

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 FOR RESPONDENTS STATE OF
LOUISIANA AND LOUISIANA DEPARTMENT
OF ENERGY AND NATURAL RESOURCES**

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November 13, 2025

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INTRODUCTION

The federal-officer removal statute authorizes the removal of civil actions filed (1) “against ... [t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof,” (2) “for or relating to any act under color of such office[.]” 28 U.S.C. § 1442(a)(1). Each prong identifies a distinct and necessary condition for removal. Prong (1) explains that the action must be filed against a specific defendant, while prong (2) explains that the filed action must address a specific subject matter.

Prong (1) is critical because it ensures that the action is, in fact, an action against a federal officer or his proxy. That confirmation is automatic in an action filed against an actual federal office or officer—“[t]he United States or any agency thereof or any officer ... of the United States or of any agency thereof.” *Id.* But, in other contexts (as here), the question is whether an action is filed against “any person acting under” a federal officer. *Id.* As the Court has held, the present participle “acting” requires a court to ask whether the defendant was cloaked with federal authority when committing the act that harmed the plaintiff. *See Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007) (“The federal statute permits removal only if [the defendant], in carrying out the ‘act[s]’ that are the subject of the [plaintiff’s] complaint, was ‘acting under’ any ‘agency’ or ‘officer’ of ‘the United States.’”).

That inquiry is easy in the cases below. Everyone agrees (Br.19) that “the subject of [respondents] complaint[s],” *Watson*, 551 U.S. at 147, is petitioners’ pro-

duction activities along the Louisiana coast. Petitioners also have rightly abandoned any argument that they acted under a federal officer when conducting such activities. The Fifth Circuit rejected that theory in *Plaquemines Parish v. Chevron USA, Inc.* (*Plaquemines II*), 2022 WL 9914869 (5th Cir. Oct. 17, 2022); this Court denied certiorari on that question, *see* Pet. for Cert. i, *Chevron USA, Inc. v. Plaquemines Parish*, No. 22-715 (U.S.); and petitioners thereafter waived that theory below, did not brief it at the certiorari stage, and declined (Br.49) to assert it in their opening merits brief. There is thus no question that petitioners cannot invoke the federal-officer removal statute: These are not actions against “any person acting under” a federal officer. 28 U.S.C. § 1442(a)(1).

That is what the district courts held in deeming removal improper because petitioners cannot satisfy prong (1). *E.g.*, Pet.App.86 (accepting petitioners’ “abandoning any effort to establish that any defendant acted under a federal officer when engaging in oil production activities”); Pet.App.89 (petitioners “[r]ecogniz[e]” that “the operations challenged in this case[] were not under federal direction”).

Remarkably, petitioners’ opening merits brief says next to nothing about this fundamental defect. Instead, they—on behalf of the defendants in the cases below¹—repeatedly rewrite the statute, declaring that

¹ Among those defendants is a ConocoPhillips subsidiary. Pet.ii, iii. Although the ConocoPhillips subsidiary withdrew from the petition for writ of certiorari without explanation, *see* 5/9/25 Letter, the subsidiary remains a defendant and would equally benefit from any ruling in petitioners’ favor.

the statute “permit[s] removal of an action ‘for or relating to any act under color of such office.’” *E.g.*, Br.6, 25, 28. Starting from that premise, they then say (a) they *did* act under federal officers in refining a fuel called avgas pursuant to federal contracts; (b) one component of the avgas sometimes was oil produced on the Louisiana coast; and thus (c) the subject matter of this action (oil production activities) is “related to” an act under a federal officer (petitioners’ refining of avgas). Voilà: This is an action “for or relating to any act under color of such office.” 28 U.S.C. § 1442(a)(1).

This is a masterclass in clever lawyering that misled the Fifth Circuit, which reached the right result but accepted petitioners’ erroneous view that the analysis may start with the premise that they were “acting under” federal officers in their refining activities.

The error in petitioners’ statutory rewrite is that the statute does not permit removal of just *any* action “for or relating to any act under color of such office” (that is, prong (2)). *Id.* The antecedent question is whether these are cognizable actions to begin with: actions against a defendant who, “in carrying out the ‘act[s]’ that are the subject of the [] complaint[s],” was acting under a federal officer (that is, prong (1)). *Watson*, 551 U.S. at 147. They are not—because petitioners agree that these lawsuits address oil production activities on the coast, which concededly were not committed under federal direction.

Petitioners’ mix-and-match theory of removal—identify another context in which a defendant acted under a federal officer and ask whether that act relates to the subject of the lawsuit—does not work. If it did, then a federal contractor sued for assault after a

Friday night bar fight might actually have a path to federal court. Petitioners would say he acted under a federal officer when he was on the job earlier in the day (prong (1)), so the only question is whether the reason for the bar fight was related to his day job (prong (2)). That is not the law—for the simple reason that, “in carrying out” the assault, that contractor was not cloaked with federal authority. *Watson*, 551 U.S. at 147. So, prong (1) would quickly end that theory, just as it ends this case.

Again, both district courts below ruled against petitioners on precisely this ground. *See* Pet.App.149 (“[E]ven considering the evidence that [petitioners] acted under government refining contracts with respect to manufacturing refined petroleum products, [they have] not shown that, with respect to the production of oil and gas in the field, [they] ‘acted under’ a federal officer.”); Pet.App.94 (petitioners “may have acted under a federal officer when refining oil in Port Arthur, Texas but [they] did not act under a federal officer when producing that oil in Louisiana”); *see also* Pet.App.35 (reproducing unchallenged factual determination that petitioners’ “oil production and refining sectors were ‘two entirely separate operations requiring different skills, and different operations at different locations’”).

The State pointed out this vehicle defect at the certiorari stage. BIO.19–22. Petitioners refused to address it on the merits, instead accusing (Reply.5) the State of trying “to change the subject” to prong (1) (because petitioners desperately want this case to be about prong (2)). But it is petitioners who are papering over their unanimous losses on prong (1) in the district

courts below. And because they cannot overcome those losses, their prong (2) arguments in this Court are misdirection and a moot point.

Telling petitioners they fail a straightforward application of *Watson* is hardly worth the Court's time and resources. Accordingly, the Court should dismiss the writ as improvidently granted. Alternatively, the Court should affirm the judgment below.

STATEMENT OF THE CASE

A. Legal Background.

1. In 1972, Congress enacted the Coastal Zone Management Act, which is codified at 16 U.S.C. § 1451 *et seq.* *E.g.*, *New Jersey v. Delaware*, 552 U.S. 597, 620 (2008). Congress included within the Act express findings regarding various substantial State interests in the integrity of their coasts. Among others, Congress found that “[t]he habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man’s alterations.” § 1451(d). Congress likewise found that “[i]mportant ecological, cultural, historic, and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost.” § 1451(e). Congress also deemed “inadequate” “present state and local institutional arrangements for planning and regulating land and water uses.” § 1451(h).

Accordingly, Congress concluded that “[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands

and waters in the coastal zone.” § 1451(i). And in particular, Congress promised its own form of encouragement through the provision of “Federal financial assistance to meet state and local needs resulting from new and expanded energy activity in or affecting the coastal zone.” § 1451(j); *see* § 1452 (detailed congressional declaration of policy).

