No. 23-30294

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PLAQUEMINES PARISH,
Plaintiff-Appellee,

LOUISIANA STATE; LOUISIANA DEPARTMENT OF NATURAL RESOURCES, OFFICE OF COASTAL MANAGEMENT, THOMAS F. HARRIS, SECRETARY,
Intervenors-Appellees,

v.

BP AMERICA PRODUCTION COMPANY, as successor in interest to AMOCO PRODUCTION COMPANY; BURLINGTON RESOURCES OIL & GAS COMPANY, L.P.; CHEVRON USA, INCORPORATED, as successor in interest to CHEVRON OIL COMPANY, THE CALIFORNIA COMPANY, AND GULF OIL CORPORATION; EXXON MOBIL CORPORATION, as successor in interest to THE SUPERIOR OIL COMPANY; SHELL OFFSHORE, INCORPORATED; SHELL OIL COMPANY; CHEVRON U.S.A. HOLDINGS, INCORPORATED, as successor in interest to TEXACO E&P INCORPORATED. AND TEXACO INCORPORATED; TEXAS COMPANY; CHEVRON PIPE LINE COMPANY, as successor in interest to GULF REFINING COMPANY,
Defendants-Appellants.

On Appeal from the United States District Court for the
Eastern District of Louisiana, No. 2:18-cv-05256 (Hon. Jay C. Zainey)

UNOPPOSED MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE AS *AMICI CURIAE* IN SUPPORT OF REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the Chamber of Commerce of the United States of America ("Chamber") certifies that it does not have a parent corporation and that no publicly held company has 10% or greater ownership in the Chamber.

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the National Association of Manufacturers ("NAM") certifies that it does not have a parent corporation and that no publicly held company has 10% or greater ownership in the NAM.

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CERTIFICATE OF INTERESTED PERSONS

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UNOPPOSED MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE AS *AMICI CURIAE* IN SUPPORT OF REHEARING[1]

Pursuant to Federal Rules of Appellate Procedure 27(a) and 29(b)(6), the Chamber of Commerce of the United States of America and the National Association of Manufacturers respectfully move this Court for leave to file a brief as *amici curiae* in support of Defendants-Appellants' petitions for rehearing. Defendants-Appellants consent to this Motion; Plaintiff-Appellee Plaquemines Parish, Intervenor-Appellee State of Louisiana, and Intervenor-Appellee Louisiana Department of Natural Resources, Office of Coastal Management do not oppose this Motion.

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 3 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

[1] No counsel for any party authored the attached brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of the brief.

end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 13 million men and women, contributes $2.89 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Many of the Chamber's and the NAM's members perform vital functions for the United States while acting under the direction and control of federal officers. The Chamber's and the NAM's members are sometimes exposed to potential liability for the performance of those functions. Thus, the Chamber and the NAM have a strong interest in ensuring that the federal-officer removal statute, 28 U.S.C. § 1442(a), is correctly interpreted so that claims subject to the statute are heard in federal courts, and not in state courts where local interests may sometimes be given undue weight.

The enclosed amicus brief will aid this Court's consideration of this appeal. The brief will explain how, prior to 2011, this Court employed a causal nexus test to determine whether a civil action may be removed under the federal-officer removal statute, 28 U.S.C. § 1442; how the Court continued to use that test even after Congress expanded federal-officer removal in 2011 to include claims "relating to any act under color of [federal] office"; and why this Court, sitting *en banc*, disavowed that requirement in *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020) (en banc). The brief will also address how the panel decision effectively restores the causal nexus test that *Latiolais* abandoned, and how the panel's restoration of that test may chill private contractors' willingness to perform work for the federal government.

For these reasons, this Court should grant the Chamber and the NAM leave to file an amicus brief in support of Defendants-Appellants' petitions for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew Kim, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on July 10, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 10, 2024

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RULE 32(A) CERTIFICATE OF COMPLIANCE

This motion complies with the type volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 598 words, excluding the parts exempted by Rule 32(f) and Fifth Circuit Rule 32.2.

