No. 25-517

In the
Supreme Court of the United States

STATE OF MARYLAND, *Petitioner*,
v.
3M COMPANY, *Respondent*.

STATE OF SOUTH CAROLINA ex. rel. Alan Wilson, in his official capacity as Attorney General of the State of South Carolina, *Petitioner*,
v.
3M COMPANY, *Respondent*.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff can defeat a defendant's entitlement to a federal forum by splitting its claims between two nearly identical lawsuits and purporting to disclaim in one of them recovery for conduct that directly implicates a federal defense.

PARTIES TO THE PROCEEDING

Respondent (defendant-appellant below) is 3M Company.

Corteva Inc., Dupont De Nemours Inc., New DuPont, EIDP, Inc., f/k/a E. I. Du Pont De Nemours & Company, Old Du Pont, the Chemours Company, and the Chemours Company FC, LLC were defendants below, but did not participate in the proceedings before the court of appeals.

Petitioners (plaintiffs-appellees below) are the State of Maryland and the State of South Carolina ex rel. Alan M. Wilson, in his official capacity as Attorney General of the State of South Carolina.

CORPORATE DISCLOSURE STATEMENT

3M certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Petitioners Maryland and South Carolina seek to recover for alleged contamination of statewide natural resources from per- and polyfluoroalkyl substances ("PFAS"). They recognize that 3M has a colorable federal defense as to some of the alleged conduct. But in an effort to keep at least some of the dispute in their own state courts, each petitioner split its claims into two nearly identical lawsuits: one seeking recovery for alleged PFAS contamination stemming from aqueous film-forming foam ("AFFF"), including AFFF that 3M produced for the U.S. military under federal contracts, and one seeking recovery for identical alleged PFAS contamination to the same natural resources from all other sources while purporting to disclaim recovery for alleged contamination stemming specifically from AFFF.

When 3M predictably removed all four lawsuits to federal court, petitioners did not contest the removability of their suits seeking recovery for alleged contamination stemming from AFFF. But petitioners insisted that by splitting their claims into two suits and disclaiming recovery stemming from AFFF in one of them, they could keep their so-called "non-AFFF" suits in state court.

Every court of appeals to confront that divide-and-defeat-federal-jurisdiction stratagem has rejected it. None of the appellate decisions on which the petition relies addressed attempts to divide suits to manipulate jurisdiction, let alone suits involving recovery for the same indistinguishable alleged contamination. And while the petition asserts a conflict with the First Circuit, that court recently

joined the Fourth Circuit in rejecting Maine's materially identical effort to split its claims into two parallel suits in an effort to evade federal jurisdiction over one of them. *See Maine v. 3M Co.*, 159 F.4th 129 (1st Cir. 2025). This issue is currently pending before the Second and Eleventh Circuits as well. In the unlikely event that either of those courts creates a circuit split, there will be time enough for this Court to decide whether to intervene. In the interim, this Court should allow the issue to percolate and should deny the petition here.

STATEMENT OF THE CASE

A. Legal Background

The federal-officer removal statute has a long and venerable pedigree. Congress first authorized federal-officer removal during the War of 1812 to protect federal officers who were being harassed for enforcing a trade embargo. *See* Act of February 4, 1815, §8, 3 Stat. 195, 198. While that statute was temporary, Congress soon enacted a permanent replacement, protecting all officials involved in enforcing federal customs revenue laws. *See Tennessee v. Davis*, 100 U.S. 257, 268 (1879). Congress likewise authorized removal for federal officers targeted in hostile jurisdictions during the Civil War and Reconstruction, *Mitchell v. Clark*, 110 U.S. 633, 638-39 (1884), and prohibition enforcers implementing the Volstead Act, *Maryland v. Soper*, 270 U.S. 9, 31-32 (1926). Each statute was animated by a desire "to protect federal officers from interference by hostile state courts." *Willingham v. Morgan*, 395 U.S. 402, 405 (1969).

In the years that followed, Congress demonstrated "a steady inclination towards

broadening the statute." App.10 n.5. Soon after the Civil War, Congress made removal available not only to federal officers themselves, but also to "any person acting under or by authority of any such officer" to enforce federal law in certain subject areas. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 148 (2007) (emphasis omitted). And, shortly after World War II, Congress lifted the subject-area restrictions, "expand[ing] the statute's coverage to include all federal officers" as well as those "acting under" them. *Id.* at 149. As this Court has explained, federal contractors are the quintessential example of private parties who "act[] under" federal direction; they go beyond mere "compliance with the law" by performing jobs the government would otherwise have to perform itself, and helping the government "produce … item[s] that it needs." *Id.* at 153-54. Given that history, this Court has repeatedly confirmed that the federal-officer removal statute, in contrast to other removal provisions, must be "liberally construed to give full effect to the purposes for which [it was] enacted," *Colorado v. Symes*, 286 U.S. 510, 517 (1932), and "should not be frustrated by a narrow, grudging interpretation," *Willingham*, 395 U.S. at 407; *Watson*, 551 U.S. at 147; *Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981).

