No. 19-1818

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

STATE OF RHODE ISLAND,

Plaintiff-Appellee,

v.

SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL PLC; MOTIVA ENTERPRISES, LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY, LP; SPEEDWAY, LLC; HESS CORP.; LUKOIL PAN AMERICAS LLC; AND DOES 1-100,

Defendants-Appellants,

GETTY PETROLEUM MARKETING, INC.,

Defendant.

On Appeal from the United States District Court
for the District of Rhode Island
No. 1:18-cv-00395-WES-LDA
Hon. William E. Smith, U.S.D.J.

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF APPELLEES AND AFFIRMANCE

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December 31, 2019

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, a nonprofit consumer advocacy organization with members in every state, appears before Congress, administrative agencies, and courts on a wide range of issues. Climate change and the need for effective measures to hold accountable those whose activities play a substantial role in contributing to it are major concerns of Public Citizen. In addition, Public Citizen has a longstanding interest in the proper construction of statutory provisions defining the jurisdiction of federal trial and appellate courts. Public Citizen has frequently appeared as amicus curiae in cases involving significant issues of federal jurisdiction, including questions of original, removal, and appellate jurisdiction.[2] Removal jurisdiction is of particular concern to Public Citizen because it implicates the authority of state courts to provide remedies under state law for actions that threaten public health

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[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

[2] *E.g.*, *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81 (2014); *Miss. ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014).

and safety. Public Citizen is concerned that defendants often improperly invoke removal jurisdiction, including federal officer removal under 28 U.S.C. § 1442(a)(1), in litigation involving matters of significant public concern to deny plaintiffs their choice of forum and escape liability under state law.

In furtherance of these interests, Public Citizen filed amicus curiae briefs at both the petition and merits stages in *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007), a case in which, as here, the defendants invoked federal officer removal to derail state-court litigation over alleged misrepresentations about the dangers of their products. Public Citizen also submitted amicus briefs in other cases concerning federal officer removal in the courts of appeals, including cases currently pending in the Ninth Circuit, *County of San Mateo v. Chevron Corp.*, Nos. 18-15499, 18-15502, 18-15503, 18-16376 (9th Cir.), and the Fourth Circuit, *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 19-1644 (4th Cir.), which raise substantially the same issues as this case. Public Citizen submits this brief to assist the Court in understanding the degree to which such invocations of section 1442(a)(1) distort its language and purpose.

SUMMARY OF ARGUMENT

In *Watson v. Philip Morris Cos.*, two plaintiffs sued cigarette manufacturers for fraudulently marketing cigarettes as "light" to deceive smokers into believing that smoking them would deliver lower levels of tar and nicotine than other cigarettes and present less danger of disease. Although the manufacturers' self-interested commercial behavior did not in any way involve carrying out official functions of the United States government, they invoked section 1442(a)(1) and removed the action on the ground that they were "acting under" a federal officer because (they claimed) the federal government regulated the way they tested the tar and nicotine levels of their cigarettes. *See* 551 U.S. at 154–56.

The Supreme Court unanimously rejected the manufacturers' invocation of section 1442(a)(1). *Id.* at 147. Emphasizing the statute's purpose of protecting against state interference with "'officers and agents' of the Federal Government 'acting … within the scope of their authority,'" *id.* at 150, the Supreme Court stated that "the statute authorized removal by private parties 'only' if they were 'authorized to act with or for [federal officers or agents] in affirmatively executing duties under … federal law,'" *id.* at 151. The Court therefore held that self-interested

commercial entities that acted under compulsion of federal regulation but had been given no authority to act "on the Government agency's behalf," *id*. at 156, did not "act under" a federal officer within the meaning of the law and were not entitled to invoke the statute, *id*. at 153.

In this case, major oil companies are alleged to have concealed their knowledge of the climate effects of their global enterprises, preventing consumers from understanding the dangers of the companies' products. Notwithstanding the unanimous holding in *Watson*, the oil companies invoke section 1442(a)(1) on the theory that some of their production and sale activities involved contractual relationships with the federal government and that they "acted under" a federal officer in complying with the terms of their contracts.

