No. 24-813

IN THE

Supreme Court of the United States

CHEVRON USA INCORPORATED, *et al.*,

Petitioners,

v.

PLAQUEMINES PARISH, LOUISIANA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON THE MERITS FOR RESPONDENTS PARISH OF PLAQUEMINES; STATE OF LOUISIANA EX REL. PARISH OF PLAQUEMINES; PARISH OF CAMERON; STATE OF LOUISIANA EX REL. PARISH OF CAMERON

VICTOR L. MARCELLO
Counsel of Record
TALBOT, CARMOUCHE & MARCELLO
17405 Perkins Road
Baton Rouge, LA 70810
(225) 400-9991
vmarcello@tcmlawoffice.com

Counsel for Respondents Parish of Plaquemines; State of Louisiana ex rel. Parish of Plaquemines; Parish of Cameron; State of Louisiana ex rel. Parish of Cameron

120552

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Section 1442 allows removal of civil actions "against or directed to" any person "acting under" a federal officer. The 2011 amendment did not change the "acting under" test established in *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142 (2007). Petitioners argue that the statute permits removal of any suit "relating to" any act taken under federal direction. Under this interpretation, a civil action need only "relat[e] to" any act under federal direction, regardless of whether or not the civil action itself is "against or directed to" any person "acting under" a federal officer. Respondents argue that the "acting under" requirement is satisfied only when the plaintiff's allegations are directed at the relationship between a defendant and a federal officer.

1. Did the 2011 amendment to Section 1442 overrule *Watson*'s interpretation of "acting under" in the statute even though the amendment did not change that language?

2. Does this case involve a "civil action" that is "against or directed to" a person "acting under" a federal officer?

3. In applying the post-2011 "relating to" language of Section 1442, did the Fifth Circuit clearly err in holding that petitioners' refinery contracts were not "relat[ed] to" their production of crude oil given that they had no authority to decide whether to refine their own crude oil?

PARTIES TO THE PROCEEDING

Petitioners are Chevron U.S.A., Incorporated; Chevron U.S.A. Holdings, Incorporated; The Texas Company; Chevron Pipe Line Company; and Exxon Mobil Corporation. Petitioners were defendants-appellants below.

Respondents are Plaquemines Parish, Parish of Cameron, the State of Louisiana, and the Louisiana Department of Energy and Natural Resources. Respondents were plaintiffs-appellees below.

BP America Production Company; Shell Oil Company; Shell Offshore, Inc.; SEPI, L.P.; and Burlington Resources Oil & Gas Company, were also defendants-appellants below. Burlington Resources Oil & Gas Company, a wholly owned subsidiary of ConocoPhillips Company, initially joined the petition for certiorari but was dismissed under rule 46 on June 2, 2025. Burlington Resources Oil & Gas Company remains a party to the remanded state court proceeding.

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Cited Authorities

Page

Page

Statutes

Page

Other Authorities

INTRODUCTION

Petitioners assert that Section 1442 "ensures that private parties sued for assisting federal officers in performing [their duties]" will have access to a federal forum. Br.1. They allege they "are being sued . . . for, *inter alia*, actions undertaken to fulfill a federal contract." Pet.17. They are not.

Petitioners removed on grounds they were sued for assisting federal officers in producing WWII crude oil. Refining activities and contracts, however, were not addressed in their notices of removal or in the respondents' complaints. In *Plaquemines II*, the Fifth Circuit held that WWII crude production was not directed or controlled by any federal officer. Certiorari was denied.[1] After *Plaquemines II*, petitioners revised their removal theory, and now argue that federal officer jurisdiction can be founded on a mere "connection" between their alleged federal duties for which they have not been sued (refining), and their non-federal activities for which they have been sued (crude production).

Section 1442 permits removal of a "civil action . . . *that is against or directed to* . . . any [federal] officer (or any person acting under *that* officer)" (emphasis added). Respondents' civil actions are not "against or directed to" any person acting under a federal officer because no federal officer directed or controlled WWII crude production. Because no federal officer directed or

1. *Plaquemines Par. v. Chevron USA, Inc.*, No. 22-30055, 2022 WL 9914869 (5th Cir. Oct. 17, 2022) (*Plaquemines II*), *cert. denied,* No. 22-715.

controlled WWII crude production, any "person" against whom a civil action is "against or directed to" cannot have been "acting under" a federal officer in producing WWII crude, even though that same "person" may have been "acting under" a federal officer in conducting activities not addressed in the civil action (such as refining).

In applying the post-2011 language of Section 1442 to the facts of this case, the panel majority did not adopt a "variant" of the old causal nexus text. Nor did it find that petitioners were required to prove the existence of an "explicit 'federal directive' with respect to the challenged conduct." Br. 2. Rather, the panel majority held that petitioners failed to prove the relationship required by the 2011 amendment because their contracts did not address crude production "at all," and because petitioners lacked any "control over where their crude oil was refined" under the Petroleum Administration for War's (PAW) mandatory crude allocation program. Pet.App.30-31. The allocation program ensured that government-contracted refiners had the crude they needed to fulfill their contracts regardless of whether they produced their own crude oil.

The respondents in this case include the State of Louisiana, the Louisiana Department of Energy and Natural Resources, and two parish governments with state-approved coastal programs. Their claims are based entirely on the statutes and regulations comprising the state's coastal management program approved under the federal Coastal Zone Management Act of 1972, 16 U.S.C.A. § 1451 ("CZMA"). The CZMA was enacted to "enhance state authority"[2] by allowing states a large measure of

2. S. Rep. No.92-753, at 1 (1972), reprinted in 1972 U.S.C.C.A.N. 4776.

control over federal land use and private land use subject to federal permitting.[3] Under these circumstances, federalism concerns weigh heavily in maintaining a state's rights to enforce its own laws in its own courts.

STATEMENT OF THE CASE

I. Basis Of State Law Claims Alleged In The Complaint

The development of Louisiana's CZMA-approved coastal management program began with the enactment of the State and Local Coastal Resources Management Act of 1978 ("SLCRMA"). La. R.S. 49:214.21 *et seq.* After the adoption of the SLCRMA implementing regulations in 1980 (43 La. Admin. Code Pt. I, 700, *et seq.*), NOAA approved the program, which became effective on September 20, 1980. The program requires that "coastal use permits" ("CUPs") be issued for certain non-exempt "uses" of the coastal zone, which presently includes all or part of twenty parishes. A "use" is defined as "any use or activity within the coastal zone which has a direct and significant impact on coastal waters." La. R.S. 49:214.23(13). "Uses" are divided into "uses of local concern" and "uses of state concern." La. R.S. 49:214.25(1)(2). Oil and gas "uses" are classified as "uses of state concern." La. R.S. 49:214.25(A)(1)(f).

The SLCRMA's statutory enforcement provision, Subsection D of La. R.S. 49:214.36, provides as follows:

> The secretary [of the Louisiana Department of Energy and Natural Resources], the attorney

3. Carlson and Mayer, *Reverse Preemption*, 40 Ecology L.Q. 583, 596-97 (2013).

> general, an appropriate district attorney, or *a local government with an approved program* may bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the coastal zone for which a coastal use permit has not been issued when required or which are not in accordance with the terms and conditions of a coastal use permit.

Beginning in November 2013, six Louisiana coastal parishes filed forty-two lawsuits seeking damages and other relief under Subsection D. The secretary of the Louisiana Department of Energy and Natural Resources and the Louisiana Attorney General intervened in all forty-two cases. Each of the forty-two complaints seeks SLCRMA remedies for violations occurring after the effective date of the program (September 20, 1980) in a case-specific, geographically defined "operational area" of the coastal zone.

The oil and gas industry includes three primary sectors: "upstream" (crude production), "midstream" (transportation), and "downstream" (refining and marketing). Respondents' complaints are limited to the "upstream" crude production ("E&P") sector.

