No. 22-1096

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, ATTORNEY GENERAL OF THE STATE OF DELAWARE,

Plaintiff-Appellee,

v.

BP AMERICA INC., ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Delaware,
No. 20-cv-1429
The Honorable Leonard P. Stark, United States District Judge

BRIEF OF AMICUS CURIAE ROBERT S. TAYLOR

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INTEREST OF AMICUS CURIAE[1]

Robert S. Taylor served as the Principal Deputy General Counsel of the Department of Defense ("DoD") from March 2009 until January 20, 2017, and twice during that period he served as the Acting General Counsel of the Department, from January 1, 2013, through October 25, 2013, and from June 2015 through June 14, 2016. His previous government experience included service as Deputy General Counsel (Environment and Installations), from May 9, 1995, through December 31, 2001, in the Clinton Administration and close to the first full year of the George W. Bush Administration. Mr. Taylor served under six General Counsels, and under seven Secretaries of Defense, and he was awarded the Distinguished Public Service Award, the Department's highest civilian honor, six times.

Mr. Taylor is a graduate of Harvard College in 1972 and of Harvard Law School in 1975, where he was a member of the Harvard Law Review. After clerking for Judge Francis Van Dusen of the United States Court of Appeals for the Third Circuit, he became an associate in the firm of Leva, Hawes, Symington,

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amicus curiae* states that no counsel for a party authored this brief, in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. *Amicus* has accepted no payment for submission of this brief. All parties consent to *amicus* filing this brief.

Martin & Oppenheimer. The senior named partner, Marx Leva, is recognized by DoD OGC as the first General Counsel of DoD, though his formal title was as Special Assistant to the Secretary. Mr. Taylor joined Swidler, Berlin, and Strelow, a spinoff from Leva, Hawes, in 1981, and worked, among others, with Joseph Swidler, a former General Counsel of the Tennessee Valley Authority and a former Chair of the Federal Power Commission, and with Edward Berlin, a former Chair of the New York Public Service Commission.

Through his two periods of service in the DoD Office of General Counsel, energy security was a major focus of amicus' work. Starting with his stand up of the Office of the Deputy General Counsel for Environment and Installations in 1995, which was later renamed as ODGC (Environment, Energy, and Installations) to better reflect the importance of energy to the office mission, and continuing during his service as Principal Deputy General Counsel, he worked closely with offices throughout the Department on energy and energy security issues, within the Office of Secretary of Defense, within Defense agencies (such as the Defense Logistics Agency), and within the military departments. During the period between his service as Deputy General Counsel and his service as Principal Deputy General Counsel, the amicus served on a Defense Science Board advisory committee concerning energy strategy for the Department of Defense, culminating in the Defense Science Board task force report, "More Fight – Less Fuel."

The amicus writes to provide the Court with the perspective of a former senior Department of Defense lawyer on the issues raised by the motion to remand this case to the state courts of Delaware. In that regard, the amicus notes that the Defendants have cited, at some length, a supporting brief filed by certain amici in the analogous proceeding styled *City of Hoboken v. Exxon Mobil Corp.*, No. 21-2728 (3d Cir.). The amici who filed that brief, General Myers and Admiral Mullen, are certainly distinguished and extraordinarily accomplished retired senior military officers, and amicus counts himself as extremely fortunate to have seen the superb leadership of Admiral Mullen up close during several years of his service as the number two lawyer within the Office of Secretary of Defense. Amicus generally takes no issue with the historical narrative concerning defense-related energy production and consumption that constitute the bulk of their amicus brief – indeed, fossil fuels are undoubtedly historically and presently important to meeting the Department's energy needs. But amicus does seriously question the relevance of this narrative, and respectfully, but strongly, disagrees with the legal conclusions they and the Defendants attempt to draw from it.

