

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

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CHEVRON USA INCORPORATED,)
ET AL.,)
Petitioners,)
v.) No. 24-813
PLAQUEMINES PARISH, LOUISIANA,)
ET AL.,)
Respondents.)

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Place: Washington, D.C.
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4 ET AL.,)
5 Petitioners,)
6 v.) No. 24-813
7 PLAQUEMINES PARISH, LOUISIANA,)
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10 - - - - -

11
12 Washington, D.C.
13 Monday, January 12, 2026
14

15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:04 a.m.
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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 24-813, Chevron
5 versus Plaquemines Parish.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONERS

9 MR. CLEMENT: Mr. Chief Justice, and
10 may it please the Court:

11 Congress amended the Federal Officer
12 Removal Act in 2011 and added the words
13 "related to." Both before and after that
14 amendment, this Court emphasized that those are
15 words of substantial breadth meaning "connected
16 to" or "associated with." Thus, the import of
17 Congress adding those capacious words to the
18 statute is hard to deny, so much so that
19 Respondents effectively spend very little time
20 defending the lower court's reasoning on
21 "related to." Instead, they shift their focus
22 to "acting under," which is a distinct
23 requirement of the statute addressing who can
24 remove and an issue on which they lost
25 unanimously below.

1 That effort to change the subject does
2 not work. The classic person who acts under a
3 government official is a government contractor
4 providing the government with what it needs to
5 win a war. Thus, no one doubts that the
6 refining of avgas under federal contract
7 satisfies the "acting under" condition. The
8 only question is whether that refining activity
9 under contract is connected to or associated
10 with the production activities assailed in
11 these lawsuits.

12 The answer to that question is
13 straightforward. The -- the Petitioners here
14 produced the very kinds of crude that were the
15 indispensable component of the avgas they
16 refined under federal contract, and the
17 contracts themselves drew the connection
18 between avgas and crude by pegging the price
19 that the government paid for refined avgas to
20 the price of crude and the government promising
21 that it would rebate any new taxes on crude.

22 What is more, if the Petitioners'
23 production of crude had been enjoined by a
24 state court during World War II, the federal
25 government's efforts, the war efforts, would

1 have suffered.

2 Now Respondents think that it's
3 anomalous to allow only the vertically
4 integrated producers to remove to federal
5 court. I don't think there's anything odd
6 about allowing people in direct privity with
7 the federal government to remove, but any
8 anomaly can be alleviated by leveling up and
9 allowing everyone who produced crude under the
10 direct supervision of the federal government
11 under the unique circumstances of World War II
12 to remove, as the Solicitor General suggests.

13 Either way, this court belongs in
14 federal court.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Mr. Clement, how
17 would your argument differ if this were
18 pre-2011?

19 MR. CLEMENT: So I think my argument
20 would be a lot tougher pre-2011 because,
21 obviously, before 2011, the statute would have
22 said "for," not "for" or "related to." Now
23 I -- I -- I might have given it the college try
24 and -- even under "for," and, of course, if you
25 get to the Solicitor General's sort of -- or

1 our alternative argument, I think then we could
2 satisfy the statute even pre-2011.

3 But that would require, as we think is
4 correct, understanding that this isn't ordinary
5 regulation of the type that was at issue at
6 Watson. This was close supervision of what
7 effectively amounted to a joint venture during
8 World War II to get as much oil out of the
9 ground, transport it to the refineries that the
10 government was helping to finance to expand,
11 all in an effort to get petroleum products and,
12 in particular, avgas onto the war front.

13 So I think we could have won under
14 that theory even pre-2011, but I do think the
15 statute --

16 JUSTICE THOMAS: But you do admit that
17 this is quite a dramatic change to the removal
18 statute?

19 MR. CLEMENT: I would say it's a
20 substantial expansion of the statute, but, of
21 course, it's a substantial expansion that I
22 think follows directly from the words that
23 Congress added to the statute. And that's why
24 I think it's -- it's really relevant that the
25 plain meaning, the dictionary definitions, of

1 "related to" always had a broad meaning. And,
2 of course, this Court, in cases like Morales,
3 had said this is a very broad term, and
4 Congress added it anyways. And so I think we
5 should sort of take Congress at its word in the
6 text of the statute that --

7 JUSTICE JACKSON: But, Mr. Clement, in
8 the text of the statute, Congress also says
9 that adding those words was a conforming
10 amendment. And we have case law that indicates
11 that conforming amendments don't make
12 substantial changes.

13 So I'm a little worried about the
14 suggestion that this is a substantial change in
15 light of Congress's statutory statement that
16 this is a conforming amendment.

17 MR. CLEMENT: So, Justice Jackson, I
18 would say you have cases that go both ways on
19 this. You certainly have the case in the case
20 that the Fifth Circuit en banc relied on in
21 rejecting this argument, is Burgess against the
22 United States, which stands for the proposition
23 that even a conforming amendment is a real
24 amendment and you give the words their effect.

25 And in my reading of the cases that go

1 the other way, they don't really deny that
2 words that pass through bicameralism and
3 presentment have to be given their effect. In
4 cases -- sometimes you go through the analysis,
5 effectively determine that the words don't have
6 a dramatic effect, and then note at the end of
7 the analysis that it was a conforming
8 amendment, and --

9 JUSTICE JACKSON: But we do have amici
10 here, an amicus brief that talks about another
11 option that really does make sense of the
12 conforming amendment analysis. In other words,
13 this amicus -- and I'm referring to the
14 Governor John Bel Edwards brief -- indicates
15 that in the House report and in the legislative
16 history, Congress explained that what it was
17 trying to do when it added "or relating to" was
18 expand the types of actions that could be
19 brought.

20 In other words, there had previously
21 been concern that pre-discovery suits were not
22 able to be removed. Congress explicitly
23 changed the statute to include them and then
24 put "or relating to," says the amicus and the
25 House report, put "or relating to" as a

1 conforming amendment to that change.

2 So what's your response to that
3 theory, which doesn't require us to view "or
4 relating to" in -- in its broadest sense?

5 MR. CLEMENT: So two things, Your
6 Honor. One thing would be a textual response;
7 one would be a response based on the House
8 report.

9 So, first, the textual response is
10 there's no way, given what Congress did to the
11 text of the statute, to limit it to the
12 pre-suit discovery actions that the -- that
13 were concededly the immediate impetus for
14 Congress getting concerned about this issue.

15 Congress could have passed a statute
16 that said something like "for" or in "pre-suit
17 actions relating to, comma," and then it would
18 have would had this limiting effect where
19 "related to" only modified those pre-suit
20 actions that were added to the definition of
21 civil action and criminal proceeding as part of
22 the rest of the statutory amendments. So
23 there's just no way, given the words that they
24 added in the various parts, to sort of limit it
25 in the way that the amici would sort of wish.

1 But the second thing is, for those
2 that look at House reports, if you actually
3 look at the House report, it has a
4 section-by-section analysis, and there is a
5 specific explanation of what the House thought
6 it was doing in 2(b) of the statute, which is
7 the specific provision, call it a conforming
8 amendment, but the specific provision that
9 added the "related to" language.

10 And Congress said that it was
11 rewriting the statute to essentially expand the
12 universe of suits that could be removed to acts
13 that could be removed by federal officers to
14 federal court. So, in --

15 CHIEF JUSTICE ROBERTS: How far -- I'm
16 sorry. Finish.

17 MR. CLEMENT: No, I was just going to
18 say, so in the one place in the section by
19 section where that House report says
20 specifically what they're trying to do, they
21 say we're trying to broaden the universe of
22 acts, not actions, acts that federal officers
23 can remove to federal court. I'm sorry.

24 CHIEF JUSTICE ROBERTS: How far
25 upstream do you carry "relating to"? Let's say

1 you have a vertically integrated company, you
2 know, a lot of inputs, changes along the way,
3 and at the end of it, they're selling a product
4 to the government.

5 Does "relating to" go to the step
6 that's, you know, 10 -- 10 steps above that,
7 where they're buying the materials, they're
8 shaping the material, all this other stuff?

9 MR. CLEMENT: I would say probably
10 not. And I think anytime you're dealing with a
11 word like "related to" there's going to be some
12 degree of attenuation at some point where
13 you're going to say, you know, fun's fun, but
14 don't die laughing, we're going to cut it off
15 before that point.

16 Now I would think, here, there are a
17 couple of factors that make this a relatively
18 straightforward case. First of all, you don't
19 have to go that far upstream. We are talking
20 about the absolute indispensable component,
21 which is this high -- the particular grades of
22 crude.

23 The other thing you have here that I
24 think it makes it a relatively straightforward
25 case is that you have the contract itself

1 drawing the connection between avgas and crude.
2 I mean, literally, what the government agrees
3 to pay for the refined avgas that it's
4 purchasing is based on the price of crude in
5 the east Texas field. So the connection is
6 very direct there.

7 The last thing I'll say, and -- and
8 this is, you know, the -- I guess the closest
9 to something that would be like a test or a
10 formulation that might give guidance, but I
11 think, if you ask the question would enjoining
12 the activity that the Petitioners engaged in
13 have a direct negative effect on the -- on the
14 government, I mean, the answer here is clear.

15 If you'd enjoined the production
16 activities during World War II, that would
17 directly affect the government's ability to get
18 refined avgas to fight the war effort. If you
19 go 10 steps upstream to an ingredient that one
20 company adds and nobody else adds, I think, if
21 you ask the question would this interfere with
22 the federal government's functioning, the
23 answer would be no. But, here, it's clearly
24 yes.

25 JUSTICE KAGAN: What if --

1 JUSTICE SOTOMAYOR: I'm not sure
2 that's satisfactory to me. The way you're
3 defining this "but-for" now, something could
4 fall apart.

5 So how about an employer's strike --

6 MR. CLEMENT: So --

7 JUSTICE SOTOMAYOR: -- or an
8 employment dispute of a critical engineer of
9 some sort?

10 MR. CLEMENT: So I guess what I would
11 say about that is it might depend. I mean,
12 here, for example, there --

13 JUSTICE SOTOMAYOR: Depend on what?
14 That's the problem because, if we define it
15 as --

16 MR. CLEMENT: Well, I think it would
17 depend on how --

18 JUSTICE SOTOMAYOR: -- if we define it
19 as capaciously as you do, I'm not sure what the
20 stopping point would be or how we would limit
21 the application to this case.