To effectuate these findings, the Act “require[s] States to submit their coastal management programs to the Secretary of Commerce for review and approval.” *New Jersey*, 552 U.S. at 620. “In return, States with approved programs [] receive federal funding for coastal management.” *Id.*

2. In 1978, Louisiana opted into this federal program by enacting the State and Local Coastal Resources Management Act of 1978 (SLCRMA). *See* La. R.S. § 49:214.21 *et seq.* The Act took effect in 1980, when the Legislature and the Governor approved coastal use guidelines. *See* § 49:214.39; La. Admin. Code § 43:I.700 *et seq.*

Through the Act, the Louisiana Legislature declared “that it is the public policy of the state ... [t]o protect, develop, and, where feasible, restore or enhance the resources of the state’s coastal zone.” La. R.S. § 49:214.22(1). To that end, the Legislature sought to protect a variety of uses “of coastal resources consistent with the maintenance and enhancement of renewable resource management and productivity” and “the need to provide for adequate economic growth and development.” § 49:214.22(3).

The Act defines “use” as “any use or activity within the coastal zone which has a direct and significant impact on coastal waters.” § 49:214.23(13). The Act also distinguishes between “[u]ses of state concern” (such as dredging and fill activities intersecting multiple water bodies, and the production of minerals) and “[u]ses of local concern” (such as piers, camps, and jet-ties). § 49:214.25.

Relevant here, the Act provides that “[n]o person shall commence a use of state or local concern without first applying for and receiving a coastal use permit.” § 49:214.30(A)(1). The Act also exempts a number of activities from the permit requirement, including (of course) hunting and fishing. § 49:214.34(A)(4). Another exemption covers “[i]ndividual specific uses legally commenced or established prior to the effective date of the coastal use permit program[.]” § 49:214.34(C)(2).² That exemption, however, is unavailable insofar as the use that *post*-dates 1980 is effectively a new and different use.

After 1980, therefore, a person who wishes to conduct a covered “use” of the Louisiana coast must either obtain a coastal use permit or seek to satisfy an exemption. If he fails to do so, the Act permits the State and local governments to file “injunctive, declaratory, or other actions as are necessary” to prohibit unlawful uses. § 49:214.36(D).

² The State’s brief in opposition contains a typo regarding this exemption—the omission of the following bolded word: “Although that permitting regime is **not** retroactive, it exempts (as relevant here) coastal uses that were ‘legally commenced’ prior to SLCRMA’s 1980 effective date.” BIO.4–5.

B. Procedural Background.

1. Petitioners are a number of oil and gas companies who wished to—and did—use the Louisiana coast after 1980. They could have opted not to do so. Or, they could have sought coastal use permits for each of their desired uses. But they did neither. Instead, they decided to use the Louisiana coast without a permit (or in violation of a permit), and they have placed all their bets on trying to satisfy SLCRMA’s exemption for the continuation of uses that were “legally commenced” prior to 1980.

Accordingly, a number of coastal Louisiana parishes filed (and the State intervened in) approximately 42 lawsuits against various entities in 2013—including the two lawsuits below, *Plaquemines Parish v. Total Petrochemical and Refining USA, Inc.*, No. 18-cv-5256 (E.D. La.), and *Parish of Cameron v. Apache Corp. of Delaware*, No. 18-cv-688 (W.D. La.), which were originally filed in Louisiana state court. For easy reading, the State here will refer to those two cases as *Plaquemines* and *Cameron* when citing those dockets.

The cases generally charge petitioners (and their predecessors) with violating SLCRMA by conducting certain “oil and gas operations and activities” along the Louisiana coast without a permit after 1980. *E.g.*, *Plaquemines*.Dkt.1-8 at 10. In that regard, petitioners’ repeated claims that they are sued for “production of crude oil ... during World War II” (Br.i) and their “activities during WWII” (Br.14) are massively misleading—those pre-1980 activities are relevant only because petitioners have placed their bets on satisfying the “legally commenced” exemption.

The unlawful post-1980 operations and activities involve, among other things, the improper use of waste pits (holes dug into the coast to deposit waste); the improper discharge of waste like drilling fluid directly into Louisiana’s coastal waters and marsh; and the improper dredging of canals across the coast resulting in erosion, saltwater intrusion, and catastrophic storm surges. *Id.* at 10–13. For present purposes, an exhaustive catalogue of petitioners’ unlawful conduct is unnecessary. That is because the parties agree (as the courts below did) that the complaints in *Plaquemines* and *Cameron* challenge only petitioners’ oil “production activities.” Br.19 (quoting Pet.App.45); *accord* Br.3, 20, 36, 45, 46, 47, 49. And that is sufficient to answer the removal question presented.

2. Over the past decade, petitioners have repeatedly attempted to remove the various lawsuits to federal court. Because this case (at this juncture) involves the federal-officer removal statute, only that aspect of the tortured procedural history is relevant here.

The federal-officer removal statute permits the removal of a civil action filed (1) against “any person acting under [a United States] officer,” (2) “for or relating to any act under color of such office.” 28 U.S.C. § 1442(a)(1). Petitioners have failed to satisfy prong (1) twice—first with respect to the oil production activities challenged in the complaints below, and then with respect to the contracts that undergird the “refinery” theory they press today.

a. Petitioners initially attempted to take all of these cases to federal court on the theory that (a) they are entitled to invoke the exemption for uses “legally commenced” before 1980 and (b) at least some of the

oil production activities that they conducted before 1980 occurred during World War II, when the federal government regulated oil production for the war effort, and some of the oil that they produced fueled war machines; thus (c) these are suits against defendants acting under federal officers. *See Plaquemines*.Dkt.1 (removal notice); *Cameron*.Dkt.1 (removal notice).

While *Plaquemines* and *Cameron* were pending, the Fifth Circuit considered that theory in another case that the parties call *Plaquemines II*—and the Fifth Circuit unanimously rejected the theory in 2022. *See* 2022 WL 9914869. The Fifth Circuit held that petitioners identified nothing more than “merely being subject to federal regulations,” which is insufficient under *Watson*. *Id.* at *3. The Fifth Circuit also observed that petitioners pointed to no contract suggesting that they “were subjected to the federal government’s guidance or control as subcontractors.” *Id.* at *4. In making that last point, the Fifth Circuit stated in dicta that “refineries, who had federal contracts and acted pursuant to those contracts, can likely remove [under § 1442], but that does not extend to [parties] not under that contractual direction.” *Id.* (citation omitted).

On that date—October 17, 2022—petitioners faced a decision point: press on with their failed “acting under” theory based on oil production activities, or try to develop a new “acting under” theory based on a refinery contract. They did both.

They first told the two district courts below that they would appeal *Plaquemines II* to this Court—and that they “preserve[d]” their “acting under” theory for the oil production activities “pending the resolution of

the petition for a writ of certiorari by the Court.” *Plaquemines*.Dkt.87 at 6; *Cameron*.Dkt.113-1 at 2. This Court denied certiorari on that “acting under” theory on February 27, 2023. *See* Pet. for Cert. i, *Chevron USA, Inc. v. Plaquemines Parish*, No. 22-715 (U.S.). After February 2023, and in accordance with their stated intent to waive the theory following this Court’s resolution of it, petitioners never raised that theory again.

b. That left petitioners’ other gambit—to come up with a new “refinery” removal theory that implicates only a small subset of the 42 cases. *See Plaquemines Parish v. Chevron USA, Inc.*, 84 F.4th 362, 378 (5th Cir. 2023) (“Only when defendants were unsuccessful in *Plaquemines II* did they construct the refinery argument, leading to additional jurisdictional litigation.”); *see also id.* at 374 (criticizing petitioners for misconstruing the closing line of “dicta in *Plaquemines II*”: “Common sense would dictate that” the *Plaquemines II* Court meant removal might be proper if refineries were “sued for activities taken pursuant to the federal directives in their refinery contracts, *i.e.*, refining activities.” (citation omitted)). This refinery theory switches the relevant activities for purposes of assessing whether petitioners were ever acting under a federal officer.

