No. 24-813

In the
Supreme Court of the United States

CHEVRON U.S.A. INCORPORATED, et al.,
Petitioners,

v.

PLAQUEMINES PARISH, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

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This Court granted certiorari to resolve a circuit split over whether the federal-officer removal statute—which Congress broadened in 2011 to permit removal of cases "relating to" acts under federal direction—imposes a causal-nexus or contractual-direction requirement. Apparently recognizing that the deliberate addition of that notoriously broad phase forecloses those atextual narrowing requirements, respondents spend almost the entirety of their briefs running away from that issue. Instead of addressing the relating-to element that divided the panel, split the circuits, and prompted this Court to grant certiorari, respondents focus on the acting-under element—a distinct statutory element that the Fifth Circuit panel below unanimously (and correctly) decided in petitioners' favor. Needless to say, petitioners did not ask this Court to review an issue they won below, which explains why the parishes needed to literally rewrite the questions presented to focus on the acting-under element, *see* Parishes.Br.i.

Respondents' desperation to avoid the actual questions presented is understandable. When Congress amends a statute to deliberately add words that this Court had already construed as terms of substantial breadth, continuing business as usual by superimposing narrowing constructions is not an option. Recognizing that rooting a narrow causal-nexus or contractual-direction requirement in the broad statutory "relating to" language is hopeless, respondents barely defend the decision below and effectively seek to impose those same limits on the acting-under element. That is doubly unavailing.

First, as Louisiana concedes up front, La.Br.1, and the United States underscores in its amicus brief in support of petitioners, the acting-under element asks a different question—the *who* question. In cases like these involving government contractors, the acting-under element is readily satisfied. The distinct question of *which* activities of the government contractors can give rise to removal is addressed by the relating-to element, which Congress deliberately broadened in 2011.

Second, changing the subject does not change the reality that there is a clear and sufficient connection between petitioners' refining activities under government contracts and the production activities needed to fulfill those contracts, which respondents now target for billion-dollar litigation windfalls. Production and refining generally go hand-in-hand, and that was particularly true in the unique context of World War II ("WWII"). The Nation could not have massively expanded its aviation gasoline ("avgas") refining without massively expanding its production. Indeed, the federal government took extraordinary steps to supervise the production and distribution of crude to ensure there was sufficient refined avgas for the war effort. That government role did not somehow break the causal chain between production and refining by vertically integrated companies. To the contrary, as the government itself recognizes, that highly unusual and pervasive government involvement means that all the wartime production activities—not just the refining contracts—satisfy the acting-under element. In short, petitioners amply satisfy all requirements for federal-officer removal. This Court should reverse.

ARGUMENT

I. The Federal-Officer Removal Statute, As Amended in 2011, Does Not Contain Any Causal-Nexus Or Contractual-Direction Requirement.

Respondents do not develop any cogent argument that a "causal-nexus or contractual-direction test survives the 2011 amendment to the federal-officer removal statute." Pet.i. Louisiana flatly concedes that the amended statute contains no such test. *See* La.Br.40-41. While the parishes advocate for a contractual-direction requirement, they make no serious effort to square their position with the statutory text. *See* Parishes.Br.29-37. Respondents' briefs thus confirm that the panel majority below erred by imposing its unduly stringent contractual-direction requirement.

A. The Federal-Officer Removal Statute Requires Only a "Connection or Association" Between the Challenged Conduct and an Act Taken Under Federal Direction.

Under the pre-2011 version of the federal-officer removal statute, a defendant seeking removal had to show that the suit was "*for*"—i.e., causally connected to—"an act under color of [federal] office." *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999) (brackets omitted). In 2011, however, Congress amended the statute to allow removal of suits "for *or relating to*" such an act, 28 U.S.C. §1442(a)(1) (emphasis added), a broad phrase that requires only a connection or association between the suit and an act under federal direction. *See* Pet'rs.Br.28-32. Accordingly, the

current version of §1442(a)(1) authorizes removal of lawsuits having "a connection with" an act under color of federal office, regardless of whether the suit was caused by or "specifically addressed to" acts performed under federal direction. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-86 (1992).