Before 2011, defendants who invoked 28 U.S.C. §1442(a) had to "establish that the suit [wa]s 'for a[n] act under color of [federal] office.'" *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999) (emphasis omitted). This Court interpreted that provision to require a defendant seeking removal to demonstrate "a causal connection between the charged conduct and asserted official authority." *Id.* In the Removal Clarification

Act of 2011, however, Congress relaxed the standard for federal-officer removal yet again, amending the statute to permit removal of an action "for *or relating to* any act under color of such office," rather than just suits "for" such acts. 28 U.S.C. §1442(a)(1) (emphasis added); *see* Pub. L. No. 112-51, 125 Stat. 545 (2011).

As petitioners acknowledge, that "added phrase expanded the scope of the statute" and "ensures a federal forum" to any defendant facing a suit that relates to acts taken at the behest of the federal government. *See* Pet.6. The statute thus ensures that a defendant facing liability for or relating to his federally directed acts can seek a federal forum in which to raise any "defense arising out of his official duties" as a federal contractor. *Manypenny*, 451 U.S. at 241-42; *Watson*, 551 U.S. at 153-54. That promise is particularly important in lawsuits filed by state governments, in state court, pursuant to state law, seeking to recover for alleged public harm, as it ensures a forum "free from local interests or prejudice," and "enables the defendant to have the validity of his [federal] immunity defense adjudicated[] in a federal forum." *Manypenny*, 451 U.S. at 241-42.

B. Factual Background

The present litigation arises from parallel efforts by petitioners Maryland and South Carolina to evade federal jurisdiction over some of their claims against 3M. In pursuit of that misguided goal, each petitioner filed two nearly identical suits in state court: one seeking recovery for alleged PFAS contamination stemming from AFFF, and the other seeking recovery for identical alleged contamination to the same

natural resources from all other sources while purporting to disclaim any AFFF-related recovery.

PFAS have been "used in a wide range of goods like non-stick cookware and upholstery shields" because they "have useful properties, including that they help repel heat, stains, and other harsh factors." App.4. The same, indistinguishable PFAS compounds are also key ingredients in AFFF, a "widely used firefighting foam" originally designed by the U.S. military and produced under military specifications for use on "military bases, airfields, and naval vessels to fight fuel fires." App.4. In those settings, fuel fires are both "inevitable and potentially devastating," so the use of PFAS in AFFF "save[s] lives[] and protect[s] property." App.145.

After developing AFFF, the Naval Research Laboratory praised the invention as "one of the most far-reaching benefits to worldwide aviation safety." App.145-46. But the government required the assistance of private manufacturers to maintain a sufficient supply. App.147. Accordingly, the Department of Defense developed detailed military specifications ("MilSpec") for private manufacturers to follow. App.147. Private manufacturers selected to perform the work as federal contractors were required to use rigorous inspection and testing procedures to "assure supplies … conform[ed] to [the] prescribed requirements." U.S. Navy, *Military Specification: Fire Extinguishing Agent, Aqueous Film-Forming Foam (AFFF) Liquid Concentrate, Six Percent, for Fresh and Sea Water* 3 (Nov. 21, 1969). The Navy carefully tests AFFF products for compliance with the MilSpec, after

which it adds approved products to the "Qualified Products List." *Id.* at 2; *see also* 48 C.F.R. §9.203(a).

For more than three decades, 3M worked for the federal government as a federal contractor producing and supplying MilSpec AFFF to the U.S. military. During that time, 3M closely followed the military's specifications in satisfying its federal contracts—which mandated that any AFFF produced for the U.S. military contain PFAS. App.147. Until May 2019, the MilSpec contained an explicit PFAS requirement. App.147 & n.11 (citing Mil-F-24385 §3.2 (1969)). The government subsequently dropped that explicit requirement, App.147 n.11 (citing MIL-PRF-24385F(2) §3.2 (2017)), but as the Department of Defense acknowledged in the most recent MilSpec, it is not possible for manufacturers to eliminate PFAS from their AFFF entirely "while still meeting all other military specification requirements," App.147 & n.13 (quoting MIL-PRF-24385F(4) §6.6 (2020)).

The military used MilSpec AFFF on military bases across the country, including at numerous sites in Maryland and South Carolina. *See* App.148-49. MilSpec AFFF contains the same PFAS compounds that are found in AFFF for non-military use, as well as other industrial and consumer goods. And once PFAS compounds are detected in water or soil, there is no reliable way to distinguish between PFAS contamination stemming from MilSpec AFFF and non-MilSpec AFFF, or from AFFF and non-AFFF products. App.148-56, 331-39.

C. Procedural Background

1. Over the past several years, states, public water providers, and private plaintiffs have sued

manufacturers of PFAS. Given the availability of a federal defense for alleged PFAS contamination stemming from AFFF produced under military specifications, most of those lawsuits filed in state courts were removed to federal court. The Judicial Panel on Multidistrict Litigation concluded that centralizing AFFF-related actions into a single proceeding for pre-trial purposes in the District of South Carolina would "promote the just and efficient conduct of this litigation," based in large part on the fact that "the AFFF manufacturers likely will assert identical government contractor defenses in many of the actions." *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 357 F.Supp.3d 1391, 1394 (J.P.M.L. 2018). The federal government-contractor defense immunizes government contractors from state tort liability when they produce equipment for the U.S. military pursuant to "reasonably precise specifications" issued by the government. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988). In the MDL, the defendants, including 3M, are asserting the government-contractor defense based on their production of MilSpec AFFF for the Department of Defense.