According to this new theory, (a) some petitioners had federal contracts to refine a fuel known as avgas and (b) they happened (it was quite literally out of their control) to use some of the oil they produced on Louisiana’s coast to refine that avgas; thus (c) petitioners were “acting under” a federal officer in refining avgas and that conduct was “related to” the types of

oil production activities challenged in this case, proving up removal under § 1442(a)(1). As part of this argument, petitioners not only refused to claim that they acted under a federal officer while engaged in the types of oil production activities challenged in this case—they outright disavowed needing to establish that fact at all.

Here is exactly how petitioners framed that argument:

- “Plaintiffs’ lawsuit is against The Texas Company and Gulf, which are persons acting under a federal officer by virtue of their WWII federal contracts to produce avgas and other military petroleum products, and the lawsuit is ‘relating to’ an act under color of federal office because it challenges The Texas Company’s and Gulf’s activities to produce the key component required to fulfill their federally-contracted obligations to produce WWII avgas.” *Plaquemines*.Dkt.87 at 8.
- “The ‘acting under’ analysis is very straightforward in this case: The Texas Company and Gulf ‘acted under’ federal officers because they were federal contractors during the war and produced 100- and 91-octane avgas for the military ... to detailed, government-set specifications at their Port Arthur refineries using Delta Duck Club and Grand Bay crude.” *Plaquemines*.Dkt.87 at 9.
- “The Texas Company and Gulf ‘acted under’ federal officers not for all purposes but in

their capacities as government-contracted avgas refiners. Under *Latiolais*, The Texas Company and Gulf can thus remove a civil action challenging conduct connected to or associated with their acts as federally-contracted refiners, like Plaintiffs' lawsuit here." *Plaquemines*.Dkt.87 at 13.

- "For this case to be removable, The Texas Company and Gulf did not need to be 'acting under' federal officers *when producing crude oil* in the Delta Duck Club and Grand Bay fields. To the contrary, The Texas Company's and Gulf's crude-oil-production practices in Delta Duck Club and Grand Bay need only be *related to* their actions *as refiners* under the federal government's subjection, guidance, and control." *Plaquemines*.Dkt.87 at 13.
- "[T]he removing Defendants here have demonstrated that this case was properly removed under Section 1442(a)(1) because (1) The Texas Company and Gulf were acting under federal officers by virtue of their avgas-production and other petroleum refining operations at their Port Arthur refineries under contract with the federal government and (2) the charged conduct—The Texas Company's and Gulf's crude-oil-production activities in Delta Duck Club and Grand Bay—is closely connected to their federal refining contracts." *Plaquemines*.Dkt.87 at 15.

3. Petitioners lost their new refinery argument in every court to hear it, including in the two district courts below. The *Plaquemines* district court began with the fact that the challenged “oil production activities ... will not (without more) suffice for federal officer removal[.]” Pet.App.77. Petitioners “conceded this argument,” the court continued. *Id.*; accord Pet.App.86 (“So crucially, the Removing Defendants have altered their ‘acting under’ argument by abandoning any effort to establish that any defendant acted under a federal officer when engaging in oil production activities, which is what this lawsuit and all of the SLCRMA lawsuits are about.”); Pet.App.89 (petitioners “[r]ecogniz[e]” that “crude oil production, much less the operations challenged in this case, were not under federal direction”).

The “sole[]” remaining question was whether petitioners’ “latest refinery-contract-based theory for federal officer removal” changed anything. Pet.App.77–78; see Pet.App.86 (“[T]he Removing Defendants’ new theory is that defendant Gulf Oil acted under a federal officer when refining aviation fuel during World War II pursuant to a federal supply contract.”). It did not. The court assumed *arguendo* that “Gulf was acting under a federal officer to produce military petroleum products at its refinery in Port Arthur, Texas during World War II.” Pet.App.88. But “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.88. And while “Gulf Oil may have acted under a federal officer when

refining oil in Port Arthur, Texas,” “it did not act under a federal officer when producing that oil in Louisiana.” Pet.App.94.

The district court also called out petitioners for improperly mixing and matching “acting under” conduct by trying to use unchallenged refining activities as the hook for finding oil production activities “related to” the “acting under” conduct. *See* Pet.App.89–90 (rejecting the argument that “the related to prong ... [can] relieve the Removing Defendants of having to show—which they cannot do—that a federal officer directed Gulf’s oil production activities”). “[P]ut another way,” the court said, petitioners cannot “satisfy the acting under prong by relying on federal directives governing conduct (refining) that is not implicated by the plaintiffs’ lawsuit.” Pet.App.90.

The *Cameron* district court reached the same result. Like the *Plaquemines* court, the *Cameron* court heard “Shell[’s argument] that its oil and gas production activities are directly connected to (or associated with) the requirements of its government refining contracts, and that it was ‘acting under’ a federal officer or federal office in fulfilling those war-time contracts.” Pet.App.145. The *Cameron* court likewise shared the *Plaquemines* court’s bewilderment at petitioners’ wrongheaded approach: “[T]he existence of a refining contract [does] not mean that the defendant ‘acted under’ a federal officer with respect to the exploration and production activities challenged in the plaintiffs’ lawsuit.” Pet.App.146. The *Cameron* court thus easily “agree[d]” that, “even considering the evidence that Shell acted under government refining contracts with respect to manufacturing refined petroleum products,

it has not shown that, with respect to the production of oil and gas in the field, it ‘acted under’ a federal officer.” Pet.App.147, 149.

4. The Fifth Circuit affirmed, correctly following its instinct that petitioners’ refinery theory is wrong—but it did so in a way that was tainted by petitioners’ rewriting of the federal-officer removal statute.

The Fifth Circuit began with the common ground among the parties: “[T]he challenged conduct here pertains to Defendants’ exploration and production activities[.]” Pet.App.21. The Fifth Circuit also highlighted that the avgas refining contracts undergirding petitioners’ refinery theory are “utterly silent” regarding where or how Petitioners would obtain the crude oil necessary to create avgas. Pet.App.27 (citation omitted). In fact, they did not “direct, require, or even suggest that [petitioners] produce [their] own crude in order to meet [their] contractual obligations.” *Id.* (citation omitted).

On top of that, the Fifth Circuit underscored the randomness of the fact that some oil producers happened to refine some of their own oil into avgas: During World War II, a federal agency known as the Petroleum Administration for War (PAW) was responsible for allocating oil to various refineries—“whether or not [petitioners] 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” but instead “depended on ‘happenstance or logistical preference.’” Pet.App.35–36.