Although, under some circumstances, a contractual relationship may bring a private party within the ambit of section 1442(a)(1), *see*, *e.g.*, *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249 (2017), not every contractual relationship transforms a private entity into a person "acting under" federal officers in carrying out "actions under color of [federal] office." 28 U.S.C. § 1442(a)(1). The relationship must be one where a contractor assists in carrying out government functions under the "subjection,

guidance, or control" of a governmental superior. *Id.* at 255 (quoting *Watson*, 551 U.S. at 141).

Here, the contractual relationships cited by the oil companies do not establish that the companies were acting on the government's behalf to assist government officers in carrying out their legal duties, as the statute requires. *See Watson*, 551 U.S. at 152–57. And because no federal officer directed the defendants to engage in their worldwide enterprises of extracting and selling oil while concealing the hazards posed by fossil fuels, the oil companies have also failed to carry their burden of showing that they are being sued "for" or "relating to" anything they ostensibly did under the direction of a federal officer, as the statute additionally requires. 28 U.S.C. § 1442(a)(1).

For similar reasons, the defendants have not shown that they have a colorable federal immunity defense against any of the claims asserted against them. Permitting adjudication of such immunity defenses in federal court is the reason for federal officer removal, s*ee Am. Policyholders Ins. Co. v. Nyacol Prods., Inc.*, 989 F.2d 1256, 1265 (1993), and removal is proper only where the removing party asserts such a defense, *Mesa v. California*, 489 U.S. 121, 139 (1989).

ARGUMENT

I. The federal officer removal statute's application is limited by its language, context, history, and purposes.

Section 1442(a)(1) provides:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

An ordinary English speaker and reader might be surprised to learn that oil companies sued for the way they have conducted their private enterprises, and in particular for concealing their knowledge of the climate impacts of their products while promoting expanded use of fossil fuels, would claim to fall within the scope of the statute. An understanding of the statute's history and application by the Supreme Court would strongly reinforce that reaction.

The earliest predecessor of section 1442(a)(1) was enacted during the War of 1812 to provide for removal of cases brought against federal

customs officers, and those assisting them in performing their duties, because of widespread efforts of state-court claimants to interfere with the execution of unpopular trade restrictions. *See Watson*, 551 U.S. at 148; *Holdren v. Buffalo Pumps, Inc.*, 614 F. Supp. 2d 129, 141 (D. Mass. 2012). In statutes enacted in 1833 and 1866, Congress extended removal rights to include revenue officers and persons acting under their authority. *See Watson*, 551 U.S. at 148; *Holdren*, 614 F. Supp. 2d at 141. Again, Congress acted out of concerns about state-court interference with the performance of the often-unpopular duties of such officers, including the collection of tariffs and other taxes, *see Watson*, 551 U.S. at 148, as well as the enforcement of liquor laws, which often met with local resistance. *See id*. at 149. Finally, in 1948, Congress extended removal to all federal officers acting under color of their office, as well as other persons who assisted in such actions under their direction. *See id*. at 148.

As the Court explained in *Watson*, animating all the variants of the statute has been the "'basic' purpose … [of] protect[ing] the Federal Government from the interference with its 'operations' that would ensue were a State able, for example, to 'arres[t]' and bring 'to trial in a State cour[t] for an alleged offense against the law of the State,' 'officers and

agents' of the Federal Government 'acting ... within the scope of their authority.'" *Id.* at 150 (quoting *Willingham v. Morgan*, 395 U.S. 402, 406 (1969)). The statute serves as a check against "'local prejudice' against unpopular federal laws or federal officials," as well as against efforts by "States hostile to the Federal Government [to] … impede … federal revenue collection or the enforcement of other federal law." *Id.*

For example, in May 1878, federal internal revenue agent James Davis raided a moonshine still in the hills near Tracy City, Tennessee. Before he and his companion could destroy the still, seven armed men attacked them. Returning fire, Davis killed one of his assailants, wounded another, and captured a third, but he was forced to retreat without destroying the still. According to a contemporary newspaper account, the raid caused "intense excitement" in the neighborhood.[3] A local grand jury indicted Davis for murder. With the support of the Attorney General of the United States, Davis invoked the predecessor to 28 U.S.C. § 1442(a)(1) and removed the case to federal court on the ground that he had acted in the discharge of his duties as a federal officer

[3] www.tngenweb.org/monroe/news3.txt (reproducing newspaper report dated May 29, 1878).

and was immune from state prosecution. In *Tennessee v. Davis*, 100 U.S. 257 (1880), the Supreme Court affirmed the removal, holding that because the federal government "can act only through its officers and agents," the ability to remove state-court actions brought against federal officers and agents for actions within the scope of their duties was essential to the vindication of federal authority. *Id.* at 263.