2. Faced with the reality that manufacturers are entitled to a federal forum to adjudicate their federal defenses, petitioners Maryland and South Carolina, as well as several other states, have employed a novel strategy to try to keep at least some of their PFAS litigation in state court. On May 20, 2023, "Maryland filed two overlapping lawsuits in state court against 3M" for alleged PFAS contamination, asserting "the same seven state-law causes of action against 3M in both complaints." App.5 & n.1. The suits not only

allege the same causes of action against 3M, but seek recovery for alleged PFAS contamination of the same bodies of water, such as a stretch of the Anacostia River and the Chesapeake Bay, and for harm to the exact same species of wildlife, including "striped bass, blue crabs, and oysters," App.76-77, 80, 202, 206-207. "The only meaningful difference in the complaints is that one [is] directed toward 3M's PFAS production through its manufacture of AFFF generally—Military AFFF and otherwise—while the other [is] directed towards 3M's production of other PFAS-containing products." App.5-6. In the latter complaint, Maryland purports to disclaim "any remediation … related to any PFAS contamination caused by AFFF," noting that such remediation is "the subject of [its] separate action." App.57.

Shortly thereafter, South Carolina mimicked Maryland's strategy. App.7. It filed two "overlapping complaints" against 3M in state court that are "bifurcated on the basis that one [is] directed towards 3M's PFAS production through AFFF products, while the other [is] directed to remediate pollution from 3M's non-AFFF PFAS production." App.7. South Carolina also included a disclaimer in the latter complaint, alleging that it is "not seeking to recover through this Complaint any relief for contamination or injury related to AFFF or AFFF products." App.269 (emphasis omitted). And as with Maryland, each of South Carolina's complaints alleges that PFAS from AFFF and non-AFFF products contaminated the same natural resources: groundwater, surface waters, wildlife, soils, and sediments "throughout the State." App.302-06, 315, 393-400, 412-13. Moreover, both complaints seek overlapping damages and injunctive

relief based on the same PFAS investigation conducted by the South Carolina Department of Health and Environmental Control. App.267-69, 297-301, 393-400.

3. 3M removed all four cases to federal court, asserting federal jurisdiction under the federal-officer removal statute based on its federal work producing MilSpec AFFF. App.137, 319. Neither petitioner objected to 3M's removal of the complaints alleging PFAS contamination resulting from 3M's AFFF production—essentially conceding that those cases belong in federal court. Both petitioners, however, objected to 3M's removal of the complaints alleging PFAS contamination from non-AFFF products, and moved to remand those cases to state court. App.6-8. Petitioners pointed to their disclaimers and argued that their so-called "non-AFFF" complaints could not possibly implicate 3M's federal-contractor defense in light of their disclaimers.

But 3M plausibly alleged in its notices of removal that the conduct that petitioners targeted in their complaints—i.e., the alleged PFAS contamination of natural resources—necessarily relates to 3M's federal work with AFFF (and thus implicates 3M's federal-contractor defense) because "PFAS [compounds] from … non-AFFF products" are the same as, and are "indistinguishably commingled with[,] PFAS from 3M's Military AFFF" in the natural resources at issue. *See* App.6. 3M plausibly alleged that once PFAS compounds reach natural resources, there is no way to distinguish PFAS from AFFF and non-AFFF sources, and thus petitioners' supposed non-AFFF suits still risked holding 3M liable for AFFF production

protected by a federal defense. At a bare minimum, some court would need to allocate the alleged PFAS contamination between activities protected by a federal defense and activities that are not protected by a federal defense, and the federal-officer removal statute entitled 3M to have that court be a federal one.

3. The district courts nevertheless granted petitioners' motions to remand the so-called "non-AFFF" cases to state court. App.28, 37. Viewing the allegations "in the light most favorable to Plaintiff," rather than the light most favorable to 3M as the removing defendant, the district court in Maryland "gave Maryland's disclaimer dispositive effect, reasoning that by virtue of the disclaimer, the non-AFFF complaint was limited in scope and precluded a connection between 3M's PFAS contamination and its federal authority." App.7; 28, 31-34.

The district court in South Carolina took the same basic approach. Instead of crediting 3M's plausible allegations in its notice of removal concerning the commingling of AFFF and non-AFFF PFAS in the affected resources and the impossibility of distinguishing the two, the court applied a presumption against removal and concluded that South Carolina's disclaimers "moot 3M's government contractor defense because … [3M] cannot be held liable in this case for PFAS contamination originating from AFFF." App.41-42.

4. On appeal, the Fourth Circuit consolidated the two cases and vacated both district courts' decisions, holding that "3M's Military AFFF production is inextricably related to the States' general allegations of PFAS contamination, notwithstanding their

attempts to draw a line between 3M's federal and non-federal work." App.19.