Louisiana professes "radical agreement" with petitioners' view of "the legal test." La.Br.41. It expressly agrees that "the ordinary meaning of the words 'relating to' is a broad one." La.Br.41. It likewise agrees that "Congress significantly broadened the scope of federal-officer removal" by adding that phrase to the statute in 2011: "It is enough that acts taken under color of federal office are 'connected or associated' with the conduct at issue in the case." La.BIO.9; *accord* La.Br.41. Louisiana has thus conceded at both the certiorari stage and the merits stage that petitioners are correct on the first question presented.

Despite these concessions, Louisiana attempts to blur the distinct acting-under and relating-to elements by suggesting that if petitioners satisfy the acting-under requirement (as the Fifth Circuit panel unanimously held), then the relating-to requirement should be "interpreted to require a close nexus" between the charged conduct and an act under federal direction. La.Br.39. In Louisiana's view, this "close nexus" requirement may be necessary—depending on how the acting-under requirement is construed—to avoid "giving free passes to federal court." La.Br.40.

That results-oriented approach makes no sense. When Congress amended the federal-officer removal statute in 2011, it left the statute's acting-under

language undisturbed. At the same time, it undeniably broadened the relating-to element by adding words that Louisiana concedes do not require a causal nexus, but reach broader connections and associations. That new, broader language must be given effect. Louisiana concedes that language eliminates any textual basis for demanding a causal nexus under the related-to element, but it would equally countermand Congress' will to reintroduce the causal-nexus requirement through the back door by reading it into the statute's unamended acting-under language.

Louisiana's suggestion also ignores that, as the Fifth Circuit explained below and Louisiana elsewhere concedes, the acting-under and relating-to requirements are "distinct." Pet.App.16; La.Br.1. The former describes "the triggering relationship between a private entity and a federal officer"; it determines *who* (beyond federal officers themselves) may remove lawsuits under §1442(a). Pet.App.14 (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 149 (2007)); *accord* U.S.Br.15-16. The relating-to requirement, by contrast, defines "*which* suits may be removed." U.S.Br.16. Each requirement is independent and has its own separate and distinct meaning. *Contra* La.Br.41-42 (arguing that if petitioners satisfy the acting-under requirement, then the relating-to requirement "must take up the slack").

Respondents' fears that giving "relating to" its plain meaning will result in an "unbounded view of the federal-officer removal statute," La.Br.40, are overblown. *See* U.S.Br.27. To be sure, as Louisiana has conceded, the 2011 amendment "significantly

broadened the scope of federal-officer removal," La.BIO.9. *See* Pet'rs.Br.26-32. But that does not mean that *any* connection, "no matter how attenuated," automatically satisfies the relating-to requirement. *Contra* Parishes.Br.36. On the contrary, that requirement continues to set meaningful limits on the universe of cases for which federal-officer removal is available. But those limits do not include atextual causal-nexus or contractual-direction requirements.

Respondents' own hypotheticals underscore the meaningful limits that the relating-to requirement imposes. While a federal officer (or contractor) remains a federal officer (or contractor) after leaving the office on a Friday afternoon, it is highly unlikely that an assault claim stemming from a "Friday night bar fight" would "relate[] to his day job" and so satisfy the relating-to requirement. *Contra* La.Br.4. Nor would the relating-to requirement be automatically satisfied by "any upstream action a company might take to satisfy a federal contract," such as purchasing a refinery or other industrial facility, hiring workers, or retaining a janitorial crew. *See* Parishes.Br.36. In short, the relating-to test is purposefully expansive, but hardly limitless.

On top of that, the "colorable federal defense" requirement further restricts the universe of cases in which federal-officer removal would be available. Pet.App.58-61 (Oldham, J., dissenting); *see Mesa v. California*, 489 U.S. 121, 129-30 (1989). It is hard to imagine, for instance, how a federal officer or contractor sued over a Friday night bar fight would have a colorable federal defense. More to the point, it

is not this Court's role to maintain an equilibrium that limits the number of removable cases to some pre-conceived golden mean. The Court's role is instead to give statutory terms their plain and ordinary meaning. Here, Congress plainly and purposefully expanded the relating-to element, while leaving the acting-under language alone. There is no warrant for ignoring the plain and ordinary meaning of the words Congress added or artificially limiting the scope of a statute that Congress has repeatedly broadened and this Court has recognized must be given a liberal construction.

