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INTRODUCTION

Tarry hydrocarbons have been crucial to Louisiana society for centuries.[1] Louisiana's unique geology and climate created ideal conditions for the development of hydrocarbons.[2] The use of tarry hydrocarbons traces back to the Native Americans and early explorers.[3] Initial uses of oil products ranged from medicine to mosquito repellant to sealant.[4]

Centuries later, in 1901, the first successful oil well in Louisiana was drilled near Jennings.[5] In 1909, the first oil refinery in Louisiana was built in Baton Rouge. The following year, the State's first long-distance oil

1. Tarry hydrocarbons are dark, oily, viscous materials, consisting mainly of hydrogen and carbon compounds produced by the destructive distillation of organic substances such as wood, coal, or peat.
History of Oil & Gas in Louisiana and the Gulf Coast Region, STATE OF LA.: DEP'T OF NAT. RES., http://www.dnr.louisiana.gov/assets/TAD/education/BGBB/6/la_oil.html [https://perma.cc/AS68-A6SW] (last visited Jan 11, 2023).

2. *Id.*

3. *Id.*

4. *Id.*

5. *The History: How Did All This Start?*, SE. LA. UNIV.: LA'S OIL, https://www2.southeastern.edu/orgs/oilspill/history.html [https://perma.cc/95KC-R2A7] (last updated July 12, 2010).

pipeline was built to transport crude oil from Caddo Parish to the Baton Rouge refinery.[6] Thousands of miles of canals were dredged to support Louisiana's extensive oil and gas operations, particularly throughout the southern part of the State.[7] Such expansion contributed to a booming oil industry and strengthened the economy.[8] In fact, Louisiana is the largest crude oil provider in the country. [9] However, that success came at a price. As more canals were built, wetlands along the coast began eroding.[10] For years, oil companies and scientists alike recognized that oil and gas exploration is directly linked to coastal erosion.[11] Studies found oil extraction to be directly proportional to subsidence and the loss of wetlands, and, specifically, that the rates of erosion tend to fluctuate with the success of the oil industry.[12]

Recently, six coastal Louisiana parishes filed a total of 42 lawsuits against 98 oil and gas companies in an attempt to hold the companies accountable for the coastal land loss caused by their activities. Of these 42 cases, *Parish of Plaquemines v. Chevron USA, Inc.* is one of the most notable. In *Plaquemines v. Chevron*, the Parish sued Chevron and several other oil and gas companies alleging the companies violated the Louisiana State and Local Coastal Resources Management Act of 1978 (SLCRMA), resulting in substantial coastal land loss.[13]

A three-judge panel of the U.S. Fifth Circuit Court of Appeals found that the defendant oil companies did not prove they acted pursuant to a federal officer's directions sufficient to give federal courts jurisdiction over the case.[14] This may seem like a win for Plaquemines Parish and other

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6. *Id.*

7. Jacob J. Pritt, *Litigating Land Loss: An Analysis of Three Attempts to Hold Oil Companies Accountable for Coastal Erosion*, 93 TUL. L. REV. 387, 389 (2018).

8. *Id.*

9. *What's At Stake: Economy*, RESTORE THE MISS. RIVER DELTA, https://mississippiriverdelta.org/whats-at-stake/economy/ [https://perma.cc/DDW3-PUPJ] (last visited Jan. 11, 2023).

10. Jason P. Theriot, *Oil and Gas Industry in Louisiana*, 64 PARS., https://64parishes.org/entry/oil-and-gas-industry-in-louisiana [https://perma.cc/8FL6-ACES] (last updated Mar. 16, 2022).

11. *Id.*

12. Subsidence is the gradual sinking of the ground because of underground material movement. *What Is Subsidence?*, NOAA, https://oceanservice.noaa.gov/facts/subsidence.html [https://perma.cc/VJ2C-FBLZ] (last visited Jan. 11, 2023); Pritt, *supra* note 7.

13. Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362, 366 (5th Cir. 2021).