While petitioners emphasized the customary presumption against removal and the maxim that a "plaintiff is the master of the complaint," the court stressed that "the federal-officer removal statute" flips the ordinary presumption against removal, and acts as "'an exception to the well-pleaded complaint rule' insofar as it 'allows suits against federal officers to be removed despite the nonfederal cast of the complaint, and reflects a congressional policy that federal officers'" and contractors alike "'require the protection of a federal forum.'" App.11 (quoting *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 644 n.12 (2006) & *Acker*, 527 U.S. at 431). And as the court explained, "Congress saw fit to amend the federal officer removal statute in 2011 to 'broaden[] the universe of acts that enable federal removal, such that there need be only a connection or association between the act in question and the federal office." App.10 n.5 (quoting *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017)).

Applying those principles, the Fourth Circuit rejected the district courts' conclusions that 3M had not shown that "the charged conduct was carried out for or in relation to the asserted official authority." App.11-13. In particular, the court "reject[ed] the notion that the States' purported disclaimers of 3M's federal conduct were dispositive," because treating those disclaimers as dispositive would "ignore[] the unique lens through which [courts must] consider federal officer removal." App.12-13. "As our sister circuits agree, '[a] disclaimer that requires a state

court to determine the nexus "between the charged conduct and federal authority" is not a valid means of precluding removal.'" App.13 (quoting *Puerto Rico v. Express Scripts, Inc.*, 119 F.4th 174 (1st Cir. 2024); *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 945 n.3 (7th Cir. 2020)). The court deemed petitioners' disclaimers to be precisely that kind of "artful pleading" aimed at avoiding federal jurisdiction, and held that "[t]he district courts erred in holding otherwise." App.15.

The Fourth Circuit went on to conclude that 3M had "plausibly alleged that its charged conduct was related to its federal work" notwithstanding the States' disclaimers. App.15. In reaching that conclusion, the court reiterated that courts must "'credit [the] *Defendants'* theory of the case when determining whether' there is … a connection or association" between the charged conduct and acts taken under federal direction, and that 3M "need not establish 'an airtight case on the merits in order to show the required causal connection.'" App.12-13. "Under [3M's] theory," the court found, "the nexus element" was "satisfied" because 3M plausibly alleged that "PFAS from different sources commingle to the point that it is impossible to identify the precise source of a contaminant once those chemicals seep into the relevant waterways." App.15. Moreover, as 3M further alleged, "[s]ome of the PFAS contamination charged by the States came from Military AFFF, so any remediation would necessarily implicate work that 3M did for the federal government," and thus implicate its federal defense. App.15.

Although petitioners disputed 3M's allegations, the court reasoned that "whether certain PFAS

contamination came from 3M's Military AFFF or from its non-AFFF products presents a challenging causation question" and raises complex "apportion[ment]" questions that necessarily implicate "3M's federal work." App.15-16. The court accordingly re-affirmed that "[w]here the parties dispute difficult factual questions about th[e] federal interest, a contractor acting at the government's direction 'should have the opportunity to present their version of the facts to a federal, not a state, court.'" App.17 (quoting *Willingham*, 395 U.S. at 409). After finding that "3M meets the nexus element of the federal officer removal statute," the court remanded "for consideration of whether 3M satisfied the other elements needed for federal officer removal." App.19-21.

Senior Judge Floyd dissented. He "agree[d] with the majority that the federal officer removal statute serves an important purpose in our courts," and "must be 'liberally construed'" in favor of "removal." App.22. But despite recognizing that "some of the [PFAS] pollution" from AFFF and non-AFFF products "may be commingled," Judge Floyd believed it would be preferable to "trust the courts of Maryland and South Carolina to hear these cases and ensure any liability is apportioned properly." App.26.

Petitioners sought rehearing en banc, but no judge called for a poll. App.45.

REASONS FOR DENYING THE PETITION

The decision below reflects the unanimous view of the courts of appeals that a plaintiff cannot defeat a federal contractor's entitlement to a federal forum based on a largely circular disclaimer that amounts to

little more than artful pleading. In the cases involving alleged AFFF contamination that are proceeding in federal court without objection, a central issue will be the extent to which the alleged PFAS contamination of natural resources is attributable to MilSpec AFFF. In federal court, that issue will be decided as a straightforward question of the scope of the federal-contractor defense. Petitioners would have state courts decide the same basic issue as a question of the scope of their disclaimers. But whether framed in terms of the scope of the federal defense or the scope of the disclaimer, the essential issue is the same, and a federal contractor is entitled to a federal forum to resolve that issue. That is why courts have uniformly rejected this kind of circular disclaimer. Indeed, no one disputes that a plaintiff cannot defeat a defendant's entitlement to a federal forum simply by disclaiming any conduct protected by a federal defense. Petitioners' effort to disclaim recovery for PFAS contamination from AFFF is no different in substance, which is why every circuit court to confront the states' divide-and-defeat-federal-jurisdiction stratagem has rejected it.

Petitioners boldly predicted that the First, Ninth, and Eleventh Circuits would have decided this issue differently. But since the petition was filed, the First Circuit has addressed Maine's materially indistinguishable effort to defeat federal jurisdiction by splitting its claims between an AFFF and non-AFFF suit, and the First Circuit rejected that effort unanimously. *Maine*, 159 F.4th at 131-32, 138-40. And while a Ninth Circuit panel criticized the decision below in dictum, that case involved a very different factual context—an opioids case where the state

completely disclaimed recovery arising from the defendants' work for the federal government, as opposed to simply splitting its claims between two largely duplicative lawsuits—leading the Ninth Circuit panel to expressly distinguish the decision below as a factual matter. Finally, it bears emphasis that this same basic issue is pending in the Second and Eleventh Circuits. In the unlikely event that one of those circuits blesses a circular disclaimer like the one at issue here, there will be time enough for this Court to decide whether to intervene. But given those pending appeals and the absence of any current circuit split, the case for further percolation is very strong, and the case for granting this petition is remarkably weak. This Court should deny certiorari.

