Nos. 21-15313, 21-15318

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY & COUNTY OF HONOLULU,
Plaintiff-Appellee,

v.

SUNOCO LP, *et al.*,
Defendants-Appellants.

COUNTY OF MAUI,
Plaintiff-Appellee,

v.

CHEVRON USA INC., *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawaii
Nos. 20-cv-00163, 20-cv-00470 (The Honorable Derrick K. Watson)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber often files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

Many of the Chamber's members serve as federal contractors, performing vital functions for the United States in national defense, law enforcement, healthcare, agriculture, transportation, and other areas. In carrying out these functions, the Chamber's members are sometimes exposed to potential tort liability related to goods manufactured or services provided at the request, and according to the specifications, of the United States. If companies are sued in state court for these activities, they will often remove the litigation to federal court. The Chamber thus

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

has an interest in ensuring the proper interpretation and application of the federal-officer removal statute as Congress amended and expanded it in 2011.

The Chamber likewise has an interest in legal and policy issues relating to climate change. The global climate is changing, and human activities contribute to these changes. There is much common ground on which all sides could come together to address climate change with policies that are practical, flexible, predictable, and durable. The Chamber believes that durable climate policy must be made by Congress, which should both encourage innovation and investment to ensure significant emissions reductions and avoid economic harm for businesses, consumers, and disadvantaged communities. *See, e.g.*, Press Release, Sen. Sheldon Whitehouse, *New Bipartisan, Bicameral Proposal Targets Industrial Emissions for Reduction* (July 25, 2019), https://tinyurl.com/y49xfg3a (reporting the Chamber's support for the bipartisan Clean Industrial Technology Act). U.S. climate policy should recognize the urgent need for action, while maintaining the national and international competitiveness of U.S. industry and ensuring consistency with free enterprise and free trade principles. *See* U.S. Chamber of Commerce, Our Approach to Climate Change, https://www.uschamber.com/climate-change-position. Governmental policies aimed at achieving these goals should not be made by the courts, much less by a patchwork of actions under state common law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal-officer removal statute allows for federal jurisdiction over any civil action against the United States, its agencies, its officers, or "any person acting under [an] officer" that is "for or relating to any act under color" of the federal office. 28 U.S.C. § 1442(a)(1). The phrase "relating to" has traditionally been understood as having a broad scope, reaching anything that has a "connection" or "association" with the subject matter of the statute. It should be given its ordinary broad meaning in § 1442(a)(1) too. A connection or association with acts taken under the direction of a federal officer should suffice for removal.

The district court here demanded more. It stated that Defendants could not remove their claims to federal court because there was no showing that the acts taken under federal direction *caused* Plaintiffs' claims. But a causal connection has clearly not been necessary at least since 2011, when Congress amended the federal-officer removal statute by adding the words "or relating to." Judicial decisions before the change read the word "for" to require a causal nexus, albeit one that was relatively easy to show. The 2011 amendment unmistakably renders a causal connection sufficient but not necessary. As almost every court to consider the amended statute has remarked, Congress dispensed with any causation requirement by adding the words "or relating to." And, in doing so, Congress broadened the universe of claims

that could be removed to federal court under § 1442(a)(1). Indeed, the legislative history of the amendment confirms Congress's intent to broaden jurisdiction.

This straightforward reading of the current statutory text also aligns with the overall purpose of the federal-officer removal statute, which is to protect federal interests by ensuring that federal officers and persons "acting under" federal officers have access to federal court when sued in relation to their federal duties. Had the district court applied the right relational standard here—requiring only a "connection" or "association," not a *causal* connection—it would have concluded that Defendants properly removed Plaintiffs' cases under § 1442(a)(1).

The district court also erred by largely confining its review to Plaintiffs' carefully structured description of their claims in deciding whether the federal-officer removal statute applied. Defendants' theory of the case is that Plaintiffs' claims are not about misrepresentation alone, but inherently pertain to the effects of global climate change caused by the production, promotion, sale, and combustion of fossil fuels. That theory is closely tied to actions taken under federal direction. And the theory of the federal *defense* matters for federal-officer removal purposes, unlike some other bases for removal that turn solely on the plaintiff's well-pleaded allegations.