B. The Panel Majority Erred by Imposing a Contractual-Direction Requirement.

The panel majority below nevertheless erroneously held that a federal contractor seeking removal under §1442(a)(1) must show that its contract included a "federal directive pertaining to [its allegedly unlawful] activities." Pet.App.37-38; *see* Pet.App.25, 29-31, 33. That holding cannot be squared with either the plain language of the amended federal-officer removal statute or the longstanding rule that the statute should be liberally construed in favor of removal. *See* Pet'rs.Br.33-36. Instead, as Judge Oldham explained in dissent, requiring a contractual directive pertaining to the challenged conduct "reinstates a version of the old, discarded, causal-nexus test" that Congress deliberately abrogated in 2011. Pet.App.57.

The parishes embrace the panel majority's contractual-direction analysis. *See* Parishes.Br.27-

42.[1] But they do not—and cannot—provide any cogent defense of that interpretation. Their lead argument is that "the 'relating to' question in this case is entirely factual, mandating review for clear error." Parishes.Br.28. That is itself a clear error. This Court granted certiorari on the *legal* issue of whether §1442(a)(1) imposes "a causal-nexus or contractual-direction test," Pet.i. That issue is purely legal, has divided the circuits, and is subject to de novo review. Indeed, none of the decisions below purported to resolve any factual disputes or make any factual findings subject to clear-error review. That is for good reason: This case is at the notice-of-removal stage, where a defendant need only offer "plausible allegation[s]" of the necessary jurisdictional facts, *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 89 (2014), and courts must "credit [the d]efendants' theory of the case" in determining whether federal-officer removal is proper, Pet.App.20 n.63; *accord Acker*, 527 U.S. at 432. That makes the parishes' invocation of the clear-error standard totally inapposite.

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[1] Louisiana, for its part, does not even try to defend the panel majority's construction of the relating-to requirement. It instead urges the Court to address other issues, *see* La.Br.20-36 (discussing the acting-under requirement), and then pitches its unwillingness to engage on the question presented as a basis to dismiss the writ as improvidently granted. *See* La.Br.41-42. That would make no sense even if Louisiana were the sole respondent and had actively participated in the proceedings below. Louisiana may not like the parishes' concessions or contentions and may regret its decision to sit on the sidelines and let the parishes take the lead, but that is hardly a justification for dismissing the writ.

Turning to the legal issue of what the relating-to element requires, the parishes assert that "[w]hen federal officer removal is based on a contract, the challenged conduct must be related to the directives in the contract." Parishes.Br.15; *see* Parishes.Br.29, 35-36, 41-42. But the parishes make no attempt to root that purported contract-specific requirement in the statutory text. Post-amendment, the statute requires a removing defendant to show that the lawsuit "relat[es] to any act under color of [federal] office," 28 U.S.C. §1442(a)(1), not that it relates to a specific contractual directive. Moreover, the relating-to language applies in every case regardless of whether or not a federal contract is involved. Trying to impose an additional contractual-direction test in the subset of cases that involve a contract finds no support in the statutory text.

Besides being atextual, the parishes' rule makes little sense. As this Court has recognized, the federal-officer removal statute ensures that private parties who perform nationally important but locally unpopular tasks for the federal government will have their federal-law defenses adjudicated in federal court, "free from local interests or prejudice." *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981). Unsurprisingly, a federal contractor's need for a federal forum has nothing to do with whether its locally unpopular actions were specifically contractually mandated or instead just useful in fulfilling the federal mission. This case illustrates the point: The risk of state interference with federal wartime operations here would be identical regardless of whether petitioners' federal contracts specified that they had to use their own crude, gave them discretion

to do so, or (as actually occurred) supervised that decision via the Petroleum Administration for War ("PAW").

The parishes' contention that their contractual-direction test is not "a 'variant' of the pre-2011 causal nexus test," Parishes.Br.29, is both wrong and irrelevant. Judge Oldham was spot on in identifying this test as "a version of the … causal-nexus test," Pet.App.57 (Oldham, J., dissenting). In fact, the parishes themselves cannot help but describe their test as one of "causation," Parishes.Br.22, 27, and even concede that it "is substantially the same" as the pre-2011 causal-nexus test, Parishes.Br.22. That said, nothing turns on whether the panel majority's test is labeled a causal-nexus test or a "contractual directive[]" test, *contra* Parishes.Br.15-16. The former at least had a claim to be based on the pre-amendment text. The latter was always atextual and became indefensible in light of the 2011 amendments.