Fully addressing the production of fossil fuels, the availability of alternative forms of energy, and the global consequences of climate change will require a comprehensive federal, indeed international, effort – but that is not what is at issue in the current litigation. Rather, the current litigation alleges that the Defendants

misrepresented the dangers of greenhouse gas buildups and, more recently, exaggerated the Defendants' efforts to mitigate the continued emission of greenhouse gases, resulting in significant harms to the people of Delaware, by suppressing the understanding of the relationship between fossil fuel consumption, greenhouse gas emissions, and climate change, and thereby delaying the development of alternatives and delaying efforts to significantly reduce emissions**. Like Defendants' friends, amicus takes no position on the merits of the case, *i.e.,* whether the State of Delaware will ultimately be successful in proving what is alleged.** But regardless of what merit this case has, the relevant point for present purposes is that *it is not a federal case*, much less a case centered on issues of national security.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

As a former DoD senior legal officer, amicus has great concerns about Defendants' invocation of federal officer removal when, as here, there is only some remote and strained connection that could be articulated between the subject matter of the litigation, even if very broadly considered, and a DoD interest**.**

First, the implicit suggestion that the DoD has "directed" or "controlled" the alleged public relations conduct at the core of this action is baseless, as the allegedly actionable conduct in this action is *misrepresentations*, not *emissions*. The suggestion that the DoD directed or controlled this conduct is also misleading

to the extent that it purports to cloak the defendants' conduct in misrepresenting the impact of greenhouse gas emissions resulting from the use of fossil fuels under the banner of national security.

Second, even if the Court were for some reason to venture beyond the alleged actionable conduct (the alleged fraud), and down the slippery slope of evaluating *emissions*, it would not be hard to see that DoD energy use is a minor percentage of total world, and U.S., energy use.

Third, and finally, Defendants' unwarranted and expansive application of federal officer jurisdiction may, ironically, serve to ultimately undermine its use in cases in which it is appropriate. It could result in new limitations on federal officer removal being adopted either legislatively or by the courts, in order to preserve the role of the state courts in our federal system. Any such change made in response to the overly broad application of federal officer removal sought by the Defendants here could undercut the ability to remove a case when it would be genuinely helpful to ensure appropriate consideration by the federal courts of important and relevant DoD concerns. "Crying wolf" in this case could easily redound to the serious detriment of DoD in future cases.

ARGUMENT

The federal officer removal statute permits removal of a state-court action against an "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." 28 U.S.C. § 1442(a)(1). The statute protects federal officers from interference with their official duties through state-court litigation. *See, e.g., Arizona v. Manypenny*, 451 U.S. 232, 241–42 and n.16 (1981).

The common modern paradigm of a case subject to "federal officer" jurisdiction is one in which a worker is injured in the process of performing a specific government contract, usually a defense contract. *See, e.g., Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016) (allegations of plaintiff injured by asbestos "are directed at actions Boeing took while working under a federal contract to produce an item the government needed, to wit, a military aircraft"). *Compare, e.g., Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 252–53, 255 (4th Cir. 2017) (defendant "acted under" the United States Navy when it manufactured boilers to be used aboard naval vessels per a detailed government contract).

To invoke § 1442(a)(1) removal, a defendant in a state court action must demonstrate that "(1) the defendant is a 'person' within the meaning of the statute; (2) the plaintiff's claims are based upon the defendant's conduct 'acting under' the United States, its agencies, or its officers; (3) the plaintiff's claims against the defendant are 'for, or relating to' an act under color of federal office; and (4) the defendant raises a colorable federal defense to the plaintiff's claims." *Papp*, 842 F.3d at 812.

The focus of my analysis (not unlike that of the district court below, or of courts in analogous actions) is on prongs 3 and 4 – i.e., (1) whether the Defendants, in the conduct alleged in this case, "acted under" the directions of the DoD, and (2) whether the claims sufficiently "relate to" DoD engagements (sometimes described as the "nexus" requirement).