To the extent the specific claims in the Complaints are relevant, Plaintiffs' artful pleading does not allow them to evade removal on federal-officer grounds.

While Plaintiffs' pleading invokes alleged misrepresentations, Plaintiffs cannot artfully plead around the reality that, until global greenhouse emissions occur, Plaintiffs cannot be *harmed* by those misrepresentations. And to the extent some of those emissions were attributable to Defendants, a significant portion resulted from acts that Defendants undertook at the direction of federal officers. Undertaking work at the direction of federal officers brings with it a right to remove. Stripping private entities of that protection, as the district court did here, will discourage them from doing work on the government's behalf. Such an interpretation of the federal-officer removal statute would frustrate the statute's chief purpose—to ensure that the threat of state-court litigation does not hinder the federal government from recruiting the officers, employees, and contractors necessary to carry out its functions.

For these reasons, removal under § 1442(a)(1) was proper, and the district court's remand orders should be reversed.

ARGUMENT

I. The district court erred by requiring a causal nexus between Defendants' actions (taken under a federal officer's directions) and Plaintiffs' claims.

A. The phrase "relating to," as used in the federal-officer removal statute, does not require a showing of causation.

In relevant part, the text of the federal officer-removal statute is unambiguous. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at

least where the disposition is required by the text is not absurd—is to enforce it according to its terms." (citation and internal quotation marks omitted)). The statute allows removal of civil actions against federal officers and "person[s] acting under" federal officers, not only when those actions are "for . . . act[s] under color of such office," but also when those actions "relat[e] to" those acts. 28 U.S.C. § 1442(a)(1). The text does not require, as a precondition for removal, that the civil action be "caused" in any sense by those acts; the "relat[e] to" prong plainly includes no causation requirement.

The word "related" means "[c]onnected in some way; having relationship to or with something else." *Related*, Black's Law Dictionary (11th ed. 2019); *e.g.*, *Vasquez v. Holder*, 602 F.3d 1003, 1012 (9th Cir. 2010) ("The phrase 'relating to,' as defined by the Supreme Court, means 'to stand in some relation to; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" (citation omitted)). "Congress characteristically employs the phrase ['relating to'] to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates." *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1197 (2017); *accord Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (the phrase "relating to" reaches "State enforcement actions having *a connection with or reference to* airline 'rates, routes, or services'" (emphasis added)).

Indeed, in interpreting the phrase "relating to" as used in other federal statutes, the Supreme Court "has typically read the relevant text expansively." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018). This Court, too, has understood the phrase "relating to" as having a "broadening effect on what follows." *United States v. Sullivan*, 797 F.3d 623, 638 (9th Cir. 2015); *Vasquez*, 602 F.3d at 1012 ("we have construed 'relating to' language broadly"); *Rodriguez-Valencia v. Holder*, 652 F.3d 1157, 1159-60 (9th Cir. 2011) (same; collecting cases that hold Congress's use of the phrase "relating to" signals congressional intent to have "broadest possible" scope). This Court has recognized that "relating to" has a broad sweep because the phrase does not impose a directness requirement that might be expected of phrases that demand a tighter relationship, such as "directly upon." *Crown Pac. v. Occupational Safety & Health Rev. Comm'n*, 197 F.3d 1036, 1039 (9th Cir. 1999) (citing *L.P. Cavett Co. v. U.S. Dep't of Labor*, 101 F.3d 1111, 1114-15 (6th Cir. 1996)).

In the context of § 1442(a)(1), almost every court to address the phrase "relating to" has held that it does *not* require causation, only some "connection" or "association" between an act challenged by a plaintiff and a "federal office."[2] The

[2] The Eleventh Circuit has nominally retained a causal nexus requirement, although it, too, recognizes that "[t]he phrase 'relating to' is broad and requires only 'a "connection" or "association" between the act in question and the federal office,'" *Caver v. Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1144 (11th Cir. 2017) (citing the Third Circuit precedent discussed in the text, which dispenses with causation), and