22 MR. CLEMENT: Well, I -- I -- I guess
23 I'd ask you to think about it this way. I
24 mean, I would think -- I mean, there are
25 provisions in this contract that go to working

1 conditions. Now, here, the contract went out
2 of its way to say that the FLSA should apply
3 here, but if the contract said something to the
4 contrary and a state tried to apply its minimum
5 wage law to the refinery itself, then I think
6 that would be a situation where you would
7 probably satisfy the statute and you could
8 remove --

9 JUSTICE SOTOMAYOR: So -- but that --
10 you -- you seem to be arguing that the only
11 defense is a federal defense, which is part of
12 the test, right?

13 MR. CLEMENT: You -- you certainly
14 need a federal defense.

15 JUSTICE SOTOMAYOR: Right.

16 MR. CLEMENT: And as Judge Oldham made
17 clear below, I think that's something that does
18 a lot of the limiting work on this statute.
19 And -- and I do think it's relevant to keep in
20 mind here that, you know, obviously, this Court
21 is concerned about these broad terms and coming
22 up with limits, but the stakes here are a
23 little bit lower in two respects.

24 One, in the ERISA context, for
25 example, or the Airline Deregulation Act

1 context, the "relating to" is the whole game.
2 I mean, it's going to determine whether state
3 law is displaced. Here, it's just one of three
4 or four factors depending on how you count
5 them.

6 And then the second thing is the net
7 result of this is not that your state law claim
8 is displaced. It's just that you would have to
9 bring your state law claim in a different
10 forum. And --

11 JUSTICE SOTOMAYOR: I didn't see your
12 brief taking on the government's position that
13 strongly, but you do -- you did so here in your
14 opening statement.

15 And -- and you answered Justice Thomas
16 by saying that the government's position would
17 expand our case law in saying that a reg --
18 that regulation alone could give you the nexus.

19 So how would you limit the
20 government's position, that it's not regulation
21 alone, it's regulation plus what?

22 MR. CLEMENT: Well, I -- I guess I
23 would say it's -- I mean, you can -- you can
24 come at it two ways. You could come at it and
25 say it's regulation plus close supervision and

1 control as a practical matter. And I think you
2 had this here in --

3 JUSTICE SOTOMAYOR: But that's true of
4 most regulation, environmental regulation, for
5 example, so I don't think that standing alone
6 is enough.

7 MR. CLEMENT: Well, so let me give you
8 my alternative theory, which is maybe not to
9 say -- think about it as regulation plus but
10 regulation to what end. I mean, in Watson, you
11 have the classic kind of more typical
12 government regulation where they're regulating,
13 but they're regulating the provision of a
14 product to a third party.

15 The government's not buying light
16 cigarettes. The government probably, all
17 things being equal, would probably prefer there
18 are less light cigarettes in the world than
19 more. So it's -- it's -- it's kind of classic
20 the government as government regulating.

21 These regulations, I think, are better
22 understood as the government as procurer,
23 regulating in service of maximizing its
24 procurement objectives. They're -- I mean,
25 part of the reason that they're in there

1 regulating the spacing of the drill isn't
2 because they have, like, some newfound federal
3 interest in -- in drill spacing. It's that
4 they're trying to make sure that they can get
5 material out of the ground quickly, that they
6 can do it in a way that preserves steel, which
7 is scarce during the wartime.

8 And so, really, all of these various
9 regulations, including the regulation of
10 production, is done in service of procurement.
11 And that's just a very different situation from
12 what this Court had in Watson, but it's also a
13 very different situation from the mine-run of
14 regulation in all these cases.

15 I mean, there's another amicus brief
16 supporting my friends that goes through all of
17 these federal cases involving poultry,
18 involving nursing homes during -- during the
19 pandemic, and it's an interesting sort of --
20 you know, sort of litany of cases, but the
21 federal courts in all of those cases were able
22 to say no, those stay in state court.

23 And I think, if you recognize that the
24 kind of regulation here is distinct in the
25 World War II context, I think that would be one

1 way to issue -- to reverse the decision below
2 but still not open up any floodgates.

3 JUSTICE BARRETT: Mr. Clement, let --
4 let's imagine that I agree with you about the
5 definition -- about the causal connection here
6 and I think it's broad.

7 I'm trying to decide what would be
8 left on remand if I -- if I took that position,
9 whether we should just remand and let the Fifth
10 Circuit figure it out and apply the law to the
11 facts or whether we should do that ourselves
12 and actually hold that the suit is removable.

13 One thing I'm worried about is the
14 colorable federal defense. The Fifth Circuit
15 didn't pass on that below. And you say that
16 Respondents don't dispute it, but the Fifth
17 Circuit hasn't decided. Judge Oldham talked
18 about it in his dissent. That's one thing.

19 The other thing is we've never
20 addressed whether the federal officer has to be
21 a federal officer now or at the time the
22 conduct occurred. And in the Meadows case,
23 which was pretty recent, Chief Judge Pryor
24 said, well, it has to be at the time currently,
25 which would not apply to your clients.

1 So if you could address those two.

2 MR. CLEMENT: Well, there's a lot
3 there. I mean, first -- and -- and let me make
4 sure I don't forget either piece.

5 JUSTICE BARRETT: Yeah.

6 MR. CLEMENT: So, on the first piece,
7 I mean, I think it's critical that this Court,
8 you know, not just say "related to" is the
9 right test but should apply it because, you
10 know, you want to provide some guidance to the
11 lower courts. So I think at least you'd want
12 to at least go so far as to saying this is a
13 clear case that satisfies the test.

14 If you want to leave the colorable
15 federal defense issue for the Fifth Circuit on
16 remand, you know, I'd prefer that you go ahead
17 and just say it's not really in -- in -- in --
18 in dispute, but in fairness, there hasn't been
19 a lot of briefing on that, and in fairness, I'm
20 not worried about that.

21 I mean, you know, we raised a number
22 of federal -- colorable federal defenses, and I
23 think, at a minimum, the preemption defense
24 based on all these wartime regulations is an
25 incredibly strong defense, and there's probably

1 an immunity defense. So, you know, you could
2 do that.

3 So, on your second question, well,
4 what can I say? I mean, Chief Judge Pryor got
5 that badly, badly wrong. I asked on behalf of
6 Mr. Meadows for this Court to take a look at it
7 and fix it. This Court wasn't interested.

8 But, you know, the arguments are
9 overwhelmingly strong that that's -- that the
10 Eleventh Circuit decision is wrong. But even
11 the Eleventh Circuit, my understanding is, has
12 not applied that in the government contractor
13 case because, you know, one of -- I mean,
14 there's a lot wrong with that approach, but one
15 of the things is it's really hard to apply in
16 the government contractor case because what are
17 you saying? Like, the contract officer that
18 gave us the contract in World War II still
19 needs to be alive or still needs to be on the
20 job? I mean, that doesn't make any sense.

21 JUSTICE BARRETT: Well, I don't -- I
22 don't know whether it makes sense or not
23 because, as you say, we didn't take up that
24 question before. I just don't want to
25 implicitly resolve it here because it's a live

1 one.

2 MR. CLEMENT: It's not a live one on
3 the Fifth Circuit on remand. You know, if you
4 want to drop a footnote and say you're not
5 deciding that case or that issue in the
6 opinion, you know, that -- that -- that would
7 be an appropriate approach, I think.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas?

11 Justice Sotomayor?

12 Justice Kagan?

13 JUSTICE KAGAN: Mr. Clement, you spoke
14 in your opening about the apparent anomaly
15 between putting the vertically integrated oil
16 companies in federal court and having the
17 oil-producing companies that don't have
18 refining capacity, didn't have refining
19 capacity, in state court, and you said we
20 oughtn't to worry about that.

21 But putting -- putting aside for now
22 the Solicitor General's alternative theory,
23 which would treat them alike, I mean, why isn't
24 that just a bizarre outcome when you consider
25 that this entire suit is about the thing that

1 both sets of those companies have in common,
2 not about the thing that separates them?

3 MR. CLEMENT: So, again, I'll grant
4 you that there's, like, a surface anomaly, if
5 you will, which is why my clients in the first
6 instance are -- you know, the SG position is
7 our position, our principal position, in the
8 Fifth Circuit until it's rejected in the
9 Plaquemines II case. But what the Plaquemines
10 II case says is, you know, our problem is under
11 "acting under," not really "related to."

12 And so -- and -- and even in the
13 Plaquemines II opinion -- it's like four pages
14 long -- it doesn't say much, but it does say
15 maybe the refining companies are differently
16 situated.

17 And so the -- you know, so -- so I
18 think the anomaly goes away if you think about
19 this as principally under "acting under." It
20 makes a big difference unless you accept my
21 sort of modification based on the unique nature
22 of these regulations.

23 If -- if you think the key problem is
24 "acting under," well, then it makes sense that
25 the people who are in direct government

1 contractual privity with the federal government
2 get to remove and those that are not don't get
3 to remove.

4 JUSTICE KAGAN: And -- and when
5 "acting under," are you saying that every
6 federal contractor is acting under?

7 MR. CLEMENT: So what -- what I would
8 probably say is, like, in some theoretical way,
9 if you're a government contractor, you could
10 come in and say I'm a government contractor, so
11 check that "acting under" box. But it doesn't
12 do you any good unless what you did under the
13 government contract is related to the thing
14 you're being sued for.

15 So, if Chevron is -- you know, got a
16 refining contract and they get sued for their
17 geothermal operations or they get sued for
18 operating a company -- a corporation-owned
19 filling station, like, "related to" is going to
20 be absolutely impossible and you're not -- and
21 so you check one box, but you wouldn't get
22 anywhere.

23 I mean, you know, essentially,
24 everybody gets to check the "I'm a person" box.

25 JUSTICE KAGAN: Mm-hmm.

1 MR. CLEMENT: But that doesn't move
2 the needle. So I wouldn't worry too much about
3 saying, well, government contractors get to
4 check the "acting under" box because they still
5 have to get "related to" and they still have to
6 show a colorable federal defense.

7 JUSTICE KAGAN: And then, on "related
8 to," which is pretty broad, so, you know, the
9 fact that you still have "related to," I'm not
10 sure how much that work does in terms of
11 limiting this.

12 But, you know, take a hypothetical
13 where you -- it's not wartime and there's
14 plenty of crude to go around, and the
15 government doesn't have a particular interest
16 in what happens at the production level as
17 opposed to what happens at the refining level.
18 But it's still, of course, true that the crude
19 oil is the single component of the -- the
20 aviation gas.