II. Procedural Background Of Louisiana Coastal Litigation

A. *Plaquemines I*

All forty-two lawsuits were initially removed on grounds of federal question, maritime, and diversity jurisdiction, and remanded in due course over the following five years. Thirteen days after the last lawsuit was remanded, all forty-two lawsuits were again removed on

grounds of federal officer and federal question jurisdiction. All forty-two practically identical removal notices alleged that the plaintiff's "Preliminary Expert Report" (the "*Rozel* report") submitted only in *Plaquemines Parish v. Rozel Operating Co.*[4] contained a new legal theory that implicated federally directed WWII crude production, and that this new theory justified re-removal of all forty-two cases even though there was no WWII crude production at all in eighteen of these cases.[5] The Louisiana Eastern and Western Districts each designated a lead case and stayed their remaining cases based on defendants' assurances that the lead cases would "resolve jurisdictional issues that cut across all of the removed SLCRMA cases."[6]

The district courts in both lead cases remanded.[7] The Fifth Circuit initially affirmed on grounds of timeliness,[8] but after an avalanche of amicus filings, vacated its initial opinion and reissued an opinion holding that the removals were timely. This re-issued opinion also held there was no

4. No. CIV.A. 13-6722, 2015 WL 403791 (E.D. La. Jan. 29, 2015). *Rozel* was the first case scheduled for trial upon remand after the first round of removals. After the Fifth Circuit's ruling in the case *sub judice*, *Rozel* was remanded and later tried before a jury on April, 2025. The jury ruled in plaintiff's favor.

5. *Par. of Plaquemines v. Chevron USA, Inc.*, 7 F.4th 362, 367 (5th Cir. 2021).

6. *Plaquemines Par. v. Chevron USA*, 84 F.4th 362, 368 (5th Cir. 2023), quoting *Northcoast*, Pet.App.76.

7. *Parish of Plaquemines v. Riverwood Prod. Co.,* No. CV 18-5217, 2019 WL 2271118 (E.D. La. May 28, 2019) (*Riverwood I); Par. of Cameron v. Auster Oil & Gas Inc.,* 420 F. Supp. 3d 532 (W.D. La. 2019).

8. *Par. of Plaquemines v. Chevron USA, Inc.*, 969 F.3d 502 (5th Cir. 2020).

federal question jurisdiction, but remanded to the district courts for reconsideration of the federal officer removal issue under the intervening *en banc* ruling in *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020). See *Par. of Plaquemines v. Chevron USA, Inc.*, 7 F.4th 362 (5th Cir. 2021) ("*Plaquemines I*").

B. *Plaquemines II*

On remand from the Fifth Circuit, the district court in the lead case in the Eastern District filed by Plaquemines Parish again ordered remand to state court.[9] The Fifth Circuit affirmed in *Plaquemines II,* holding that the "acting under" element was not satisfied because the federal government only regulated, but did not control crude production, and thus no federal officer directed or controlled WWII crude production. Certiorari was denied.[10] The district court in the Western District then also ordered remand, finding that neither the "acting under" nor the "relating to" elements were satisfied.[11]

Plaquemines II was based on an extensive historical record (duplicated in the present record) which demonstrated that the federal role in WWII crude production was limited to minimal regulation. For example, in 1945, the Standard Oil Company hired

---

9. *Par. of Plaquemines v. Riverwood Prod. Co.*, No. CV 18-5217, 2022 WL 101401 (E.D. La. Jan. 11, 2022).

10. *Plaquemines II, supra,* 2022 WL 9914869*, cert. denied*, No. 22-715. Justice Alito took no part in this case.

11. *Parish of Cameron v. Auster,* No. 2:18-cv-00677, W.D. La., Doc. 217, Dec. 22, 2022.

Dr. Charles Popple (Harvard Department of Business History) to write a history of the company's wartime efforts. His book concludes: "Throughout the war period the petroleum industry, voluntarily and without governmental pressure, successfully met all of the demands made upon it." JA39. Addressing the American Petroleum Institute (API) in 1945, Ralph Davies, PAW's Deputy Director, declared that industry cooperation during wartime was "done [] without compulsion. The broad war powers of the [PAW] have never been exercised because it has never been necessary to exercise them to get the job done." ROA.23-30422.47382. In another API address, Interior Secretary Harold Ickes declared that "oil can best do its part in wartime with the least possible direction, and the least possible interference, by the government." ROA.23-30433.47382-3. Frey and Ide's official *PAW History* concludes: "[T]he combined forces of government and industry with a minimum of regulation and maximum of cooperation got from the ground the crude oil that was the indispensable raw material of victory." ROA.23-30422.33093. The Max Ball article cited by petitioners concludes that the PAW exercised its authority "very little," and the industry "direct[ed] its own effort . . . with freedom of enterprise conserved and utilized instead of suppressed." ROA.23-30294.35017. WWII petroleum historian Jay Brigham, Ph.D. concludes: "[C]ontemporary commentators and participants in the wartime programs are virtually unanimous that the relationship was cooperative, and that the government left the production details largely to industry." JA39.

The evidence is clear. The federal government did not control petitioners' crude oil production during WWII.

C. *Plaquemines III*

After *Plaquemines II* was published, the removing defendants in eleven of the forty-two cases urged an entirely new federal officer removal theory (the "refinery theory") premised on their WWII refinery contracts, even though refinery activities are not addressed in the complaints or the removal notices. The removing defendants in these cases allege that they "acted under" federal officers in complying with their WWII refinery contracts, and that their crude production is "related to" these contracts because they refined *some* of the crude produced from the "operational areas" defined in each of the eleven complaints. The crude produced in the remaining thirty-one cases was also refined by government-contracted refineries, but the refinery theory does not apply in these thirty-one cases because the theory requires at least one defendant in each case to have coincidentally refined at least some crude produced from the case-specific "operational area" defined in the complaint.

No refinery directive or contract is mentioned in the illustrative list of "Federal Directives" in the notices of removal in the eleven refinery cases [ROA.23-30294.00057-60], a glaring omission that suggests the "refinery theory" was a gratuitous afterthought cut from whole cloth in the wake of the adverse ruling in *Plaquemines II*. As it turns out, *Plaquemines II* ironically shines a discriminating light on the contrived nature of the "refinery theory" itself, as federal officer jurisdiction was rejected in *Plaquemines II* even though Humble Oil's crude was refined *by one of its corporate affiliates*. Petitioners insist *Plaquemines II* is distinguishable because some of the crude here was refined by the same corporate entity that produced it instead of an affiliate, a hair-splitting distinction that beggars belief.

Petitioners obviously did not believe they were being sued for actions undertaken to fulfill their refinery contracts until after their stated grounds for removal were rejected in *Plaquemines II*. As a separate Fifth Circuit panel has observed, "[o]nly when defendants were unsuccessful in *Plaquemines II* did they construct the refinery argument, leading to additional jurisdictional litigation." *Plaquemines Par. v. Chevron USA, Inc.*, 84 F.4th 362, 378 (5th Cir. 2023).

This proceeding involves two of the eleven "refinery theory" cases, namely *Plaquemines Parish v. Total Petrochemical & Refining USA, Inc.,* Pet.App.66-67 (Eastern District), and *Parish of Cameron v. Apache Corp. of Delaware,* Pet.App.126-149 (Western District). Adopting its reasoning in *Plaquemines Parish v. Northcoast Oil Company* [Pet.App.68-96], the district court in *Total* rejected the refinery theory and ordered remand, and the defendants appealed. The district court in *Apache* likewise rejected the refinery theory and ordered remand, and the defendants appealed. The Fifth Circuit consolidated the *Total* and *Apache* appeals, and affirmed, holding that petitioners' crude production activities were not "related to" the directives in their refinery contracts. Pet.App.1. Motions for rehearing were denied. Pet.App.64-65. It is from this judgment that certiorari was sought and granted.

III. The Refinery Theory Is Based Entirely On A State Law Exemption

Respondents do not seek "billions of dollars in damages based on long-ago operations that pre-date the permitting regime by decades." Br.13. Violations of WWII crude production laws and regulations are not actionable

under the SLCRMA. The relief respondents seek is based solely on violations of coastal use permits issued under the SLCRMA permitting program, and violations based on petitioners' failure to obtain such permits "when required" after the start of the program (September 20, 1980). Petitioners do not allege—nor can they--- that they were "acting under" federal officers at the time when their SLCRMA violations occurred.