Third Circuit—citing Supreme Court precedent interpreting the phrase "relating to" in other contexts—determined that it is "sufficient for there to be a 'connection' or association' between the act in question and the federal office." *In re Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 471 (3d Cir. 2015) (discussing, in part, *Morales*); *accord Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016). The Fourth and Seventh Circuits followed suit by adopting the Third Circuit's reasoning in its entirety. *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017) (statute requires "only a connection or association between the act in question and the federal office" (citing *Papp*, 842 F.3d at 813, quotation marks omitted)); *Baker v. Atlantic Richfield Co., E.I.*, 962 F.3d 937, 943 (7th Cir. 2020) (quoting *Def. Ass'n*, 790 F.3d at 471). The Fifth Circuit, sitting en banc, has also adopted the understanding that the phrase "relating to," as used in § 1442(a)(1), includes not just those actions that are "*causally* connected," but also those that are "*connected* or *associated*, with acts under color of federal office." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc).

Section 1442(a)(1)'s requirement of showing a connection or association is a "quite low" bar to meet, *Caver*, 845 F.3d at 1144—and certainly does not demand a

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the Eleventh Circuit views that "hurdle" as "quite low," *id.* (quoting *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008)).

showing that the acts taken under the direction of a federal officer caused the plaintiff's injuries and gave rise to his claims. In *Baker*, for example, a group of public-housing tenants sued Atlantic Richfield and DuPont in state court, alleging that the two companies were successors-in-interest to defunct manufacturers of industrial materials which were allegedly responsible for polluting the soil nearby over several decades. 962 F.3d at 939-40. The plaintiffs initially sued in state court alleging state torts. Both companies removed the case to federal court under the federal-officer removal statute, on the ground that their predecessors had produced wartime resources for the federal government, at the government's direction and under the government's watchful regulatory eye. *Id.* at 940-41. The plaintiffs argued that Atlantic Richfield and DuPont had failed to show an adequate connection between the plaintiffs' injuries and the predecessors' "wartime production for the government." *Id.* at 943. Despite the fact that the predecessors had operated "under government commands" for only a small fraction of the relevant timespan (20% for Atlantic Richfield, 5% to 15% for DuPont), the Seventh Circuit determined that an adequate connection existed: it was "enough for the present purposes of removal that at least some of the pollution arose from the federal acts." *Id.* at 945.

The Fourth Circuit reached a similar conclusion in *County Board of Arlington County v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243 (4th Cir. 2021), an opioids lawsuit brought by a local municipality alleging that various manufacturers,

distributors, and pharmacies had caused a public nuisance within its borders. Two mail-order pharmacy defendants removed the case citing § 1442(a)(1), claiming that part of the municipality's claims implicated their work in filling prescriptions as subcontractors for a Department of Defense (DOD) program. *Id.* at 247-48. The municipality argued that its complaint did not "relate to" these defendants' work for the federal government, as it "did not even mention the distribution of opioids to veterans, the DOD contract or the operation of the [DOD program]." *Id.* at 256. Nevertheless, the Fourth Circuit determined that the pharmacy defendants demonstrated an adequate connection with work performed under the direction of the federal government, noting that the municipality's position "would elevate form over substance." *Id.* Because the municipality pleaded that *every* opioid prescription filled within its borders caused it some amount of harm, and because the pharmacy defendants established that the allegedly harmful prescriptions that it filled in the area included prescriptions filled pursuant to a DOD contract (and following the DOD's strict guidelines), the court determined that the municipality's claims were "related to" the defendants' "governmentally-directed conduct." *Id.* at 257.

Here, the district court was not satisfied with looking for a "connection" or an "association." Instead, the court looked for a "*causal* connection," and concluded that Defendants had failed to show such a connection because Plaintiffs' claims of misinformation were not caused by Defendants' acts taken under the direction of the

federal government. ER20. But the federal-officer removal statute clearly no longer requires a showing of causation; the district court applied the wrong framework in determining whether Plaintiffs' allegations were sufficiently tethered to Defendants' acts taken under federal direction so as to allow for removal.

B. The recent history of the federal-officer removal statute further confirms that the statute does not require a showing of causation.

The recent history of the federal officer-removal statute further confirms that the text of the statute means what it says. In 2011, Congress added to the statute the "relating to" basis for removal jurisdiction. By adding the phrase "relating to," Congress expanded federal-officer removal and gave the statute a "broad scope" and an "expansive sweep." *Morales*, 504 U.S. at 384. The legislative history confirms what the textual addition already makes plain: that the overall purpose of the 2011 amendment was "broaden[ing] the universe of acts that enable Federal officers to remove to Federal court." H.R. Rep. No. 112-17, pt. 1, at 6 (2011).