The Supreme Court has repeatedly pointed to *Davis* as exemplifying the core purposes of section 1442(a)(1)'s authorization for removal of cases by federal officers and persons acting under them who are sued in state court for the performance of official acts. *See*, *e.g.*, *Mesa*, 489 U.S. at 126–27 (1989); *Arizona v. Manypenny*, 451 U.S. 232, 241 n.16 (1981); *Willingham*, 395 U.S. at 406. Those purposes, however, are subject to a significant limitation: The statute permits removal only when federal officers or persons assisting them in carrying out federal law have "a colorable defense arising out of their duty to enforce federal law." *Willingham*, 395 U.S. at 406–07; *see also Mesa*, 489 U.S. at 129; *Am. Policyholders*, 989 F.2d at 1265.

Thus, the principal way in which the statute serves the policies underlying it is by "assuring that an impartial setting is provided in

which the federal defense of immunity can be considered during prosecution under state law." *Manypenny*, 451 U.S. at 243. Only where such a federal defense is available does the statute also serve to "permit a trial upon the merits of … state-law question[s] free from local interests or prejudice." *Id.* at 242. For this reason, the statute expressly limits removal to circumstances where the defendant is sued in relation to the performance of official duties—"act[s] under color of … office." 28 U.S.C. § 1442(a)(1); *Mesa*, 489 U.S. at 134–35. An action removed under the statute must relate to "acts done by the defendant as a federal officer under color of his office." *Maryland v. Soper (No. 1)*, 270 U.S. 9, 33 (1926) (holding removal improper in a murder prosecution where the federal defendants did not explain how the victim's death was connected to performance of their duties); *see also Me. Ass'n of Interdependent Neighborhoods v. Comm'r, Me. Dep't of Human Servs.*, 876 F.2d 1051, 1055 (1st Cir. 1989) ("*MAIN*") (removal improper where defendant was not acting "under color of federal office").

Within the limits imposed by the statute's language and purposes, the Supreme Court has stated that section 1442(a)(1) must be "liberally construed," *Colorado v. Symes*, 286 U.S. 510, 517 (1932), so that the

policies it is intended to serve are not "frustrated by a narrow, grudging interpretation," *Manypenny*, 451 U.S. at 242. At the same time, however, the Court has recognized that the statute's "broad language is not limitless," and that "a liberal construction nonetheless can find limits in a text's language, context, history, and purposes." *Watson*, 551 U.S. at 147; *see also Holdren*, 614 F. Supp. 2d at 141 (noting that the Supreme Court's warnings "against an unduly narrow view of federal officer removal" came in cases "where the federal character of the disputed act [was] hardly in doubt"). When, as in *Watson*, the Supreme Court has faced attempts to stretch the statute beyond its intent, the Court has declined to construe it expansively. *See Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72 (1991); *Mesa*, 489 U.S. at 139. As the Court stated in *Mesa*, respect for state courts dictates that the "language of § 1442(a) cannot be broadened" beyond its "fair construction." *Id.* at 139 (quoting *Maryland v. Soper (No. 2)*, 270 U.S. 36, 43–44 (1926)). Section 1442(a)(1) removal remains "an 'exceptional procedure' which wrests from state courts the power to try" cases under their own laws, and, therefore, "the requirements of the showing necessary for removal are strict." *Screws v. United States*, 325 U.S. 91,

111–12 (1945) (opinion of Douglas, J.) (citing *Soper (No. 2)*, 270 U.S. at 42).