21 Is that enough?

22 MR. CLEMENT: Sure. I think that is
23 definitely enough and --

24 JUSTICE KAGAN: So all the rest is
25 atmospheric? The fact that the government was

1 super-concerned about this and, you know, was
2 really looking at the production activities too
3 in order to ensure that the refiners got the
4 crude that they needed, even if that wasn't the
5 case, just the fact that the crude was the
6 component product is enough?

7 MR. CLEMENT: It would be enough for
8 the "related to" box. It's a lot more than
9 atmospherics. It's, you know, part and parcel
10 of why I don't fear the possibility of being
11 remanded for the colorable federal defense
12 prong here, and if it were just ordinary,
13 non-wartime kind of generic stuff, I'm not sure
14 what the colorable federal defense would be.

15 But, for purposes of the "related to,"
16 I mean, I honestly think, if you take the
17 wartime context out of this and the government
18 contracts with Chevron Refining Company, it's
19 probably guessing that almost all of the crude
20 is going to be produced by Chevron in the field
21 because, you know, they vertically integrated
22 for a reason, it's efficient for them to
23 operate kind of as an internal corporate
24 entity.

25 So, in some respects, you know, the --

1 the wartime context had a little bit of the
2 anomaly that we didn't refine as much of our
3 own crude as we otherwise would have, but it
4 also provides all this other direction and
5 control that I think make the colorable federal
6 defense an easy piece.

7 The other thing it does, which is more
8 than atmospherics, is I think it provides part
9 of the answer to why contractual direction
10 can't be the test, because part of the reason
11 the contract didn't have to specify anything
12 more about production is because that's being
13 regulated to a fare-thee-well by the Petroleum
14 Administration for War.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: There seems to be
19 a concern about the fairness of the state court
20 system that underlies your position in this
21 case. What is that concern?

22 MR. CLEMENT: So the concern is in a
23 nutshell -- I mean, I'm not, you know, going to
24 try to improve on Daniel Webster, right?
25 Daniel Webster, talking about this in the

1 context of 1812, said there's real value in
2 having your case litigated in a forum that
3 respects the federal authority.

4 And so, for -- you know, really, since
5 almost the framing of the country, there's been
6 this problem, this issue, this concern with
7 issues that are nationally important but
8 locally unpopular. So War of 1812, not a lot
9 of big fans of that in New England. You know,
10 taxes after World -- after the Civil War or
11 certain Civil War Reconstruction things, not a
12 lot of fans in the south. Those are the times
13 when it's most important to be in federal
14 court.

15 And as we say in the briefs, I mean, I
16 actually think that, you know, you can see this
17 as a threat to federalism, but, in some ways, I
18 think it works hand in hand with federalism
19 because we're not saying that they don't get
20 their chance to prove their case in court. It
21 just has to be proven in a federal court. If
22 they can prove their case in federal court,
23 then everybody's going to accept the outcome
24 and they're not going to view it as something
25 that's a product of local prejudice.

1 The last thing I'll say is there are
2 some real procedural advantages to being in
3 federal court in terms of the ability to get
4 interlocutory appeals, the ability to get this
5 Court to review a cert petition when it's
6 interlocutory. So, as a practical matter, you
7 know, it's not just like a difference in the
8 jury pool, though that might make a little
9 difference in a case -- or it'd make more
10 difference than usual in a case like this,
11 where you still are going to have a regional
12 jury pool, but it's not going to be drawn
13 exclusively from people that are going to get,
14 you know, effectively a direct benefit if the
15 parish collects a massive windfall.

16 JUSTICE KAVANAUGH: And do you have
17 specific concerns in this case about the state
18 court system, or is it more the general
19 concerns, historical concerns, and the
20 procedural points that you're -- just
21 mentioned?

22 MR. CLEMENT: Well, it's both. I
23 mean, I'd be lying if I didn't say that the
24 verdict in the one case that went to trial
25 here, which was, you know, roughly \$750 million

1 for just one parish, you know, since the -- the
2 Fifth Circuit, the one time they took a look at
3 one of these cases on a removal and a diversity
4 context, basically said that, you know, the --
5 the -- the state has a fatal problem with its
6 grandfather clause argument.

7 So I'm -- I'm looking at this case in
8 practice. I'm seeing what happened in federal
9 court, which is we won going away. I'm looking
10 at what happened in state court and a \$744
11 million judgment, and I'm thinking, yeah, you
12 know, facial and as applied.

13 JUSTICE KAVANAUGH: Right. And then
14 you mentioned earlier -- and I don't know if
15 you meant this to be a test, so I want to
16 clarify whether you want this as something
17 you're suggesting should be in the opinion.
18 Would enjoining the activity have a direct
19 negative effect on the government? Was that
20 something that you were suggesting as a test or
21 just a comment you were making about the
22 application of this test -- case? Because the
23 word "direct" could, of course, assume large
24 significance going forward.

25 MR. CLEMENT: Right. I'd -- I'd live

1 with that as a guidepost. If you were -- if
2 you were going to make it into a test, I'd take
3 the word "direct" out. But, you know, I mean,
4 this Court has approached this exact statutory
5 language in sort of different ways. In
6 Morales, the Court basically said, yeah, it's a
7 broad term and this is a relatively
8 straightforward case and we'll leave the rest
9 for another day. So that's one option.

10 In Watson, this Court, with, you know,
11 the "acting under," sort of did the opposite
12 where it said, all right, this is a broad term,
13 we're supposed to liberally construe it, but we
14 can look to the broader purposes of the
15 statute, and the broader purposes of the
16 statute -- it's the same statute -- is to
17 provide a federal forum in circumstances where
18 you would interfere with the federal
19 government's operations.

20 So I can sort of live with that
21 approach too. There's kind of an intermediate
22 where you say, like, there's three or four
23 factors that make this an easy case, and those
24 are relevant, but we can wait for the next case
25 when only three of the four factors are

1 present.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 JUSTICE BARRETT: A couple of factual
6 questions.

7 In thinking about how settled the
8 factual record is here for purposes of applying
9 a test, it seemed like there was -- I
10 understand all the reasons why PAW is a federal
11 agency from your point of view. I understand
12 all of the evidence from that.

13 But I kind -- do -- do you understand
14 Respondents to contest that point at all?
15 Because it seems in some places like they cast
16 doubt on it. Is that settled?

17 MR. CLEMENT: I mean, I -- I think
18 it's settled beyond any reasonable debate, but
19 I suppose, if there really were a debate on
20 that, you know, this is a context where, if you
21 think there's a factual dispute, you
22 essentially defer to the plausible allegations
23 in the removal petition, and, you know, I
24 think, based on that, it's -- we're more than
25 plausible. I mean, we have the official

1 history that supports, I think, really, what
2 we're saying.

3 Now, like, their -- you know, they
4 point out that, well, you know, the state still
5 had some residual role in regulating
6 production. I don't think they're wrong about
7 the fact that the state still had some residual
8 role. But there's just -- it's black and white
9 in terms of the federal government's role in
10 the war versus outside of the war. So --

11 JUSTICE BARRETT: Okay.

12 MR. CLEMENT: But -- but -- but, in
13 all events, if you thought there was a factual
14 dispute, you still end up deferring to the
15 plausible allegations in the removal petition,
16 and any factual issues get sorted out in
17 federal court, not in state court.

18 JUSTICE BARRETT: Okay. Second
19 question is Louisiana says that you grossly
20 mischaracterize whether the state is trying to
21 hold you liable for the World War II
22 activities. You know, Mr. Aguiñaga says, no,
23 no, no, no, this is just about the defense.
24 The only thing that's relevant is they're
25 showing that the activities were lawfully

1 commenced before the Louisiana statute was
2 enacted.

3 I've read the expert report, I mean,
4 and -- and I can see why, right. Is it the
5 expert report that's leading you to say that,
6 yes, we're actually being held -- they're
7 trying to hold us liable for that as opposed to
8 having it be relevant solely for the defense?

9 MR. CLEMENT: So, I mean, I think
10 the -- the -- as a practical matter, it was the
11 expert report that sort of started the whole
12 re-removal effort. And I think even the Fifth
13 Circuit, when it considered that, said: Yeah,
14 you know, World War II is directly at issue
15 here.

16 I -- I mean, you know, there were
17 hints of that even in the -- in the original
18 complaint because, if you look at the
19 complaint, they're asking -- one of the, you
20 know, forms of relief is to restore this to its
21 original condition.

22 And, of course, you know, there's
23 nothing more effective in a state court sort of
24 jury presentation than a before-and-after
25 presentation. And the before-and-after photos

1 they want to show are the bayou before the war
2 and now in sort of 2026, whatever it is. So,
3 you know -- so it -- that's a much less
4 effective demonstrative if it's 1981 to -- to
5 now.

6 And there are still even further
7 problems. But, if they would have strictly
8 limited this to 1980 forward, we wouldn't have
9 this argument based on World War II. But,
10 again --

11 JUSTICE BARRETT: Right.

12 MR. CLEMENT: -- the Rozel expert
13 report, I think, speaks for itself.

14 JUSTICE BARRETT: Thanks.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: So assuming that I
18 think that "of" or -- or "relating to" was just
19 a mere conforming amendment and, therefore,
20 we're still in the land of causal nexus,
21 but-for nexus, I thought your client had a
22 pretty good argument that you satisfied that,
23 but it seemed like you were giving it up in
24 your conversation with Justice Thomas.

25 So can you help me to understand

1 what -- maybe I'm misunderstanding what is
2 necessary for but-for causation, but I thought
3 that the argument was that there was a
4 connection, a sufficient nexus, between the
5 avgas contracts and the production of crude
6 oil, which is what is being alleged here.

7 MR. CLEMENT: So I -- I -- I didn't
8 mean to give that up, and I thought I
9 specifically said I'd give it a try. So let me
10 give it a try.

11 JUSTICE JACKSON: Please.

12 MR. CLEMENT: I mean, you know, yes,
13 you could say that this is the unusual case
14 where, even if you have a causal nexus test of
15 some sort, we would still satisfy it.

16 You know, in fact, I had a colloquy
17 with the Fifth Circuit judge in this case who
18 proposed but-for as the test, and I thought we
19 could satisfy but-for if it's the test. I
20 don't think it is the test.

21 JUSTICE JACKSON: Mm-hmm.

22 MR. CLEMENT: But I think we could
23 satisfy it here because it is -- you know, it
24 is both the reality that we did refine a
25 substantial amount of crude from our own fields

1 in these cases, and it is also an undeniable
2 reality that the crude here is the absolute
3 indispensable component.