I. The Defendants Did Not "Act Under" the DoD When They Engaged in the Challenged Public Relations Practices Relating to Climate Change, Nor Do These Practices "Relate" to DoD Contracts

As noted by the district court, as well as by other courts in analogous contexts, conduct alleged in this action is misrepresentations alleged to have been made by the Defendants in the course of their public relations activity over several decades. *Delaware v. BP America Inc.*, 2022 WL 58484, at *10 (D. Del. Jan 5, 2022) ("Defendants' alleged disinformation campaign…is what the instant case is actually about"). The Defendants are not being sued for causing fossil fuel emissions. They are being sued for, allegedly, engaging in a conspiracy to downplay the effects of human conduct on global warming, and of global warming generally, in order to encourage fossil fuel consumption. This case will succeed, or fail, depending on whether the Plaintiff can demonstrate that the Defendants engaged in actionable fraudulent conduct, as well as the satisfaction of state common law proximate cause requirements, matters about which I express no

opinion.

But I do opine as to whether the allegations of fraudulent conduct at issue here have a sufficient nexus with the DoD, so as to generate a basis for "federal officer" jurisdiction. They do not.

With respect to the "acting under" prong of federal officer jurisdiction, the Supreme Court has made it clear that "it is not enough that a federal agency 'directs, supervises, and monitors a company's activities in considerable detail." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 145 (2007). The statutory language – a private person "acting under" a federal officer or agency – describes a relationship that "typically involves 'subjection, guidance, or control.' " *Id.* at 151 (quoting Webster's New International Dictionary 2765 (2d ed. 1953)). Here, there is *not even a remote suggestion*, anywhere in the four corners of the Defendants' Notice of Removal, or for that matter in their Opening brief, that the Department of Defense exerted any measure of "subjection, guidance or control" over the fossil fuel industry's *public relations* practices (alleged by the Plaintiff to be fraudulent) concerning the risks of, and fact of, global warming. The Defendants' decades-long marketing campaign, described in some detail in the 232-page Complaint, was not conducted pursuant to government contracts and the Department of Defense did not direct or control any of this conduct.

For similar reasons, the nexus requirement is not satisfied, as the

Defendants' public relations conduct does not "relate" to DoD contracts. Even though some quantity of fossil fuels were *produced* under DoD contracts, this action does not "relate" to those contracts. The actionable conduct in this action is defendants' public relations practices, and not those DoD contracts. *See Mayor and City Council of Baltimore v. BP PLC*, 2022 WL 1039685, at *31-32 (4th Cir. Apr. 7, 2022) ("…the unrestrained production and use of Defendants' fossil-fuel products…is not the source of tort liability" and district court properly held that the nexus requirement was not satisfied). The *Baltimore* court noted that it "might be inclined to think otherwise" if the Defendants' liability were based on "production and sales," *Id.* at *32, but that was not the case there, nor is it here. The misrepresentation that is the subject of this litigation in no meaningful sense "relates to" the production of fossil fuels under contracts between the Defendants and the Government.

On appeal, the Defendants contend that the district court erred, and cite examples of the provision of energy to DoD, both present and historical, and the defense amici in analogous cases cited by the Defendants devote the bulk of their amicus brief to providing an array of historical anecdotes relating to supplying energy to DoD. But where they fail is in making any connection between this historical narrative and the conduct alleged in this action.

The Defendants would likely be on solid ground asserting "federal officer"

jurisdiction if their liability actually arose from the performance of a specific contract. For example, if a fire resulting from the characteristics of a specialized energy product produced by a defense contractor pursuant to a specific government contract, it might fall within the scope of the "federal officer" removal statute. *Compare, e.g. Moore v. Electric Boat Co.*, 25 F.4th 30 (1st Cir. 2022) (claim by serviceman alleging asbestos injury, brought against submarine manufacturer, subject to "federal officer" removal). But that is not this case.

The Defendants would, perhaps, be on more solid ground asserting "federal officer" jurisdiction if they had been retained by DoD specifically to perform a decades-long public relations initiative to propagate certain positions on emissions and global warning. The problem for the Defendants is that it never happened and the Defendants do not contend otherwise.