I. The Decision Below Is Consistent With The Decisions Of Every Other Circuit To Have Addressed The Relevant Issues.

Petitioners' assertion that the decision below creates a circuit split is flat wrong. The decision below does not "conflict[] with rulings from the First, Ninth, and Eleventh Circuits," Pet.14; on the contrary, the First Circuit just reached the exact same outcome—and explicitly agreed with the decision below—in a materially identical decision issued not long after petitioners filed their petition. Ninth Circuit dictum cannot create a circuit split, and the Eleventh Circuit precedent petitioners cite is inapposite. In short, every circuit court to squarely address petitioners' circular disclaimers has rejected them.

1. Petitioners confidently assert that "this case would have been decided differently" if it were brought "in the First Circuit." Pet.17. The First Circuit begs

to differ. In *Maine*, the State of Maine, like petitioners, filed two largely duplicative suits against 3M for alleged PFAS contamination of statewide natural resources: one targeting AFFF sources, and another targeting non-AFFF sources while purporting to disclaim recovery for AFFF-related PFAS. 159 F.4th at 130-31. Like petitioners, Maine acceded to removal of its AFFF suit on federal-officer grounds but moved to remand its "non-AFFF" suit based on the complaint's disclaimer of "any relief for contamination or injury related to [AFFF]." *Id.* Like the district courts below, the district court granted remand based on Maine's disclaimer. *Id.*

And like the Fourth Circuit here, the First Circuit reversed, holding that Maine's "efforts to have two courts answer the same questions must fail." *Id.* at 131. Just like the Fourth Circuit, the First Circuit reasoned that "3M is entitled, under the [federal-officer] removal statute, to have a federal court decide" the issues relevant to its federal defense, including "whether [non-AFFF] PFAS contamination has commingled with AFFF contamination." *Id.* at 131-32. Because "[r]esolution of Maine's Complaint requires addressing whether and to what extent … contamination from AFFF sources has commingled with non-AFFF [contamination]," 3M met both the nexus requirement and the colorable federal defense requirement, and was entitled to remove Maine's "non-AFFF" complaint. *Id.* at 138-39 & n.22. And further mirroring the Fourth Circuit's decision, the First Circuit rejected Maine's reliance on its disclaimer, which would "leave a state court to determine the nexus between the charged conduct and federal authority," making it circular and therefore

ineffective under binding First Circuit precedent. *Id.* at 139.

Maine also explicitly refutes petitioners' assertion that the decision below "conflicts with the First Circuit's … decision" in *Express Scripts*. Pet.17. In *Express Scripts*, the Commonwealth of Puerto Rico sued Caremark for alleged insulin price inflation based on the company's rebate negotiations with private clients, while expressly disclaiming "relief relating to a federal program." 119 F.4th at 179. Caremark removed on federal-officer grounds, alleging in its removal notice that its handling of private and federal benefits was intertwined. *Id.* at 181-84. The First Circuit reversed the district court's remand order, holding that the defendant's "theory of the case," and its allegations concerning the "indivisibility" of federal and non-federal activity "must be credit[ed]," and that a plaintiff's "disclaimer" is "circular" and thus "not effective" where there is little difference between what the plaintiff disclaims and what the federal-contractor defense protects. *Id.* at 187-89, 191.

Petitioners argue, just as Maine did in *Maine*, that *Express Scripts* is cabined to circumstances where the upstream private activity is intertwined with federal work, and does not support removal of non-AFFF PFAS suits against 3M because 3M has not conducted any "joint" PFAS-producing activities with "federal and private parties." *Maine*, 159 F.4th at 139; Pet.17-18. According to the First Circuit itself, though, that argument "misapprehends" how *Express Scripts* "defines effective … disclaimers in contrast to" circular disclaimers that are no more than "artful

pleading." 159 F.4th at 139. Like petitioners' disclaimers here, the disclaimers in *Express Scripts* and *Maine* were ineffective because they "would leave 'a state court to determine the nexus "between the charged conduct and federal authority."'" *Id.* Far from showing a "square[] conflict[]," Pet.14, the First Circuit and the Fourth Circuit are fully aligned on the question presented. *See Maine*, 159 F.4th at 140 n.24 ("The Fourth Circuit's reasoning … supports the result we reach.").

2. Petitioners' mistaken prediction about the First Circuit is a cautionary tale about their suggestion that there is a conflict with the Ninth and Eleventh Circuits. Neither of those circuits has confronted the same kind of divide-and-defeat-federal-jurisdiction gambit employed by Maine, Maryland, and South Carolina, and there is no reason to think those circuits would reward that claim-splitting tactic. If those courts do ultimately endorse that strategy and thereby create an actual circuit split, there will be time enough for this Court to decide whether to intervene at that point.