The SLCRMA contains eleven listed exemptions, one of which is the "grandfather clause." La. R.S. 49:214.34(A)(1)-(10), and (C)(2). The only pre-program coastal uses at issue are non-exempt uses continued ("carried out") after the SLCRMA permitting program became effective on September 20, 1980. 43 La. Admin. Code Pt. I, 723(A)(2). The complaint alleges no claims based on uses terminated before the start of the permitting program, and no claims based on violations of state laws or regulations in effect before the start of the permitting program.[12]

"Long ago operations," and specifically WWII crude production activities, are thus relevant only to the "grandfather clause" exemption, which provides that "[i]ndividual specific uses legally commenced or established prior to the effective date of the coastal use permit program shall not require a coastal use permit." La. R.S. 49:214.34(C)(2). An oil and gas operator who "legally commenced or established" an "individual specific use" before the start of the permitting program was not

12. The complaints, however, refer to pre-SLCRMA laws in affirmatively alleging that the defendants are not entitled to the grandfather clause exemption. ROA.23-30422.250-273; ROA.23-30294.251-271.

required to obtain a permit to continue that use after the start of the program if the use was not substantially changed after its commencement. However, illegally "commenced or established" uses commenced before but continued after the start of the program required a permit because such uses are "uses" as defined in the statute. Pre-program uses terminated before the start of the program are excluded from the program, and are thus not actionable, *even if such uses were illegal under applicable law.* The only actionable pre-program uses at issue here are illegally commenced or established pre-program uses continued after the program without a permit, or violations of permits issued for such uses.[13]

An operator who illegally commenced a use before the effective date of the program could avoid the obligation to obtain a permit by discontinuing the use before the start of the program. The program procedures provide a mechanism for operators seeking to continue a pre-program use to obtain a definitive determination as to whether the continuance of that use required a permit. 43 La. Admin. Code Pt. I, 723(G). In these cases, petitioners chose to ignore the law while continuing certain exploration and production "uses" of the coastal zone. Hence, both

13. Accordingly, respondents do not seek to "impose massive retroactive liability." Pet.4. The applicable SLCRMA regulations generally require that mineral exploration and production activities, "linear facilities" such as dredged access canals, and "surface alterations" be restored to original condition to the maximum extent practicable upon termination of a use. 43 La. Admin. Code Pt. I, 705N, 711F, 719M. Permits issued under the SLCRMA would have required compliance with these regulations. Operators who chose to continue a use after the start of the program would have been bound by these obligations.

state-court lawsuits seek damages based on petitioners' violations of state law in 1980 and thereafter.

IV. The PAW's Allocation Program And State Regulations

The coincidental occurrence of the production and refining of the same tranche of WWII crude by an alleged vertically integrated corporation in the eleven "refinery theory" cases is the mere byproduct of the operation of the PAW's mandatory crude allocation program, not any defendant-refiner's considered decision or "quite natural response" [Br. 19] to increase its own crude production. Under the allocation program, a refiner that produced crude did not have the discretion to refine it. WWII crude was allocated to refineries based on a government program designed to ensure the maximum efficient production of critical war products such as avgas. Petitioners do not dispute that the PAW, not crude producers, controlled the allocation of crude to refineries *after it was produced in the field*, and do not contest the fact that under the terms of the allocation program, the corporate identity of the crude producer (including its level of "vertical integration") had nothing whatsoever to do with where the crude was refined.

Under the allocation program, petitioners did not have the right to refine their own crude, so refining their own crude could not have been an action undertaken to fulfill their refinery contracts. Besides, there is not a shred of evidence that "vertically integrated" refiners had to produce their own crude to satisfy their WWII avgas contracts. WWII triggered market demands for crude oil that were virtually unlimited, and the industry did not have to be pressured, directed, ordered, controlled,

or cajoled to meet those demands. JA58-59, *PAW History* ("No Government agency had to compel [the oil industry] to do the job."). Subject to the PAW allocation program, WWII crude was purchased on the open market by refineries from crude producers and from each other.[14]

Petitioners contend that the PAW "require[ed] all producers to expand oil production pursuant to federal direction." Br. 8. However, crude producers were "merely . . . subject to federal regulations" during WWII, *Plaquemines II,* 2022 WL 9914869, at *3, and to the extent WWII crude production was "minimally" regulated [Pet.App.25], the focus of these regulations was the conservation of reservoirs, not increased production. The primary regulation of WWII crude production was left to the states. The PAW set crude production rates using conservation measures known as "allowables" that were designed to *limit production* to avoid reservoir damage. The PAW established "maximum efficient rates" for each state, and allowed the states the discretion to allocate their total production under state conservation laws. See evidence cited in Appellees' Brief, Fifth Cir. No. 23-30422. Doc.84-1, ECF pp. 53-54. PAW's Production Director explained that the PAW "was faced with trying to supply

14. See, *e.g.*, ROA.23-30422.32255-32258 (fifteen producers supplied SOLA refinery); ROA.23-30422.31218-31239 (dozens of producers supplied PanAmerican refinery); JA35;64-67,125; ROA.23-30294.31782;31808-31811 (WWII oil companies routinely bought and sold crude and avgas components amongst themselves, including large purchases from non-owned producers); ROA.23-30422.28866; JA64-67 (Humble's crude sent to competitors and affiliates); ROA.23-30422.28866-67 (Stanolind sent crude to various refiners); ROA.23-30422.7906-7 (Amerada crude sent to non-owned refineries).

an adequate quantity of crude oil over an indefinite period of time. No one knew when the war would end. Therefore, plans had to be made for a long war." JA14; 220.

SUMMARY OF ARGUMENT

The allegations of the complaint are strictly limited to petitioners' violations of the SLCRMA resulting from their crude production activities. The Fifth Circuit in *Plaquemines II* concluded that WWII crude producers were merely subject to regulation and did not "act under" the direction of federal officers in producing WWII crude oil. Here, petitioners have abandoned the arguments urged in *Plaquemines II*, and now urge an entirely new theory based on their refinery contracts. However, refinery activities and contracts are not addressed in the complaints or the notices of removal.

Section 1442 permits removal of a state court "civil action . . . *that is against or directed to* . . . any [federal] officer (or any person acting under *that* officer)" (emphasis added). The civil actions filed by the parishes are not "against or directed to" any person acting under a federal officer simply because, as the court in *Plaquemines II* held, no federal officer directed or controlled WWII crude production. No one—neither petitioners nor anyone else—could have "acted under" a federal officer in producing WWII crude.

Petitioners argue that the 2011 amendment permits removal of "any suit 'for or relating to' an act taken under federal direction." Br. 21. To be removable under petitioners' interpretation, the suit or civil action does not have to be "against or directed" to a "person acting under [a federal] officer." Rather, the suit or civil action need

only "relat[e] to" any act under federal direction issued under the authority of any federal officer, regardless of whether or not the suit itself is "against or directed to" a "person acting under federal officer." Petitioners' interpretation cannot be reconciled with the statutory text. The 2011 amendment did not amend the requirement that the civil action must be "against or directed" to a "person acting under [a federal] officer." The "acting under" requirement is satisfied only when the plaintiff's allegations are directed at the relationship between a defendant and a federal officer. Petitioners' theory grants access to a federal forum to "persons" who have federal duties for which they are not being sued when such duties are merely related to non-federal activities for which they are being sued.

The panel majority did not apply a "variant" of the "causation" test mandated by the 2011 amendment. Rather, it faithfully applied the amendment as written, finding that the facts in the record did not show that respondents' crude production activities were related to their refinery contracts. The uncontested evidence shows that *after* crude was produced in the field, the PAW controlled the allocation of crude to government contracted refineries during WWII, and that this allocation program ensured that these refineries had the crude they needed to fulfill their contracts regardless of whether they produced their own crude.

When federal officer removal is based on a contract, the challenged conduct must be related to the directives in the contract. The refinery contracts say nothing at all about oil production, or about how petitioners should acquire the crude to satisfy their contractual obligations. Petitioners concede that there are no federal directives

in their refinery contracts that address crude production. They argue that WWII federal regulations should be allowed to serve as a stand-in for conspicuously absent contractual directives. However, under *Watson,* federal direction cannot be based on mere regulatory compliance. The 2011 amendment did not alter the statutory language that was the basis of this holding.