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INTEREST OF THE *AMICI CURIAE*[1]

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Many of the Chamber's and the NAM's members perform vital functions for the United States while acting under the direction and control of federal officers. The Chamber's and the NAM's members are sometimes exposed to potential liability for the performance of those functions. Thus, the Chamber and the NAM have a strong interest in ensuring that the federal-officer removal statute, 28 U.S.C. § 1442(a), is correctly interpreted so that claims subject to the statute are heard in federal courts, and not in state courts where local interests may sometimes be given undue weight.

INTRODUCTION

To remove a case to federal court under the federal-officer removal statute, 28 U.S.C. § 1442(a), a private defendant must show that the plaintiff's claims are "for or relating to," *i.e.*, connected to or associated with, the defendant's "acting under" a federal officer. Here, the panel majority recognized that there was "some relation" between Plaintiffs' claims and the federal contracts for refined petroleum products that Defendants fulfilled during World War II. Rightly so: Plaintiffs' lawsuits are about Defendants' oil and gas "production"; part of that activity includes Defendants' production of raw crude oil in Louisiana during the Second World War, which Defendants used to fulfill their federal contracts.

But despite that "relation," the panel majority concluded that the case must be remanded because there was no "*direct* connection" between the subject claims and

acts. To reach this conclusion, the panel majority effectively revived a causal-nexus test that the *en banc* Court disavowed in *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020). *Latiolais* aligned this Court with its sister circuits; the panel majority undid that alignment. Worse still, the decision creates uncertainty about what kind of a "connection" or "association" is sufficient for federal-officer removal. The panel majority took what should have been a minimal requirement of "connection" or "association" and turned it into a moving target, leaving Defendants and other federal contractors with little guidance on when they may access a federal court.

For these reasons, and those set forth below, this Court should grant rehearing to restore uniformity to this Court's caselaw on federal-officer removal.

ARGUMENT

I. The panel decision reintroduces the causal-nexus requirement that this Court scuttled in *Latiolais.*

According to the panel majority (at 26-27 & n.77), a civil action "relat[es] to any act under color of [federal] office" only if the removing defendant establishes a "direct connection" between the two, on the order of a "contractual provision pertaining to … or directing" the conduct over which the contractor has been sued. Op. 25-26. The "direct connection" requirement improperly restores the causal-nexus requirement that this Court rejected as too restrictive in *Latiolais*.

1. From 1948 to 2011, the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), provided for the removal of any "civil action" against "[a]ny officer of the United States … or person acting under him for any act under color of such office." The phrase "for any act" required a "'causal connection' between the charged conduct and asserted official authority," *Willingham v. Morgan*, 395 U.S. 402, 409 (1969), or, as this Court described it, "a direct causal nexus … between the defendants' actions taken under color of federal office and [the plaintiff's] claims." *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 400 (5th Cir. 1998).

In the Removal Clarification Act of 2011, Pub. L. No. 112-51, Congress expanded the scope of removal to include actions "relating to any act under color of [federal] office." This Court, however, continued to employ the "causal nexus" requirement it used before the Act. It did relax that requirement to allow for "some attenuation," so long as the causal nexus was not rendered irrelevant. *E.g.*, *Zeringue v. Crane Co.*, 846 F.3d 785, 794 (5th Cir. 2017). Yet despite loosening the nexus requirement, the Court at times continued to require a direct causal link, *i.e.*, it limited federal-officer removal to only those instances where the "federal government … order[ed]" the conduct that gave rise to the cause of action. *IntegraNet Physician Res., Inc. v. Tex. Indep. Providers, LLC*, 945 F.3d 232, 241 (5th Cir. 2019). To address this "tension between the amended statute and [this

Court's] precedents," this Court granted *en banc* rehearing in *Latiolais*. 951 F.3d at 292.

In *Latiolais*, this Court held that the 2011 Act "broadened federal officer removal to actions, not just *causally* connected, but alternatively *connected* or *associated*, with acts under color of federal office." *Id*. *Latiolais* made a causal nexus sufficient but not necessary: under *Latiolais*, a civil action need only "relate[] to an act under color of federal office." *Id.* at 296.