Until 2011, the statute permitted removal of a civil action against "[t]he 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 . . . *for* any act under color of such office." 28 U.S.C. § 1442(a)(1) (2006) (emphasis added). Because the statute used only the word "for," the Supreme Court had long construed the statute as requiring "a nexus, a '"causal connection" between the charged conduct and asserted

authority.'" *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999) (quoting *Willingham v. Morgan*, 395 U.S. 402, 409 (1969)).

Congress decisively eliminated any such requirement in 2011. In the Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2(b), 125 Stat. 545, Congress added the phrase "or relating to" to § 1442(a)(1). Because Congress kept the word "for" and added "relating to" in the disjunctive, it expressly provided that jurisdiction would no longer be limited to cases presenting a causal nexus. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have a real and substantial effect."); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) (same, for amendment to jurisdictional statute).

Courts construing the 2011 amendment have observed that the change was intended to broaden the scope of removal involving federal officers, as the House committee report said explicitly. H.R. Rep. No. 112-17, pt. 1, at 6. Looking to the legislative history, this Court, along with others, has observed that Congress' addition of the "*or relating to*" language is "intended to broaden the universe of acts that enable Federal officers to remove to Federal court." *Goncalves v. Rady Child.'s Hosp. San Diego*, 865 F.3d 1237, 1250 (9th Cir. 2017) (citing and quoting *Def. Ass'n*, 790 F.3d at 467); *Def. Ass'n*, 790 F.3d at 471-72 (quoting H.R. Rep. No. 112-17, pt. 1, at 6); *Sawyer*, 860 F.3d at 258 (quoting the same); *see also Arlington Cnty.*,

996 F.3d at 256 ("[T]his 'connection or association' standard is broader than the old 'causal nexus' test that we abandoned after the Removal Clarification Act of 2011 . . . ."). To be sure, consideration of legislative history is not needed here, given the unambiguous mandate of the statutory text as Congress amended it in 2011. Thus, even courts that have considered only the textual changes have concluded that "[b]y the Removal Clarification Act, Congress broadened federal officer removal." *Latiolais*, 951 F.3d at 292; *Baker*, 962 F.3d at 943-44; *Caver*, 845 F.3d at 1144 n.8 (holding that, by "add[ing] the phrase 'or relating to,'" Congress "intended to broaden the scope of acts that allow a federal officer to remove a case to federal court").

The district court's determination—that the *current* statute requires "a causal connection . . . between [plaintiffs'] claims here and any acts Defendants may have taken at the direction of a federal officer"—failed to account for the 2011 update to § 1442(a)(1). ER20. Relying on this Court's since-vacated decision in *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020), *vacated*, No. 20-884, 2021 WL 2044534 (U.S. May 24, 2021), the district court believed that "[s]ection 1442(a)(1) permits removal" only when "there is a causal nexus between a defendant's actions, taken pursuant to a federal officer's direction, and the plaintiff's claims." ER10 (citing *San Mateo*, 960 F.3d at 598). The *San Mateo* court derived that nexus formulation from this Court's decision in *Fidelitad, Inc. v. Insitu, Inc.*,

904 F.3d 1095 (9th Cir. 2018), which, in turn, relied on cases *predating* the 2011 amendment, including the Supreme Court's 1999 decision in *Acker*. *Id.* at 1099 (citing *Acker*, 527 U.S. at 431; *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006)).

In other words, the district court ultimately derived its post-amendment nexus requirement from pre-amendment cases, without addressing the significance of the statutory change. That was a critical error in the district court's removal analysis. "[W]hen Congress amends statutes, our decisions that rely on the older versions of the statutes must be reevaluated in light of the amended statute." *United States v. McNeil*, 362 F.3d 570, 574 (9th Cir. 2004). Had the district court done the requisite reevaluation, the court would have been compelled to conclude that the nexus requirement did not survive Congress's 2011 amendment to the statute.