ARGUMENT

I. The Fifth Circuit Erred In Holding That The "Acting Under" Element Was Satisfied

A. Under The Text of Section 1442, The "Acting Under" Element Is Not Satisfied In This Case

The Fifth Circuit held that petitioners satisfied the "acting under" element of the federal officer jurisdictional test. Respondents challenged this holding in their opposition to the petition for certiorari. Parishes Opp. Br. 29.

The complaints in all forty-two Louisiana coastal lawsuits are limited to petitioners' crude production activities. Refinery activities are not addressed in any complaint or notice of removal. The Fifth Circuit in *Plaquemines II* concluded that WWII crude producers did not act under the direction of federal officers, and certiorari was denied. Petitioners have now abandoned the grounds for removal alleged in their removal notices and in *Plaquemines II,* as they no longer argue that they "acted under" federal officers in producing crude. Instead, they argue that they "acted under" federal officers in refining avgas.

Watson explains that "the removal statute's 'basic' purpose is to protect the Federal Government from the interference with its 'operations' that would ensue were a State able, for example, to 'arres[t]' and bring 'to trial in a State cour[t] for an alleged offense against the law of the State,' 'officers and agents' of the Federal Government '*acting ... within the scope of their authority.*'" 551 U.S. at 150 (emphasis added). The text of Section 1442 permits removal of a state court "civil action . . . *that is against or directed to* . . . any [federal] officer (or any person acting under *that* officer) . . . for or relating to any act under color of *such office*," but the civil actions filed by the parishes are not "against or directed to" any federal officer or person acting under "*that*" federal officer simply because no federal officer directed WWII crude production (emphasis added). Thus, no one could have "acted under" a federal officer in producing WWII crude.

The federal authority of a "person" who acts under a federal officer cannot exceed that officer's authority. Because no federal officer controlled crude production during WWII, the "person" against whom the civil action is "against or directed to" cannot have been acting under a federal officer in producing crude, even though the same "person" may have been "acting under" an officer in conducting operations or activities not addressed in the civil action (such as refining). "[M]erely being subject to federal regulations or *performing some functions that the government agency controls* is not enough to transform a private entity into a federal officer." *Panther Brands, LLC v. Indy Racing League, LLC*, 827 F.3d 586, 590 (7th Cir. 2016)(emphasis added).

Petitioners' argument is not supported by the statutory text. They argue that the statute permits

removal of "any suit [*i.e.,* civil action] 'for or relating to' an act taken under federal direction." Br. 21-22. To be removable under petitioners' interpretation, the suit or civil action does not have to be "against or directed" to a "person acting under [a federal] officer." Rather, the suit or civil action need only "relat[e] to" any act under federal direction issued under the authority of any federal officer, regardless of whether the suit itself is "against or directed to" a "person acting under a federal officer."

The "acting under" requirement is satisfied only when "*the plaintiff's allegations*" are "directed at the relationship between" a defendant and a federal officer.[15] The notices of removal concede this point. ROA.23-30294.53. Petitioners' "acting under" argument is premised entirely on their alleged "relationship" with federal officers whose duties involved refinery operations. While this "relationship" was contractual, petitioners' only "relationship" with the government regarding crude production was merely regulatory in nature, as shown in *Plaquemines II*. The present civil action is not "against or directed to" any refiner acting under a federal officer, but is only "against or directed to" defendants who were conducting crude production activities that were not directed by a federal officer.

The House Committee on the Judiciary wrote that the 2011 changes to Section 1442 were intended "to ensure that any individual drawn into a State legal proceeding based on that individual's status as a Federal officer has

15. *Mohr v. Trs. of Univ. of Pennsylvania,* 93 F.4th 100, 104-05 (3d Cir. 2024) (emphasis added); *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016).

the right to remove the proceeding to a U.S. district court for adjudication."[16] No defendant in the parishes' coastal lawsuits was drawn into State proceedings based on its status as a person acting under a federal officer because no federal officer controlled WWII crude production, and no defendant was sued based on its refinery activities.

To remove under Section 1442, a private "person" must show that he or she is "acting under" an "officer," as the parenthetical phrase "any person acting under that officer" makes specific reference only to an "officer," not to the "United States" or an "agency thereof." The statute's requirement that the removed action be "for or relating to any act under color of *such office*" refers back to the specific federal "officer" under whom the defendant is "acting," so therefore the "act[s]" involved must be "under color" of *that* officer's office. By tying the concept of "acting under" to actions taken "under color of such office," the statute limits such actions to actions involving a federal officer's official duties.[17]

The words "person" and "officer" in Section 1442 must be interpreted in accordance with 1 U.S.C. § 1, which states that "unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations . . . as well as individuals," and the word "'officer' includes any *person* authorized by law *to perform the duties of the office*" (emphasis added). Under these statutory

16. H.R. Rep. No. 112–17, pt. 1 (2011), as reprinted in 2011 U.S.C.C.A.N.

17. *Ely Valley Mines, Inc. v. Hartford Acc. & Indem. Co.*, 644 F.2d 1310, 1313 (9th Cir. 1981) ("Act under color of such office" provision "restricts or clarifies the types of cases" removable under Section 1442.).

definitions, the present civil action is not "against or directed to" a "person acting under" a federal "officer" because, as found in *Plaquemines II*, no federal "officer" had a duty to direct or control crude production, and thus no federal officer could have authorized any private "person" (including any vertically integrated corporation) to assist in carrying out a federal duty to direct or control WWII crude production.

In sum, a finding of federal officer jurisdiction in this case cannot be reconciled with the text of 1 U.S.C. § 1 or 28 U.S.C. § 1442 because: (1) the statutory definitions of the words "person" and "officer" limit the word "officer" to a "*person* authorized by law *to perform the duties of the office*"; (2) private "persons" may remove under Section 1442 only if the civil action is "against or directed to" a "person acting under" an "*officer* ... of the United States or of any agency thereof"; and (3) since no WWII federal officer "perform[ed] the dut[y]" of directing or controlling crude production, this civil action is not "against or directed to" a "person acting under" a federal "*officer*."

Petitioners seek to leverage their "vertically integrated" corporate structures as a means of expanding their rights to remove under Section 1442 to circumstances under which no natural person or other legal entity would be entitled to remove. The "vertically integrated" petitioners' rights to remove should be no greater than the rights of any "persons" engaged in the same activities, including the vertically integrated crude producers who did not refine their own crude, all of whom furthered the war effort and were subject to the same crude production regulations as the petitioners. Under petitioners' "refinery" theory, a large, vertically integrated corporate

defendant need only search its books for a federal contract that might in some way "relate to" the actions for which it has been sued. More to the point, petitioners' theory allows access to a federal forum to parties who are not sued for assisting federal officers in performing their federal duties, thus subverting the purpose of the statute.

B. The Fifth Circuit's "Acting Under" Holding Is Inconsistent With *Watson*

This Court's unanimous decision in *Watson* begins by explaining that Section 1442 "permits removal *only if* Philip Morris, *in carrying out the 'act[s]' that are the subject of the petitioners' complaint*, was 'acting under' any 'agency' or 'officer' of 'the United States.' 28 U.S.C. § 1442(a)(1)." 551 U.S. 142, 147 (2007) (emphasis added). Consistent with *Watson*, the Fifth Circuit in *St. Charles Surgical Hosp., L.L.C. v. Louisiana Health Serv. & Indem. Co.* (*St. Charles II*) held that federal officer jurisdiction does not exist when the plaintiff's "complaint does not include any federally-governed claims." 990 F.3d 447, 455 (5th Cir. 2021) (*St. Charles II*). The *acts that are the subject of the petitioners' complaint* in this case are petitioners' crude production activities, not their refinery activities. Petitioners argue that a civil action is removable under Section 1442 when federally directed conduct *that is not the subject of the complaint* (refining) is "related to" *non-federal conduct that is the subject of the complaint* (crude production). *Watson* instructs that the purpose of Section 1442 is to provide a federal forum to persons who are sued based on their status as persons acting under a federal officer, but there is no federally directed conduct alleged in the complaints.