This Court applied that more relaxed standard to hold that the *Latiolais* plaintiff's claims were removable, even without a causal nexus. The plaintiff had alleged that (1) the federal government contracted with the defendant to refurbish a Navy ship (which included asbestos work), (2) the plaintiff worked on that refurbishment and, in doing so, had been exposed to asbestos, (3) the defendant failed to warn the plaintiff of the dangers of asbestos and failed to provide him with the proper equipment, and (4) the plaintiff contracted mesothelioma as a result of that work. *Id.* at 289-90. The Court had previously held that these allegations were not enough to satisfy the "direct causal nexus" standard, even after the 2011 amendment. *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 463-65 (5th Cir. 2016). Adopting the more relaxed "connection" or "association" standard in *Latiolais* made these claims removable. 951 F.3d at 292.

2. As the panel majority correctly noted, Plaintiffs' claims have "some relation" to acts taken under color of federal office: the fulfillment of federal contracts for refined oil products. Op. 24. To manufacture avgas for the federal government, Defendants first had to produce raw crude oil that they could later refine into the petroleum products that the federal government needed. En Banc Reh'g Pet. 15-16. Through the Petroleum Administration for War's close oversight of Defendants' crude-oil production and refining activities, the federal government recognized that Defendants would use raw crude oil from their fields to manufacture avgas. *Id.* at 16. Under *Latiolais*, this relationship should have been enough of a "connection" or "association" to make Plaintiffs' claims removable under § 1442(a)(1).

But the panel majority resisted that outcome, citing concerns about attenuation and the need for "various intermediary (and ultimately severed) links to connect the federal directives and challenged conduct." Op. 26. It insisted that an act taken under color of federal office is "connected or associated with" a claim only if the two are "direct[ly] connect[ed]" or "directly tied" together—that cases involving such a direct connection are "the current limits." Op. 27 & n.77 (quoting, *inter alia*, *Williams v. Lockheed Martin Corp.*, 990 F.3d 852, 859-60 (5th Cir. 2021); *Trinity Home Dialysis, Inc. v. WellMed Networks, Inc.*, No. 22-10414, 2023 WL 2573914, at *4 (5th Cir. Mar. 20, 2023) (per curiam)).

A direct connection, however, is a vestige of the causal-nexus test that *Latiolais* "discarded." Op. 49 (Oldham, J., dissenting). If anything, the panel's test is more difficult to satisfy. Even before *Latiolais*, this Court held that "*some* attenuation is permissible" in the connection between the claims and acts under color of federal office. *Zeringue*, 846 F.3d at 794. In holding that § 1442 leaves no room for even "intermediary" links, the panel erected a standard more stringent than the one in place prior to *Latiolais*.

The panel decision also leaves the target for federal-officer removal blurry, because it provides no benchmarks for determining when the relationship between "the relevant challenged conduct and federal directives … is sufficient for purposes of the 'connected or associated with' element of the federal officer removal test." Op. 22 (majority opinion). Instead, because "reasonable minds can differ on where to draw the line between related and unrelated conduct," *id.* at 28, a removing defendant is left to guess whether the acts that it took under color of federal office are sufficiently "connected" to qualify for removal.

The 2011 amendment was "intended to broaden the universe of acts that enable" federal-officer removal. H.R. Rep. No. 112-17, at 6. The panel decision does the exact opposite. This Court should grant rehearing to correct the majority's departure from *Latiolais* and to restore uniformity to circuit caselaw on federal-officer removal.

II. The panel's construction of "for or relating to" is narrower than the construction used by other circuits.

This Court granted *en banc* review in *Latiolais* in part to "align with [its] sister circuits" on the meaning of the phrase "for or relating to." 951 F.3d at 289. As Defendants explain more fully, the panel decision has made this Court fall back out of line with those other circuits. En Banc Reh'g Pet. 12-13, 16-17 (identifying conflict with First, Third, and Fourth Circuits).

Consider *Baker v. Atlantic Richfield Co.*, 962 F.3d 937 (7th Cir. 2020), which is on all fours with the facts here. Atlantic Richfield removed a pollution case by contending that one cause of the pollution was its predecessors' fulfillment of federal contracts for the production of zinc oxide during World War II. *Id.* at 940. Much like the wartime production of petroleum at issue here, "the government directed nearly every aspect of [the] production process at the site." *Id.* Following *Latiolais*, the Seventh Circuit held that the claims were removable under § 1442. "[R]eplac[ing] causation with connection," it used that standard to hold that "wartime production"—"a small, yet *significant*, portion of [the defendants'] relevant conduct"—was sufficient to "support[] removal." *Id.* at 944-45.