What do the Defendants allege?

The Defendants and their amici devote much of their "public officer" jurisdiction argument to discussing supply arrangements that have existed historically, including during World War II and the Korean War. Opening Br., at 39-42. They attempt to associate their conduct with the heroism behind the American war effort, including efforts taken here at home to support the U.S. military, during these and other conflicts. But all that they have established is that the DoD used fossil fuels in wars, and private contractors furnished DoD with fuel,

which are hardly Earth-shattering propositions. Our enemies use fossil fuels, too. Everybody uses fossil fuels. This narrative takes them on a long trip to precisely nowhere.

An additional problem is that there is an astonishing temporal disconnect between these events and the actionable conduct at issue in this action. The Plaintiff alleges that the misleading conduct at issue in this case did not begin until, at the very earliest, the 1980s. This discrepancy, and complete failure in the Defendants' logic, was astutely noted by the district court.

The Defendants suggest that this not insubstantial time lag is not an issue since *emissions* that contributed to global warming started in an earlier time period. Opening Br., at 47. But, again, they are missing the point – this case is not about emissions – it is about misrepresentations, and the Defendants cannot be said to have committed fraud during the Second World War or Korean War when no one had much of a developed understanding of global warming, much less had embarked on a public relations campaign to mislead the public. Their actionable conduct could not be plausibly suggested to have commenced until decades later.

The Defendants' suggestion that at least some of the products produced were made to military specification also merits a response. The Defendants and their amici have made bare references in the record to any number of specific energy

products,[2] an understandable litigation tactic, since, in a typical, non-frivolous invocation of "federal officer" jurisdiction, the question of whether jurisdiction will lie in a particular case may depend on whether the contract at issue related to the procurement of mere "off-the-rack" products or items manufactured specifically at the government's direction.[3] But since this case is about disinformation, and is not about *any* DoD contract, this is basically about dressing the case up to make it *look* like a *real* "federal officer" case. And, on appeal, the mantra the Defendants repeat, *ad nauseum*, is that the district court purportedly "ignored" mountains of "evidence."[4] No doubt, the record is full of "stuff," but it was certainly not full of pertinent "evidence," much less evidence "ignored" by the district court. This line of argument failed in the Fourth Circuit and the Tenth

[2] These references include, *e.g.,* "JP-5 jet aviation fuel," "Navy Special Fuel Oil," and "F-76 marine diesel."

[3] *Compare*, *e.g., Winters v. Diamond Shamrock Chemical Co*., 149 F.3d 387 (5th Cir. 1998) (production of defoliant "agent orange" Dow satisfied the "acting under" element for federal officer removal based on "the government's detailed specifications concerning the make-up, packaging, and delivery of defoliant Agent Orange, the compulsion to provide the product to the government's specifications,) *with Washington v. Monsanto Co.*, 738 F. App'x 554, 555 (9th Cir. 2018) (unpublished) (explaining the government's off-the-shelf purchase of a defendant's product does not show that the government "supervised [the defendant's] manufacture ... or directed [the defendant] to produce [the product] in a particular manner, so as to come within the meaning of 'act[ed] under').

[4] *See, e.g.,* Opening Br., at 4 ("The record is replete with evidence"); *id.* at 10 ("The [district] court also ignored substantial evidence"); 36 (district court" refused to consider substantial evidence")

Circuit, and should fail here too.

And, just to be clear, if the undersigned amicus (who, just like the opposing amici, is not a chemist) declines to opine regarding the differences between, say, civilian and military jet fuels, it should not be construed as a concession that any particular product was (or was not) made "at the direction" of DoD. The reality is that DoD historically, and presently, utilizes a vast array of energy products, some of which are plainly "off-the-rack" energy products that are no different than those used in civilian applications, some of which are unique to the military, and others of which are something in between (*i.e.,* substantially similar to civilian-use energy products, but with one or more modifications for military application). But, for purposes of the present case, which does not relate to *any* DoD contract, none of this matters. The specific characteristics of fuels produced for DoD are simply irrelevant to the misrepresentations of the Defendants at issue in this case.