14. Plaquemines Par. v. Chevron USA, Inc., No. 22-30055, 2022 WL 9914869 (5th Cir. 2022).

coastal parishes, but the battle for jurisdiction did not end there—the defendants appealed to the United States Supreme Court. The Court rejected the case, but the issues regarding federal officer removal presented in the case still persist as several circuit courts are split on one of the requirements of the removal statute.

Guidance from the Court is needed to determine when federal officer removal is warranted in these cases. If federal officer jurisdiction removal is proper, the companies will likely have a greater chance of success in this case and others like it; meaning, the companies will not be required to pay the Parish monetary damages or make efforts to restore the coast. However, keeping the case in state courts gives the Parish a greater chance of receiving injunctive relief and requiring oil companies to pay millions—possibly billions—of dollars in damages to parishes or make efforts to restore coastal lands themselves. If the courts award parishes monetary damages, the parishes are required to spend the money in accordance with state laws mandating coastal land protection. Louisiana loses about a football field's worth of land every hour to coastal erosion, making efforts to restore the coast more important than ever.[15]

Healthy wetlands are crucial for protecting people and communities from natural disasters. Human activity, such as oil exploration, confining rivers with dams and levees, dredging canals, and draining and filling wetlands, has exacerbated the disappearance of these vital regions. Coastal land, including wetlands and barrier islands, act as storm buffers that protect inland communities from hurricanes and storm surges.[16] As the coast continues to erode, its ability to mitigate storm surges and other related impacts decreases, while the risk of catastrophic loss of life and property from storms increases.[17] More than 2 million people—almost half of Louisiana's population—live near the Gulf Coast, with coastal erosion threatening their livelihoods.[18]

Coastal Louisiana is also important to the State as well as the national economy. Ports in southern Louisiana provide food, fuel, and other goods to the nation and connect the U.S. with the world. In fact, 5 of the nation's

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15. Pritt, *supra* note 7.

16. It is estimated that every three miles of wetlands reduces a storm surge by one foot. *Louisiana's Disappearing Wetlands*, SE. LA. UNIV.: LA'S OIL, https://www2.southeastern.edu/orgs/oilspill/history.html [https://perma.cc/95KC-R2A7] (last updated July 12, 2010).

17. *Id.*

18. *What's At Risk: People*, RESTORE THE MISS. RIVER DELTA, https://mississippiriverdelta.org/whats-at-stake/people/ [https://perma.cc/GP3Z-EZYY] (last visited Jan. 11, 2023).

15 largest shipping ports by cargo volume are in Louisiana.[19] In 2015, more than 33 million tons of exports passed through the Port of New Orleans, and tons more passed through other major Louisiana ports, such as Baton Rouge and Lake Charles.[20] Every year, Louisiana ships more than $100 million worth of goods to the rest of the country through these ports.[21] Furthermore, Louisiana's water management sector, which includes coastal restoration and urban water management, is the largest driver of jobs in Southeast Louisiana and ranks second across the entire coastal zone.[22]

Louisiana's land loss crisis presents major implications for both the nation and the state. A March 2017 study found billions of dollars at stake due to land loss along the Louisiana coast. Specifically, the estimated replacement cost of capital stock at risk from land loss ranges from $2.1 billion to $3.5 billion.[23] The estimated total economic activity at risk from erosion falls between $5.8 billion to $7.4 billion.[24] When it comes to storm damages, damage estimates for economic assets fell between the wide range of $10 billion to $133 billion.[25] Increased storm damage caused by land loss will disrupt economic activity, leading to an estimated loss output of $5 billion to $51 billion.[26] These estimated losses are no surprise after the 2020 and 2021 hurricane seasons. Hurricanes Laura and Delta, both of which made landfall only six weeks apart in southwest Louisiana in 2020, caused an estimated $26 billion in damages.[27] Hurricane Ida, which hit

19. *What's At Risk: Economy*, RESTORE THE MISS. RIVER DELTA, https://mississippiriverdelta.org/whats-at-stake/economy/ [https://perma.cc/GP3Z-EZYY] (last visited Jan. 11, 2023).