The extension of section 1442(a)(1) to "person[s] acting under" officers of the United States supports the statute's predominant concern: protecting vulnerable individual officers and employees of the federal government against prosecution or suit in state courts for the performance of their official duties. The primary function of that language is to include federal employees who fall outside the definition of "officers of the United States"—a term of art referring to federal officers who exercise significant authority. *See Primate Prot.*, 500 U.S. at 81 (discussing limited meaning of the term "officers of the United States"). Thus, including persons "acting under" officers was essential to achieve the statutory purpose of "apply[ing] to all officers and employees of the United States and any agency thereof." H.R. Rep. No. 80-308, at A134 (1947), *quoted in Primate Prot.*, 500 U.S. at 84.

As the Supreme Court has recognized, the term "person" also extends to a private person who "acts as an assistant to a federal official in helping that official to enforce federal law." *Watson*, 551 U.S. at 151. The paradigmatic case for application of the statute to such a person was

Soper (No. 1), where the Court pointed out that a private individual hired to drive and assist federal revenue officers in busting up a still "had 'the same right to the benefit of' the removal provision as did the federal agents." *Watson*, 551 U.S. at 150 (quoting *Soper (No. 1)*, 270 U.S. at 30); *see also Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989) (upholding removal by telephone companies and individuals who assisted federal law enforcement officers in carrying out electronic surveillance and were entitled to immunity under federal law for providing that assistance).

By contrast, the vast majority of persons and entities in this country who, in going about their daily business, obey directions from federal officers do not qualify. *See Watson*, 551 U.S. at 152–53. Only persons who are "authorized to act with or for [federal officers or agents] in affirmatively executing duties under … federal law," *id.* at 151 (brackets by the Court; citation omitted), and whose conduct "involve[s] an effort to *assist*, or to help *carry out*, the duties and tasks of the federal superior," *Watson*, 551 U.S. at 152, fall within the language and purposes of the statute.

II. The defendants have not demonstrated that they meet the prerequisites for removal under section 1442(a)(1).

In light of the governing Supreme Court precedent, federal appellate and trial court decisions, including those cited by the defendants in this case, are in general agreement that "a private defendant, such as a government contractor, who seeks to remove a case under § 1442(a)(1), must show: (1) that it 'act[ed] under' a federal officer …; (2) that it has 'a colorable federal defense' …; and (3) that the charged conduct was carried out for on in relation to the asserted official authority …." *Sawyer*, 860 F.3d at 254 (citations omitted); *see also Holdren*, 614 F. Supp. 2d at 139–40. The first and third parts of the test, which are principally at issue in this case, reflect the statutory language permitting removal only by a person "acting under" a federal officer in performing some "act under color of [federal] office," and only when there is a sufficient relationship between the performance of that official action and the plaintiffs' claims—that is, in the statute's words, when the action or prosecution is one "for or relating to" an official act. 28 U.S.C. § 1442(a)(1). The second part of the test not only reflects the statute's purpose of allowing the validity of federal immunity defenses to be determined in federal court, *see Am. Policyholders*, 989 F.2d at 1265, but

also serves to conform the statute to Article III limits on jurisdiction over cases "arising under" federal law, s*ee Mesa*, 489 U.S. at 136–37; *Holdren*, 614 F. Supp. 2d at 140.

In cases satisfying these requirements, section 1442(a)(1) both allows removal and creates a basis for federal jurisdiction over cases that would otherwise fall outside the original jurisdiction of the federal courts: It is "a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant." *Mesa*, 489 U.S. at136. The normal principles that "the party asserting federal jurisdiction when it is challenged has the burden of establishing it," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006), and, specifically, that "the removing party bears the burden of persuasion vis-à-vis the existence of federal jurisdiction," *BIW Deceived v. Local S6, Indus. Union of Marine & Shipbldg. Workers of Am.,* 132 F.3d 824, 831 (1st Cir. 1997), are thus fully applicable to federal officer removal cases. *See*, *e.g.*, *Bartel v. Alcoa S.S. Co.*, 805 F.3d 169, 172 (5th Cir. 2015); *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 728 (9th Cir. 2015). Here, the oil companies have failed to carry the burden of demonstrating that they are being sued for or in relation to

anything they did while acting under federal officers in carrying out federal law, or that they have a colorable federal immunity defense based on their claimed duties under federal law.