The parishes' appeal to federalism goes nowhere. The Constitution includes both a Supremacy Clause and the Tenth Amendment, and the federal-officer removal statute has more to do with the former. Even so, the statute serves federalism interests in the long run by ensuring that the airing of local grievances occurs in an impartial forum where local and federal actors will all accept the outcome as fair. The state invokes *Colorado v. Symes*, 286 U.S. 510 (1932), but that case acknowledges *both* the states' interest in enforcing their own laws *and* the federal government's overriding interest in protecting those "acting under federal authority against peril of punishment for violation of state law." *Id.* at 517-18. *Symes*

determined that this federal interest requires federal-officer removal provisions "to be liberally construed," *id.*, and this Court has repeatedly reaffirmed that principle. *See, e.g.*, *Watson*, 551 U.S. at 147; *Manypenny*, 451 U.S. at 242. Notably, several other states—themselves "no fans of overly expansive removal rights"—agree that these suits belong in a federal forum. States.Br.4.

Respondents also err in attempting to downplay the risk that "state court parochialism" could cause private parties to think twice about signing up to help the federal government carry out important but controversial responsibilities. *See* Parishes.Br.43; La.Br.38. Just one lawsuit out of the dozens initiated by respondents and their lawyers provides approximately 750 million reasons to think twice about assisting the federal government with locally unpopular, but nationally necessary, initiatives. *See* Pet'rs.Br.20-21 (discussing $744.6-million state-court verdict based on finding that petitioners' oil-production activities were not "lawfully" commenced in December 1941). The chilling effect of these suits and respondents' proposed test is widely recognized. *See* Chamber.Br.5-15, 22-29; Myers/Mullen.Br.13-15; Barr/Mukasey.Br.26-30.

Finally, giving effect to the plain meaning of "relat[ing] to" does not make federal jurisdiction a matter of "happenstance." *Contra* Parishes.Br.35. Given the close relationship between refining and production, allowing removal by those who signed refining contracts with the federal government and were then sued for the production activities undertaken to fulfill those contracts is common sense,

not mere coincidence. That said, as the federal government has suggested, if there is some perceived anomaly with allowing those in direct privity with the federal government to remove while those who produced crude under the close supervision of PAW languish in state court, the answer is to level up, not level down. *See* U.S.Br.31-34; *infra* pp.19, 23.

II. Petitioners Are Entitled To Remove These Cases Under §1442(a)(1).

A. The Challenged Production of Crude Oil During WWII Was Closely Connected With Petitioners' Federally Directed Production of Avgas.

The correct inquiry under the relating-to element—requiring only a connection or association between the challenged conduct and acts under federal direction—is readily satisfied here. Petitioners' allegedly unlawful production of crude oil during WWII plainly relates to their refining of that same crude into avgas under contracts with the federal government. *See* U.S.Br.23-24. Even the panel majority acknowledged "some relation" between petitioners' production activities and refining activities, Pet.App.28, and under the amended statute "some relation" suffices. Indeed, there is a close connection between the WWII-era production practices that respondents now challenge as imprudent and the refining of the unprecedented quantities of avgas the U.S. military needed. *See* Pet'rs.Br.40-41. That close connection is manifest on the face of petitioners' federal contracts, which (1) tied the price of avgas to the cost of producing crude oil and transporting it to petitioners' refineries, and

(2) provided that if petitioners were subject to state or local taxation "by reason of the production[] … [of] crude petroleum," they would be "entitled" to an "exemption" from those taxes because they were using the crude to make avgas for the U.S. military. Pet'rs.Br.41-43; *see* U.S.Br.25.

Additional contractual detail was obviated by PAW's comprehensive supervision of the oil industry during WWII, which further confirms the close connection between production and refining. *See* U.S.Br.24-25. PAW designated the relevant fields as "Critical Fields Essential to the War Program," and specifically allocated crude that petitioners produced in those fields to petitioners' refineries to ensure that petitioners would have a sufficient supply of the type of crude needed to refine avgas. Pet'rs.Br.43; U.S.Br.25-26. PAW further dictated the manner in which petitioners produced crude, both by restricting petitioners' use of critical war materials (such as steel) and by granting petitioners exemptions allowing them to drill or deepen specific wells because petitioners were using the crude from those wells to make avgas. *See* Pet'rs.Br.43-44. For all these reasons, petitioners' WWII-era production of crude was plainly connected to and associated with petitioners' use of that same crude to fulfill WWII-era federal avgas contracts.