20. *Id.*

21. *Id.*

22. *Id.*

23. Stephen R. Barnes & Stephanie Virgets, *Regional Impacts of Coastal Land Loss and Louisiana's Opportunity for Growth*, LSU E.J. OURSO COLL. OF BUS.: ECON. & POL'Y RSCH. GRP. (Mar. 2017), https://www.edf.org/sites/default/files/LSU-EPRG-Regional-Economic-Land-Loss-Risks-and-Opportunities-2017.pdf [https://perma.cc/Z6MA-M7UB].

24. *Id.*

25. *Id.* Economic assets include Louisiana business, residential, and infrastructure assets.

26. *Id.*

27. Jim Sams, *Delta Losses Bring Hurricane Damages to $26B for Year*, CLAIMS J. (Oct. 14, 2020), https://www.claimsjournal.com/news/national/2020/10/14/299927.htm [https://perma.cc/2R3A-6JLV].

southeastern Louisiana in 2021, caused an estimated $30 billion in damages.[28]

An eroding coast also threatens habitats and species vital to Louisiana's economy. Louisiana, known as "Sportman's Paradise," provides ample fishing and hunting opportunities. Louisiana is home to hundreds of important animal species that coastal land loss threatens every year.[29] More than 400 species of birds live in coastal habitats, including the Brown Pelican, Louisiana's state bird. Millions of birds stop along the coast during their annual migrations.[30] Many mammals, including endangered species such as the Louisiana black bear, live in Louisiana's coastal regions and face an even greater risk of extinction as the coast erodes.[31] The coast also provides ample grounds for many different aquatic animals, including important seafood species like crawfish, shrimp, crabs, and oysters, as well as thousands of different fish species.[32] The loss of these animals presents a huge risk to Louisiana's human population and economy. These issues will continue growing if land loss remains unchecked. Louisiana cannot afford to sit by idly while corporations exploit and ruin its coast without making an effort to repair the damages it has caused. *Plaquemines v. Chevron*, and other cases like it,[33] presents the perfect opportunity to take a step towards fixing the land loss problem that Louisiana faces and significantly reduce potential future costs for the State.

Part I of this Note introduces *Plaquemines v. Chevron* and the events leading up to the case. Part II illustrates the arguments made by the Parish and the oil and gas companies regarding removal. Part III examines the various tests used by several circuit courts to determine whether a defendant "acted under" a federal officer or the federal government for purposes of removal. This component of the removal statute was at issue in *Plaquemines Parish v. Chevron*, and a circuit split is evident. Part IV

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28. Jed Cain, *Louisiana Hurricane Ida Recovery Will Take Longer and Cost More*, THE LEGAL EXAM'R: NEW ORLEANS INJ. L. NEWS (Oct. 12, 2021), https://neworleans.legalexaminer.com/legal/louisiana-hurricane-ida-recovery-will-take-longer-and-cost-more/ [https://perma.cc/GQ9Q-XBCF].

29. Threatened species include the Brown Pelican (Louisiana's state bird), herons, egrets, the Louisiana black bear, bobcats, beavers, shrimp, alligator gar, the American alligator, and the endangered pallid sturgeon. *What's At Stake: Wildlife*, *supra* note 9.

30. *Id.*

31. *Id.*

32. *Id.*

33. *See, e.g.*, Par. of Cameron v. Auster Oil & Gas, Inc., 2022 WL 17852581 (W.D. La. Dec. 22, 2022).

urges the United States Supreme Court to grant certiorari in one of the dozens of Louisiana land loss cases to establish a clear, uniform rule for analyzing the "acting under" requirement. Specifically, this part argues that the Supreme Court should adopt the Fifth and Eighth Circuits' approach.

If the Court were to grant certiorari in one of these cases, the Court should find federal officer jurisdiction improper, thereby leaving these land loss cases in state courts. Under a test recently established in *Latiolais v. Huntington Ingalls*, the defendant oil and gas companies failed to prove a colorable federal defense and that they acted pursuant to a federal officer's directions when they performed various exploration and production (E&P) operations resulting in or contributing to significant erosion of Louisiana's Gulf Coast during World War II. Such a ruling would carry major implications not only in the courtroom, but also in the oilfields. Based on the ruling in this case, other land loss cases will either be sent to federal courts or state courts. About 15 of the 42 lawsuits filed alongside *Plaquemines v. Chevron* involve oil and gas companies' wartime activities, and the ruling in this case is vital to determine whether federal courts or state courts are the proper venue for pending litigation.