In 2011, Congress did not amend the statutory language

that governs the "acting under" element. Petitioners have argued, however, that the 2011 amendment changed the "acting under" element, and that they are no longer required to show they were "carrying out" the "acts that are the subject of the [plaintiff's] complaint" because Justice Breyer in *Watson* was merely "summariz[ing]" the pre-2011 "'for' requirement, but now we have 'for or related to.'" Oral Argument recording, Fifth Circuit, No. 23-30294, 37:00-37:26. Not so. The causation standard applied by this Court when *Watson* was decided in 2007 is substantially the same as it is today. As noted by the Seventh Circuit in *Baker v. Atl. Richfield Co.*

> The Supreme Court has never utilized a rigid causation standard for removal. Indeed, long before the Removal Clarification Act of 2011, the Court had opined that "the statute does not require that the [lawsuit] must be for the very acts which the [defendant] admits to have been done ... under federal authority. It is enough that [the] acts . . . constitute the basis . . . of the state [lawsuit]."[18]

Petitioners in essence contend that their status as "vertically integrated" corporate "persons" allows them to remove if the corporation "acts under" a federal officer for any reason at all, so long as the "relaxed" connection requirement is satisfied. But in a post-2011 decision, the Fifth Circuit in *St. Charles II* cautioned that a corporate "person" who acts under a federal officer for one purpose does not necessarily act under that officer

---

18. 962 F.3d 937, 944 (7th Cir. 2020) (quoting *State of Maryland v. Soper*, 270 U.S. 9, 33 (1926)) (citing cases decided before *Watson*). See also Mike Lee, *et al.* Amicus Curiae Br. 12.

for all purposes.[19] Petitioners and Amici Curiae altogether ignore this holding despite the extensive briefing on *St. Charles II* in the Fifth Circuit. ROA.23-30294, Doc.86. In *Parish of Cameron v. Apache Corp.*, the district court found that Shell may have been "acting under" a federal officer in refining crude, but was not "acting under" a federal officer in producing crude. Pet.App.144-149.[20]

Watson notes that the words "acting under" describe "the triggering relationship between a private entity and a federal officer." 551 U.S. at 149. This relationship "typically involves 'subjection, guidance, or control'" by a federal superior, and "must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior." 551

19. *St. Charles II,* 990 F.3d at 455; *Ely Valley Mines, Inc. v. Hartford Acc. & Indem. Co.*, 644 F.2d 1310, 1313 (9th Cir. 1981)(finding federal receiver "acts under" when challenged for dereliction in execution of the court's orders, but not when challenged for negligent performance of duties not entrusted to him by the courts); *Plaquemines Par. v. Exch. Oil & Gas Corp.*, No. CV 18-5215, 2023 WL 3001417, at *4 (E.D. La. Apr. 19, 2023) ("A company found to be acting under a federal officer for some purposes is not thus acting under federal control for all purposes.").

20. Petitioners argue that respondents conceded the "acting under" element at oral argument. Br. 38. Not so. Respondents stated that petitioners arguably were "acting under to produce refined products. That is what they are doing" [Fifth Circuit No. 23-30294, oral argument recording 18:15-18:20], but (referring to *St. Charles II*) a "private party acting under for one purpose does not always act under for all purposes." (Fifth Circuit No. 23-30294, oral argument recording, 36:15-36:51). This finding in *St. Charles II* was repeatedly emphasized in respondents' appellate briefing. Fifth Cir. No. 23-3094, Doc.86, ECF pages 18-19, 26-28. 40, 48. Besides, the panel majority would not have labored over the "acting under" element had it been conceded.

U.S. at 151-52. While a removing defendant need not show that "the complained-of conduct *itself* was at the behest of a federal [officer]," the "acting under" requirement is met only when the plaintiff's allegations are "directed at the relationship between" a defendant and a federal officer, and "involve conduct that *occurred when* [the defendant] was 'acting under' the direction of a federal officer or agency." *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016) (emphasis added). Here, the respondents' allegations are not directed at the relationship between any refiner and a federal officer, and the actionable conduct (non-compliance with the SLCRMA) occurred over thirty-five years after petitioners were allegedly "acting under" federal direction. Since no federal officer was charged with the duty to control WWII crude production, petitioners have no "triggering" relationship with a federal officer. A removable civil action cannot be premised on a relationship that does not exist, nor can it be premised on a non-alleged, irrelevant existing relationship.

The panel majority repeatedly emphasizes that the "relating to" element requires a showing of a "connection or association" between the challenged conduct "and the **relevant** federal directives in Defendants' refinery contracts." Pet.App.19 (emphasis added); Pet.App.12;23;25-6. By ultimately finding that petitioners "acted under" federal directives that were not "relevant" federal directives while at the same time finding that the "acting under" element was satisfied, the panel majority essentially found that the "acting under" element can be premised on an ***irrelevant*** federal directive. The panel majority sought to justify this anomalous result by noting that the "acting under"

and "connection" elements are "distinct," and thus a finding that petitioners were not "acting under" as refiners would be "inconsistent with the fact that a defendant might be acting under a federal officer, while at the same time the specific conduct at issue may not be 'connected or associated with an act pursuant to the federal officer's directions." Pet.App.17. However, the panel majority would not have concluded that petitioners "acted under" federal officers in the first place had it applied its own precedent in *St. Charles II*.

The petitioners' interpretation of the "acting under" element stretches the jurisdictional reach of the statute far beyond its clear intent. Petitioners argue that "over the decades" Congress has "relaxed and relaxed again the limits of federal officer removal." Pet.6; Br. 5. However, as noted in *Watson* in 2007, Congress has "nowhere indicated any intent to change the scope of words, such as 'acting under,' that described the triggering relationship between a private entity and a federal officer." 551 U.S. 142, 149. The same holds true today. Neither the text nor the history of the post-*Watson* 2011 amendment evidences any Congressional intent to change or relax the scope of the words "acting under."[21]

---

21. The evidence actually shows that the refinery contracts do not impose a level of control that would support jurisdiction. See Norman Affidavit, ROA.23-30294.3272-32735, explaining that multiple different technologies were available to make avgas, and that the contracts were just supply contracts that did not specify how avgas was to be refined, or the types crude or fields from which to obtains it. In other words, the avgas specifications were "typical of any commercial contract . . . [and] incidental to sale and sound in quality assurance."*Mayor & City Council of Baltimore, BP P.L.C.*, 31 F.4th 178, 231 (4th Cir. 2022).

Applying the logic of petitioners' argument, a contractor that uses raw materials or component parts that it produces on its own to complete a government contract is deemed to be "acting under" a federal officer in any suit involving only the raw materials or component parts, even when such materials or parts are sold as standardized commercial products to the general public and are not mentioned in the contract or the complaint. As an example, an automobile company that produces a defective car battery incorporated into both private automobiles and military vehicles would be deemed to be "acting under" a federal officer in any exploding battery case involving a private automobile. The purpose of Section 1442 is to protect federal officers and persons acting under them, not to federalize the panoply of contractors and vendors involved in the government procurement apparatus.

Contrary to *Watson*, petitioners contend the "acting under" element is satisfied even when carrying out federal "act[s]" that are **not** the subject of the petitioners' complaint. When the only alleged federally directed conduct is not even mentioned in the complaint, only the broad "relating to" standard is left to mark the jurisdictional boundaries. And as shown below, this Court has sometimes found the marking of such boundaries to be "frustratingly difficult[]." See footnote 26, *infra.* Congress did not intend to confer Section 1442 jurisdiction in suits that merely "relate to" contractual directives that are not implicated in the complaint.

C. The Fifth Circuit's "Acting Under" Holding Is Directly Refuted By The Allocation Program

The panel majority correctly held that the PAW's allocation program "severed" any connection between

petitioners' crude production and refinement activities. Pet. App.36. This holding *also* undermines petitioners' "acting under" argument. "[O]fficial actions are those committed by law to [the officer's] control or supervision."[22] It is undisputed that the PAW retained control and supervision of the allocation of WWII crude. Refinery contracts may have directed or controlled refining activities, but control of the sourcing and allocation of crude to refineries was not delegated by the PAW or any federal officer to private parties. As noted by the panel majority, petitioners "were in the same position as companies that did not produce crude oil but had refineries with federal contracts." Pet. App.36. While certainly WWII crude was purchased on the open market by refineries from crude producers and from each other, such transactions were subject to the allocation program.