A. The contractual relationships that the defendants cite do not bring them within the federal officer removal statute.

The defendants' claims to have been acting under federal officers in performing acts under color of federal office rest entirely on three contractual relationships briefly discussed by the oil companies in a four-page section of their brief. Appts. Br. 39–42.[4] The commercial relationships they describe do not involve actions under federal officers, or under color of federal office, within the meaning of the statute.

In *Watson*, the Supreme Court reserved the question whether a contractual relationship between a private company and the federal government could ever serve as a basis for removal under section 1442(a)(1). The Court noted, however, that some lower courts had "held

[4] The companies have, under this Court's precedents, waived reliance on any contractual relationships not asserted in their opening brief or on aspects of the contracts mentioned that are not explained in the opening brief. *See Sparkle Hill, Inc. v. Interstate Mat Corp.*, 788 F.3d 25, 29 (1st Cir. 2015) ("Our precedent is clear: we do not consider arguments for reversing a decision of a district court when the argument is not raised in a party's opening brief.").

that Government contractors fall within the terms of the federal officer removal statute, at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." 551 U.S. at 153. The Court noted that such results were "at least arguably" justifiable where contractors were assisting in performing governmental functions, *id.* at 154, but declined to determine "whether and when particular circumstances may enable private contractors to invoke the statute," *id.*

Several courts have subsequently determined that a private contractor could remove under section 1442(a)(1) where the nature of the relationship established by the contract satisfied the criteria laid out in *Watson* to distinguish circumstances in which a private person acts under a federal officer in performing actions under color of federal office from those in which it does not. For example, the Fourth Circuit held in *Sawyer*, cited by the defendants, that a government contractor can be found to act under a federal officer "where the government exerts some 'subjection, guidance, or control,' … and where the private entity engages in 'an effort to assist, or to help carry out, the duties or tasks of the federal superior.'" *Sawyer*, 860 F.3d at 255 (quoting *Watson*, 551 U.S. at 151,

152). Applying these principles, *Sawyer* held that a defense contractor acted under federal officers when it manufactured boilers for Navy ships to meet "highly detailed ship specifications and military specifications," *id*. at 253, and when the warnings that it provided concerning potential hazards associated with the boilers were likewise "dictated or approved" by the government, *id*. at 256. A district court in this Circuit likewise held that a defense contractor acted under federal officers when it produced equipment "pursuant to specific procurement requests from the Navy and under the close supervision of its employees." *Holdren*, 614 F. Supp. 2d at 149.

Similarly, the Ninth Circuit held that private contractors that assist or carry out duties of a federal superior, and are under the subjection, guidance or control of a federal officer in doing so, act under a federal officer for purposes of section 1442(a)(1). *Goncalves by & Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017). Thus, in *Goncalves*, nongovernmental entities that administered federal health insurance plans and had been "delegated" authority by the government "to act 'on the Government agency's behalf'" in pursuing subrogation claims were entitled to remove under section

1442(a)(1) when they were sued for such actions. *Id.* at 1247 (quoting *Watson*, 551 U.S. at 156).

By contrast, in the absence of circumstances indicating that a contractor is engaged to exercise delegated authority to assist federal officers in performing official functions and is subject to their supervision or control, a federal contractor does not act under a federal officer, or under color of federal office. In *Cabalce*, for instance, the Ninth Circuit held that a company that contracted with the federal government to dispose of fireworks was not entitled to remove an action against it under section 1442(a)(1), where it failed to show that it was sufficiently under "subjection, guidance, or control" of a federal officer in implementing the contract, 797 F.3d at 728, and where the contract made clear that the contractor was an independent actor rather than acting as an agent of the government, *see id.* at 728–29. As a result, the company's actions "were not acts of a government agency or official." *Id.* at 729.

Similarly, a well-reasoned district court opinion in another case concluded that a government contractor was not "acting under" federal officers in its dealings with subcontractors where federal officials exerted no control over its management of the subcontractors. *L-3 Commc'ns*

Corp. v. Serco Inc., 39 F. Supp. 3d 740, 750 (E.D. Va. 2014). As the court explained, a contractor does not act under a federal officer merely because it is engaging in commercial activity under the "general auspices" of a federal contract in the absence of control over the contractor's activity by a federal officer. *Id.* Not every federal contract, or every action taken by a company that has such a contract, transforms the contractor into a person "acting under" a federal officer.