An additional concern to the undersigned amicus is the Defendants' disingenuous attempts to associate this action with our national defense, and with some of the most pivotal events in American military history. Yes, the DoD uses fossil fuels to further our national defense, and the DoD has purchased fossil fuels from the Defendants. Energy and energy security are, and have been for some time, critically important issues for the Department of Defense. The availability and security of the supply of energy are essential to the employment and projection

of military force – just as the availability and security of the supply of energy are essential to the safety and prosperity of the people of Delaware. The Defendants are business entities, and they sell their products to literally anyone who will pay for them. They are not heroes. They are business people who sold their products to heroes, and to many other people. This action is about Defendants' public relations conduct, and not about the value of fossil fuels, and certainly not about the role of fossil fuels in national security.

And while the DoD is a fossil fuel user, it is also an institution that is deeply *affected* by global warming, as global warming poses great concerns and challenges to the Department of Defense, just as it does to the State of Delaware, and to many other institutions. As stated in October, 2021, in "The Department of Defense Climate Risk Analysis:"

> Climate change is reshaping the geostrategic, operational, and tactical environments with significant implications for U.S. national security and defense. Increasing temperatures; changing precipitation patterns; and more frequent, intense, and unpredictable extreme weather conditions caused by climate change are exacerbating existing risks and creating new security challenges for U.S. interests. The risks of climate change to Department of Defense (DoD) strategies, plans, capabilities, missions, and equipment, as well as those of U.S. allies and partners, are growing.

United States Department of Defense, "Department of Defense Climate Risk Analysis" (Oct. 2021). [5]

[5] Available online at https://media.defense.gov/2021/Oct/21/2002877353/-1/-

II. If the Court Were, for Some Reason, to Consider Emissions, DoD's Energy Consumption is a *Very* Small Fraction (Less than 1/800th) of Global Energy Consumption

It is with some hesitancy that amicus takes a brief detour into discussing DoD's energy consumption. As discussed above, the liability in this case arises from an alleged disinformation campaign, not emissions. Moreover, as accurately noted by the district court, any claim of injuries associated with DoD (or other federal) emissions has been expressly waived by the Plaintiff. *Delaware v. BP America Inc.*, 2022 WL 58484, at *10. I will nonetheless indulge the Defendants for a moment and assume, for the sake of argument, that they are correct that this case will inevitably require a court to trace the origin of every particle of fossil fuel ever emitted.

Let us start with how the Defendants describe it. The portion of the Defendants' opening brief discussing "federal officer" jurisdiction is replete with vague references to how "substantial," "significant" and "large" the Defendants' defense-related production and consumption is. See, e.g., Opening Brief at 37 ("a *significant portion* of their oil and gas production and sales over the last century was conducted under the direction, guidance, supervision, and control of the federal government"); *id. at* 39 ("*large quantities* of specialized jet fuel"); *id. at* 43

1/0/dod-climate-risk-analysis-final.pdf.

("Defendants continue to produce and supply *large quantities* of highly specialized fuels to the federal government."); *id. at* 45 ("Defendants have produced and supplied *large quantities* of highly specialized, non-commercial-grade fuels…").

But the Defendants make no attempt to quantify what "large," "substantial" or "significant" actually means. In a vacuum, these words mean absolutely nothing.

Here are some actual numbers. In recent years, the Defense Department has consumed approximately 700 trillion (or 0.7 quadrillion) British Thermal Units ("BTUs") of energy per year.[6] While "700 trillion" of anything, no doubt, seems like "a lot," it needs to be put in perspective. The entire world consumes approximately 600 *quadrillion* BTUs, of energy per year.[7] United States DoD consumption, then, amounts to approximately one out of every 857 BTUs consumed on the planet. That figure does not even amount to the proverbial "drop in the bucket."