Louisiana does not meaningfully dispute the close connection between petitioners' production of crude and their refining of that same crude into avgas, and the parishes' attempts at disputing that connection go nowhere. Contrary to the suggestion of the parishes (and the panel majority below), PAW's tight control over crude allocation during WWII did not "sever[]"

the obvious "connection between refining and crude production," Parishes.Br.30. Just the opposite: PAW's allocation of specific crude oil to specific refiners "to assure maximum output of war products," Parishes.Br.32, *underscores* that the production of crude oil was inextricably linked to the refining of that same crude into avgas. *See* U.S.Br.29-30. Indeed, it makes crystal clear that both refining and production activities during WWII were carried out by entities "acting under" federal supervision and control. U.S.Br.31-34.

The parishes' observation that PAW often allocated one oil company's crude to other companies' refineries misses the point. *Contra* Parishes.Br.30-31, 38. While it is true that vertically integrated producer-refiners did not exclusively refine their own crude during WWII, that hardly negates the overall connection between production and refining—particularly in *these* cases, where PAW undisputedly *did* direct petitioners to refine large amounts of the crude that they produced from the Delta Duck Club, Grand Bay, and Black Bayou fields into avgas. *See* Pet.App.9-10, 28. There is thus no denying that these petitioners are being sued in state court for production activities undertaken to fulfill their federal refining contracts. Nothing more is required for removal. While "orange juice makers do not have to grow" their own oranges, Parishes.Br.39, a vertically integrated juice company's cultivation of oranges unquestionably "relat[es] to" its production of orange juice. And a vertically integrated juice manufacturer sued for picking too many oranges too quickly in order to fulfill a federal contract for orange juice should be able to remove to federal court, especially if the federal

contract drew multiple direct links between orange harvesting and the contracted-for juice (and, *a fortiori*, if the federal government closely supervised the groves to ensure sufficient juice supply for the troops during wartime).

The parishes err in attempting to downplay the unique and pervasive nature of PAW's supervision of the oil industry during WWII. *Contra* Parishes.Br.33-34. As the government explains, supervision, not ordinary regulation, describes PAW's control over oil production during the war, "down to the spacing and angle of wells and how much producers could spend on oil lines." U.S.Br.6-7. The government likewise tightly restricted oil producers' use of critical war materials such as steel and asphalt (and granted petitioners only limited exceptions). Pet'rs.Br.10-11, 44; *see also, e.g.*, JA43-44; U.S.Br.6-7. This further constrained petitioners' production options and renders fanciful respondents' preferred techniques (which respondents suggest only with the benefit of decades of hindsight and the assurance that we actually won the war). *See* Pet'rs.Br.24, 40-41; U.S.Br.31-32. While the parishes may dispute whether wartime controls affirmatively *prohibited* petitioners from adopting certain practices (like directional drilling and saltwater injection), *see* Parishes.Br.34-35, those quibbles at most go to the merits of petitioners' federal defenses. Petitioners need not "win [their] case before [they] can have it removed," *Acker*, 527 U.S. at 431.

Finally, the parishes assert that "the conduct now being sued upon" is "too temporally remote from the asserted WWII federal direction to satisfy the 'relating

to' element," Parishes.Br.40-41 (emphasis omitted). That gets matters backward. The hindsight bias allowed by being decades removed from the imperatives of WWII is precisely what makes this lawsuit so misguided and a federal forum so indispensable. During the height of WWII, a sense of patriotism would have rendered a state or local effort to micromanage production techniques unthinkable. The passage of the decades should not obscure the reality that respondents are arguing that petitioners' operations *during WWII* were not "lawfully commenced or established." Pet.App.5-6; *see* La. Rev. Stat. §49:214.34(C)(2). Moreover, respondents cannot deny that they would like to show local juries before-and-after demonstratives, where the "before" predates the extraction efforts that helped win the war. As the Fifth Circuit previously held, the parishes' claims plainly "implicate[]" petitioners' "World War II-era conduct." *Parish of Plaquemines v. Chevron USA, Inc.* (*Plaquemines I*), 7 F.4th 362, 369 (5th Cir. 2021); *see id.* at 370-73. Petitioners are therefore entitled to invoke federal-officer removal to obtain a federal forum for these suits related to their acts under federal direction.