To be sure, the Ninth Circuit has criticized the decision below in dictum, albeit only after distinguishing the decision factually. *See California ex rel. Harrison v. Express Scripts, Inc.*, 154 F.4th 1069 (9th Cir. 2025). *Harrison* involved a very different factual context, in which California brought opioid-related claims against pharmacy benefit managers but completely disclaimed any relief arising from the defendants' work for the federal government. *Id.* at 1075-76. Petitioners, by contrast, have disclaimed nothing, but have instead filed two duplicative

contamination lawsuits in an effort to defeat federal jurisdiction over one of them, despite 3M's plausible allegations that PFAS from MilSpec AFFF are indistinguishably commingled with the same PFAS compounds from other sources at sites in the "non-AFFF" lawsuits. *See* App.18-19. The Ninth Circuit in *Harrison* recognized as much, and expressly distinguished the Fourth Circuit's decision below as involving the "unique facts" of "pollution discharged into a waterway in which the source of the contaminant might be difficult to identify." 154 F.4th at 1089. Only after distinguishing this case and its "unique facts" did the panel go on to suggest its disagreement in dictum. *See* Pet.14-15. But mere dicta "does not a circuit split make." *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 334 n.10 (D.C. Cir. 2015). It is telling, moreover, that the First Circuit had the benefit of both the Ninth Circuit's dictum and the Fourth Circuit's holding, and followed the latter on indistinguishable facts. *See Maine*, 159 F.4th at 138-40 & n.24. There is simply no denying that every circuit court to actually confront the prospect of two nearly identical complaints and a disclaimer that does not actually disclaim any recovery, but simply reinforces the claim splitting, has upheld the removing defendant's entitlement to a federal forum.[1]

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[1] Petitioners can find no support in the Ninth Circuit's unpublished decision in *Young v. Tyco Fire Prods., LP*, 2022 WL 486632 (9th Cir. Feb. 17, 2022). Not only is that decision unpublished, and thus incapable of creating any actual circuit split, but it also explicitly distinguished cases like this one where "the plaintiff explicitly alleged groundwater contamination as a source of injury." *Id.* at *2.

3. As to the Eleventh Circuit, petitioners cannot even identify any contradictory dictum. Instead, petitioners point to that court's decision in *Georgia v. Meadows*, 88 F.4th 1331 (11th Cir. 2023), which has almost nothing to do with the question presented here. First, *Meadows* was "a criminal case" and so required a "more detailed showing" for removal that is not required in the civil context. *Id.* at 1348. Second, due to the Double Jeopardy Clause, criminal cases do not lend themselves to claim splitting, and so (unsurprisingly) the criminal indictment in *Meadows* did not feature a disclaimer. Third, *Meadows* held that removal was unavailable to former federal officers, a holding with no application here. As an alternative ground, the Eleventh Circuit concluded that the former Chief of Staff's official actions were unrelated to the criminal charges against him because his official "role [did] not include altering valid election results in favor of a particular candidate." *Id.* at 1348-50. To state that holding is to underscore its irrelevance here.

While *Meadows* has little relevance to the issues at hand, the Eleventh Circuit will soon have a chance to address the impact of a disclaimer in the context of civil litigation involving alleged PFAS contamination of natural resources in *Town of Pine Hill v. 3M Company*, No. 25-10746 (11th Cir. docketed Mar. 7, 2025). That appeal is fully briefed and awaiting oral argument. There is every reason to think that the Eleventh Circuit will agree with the First and Fourth Circuits. If not, the asserted circuit split may finally materialize. As things stand, however, there is no

division in the Circuits and no basis for plenary review.[2]

4. Last and least, the Fifth Circuit's decision in *Plaquemines Parish v. BP America Production Company*, 103 F.4th 324 (5th Cir. 2024), does not "illustrate[]" any "confusion" regarding the question presented here. *Contra* Pet.18. Indeed, petitioners concede (with considerable understatement) that "[t]his case is distinct from" that one, Pet.19, where this Court has granted certiorari to decide "[w]hether a causal-nexus or contractual-direction test survives the 2011 amendment to the federal-officer removal statute." *See* Br. of Petitioner at i, *Chevron U.S.A. Inc.*

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[2] The First and Fourth Circuit's decisions also accord with relevant decisions from the Seventh Circuit, which petitioners tellingly omit from their discussion. In *Baker*, for example, the Seventh Circuit upheld DuPont's removal of claims for alleged property contamination despite the plaintiff's effort to disclaim recovery for DuPont's actions under federal contracts during World War II. 962 F.3d at 943-45. Because there was a dispute over the source of the toxins and the extent to which they stemmed from actions to fulfill the federal contracts, the Seventh Circuit viewed that dispute as "just another example of a difficult causation question that a federal court should be the one to resolve." *Id.* at 945 n.3; *see* App.17; *Maine*, 159 F.4th at 139. More recently, in the PFAS context, the Seventh Circuit allowed a remand to state court, but only because the State in that single-site case was willing to make an extraordinary disclaimer at oral argument that prevented it from recovering at all if "even a morsel" of PFAS contamination could be traced to AFFF. *Illinois ex rel. Raoul v. 3M Co.*, 111 F.4th 846, 849 (7th Cir. 2024). Petitioners and Maine were unwilling to make comparable disclaimers in their statewide cases, and both the First and Fourth Circuits viewed *Raoul* as consistent with and supportive of their decisions to uphold 3M's entitlement to a federal forum. App.18-19; *Maine*, 159 F.4th at 140 n.24.