II. The Fifth Circuit Correctly Held That Petitioners' WWII Crude Production Did Not "Relate To" Their Federal Refinery Contracts

A. Causation Is A Factual Question Reviewed For Clear Error

An order remanding a case removed under Section 1442 is reviewed *de novo. St. Charles Surgical Hosp., L.L.C. v. Louisiana Health Serv. & Indem. Co.* (*St. Charles II*), 990 F.3d 447, 450 (5th Cir. 2021). However, "factual determinations made in the process of determining jurisdiction are reviewed for clear error." *U.S. Fire Ins. Co. v. Villegas,* 242 F.3d 279, 283 (5th Cir. 2001).

22. *State v. Meadows*, 88 F.4th 1331, 1345 (11th Cir. 2023), *cert. denied*, 145 S. Ct. 545 (2024), quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896); see definition of "officer," 1 U.S.C. § 1.

Petitioners and Amici Curiae rely primarily on *Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 390 (1992), in arguing that the panel majority's interpretation of the words "relating to" was not broad enough. The issue in *Morales* was limited to a question of law, namely, whether a federal law preempted a state law. If the "relating to" determination here was so limited, *de novo* review would be appropriate. However, the "relating to" question in this case is entirely factual, mandating review for clear error.

The panel majority concluded that petitioners' *only* proof of an alleged "connection" between refining and crude production is limited to evidence that "crude oil is a necessary component of avgas, and one way of obtaining crude oil is to produce it." Pet.App.28-29. The panel majority characterized petitioners' alleged "connection" evidence as "attenuated" at best, noting that "even that attenuated connection was severed by Defendants' lack of control over where their crude oil was refined and by their use of crude oil purchased on the open market from other producers to comply with their contractual obligations." Pet.App.30. *Morales* concluded that "[t]he present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line." 504 U.S. at 390. By contrast, the "relating to" determination here required the panel majority to "draw the line" in the factual record,[23] and in

23. Pet.App.33 ("[T]hese cases fall on the unrelated side of the line given the lack of any reference, let alone direction, pertaining to crude oil production in [petitioners'] federal contracts."). Referring to the multiple district court rulings denying Section 1442 jurisdiction, the Fifth Circuit in a related case observed that "[w]hat the district courts have concluded is that these activities were *not in fact* related." Plaquemines Par., 84 F.4th at 374 (emphasis in original).

doing so, it found that an ultimately severed attenuated connection is hardly the stuff of even a borderline question, and that at bottom, petitioners proffer an "unduly expansive reading of the 'connected or associated with' element." Pet.App.29, n.70. Petitioners posit an alleged fact-based "connection" in the nature of the "tenuous, remote, or peripheral" connections *Morales* excludes from any affirmative "relating to" determination. *Morales*, 504 U.S. at 390. They cannot overcome the clear-error standard.

B. No Directive In The Refinery Contracts "Relates To" Crude Production

Petitioners and Amici Curiae argue that the panel majority erroneously applied a "variant" of the pre-2011 causal nexus test. In discussing the "acting under" element, the panel majority begins by noting that "a removing defendant 'need not show that its alleged conduct was precisely dictated by a federal officer's directive.'" Pet. App.14. In discussing the "relating to" element, the panel majority later reiterates that "Defendants need not show that a federal officer directed the specific oil production activities being challenged." Pet.App.29. Thus, the panel majority did not "err[] by reading an explicit-contractual-requirement into the statute" [Br. 34], did not require that the contracts "limit" petitioners' "discretion with regard to [the] challenged conduct"[Br. 33], and "ultimately conclude[d] that these cases fall on the unrelated side of the ["relating to"] line given the lack of any reference, let alone direction, pertaining to oil crude oil production in [petitioners'] federal contracts." Pet.App.33. To pretend that the Fifth Circuit applied a "variant" of the pre-2011 causal nexus test is to enter a world of make believe.

Having no contractual directive to anchor their relatedness argument, petitioners contend that jurisdiction can be founded upon a contract that has no "express" or "explicit" directive [Br.34-35], and also does not "even generally address" the challenged conduct. Fifth Cir. No. 23-30422.Doc.156, ECF p. 27. The Chamber of Commerce goes so far as to suggest that a contract that permits the contractor complete discretion is good enough. See Chamber Amicus Curiae Br. 19, 24-25. Petitioners argue that sometimes a contract "leaves some discretion" to the contractor's "greater specialized expertise," and sometimes "specific *regulatory* directions obviate the need for largely redundant contractual verbiage." Br. 36. Petitioners fault the panel majority for failing to consider "the broader regulatory background" in applying the "connection" test. Br. 35.

While conceding that regulatory compliance is not federal direction, petitioners nonetheless contend that WWII regulations "ensured" that they "would refine crude from the specific fields at issue in this case." Br. 36. They cite no such "regulation," and instead rely solely on the dissent of Judge Oldam [Br. 36-37] for this dubious proposition, who in turn cites no evidence at all. JA40-63. Rather than "obviating" the need for "more specific" contractual direction, PAW's extra-contractual control of crude allocation *via* the allocation program in fact proves that the government denied refiners the right to control and direct "about where and how the necessary crude oil should be procured" Br. 37, thus severing any connection between refining and crude production. Humble Oil did not refine the crude it produced from the Potash Field in *Plaquemines II*; Shell did not refine the crude it produced from the fields in nine of thirteen cases in which it is a

named defendant [Pet.App.38, n. 92]; and Chevron and its predecessors did not refine the crude they produced from the fields in eleven of the thirty-six cases in which they are named as a defendant. Petitioners' "refinery theory" applies only to cases in which a defendant has refined the crude it produced from the field at issue in the case, and that theory has been urged in only eleven of the forty-two coastal cases. These facts alone refute any assertion that WWII regulations "ensured" that petitioners "would refine crude from the specific fields at issue in this case." Br. 36.

The unrefuted evidence shows that ***after*** crude was produced in the field, the PAW programmed its distribution to refineries that made war products, and that a particular refiner's production of crude played no part in whether it was allocated that crude by the PAW. Petitioners' expert Gravel provides an explicit list of factors the PAW considered in allocating crude, none of which involve the refiner's role in producing the crude, or its relationship or affiliation, if any, with the crude producer. JA26; 31. Gravel also admits that federal government controlled the allocation of crude oil from fields to refineries JA26-28, and that the PAW "allocated crude oil . . . on the basis of obtaining the maximum amount of critical war products from the minimum run of crude oil." JA27, 78-79. Plaintiff's expert Brigham echoes this latter statement, adding that crude was "not [allocated] on the basis of which company owned the crude." JA209-211. The PAW's Solicitor, J. Howard Marshall, testified: "Q. Okay. And they couldn't even use their crude oil the way they wanted, that was allocated? A. Crude oil was all subject to allocation of one kind or another." ROA.23-30294.26305-06. The United States admits that refiners had no control over the refinement of their own crude

after it was produced: "PAW therefore directed crude-oil supplies to the 'refineries that were in the greatest need of them,' getting 'specific volumes of crude to specific refiners.'" U.S. Amicus Br. 25.[24]

In their official PAW History, Frey and Ide summarize the PAW's crude allocation program as follows:

> There is no doubt that a large factor in meeting requirements [for crude to make war products] was the system of monthly allocations of *specific* volumes of crude to *specific* refiners on the basis, always, of providing first for the minimum quantities estimated to be necessary to assure maximum output of war products. After minimum needs of war plants had been supplied, the rest of the crude was divided equitably, always with a view to keeping *all* refineries operating, because it was known that the Nations's entire refining plant must be kept in operation. . . . By far the greatest share of the work was done by the industry itself, **with final approval always remaining the responsibility of PAW**. *PAW History*, p. 215, ROA.23-30294.29599 (emphasis added, italics in original); JA26-28.