4 JUSTICE JACKSON: Right. I mean --

5 MR. CLEMENT: I mean, there's a
6 straight line --

7 JUSTICE JACKSON: -- I -- I thought
8 all the arguments and the things that you were
9 saying, for example, to Justice Kagan, the
10 stuff about the wartime context and the actual
11 product here was your answer to why this
12 isn't -- why this would satisfy a but-for
13 context -- a -- a but-for test.

14 MR. CLEMENT: Yeah, I mean, I agree.
15 There's a -- there's a --

16 JUSTICE JACKSON: Yeah.

17 MR. CLEMENT: -- great line in the PAW
18 history that's reproduced at Joint Appendix
19 page 5 that basically says, look, oil starts in
20 the earth and, without crude, all of those
21 towering wartime refineries would lay idle.
22 So, you know, there -- there's no question that
23 the crude in general is the but-for cause.

24 Now my -- I think my friends are going
25 to get up here and say, well, but the contracts

1 would have allowed you to use different crude
2 that you purchased on the open market as
3 opposed to the crude that you produced. And
4 that's the argument that tripped up the Fifth
5 Circuit.

6 But just to be as clear as I can, one
7 way for us to win is the way that you're
8 talking about that it's just but-for.

9 The other way for us to win is, you
10 know, and that was what I was trying to say to
11 Justice Thomas, is even apart from the 2011
12 amendments, if you think the production
13 activities are under federal authority --

14 JUSTICE JACKSON: Yeah.

15 MR. CLEMENT: -- because of the
16 pervasive wartime regulation, then it's not --
17 I don't need "related to" at all. Then it's
18 for the activities.

19 JUSTICE JACKSON: Let me just -- let
20 me just ask you really quickly about the Fifth
21 Circuit's opinion because I understood them to
22 be requiring a contractual directive with
23 respect to crude oil production, and it seems
24 to me that that test is even more stringent
25 than a but-for.

1 Am I right about that? I mean, that's
2 what seems wrong about the Fifth Circuit's
3 test.

4 MR. CLEMENT: You -- you are
5 absolutely right about that, and that's why I
6 thought I could tell the Fifth Circuit that we
7 could live with but-for, but we can't live with
8 contractual direction.

9 JUSTICE JACKSON: Thank you.

10 MR. CLEMENT: And -- yeah.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Roper.

14 ORAL ARGUMENT OF AARON Z. ROPER
15 FOR THE UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING THE PETITIONERS

17 MR. ROPER: Mr. Chief Justice, and may
18 it please the Court:

19 By assisting the federal government in
20 obtaining a critical wartime product under
21 federal supervision, Petitioners acted under a
22 federal officer in refining avgas.

23 That refining is an act under color of
24 federal office that can support removal. And
25 these suits relate to that act because they

1 target the production of the crude oil that was
2 the key ingredient in avgas and that the
3 federal government linked to that refining by
4 both contract and regulation.

5 Respondents go all in on their
6 alternative argument that Petitioners must have
7 been acting under a federal officer in the
8 crude production that these suits are for. But
9 the statute contains no such requirement, which
10 would nullify Congress's addition of "relating
11 to."

12 Regardless, Petitioners were acting
13 under a federal officer in producing crude
14 given the Petroleum Administration for War's
15 unique role supervising production to further
16 the war effort.

17 I welcome questions.

18 JUSTICE THOMAS: Would your approach
19 apply to contract disputes with employees also?

20 MR. ROPER: Yes. In our view, if
21 we're talking about the sort of direct thing
22 that is going into the product, and, of course,
23 labor is a critical component of creating a
24 federally contracted product, that is a
25 sufficient connection. You, of course, don't

1 need to even go that far for Petitioners to win
2 this case.

3 But we have readily acknowledged that
4 there are going to be hard line-drawing
5 problems here, although I agree with Mr.
6 Clement that the federal defense requirement is
7 going to take care of many of them.

8 And we ultimately see that
9 line-drawing problem as inherent in Congress's
10 choice to use this broad, capacious term
11 "relating to." And the way you have dealt with
12 that --

13 JUSTICE THOMAS: Don't you think it's
14 odd, though, that, as I think Justice Jackson
15 alluded to, that this is simply a conforming
16 amendment and it's doing so much substantive
17 work?

18 MR. ROPER: No, not at all. I fully
19 agree with Mr. Clement's answer there. I think
20 the reason you only see this argument in an
21 amicus brief and not in either of the red
22 briefs is that there is just no way to get
23 there textually.

24 When Congress enacted this statute in
25 2011, this Court had in over a dozen cases said

1 that "relating to" is a broad, capacious term,
2 and then Congress puts that language in a
3 statute that this Court in five opinions had
4 said was a broad statute that was to be
5 liberally construed. And so I just don't see
6 how you can limit "relating to" to just this
7 sort of narrow pre-suit discovery issue.

8 And we also know that Congress wasn't
9 focused on just that problem because, if you
10 look at the very next page of the Act, Congress
11 amends Section 1447(d), which creates a right
12 to appeal in every federal officer removal
13 case. And everyone agrees that that provision
14 is not limited to pre-suit discovery actions.
15 That was the basis for this Court's BP decision
16 a few years ago.

17 And so I think it's clear from the
18 text and context that Congress was addressing a
19 broader issue here.

20 CHIEF JUSTICE ROBERTS: Well,
21 you're -- you're right, obviously, that
22 "relating to" is very broad, but it's hard to
23 see where you stop. I mean, is it a butterfly
24 effect? You know, the butterfly flaps its
25 wings and it has the end result halfway around

1 the world?

2 MR. ROPER: So the way this Court has
3 dealt with this problem in the preemption
4 context, which we think is instructive here, is
5 in one of two ways.

6 So, first, in one set of cases like
7 Morales, what you said is that this is an easy
8 case, there are going to be hard ones, and we
9 leave those line-drawing problems for another
10 day.

11 But, of course, in the course of such
12 an opinion, you would presumably explain why
13 this is an easy case, namely, that avgas or
14 that crude oil is the indispensable ingredient
15 in avgas and that the federal government itself
16 recognized this link contemporaneously.

17 And while I wouldn't want to suggest
18 that those facts are somehow talismanic, in the
19 ordinary course of common law adjudication,
20 that is going to provide guidance to the lower
21 courts in how to deal with this.

22 CHIEF JUSTICE ROBERTS: So you want us
23 to do the same thing we did in the prior case
24 and just say, well, there might be hard cases
25 down the line, but we're not -- I mean, how

1 many times are we supposed to say that?

2 MR. ROPER: Sure. So that's Option 1
3 of how to write the opinion.

4 Option 2 is I agree with what
5 Mr. Clement said, which is you say what you
6 said in Watson and what you've done in the
7 ERISA context, which is, if you want to try to
8 put more meat on the bones, you look to the
9 statutory history, the context, and the
10 objectives.

11 And, here, this Court has a deep body
12 of precedent going back to 1880 that is
13 explaining the -- the objectives of federal
14 officer removal, most importantly, protecting
15 the federal government from interference with
16 its operations.

17 And, you know, to operationalize that,
18 I agree with Mr. Clement. What we would want
19 to do is just ask, if the defendant had been
20 enjoined at the time, would that have impaired
21 his ability, interfered with his ability, to
22 assist the federal government?

23 And, here, the answer to that question
24 is obviously yes when we are talking about the
25 production of the indispensable ingredient in a

1 critical military product and when the federal
2 government banned many of the specific
3 practices Respondents favor.

4 JUSTICE SOTOMAYOR: So could you
5 summarize that into a test of some sort? It
6 seems to be part of your argument in your brief
7 that the goals of the federal officer removal
8 statute can provide a useful limit on the
9 seemingly expansive reach of the "relating to"
10 phrase, but how do you articulate that?

11 MR. ROPER: Yeah. So the question we
12 would ask is, would enjoining the charged
13 conduct at the time have impaired the
14 defendant's ability to assist the federal
15 government?

16 So suppose, for example --

17 JUSTICE SOTOMAYOR: Well, that's too
18 broad.

19 JUSTICE KAGAN: I mean, isn't that
20 going to be true of any federal contractor?
21 Presumably, a federal contractor is doing
22 something that the federal government needs.
23 So, if you enjoin the federal contractor,
24 you're going to be impairing the operations of
25 the federal government. That -- that seems as

1 though you have a federal contractor, you meet
2 your test.

3 MR. ROPER: No. I think that's going
4 to fail in two respects. So, one, you're going
5 to have this sort of category of cases that are
6 collateral to the contract. I mean, the oil
7 companies here are doing all sorts of stuff
8 besides refining avgas. And if we're talking
9 about a lawsuit against their petroleum jelly
10 factory or their plastics factory, that seems
11 less likely to, you know, directly impede the
12 avgas refining.

13 And you're also going to have stuff
14 that is just sort -- too far up the supply
15 chain, where you're getting so attenuated that,
16 you know, this is the one product that -- the
17 one ingredient that maybe they were using but
18 everyone else wasn't using and it would have
19 been fine.

20 JUSTICE GORSUCH: Well, you just said
21 "directly impede," and Mr. Clement put -- took
22 that word out of Justice Kavanaugh's
23 formulation --

24 MR. ROPER: Yes.

25 JUSTICE GORSUCH: -- notably.

1 MR. ROPER: I would not put that in --

2 JUSTICE GORSUCH: And I can easily see
3 that in different product lines, one might say
4 I have a contract in one product line, but over
5 here, interference over here in another product
6 line will impair my ability to meet my
7 government contract in the first. Thoughts?

8 MR. ROPER: I think courts can
9 exercise a degree of common sense and say, you
10 know, that is not plausible, it is too
11 attenuated because remember, here, this is the
12 usual --

13 JUSTICE GORSUCH: So you'd have us put
14 "direct" into Mr. Clement's test?

15 MR. ROPER: I would not put "direct"
16 in the test. I think, if it is direct --

17 JUSTICE GORSUCH: You wouldn't? But I
18 think you -- I think you said "direct" in
19 response to Justice Kagan. So I -- I'm just
20 trying to get to the bottom of it.