B. As the Panel Unanimously Held, Petitioners Satisfy the Acting-Under Requirement.

1. Because they cannot defend the panel majority's relating-to analysis, respondents spend most of their briefs discussing the acting-under element instead. *See* Parishes.Br.16-27; La.Br.20-36. That is not a strategy this Court should reward. The Fifth Circuit unanimously (and correctly) held that

petitioners satisfied the acting-under element, and certiorari was neither sought nor granted on that issue. Respondents' unabashed effort in their merits briefs to "raise additional questions" and "change the substance of the questions already presented" is entirely improper. S. Ct. R. 24.1.

Respondents' desire to litigate the acting-under requirement is all the more puzzling because they expressly conceded that point below. During oral argument, Judge Oldham spent several minutes attempting to "disentangle" the acting-under and relating-to prongs, which all agree are "separate" and "independent requirements." Oral Argument at 24:30-56, *Plaquemines Par. v. BP Am. Prod. Co.*, Nos. 23-30294 & 23-30422 (5th Cir. Dec. 7, 2023), https://perma.cc/HLH7-64ZQ. Throughout this colloquy, respondents' counsel repeatedly agreed that petitioners "were *acting under* the direction of a federal officer" during WWII, but insisted that respondents' "claims do not *relate to* the thing [petitioners] were doing, namely, refining." *Id.* at 26:08-40; *see also id.* at 23:10-30 (Judge Oldham: "You agree that [petitioners] were acting under the direction of a federal officer because they have contracts with the Defense Supply Corporation." Counsel: "Yes… They were acting under in refining."); *id.* at 25:15-25 (Judge Oldham: "Give me an example of how a defendant could act under, but the claims would not relate to that acting under." Counsel: "This case is a perfect example."). Respondents' suggestion that they conceded only that petitioners "acted under federal officers in their refining activities," La.Br.34-35 (emphasis omitted), simply misses the point: Because petitioners concededly acted under federal

direction in refining avgas for the federal government, the acting-under element is satisfied, and the only remaining question is whether the challenged conduct related to those acts under federal direction.[2]

In all events, respondents were correct to concede, and the Fifth Circuit was correct to unanimously hold, that petitioners satisfy the acting-under requirement in light of their WWII-era federal contracts to refine avgas for the federal government. Pet.App.16; *accord* Pet.App.40 (Oldham, J., dissenting). As noted, the acting-under element asks the *who* question, and "[a] private party 'working under a federal contract to produce an item the government needed' is the 'archetypal case' of a defendant 'acting under' a federal officer." Pet.App.15 (quoting *Williams v. Lockheed Martin Corp.*, 990 F.3d 852, 859 (5th Cir. 2021)); *accord Watson*, 551 U.S. at 153-54. As the Fifth Circuit explained, petitioners produced a specialized product "that the government needed to fight in World War II" under detailed contracts that "vested the government with control over the size and manufacturing capacity of their refineries." Pet.App.16. That readily satisfies the acting-under requirement and leaves the relating-to element—i.e.,

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[2] Louisiana attempts to escape the concessions below on the ground that it "did not present oral argument in the Fifth Circuit," La.Br.34. That decision to leave oral argument to private counsel for the parishes underscores who is driving this litigation, but it does not allow the state to disavow the concession. Louisiana expressly informed the Fifth Circuit that the parishes' counsel would represent it at oral argument. *See* Oral Argument Acknowledgment Form, *Plaquemines Par. v. BP Am. Prod. Co.*, No. 23-30294 (5th Cir. Nov. 2, 2023), Dkt.155.

the *which* question—as the only even arguably disputable issue. *See* Pet.App.15-17; U.S.Br.20-23.