In addition to the committee report's statement about "broaden[ing] the universe of acts that enable Federal officers to remove to Federal court," discussed above, the broader legislative history of the Removal Clarification Act confirms that Congress did not retain a causal-nexus requirement in § 1442(a)(1). The Removal Clarification Act sought, among other things, to solve the problem of plaintiffs initiating proceedings against federal officers seeking pre-suit discovery, often with no proper legal basis for enforcing the request. H.R. Rep. No. 112-17, pt. 1, at 4 ("[T]he problem occurs when a plaintiff who contemplates suit against a Federal

officer petitions for discovery without actually filing suit in State court."); *see also Removal Clarification Act of 2010: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary on H.R. 5281*, 111th Cong. 1 (May 25, 2010) (in discussing predecessor bill, noting that the proposed changes were prompted by problems created by state "pre-suit discovery procedures" that allowed individuals to "be deposed and/or required to produce documents, despite the fact that a civil action has not yet commenced," which "muddied the waters of the Federal removal statute"). Federal officers had no way of removing the proceedings to federal court because such proceedings only "anticipate[d] a suit," and thus were not "a 'cause of action' as contemplated by the Federal removal statute." H.R. Rep. No. 112-17, pt. 1, at 4.

Against this backdrop, Congress enacted the statutory amendment because it "felt that the courts were construing the [removal] statute too narrowly." *Goncalves*, 865 F.3d at 1250. Congress sought to ensure the removal of proceedings in which the plaintiff had not yet even *asserted* any claims, so it plainly would not have tried to preserve any requirement that conditioned the availability of removal on proof of a causal nexus between the federal direction and the claims *as pleaded by the plaintiff*.

This Court must give effect to the way in which Congress opted to solve the problem before it—not with a narrow tweak, but with the adoption of the "relating

to" language, the broad scope of which was well-established by multiple Supreme Court decisions. Congress did not need to speak any more clearly than that. *See Exxon Mobil*, 545 U.S. at 558 (rejecting the argument that a jurisdictional amendment should be read to overturn one precedent and otherwise left the law the way it was). As the Supreme Court "frequently has observed," "a statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.'" *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (quoting *Barr v. United States*, 324 U.S. 83, 90 (1945)) (modifications in original); *see also New York v. FERC*, 535 U.S. 1, 21 (2002) (Congress's decision to close a gap created by a Supreme Court decision did not "define the outer limits of the [amended] statute's coverage"). This Court has also long recognized that "[w]here the words and purpose of a statute plainly apply to a particular situation," then "the situation falls within the statute's coverage" whether or not Congress contemplated "the specific application of the statute." *United States v. Jones*, 607 F.2d 269, 273 (9th Cir. 1979).

There is no indication in the Removal Clarification Act's legislative history that Congress intended to bar removal under § 1442(a)(1) where acts taken by a private entity under the direction of a federal officer are related to, but not necessarily the cause of, the plaintiff's lawsuit. *See Church of Scientology of Cal. v. U.S. Dep't of Justice*, 612 F.2d 417, 427 (9th Cir. 1979). Indeed, applying the plain text of § 1442(a)(1) under such circumstances would serve the overarching purpose of the

Removal Clarification Act—which, as noted, was "to broaden the universe of acts that enable Federal officers to remove to Federal court." H.R. Rep. No. 112-17, pt. 1, at 6.

II. Plaintiffs cannot artfully plead their way around the significant role that work performed under the direction of federal officers plays in this case.

The district court concluded that the "for or relating to" requirement in the federal-officer removal statute was not satisfied because it thought Plaintiffs' claims did not "rely on or even relate to" Defendants' production and sale of petroleum products, including the significant production that Defendants undertook for the federal government over decades. ER18. Describing Plaintiffs' claims as ones of misrepresentation, *i.e.*, the "alleged failure to warn and/or disseminate accurate information about the use of fossil fuels," the district court held that the alleged claims were not based on "billions of consumers' use of fossil fuels"—but instead solely the failure to warn about the "hazards of using fossil fuels." ER18-19.