But the Fifth Circuit mistakenly determined that the district courts erred in “conclud[ing] that although

[petitioners] may have acted under a federal officer in *refining* petroleum products, they were unable to show they acted under a federal officer in *producing* crude oil.” Pet.App.15. The Fifth Circuit thought it wrong to require petitioners to show “that they acted pursuant to federal directives when they engaged in the conduct giving rise to Plaintiffs’ suits.” Pet.App.16. Specifically, the Fifth Circuit believed that requirement would “impermissibly conflate[] the ‘distinct’ ‘acting under’ and ‘connected or associated with’ elements of the federal officer removal test.” Pet.App.17. The Fifth Circuit did not address *Watson* or the myriad other appellate precedents holding otherwise.

Despite ruling against the State on prong (1) of the removal analysis, the Fifth Circuit ruled in the State’s favor on prong (2) because “the relationship between [petitioners’] oil production and refining activities was insufficient to satisfy the fourth element of federal officer removal.” Pet.App.29. Petitioners “need not show that a federal officer directed the specific oil production activities being challenged,” the Fifth Circuit emphasized, but “they still must show these activities had a sufficient connection with directives in their federal refinery contracts.” *Id.*; accord Pet.App.33 (“[W]e ultimately conclude that these 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.”). But they could not, not least because they had no “control over where their crude oil was refined” and they had unbridled discretion to obtain oil however they pleased to fulfill their avgas contracts. Pet.App.30; see Pet.App.29–30

(“[T]he contracts gave [petitioners] ‘complete latitude ... to forego producing any crude and instead to buy it on the open market.’”).

SUMMARY OF ARGUMENT

I. These cases begin and end with petitioners’ failure to satisfy prong (1) of the federal-officer removal statute by showing that these cases are filed against “any person acting under” a federal officer.

A. The plain text of the statute—and in particular, the present participle “acting”—covers only an action filed against a defendant who is performing a present and continuing act under a federal officer. A wide swath of federal courts of appeals unanimously understand that requirement to mean that the defendant must have been acting under a federal officer when it injured the plaintiff. In fact, that is exactly the rule this Court articulated in *Watson*: The statute “permits removal only if [the defendant], in carrying out the ‘act[s]’ that are the subject of the [plaintiff’s] complaint, was ‘acting under’ any ‘agency’ or ‘officer’ of the United States.” 551 U.S. at 147. And that is the rule that traces throughout the Court’s removal precedents, which ensure a federal forum for “‘officers and agents’ of the Federal Government ‘acting ... within the scope of their authority.’” *Id.* at 150.

B. There is no dispute that petitioners do not satisfy that rule. Indeed, they concede that they were not acting under federal officers when committing the oil production activities that are the subject of the complaints below. Recognizing their dilemma, they told the Fifth Circuit that *Watson*’s rule was “dictum,” and that Congress subsequently amended the statute in

relevant part—neither of which is true. The United States also has filed a brief attempting to resurrect the “acting under” oil production theory that petitioners lost and then waived. But this Court routinely ignores such amicus tactics—and it should do the same here.

C. Petitioners’ mix-and-match theory of removal also goes nowhere. They claim that they acted under federal officers pursuant to avgas refining contracts. But they are not (and likely could not be) sued over refining activities. Both *Watson* and the statutory text itself thus squarely foreclose petitioners’ attempt to find “acting under” conduct in another context and then try to link it up with the actual charged conduct in this case. At bottom, this is an extraordinarily easy case—insomuch that a dismissal as improvidently granted is in order, or alternatively a brief affirmance.

II. A. The prong (2) “relating to” inquiry is ultimately irrelevant. Petitioners pitched it as the marquee issue, but they papered over the fact that the Court cannot reach prong (2) because petitioners cannot get past the “acting under” analysis in prong (1).

B. But even if the Court wished to consider prong (2), the Fifth Circuit correctly recognized that the prong (2) analysis required special care in this context. That is because petitioners’ “refinery” theory for prong (1) is unmoored from the text of the statute—and so, if that theory could ever work, there would need to be a close nexus between petitioners’ refining contracts and the actual charged conduct, *i.e.*, the oil production activities. But, as the Fifth Circuit recognized (and petitioners do not seriously dispute), the re-

finery contracts say virtually nothing about oil production. The Fifth Circuit thus reached the right result in affirming the remand orders below.

ARGUMENT

The federal-officer removal statute authorizes the removal of civil actions that are (1) “against ... [t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof,” (2) “for or relating to any act under color of such office[.]” 28 U.S.C. § 1442(a)(1). Petitioners do not get past prong (1), and thus their prong (2) arguments are both irrelevant and wrong. The Court should dismiss the writ as improvidently granted, or affirm the judgment below.

I. THESE ARE NOT SUITS AGAINST PERSONS ACTING UNDER FEDERAL OFFICERS.

As the district courts below recognized, these cases begin and end with petitioners’ failure to satisfy prong (1) of the federal-officer removal statute. As relevant here, that prong permits removal only of a discrete universe of civil actions: those filed “against ... any person acting under” a federal officer. 28 U.S.C. § 1442(a)(1). Or, as this Court has put it, “[t]he federal statute permits removal only if [the defendant], in carrying out the ‘act[s]’ that are the subject of the [the plaintiff’s] complaint, was ‘acting under’ any ‘agency’ or ‘officer’ or ‘the United States.’” *Watson*, 551 U.S. at 147; *see id.* at 151–52 (the “acting under” relationship “typically involves ‘subjection, guidance, or control’” as the private person makes “an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior”).

That basic rule is dispositive here because petitioners have conceded that they did not engage in oil production activities—the subject of the complaints below—under a federal officer. Moreover, their attempt to shift the Court’s attention to federal refining contracts is blatant misdirection—for no refining activities are charged (or could be charged) in the complaints below. For these reasons, the Court should simply dismiss the writ as improvidently granted, or affirm the judgment below.

A. Removal Is Available Only Where a Defendant’s Charged “Acts” Were Committed Under Federal Authority.

1. Relevant here, the federal-officer removal statute authorizes removal only of “[a] civil action ... that is commenced in a State court ... against ... any person acting under” an officer of the United States. 28 U.S.C. § 1442(a)(1). The plain meaning of that statutory text is that the action must be filed against a defendant that was cloaked with federal authority when it committed the acts that harmed the plaintiff.

That basic understanding flows principally from the present participle “acting.” “A present participle is used to signal present and continuing action.” *E.g.*, *Westchester Gen. Hosp., Inc. v. Evanston Ins. Co.*, 48 F.4th 1298, 1307 (11th Cir. 2022); *see Farrey v. Sanderfoot*, 500 U.S. 291, 296 (1991) (“The gerund ‘fixing’ refers to a temporal event.”). The statute thus covers only an action filed against a defendant who is performing a present and continuing act under a federal officer.