If removal is proper and these cases are heard in federal courts, it is likely that oil companies will not face any consequences for exploiting Louisiana's land and resources in violation of state law. If oil and gas companies successfully avoid liability for their state law violations by claiming their actions were directed and controlled by the federal government—even though strong evidence suggests otherwise—defendants in similar cases may also damage the coast without any consequences under the guise of federal government action. Finding federal removal jurisdiction improper in these cases is vital to protecting the Louisiana coast.

I. BACKGROUND

Plaquemines Parish asked the Fifth Circuit to affirm the lower court's ruling that this case belongs in state court. The Parish has a better chance at recovery in state court because state law requires a permit for use of coastal lands and explicitly provides remedies to government agencies when companies act without permits or exceed the limits of existing permits.[34] Additionally, keeping this case, and others like it, in state courts

34. Pritt, *supra* note 7, at 414.

is consistent with environmental policy.[35] The Coastal Zone Management Act (CZMA) aims to "encourage and assist states to exercise effectively their responsibilities in the coastal zone and implementation of management programs."[36] Hearing these lawsuits in state courts fulfills the purpose of the CZMA by allowing states to "manage *'their'* coastal environments through *'their'* own individual management programs."[37] Federal courts "can be very hostile" towards plaintiffs, a benefit for the oil and gas companies.[38] Less sympathetic federal judges and juries give defendants a greater chance of success. In order to have the lawsuit heard in federal court, the defendant companies must show that federal officer jurisdiction is proper.

A. Original Hearing

The saga began when Plaquemines Parish, the State of Louisiana, and the Louisiana Department of Natural Resources filed suit in state court seeking costs necessary to restore coastal zones "as near as practicable to their original condition" from multiple oil companies under the SLCRMA.[39] The plaintiffs alleged that the defendants are liable for acts committed during World War II in violation of the SLCRMA—specifically, drilling wells from barges and further dredging and

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35. Riana Morales, *Parish of Plaquemines v. Chevron USA, Inc.: Fifth Circuit Panel Unanimously Votes Oil Companies' Removal Filing is Too Little, Too Late and Keeps Forty-Two Pollution Lawsuits in State Court*, 95 TUL. L. REV. 1029, 1040 (2021).

36. 16 U.S.C. § 1452(2); A coastal zone is the interface between land and water. The Louisiana Coastal Zone boundary encompasses a large section of the southern part of the state, from the Texas to Mississippi borders. The southern boundary is the state's 3-mile line offshore, while the inland boundary meanders across the state depending on tidal influence, soils, salinity, vegetation, fish and wildlife, topography, geology, geography, economy, recreation, and various other factors. *Coastal Environment*, SCIENCEDIRECT, https://www.sciencedirect.com/topics/earth-and-planetary-sciences/coastal-environment [https://perma.cc/4QCJ-YHY8] (last visited Jan. 11, 2023); LA. REV. STAT. § 49:214.14 (2022).

37. Morales, *supra* note 35.

38. Ellen M. Gilmer & Jennifer Kay, *Oil Industry Faces Litigation Worth Billions in Louisiana Courts*, BLOOMBERG L.: ENV'T & ENERGY (Aug. 13, 2020, 11:42 AM), https://news.bloomberglaw.com/environment-and-energy/oil-industry-faces-litigation-worth-billions-in-louisiana-courts [https://perma.cc/K7ZU-Q4XG].