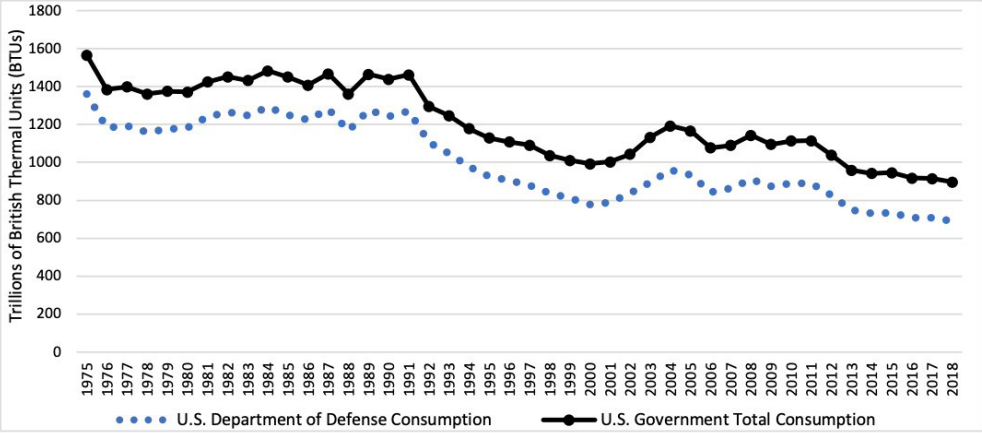
Notably, not only is total DoD consumption a very *small* fraction of world

[6] FY2017, DOD consumed 707.9 trillion British thermal units (Btu) of energy. Congressional Research Service, "Department of Defense Energy Management: Background and Issues for Congress" (June 25, 2019). Available online at: https://sgp.fas.org/crs/natsec/R45832.pdf

[7] U.S. Energy Information Administration (FY 2019 data), available online at: In 2020, world consumption was estimated to be 601.5 quadrillion BTUs. U.S. Energy Information Administration, "INTERNATIONAL ENERGY OUTLOOK 2021," available online at https://www.eia.gov/outlooks/ieo/tables_side_xls.php .

consumption, it is a fraction that has been (generally, if not necessarily every year) shrinking (along with total federal government consumption) since such statistics began being kept in 1975:

DOD and Total US Federal Government Energy Consumption, FY 1975-2018, in Trillions of BTUs[8]



DoD has greatly *reduced* its energy consumption, including the consumption of fossil fuels over the past 40 years (roughly coinciding with the period of the conduct attributed to the Defendants in this case) even as *world consumption has steadily increased*.

Thus, even if liability in this case *were* based on fossil fuel production and

[8] Neta C. Crawford, "Pentagon Fuel Use, Climate Change, and the Costs of War" at 4 (Nov. 13, 2019), available online at: https://watson.brown.edu/costsofwar/files/cow/imce/papers/Pentagon%20Fuel%20Use%2C%20Climate%20Change%20and%20the%20Costs%20of%20War%20Revised%20November%202019%20Crawford.pdf (citing US Energy Information Administration data, at https://www.eia.gov/totalenergy/data/monthly/dataunits.php)

emissions, only a minor percentage of world emissions can be traced to the US DoD. This is a far cry from the typical scenario at play in a legitimate "federal officer" case, in which a federal contract (or contracts) is central to the factual allegations at issue.

III. The Defendants' Abuse of the "Federal Officer" Statute Could Jeopardize its Future Use in Cases in Which It Would Be Proper

As a former senior Department of Defense lawyer, amicus is concerned about the Defendants' invocation of "federal officer" jurisdiction in this action because amicus is a firm *believer* in the need for this vehicle to be available in appropriate cases, and that abuse of this statute could jeopardize its future availability.