The contracts on which the oil companies rely here do not establish the kind of relationship that supports characterizing the companies' self-interested business activities as acts on behalf of the government at the direction of federal officers. Any obligations imposed on the companies by the contracts were limitations on their essentially private conduct, more akin to the regulatory limitations that *Watson* held insufficient to justify invocation of section 1442(a)(1) than to the delegation of authority to act "on the Government agency's behalf" that was lacking in *Watson*. 551 U.S. at 156. None of the three sets of contracts on which the companies rely supports the counterintuitive conclusion that the companies, in producing and selling fossil fuel products—and promoting them to the public while allegedly concealing knowledge of their damaging effects on

the global climate—were helping to perform governmental tasks under color of federal authority.

Specifically:

- The Elk Hills Naval Petroleum Reserve contract between Standard Oil Company of California and the United States Navy allocated rights in oil fields within the reserve between Standard Oil and the government, and required Standard Oil to *curtail* its own production to protect the interests of the government. *See United States v. Standard Oil Co. of Calif.*, 545 F.2d 624, 628 (9th Cir. 1976). The agreement recognized the distinct interests of the government and the company and created mechanisms to balance the two. When Standard Oil chose to produce oil from the reserve for itself, it was not exercising delegated authority to act on "behalf" of the government, *see Watson*, 551 U.S. at 156; it was acting in its own interests.
- The companies' oil and gas leases on the Outer Continental Shelf allow private actors to purchase leaseholds on federal property and extract resources from those leases for their own commercial uses, with payment of royalties to the government. The government's

willingness to make public property available, for a price, to private interests who wish to use it for their own profitable purposes does not delegate to private persons authority to act on behalf of the government or otherwise transform them into public actors assisting government officers in "fulfill[ing] … basic governmental tasks." *Watson*, 551 U.S. at 153. That the companies, by entering into the leases, have chosen to subject themselves to detailed regulation of their activities on the leaseholds likewise cannot, under *Watson*'s reasoning, transform them into persons acting under federal officers. *See* 551 U.S. at 153. If the companies' contrary view were correct, any number of companies and individuals who have paid for the right to extract resources from federal lands subject to the terms established by the laws, regulations, and contracts governing their activities—timber companies, miners and prospectors, grazers—would likewise qualify for removal under section 1442(a)(1).

- Citgo's contracts to sell standardized commercial commodities—gasoline and diesel—to NEXCOM, which operates retail stores on Navy bases, do not qualify it as a person acting under a federal

officer in performing acts under color of office. Merely selling products to the government, and complying with the contract terms incidental to that sale, does not constitute assisting federal officers "in affirmatively executing duties under … federal law." *Watson*, 551 U.S. at 151 (citation omitted). Such standard, arms-length commercial transactions do not make one of the parties the agent of the other or establish the degree of "subjection, guidance, or control" required by section 1442(a)(1). *Sawyer*, 860 F.3d at 255; *see, e.g.*, *Cabalce*, 797 F.3d at 728–29. Government purchases of "off-the-shelf" products from a defendant thus do not show that the defendant's conduct "come[s] within the meaning of 'act[ed] under.'" *Washington v. Monsanto Co.*, 738 F. Appx. 554, 555 (9th Cir. 2018).

The companies' blanket assertion that "[t]he Supreme Court has indicated that a private contractor 'acts under' the direction of a federal officer when it 'help[s] the Government to produce an item that it needs' under federal 'subjection, guidance, or control,'" Appts. Br. 39 (quoting *Watson*, 551 U.S. at 151, 153), fails to justify their reliance on the contracts they invoke here. *Watson* by no means "indicates" that a private actor is permitted to qualify whenever it produces something the

government needs. *Watson* in fact left the question of application of section 1442(a)(1) to contractors open, and it noted only that lower courts had held that contractors that "help[] officers fulfill other basic governmental tasks" (such as the conduct of a war) can qualify under the statute if their relationship involves "detailed regulation, monitoring, or supervision." 551 U.S. at 153. The contractual arrangements that the companies invoke here are not the kinds of contracts that *Watson* suggested might suffice. Nor are they similar to defense contracts involving detailed specifications and oversight for the production of war matériel, which other courts have found sufficient to satisfy the "acting under" element. Rather, in selling gasoline to Navy service stations, producing oil from offshore leases, and exercising rights to extract oil from the Elk Hills reserve—as in their other petroleum production and marketing activities—the oil companies remained essentially private enterprises and acted in that capacity, not under color of federal office. *Cf*. *MAIN*, 876 F.2d at 1055 (removal improper where defendant, though subject to federal regulation, acted under color of state rather than federal office).