39. Opening Brief of Defendants-Appellants, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2019) (No. 19-30492), 2019 WL 4238405, at *6.

maintaining canals to facilitate access to those wells.[40] Plaintiffs claim the defendant-companies violated the SLCRMA by dredging without a permit. The Plaintiffs alternatively alleged that even if the companies had permits, the dredging still violated those permits.[41]

The oil companies' first attempt to remove the case to federal court was unsuccessful because the Parish disclaimed any "cause of action arising under federal law or federal regulations," resulting in the district courts remanding the case for lack of a federal question.[42]

In 2018, Plaquemines Parish served its expert report (the Rozel Report).[43] The companies claimed the Rozel Report was their first notice that the Parishes' claims relied on the companies' actions during World War II.[44] The companies sought removal under the federal officer removal statute (28 U.S.C. § 1442) after discovering the suit was based on company actions taken under the authority of a federal wartime agency.[45] Additionally, the companies contended that federal question jurisdiction applied.[46] Both the Eastern and Western Districts of Louisiana remanded the cases back to state courts, and the Fifth Circuit affirmed, finding the remand appropriate because the defendant companies filed their notices of removal too late.[47]

The conditions for federal officer removal jurisdiction are defined by 28 U.S.C. § 1442, which allows a civil action directed against any person acting as a federal officer for or relating to any act under color of such officer to be removed to federal court.[48] The statute provides two deadlines for filing a notice of removal.[49] If the basis for federal jurisdiction is "evident on [the pleadings'] face," defendants must file notices of removal "within 30 days after the receipt by the defendant . . . of a copy of the initial pleading setting forth the claims for relief upon which such action or proceeding is based."[50] However, if the basis of federal jurisdiction is not evident from the face of an initial pleading, a defendant has 30 days after receiving "an amended pleading, motion, or *other paper* from which

40. Par. of Plaquemines v. Chevron USA, Inc., 969 F.3d 502, 506 (5th Cir. 2020), *opinion withdrawn and superseded on reh'g*, 7 F.4th 362 (5th Cir. 2021).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. 28 U.S.C. § 1442.
49. *Id.* § 1446(b)(1).
50. *Par. of Plaquemines*, 7 F.4th at 362.

it may first be ascertained that the case is one which is or has become removable."[51] Here, the court found the Rozel Report failed to fit the description of "other paper" required by the statute governing the procedure for the removal of civil actions (28 U.S.C. § 1446). Thus, removal was untimely.

B. Latiolais Established a New Test for Federal Officer Removal

In *Latiolais v. Huntington Ingalls, Inc.*, the Fifth Circuit Court of Appeals determined whether removal was proper when Avondale, a shipbuilding company, and the United States Navy entered into several contracts requiring Avondale to use asbestos for vessel insulation.[52] Mr. Latiolais, a former Navy machinist, claimed he contracted mesothelioma from asbestos exposure as a result of the requirement.[53] He sued Avondale in Louisiana state court, asserting that the company negligently failed to warn him of asbestos hazards and failed to provide adequate safety equipment.[54] Avondale removed the suit to federal court under section 1442(a)(1).[55] The district court held that removal was improper, finding the causal nexus requirement for federal officer removal was not satisfied because neither the United States nor any government officials controlled Avondale's safety practices.[56] However, amendments to the federal officer removal statute in 2011 allowed for the removal of cases related to any act under color of federal office.[57] On appeal, the Fifth Circuit in *Latiolais* held that the "relating to" language broadened the statute and allowed cases to be removed even if there was no causal connection, and acts associated or connected to other acts under federal office were sufficient.[58]

The Fifth Circuit's decision in *Latiolais* necessitates a new federal officer removal analysis to replace the district court's initial analysis in *Plaquemines v. Chevron*. Under this new analysis, federal officer jurisdiction is improper in *Plaquemines v. Chevron*. *Latiolais* overruled a line of prior decisions holding that federal officer jurisdiction required a causal nexus between the defendant's actions under color of federal office and the plaintiff's claims. Now, under *Latiolais*, for proper federal officer removal, the defendants must show: (1) they asserted a colorable federal

51. *Id.* (emphasis added).
52. Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286 (5th Cir. 2020).
53. *Id.* at 289.
54. *Id.* at 290.
55. *Id.*
56. *Id.*
57. 28 U.S.C. § 1442(a)(1); *Latiolais*, 951 F.3d 290.
58. *Latiolais*, 951 F.3d 286, 291–96.

defense; (2) they are "persons" within the statute's meaning; (3) they acted pursuant to a federal officer's directions; and (4) the charged conduct connects to or associates with an act pursuant to a federal officer's directions.[59] Replacing the causal nexus test with a broader requirement makes it easier for claims to end up in federal court. Prior to 2020, federal officer removal in the Fifth Circuit was limited to claims of strict liability and international tort; now, negligence claims may also be subject to removal, as seen in *Latiolais*.[60] In *Plaquemines v. Chevron*, the main issue was whether the first and third *Latiolais* requirements were met.