Notably, the court determined that the claims were removable despite "serious questions" about whether the relevant pollution actually "flowed from the Companies' specific wartime production for the federal government," not just "their more general manufacturing operations." *Id.* at 944. In other words, questions about

"directness" did not prevent the court from discerning the "connection" or "association" sufficient for removal under § 1442.

While the panel majority relied on Third Circuit caselaw to support its insistence on a "direct connection," Op. 27 n.77, that court has never held as the panel did here: that there is no "connection" or "association" despite there being "some relation" between a plaintiff's claims and acts taken under color of federal office, *see* Op. 24. To be sure, the Third Circuit has held that a "direct connection or association" is *sufficient* to satisfy the "connection or association" requirement—but not that directness is *necessary*. *E.g.*, *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016). The court has only concluded that claims are too attenuated from the acts of federal office where there is no apparent connection between the two—for example, a federal contract to provide paint for "ships and military purposes" has no apparent relationship to a claim about lead paint in "federal housing projects." *E.g.*, *Cnty. of Montgomery v. Atl. Richfield Co.*, 795 F. App'x 111, 113 (3d Cir. 2020).

This Court should grant rehearing to avoid an unwarranted conflict with its sister circuits on federal-officer removal.

III. If not corrected, the panel's resurrection of the causal-nexus requirement will create forum uncertainty and will discourage private companies from providing assistance to the federal government.

Federal-officer removal has existed in some form since the War of 1812, reflecting Congress's desire to protect those carrying out the functions of the federal government, including persons "aiding or assisting" federal officials, "from interference by hostile state courts." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 148 (2007) (citations omitted). In extending removal rights to private contractors, Congress recognized that they, too, need protection from "[s]tate-court proceedings" that "reflect 'local prejudice' against unpopular federal laws or federal officials." *Id.* at 150-51. Federal-officer removal guarantees access to a neutral forum in federal court in any lawsuit related to a contractor's federal work, so that federal protections may be properly applied and not slighted in favor of state interests. *E.g.*, *Willingham*, 395 U.S. at 407.

Conditioning the defendant's right to a federal forum on a plaintiff making a claim "directly connected" to federal directions would inevitably have "a chilling effect on [the] acceptance of government contracts," *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 134 (2d Cir. 2008). Private companies doing the federal government's work simply would not know when they have a removal right. Indeed, the panel majority all but acknowledged that its causal-nexus requirement might be a moving target. *See* p. 7, *supra*. The resulting uncertainty, in turn, would substantially burden

the federal government's own interests, as the reluctance of private companies to provide assistance to the federal government would inevitably affect the government's ability to fulfill its needs "at a reasonable cost." *Winters*, 149 F.3d at 398 (citation omitted).

The panel majority concluded (at 25) that despite Defendants' contracts to provide refined petroleum products to the federal government, they had not established a sufficiently direct "connection" or "association" because they failed to point to a specific "contractual provision pertaining to oil production or directing Defendants to use only oil they produced." But it is unrealistic to expect federal directives at such a level of specificity—especially for the sort of claims that are based on the consequences of a private party's work for the government that allegedly emerge only years, if not decades, later. Limiting federal-officer removal to what the federal government specifically dictated at the point of supply would risk subjecting companies assisting the government to the anomalous result of having to face lawsuits in both federal and state court *over the same body of work.* Take, for example, the facts of *Latiolais*: under the panel's test, a claim that asbestos had been negligently installed could be removed to federal court, while a negligence claim about the failure to warn of the dangers of working near the installed asbestos could not. A "connection"-based standard of removal does not require—and indeed precludes—this kind of line-drawing, as *Latiolais* itself demonstrates.

These considerations only reinforce the need to comply with the letter and spirit of this Court's precedent in *Latiolais*, and to give full effect to Congress's intent to expand removal jurisdiction through its 2011 amendment.

CONCLUSION

This Court should grant the petitions for rehearing.

Respectfully submitted,

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