases, courts have found private companies that contract to administer Medicare benefits to be "acting under" federal officers. *See, e.g.*, *Peterson v. Blue Cross/Blue Shield of Tex.*, 508 F.2d 55, 57 (5th Cir. 1975); *Einhorn v. CarePlus Health Plans, Inc.*, 43 F. Supp. 3d 1268, 1270 (S.D. Fla. 2014); *Freeze v. Coastal Bend Foot Specialist*, No. C-06-481, 2006 WL 3487405, at *3 (S.D. Tex. Dec. 1, 2006); *Pani v. Empire Blue Cross Blue Shield*, No. 93 Civ. 8215 (SHS), 1996 WL 734889, at *1 (S.D.N.Y. Dec. 23, 1996), *aff'd*, 152 F.3d 67 (2d Cir. 1998); *Grp. Health Inc. v. Blue Cross Ass'n*, 587 F. Supp. 887, 891 (S.D.N.Y. 1984). The same has been held of companies administering health benefits for federal employees. *See Goncalves ex rel. Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1243-51 (9th Cir. 2017); *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1232-35 (8th Cir. 2012), *abrogated in part on other grounds by BP p.l.c. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532 (2021); *Anesthesiology Assocs. of Tallahassee, Fla., P.A. v. Blue Cross Blue Shield of Fla., Inc.*, No. 03-15664, 2005 WL 6717869, at *2 (11th Cir. Mar. 18, 2005).

Other contractors have also availed themselves of the protections of the federal-officer removal statute. For example, a business hired to eliminate toxic mold from an air-traffic control tower was held to be "acting under" the Federal Aviation Administration and, on

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[7] *Texas ex rel. Falkner v. Nat'l Bank of Com. of San Antonio*, 290 F.2d 229, 231 (5th Cir. 1961); *First Nat'l Bank of Bellevue v. Bank of Bellevue*, 341 F. Supp. 960, 961-62 (D. Neb. 1972).

that basis, successfully removed a negligence lawsuit. *Bennett v. MIS Corp.*, 607 F.3d 1076, 1088, 1091 (6th Cir. 2010). Businesses relying on § 1442 have also included federal land banks operating under the Farm Credit Administration, which exist only to "further a government interest";[8] and telecommunications companies that provide information to federal law-enforcement or national-security authorities.[9]

Contractors are not always for-profit businesses: nonprofits and individuals also benefit from the protection of § 1442. Of particular note, as one of the cases forming the circuit split demonstrates (*see* Pet. 11-13), attorneys providing legal services to disadvantaged individuals have availed themselves of the removal statute. *See In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 462-63, 468, 472 (3d Cir. 2015) (the Federal Community Defender Organization for the Eastern District of Pennsylvania, which provided legal services pursuant to the Criminal Justice Act, was "acting under" the Administrative Office of the U.S. Courts); *Gurda Farms, Inc. v. Monroe Cnty. Legal Assistance Corp.*, 358 F. Supp. 841, 842-47 (S.D.N.Y. 1973) (nonprofit providing legal advice to migrant workers was "acting under" the Office of Economic Opportunity); *see also Bell v. Thornburg*, 743 F.3d 84, 89 (5th Cir. 2014) (permitting "private citizen[]" serving as Chapter 13 standing trustee under the Bankruptcy Code to remove under § 1442).

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[8] *Mansfield v. Fed. Land Bank of Omaha*, No. 4:14-CV-3232, 2015 WL 4546610, at *5 (D. Neb. July 28, 2015).

[9] *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486-87 (1st Cir. 1989); *In re Nat'l Sec. Agency Telecomms. Recs. Litig.*, 483 F. Supp. 2d 934, 943 (N.D. Cal. 2007).

3. Removal under § 1442 is important to these persons working for the federal government—individuals, nonprofits, and for-profit business alike. That is especially so when the work is risky or politically controversial.

One prominent example, the Agent Orange litigation, *see Isaacson*, 517 F.3d at 138-39, took place against the backdrop of the government's controversial decision to use herbicides in the Vietnam War. And the conflict itself was the subject of considerable debate, to say the least. *See, e.g.*, *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 119 (2d Cir. 2008).

Similar examples abound. One involved a challenge to a controversial practice of sharing customer phone records with the National Security Agency—a case in which the United States was prepared to intervene to ensure its interests were adequately protected. *See Nat'l Sec. Agency Telecomms. Recs. Litig.*, 483 F. Supp. 2d at 945. In yet another case, Pennsylvania state courts sought a blanket disqualification of federally-funded lawyers from state habeas proceedings, animated by what one circuit judge concluded was "simple animosity or a difference in opinion regarding how capital cases should be litigated." *In re Commonwealth's Motion*, 790 F.3d at 486 (McKee, J., concurring). And this petition involves climate change, a topic that has become the subject of significant political disagreement. *See Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 346 (2019) (Alito, J., dissenting from denial of certiorari) ("[T]he controversial nature of the whole subject of climate change exacerbates the risk that the jurors' determination will be colored by their preconceptions on the matter.").