C. Plaquemines v. Chevron Rehearing after the Latiolais Decision

The defendant companies appealed the district court's ruling for improper removal. On rehearing in August 2021, the Fifth Circuit relied on new information provided to the court to conclude that the companies' removal based on federal officer jurisdiction was timely because neither the Parish's original petition nor any "other papers" revealed that the companies could remove based on federal officer jurisdiction.[61] The court did not decide the merits of the case or determine whether federal officer jurisdiction existed.[62] Rather, the court remanded the case back to the state courts to decide if, under *Latiolais*, federal officer jurisdiction is proper.[63]

II. PLAQUEMINES PARISH V. CHEVRON

A. The Parish's Argument

In the Rozel Report, the Parish asserted six actions the companies should have—or should not have—taken to avoid producing oil in bad faith. First, the companies should not have extracted oil at high production rates, because such production operations "generated accelerated wave action that erodes levees and destroys marshes," and increased subsidence

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59. *Id.* at 296.

60. *See* Scott Seiler, *En Banc Fifth Circuit Issues Long-Awaited Ruling on Federal Officer Removal*, LISKOW & LEWIS: THE ENERGY L. BLOG (Feb. 28, 2020), https://www.theenergylawblog.com/2020/02/articles/litigation/en-banc-fifth-circuit-issues-long-awaited-ruling-on-federal-officer-removal/ [https://perma.cc/E9LD-5NGT].

61. Par. of Plaquemines v. Chevron USA, Inc., 969 F.3d 502, 507 (5th Cir. 2020), *opinion withdrawn and superseded on reh'g*, 7 F.4th 362 (5th Cir. 2021).

62. *Id.* at 365. The court, however, determined no federal question jurisdiction existed.

63. *Id.*

which weakens surface lands.[64] Second, the companies should not have widely spaced wells drilled vertically into oil reservoirs. Instead, they should have drilled wells directionally from a central location to reduce the need for dredging canals and eliminate the long flowlines for oil that increase leaks and spills. Third, the companies should have used individual steel tanks at each well instead of earthen pits and long flowlines to central tank batteries because earthen pits and long flowlines "leaked and seeped waste, producing saltwater and hydrocarbons into the marsh."[65] Fourth, the companies should have built saltwater reinjection wells to avoid salinization, pollution, and subsidence.[66] Fifth, the companies should have used thicker tubing to prevent failures of tubular walls and leakage. Lastly, the companies should have constructed roads instead of dredging canals for oil transportation, which collectively led the marsh to collapse over the entire area.[67]

1. "Acting Under" Requirement

The Parish claims that there is no federal officer jurisdiction and removal is improper for several reasons. First, the companies' removal was untimely. Next, the Parish argues that a private person "act[s] under" a federal officer when the relationship to the officer involves "subjection, guidance, or control" and "an effort to assist, or to help carry out, the duties or tasks of the federal superior."[68] Detailed federal direction, supervision,

64. Par. of Plaquemines v. Riverwood Prod. Co., No. 18-5217, 2022 WL 101401, at *9 (E.D. La. Jan. 11, 2020).

65. An earthen pit is any indentation in the ground used for oil and gas exploration activities. *Production Pits*, IADC, https://iadclexicon.org/production-pits/ [https://perma.cc/XH8D-U294] (last visited Jan. 11, 2023); Opening Brief of Defendants-Appellants, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2019) (No. 19-30492), 2019 WL 4238405, at *30.