21 MR. ROPER: Sure. If it's direct, I
22 think it's obvious. But I think we know that
23 it can't be direct because that's the sort of
24 language of proximate causation --

25 JUSTICE GORSUCH: We're back to --

1 MR. ROPER: -- and everyone agrees
2 this is broader than that.

3 JUSTICE GORSUCH: -- we're back to the
4 Chief's butterfly effect problem then.

5 MR. ROPER: Yeah. I mean, I think, in
6 the butterfly --

7 JUSTICE GORSUCH: The big bang is
8 related to you being here today, counsel,
9 right?

10 MR. ROPER: Of course. I think what
11 you say in that context because I think courts
12 are going to, you know, take these cases as
13 they have in the ERISA context, in the
14 preemption context, and I don't think we have
15 seen that flood of cases in the airline
16 deregulation context, for example. I think
17 courts have applied sense and said airline
18 advertising is related to airline rates. But
19 maybe if we're talking about a strike at the
20 mechanics' plant, wherever, that is going to be
21 too attenuated. And maybe, you know, some
22 clever -- Mr. Clement can come up with some
23 theory of why that is related, but I think
24 courts have --

25 JUSTICE GORSUCH: Oh, I guarantee you

1 he would.

2 (Laughter.)

3 MR. ROPER: Yes. And I think courts
4 have not struggled with that. At the end of
5 the day, this Court has offered these
6 guideposts, and, of course, there are going to
7 be hard cases, and I don't want to run away
8 from that. I think, though, that is inherent
9 in Congress's choice in picking this language
10 because, remember, Congress is enacting this
11 statute in 2011, after Justice Scalia's
12 concurrence in Dillingham saying our ERISA
13 preemption test is too hard to apply, after his
14 concurrence in Egelhoff. And so Congress came
15 in here eyes wide open, knowing that "relating
16 to" is a broad term and courts --

17 JUSTICE JACKSON: But Congress also
18 said what it was doing in the report. This is
19 the thing that is a little troublesome for me,
20 that to the extent that you are relying on
21 arguments about what Congress actually intended
22 as opposed to just looking at the words of the
23 statute, it seems to me we're in the territory
24 where we look at the House report and see what
25 Congress said about what it was doing.

1 And in the House report, Congress
2 described the existing causal nexus
3 requirement, saying that federal officers "must
4 demonstrate a causal connection between the
5 charged conduct and the asserted official
6 authority." And in the testimony Congress
7 looked at during that time, consistently,
8 people said we're not trying to change that
9 standard.

10 So, if we are interested in being
11 consistent with what Congress intended, I don't
12 understand why the evidence doesn't show that
13 Congress was not trying to change the stand --
14 the standard.

15 MR. ROPER: So we see a difference
16 between identifying statutory objectives by
17 looking to this Court's 150 years of case law,
18 applying the statute, and looking in the
19 specific House report --

20 JUSTICE JACKSON: No, but you said
21 Congress is coming in eyes wide open relative
22 to our case law. And what I'm saying is, yes,
23 and then they wrote what it is that they were
24 trying to do in the report.

25 MR. ROPER: Yes. And to be clear, we

1 absolutely agree that the motivating event for
2 this act was that a Congresswoman found herself
3 stuck in state court in a subpoena case and
4 Congress didn't want -- like that result and
5 wanted to make sure that the Congresswoman
6 could have her case in federal court.

7 But I don't think it follows that that
8 specific problem that motivated the act is the
9 breadth, is the sum total, of what Congress
10 did. And I'll, I think, offer the same answer
11 as Mr. Clement, which is we know that from the
12 text, and, of course, we also know that page 6
13 of the House report, the section-by-section
14 analysis --

15 JUSTICE JACKSON: Do you think they
16 lose if I disagree with you?

17 MR. ROPER: So it depend --

18 JUSTICE JACKSON: I mean, do you
19 not -- do they not meet the causal nexus test
20 here?

21 MR. ROPER: We would say that the
22 "relating to" theory does not meet the pre-2011
23 test, but it does meet causation in a sort of
24 broader sense of the word.

25 JUSTICE JACKSON: No, I mean on these

1 facts, does Chevron lose if we disagree with
2 you about the causal nexus requirement?

3 MR. ROPER: No for two reasons.

4 First, we, of course, have our alternative
5 argument that the Petroleum Administration for
6 War was supervising all of this directly,
7 causally, et cetera.

8 We also think that there is causation
9 here, if you want to call it that, in a sort of
10 looser, broader sense of the word that
11 "relating to" would clearly encompass along the
12 lines of Justice Alito's concurrence in Ford
13 Motor Company, exploring this question in the
14 personal jurisdiction context, because we know
15 that the reason that these companies were
16 refining their own crude oil was not a matter
17 of happenstance. It was because the federal
18 government specifically told them to do that
19 because, in part, this crude was uniquely
20 suited for making avgas.

21 And we also have causation here at a
22 broader scale in that there's no question that
23 these oil companies generally increased
24 production to meet their needs, and so the only
25 difference here comes from the happenstance of

1 Respondents having tried to slice this case up.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas?

5 Justice Sotomayor, anything further?

6 Justice Kagan?

7 JUSTICE KAGAN: I'll give you a hypo,
8 Mr. Roper. Suppose there's a airline crash of
9 some kind and somebody brings a lawsuit. It's
10 a private airline, and somebody brings a
11 lawsuit and says there's a defective part. And
12 the air -- the airplane manufacturing company
13 says, you know, this part that you're talking
14 about, it also goes into all the airplanes that
15 we make for the federal government, which is a
16 very substantial part of our business, so if
17 you enjoin us from using this part, it's really
18 going to affect the federal government.

19 Does that mean that that suit, which
20 is a standard state tort suit, should be
21 removed?

22 MR. ROPER: And I assume there that
23 the remedy is just for damages and not actually
24 for an injunction against production of the
25 part. In that case, I would say no, that is

1 not removable because, I mean, effectively,
2 what that remedy is asking for is the
3 equivalent of an injunction against the use of
4 the part in civilian planes.

5 Of course, if they came in and said --

6 JUSTICE KAGAN: But we -- but --
7 but -- but, if they're just asking for damages,
8 which would effectively prevent -- you know,
9 it's like, oh, my gosh, if we're going to be
10 subject to damages here, we better find another
11 part, so that would affect the way that the
12 federal government is going to -- maybe the
13 federal government even asked for this part.
14 You know, what -- what happens then?

15 MR. ROPER: I don't think that affects
16 in the relevant sense because the measure of
17 damages in that case is presumably pegged to
18 the use of the part in the civilian plane. Of
19 course, if they came in and said state law
20 permits us to get a universal injunction
21 against the production of this part for anyone
22 ever, that we would have much greater concerns
23 about because that would actually be impeding
24 the federal government's contact. But just a
25 normal state-law damages action for purely

1 civilian conduct, no.

2 JUSTICE KAGAN: What does it mean to
3 have a colorable federal defense?

4 MR. ROPER: So this case -- Court's
5 cases haven't fully explored that question.
6 It's definitely something above frivolous. It
7 seems to be, as we read the cases, a little bit
8 more than that. But the basic gist of the
9 cases as we take it is that when the
10 defendant's story is that, you know, they were
11 doing this because the federal government told
12 them to do so, that should be a question that
13 should ultimately be resolved in federal court.

14 JUSTICE KAGAN: I mean, one of the
15 issues here, right, is that each of the three
16 parts of this, you can always say, oh, well,
17 that, it'll be taken care of by the other prong
18 of the test. But each of the three prongs is
19 setting a really low bar, including the federal
20 defense prong. It's not like you have to have
21 a federal defense. It's you have a -- have to
22 have a colorable federal defense, which is just
23 barely above frivolous.

24 MR. ROPER: Yes. And I think that
25 that is intentional when you think about this

1 statute against the backdrop of Congress's
2 authority under Article III to put every
3 federal defense in federal court, and so
4 Congress has created this exception to the
5 well-pleaded complaint rule and it has
6 identified this subset of cases that most
7 directly implicate the federal government.

8 And we don't want that to be an
9 extraordinarily high bar because, again, as
10 Mr. Clement said, all we are talking about here
11 is a forum, and when the defendant has a
12 plausible story that the federal government
13 told them to do this, that is a story we
14 ultimately want to be resolved by a federal
15 judge in federal court.

16 And in the context of this case, I
17 don't think it casts any aspersions on the good
18 people of Plaquemines Parish to say that when
19 we're talking about liability for conduct that
20 the federal government directed during World
21 War II, that is a question that should be
22 resolved in federal court.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: You -- your argument

1 in your brief had a lot to do with the
2 production of crude as opposed to the refining
3 activity. That wasn't a central feature of --
4 of -- of the Petitioners' argument. And
5 Respondents contend that it was waived below.
6 Thoughts?

7 MR. ROPER: We definitely disagree
8 that it's waived. If you look at page 6 of the
9 amended removal petition, it is preserved at
10 least at that stage. I agree they did not
11 continue to press it. But the reason that
12 argument is in our brief --

13 JUSTICE GORSUCH: You're saying it
14 was -- it was presented to the district court.

15 MR. ROPER: To the district court.

16 JUSTICE GORSUCH: But not to the court
17 of appeals.

18 MR. ROPER: Correct. I would say it's
19 forfeited but not waived. And we, of course,
20 are happy to win on "relating to." That's the
21 part of the statute that applies directly to
22 our officers. So we are -- if anything, prefer
23 the refinery theory.

24 But the reason that that argument is
25 in our brief is twofold. First --

1 JUSTICE GORSUCH: That -- that's
2 enough for me.

3 MR. ROPER: Okay.

4 JUSTICE GORSUCH: Thank you.
5 Appreciate it.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: If we define
9 "relating to" too narrowly from your
10 perspective, what are the effects on the
11 federal government going forward?

12 MR. ROPER: So, Justice Kavanaugh, we
13 think it's important to remember that this
14 statute comes out of some of the most intense
15 moments of state and federal conflict in our
16 nation's history, like Reconstruction,
17 Prohibition, and the South Carolina
18 nullification crisis.

19 So we have deep concerns about cases
20 that do have that risk of interfering with the
21 federal government's operations proceeding in
22 state court. This case is, of course, a poster
23 child for that. A couple other buckets of
24 cases that are of concern to us are, first, the
25 sort of retaliation scenario that is laid out

1 in Senator Lee's brief, where you have those
2 assisting the federal government as contractors
3 or in other ways with whatever is the
4 controversial policy of the day being targeted
5 by hostile states or localities who know not to
6 go after the federal conduct itself but sort of
7 work around the margins to go after the federal
8 contractor. And in that scenario, if you have
9 a federal colorable defense and plausible
10 allegations that the suit is relating to the
11 federal conduct, we'd absolutely want that case
12 in federal court.