The district court erred by allowing Plaintiffs to artfully plead their way around the crux of their claims: the alleged global emissions that led to localized harms in Plaintiffs' respective jurisdictions. As the Second Circuit explained (in a case concerning similar facts and theories, but a different basis for federal jurisdiction), claims that fossil-fuel manufacturers "downplayed the risks and continued to sell massive quantities of fossil fuels," which in turn "caused and will

continue to cause significant changes to . . . climate and landscape," are ultimately "a suit over global greenhouse emissions," and those emissions are "the singular source of . . . harm." *City of New York v. Chevron Corp.*, 993 F.3d 81, 86-87, 91 (2d Cir. 2021).

Federal-officer jurisdiction requires courts to consider the substance of claims and defenses, not just the claims as pleaded. The question is not whether "a federal question is presented on the face of the plaintiff's properly pleaded complaint." *E.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). To the contrary, because the federal-officer removal statute is much more solicitous of defendants' interests in a federal forum, the well-pleaded complaint rule does not govern where the basis for jurisdiction is work done under the direction of a federal officer. *Durham*, 445 F.3d at 1253 ("[R]emovals under section 1441 are subject to the well-pleaded complaint rule, while those under section 1442 are not."); *accord Latiolais*, 951 F.3d at 290 ("[S]ection 1442(a) permits an officer to remove a case even if no federal question is raised in the well-pleaded complaint, so long as the officer asserts a federal defense in the response."); *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1180 (7th Cir. 2012) (federal-officer jurisdiction "represents an exception to the well-pleaded complaint rule"). Thus, courts may not look merely to the pleadings in the complaint alone in determining whether federal-officer jurisdiction exists, as the district court did here.

Indeed, in assessing federal-officer jurisdiction, courts "credit the defendant's theory of the case." *Leite v. Crane Co.*, 749 F.3d 1117, 1124 (9th Cir. 2014).

Even in a case to which the well-pleaded complaint rule applies, an "independent corollary" of the rule is that "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 22 (1983) (citation omitted). A plaintiff can choose to bring its state-law claim in state court, but it cannot deliberately conceal an "inherently federal cause of action." 14C Wright & Miller, Fed. Prac. & Proc. Juris. § 3722.1 (4th ed.). Jurisdiction should be based on the "gravamen" of the complaint, not the labels or "magic words" that the plaintiff affixes to its causes of action. *See OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 36 (2015) (looking not just at how the plaintiff "recast[s]" her negligence claims, and instead at the "'essentials' of her suit," to determine whether jurisdiction existed under the Foreign Sovereign Immunities Act (citation omitted)).

Had the district court applied the correct legal standards to the claims *and* the asserted basis for removal, it would have concluded that Defendants properly removed Plaintiffs' cases based on federal-officer jurisdiction. The relevant question of law that the district court should have asked is whether there is a connection or an association between the allegations in Plaintiffs' Complaints and the acts that Defendants took under the direction of federal officials. *See* pp. 5-11,

supra. Even a "small, yet significant" level of federal activity would have provided enough of a basis for removal. *Baker*, 962 F.3d at 945. As Defendants explain in their opening brief, that modest threshold was easily exceeded in this case. Over many years, Defendants took a significant number of important acts under federal direction that are connected to the Plaintiffs' allegations in these cases, including but not limited to the following: (1) Defendants produced and supplied petroleum in wartime under contract and at the command of the United States government; (2) at least one Defendant acted under the command of the U.S. Navy in operating a major petroleum reserve; (3) for decades, Defendants produced highly specialized military-grade fuels following the government's exacting specifications; (4) Defendants filled the shoes of the federal government in operating the Strategic Petroleum Reserve, subject to the orders of the President; and (5) Defendants' contracts for operations on the Outer Continental Shelf required Defendants to subject themselves to federal officials' substantial oversight and control to meet goals mandated by Congress—goals that the federal government would otherwise have had to meet through its own direct action. Opening Br. 29-54. Plaintiffs' claims are ultimately about the cumulative effects of the "extraction," "production," and "promot[ion]" of petroleum products all around the world over decades. ER479 ¶ 2. Defendants' acts taken under the direction of federal officials—implementing important and often controversial federal energy policies that our government formulated to protect vital

national security interests—represent a significant share of any part that Defendants' conduct has played in that cumulation. That makes removal under § 1442(a)(1) appropriate. *See Baker*, 962 F.3d at 945.