v. Plaquemines Parish, No. 24-813 (U.S. filed Sept. 4, 2025). In *Chevron*, there is no disclaimer or claim-splitting tactic at issue. Instead, the dispute centers on whether the defendant's federal refining contracts are sufficiently related to its allegedly tortious oil production to support federal-officer removal. *See id.* Here, there is no dispute about the connection between 3M's federal work and the alleged PFAS contamination—petitioners instead seek to carve out a subset of that alleged contamination with a disclaimer so that they can litigate the remainder (or more realistically, large overlapping portions) in state court. *Chevron* accordingly has nothing to do with (and certainly does not conflict with) the Fourth Circuit's correct rejection of petitioners' divide-and-defeat-federal-jurisdiction gambit. Petitioners' failure to show any conflict between the decision below and any other court of appeals confirms that certiorari should be denied.

II. The Decision Below Is Correct And Does Not Conflict With This Court's Precedent.

The Fourth Circuit's decision not only creates no conflict, but also is correct and aligns with this Court's federal removal jurisprudence.

Under the federal-officer removal statute, a federal contractor acting under federal authority can remove any lawsuit that is "for or relating to any act under color of such office." 28 U.S.C. §1442(a)(1). It is black-letter law that a reviewing court must "credit" a defendant's "theory of the case" in determining whether removal is appropriate, *Acker*, 527 U.S. at 432, and that the statute must be "liberally construed" in favor of federal removal, *Watson*, 551 U.S. at 147.

In light of those binding principles, there is no serious dispute that 3M is entitled to a federal forum in any case that seeks to hold it liable for alleged PFAS contamination from work undertaken to fulfill federal contracts for AFFF. Petitioners themselves did not even try to resist the removal of their cases explicitly seeking to recover for alleged PFAS contamination stemming from AFFF. Thus, the sole debate in this case is whether by filing two suits and purporting to disclaim recovery for AFFF-related contamination in one of them, they can keep one of the two cases in state court.

The Fourth Circuit correctly rejected that effort. Properly crediting 3M's theory of removal, the panel majority accepted that "PFAS from different sources commingle to the point that it is impossible to identify the precise source of a contaminant once those chemicals seep into the relevant waterways." App.15. And because "[s]ome of the PFAS contamination charged by the States" as resulting from non-AFFF products plausibly "came from" "Military AFFF … any remediation [will] necessarily implicate work that 3M did for the federal government." App.15. More to the point, "whether certain PFAS contamination came from 3M's Military AFFF or from its non-AFFF products presents a challenging causation question" and raises complex "apportion[ment]" questions that implicate "3M's federal work" and belong in federal court. App.15-16.

2. Petitioners' critiques of that well-reasoned decision are unavailing. *Contra* Pet.19-28. Petitioners principally contend that the Fourth Circuit's decision is flawed because (they say) it

misunderstands what constitutes the "charged conduct" in their complaints. According to petitioners, the "charged conduct" in their complaints is not PFAS contamination, but instead 3M's production of non-AFFF products. *See* Pet.23-25, 26-27. That is impossible to square with petitioners' complaints, let alone the plausible allegations of 3M's removal petition, which are what must be credited. These cases are not about production techniques that are unique to non-AFFF products. The complaints seek recovery for the alleged contamination of statewide natural resources by PFAS. The only things that even purport to distinguish PFAS sourced from AFFF and PFAS sourced from non-AFFF products are petitioners' disclaimers. Petitioners seek recovery for alleged contamination of the same resources by the same chemical compounds. That is the relevant charged conduct.

To be sure, when it came to the question of whether PFAS contamination can be neatly divided and traced to discrete AFFF and non-AFFF sources, the Fourth Circuit credited 3M's theory of removal and the plausible allegations of its removal petition. But that is fully in accord with this Court's precedents. While in other removal contexts, the allegations of the complaint may control, the federal-officer removal context is different. *See Acker*, 527 U.S. at 432; *see also* App.12-13 (courts considering federal-officer removal must "credit a removing defendant's theory of the case"). The Fourth Circuit did not err by faithfully applying that well-settled law.

At bottom, petitioners' real argument is that the Fourth Circuit refused to credit their disclaimers and

their insistence that those disclaimers convert questions about the scope of the federal defense into questions about the scope of the disclaimers themselves. But the Fourth Circuit (and the First Circuit) was entirely correct to dismiss that approach as circular and the disclaimers as mere artful pleading. No one thinks a disclaimer that purports to disclaim any recovery for activities protected by a federal defense would suffice to defeat federal jurisdiction. That remains true even though the question in state court would be framed in terms of the scope of the disclaimer rather than the scope of the federal defense. Petitioners' effort to disclaim any relief for PFAS stemming from AFFF is not materially different. Petitioners seek to carve out AFFF liability for no reason other than to preserve a state forum, but there is no avoiding the need for some court to make the difficult—perhaps impossible—determination of how much of the alleged PFAS contamination of any given resource stems from MilSpec AFFF as opposed to non-AFFF sources. Whether framed in terms of the scope of the disclaimer or the scope of the federal defense, that question belongs in federal court.