13 The other bucket that concerns us is
14 the military contractor scenario. There's all
15 of these failure-to-warn asbestos cases that
16 are cited at page 28 of Mr. Clement's brief.

17 I think the logic of Louisiana's
18 argument here is that all of those cases go to
19 state court because the contractors were not
20 acting under a federal officer in giving
21 warnings. The government only said use
22 asbestos and it didn't say anything about the
23 warnings.

24 And when we're talking about how
25 federal contractors are implementing their

1 federal contracts, especially in the military
2 context, we definitely want a federal forum
3 there as well.

4 JUSTICE KAVANAUGH: And does that
5 worry extend to incentives for military
6 contractors going forward then?

7 MR. ROPER: Yes. That is also a
8 concern as well. I mean, we think the Fifth
9 Circuit's ruling here is really novel. This
10 contractual directive test we don't see
11 anywhere in the statute or this Court's prior
12 cases. And the idea that you would need a
13 specific term in the contract addressing
14 everything that you might be sued over we see
15 as deeply unworkable and also problematic.

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 Justice Jackson?

20 MR. ROPER: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Aguiñaga.

24

25

1 ORAL ARGUMENT OF J. BENJAMIN AGUIÑAGA

2 ON BEHALF OF THE RESPONDENTS

3 MR. AGUIÑAGA: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 The federal officer removal statute
6 authorizes the removal of a civil action
7 commenced against a person acting under a
8 federal officer. As that statutory text
9 suggests, you have to look at the complaint
10 that actually commenced the civil action.

11 That complaint tells you the acts by
12 the defendant that are charged, and then you
13 ask: Did the defendant commit those charged
14 acts under a federal officer?

15 That is the straightforward reading of
16 the statute that is reflected in the Watson
17 Court's statement that a defendant may remove
18 to federal court only if, in committing the
19 charged acts, he was acting under a federal
20 officer.

21 And that's what we think makes this an
22 easy case. Petitioners not only abandoned
23 below any argument that they were acting under
24 a federal officer in committing the acts
25 charged in our complaints, but they also told

1 the district courts, in italics, that they did
2 not need to be acting under a federal officer
3 in committing those acts.

4 And let me be specific about those
5 acts that are actually charged because we now
6 know, having gone to trial with Chevron down in
7 Pointe à la Hache that they do not dispute that
8 they dumped billions of gallons of produced
9 water from oil wells directly into our marsh
10 both before and after 1980.

11 That's why this is such a massive deal
12 for the State of Louisiana. And that's why I
13 think they abandon any theory that they acted
14 in that misconduct way under a federal officer.

15 All that is why I say we think this is
16 an easy case and the Court should affirm.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: How much can you rely
19 on Watson, which is quite different factually.
20 It's a heavily regulated company versus -- and
21 it was pre-2-11, 2011. So how much work does
22 Watson actually do for you?

23 MR. AGUIÑAGA: Well, Your Honor, I
24 think Watson's extremely important for us
25 because one thing it does is it catalogues this

1 Court's cases going all the way back to
2 Tennessee versus Davis, where the Court has
3 said, and this, you know, culminated in Watson,
4 the Court said all of those precedents, when
5 they're talking about acting under federal
6 authority, they're talking about an agent of
7 the federal government that is acting within
8 the scope of his authority.

9 That's the backdrop against which this
10 Court decided Watson. And so I think, when you
11 open your analysis section in Watson and you
12 say that a defendant can only remove only if
13 he -- he engages in those charged acts while
14 under a federal officer, I think that's what
15 this Court was summarizing, was that entire
16 backdrop of precedents that led up to Watson.

17 Now I will say, Your Honor, I mean, I
18 think the Court's decision in Tennessee versus
19 Davis, you look at the Willingham case, you
20 know, what Watson says in reflecting on all
21 those precedents is that when we talk about an
22 agent of the federal government acting within
23 the scope of authority, we're asking about
24 somebody which is basically executing federal
25 duties except they're doing that on behalf of a

1 federal officer.

2 And that's why we've pointed out in
3 the red brief this fundamental disconnect
4 between this refinery theory, which we could
5 not sue. We could not sue Petitioners under
6 our law on this refinery theory because we,
7 like, literally can't grab conduct that is 300
8 miles away in Port Arthur, Texas, at a refinery
9 and say that violates our coastal law, that
10 disconnect on the one hand, whereas the charged
11 conduct that we've outlined in the complaint is
12 literally in the marsh in Plaquemines Parish.

13 I think this Court has never seen and
14 Petitioners have not identified for you any
15 case where this Court has basically mixed and
16 matched the "acting under" conduct that
17 satisfies prong 1 with whatever the conduct is
18 that satisfies prong 2.

19 Now my friends on the other side
20 talked a lot about preemption, federal
21 colorable defenses. I -- if I could hit one
22 thing strong this morning, it's this idea that
23 they have a federal colorable defense.

24 Justice Barrett, you asked about
25 whether that's a live issue. You know, I

1 thought to myself we don't actually have to
2 speculate about whether -- you know, how these
3 defenses shake out because we've gone to trial.

4 So, if you go down to the public
5 records there at Pointe à la Hache in
6 Plaquemines Parish and you look at the 18-day
7 trial that we had with Chevron, I said, my
8 gosh, I'm going to read that transcript back --
9 you know, front to back and see how did this
10 narrative of the federal government's bidding
11 in World War II play out and how did the
12 preemption defense play out.

13 And you know what? The jury heard
14 crickets on that because none of that was
15 raised in the Rozel trial. I think that's as
16 dead a give-away as any that for all the
17 narrative you see in your briefs in the federal
18 courts about how this is us targeting World War
19 II conduct and everything they did was directed
20 by federal officers, nothing like that in the
21 actual state court proceedings.

22 I think that's the exact same story
23 that would play out in federal court. And, you
24 know, that's just a fundamental mismatch in
25 practice. That's the reality, Justice Barrett.

1 JUSTICE BARRETT: Mr. Aguiñaga, I have
2 a question about whether you designated the
3 parishes' counsel to represent you in the Fifth
4 Circuit.

5 On pages 34 and 35 of your brief, you
6 try to run away from the concession that
7 counsel made before the Fifth Circuit on the
8 "acting under" prong and you say, well,
9 Louisiana didn't appear.

10 But didn't the counsel for the
11 parishes represent you and appear on your
12 behalf and concede that point?

13 MR. AGUIÑAGA: So a couple things
14 there, Justice Barrett. We were at counsel
15 table for sure with the parishes. We've been
16 in lock step with the parishes the whole time.
17 And so we -- we ceded our argument time to the
18 parishes to represent all of Respondents here
19 in the Fifth Circuit, no doubt about that.

20 I do have to push back on the idea
21 that we're running away from a concession
22 because, as you know from that part of our
23 brief, we vehemently disagreed that there was
24 any concession.

25 I mean, I think the whole point, if

1 you look at our Fifth Circuit briefs in both
2 Cameron and Plaquemines Parish, the whole point
3 of those briefs was Watson. It's -- it's this
4 mismatch. It's like we told the Fifth Circuit,
5 look, they're coming to you with this idea that
6 under the refining contracts, they were acting
7 under a federal officer, but we haven't sued.

8 That was the whole point. And I think
9 that's why you saw the Fifth Circuit take that
10 on directly and they rejected our argument, no
11 doubt, unanimously, but that's the basis on
12 which we won in the district courts. That was
13 the whole arguments that we pressed in our
14 Fifth Circuit briefs.

15 And if you listen to that argument
16 audio, I mean, like, with all respect to my
17 friends on the other side, I don't think that's
18 a fair characterization of what we argued at
19 oral argument in the Fifth Circuit.

20 JUSTICE BARRETT: But you did -- I
21 mean, the parishes' counsel did speak on your
22 behalf, so if I read that transcript
23 differently, then it does bind you too?

24 MR. AGUIÑAGA: So, Your Honor, I'm
25 happy to take -- yes. I -- I -- I think --

1 JUSTICE BARRETT: Yeah.

2 MR. AGUIÑAGA: -- like, as I say,
3 we've been -- you know, we have a joint defense
4 agreement. We've been consistent with my
5 friends from the parishes the whole time. All
6 I'm saying is that if you listen to that audio
7 and then you look at our briefs and you look at
8 the arguments we made in our BIOs here, we have
9 made -- been making the exact same argument the
10 whole time, which is you could conceive of the
11 federal -- you know, the federal refining
12 contracts and the conduct under those contracts
13 as "acting under" conduct if you had a suit
14 that actually targeted refining activities.

15 JUSTICE BARRETT: Mr. Aguiñaga --

16 MR. AGUIÑAGA: But --

17 JUSTICE BARRETT: -- another question.
18 Do you understand there to be a factual dispute
19 about whether PAW is a federal agency?

20 MR. AGUIÑAGA: So, Your Honor, we have
21 pressed in our briefs below and I think my
22 friends from the parishes pressed in their red
23 brief here --

24 JUSTICE BARRETT: Yeah.

25 MR. AGUIÑAGA: -- the fact that -- the

1 very -- the very textual point that if you look
2 at the statute, it requires acting under a
3 federal officer. And I think, you know,
4 there's some dicta in the Court's decision in
5 Watson that -- and -- and I -- you know, I'm
6 actually quoting that -- that first sentence in
7 the analysis section where the Court refers to
8 acting under an agency or officer.

9 The statute itself requires acting
10 under an officer. They've never identified a
11 particular officer that they were purportedly
12 acting under instructions, you know, from. I
13 think a fortiori, if you were supposed to -- if
14 you were to look at the agency question, I
15 don't think the statute actually allows them to
16 come into federal court on the theory that they
17 acted under a federal agency.

18 But we have preserved that sort of
19 threshold argument that, like, if you look at
20 the right federal actor, there is no particular
21 federal officer that they have identified. And
22 then, if you think PAW is an agency -- and
23 we've not spelled that latter argument out,
24 Justice Barrett. I mean, I think that's one
25 thing that -- that -- that, you know, is

1 interesting, but, in all candor, we haven't --
2 we haven't spelled out. The other --

3 JUSTICE JACKSON: Counsel, I'm a
4 little concerned about what I see as a
5 conflation of the different prongs in your
6 argument. You've said a couple times that what
7 we should be looking for is "acting under"
8 conduct or did the defendant commit those acts
9 while "acting under" a federal officer.