The "basic purpose" of "federal officer" jurisdiction is to protect against the interference with federal operations that would ensue if a state were able to bring federal officers and agents acting within the scope of their authority to trial in a state court for an alleged state-law cause of action. *Watson*, 551 U.S. at 150 (explaining that state-court proceedings may (1) "reflect 'local prejudice' against unpopular federal laws or federal officials"; (2) "impede [enforcement of federal law] through delay"; or (3) "deprive federal officials of a federal forum in which to assert federal immunity defenses" (citations omitted)).

A state court might not be as sensitive to the nuances of federal policy and

the national public interest. Or, even worse, state courts might be used as a vehicle for harassing or attacking federal agencies and/or locally unpopular federal policies. Indeed, Congress enacted the statute after the War of 1812, when United States customs officials were trying to enforce a trade embargo against England. *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). In response to having their goods seized by federal agents, American ship owners brought state-court claims against federal customs officials. *Id.* The statute was later invoked by those being criminally prosecuted in state courts for their role in federal distillery raids. *See Maryland v. Soper*, 270 U.S. 9, 30 (1926) (noting that a private party acting as a federal officers' driver in a distillery raid had "the same right to the benefit of" the removal provision as did the federal agents); *Davis v. South Carolina*, 107 U.S. 597 (1883) (holding that a soldier who killed a distiller during a raid could remove his criminal case because he "lawfully assist[ed]" a revenue officer "in the performance of his official duty").

In more modern practice, the defense is invoked to (typically) allow a defense contractor to defend itself in federal court from an action (most typically a personal injury case) arising from the performance of a federal contract. In *Papp*, for example this Court described the case before it as an "archetypical case" under the statute, as the plaintiff alleged personal injuries directly related to "Boeing ['s] … federal contract to produce … a military aircraft." 842 F.3d at 813. Such

removal is a valuable tool, and is entirely appropriate when the private defendant is genuinely acting at the direction of DoD or another federal agency.

The Defendants in this action may very well be federal contractors, too, from time to time, and there may be circumstances in which it is appropriate (or, at least, not frivolous) for them to seek use of the "federal officer" statute to remove an action to federal court. But this action has nothing to do with *any* DoD contract, much less with conduct directed or controlled by DoD as required for federal jurisdiction under the statute.

The species of "federal officer" jurisdiction suggested in this case is a misdirection. When a defendant is being sued in state court for conduct relating to a federal contract, it should be fairly obvious – the defendant is producing ships, airplanes, or mail trucks, or something, at the direction of a federal agency, and its liability plainly relates to the performance of that contract.

The "federal officer" theory proffered in this action is designed principally to afford the defendant with an *immediate right of appeal* that would not otherwise be available to it. The point of the "federal officer" argument here is not to actually carry the day – the Defendants have no serious expectation of actually prevailing on this issue. The point is to have a vehicle for an immediate appeal, both for purposes of delay, but also to enable them to get in front of the Court of

Appeals with *other* jurisdictional theories that might be more plausible.[9]

In abusing this jurisdictional vehicle, the Defendants risk generating case law that is unfavorable for others who might, with just cause, attempt to remove cases in the future. It might also, perhaps with some degree of justification, provoke a legislative backlash against the statute.

Any response, whether at the judicial or legislative level, made in response to the overly broad application of federal officer removal sought by the Defendants here could undercut the ability to remove a case when it would be genuinely helpful to ensure appropriate consideration by the federal courts of important and relevant DoD concerns. "Crying wolf" in this case could easily redound to the serious detriment of DoD and its contractors in future cases.

Dated: April 21, 2022

Respectfully Submitted,

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[9] I express no view as to the Defendants' other purported bases for federal jurisdiction, as they do not appear to relate to my area of expertise, which is the DoD and national security.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 4,865 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *Amicus Curiae* Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point Times New Roman font.

Executed this 21st day of April, 2022.

/s/ Jonathan W. Cuneo
Jonathan W. Cuneo
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: April 21, 2022

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