A natural follow-on question is present and continuing *at what point in time?* As one of petitioners’ favorite cases (Pet.14, 16, 24, 25, 28, 29) explains, the statute focuses on whether the defendant “was ‘acting under’ a federal [officer] ... at the time of the complained-of conduct.” *In re Commonwealth’s Motion*, 790 F.3d 457, 469 (3d Cir. 2015). The Third Circuit, like virtually all circuits,³ rightly recognized that Congress has limited removal to those actions where the defendant was acting under a federal officer when it

³ See, e.g., *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 289, 291 (5th Cir. 2020) (en banc) (cited at Br.31, 32, 38) (the defendant “was entitled to remove this negligence case filed by a former Navy machinist because of his exposure to asbestos while the Navy’s ship was being repaired at the [defendant’s] shipyard under a federal contract”); *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 255 (4th Cir. 2017) (cited at Br.31, 32) (asking whether defendant “was a ‘person acting under’ the Navy when it constructed the boilers with asbestos that allegedly harmed [the victim]”); *Moore v. Electric Boat Corp.*, 25 F.4th 30, 35–36 (1st Cir. 2022) (cited at Br.31) (the defendant “built the USS Francis Scott Key while ‘acting under’ the authority of naval officers” because “[t]he Navy oversaw every aspect of the design, construction, maintenance, and modernization of the submarine, including the use of asbestos” that allegedly harmed the plaintiff); *Bd. of Cnty. Comm’rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1254 (10th Cir. 2022) (cited at Br.31) (“Exxon has not established that it acted under a federal officer by complying with the terms of its OCS leases[.]”); *Graves v. 3M Co.*, 17 F.4th 764, 769–70 (8th Cir. 2021) (defendant “was not ‘acting under’ federal authority when it failed to warn commercial earplug customers of the injury risks plaintiffs allege”); *Connecticut v. Exxon Mobil Corp.*, 83 F.4th 122, 144 (2d Cir. 2023) (“That is fatal for Exxon Mobil, which bears the ‘burden of providing candid, specific and positive allegations that [it was] acting under federal officers when’ its alleged campaign of deception was underway.” (internal quotation marks omitted)).

injured the plaintiff—that is, whether “the injuries the [plaintiff] complains of are based on the [defendant’s] conduct *while* it was ‘acting under’” a federal officer. *Id.* at 468 (emphasis added).⁴

To be clear, this is not a requirement that the federal officer must have “specifically directed or caused” (*cf.* Br.51) the conduct that harmed the plaintiff. *Cf.* Pet.App.17 (Fifth Circuit mistakenly believing that this requirement would “impermissibly conflate[] the ‘distinct’ ‘acting under’ and ‘connected or associated with’ elements of the federal officer removal test”). As the Third Circuit has explained, the question whether a defendant “‘act[ed] under’ color of federal office at the time of the complained-of conduct” is separate from the question whether the defendant “acted pursuant to a *federal duty* in engaging in the complained-of conduct.” *In re Commonwealth’s Motion*, 790 F.3d at 470. At the prong (1) “acting under” step of the removal analysis, a defendant is not “required to allege that the complained-of conduct *itself* was at the behest of a federal [officer].” *Id.* It is instead enough (but still necessary) that the “the injuries the [plaintiff] complains of are based on the [defendant’s] conduct while it was ‘acting under’ the [federal officer].” *Id.* at 468.

2. This is precisely the rule that the Court articulated and applied in *Watson*. There, the Court held

⁴ Note that the only other plausible interpretation—that is, a present, continuing act under a federal officer *at the time of suit*—would not only be inconsistent with the statute, but also would automatically doom petitioners’ removal arguments because there is no argument that they were acting under federal officers when these suits were filed a few years ago.

that the statute “permits removal only if [the defendant], in carrying out the ‘act[s]’ that are the subject of the [plaintiff’s] complaint, was ‘acting under’ any ‘agency’ or ‘officer’ of ‘the United States.’” 551 U.S. at 147. That rule, the Court explained, stems from “the removal statute’s ‘basic’ purpose,” which is to provide a federal forum for “‘officers and agents’ of the Federal Government ‘acting ... within the scope of their authority.’” *Id.* at 150. The Court then applied that rule to the facts in *Watson*.

The plaintiffs in *Watson* challenged the accuracy of the term “light,” which Philip Morris used to describe some of its cigarettes. 551 U.S. at 146. That challenge effectively targeted how those cigarettes were “tested”—a process that was subject to the Federal Trade Commission’s “detailed supervision.” *Id.* at 146–47. The Court recognized that the prong (1) “acting under” question was whether “Philip Morris [was] ‘acting under’ officers of the FTC *when it conduct[ed] cigarette testing*.” *Id.* at 154 (emphasis added). And the Court said no, finding “nothing” that could “be construed as bringing Philip Morris within the terms of the statute.” *Id.* at 157.

Particularly relevant here is the Court’s express reliance on the Fifth Circuit’s decision in *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), which applied the same rule. *Winters* was a suit against Dow Chemical implicating its contract to “provid[e] the Government with a product that it used to help conduct a war”—namely, Agent Orange, which was alleged to have caused the plaintiff’s lymphoma. *Watson*, 551 U.S. at 153–54; *see Winters*, 149 F.3d at 390. This Court accepted that the relevant prong (1)

question in *Winters* was whether “Dow was ‘acting under’ officers of the Department of Defense *when it manufactured Agent Orange*.” *Watson*, 551 U.S. at 154 (emphasis added). The Court further cited the page of *Winters* where the Fifth Circuit found prong (1) satisfied because “the government maintained strict control over the development and subsequent production of Agent Orange.” *Winters*, 149 F.3d at 399.

Under *Watson*, therefore, there is no question that the federal-officer removal statute “permits removal only if [the defendant], in carrying out the ‘act[s]’ that are the subject of the [plaintiff’s] complaint, was ‘acting under’ any ‘agency’ or ‘officer’ of ‘the United States.’” 551 U.S. at 147.

3. This settled understanding, moreover, can be traced throughout the Court’s removal precedents. The Court has long emphasized that “the general government must cease to exist whenever it loses the power of protecting itself *in the exercise* of its constitutional powers.” *Tennessee v. Davis*, 100 U.S. 257, 262–63 (1879) (citation omitted and emphasis added). Central in that concern, of course, is the unfettered exercise of federal authority. Where federal officers and agents are “acting” “within the scope of their authority,” the Court has explained, Congress has the power to authorize the removal of actions involving that exercise of federal authority. *Id.* at 263, 271.

For that reason, the *Davis* Court criticized the notion that federal officers and agents who, “when thus acting [in enforcing federal law], within the scope of their authority,” could be arrested and tried in State court for a violation of State law. *Id.* at 263.

Similarly, in *Maryland v. Soper*, 270 U.S. 9 (1926), it was critical that the chauffeur responsible for driving federal prohibition agents around was sued for “acts ... alleged to have been done at a time when he was engaged in the discharge of his duties while acting under and by authority of” the prohibition agents. *Id.* at 22. The irreducible minimum, the Court confirmed, is that the defendant must have been acting “under asserted official authority” when he committed the charged offense. *Id.* at 33.

Likewise, in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), the Court reiterated that removal by private parties was permitted “only” if they were “authorized to act with or for [federal officers or agents] in affirmatively executing duties under ... federal law.” *Watson*, 551 U.S. at 151 (quoting *City of Greenwood*, 384 U.S. at 824); see *id.* (deeming *City of Greenwood* “consistent with” the Court’s longstanding removal precedents).