III. The district court's atextual reimposition of the causal nexus requirement frustrates the purpose of the federal-officer removal statute.

The federal government can act only through individuals, whether they be officers, other employees, or contractors. *See Tennessee v. Davis*, 100 U.S. 257, 262-63 (1879). The purpose of the federal-officer removal statute is to ensure that those individuals "acting under federal authority" to assist in carrying out federal actions are protected "against peril of punishment by those purporting to enforce local laws." *Yeung v. Hawaii*, 132 F.2d 374, 377 (9th Cir. 1942). In doing so, "[s]ection 1442, although dealing with individuals, vindicates also the interests of government itself; upon the principle that it embodies 'may depend the possibility of the general government's preserving its own existence.'" *Bradford v. Harding*, 284 F.2d 307, 310 (2d Cir. 1960) (Friendly, J.) (quoting *Davis*, 100 U.S. at 262). Federal agents may undertake acts that are controversial at the state or local level; protecting access to a federal forum is a necessary part of ensuring that sometimes-controversial implementation of federal policy is not frustrated or deterred by state-court lawsuits or the specter of such lawsuits. *Durham*, 445 F.3d at 1252-53; *see also Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007) ("State-court

proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials.").

The persons "acting under" federal authority who are entitled to the broad protection of the federal-officer removal statute include private contractors. As the Supreme Court recognized in *Watson*, a clear case for applying the federal-officer removal statute is when a private party "fulfill[s] the terms of a contractual agreement by . . . perform[ing] a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." 551 U.S. at 153-54 (citing *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998)). For that reason, contractors who follow the federal government's direction in providing a good or service essential to the government's operations have successfully removed cases when the plaintiff's claims involve work done for the government. *E.g.*, *Sawyer*, 860 F.3d at 255; *Papp*, 842 F.3d at 813; *Agyin v. Razmzan*, 986 F.3d 168, 175 (2d Cir. 2021) (noting that "a private company acting pursuant to a contract with the federal government" has the "relationship between a private entity and a federal officer" necessary to trigger the federal-officer removal statute (citation and internal quotation marks omitted)). And under the 2011 Removal Clarification Act's more relaxed "relating to" standard, that work need not even be the cause of a plaintiff's claims—the federal government's playing a "small, yet *significant*" role

in the "relevant conduct" is enough to make the case removable. *Baker*, 962 F.3d at 945.

Not only did the district court re-impose a causal nexus requirement despite Congress's abandonment of it, it imposed an impossibly high standard in this case. Under the district court's removal standard, which improperly fails to credit Defendants' theory of the case, *Leite*, 749 F.3d at 1124, Defendants must show that "they failed to warn or disseminate accurate information at the direction of a federal officer." ER20. Demanding such a tight causal connection (where the statute requires none) undermines the leeway that Congress accorded to agents of the federal government in exercising their "absolute" right of removal "for conduct performed under color of federal office." *Goncalves*, 865 F.3d at 1244 (quoting *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981)). Making the "absolute" right of removal a much more limited one—not only by re-adding a causation requirement, but by requiring the federal officer to provide the exact controversial instruction giving rise to the cause of action—will make companies think twice before agreeing to take on the government's business. As this Court has cautioned: "If the federal government can't guarantee its agents access to a federal forum if they are sued or prosecuted, it may have difficulty finding anyone willing to act on its behalf." *Durham*, 445 F.3d at 1252-53.

As a result, the district court's exacting causation requirement contradicts the plain text of the statute, Congress's purpose in expanding that text, and the rule that the text must be "liberally construed" (given the statute's purpose). *Watson*, 551 U.S. at 147. "Federal officers or agents . . . should not be forced to answer for conduct asserted within their Federal duties in a state forum that invites 'local interest or prejudice' to color outcomes." H.R. Rep. No. 112-17, at 3. The district court's decision extends localities like the plaintiffs here just such an invitation to challenge the work of the federal government in a state forum. If allowed to stand, that decision would threaten the federal government's ability to rely on its private-sector partners in carrying out the important, and often hotly disputed, work of government.

CONCLUSION

This Court should reverse the district court's remand orders.

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Respectfully submitted,

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This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,727 words, excluding the parts exempted by Rule 32(f).

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 26, 2021.

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