10 And that's not the way I understood
11 the statute to be read. I thought "acting
12 under" was one prong and it was related to the
13 authority that you have as this defendant,
14 whether you're a federal officer yourself or
15 you're not, but you are acting under the
16 authority of the federal government.

17 And then we have the "for or relating
18 to any act." Mr. Clement says the who, the
19 what. I see that. And you, I think, are
20 collapsing them. So can you help me to
21 understand why you're not?

22 MR. AGUIÑAGA: Sure. So if I could
23 give you a textual response based on the
24 statute and then just a response based on
25 practice with -- from the asbestos cases.

1 So just as a textual matter, Your
2 Honor, I think paragraph 1 in our red brief was
3 very delicately crafted because I think the
4 right way to interpret the statute is to say --
5 is to focus on the subject in the prefatory
6 language in 1442(a)(1). If you look at Pet.
7 App. 182, the very first sentence, right, the
8 subject there is "a civil action." And then
9 the rest of (a)(1), what it's doing is telling
10 you which civil actions may be removed.

11 Now my friends on the other side want
12 to make prong 1 about who can remove and prong
13 2 about what suits can be removed.

14 JUSTICE JACKSON: But doesn't that
15 follow from our case law? I guess I can't
16 figure out how Willingham comes out the same
17 way if you're right.

18 MR. AGUIÑAGA: Right, Your Honor.
19 So -- so what I'm saying is that, on our view,
20 if you ask what -- if you say that the rest of
21 (a)(1) basically asks which actions can be
22 removed, prong 1 is which action, the action
23 must be against a specific defendant.

24 And the textual point I made in my
25 opening is that if you take that phrase, "a

1 civil action commenced against a person acting
2 under a federal officer," implicit in that
3 language is a presupposition that that
4 defendant has acted under a federal officer.
5 Where do you go to find whether that defendant
6 actually acted under a federal officer? The
7 complaint is the one that actually commenced --

8 JUSTICE JACKSON: So are you saying
9 that the act must be directed by the federal --
10 that the act in question has to be directed by
11 the federal officer in order to give grounds
12 for removal?

13 MR. AGUIÑAGA: No, Your Honor.

14 JUSTICE JACKSON: Is that what you're
15 saying -- no? Okay.

16 MR. AGUIÑAGA: No, Your Honor. And
17 that's why I think that, you know, this --
18 this -- this -- this attack from the other side
19 on that point is a -- is a bit misleading. So
20 let me go to the asbestos cases because we
21 actually agree with pages 31 and 32 of Mr.
22 Clement's brief.

23 JUSTICE JACKSON: But, I mean, that is
24 what the Fifth Circuit said here, didn't it? I
25 mean, that was the -- the basis for the Fifth

1 Circuit's ruling, was that the production of
2 the crude was not directed by the contracts.
3 And so that's why, right? I mean, am I wrong
4 about that?

5 MR. AGUIÑAGA: So I -- I -- I think
6 you're right, Your Honor, but I think what the
7 Fifth Circuit was recognizing is the mismatch
8 problem that we outline in our red brief. They
9 tried to solve that problem at prong 2. And
10 our humble submission was that you should just
11 solve that problem at prong 1.

12 Now, if I could, like, tell you why I
13 agree with Mr. Clement's description of the
14 asbestos cases and how they shake out pre- and
15 post-2011, remember, the basic fact pattern in
16 those cases is you've got a federal contract
17 that says, contractor, you go refurbish a Navy
18 ship and you install asbestos.

19 So pre-2011, if there's a
20 failure-to-warn claim about the asbestos being
21 installed, you know, the courts say and the
22 Latiolais panel in the Fifth Circuit, which had
23 that same fact pattern, said, you know, this
24 doesn't suffice for federal officer removal
25 because the claim is not for an act that was

1 directed by the federal government.

2 Now, post-2011, you've got "related
3 to." And as Mr. Clement says, you know, once
4 there's a failure-to-warn claim, it may not be
5 that the federal government said -- specified
6 these warnings or don't include warnings, but
7 that doesn't matter. And that's why you have
8 the outcome in Latiolais II, the en banc
9 decision from the Fifth Circuit that says,
10 like, look, when you engaged in the act of
11 installing asbestos, unquestionably, that is an
12 act under color -- under -- sorry -- under a
13 federal officer. That's prong 1.

14 And so the only question remaining is
15 prong 2: Is your failure to submit safety
16 warnings or submit safety gear to your
17 employees related to that act under a federal
18 officer?

19 That's why I think, you know, the idea
20 that our theory somehow, like, dooms federal
21 government contracting as we know it doesn't
22 hold up because we're perfectly consistent with
23 the -- the asbestos cases that I think are the
24 prototypical cases where you're going to see
25 government contractors come to court and say we

1 deserve to be in federal court because we, you
2 know, installed asbestos pursuant to the -- to
3 the government's contract. I think that's --
4 that's the important piece.

5 Justice Jackson, you asked about
6 but-for causation. I'd like to talk about,
7 like, the test from my friends on the other
8 side in trying to answer the Court's limiting
9 principle questions about how far does
10 "relating to" go.

11 Now I'll pick up where Mr. Clement
12 did, which was with his colloquy with Judge
13 Engelhardt at the very end of oral argument in
14 the Fifth Circuit, where Judge Engelhardt asked
15 him, are you basically saying that this is a
16 but-for causation standard? And Mr. Clement
17 says yes, as he says today.

18 And I was a bit taken aback by that
19 because they don't have a but-for causation
20 argument in this case. Think about it. There
21 is no argument that but for the avgas refining
22 contracts, they would not have engaged in, for
23 example, dumping produced water from oil wells
24 into the marsh. One way we know that, if you
25 look at the PAW history book, look at page, you

1 know, 176, 189, what the history recounts is
2 that 70 -- 70 percent of the nation's crude oil
3 was actually going to civilian use, not
4 military use, civilian use. Our expert cites
5 that at JA 67.

6 And the whole point is that, like,
7 industry would have been engaging in the exact
8 same conduct that we charge in our complaints
9 whether or not an avgas refining contract
10 existed.

11 And I think, you know, to your point,
12 Justice Barrett, about open questions in the
13 case, that is one of the most important things
14 because, for all of the narrative from my
15 friends on the other side that, you know, this
16 was a natural consequence of their avgas
17 refining contracts, that is inconsistent with
18 the historical record.

19 And so I think, you know, that
20 that's -- that's the answer on but-for
21 causation, Your Honor. And so, if that's the
22 outer limit of their test, then, as a factual
23 matter, whether we win it here or we win it
24 back on remand, we're going to win that issue
25 because there is no argument that but for the

1 avgas refining contracts that they would not
2 have engaged in, for example, the dumping of
3 produced water into the marsh.

4 Now the other thing I would add to
5 that is just the argument that, you know, I --
6 I -- I take my friends' -- we talked about the
7 narrative in World War II. There was a line
8 from Judge Oldham in dissent below that said
9 it's hard to -- like, it's hard to tell how
10 they would have been able to satisfy their
11 avgas refining contracts if they had not
12 produced oil. And, respectfully, that too is
13 directly contrary to the record.

14 For one thing, I mean, just look at
15 pages 217 and 218 of the PAW history book. The
16 problem -- and this is a section called the
17 Gulf Coast Surplus -- the problem that
18 Louisiana refineries had during the World War
19 II era that my friends want to focus on is they
20 had too much oil. There wasn't enough
21 transportation to take oil throughout the rest
22 of the country, and that overstimulation, that
23 oversupply of oil on the Gulf Coast meant that
24 there was a serious concern that the refineries
25 would actually have to close for lack of

1 storage capacity.

2 That's in the PAW history book. And
3 what they say is that throughout the war, the
4 refineries actually had to operate at 70 --
5 70 percent capacity of pre-war levels just to
6 avoid this oversupply of crude oil running them
7 over.

8 Like, I -- I take my friends, I
9 understand they want to make this case about
10 World War II. With all due respect, our
11 experience in the -- the Pointe à La Hache
12 trial in Plaquemines Parish and the historical
13 record, the cites I just gave you directly
14 contradict that narrative.

15 And if the Court has no further
16 questions, Mr. Chief Justice --

17 JUSTICE KAVANAUGH: Well, can I give
18 you an opportunity to respond to the amicus
19 brief from General Myers and Admiral Mullen,
20 which says, among other things, that the Fifth
21 Circuit's approach would set a dangerous
22 precedent that could adversely impact our
23 national security, discouraging private parties
24 from taking direction from federal officers for
25 fear of future liability, weakens our armed

1 forces while strengthening our enemies.
2 Devastating implications for our national
3 defense are not hypothetical after September
4 11th. For example, our nation needed
5 specialized protective equipment which the
6 military did not have. If private-sector
7 parties producing the equipment had said no,
8 fearing future liability, that would have left
9 our troops at great risk.

10 So I just want to give you an
11 opportunity to respond to that fairly strongly
12 worded amicus brief from General Myers and
13 Admiral Mullen.

14 MR. AGUIÑAGA: Yes, Justice Kavanaugh.
15 The thing I'd say to that is my friends on the
16 other side say we're trying to take the Court's
17 precedents to -- back to pre-2011 -- 2011
18 standard. I think, if that were true, then we
19 would have seen evidence of all of this parade
20 of horrors for the decades that this Court's
21 removal precedents required exactly what they
22 say we're trying to return the Court to.

23 You don't see anything in those
24 briefs, and, like, I admit the rhetoric is
25 strong, but where are the examples of the

1 government contractors who said, man, before
2 2011, because of the court -- federal -- the
3 federal officer removal statute, the way it's
4 been interpreted by the Supreme Court, we're
5 not going to engage in contracting like we --
6 like -- you know, like we'd like to. Where --
7 you don't see anything in the amicus briefs on
8 that point, Your Honor.

9 And so I think you should take the
10 rhetoric from lawyers' pens for what it is.
11 And, you know, I -- I made the point with
12 Justice Jackson earlier that our theory of the
13 case is perfectly consistent with all of the
14 asbestos cases, which is the mine-run removal
15 case that the federal courts are going to see.
16 And so I -- with all due respect, the rhetoric
17 is unfounded.

18 Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas?

22 JUSTICE THOMAS: As a practical
23 matter, what difference does it make to be in
24 state court as opposed to federal court?