The work "done by the industry itself" was performed by the "industry refining committees." ROA.23-30294.29599. The PAW was staffed by regular, full-time

24. See also ROA.23-30294.35602 ("[PAW] refinery division allocated crude oil among and controlled runs within all refineries"); ROA.23-30422.28825-26 (PAW directed crude to refineries without regard to refiner/producer affiliation); and ROA.23-30294.36549.

government employees, most of whom were recruited from the oil industry. ROA.23-30294.11387. The PAW established the Petroleum Industry War Council (PIWC), and district committees below the PIWC, to formulate national oil and gas policy. These committees had "no administrative authority at all," but they "secured the cooperation of the industry." ROA.23-30294.11385. "The district PAW offices and the industry refining committees maintained 'scoreboards' of statistical information as to crude stocks, runs, yields and other pertinent information at *each* refinery. . . . Supplies could be programmed into refineries that were in the greatest need of them." *PAW History*, p.215, ROA.23-30294.29599.

The operation of the allocation program ensured that all of the crude necessary to produce critical war products, including avgas, would be allocated to refineries producing those products, and that the remainder would be allocated to all refineries on an "equitable" basis. It was thus unnecessary for any refiner to increase the production of its own crude to make war products, as the allocation program ensured that refiners had the necessary supply of crude to fulfill their government contracts regardless of whether they refined their own crude. Petitioners argue that the PAW "authorized petitioners to use their own crude" from the oilfields at issue. Br. 25; 29. The not-so-subtle impression sought to be conveyed is that petitioners were authorized to refine their own crude at their discretion. They were not.

The panel majority concluded that "[i]n allocating the crude oil, the PAW considered neither the practices of the producer nor whether the company that produced the crude had an affiliated refinery." Pet.App.35-36. It

found that the PAW's crude allocation program "severed" any link between crude production and refining. Pet. App.36. Judge Oldam's dissent ignores this severed link by redefining the supply chain as a series of connected links that, conveniently, excludes the allocation program. Pet.App.53.

Petitioners urge the Court to find that the "pervasive federal regulations" imposed during WWII satisfy the "relating to" element because a federal forum should not be denied "when, as here, the federal role is pervasive." Br. 23; 36. But the virtually unanimous conclusions of WWII petroleum historians (See *supra*, pp. 6-7) and the panel majority's characterization of WWII crude oil production regulations as "minimal" [Pet.App.25] demonstrate that neither the "federal role" in crude production nor WWII federal regulations were "pervasive."

Petitioners further argue that some of their WWII production practices now challenged by respondents were "required" by "comprehensive wartime regulations" [Br. 44], and that adopting the production practices "that respondents now claim should have been employed" would have "hampered" their ability to produce more crude oil to fulfill their government contracts. Br. 24. However, the allocation program ensured that petitioners had access to the crude needed to fulfill their contracts, and the "minimal" government regulation of WWII crude production did not require petitioners to engage in the challenged production practices. For example, the *Rozel* report opines that petitioners should have, but did not, use directional drilling whenever feasible. ROA.23-30294.213. Petitioners argue directional drilling would have "slowed production practices" [Br. 41] when in fact it would have

enhanced production. ROA.23-30294.170. No WWII regulation prohibited directional drilling, and petitioners' expert admits directional drilling was permitted as long as spacing requirements were complied with. JA19-20. Saltwater injection was not "prohibited by PAW regulations" [Br. 44], and WWII materials regulations actually encouraged its use by assigning high preference ratings.[25]

Under petitioners' refinery theory, whether any particular tranche of WWII Louisiana crude is "related to" federal direction is entirely dependent on whether the PAW's crude allocations happened to align with the parishes' operational area designations confected thirty-five years hence. Jurisdiction under the refinery theory is thus entirely a matter of *post hoc* happenstance. The panel majority concluded that "[a]t base, whether or not Defendants happened to refine their own crude oil in fulfilling their federal contracts had nothing to do with any actions they took pursuant to a federal directive. Instead, it depended on 'happenstance or logistical preference.'" Pet.App.36 (quoting *Jefferson Par. v. Chevron*, 2023 WL 8622173, at *6).

When federal officer removal is based on contractual directives, the challenged conduct must be related to the federal directives in the contract. Not just any federal contract will do. Accordingly, the panel majority found that "in cases involving private federal contractors, courts

25. The federal crude production regulations at issue and the evidence demonstrating the absence of conflict between these regulations and the challenged production practices are referenced in the record of *Plaquemines II*, 23-30055, Original Brief of Plaintiff-Appellee and Intervenors Appellees, pp. 40-53.

look to the contents of the relevant federal contracts in determining whether the challenged conduct was 'connected or associated with' acts taken under color of federal office." Pet.App.25; see also *Northcoast*, Pet. App.92. Responding to petitioners' argument that the required "connection" can be satisfied by regulation alone, Judge Davis at oral argument bluntly observed that "if you don't go back to the contract, then you are just in never-never land in trying to predict the next case." Fifth Circuit, No. 23-3024, oral argument recording 12:04-12:08.

Petitioners' interpretation of the connection test would take it "too far" in that jurisdiction could be predicated on "any upstream action a company might take to satisfy a federal contract, no matter how attenuated or outside of federal control." *Plaquemines Par. v. Exch. Oil & Gas Corp.*, 2023 WL 3001417, at *4 (E.D. La. Apr. 19, 2023). For example, "land must be purchased to place the refinery on, construction workers must be retained to build the refinery, employees must be retained to operate the refinery, janitorial staff must be retained to clean the refinery, etc." *Id.* at *4. The district court in *Northcoast* noted that "upstream oil producing operations in the field and downstream refining operations at the plant are two entirely separate operations requiring different skills, and different operations at different locations." Pet.App.87. (internal quotations omitted). All five of the federal district court judges (some with multiple cases) who have analyzed petitioners' "refinery theory" have found no "connection" between WWII refining contracts and crude production.

The panel majority held that "stretch[ing] the 'relating to' requirement to permit" removal in this case "would be to ignore the statute's 'language, context, history,

and purposes.'" Pet.App.34 (quoting *Watson, supra,* at 147). This Court has acknowledged the "frustrating difficulty" in a strictly text-based application of a "relating to" requirement,[26] and its precedents support the panel majority's reliance on statutory "language, context, history, and purpose."[27]

C. Increase In Crude Production Was Simply Evidence Of A Functioning Capitalist System

Petitioners declare the required "connection" to be "self-evident." Pet.17. Without citing any evidence, they argue their WWII crude production was expanded "[t]o satisfy their wartime government contracts" because more crude was needed to make avgas. Br.10. But the reality is decidedly less myopic. WWII refineries needed more oil to refine for both civilian and military use (seventy percent of WWII crude production went to civilians. JA67; ROA.23-30422.31380), so WWII crude producers, including those who owned and did not own refineries, increased crude production. WWII triggered a dramatic increase in overall worldwide and domestic demand for crude oil. To premise a jurisdictionally significant "connection" between the refinery contracts and increased crude supply on the companies' "quite natural [capitalist] response" [Br.19] to increase overall supply to meet overall demand is to trivialize the "relating to requirement," and to permit proof of jurisdiction by simply parroting truisms, such

---

26. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995).

27. *Id.* at 656-66; *Mellouli v. Lynch*, 575 U.S. 798, 812-813 (2015); *Maracich v. Spears*, 570 U.S. 48 (2013) (construing "in connection with").

as "crude oil is the primary, indispensable component of refined avgas." Br. 19. Secretary of War Stimson cautioned that "to prepare for war, in a capitalist country, you have got to let business make money out of the process or business won't work." ROA.23-30422.45100.

The "refinery theory" is not urged by the government-contracted vertically integrated defendants in thirty-one coastal of the coastal lawsuits because no defendant in those lawsuits refined the crude it produced from the case-specific operational areas defined in the complaint. Quoting Judge Oldham's dissent, petitioners assert that "it is unclear how [the companies] could have met their contractual obligations" without using the challenged production practices. Br. 3. To the contrary, it cannot be any clearer, as Shell managed to meet its contractual obligations without refining the crude it produced using the challenged practices in nine of the thirteen "operational areas" from which it produced WWII crude [Pet.App.38, fn.92], and Chevron or its predecessors did the same in twenty-five of the thirty-six "operational areas" from which it produced WWII crude. Neither Shell nor Chevron needed to increase crude production to fulfill their government contracts because the allocation program guaranteed they would have the crude they needed to satisfy their contractual obligations. Although practically all crude producers increased production to some extent in response to the historic increase in demand for crude oil during WWII, no refiner who also produced crude had to increase its crude production to fulfill a government contract.