The through line in these precedents is “the removal statute’s ‘basic’ purpose”: to provide a federal forum for “‘officers and agents’ of the Federal Government ‘acting ... within the scope of their authority.’” *Id.* at 150. That basic purpose is effectuated only if removal is properly limited to those actions filed against a defendant who was acting under a federal officer in committing the acts that harmed the plaintiff.⁵

⁵ To add “extra icing on a cake already frosted,” *Yates v. United States*, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting), it bears noting that the same “acting under” framework also has always applied in actions brought under 42 U.S.C. § 1983. See *Tanzin v. Tanvir*, 592 U.S. 43, 48 (2020) (interpreting similar “acting under” language in § 1983 and the Religious Freedom

B. Petitioners’ Production Activities Concededly Were Not Committed Under Federal Authority.

1. As the district courts below recognized, this analysis is easy to apply here. The courts below and petitioners agree that “the charged conduct” in the complaints—that is, “the ‘act[s] that are the subject of the [] complaint[s],” *Watson*, 551 U.S. at 147—is petitioners’ “production activities.” Br.19 (citation omitted); *accord* Br.3, 20, 36, 45, 46, 47, 49. The prong (1) question, therefore, is whether petitioners—“in carrying out” the oil production activities—were “‘acting under’ any ‘agency’ or ‘officer’ of ‘the United States.’” *Watson*, 551 U.S. at 147. That answer is easy because petitioners agree that the answer is no.

As an initial matter, remember that only post-1980 uses require a permit under SCLRMA. *Supra* pp.6–7. Petitioners have never argued that they were acting

Restoration Act similarly). There, as here, the threshold question is whether the defendant “violate[d] a [] right while acting ‘under color of law.’” *Lindke v. Freed*, 601 U.S. 187, 195 n.1 (2024). That is why, for example, the question in *Lindke* was whether James Freed acted under color of law “*when* he blocked Lindke and deleted his comments.” *Id.* at 197 (emphasis added). That also is why the question in *Griffin v. Maryland*, 378 U.S. 130 (1964), was whether the amusement park security guard acted under color of law “*when* he enforced the park’s policy of segregation against black protestors.” *Lindke*, 601 U.S. at 195 (emphasis added). In all of these contexts, the critical question is whether “the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority.” *Id.* at 198 (citation omitted). So, too, here in determining whether the defendant harmed the plaintiff while cloaked in federal authority.

under federal officers—in any context—after 1980. That gap alone is fatal for petitioners.

But, even looking at pre-1980 conduct, petitioners abandoned—and indeed, waived—any argument that they were acting under federal officers when they engaged in the sorts of oil production activities challenged below. Following their loss on that theory in *Plaquemines II*, they told the district courts that they would “preserve” that theory “pending the resolution of the petition for a writ of certiorari by the Court.” *Plaquemines*.Dkt.87 at 6; *Cameron*.Dkt.113-1 at 2. This Court’s denial of certiorari on that theory came and went in February 2023. *See* Pet. for Cert. i, *Chevron USA, Inc. v. Plaquemines Parish*, No. 22-715 (U.S.). And petitioners never raised that theory again.

Not only that, but petitioners also framed their new “acting under” theory exclusively in terms of “their WWII federal contracts to produce avgas.” *Plaquemines*.Dkt.87 at 8; *id.* at 13 (“The Texas Company and Gulf ‘acted under’ federal officers not for all purposes but in their capacities as government-contracted avgas refiners.”). Indeed, they complained that, “[f]or this case to be removable, The Texas Company and Gulf did not need to be ‘acting under’ federal officers *when producing crude oil*.” *Id.*

If all that were not enough, petitioners did not claim at the certiorari stage that they were acting under a federal officer as to the oil production activities. And their opening merits brief all but concedes (again) that they were not. Br.49 (stating that the federal government’s “pervasive regulation[]” of oil production during World War II “may not suffice to provide a basis for removal on [its] own”).

All this is to say that the district court findings below are unassailable. Petitioners “conceded” that the challenged “oil production activities ... will not (without more) suffice for federal officer removal[.]” Pet.App.77; *accord* Pet.App.86 (“So crucially, [petitioners] have altered their ‘acting under’ argument by abandoning any effort to establish that any defendant acted under a federal officer when engaging in oil production activities, which is what this lawsuit and all of the SLCRMA lawsuits are about.”); Pet.App.89 (petitioners “[r]ecogniz[e]” that “crude oil production, much less the operations challenged in this case, were not under federal direction”); Pet.App.147, 149 (“agree[ing]” that petitioners have “not shown that, with respect to the production of oil and gas in the field, [they] ‘acted under’ a federal officer”).

2. Notably, petitioners have never argued that they can satisfy this straightforward *Watson* analysis. And to make this point crystal clear: Petitioners did not (and could not) preserve any argument in the Fifth Circuit that they fit within *Watson*’s rule.

The most they could muster in the Fifth Circuit was that the opening line of *Watson*’s analysis section—“The federal statute 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,’” 551 U.S. at 147—was just “dictum.” CA5 Oral Arg. Audio 37:00–08, tinyurl.com/2m36hzyk. That is plainly wrong. The entire question in *Watson* was what “*acting under*” an “*officer*” of the United States” means. 551 U.S. at 145 (emphasis in original). And applying

the rule it had just announced, the *Watson* Court rejected the argument that “Philip Morris [was] ‘acting under’ officers of the FTC *when* it conduct[ed] cigarette testing.” *Id.* at 154 (emphasis added). Dictum, that is not.

Petitioners also told the Fifth Circuit that *Watson* “is no longer good law” after the Removal Clarification Act of 2011. CA5 Oral Arg. Audio 37:00–27 (“[T]he problem is that *Watson* is a 2007 case, the statute’s amended in 2011; so Justice Breyer, writing for the Court, may have well summarized the ‘for’ requirement, but now we have ‘for or related to’—so “that line of dictum, I think, is no longer good law.”). That proposition is even more wrong than the “dictum” charge. Congress did not amend *prong (1)*—that is, the requirement that an action be filed “against ... any person acting under [a federal] officer,” 28 U.S.C. § 1442(a)(1)—in the Removal Clarification Act of 2011. Instead, Congress amended *prong (2)*—that is, the separate requirement that the action be “for or relating to any act under color of such office.” *See Latiolais*, 951 F.3d at 292. Because *Watson* concerned only *prong (1)*, the Removal Clarification Act of 2011 has precisely zero effect on *Watson*’s articulation of the acting-under analysis.

Petitioners’ painfully weak attempts to sidestep *Watson* betray that they do not satisfy *Watson*. There is no dispute that petitioners were not cloaked with federal authority in conducting the production activities challenged in the complaints below. *Watson* thus squarely forecloses petitioners’ attempt to invoke the federal-officer removal statute.

3. Sensing this problem, the United States has filed an amicus brief in this Court arguing, in part, that “petitioners were ‘acting under’ PAW when they engaged in the wartime oil-production activities that respondents challenge.” U.S.Br.30–34. Setting aside that the complaints in these cases do *not* challenge “wartime oil-production activities,” *see supra* p.8, the United States fails to disclose that petitioners have not just abandoned, but waived, that acting-under-theory both below and by failing to brief it here, *see supra* pp.10–13.

The Court’s ordinary practice is to ignore tactics like this—and it should follow that practice here, particularly given petitioners’ abandonment and waiver. *See, e.g., Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 560–61 (2018) (declining to consider issue that “appeared only when the United States filed an *amicus* brief in this case”); *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013) (“Because this [amicus] argument was not raised by the parties or passed on by the lower courts, we do not consider it.” (citing *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981))). Otherwise, the State rests on the Fifth Circuit’s own rejection of this theory in *Plaquemines II*, after which this Court denied review of that theory.