B. The defendants have not shown the requisite connection between this action and the acts they claim were taken under the direction of federal officers.

Removal under section 1442(a)(1) requires that a defendant show both that it did something that constituted an act under a federal officer and under color of that officer's office, and that the action or prosecution removed was brought against it "for or relating to" that act. Courts have variously characterized this aspect of the statute as requiring that claims be "causally related" to the acts performed under the direction of a federal officer, *Goncalves*, 865 F.3d at 1244, or as requiring a "connection or association" but not a "*strict causal connection*" between the claims in the case and the acts performed under a federal officer, *Sawyer*, 860 F.3d at 258. Under either formulation, the statute requires a "relationship sufficient to connect the plaintiffs' claims" with the acts taken under federal direction or supervision. *Id.*

In *Sawyer*, for example, the Fourth Circuit found that the plaintiffs' claims that a contractor failed to provide adequate warnings about the dangers of asbestos were related to the Navy's exercise of "discretion," *id.*, in dictating and approving warnings given by the contractor acting under its detailed supervision, *see id.*; *see also id.* at 256–57 (describing

nature of the Navy's role with respect to warnings about the products at issue). By contrast, in *Cabalce*, the Ninth Circuit found the required connection lacking because the acts for which the defendant was sued were unrelated to any direction it had received from federal officers. *See* 797 F.3d at 728–29 (holding nexus between claims and official actions insufficient where plaintiffs challenged government contractor's negligence in destroying illegal fireworks seized by the government, and the contract did not include specifications controlling the manner in which it destroyed the fireworks).[5]

Here, as the plaintiffs demonstrate in their brief, the companies have not made that showing. Rather, the claims against the oil companies rest on their concealment of their knowledge of the climate hazards posed by their activities, and their mass, worldwide production and marketing of defective products; they do not relate to anything that the companies were "asked to do by the government," *Goncalves*, 865 F.3d at 1245, or on anything that the government "dictated," *Sawyer*, 860 F.3d

[5] *See also Washington v. Monsanto Co.*, 274 F. Supp. 3d 1125, 1131 (W.D. Wash. 2017) (finding no "nexus" between federal contracts to purchase PCBs and claims that a manufacturer concealed the hazards of PCBs where federal officials did not "direct [the manufacturer] to conceal the toxicity of PCBs"), *aff'd*, 738 F. Appx. 554 (9th Cir. 2018).

at 258. Nothing in the contractual relationships cited by the companies demonstrates that they involved any exercises of federal-government "discretion," *id.*, related to the oil companies' alleged concealment of their knowledge of the climate risks posed by their products, their promotion of fossil fuels notwithstanding that knowledge, or, more generally, their mass production and marketing of products that were allegedly defective in that they were not as safe as the companies had led ordinary consumers to understand. The district court correctly held that any connection between the federal contracts and the claims in this case was too attenuated to supply the necessary connection between the plaintiffs' claims and any official action carried out under direction of federal officers.

C. The oil companies have not attempted to show that they would have a colorable federal immunity defense satisfying the requirements of the federal officer removal statute.

With respect to the requirement that parties invoking federal officer removal claim "a colorable defense arising out of their duty to enforce federal law," *Am. Policyholders*, 989 F.2d at 1259 (quoting *Willingham*, 395 U.S. at 406–07), the oil companies assert that "[t]he district court did not disagree (nor could it) that Defendants have

colorable federal defenses." Appts. Br. 39. The district court's failure to reach the issue, however, does not relieve the oil companies of the burden of demonstrating the existence of jurisdiction, and their brief is deficient on what they concede is a key element of jurisdiction under section 1442(a)(1). They briefly list certain defenses they claim are colorable, "including federal preemption, and arguments that the claims are barred by the First Amendment, Commerce Clause, and Due Process Clause." *Id*. But they offer no explanation of how these defenses justify removal under section 1442(a)(1).