Indeed, as the United States observes, petitioners acted under the federal government in *producing* crude oil during the WWII era as well as in refining that crude into avgas for the federal government under federal contracts. While petitioners (and other oil companies) did not have federal contracts to produce crude, "[i]n the unique setting of World War II, petitioners' oil production served 'to *assist*, or to help *carry out*, the duties or tasks of the federal superior.'" U.S.Br.32-33 (quoting *Watson*, 551 U.S. at 152). PAW "directed and controlled the entire petroleum industry," including petitioners' "production of crude oil … in coastal Louisiana," in order "to ensure adequate supplies of products for the federal government during WWII." JA32; *accord* U.S.Br.6-8; Oil&Gas.Ass'ns.Br.7-16. Petitioners were thus acting under the federal government both in refining avgas under federal contracts and in producing the crude for avgas under close federal supervision. U.S.Br.31-32.

2. While respondents attempt to run away from the relating-to element and into the arms of the acting-under element, they essentially read "a version of the … causal-nexus test" into the acting-under element. Pet.App.57 (Oldham, J., dissenting). Indeed, one of their *amici* is explicit, arguing that "the acting-under prong imposes its own nexus requirement." Edwards.Br.24. That argument is dead wrong textually and analytically. As already emphasized, the causal-nexus test was never a gloss on the acting-under element, and the acting-under language of the

statute was left undisturbed in the 2011 amendments. Responding to Congress' deliberate broadening of the nexus element in its 2011 amendments—which expressly added "relating to" the text (thus eliminating the causal-nexus test)—by having the causal-nexus test reemerge as a gloss on the unamended acting-under language is the worst form of evasion and violates multiple cardinal principles of statutory interpretation. As the Fifth Circuit unanimously (and correctly) held, it also "impermissibly conflates the distinct 'acting under' and 'connected or associated with' elements of the federal officer removal test." Pet.App.16; *see* U.S.Br.22-23. The former asks the *who* question (which a federal contractor readily satisfies), while the latter asks the *which* question (and applies a less demanding standard post-2011).

Louisiana attempts to fashion a different standard based on a single sentence from *Watson*, which its brief quotes more than a dozen times: "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.'" La.Br.1 (quoting 551 U.S. at 147); *see* La.Br.3, 4, 18, 20, 24, 25, 27, 29, 32 (twice), 35, 36. Louisiana identifies that sentence as "the rule *Watson* lays down" for the acting-under requirement. La.Br.32. But repeating a sentence of dictum, even a dozen times, does not convert it into a holding. Louisiana badly misreads *Watson*, which did not address any nexus question. Instead, the rule it laid down addressed a different question: whether compliance with federal regulation alone is sufficient to establish an acting-under

relationship. The Court answered that question in the negative; instead, the private party must have been engaged in "an effort to *assist,* or to help *carry out,* the duties or tasks of the federal superior." 551 U.S. at 152. As explained, petitioners' refining of avgas under federal contracts for the federal government as well as their production activities to fulfill those contracts under the close supervision of PAW readily meet that standard. *See supra* pp.12-16.

The single sentence from *Watson* on which Louisiana fixates does not change that reality. To the extent that sentence addresses the nexus required for federal-officer removal at all, the 2007 opinion merely summarizes the pre-2011 test for federal-officer removal, based on the pre-amendment text. Saying that a person was acting under a federal officer "in carrying out the 'acts' that are the subject of the … complaint," *Watson*, 551 U.S. at 147, is just another way of saying that the person has been sued "for an[] act under" federal direction. 28 U.S.C. §1442(a)(1) (2006). That is precisely the requirement that Congress amended four years after *Watson* was decided, deliberately broadening the universe of removable actions to suits "for *or relating to* any act under" federal direction. 28 U.S.C. §1442(a)(1) (emphasis added). In light of that amendment, any dictum in *Watson* about the requisite nexus between the "charged acts" and government directions does not survive the 2011 amendments.

The state's efforts to read a nexus requirement into "the present participle 'acting,'" La.Br.21, fare no better. Of course, a defendant seeking removal must have been "'acting under' a federal officer *at the time*

of the complained-of conduct." La.Br.22 (emphasis added) (quoting *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 469 (3d Cir. 2015)). But petitioners readily satisfy that temporal requirement, as they acted under federal direction throughout WWII, *see* JA112-22; JA159-67, when respondents broadly allege that petitioners' oil production activities were not "lawfully commenced," *Plaquemines I*, 7 F.4th at 372-73. *Watson* does not even hint, much less "h[o]ld," that "the present participle 'acting' requires a court to ask" whether the defendant was acting under federal direction in committing the specific "act that harmed the plaintiff." *Contra* La.Br.1, 39.