In such politically charged cases, there is a significant risk that state officials will disagree with the decisions of the federal government. Such political disagreements (over the War of 1812 and the federal trade embargo of England) are, in fact, what prompted the earliest predecessor of § 1442 in 1815. *See Willingham*, 395 U.S. at 405.

The value of the protection afforded by § 1442 to private businesses—and the drawbacks of narrowly construing the statute to preclude removal—have not escaped judicial attention. One district judge, who presided for decades over multi-district litigation concerning Agent Orange, made the following observation:

> If cases such as those in this present wave of Agent Orange claims were scattered throughout state courts, manufacturers would have to seriously consider whether they would serve as procurement agents to the federal government. Since the advent of the Agent Orange litigation in 1979, mass tort law has become more hazardous for defendants. While on balance state tort law does more good than harm, its vagaries and hazards would provide a significant deterrent to necessary military procurement.

In re "Agent Orange" Prod. Liab. Litig., 304 F. Supp. 2d 442, 451 (E.D.N.Y. 2004) (Weinstein, J.), *aff'd sub nom. Isaacson v. Dow Chem. Co.*, 517 F.3d 129 (2d Cir. 2008).

For private businesses "acting under" federal officials, the importance of a federal forum is particularly

strong in such cases. Given that their activities were conducted under federal supervision, they should not be the ones to bear the brunt of political disagreements over federal policy choices. And so it is hardly surprising that, as is set forth above, a variety of different businesses have availed themselves of removal under § 1442. The Ninth Circuit's holding threatens to send some indeterminate share of those cases back to state court, based on a requirement that (as discussed below) appears nowhere in the statute or this Court's decisions. That holding is critically important and warrants this Court's review.

II. The court of appeals' holding departs from this Court's precedent, creates a circuit split, misreads the statute, and creates uncertainty for federal officers and private parties.

The court of appeals swiftly and summarily rejected a number of petitioners' federal defenses on the ground that petitioners did "not contend that the government ordered" the conduct at issue, and thus that the defenses did "not flow from official duties." Pet. App. 17a. If a federal defense did not flow from official duties and government instructions, the court of appeals held, a federal defense does not count as a colorable federal defense.

Not only is that holding inconsistent with this Court's cases, sister-circuit precedent, the statute itself, and Article III background principles, it creates uncertainty for the many private parties that rely on federal-officer removal when performing work for the federal government. This Court should review it without delay.

A. The proposition that colorable federal defenses must "flow from official duties" is incorrect as a matter of precedent, text, and constitutional structure.

1. This Court has never adopted the requirement imposed by the court of appeals here: that a party seeking removal under § 1442 must assert a defense that arises not just under federal law, but specifically from official duties. Tellingly, the Court did not even mention such a rule in its two most recent pronouncements on the issue of a "colorable federal defense." In *Mesa v. California*, the Court addressed whether the "colorable federal defense" requirement remained viable at all. 489 U.S. at 134. The Court concluded that it did, relying principally on the statute's history and on doubts about whether the statute would exceed the bounds of Article III jurisdiction without such a requirement. *Id.* at 125-39. Then, in *Jefferson County v. Acker*, the Court easily found a "colorable federal defense" in "intergovernmental tax immunity," noting that "we have rejected a 'narrow, grudging interpretation'" of that requirement. 527 U.S. at 431 (quoting *Willingham*, 395 U.S. at 407). *Jefferson County* is squarely inconsistent with any requirement that the defense arise from official duties. *See, e.g.*, *In re Commonwealth's Motion*, 790 F.3d at 473 (recognizing that in *Jefferson County*, "the judges' duties did *not* require them to resist the tax") (emphasis added).

To be sure, this Court has recognized that an officer's duties often *do* give rise to official immunity and other defenses, and that the statute serves the important purpose of providing a federal forum for litigating *those* defenses. *See, e.g.*, *Mesa*, 489 U.S. at 137; *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981);

Willingham, 395 U.S. at 405. But the Court has never limited the statute to such defenses. Quite the opposite: in *Willingham*, the Court noted that "the test for removal should be broader, not narrower, than the test for official immunity." 395 U.S. at 405. Nor is providing a forum for such defenses the *only* purpose of the statute. Rather, this Court has recognized that another important purpose is to provide refuge from state courts that may be hostile to the decisions of the federal government. *See Watson*, 551 U.S. at 147-48; *supra* at 6-8. That purpose would not be served by limiting the statute to a subclass of federal defenses.

In sum, the requirement imposed by the court of appeals here represents a departure from this Court's cases.

2. This requirement is also unwarranted as a matter of statutory construction. On its face, the statute does not say anything about a connection between any federal defense and official duties. *See* 28 U.S.C. § 1442(a)(1). That alone is good reason not to impose such a requirement.

What the statute does require is a connection—though it can be an attenuated one—between the *plaintiff's claims* and official duties: the suit must be "for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). The phrase "or relating to" was added by a 2011 statutory amendment. Removal Clarification Act of 2011, § 2(b)(2), 125 Stat. 545. As multiple lower courts have recognized, the intent of this change was to facilitate removal by loosening the connection required between the plaintiff's claims and the official duties. *See Moore*, 25 F.4th at 35 & n.4; *Baker*, 962 F.3d at 943-44; *Latiolais*, 951 F.3d at 292; *Sawyer*, 860 F.3d at 258; *In re Commonwealth's*

Motion, 790 F.3d at 470-71. Given that the statute expressly requires a connection between the plaintiff's claims and the official duties—and Congress has chosen to loosen that connection over time—it would be anomalous to now impose a further requirement, absent from the text, of a connection between a *defense* and those duties.