This omission is important because not every defense under federal law that a defendant might offer against a claim necessarily satisfies section 1442(a)(1)'s requirements. As the Supreme Court has repeatedly emphasized, the type of federal defense contemplated under section 1442(a)(1) is one that "arise[s] out of [the defendant's] duty to enforce federal law." *Willingham*, 395 U.S. at 406–07; *accord*, *Mesa*, 489 U.S. at 966–67; *see Am. Policyholders*, 989 F.2d at 1265. In the words of both *Mesa* and this Court in *American Policyholders*, section 1442(a)(1)'s requirements are satisfied by the assertion of a federal defense of official

immunity. *See Mesa*, 489 U.S. at 967; *Am. Policyholders*, 989 F.2d at 1265.

The defenses the defendants discuss do not meet this criterion. The defendants' brief makes clear that their principal claimed federal defense is implied preemption. But the oil companies' broad assertions of preemption do not set forth an immunity defense based on duties to carry out federal law associated with their claims to have acted under federal officers in performing under the contracts described in their brief: The merit (or lack of merit) of their preemption claims is not affected by the companies' claimed status as persons acting under federal officers in some contracts. That the defendants are likely to assert defenses of preemption, therefore, should not by itself support removal under section 1442(a)(1).[6] The defendants' conclusory references to First Amendment, Commerce Clause, and Due Process defenses likewise do not assert defenses of immunity related to their claims of having acted

[6] Some courts have accepted preemption defenses as satisfying the requirements of federal officer removal. *See*, *e.g.*, *Goncalves*, 865 F.3d at 1249. That position is at odds with the description of the types of federal defenses that satisfy section 1442(a)(1) in *Mesa*, *Willingham*, and *American Policyholders*.

under color of federal office, let alone establish that the defenses are colorable.

Some courts have held that one specialized type of preemption defense, the government-contractor immunity defense recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), can satisfy the federal officer removal statute's requirement of a colorable federal defense in circumstances where a federal contractor acts under a federal officer and the claims against it are for or relating to its official actions in that capacity. *See Sawyer*, 860 F.3d at 255; *Holdren*, 614 F. Supp. 2d at 142–49. That holding reflects the view that the *Boyle* defense, where applicable, is a form of immunity against claims based on the contractor's performance of its duties under federal law, and thus meets the requirements of section 1442(a)(1) as described by *Mesa*, *Willingham*, and *American Policyholders*. But a colorable claim of immunity under *Boyle* requires a contention that in performing the actions that are the basis of the plaintiff's claims, the defendant was in fact complying with specific contractual specifications or requirements, such as providing warnings "dictated or approved" by the government under the contract. *See Sawyer*, 860 F.3d at 256; *Holdren*, 614 F. Supp. 2d at 142–49. Absent

such a showing, a court "cannot conclude that defendants have met even the … threshold" of showing a colorable defense. *Id.*

The oil companies nowhere claim that they intend to assert a federal contractor defense under *Boyle*, much less attempt to explain how *Boyle* would give them a colorable defense of immunity to even a single one of the claims asserted in the complaint. Neither in concealing the climate risks they allegedly knew their products posed nor in marketing defective products to the general public have the defendants demonstrated that they were carrying out federal contract terms that would provide a colorable immunity defense under *Boyle*. In defaulting on the requirement of showing a colorable federal defense, as in failing to demonstrate that they took actions under the direction of a federal officer to which the claims relate, the oil companies have fallen far short of establishing an entitlement to invoke the federal officer removal statute.

CONCLUSION

For the foregoing reasons, as well as those set forth in the briefs of the plaintiff-appellee, this Court should affirm the order of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 32(a)(7)(B) and 29 as follows: The type face is fourteen-point Century Schoolbook font, and the word count, as determined by the word-count function of Microsoft Word 2016, is 6,393, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on December 31, 2019, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case, including all parties required to be served.

/s/ Scott L. Nelson
Scott L. Nelson