25 MR. AGUIÑAGA: Well, Justice Thomas,

1 I'm not going to lie, that, you know, we have
2 the same reasons for wanting to be in state
3 court that anybody who sues under state law
4 wants to be in state court. We want the actual
5 experts interpreting state law, especially when
6 we get to the Louisiana Supreme Court on an
7 important statute like this and especially with
8 respect to a problem that is so sweeping in
9 scope.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor?

12 JUSTICE SOTOMAYOR: If you were to
13 lose on the "acting under," do you
14 automatically lose on the "relating"? If we
15 accept the Fifth Circuit's view, then how do
16 you win?

17 MR. AGUIÑAGA: So the answer's no,
18 Your Honor. I'll admit it's a harder question,
19 but I think we still win for exactly the reason
20 I was articulating earlier to Justice Jackson,
21 which is, if you want to take my friends on the
22 other side as asking you to adopt a but-for
23 test, well, look at the facts in this case and
24 ask: But for these avgas refining contracts,
25 would they have --

1 JUSTICE SOTOMAYOR: What do you do
2 with the "relating to" language?

3 MR. AGUIÑAGA: So, Your Honor, as
4 we've said from our BIO and through -- through
5 the red brief, we've interpreted the "relating
6 to" language, you know, with respect to this
7 Court's decision in Morales, I think, in lock
8 step with how my friends on the other side have
9 interpreted it.

10 In fact, that's the very language that
11 the court below and the en banc court in
12 Latiolais, and the Fifth Circuit's decision in
13 Latiolais adopted. We have no quarrel with all
14 of that blackletter language. I think the
15 question is, on particular facts, how does
16 that -- how does that test shake out?

17 And what I'm saying when I reference
18 the but-for causation standard that I heard
19 from my friends on the other side, like, ask
20 how that shakes out. It does not shake out for
21 them on this historical record.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: And could you respond
24 to the Solicitor General's alternative argument
25 just so I'm sure I know what your -- your view

1 of that is?

2 MR. AGUIÑAGA: So, Your Honor, our
3 front-line position -- I mean, we cited Docket
4 Entry 87, which was their -- you know, their
5 advisement to the district courts that they
6 were going to file a cert petition in this
7 Court on that alternative theory and that they
8 were only preserving that theory pending this
9 Court's resolution of it.

10 After you denied cert in *Plaquemines*
11 II, you never saw that theory again from my
12 friends. And, you know, we raised the problem
13 in our BIODs. We said -- we said at pages 19 to
14 22 this is a problem for you. My friends from
15 the parishes cited at -- at page 29, they said,
16 like, *Watson's* a problem for you.

17 You never saw this alternative theory
18 in the cert reply or the opening blue brief,
19 right? And so that's our top-line response,
20 Your Honor, is that, like, this is -- they made
21 a strategic choice. A heavily lawyered case on
22 the other side of this case. They made a
23 strategic choice to say, like, obviously, the
24 *Plaquemines II* decision says what it says.
25 We're not going to press it anymore. And they

1 have no --

2 JUSTICE KAGAN: Yeah. How about a
3 substantive response?

4 MR. AGUIÑAGA: So a substantive
5 response, Your Honor, and I'll say we're not
6 scared of the argument for one reason. My
7 friend, Mr. Clement, quoted from you the
8 head -- the heading starting the -- the chapter
9 on oil production in the PAW history that says
10 oil starts in the ground.

11 I'd ask you to read the conclusion.
12 Read page 189 that says the government's
13 treatment of production of oil in World War II
14 was subject to "a minimum of regulation."
15 That's a direct quote. That's the federal
16 government's own conception of what it did.

17 And the way we know that, Your Honor,
18 if you look at page 176, is a key part of how
19 the federal government treated the actual
20 production, this is far upstream, the
21 production of crude oil, they left that to the
22 states. The only thing they did each month was
23 say: States, we think this is a certain
24 capacity you could reach in terms of producing
25 crude oil for this month, and then -- and this

1 is -- this is actual language in the PAW
2 history -- it says we're leaving it to the
3 state regulatory agencies to determine how to
4 implement that if they so wish.

5 Like, that's how -- that's minimum
6 regulation, Your Honor. So, if you're looking
7 at Watson and you stack that up against the
8 historical record on that alternative theory,
9 that theory fails a hundred days out of a
10 hundred.

11 JUSTICE KAGAN: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?

14 JUSTICE GORSUCH: On the "relating to"
15 point, I didn't hear you make an argument that
16 it's a mere conforming amendment. Thoughts?

17 MR. AGUIÑAGA: So, Justice Gorsuch,
18 there -- like, the record is undisputed that it
19 is a conforming amendment. If you look at the
20 heading and --

21 JUSTICE GORSUCH: I -- no, I
22 understand that. That's not really my
23 question. I'm trying to get at, did it do
24 nothing, or do those words that Congress added
25 mean something? And I didn't hear you --

1 MR. AGUIÑAGA: Yeah.

2 JUSTICE GORSUCH: -- contest that they
3 mean something. And, in fact, the test is a
4 very broad one, you concede in your brief.

5 MR. AGUIÑAGA: They -- they --

6 JUSTICE GORSUCH: Am I right about
7 that?

8 MR. AGUIÑAGA: So they absolutely mean
9 something, Justice Gorsuch. And I think the
10 way I'd approach that question is to say two
11 things. What does Section 2(b) in the act do
12 to the -- the big -- the big amendment in the
13 2011 act was to change what is now (d)(1) to
14 redefine a civil action.

15 As my friend from the government said,
16 the whole point was to capture pre-suit
17 discovery procedures. So that's why you see
18 (d)(1), what is currently (d)(1) in the
19 statute, this redefinition.

20 Section 2(b), conforming amendments.
21 Conforming to what? I mean, I think what
22 Congress was trying to do by adding the phrase
23 "relating to" is just --

24 JUSTICE GORSUCH: I understand that.
25 But there's been a suggestion that the result

1 of that --

2 MR. AGUIÑAGA: Right.

3 JUSTICE GORSUCH: -- is that it
4 doesn't change the standard and it remains
5 "for" and not "for or relating to."

6 But I don't hear you in your briefs at
7 least suggest that argument. I hear you
8 admitting that "relating to" is quite a broad
9 test.

10 MR. AGUIÑAGA: Your Honor, and we
11 have. And I -- I -- that, like -- I'm not
12 going to back away from that. That is
13 absolutely the case.

14 Congress said what it said. It
15 included the words it did. And that's where we
16 think that stories like Latiolais and the
17 asbestos cases, those two decisions from the
18 Fifth Circuit that came out different ways,
19 that's why they do. We're completely
20 comfortable with that.

21 And the only reason I, you know, I
22 bring that up is to say the mismatch issue in
23 this case --

24 JUSTICE GORSUCH: No, I understand the
25 mismatch point. But you agree that those words

1 have meaning and that they change the meaning
2 of this statute?

3 MR. AGUIÑAGA: Absolutely, Justice
4 Gorsuch. Absolutely.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh?

7 Justice Barrett?

8 Justice Jackson?

9 Thank you, counsel.

10 Rebuttal, Mr. Clement?

11 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

12 ON BEHALF OF THE PETITIONERS

13 MR. CLEMENT: Thank you, Mr. Chief Justice.
14 Just a few points in rebuttal.

15 First, let me start with the one and
16 only thing I disagree with the government
17 about, and that is we did not forfeit this
18 argument in the Fifth Circuit. We stopped
19 making the argument because we lost in
20 *Plaquemines II* and then had cert denied.

21 And I think it's really important for
22 those of us that practice appellate law that in
23 that posture you don't have to keep making the
24 argument at various stages of the case.

25 I mean, the VMI cert deny sort of says

1 that. The N -- the NFL cert denied says that.
2 So, unless you are going to all of a sudden
3 have appellate lawyers have to lard up their
4 appellate briefs with arguments that are
5 already foreclosed by appellate precedent in
6 that circuit, I think it's very important not
7 to find any forfeiture here.

8 Now I would say two other things.
9 First of all, I think the second question
10 presented is broad enough to capture this
11 theory. And in all events, if anybody's opened
12 the door wide open to a discussion of the
13 "acting under" prong, it is my friends on the
14 other side. So I think we are perfectly --
15 the -- the SG's theory, which is our theory
16 from *Plaquemines II*, is squarely before this
17 Court.

18 A couple of other quick points.
19 First, on the war, the war context of this is
20 critical. My friend says, well, 70 percent of
21 the production out of the fields went to
22 civilian uses. Civilian uses in World War II
23 were the homefront. They were, like, fueling
24 the factories that were making munitions.

25 And if you read the *Petroleum*

1 Administration for War history, it makes this
2 point that the reason the federal government
3 was all over this is war was -- that oil was
4 absolutely essential to everything, including
5 the homefront.

6 And if we are going to get in a big
7 debate about exactly what happened in World War
8 II, boy, I think, first, that should take place
9 in federal court, and, second, you should
10 probably take a look at the SG's brief,
11 including at pages 6 or 7, when they point out
12 that there were regulations that go down to the
13 level of the drilling angles and the
14 production.

15 Now, as to the statutory text, I think
16 it's important that if you look at the
17 statutory text that's in the U.S. Code, this
18 isn't even a close case. "Related to" is in
19 there. It's broad as can be.

20 Now I'd hate to have a world where all
21 of a sudden, like, my U.S. Code has to have
22 yellow highlighting on certain words because
23 they were put into the Code by a conforming
24 amendment, and all of a sudden I should take
25 those words less seriously or figure out what

1 else Congress was trying to do in 2011 and
2 limit the words that are there in black and
3 white. I think that's a dangerous path to go
4 down.

5 But, if you're going to go down the
6 path of legislative history, the -- the phrase
7 that we've all on our side relied on from the
8 House report is not some stray comment. It is
9 the section-by-section explanation for what
10 they're doing with rewriting the statute.
11 That's -- that's the words of the House report.
12 And it's to broaden the universe of acts that
13 enable removal. So Congress actually knew what
14 it was doing here.

15 Last point on the test. If you're
16 going to have a verbal formulation, please
17 don't have the word "direct" in it.

18 I actually think, though, that maybe
19 the better path here is to say that there are
20 three or four factors about this case, that
21 it's the indispensable component, that the
22 contract itself mentions the connection, that
23 the war effort is directly interfered with if
24 this is enjoined, and leave it at that.

25 Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 The case is submitted.

4 (Whereupon, at 11:21 a.m., the case
5 was submitted.)

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