The parishes likewise attempt to smuggle a nexus requirement into the acting-under element, asserting that the element "is satisfied only when '*the plaintiff's allegations*' are 'directed at the relationship between' a defendant and a federal officer." Parishes.Br.18; *see* Parishes.Br.i, 24. That is not the law. Indeed, the federal-officer removal statute is the last context where the plaintiffs' allegations are allowed to control the analysis. Rather, it is the plausible allegations of the removal petition and the defendant's theory of the case that must be credited. *See supra* p.8. Moreover, the acting-under element does not house the statute's nexus requirement. The acting-under element defines *who* may remove under §1442(a)—namely, a private party involved in "an effort to *assist*, or to help *carry out*, the duties or tasks of [a] federal superior." *Watson*, 551 U.S. at 152. It does not define the necessary connection between the defendant's challenged conduct and the defendant's acts under

federal direction, which is the separate office of the relating-to element. Unsurprisingly, neither of the lower-court cases that the parishes cite for their novel rule actually adopted it. Those cases instead hold only that "it is sufficient"—not *necessary*—for the plaintiffs' allegations to be "directed at the relationship between [the] defendant and the federal officer." *Compare* Parishes.Br.18, 24, *with Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016), *and In re Commonwealth's Motion*, 790 F.3d at 470.

3. Even if petitioners did need to show that their WWII-era production activities were "committed under federal authority," La.Br.21, they have done so twice over. As noted, petitioners were plainly acting under federal authority in fulfilling their refining contracts, which expressly drew the connection between production and refining. When vertically integrated companies were producing crude that they used to fulfill a federal refining contract, they were acting "under federal authority." But even more fundamentally, as the United States has emphasized, petitioners were "acting under" federal authority "when they engaged in the wartime oil-production activities that respondents challenge." U.S.Br.30. The record contains ample evidence that "[t]he federal government directed and controlled the entire petroleum industry during WWII, including the exploration, development, and production of crude oil, natural gas, and related products in [the] coastal Louisiana oil fields" at issue in this case. JA76; *see* JA112-22; JA159-67. What is more, the federal government (through PAW) effectively prohibited many of the specific practices that respondents contend petitioners should have used—which is why

respondents do not dispute that petitioners meet the "colorable federal defense" requirement. *See* JA16-23; JA25-27; JA43-44.

Lacking any substantive response, Louisiana insists that petitioners' argument that they acted under federal direction in producing crude oil has been "waived" and "abandoned." La.Br.2; *see* La.Br.28-31, 36. Not so. Petitioners vigorously maintained that they acted under federal direction in producing crude oil until the Fifth Circuit specifically rejected that argument in *Plaquemines II* and this Court denied certiorari on that issue. *See Plaquemines* D.Ct.Dkt.87 at 6; *Cameron* D.Ct.Dkt.113-1 at 3. That interlocutory denial of certiorari does not preclude this Court from reaching the issue now. *See, e.g.*, *Va. Mil. Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Nat'l Football League v. Ninth Inning, Inc.*, 141 S.Ct. 56 (2020) (Kavanaugh, J., respecting denial of certiorari). It did, however, make continuing to raise the point in the Fifth Circuit futile and unnecessary, which is why petitioners focused on cases in which they were in direct contractual privity and the acting-under prong was readily satisfied. And petitioners can hardly be faulted for not raising this acting-under issue "at the certiorari stage," La.Br.28, since they *prevailed on that element* below. In short, this is nothing like an "argument [that] was not raised by the parties or passed on by the lower courts." *Contra* La.Br.31. It is respondents who are trying to reopen the acting-under question, and if they are permitted to do so, then petitioners are free to raise arguments that are fair game in this Court, even though they were

constrained by interlocutory circuit precedent in the courts below.

Finally, it bears emphasis that there is no great anomaly in treating companies in direct contractual privity with the federal government differently from those subject only to close government supervision of their wartime production activities. But as the federal government suggests, any anomaly should be resolved by leveling up and allowing a federal forum for all wartime production activities undertaken under PAW's close supervision. One way or another, however, the production activities of the petitioners here occurred under federal authority. Any alleged illegality of those actions should be resolved in a federal forum, not in a local courthouse where every member of the jury stands to benefit from a windfall.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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