C. Petitioners’ Mix-and-Match Theory Is Foreclosed and Wrong.

1. Because *Watson* forecloses petitioners’ invocation of the federal-officer removal statute, petitioners lured the Fifth Circuit into adopting a different theory

of removal that is directly contrary to *Watson*, the statutory text itself, and all of petitioners' favorite court of appeals cases.

That theory (reflected in petitioners' opening merits brief) concedes that petitioners cannot show that they were “‘acting under’ any ‘agency’ or ‘officer’ of ‘the United States’” “‘in carrying out the ‘act[s]’ that are the subject of the [] complaint[s]”—that is, the oil production activities. *Watson*, 551 U.S. at 147. But not to worry, the theory goes, because petitioners can identify some *other* activities in which petitioners *were* acting under a federal officer—and then petitioners can use *those* activities to satisfy the prong (1) “acting under” analysis, which can then serve as the basis for conducting the prong (2) analysis. Those other activities are the “refining activities taken under federal direction” (*i.e.*, under federal refining contracts) widely hailed in petitioners' opening merits brief. *E.g.*, Br.3, 38. That theory is wrong.

Start with *Watson* and the statutory text. Remember that the rule *Watson* lays down is that a defendant must have been “‘acting under’ any ‘agency’ or ‘officer’ of ‘the United States’” “‘in carrying out the ‘act[s]’ that are the subject of the [] complaint[s].” *Watson*, 551 U.S. at 147. But, as the district courts below recognized, it makes no sense to ask whether petitioners acted under federal officers pursuant to their refinery contracts—because petitioners are not sued over any refining activities. *See, e.g.*, Pet.App.90 (petitioners cannot “satisfy the acting under prong by relying on federal directives governing conduct (refining) that is not implicated by the plaintiffs' lawsuit”); Pet.App.146 (“[T]he existence of a refining contract [does] not mean

that the defendant ‘acted under’ a federal officer with respect to the exploration and production activities challenged in the plaintiffs’ lawsuit.”). In fact, Louisiana arguably could *not* sue petitioners over such refining activities, which occurred out-of-state or, at minimum, did not involve coastal uses covered by SCLRMA. Pet.App.88 (Port Arthur, Texas refinery); Pet.App.144 (Houston, Texas refinery and Norco, Louisiana refinery). As the courts below found, petitioners’ “oil production and refining sectors were ‘two entirely separate operations requiring different skills, and different operations at different locations.’” Pet.App.35.

Petitioners’ mix-and-match theory is thus directly contrary to *Watson*’s framework and the statutory text itself, which asks whether the defendant harmed the plaintiff while cloaked with federal authority. *See supra* Section I.A; *see also Graves*, 17 F.4th at 769 (“[I]f 3M was not ‘acting under’ federal authority when it failed to warn commercial earplug customers of the injury risks plaintiffs allege, it may not remove under § 1442(a)(1), no matter how much connection there was between its commercial warnings and instructions and its earlier actions as government contractor.”).

Finally, note that petitioners do not cite a single case from any court adopting the mix-and-match theory they sold to the Fifth Circuit. That is because none exists. All of their favorite cases align with *Watson* and the district courts below in flatly contradicting petitioners’ rewrite of the statutory text. *Supra* pp.22–23 & n.3 (citing cases).

2. More striking still is petitioners’ utter silence on these problems. At the certiorari stage, petitioners devoted all of one (long) sentence to avoiding the fact that it lost under *Watson* below.

First, petitioners breathlessly observed that the State has “contradict[ed] ... the [Fifth Circuit] panel’s unanimous holding” that “petitioners satisfied ‘the acting under requirement.’” Reply.5 (internal quotation marks omitted). But petitioners cannot seriously pretend to be shocked to see the State point out that they sold the Fifth Circuit a bill of goods. The Fifth Circuit reached the right result, which is why the State is fully defending the judgment below—but how the Fifth Circuit did so was tainted by petitioners’ smoke-and-mirrors theory of removal.⁶

Second, petitioners said that the State’s position was contrary to “the Parishes’ concession at oral argument” in the Fifth Circuit. Reply.5; *see* Br.38 (changing this claim to say “*Respondents* likewise conceded at oral argument before the Fifth Circuit that petitioners were ‘acting under’ the federal government in fulfilling their WWII-era contracts to supply the U.S. military with avgas, and the panel unanimously agreed.” (emphasis added)). The State did not present oral argument in the Fifth Circuit. But, more importantly, petitioners directly misrepresent the Parishes’ purported “concession”—indeed, citing (Br.38 n.9) the

⁶ Because the State is defending the judgment below on grounds raised below, no cross-petition was necessary. *E.g.*, *Northwest Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 364 (1994) (“A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment.”).

very argument audio that demonstrates as much. In that audio, the Parishes plainly say that (a) they accept that petitioners acted under federal officers *in their refining activities* but (b) that is not the relevant “acting under” conduct because the refining activities are not the “act[s]’ that are the subject of the [] complaint[s],” *Watson*, 551 U.S. at 147.

That is exactly the holding of the two district courts below in ordering remand because petitioners cannot satisfy the prong (1) “acting under” analysis. And that is exactly what the State has argued above in emphasizing that (a) *Watson* and the statutory text require petitioners to show that they were acting under a federal officer in their oil production activities but (b) petitioners concede that they were not acting under a federal officer in their oil production activities. Whether petitioners were acting under a federal officer in their refining activities—which was an “entirely separate operation[],” “requiring different skills,” and “at different locations,” Pet.App.35—is entirely irrelevant to the prong (1) “acting under” analysis in this case.

Third, and relatedly, petitioners claimed that the State is contradicting “this Court’s recognition that government contractors are the very archetype of those who ‘act under’ federal officers.” Reply.5 (citing *Watson*, 551 U.S. at 153–54). That is not correct. The State has no quarrel with the *Watson* Court’s suggestion that government contractors may easily satisfy the prong (1) “acting under” analysis. *But see Watson*, 551 U.S. at 154 (“[W]e need not further examine here ... whether and when particular circumstances

may enable private contractors to invoke the statute.”). But that suggestion rings true only insofar as the government contractor committed “the ‘act[s]’ that are the subject of the [] complaint” while performing the contractually required conduct. *Id.* at 147, 153–54. And that is the problem with petitioners’ mix-and-match removal theory: They are not sued over their refining activities—and thus, whether the mere existence of their refining contracts could satisfy the *Watson* prong (1) analysis is irrelevant.

* * *

The prong (1) “acting under” analysis is exceedingly straightforward. Everyone agrees that petitioners’ oil production activities “are the subject of the [] complaint[s].” *Watson*, 551 U.S. at 147. Petitioners have abandoned, and indeed waived, any argument that they conducted those activities under a federal officer. Accordingly, *Watson* forecloses removal under the federal-officer removal statute. That straightforward analysis requires little more than a couple of sentences pointing out the obvious. As a result, it would be appropriate to dismiss the writ as improvidently granted—particularly because the Fifth Circuit reached the right result, and no court is likely to see “idiosyncratic” (Pet.34) facts like these again.