Finally, petitioners submit that the Fourth Circuit misapplied its own precedent. Pet.25 (citing *Anne Arundel Cnty. v. BP P.L.C.*, 94 F.4th 343 (4th Cir. 2024)). If true, that would be an argument for en banc review, not certiorari. *See, e.g.*, *Joseph v. United States*, 135 S.Ct. 705, 707 (2014) (Kagan, J., respecting denial of certiorari) ("[W]e usually allow the courts of appeals to clean up intra-circuit divisions on their own[.]"). In reality, however, not a single judge of the Fourth Circuit perceived a conflict between the

decision below and *Anne Arundel*, including the three judges who decided *Anne Arundel*.

III. Further Percolation Is Warranted.

As petitioners themselves acknowledge, there are "a large and increasing number of cases" percolating below that raise similar questions. Pet.28. To date, that volume of cases has not translated into a circuit split. Instead, the appellate courts that have squarely confronted these duplicative lawsuits and disclaimers have uniformly rejected the effort to deny a federal contractor a federal forum.

But other courts are still considering the issue. For instance, a case materially identical to this one has been fully briefed and argued in the Second Circuit. In *Connecticut v. 3M Company*, No. 25-11 (2d Cir. docketed Dec. 23, 2024), the State of Connecticut (like Maryland, South Carolina, and Maine before it) has attempted to evade federal jurisdiction by litigating two suits against 3M for alleged PFAS contamination of its natural resources—an AFFF suit in federal court, and a non-AFFF suit in state court. And like the other states to try that gambit, Connecticut pins its hope on a disclaimer, arguing that its state suit excludes recovery for contamination from AFFF sources despite 3M's plausible allegations that the alleged PFAS contamination from AFFF and non-AFFF sources is inextricably commingled, implicates its federal defense, and requires a federal forum. *See* Appellant Br. at 1-4, 21-26, 28-37, *Connecticut v. 3M Co.*, No. 25-11 (2d Cir. Apr. 7, 2025), Dkt.28.1. The Second Circuit held oral argument on November 20, 2025, and the parties are awaiting a decision.

The same basic issue is also pending in the Eleventh Circuit. In *Pine Hill*, the Town of Pine Hill has likewise attempted to evade federal jurisdiction by filing suit against 3M in state court for alleged non-AFFF PFAS contamination to the Alabama River, even though AFFF-sourced PFAS could also have plausibly contributed to that alleged contamination. *See* Appellant Br. at 8-9, *Pine Hill*, No. 25-10746 (11th Cir. May 16, 2025), Dkt.18. Although the case does not involve an attempt to recover for alleged statewide contamination, the Town relies on a disclaimer like the ones at issue here. That appeal is fully briefed and awaiting argument. There is no reason to think that the Second or Eleventh Circuit will resolve those pending cases any differently from the unanimous *Maine* decision and the decision below. But there is every reason to wait and see whether a circuit split develops before granting review.

Ignoring the absence of any split and the active percolation on these issues in the courts of appeals, petitioners ask this Court to grant certiorari to prevent the "delay" purportedly caused by §1442 appeals that "undermine Congress's policy against 'interrupti[ng] … litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction.'" Pet.28. But it was Congress that granted parties seeking federal-officer removal a right to interlocutory appeal, deciding that the "heightened concern for accuracy" in the federal-officer context warrants "the delay it can entail." *BP P.L.C. v. Mayor & City Council of Balt.*, 141 S.Ct. 1532, 1542 (2021). And the history of these cases here and in *Maine* has underscored the wisdom of that policy choice, as the district courts have been willing to remand cases that

the appellate courts have held firmly belong in federal court. In all events, that is a policy choice for Congress, not a valid reason to grant a premature petition on an issue that merits further percolation.

Petitioners next assert that there are significant issues of state sovereignty that the decision below gets wrong. Pet.29-30. But that gets matters almost exactly backwards. The federal-officer removal statute and Congress' steady broadening of the statute have far more to do with the Supremacy Clause than the Tenth Amendment or federalism principles. And there are few situations in which a federal forum and the policies behind the federal-officer removal statute are more important than when a defendant who has helped the federal government accomplish objectives that are nationally important, but locally unpopular, faces a lawsuit by the state itself. *Cf. Watson*, 551 U.S. at 153-54 (approving of federal-officer removal where a private contractor is "helping the Government to produce an item that it needs").

Finally, petitioners submit that this Court's guidance is necessary because (they say) "lower courts have struggled to apply the federal officer removal statute consistently and coherently," and so (they say) this Court should step in to provide "greater certainty to defendants deciding whether to remove, plaintiffs deciding whether to seek remand, and courts resolving those disputes." Pet. 29, 32. But the courts of appeals uniformly agree that cases like the ones here belong in federal court. *See* App.21; *Maine*, 159 F.4th at 139; *Baker*, 962 F.3d at 945. If some court were to break from that uniform consensus in the future, this Court

might need to decide whether to intervene. But today is not that day.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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