Mesa reinforces this straightforward reading. The *Mesa* Court located the "colorable federal defense" requirement in the phrase "under color of office," which was intended "to preserve the pre-existing requirement of a federal defense for removal" in the Court's prior cases. 489 U.S. at 134-35. The cases on which *Mesa* relied made clear that *any* federal defense sufficed. *See id.* at 125-29; *Davis*, 100 U.S. at 271 ("It ought, therefore, to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for alleged offences against State laws from State courts to the circuit courts of the United States, when there arises a Federal question in them, is as ample as its power to authorize the removal of a civil case."); *Mayor & Aldermen of City of Nashville v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1867) ("Nor is it any objection that questions are involved which are not all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction.").

Moreover, in affirming the "colorable federal defense" requirement, the *Mesa* Court relied on principles of constitutional avoidance, concluding that at least some arguable federal defense was required to ensure that § 1442 did not exceed Article III jurisdiction. *See* 489 U.S. at 136-39. But Article III allows for federal jurisdiction over any case "arising

under" under the Constitution, laws, or treaties of the United States. And the term "arising under" in Article III, this Court has repeatedly held, is considerably broader than the similar term in the general federal-question jurisdiction statute. A case arises under federal law, in the constitutional sense, if it involves a federal defense. *E.g.*, *Osborn v. Haley*, 549 U.S. 225, 244-45 (2007); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494-95 (1983). No particular kind of federal defense is required; the same constitutional principle extends to federal defenses that do not resemble official immunity in any way, such as the preemption of state-law class actions by the Securities Litigation Uniform Standards Act of 1998. *See, e.g.*, *Dudek v. Prudential Sec., Inc.*, 295 F.3d 875, 879 n.3 (8th Cir. 2002) (SLUSA's federal preemption defense and special removal provision "are clearly sufficient to confer Article III 'arising under' jurisdiction") (citing *Verlinden*, 461 U.S. at 494-97). In other words, once there is a colorable federal defense, of any kind, there is no room for constitutional doubt about the federal courts' jurisdiction. Article III therefore provides no support for requiring anything more than a colorable federal defense.

B. The Ninth Circuit's holding leaves private businesses uncertain about whether they can invoke federal-officer removal if they work for the federal government.

By imposing this additional requirement—that the "colorable federal defense" must "arise from" the official duties at issue, Pet. App. 16a, 17a—the court of appeals has created a significant impediment to the availability of federal-officer removal. Under the court of appeals' holding, both federal officers themselves and private parties that have already passed the

"acting under" test must satisfy yet another requirement of uncertain application: the federal defense must "arise from"—or alternatively, "stem from" or "flow from"—the official duties at issue. Pet. App. 16a, 17a. This unwarranted requirement will likely prove uncertain in application and unsettle the ability of private parties to rely on § 1442.

While the court of appeals here applied this novel requirement in summary fashion, *see id.* at 17a, it will likely become the subject of substantial litigation going forward. It is unclear what it means for a legal defense to "arise out of" a legal duty. Consider, for example, *Bell v. Thornburg*. There, a private citizen serving as a Chapter 13 standing trustee under the Bankruptcy Code was sued for allegedly terminating an employee on the basis of race. 743 F.3d at 85. The Fifth Circuit found a colorable federal defense because the employment action was taken "after input from [a] peer review process, and involving communication with and involvement of the United States Trustee and a United States bankruptcy judge." *Id.* at 90. But it was not at all clear that the trustee's federal duties *required* him to undertake that peer review process or, ultimately, to terminate the plaintiff. *See id.* at 86, 90. Applying the court of appeals' holding to the facts of *Bell* would likely prove challenging—and the result may well have been remand of a case where removal was appropriate and consistent with the purpose of the statute.

As a result, the court of appeals' holding will weaken the protections of federal-officer removal for private businesses as well as federal officers. Many cases will be remanded to state court because a federal defense, even though robust, does not pass the Ninth Circuit's "flow from" standard. And more generally, businesses

will have significantly less confidence in their ability to avail themselves of a federal forum. Ultimately, businesses "would have to seriously consider whether they would serve as . . . agents to the federal government," *Agent Orange*, 304 F. Supp. 2d at 451.

This uncertainty will persist as long as the circuit split persists. Pet. 11-16. Any claim that can be brought in one of the nine states of the Ninth Circuit may not be removable—and plaintiffs have a powerful incentive to bring their claims in one of those nine states if they can.

The Court should take this opportunity to clarify that all § 1442 requires, consistent with *Mesa*, is a colorable federal defense that provides jurisdiction under Article III—not a federal defense that "arises out of" official duties. Resolving the circuit split is necessary in order for federal officers and those acting under them to be able to count on the removal protection with any certainty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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