Citing no evidence, Judge Oldham wrote that the "connection" element is satisfied because "defendants could not simply snap their fingers and, voilà, make avgas. They had to make it out of something, and that something

was crude oil. . . . So defendants satisfied their contractual avgas obligations by increasing their own exploration and production of crude. The exploration/production of crude was therefore undeniably 'related to' the avgas refining contracts." Pet.App.45. Judge Oldam assumed that petitioners must have increased their crude production to satisfy their avgas contracts because it is axiomatic that crude is needed to make avgas. By the same token, lemons are needed to make lemonade, apples are needed to make apple cider, and oranges are needed to make orange juice. It is doubtful that these types of indisputable and literally "limitless" relationships were what Congress had in mind when it "relaxed" the causation standard in 2011. Lemonade, apple cider, and orange juice makers do not have to grow lemons, apples, or oranges to sell their products. As the panel majority notes, petitioners "were in the same position as companies that did not produce crude oil but had refineries with federal contracts." Pet. App.36. Judge Oldam's analysis does not account for the fact that non-crude producer refiners also had to "make [avgas] out of something."

What's more, the "operational areas" at issue in all forty-two coastal lawsuits were not defined until thirty-five years after V-J Day. Even if it is assumed that petitioners' alleged decision to increase production was motivated by their contractual obligations, any such decision certainly could not have been focused on the case-specific operational areas in the eleven refinery cases that were not defined until these coastal suits were filed thirty-five years after VJ Day. The logic of petitioners' refinery theory requires the nonsensical conclusion that Shell, for example, extracted oil from four of its fields to "fulfill their federal contracts," but its crude extraction from nine other fields was not extracted to "fulfill their federal contracts."

D. The Critical Fields Survey

Petitioners point to the PAW's "Critical Fields" survey as showing that the government "contemporaneously recognized the connection" between their crude production "in the relevant fields" and the "federally directed refining" of that production. Br. 43. It was not. The PAW's "Critical Fields" designation was merely the product of a PAW field survey entitled "Preliminary Survey Listing Critical Fields Essential to the War Effort." ROA.23-30422.7900,10054. The survey was not a regulation. None of the refinery contracts mention the fields at issue, much less a specific "Critical Field." The primary focus of the PAW's designation of "Critical Field[s]" was their geographical location and susceptibility to sabotage. JA203. ROA.23-30422.10052-69. Tellingly, the Fifth Circuit found no federal officer jurisdiction in *Plaquemines II*, even though the Potash Field in that case was classified as a "Critical Field" in PAW's survey.[28]

E. Requirement of Simultaneity Of Federal Direction And The Charged Conduct

Petitioners do not allege they were "acting under" federal officers after the start of the SLCRMA permitting program thirty-five years after WWII. The federal-officer jurisprudence has long acknowledged the necessity of a simultaneity of the charged conduct and the asserted federal direction. In *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liab. Litig.*, the Second Circuit noted that "[c]ritical under the [federal officer] statute is to what extent defendants acted under federal direction *at the time*

28. Brief of Defendants-Appellants, *Plaquemines II*, Fifth Circuit No. 22-30055, Doc. 36, ECF p. 40.

they were engaged in the conduct now being sued upon." 488 F.3d 112, 124-25 (2nd Cir. 2007) (emphasis added). The Seventh Circuit in *Baker v. Atl. Richfield Co.*, 962 F.3d 937 (7th Cir.2020) notes that defendants must show that "the act that is the subject of Plaintiffs' attack . . . occurred *while* Defendants were performing their official duties." (emphasis in original). *Id.* at 945.[29] Petitioners' violations of the SLCRMA after the start of the permitting program are too temporally remote from the asserted WWII federal direction to satisfy the "relating to" element.

F. The Contracts Confirm There Is No "Connection"

The avgas contracts themselves sever refining from crude production. As noted, the contracts do not mention any specific means or sources of crude. *See e.g.* The Texas Company - Port Arthur contract, Pet.App.150-181. Nor do the contracts implicate any promise, or otherwise suggest, that petitioners would, or could, bring any increased crude production to bear as consideration for the contracts.

The required "connection" cannot be based upon contractual provisions that tie the price of avgas to the "cost of crude" and "any new state or local taxes on crude oil." Br. 3;24. These provisions deal with the price of avgas, not "oil production" activities. The contracts are cost plus contracts. Br. 42; JA41. For example, the Texas Company's contract includes a "Price Escalation" section, which based adjustments to the price of avgas on changes in the price

29. The Third and Fourth Circuits also require that the charged conduct and asserted official authority be contemporaneous. *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 809 (3d Cir. 2016); *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 252; *In re Commonwealth,* 790 F.3d 457, 472 (3d Cir. 2015).

of "East Texas crude" in the "East Texas field" and on changes in the "wholesale price Index Number for 'All Commodities other than Farm Products and Foods,' as now published by the Bureau of Labor Statistics, ..." Pet. App.158. In addition, the contracts expressly provide that petitioners would bear no risk for the supply of crude. For example, Section X of the Texas Company Contract leaves no doubt that petitioners were not responsible for delays, failures or the unavailability of crude oil to supply the refineries in achieving "performance under [the] contract." This provision shows that petitioners made no pledge in the contract as to their ability or willingness to produce crude. See also Shell contract, JA183-184.

III. Federalism And Parochialism

In *State of Colorado v. Symes*, 286 U.S. 510, 518 (1932), a federal officer case, this Court declared that "it is axiomatic that the right of the states, consistently with the Constitution and laws of the United States, *to make and enforce their own laws* is equal to the right of the federal government to exert exclusive and supreme power in the field that by virtue of the Constitution belongs to it"(emphasis added). Accordingly, this Court held that the federal officer statute "is to be construed with highest regard for such equality." *Id.* Thus, while the right to remove under Section 1442 is liberally construed, federalism concerns require respect for the rights of states to enforce their own laws in their own courts, especially when the state itself is a party to the action. These federalism concerns are further heightened in the present case, as the state and parishes are seeking

enforcement of laws authorized by the federal CZMA, which cedes certain federal powers to the coastal states for the express purpose of enhancing the states' authority to manage their coastal zones.

The specter of hostile state courts alluded to in Judge Oldham's dissent cannot be reconciled with his prior views, which are consistent with *Symes*. In *Durbois v. Deutsche Bank*, 37 F.4th 1053, 1060 (5th Cir. 2022), a case decided a year prior to his dissent, Judge Oldham wrote that "[t]here's nothing wrong with a plaintiff's desire to litigate his claims in state court. Those courts are generally the equals of federal ones, and when it comes to questions of state law specifically, the state courts are superior."

The federal officer statute was expanded to include all federal officers in 1948. Act of June 25, 1948, ch. 646, §1442(a), 62 Stat. 938. From 1948 to 2011, the appellate courts required a showing of a direct causal nexus. During this period, this country fought the Korean War, the Vietnam War, Desert Storm, the Iraq War, the Afghanistan War, and engaged in other numerous military interventions. There is no evidence that the alleged risk of state court parochialism caused any military contractor to shy away from meeting the military's needs during these conflicts. Petitioners' argument that military contractors will refrain from accepting the Pentagon's usual largesse during wartime on account of the panel majority's interpretation of Section 1442 is, to say the least, implausible.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

VICTOR L. MARCELLO
Counsel of Record
TALBOT, CARMOUCHE & MARCELLO
17405 Perkins Road
Baton Rouge, LA 70810
(225) 400-9991
vmarcello@tcmlawoffice.com

Counsel for Respondents Parish of Plaquemines; State of Louisiana ex rel. Parish of Plaquemines; Parish of Cameron; State of Louisiana ex rel. Parish of Cameron