II. THE COURT SHOULD IGNORE PETITIONERS’ MISDIRECTION TO THE “RELATING TO” INQUIRY.

The foregoing discussion is extraordinarily important because it unravels the tale in petitioners’ certiorari-stage papers and opening merits brief about how this case cries out for the Court to explicate the phrase “for or relating to any act under color of such

office”—that is, prong (2) of the removal analysis. 28 U.S.C. § 1442(a)(1). Under the correct view of prong (1), all of petitioners’ protestations are meritless. And even if petitioners’ rewrite of prong (1) were valid, that would only underscore that the Fifth Circuit reached the right result.

A. There Is No Need to Address the “Relating To” Inquiry.

Petitioners sold the case to this Court as a grand vehicle to address alleged confusion over the meaning of prong (2)—the “for or relating to” inquiry under the federal-officer removal statute. *See, e.g.*, Pet.2 (The Fifth Circuit’s decision “reimpos[es] a variant of the causal-nexus requirement that six other courts of appeals have expressly rejected exacerbating a lopsided circuit split and underscoring the general confusion in the lower courts on this recurring and important issue.”). But that was a masterclass in misdirection because petitioners never get to prong (2). They lose on prong (1), so there is no reason to ask and answer whether this action also happens to be “for or relating to any act under color of such office[.]” § 1442(a)(1).

Note, moreover, that rejecting petitioners’ mix-and-match theory under prong (1) also has the salutary effect of eliminating all the wildly overstated claims from petitioners and their amici about ending government contracting as we know it. The *Watson* rule that the State articulated and applied above—and that the district courts followed—is the same rule followed by virtually every federal court of appeals. *Supra* pp.22–23 & n.3. That rule allows actual government contractors who are actually sued over their contractual conduct to remove actions to federal court.

Take, as a prime example, the contractors who built Navy ships and submarines with asbestos that allegedly harmed workers. *See Latiolais*, 951 F.3d at 289; *Sawyer*, 860 F.3d at 252; *Moore*, 25 F.4th at 32. Because they plainly were acting under federal officers in constructing those vessels (prong (1)), and because their alleged failure to provide warnings and other protection was plainly “related to” the contractors’ conduct under federal authority (prong (2)), there is no question that such suits are removable.

Petitioners’ problem is that they are *not* actually contractors sued over conduct committed under federal authority. Their sky-will-fall rhetoric, therefore, is baseless. Indeed, the best evidence of that is the fact that this Court and the federal courts of appeals have widely applied prong (1) as articulated above for decades—and there is no evidence of a chilling of government contracting. Empty rhetoric via lawyers’ pens is no substitute.

Dismissing the writ or correcting the prong (1) error ends this case. The Court need proceed no further.

B. If Petitioners Were Right About the “Acting Under” Analysis, They Would Be Wrong About the “Relating To” Analysis.

Even if petitioners could survive prong (1) on the theory that they acted under federal officers in fulfilling avgas refining contracts, that would underscore that the Fifth Circuit reached the right result. That is because what petitioners characterize as an error by the Fifth Circuit is actually a wise instinct that—if petitioners’ “acting under” theory were valid—prong (2) would need to be carefully interpreted to preserve the

entire statutory text. And petitioners have no answer.⁷

1. Recall that the federal-officer removal statute authorizes the removal of civil actions that are (1) “against ... [t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof,” (2) “for or relating to any act under color of such office[.]” 28 U.S.C. § 1442(a)(1). As discussed above, *supra* Section I.A., the present participle “acting” requires the defendant to have harmed the plaintiff while cloaked with federal authority.

For present purposes, however, the assumption is that petitioners could survive this prong (1) inquiry by pointing to their activities in executing refining contracts—activities that, while under the cloak of federal authority, did not harm the plaintiffs and are not the subject of the complaints below. Wrong as that assumption is, it could potentially work *only if* prong (2) were interpreted to require a close nexus between the contractual conduct (which is not the subject of the complaints) with the non-contractual conduct (which is the subject of the complaints). If that nexus is sufficiently tight, then perhaps a court could conceive of the “action” as one “that is against” defendants “acting under” a federal officer, 28 U.S.C. § 1442(a)(1)—notwithstanding that the defendants did not commit the acts that are the subject of the complaints under a federal officer.

⁷ With respect to prong (2), the State joins, so far as they are consistent with the State’s position, the Parishes’ able responses to the various factual and legal claims asserted by petitioners.

Without that careful limitation, a court would effectively read the present participle “acting” out of the statute by giving free passes to federal court. Just consider the Friday night bar fight hypothetical: The contractor in that hypothetical has no business being in federal court, for the simple reason that he was not cloaked with federal authority when he assaulted a fellow barfly. But petitioners would say that he could gain access to federal court, so long as whatever precipitated the fight had “some relation” (Br.46) to the contractor’s day job.

That is precisely the sort of unbounded view of the federal-officer removal statute that the Fifth Circuit was trying to avoid in emphasizing “the lack of any reference, let alone direction, pertaining to crude oil production in [petitioners’] federal contracts.” Pet.App.33; *id.* (“To hold otherwise would permit a federal contractor with a non-frivolous federal defense to invoke federal jurisdiction under § 1442(a)(1) for conduct only ‘remote[ly]’ or ‘tenuous[ly]’ related to its federal contracts and thereby impermissibly expand the scope of federal officer removal under our existing precedent.” (footnote omitted)); Pet.App.94 (“[U]nder [petitioners’] theory a company with a single federal contract could remove essentially any claim for activities outside the scope of the contract but arguably connected to it, which may mean virtually anything.”); *see also Watson*, 551 U.S. at 147 (“[B]road language is not limitless.”).

Here, as below, petitioners have suggested (Br.48) that the separate “not textually required” (Br.38 n.8) colorable federal defense factor could serve to rein in

the statutory scope. But that would be a puzzling exercise in statutory interpretation: to try to restore an actual statutory term (“acting”) by puffing up a term that does not appear in the statute. Moreover, petitioners still have no answer to the point that treating the colorable-defense inquiry as dispositive “would read out of the statute the requirement that only civil actions ‘for or relating to’ acts taken under color of federal office are removable.” Pet.App.34; *accord* BIO.21.

To be clear, if the Fifth Circuit’s analysis does not feel perfect, that is not the Fifth Circuit’s fault; that is a product of petitioners’ own novel attempt to transform how the federal-office removal statute operates. The right response is to agree with the Fifth Circuit that something is not right—but to resolve that problem at prong (1) rather than making new law on prong (2).

2. The foregoing discussion largely renders academic petitioners’ droning on and on about what “for or relating to” means in the statute. The Fifth Circuit, the State, and petitioners are in radical agreement about what the legal test is. *See* BIO.9 (noting that “[e]veryone agrees” that “[t]he ordinary meaning of the words ‘relating to’ is a broad one—‘to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with’” (citation omitted)). They just disagree on whether that test is satisfied here. And on that score, petitioners studiously ignore that, if a court accepts their novel “refinery” theory which is unmoored from *Watson* and the statutory text at prong (1), the prong (2) analysis necessarily must take up the slack

to keep petitioners within the statutory bounds. The Fifth Circuit properly recognized as much.

All this is an unfortunate consequence of the “idiosyncratic” (Br.34) facts in this case and petitioners’ relentless quest for removal jurisdiction. This is not the vehicle to write any new law about the federal-officer removal statute—and it certainly is not worth this Court’s time and resources.

CONCLUSION

The Court should dismiss the writ as improvidently granted, or affirm the judgment below.

Respectfully submitted,

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