66. An injection well is used to place fluid underground into porous geologic formations. These underground formations may range from deep sandstone or limestone, to a shallow soil layer. Injected fluids may include water, wastewater, brine (salt water), or water mixed with chemicals. *General Information About Injection Wells*, EPA, https://www.epa.gov/uic/general-information-about-injection-wells#well_def [https://perma.cc/LKP3-YN6B] (last updated Aug. 2, 2022).

67. Opening Brief of Defendants-Appellants, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2019) (No. 19-30492), 2019 WL 4238405, at *32.

68. Original Brief of Plaintiff-Appellee and Intervenors-Appellees, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021) (No. 19-30492), 2019 WL 5458958, at *15.

or monitoring of a company's activities insufficiently establishes a private person as acting under a federal officer.[69]

In *Watson v. Philip Morris Co.*, the Supreme Court held that a highly regulated private firm cannot base removal on the firm's compliance with federal laws, rules, and regulations, even if the regulation was highly detailed and the firm was highly supervised and monitored by a federal agency.[70] Basing federal officer removal allegations on a limited set of federal regulations temporarily imposed on existing state regulations during WWII fails to satisfy the "acting under" requirement, according to the Parish. Further, the Parish maintains there was no evidence of a federal superior guiding or controlling the companies, nor any effort to assist or help carry out the duties of a federal superior.[71] The Parish also argues there was no formal delegation of legal authority, or a contract, payment, employer/employee relationship, or principal/agent arrangement, which could serve as evidence of the companies acting under a federal superior.[72]

The Parish also argues that the historical background of their wartime activities does not prove that the companies worked under strict government control.[73] The oil and gas industry consists of three primary sectors: (1) the upstream sector, (2) the downstream sector, and (3) the midstream sector.[74] In this case, the activities involved only upstream E&P

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69. *Id.*

70. Watson v. Philip Morris Co., Inc., 551 U.S. 142 (2007). *See also* Original Brief of Plaintiff-Appellee and Intervenors-Appellees, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021) (No. 19-30492), 2019 WL 5458958, at *16 (quoting Watson v. Philip Morris Co., Inc., 551 U.S. 142 (2007)).

71. Original Brief of Plaintiff-Appellee and Intervenors-Appellees, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021) (No. 19-30492), 2019 WL 5458958, at *16.

72. *Id.*

73. *Id.* at *16–23.

74. The upstream sector concerns oil and gas production conducted by companies who identify, extract, or produce raw materials. The downstream sector concerns the post-production of crude oil and natural gas activities, like refining petroleum and crude oil into usable products that are sold to consumers. The midstream sector involves the transportation, storage, and trading of crude oil, natural gas, and refined products. Leslie Kramer, *Upstream vs. Downstream Oil & Gas Operations: What's the Difference?*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/060215/what-difference-between-upstream-and-downstream-oil-and-gas-operations.asp [https://perma.cc/ZTZ8-BMB5] (last updated Mar. 7, 2022); James Chen, *What is Midstream?*, INVESTOPEDIA, https://www.investopedia.com/terms/m/midstream.asp [https://perma.cc/RQ26-2QR6] (last updated Aug. 26, 2020).

activities, which the government had no wartime control over, limiting federal control to the downstream refining sector.[75]

The Parish further argued that the companies confused the oil and gas industry's cooperation with the government as total government control and guidance over the industry.[76] Before the United States officially entered the war, President Franklin D. Roosevelt created the Office of Petroleum Coordinator for National Defense (OPC). After Pearl Harbor, the OPC became part of the Petroleum Administration for War (PAW). While Roosevelt issued an executive order to create regulations and controls rapidly, a limited number of regulations and controls followed, since PAW's policy sought to keep these controls to a minimum.[77] PAW refrained from controlling and intensely regulating the companies' E&P activities.[78] Instead, the companies simply cooperated with PAW—"a far cry from the 'significant degree of guidance and control'" required to establish federal officer removal jurisdiction.[79]

Like the defendants, the Parish relied on Regulation 1, arguing the defendants exaggerated the interpretation of the regulation and ignored its application to the economy as a whole, not just to the oil industry.[80] Additionally, the regulation failed to specify the manner in which the companies should conduct their E&P operations or otherwise interfere with oil and gas operations.[81] Lastly, the regulation did not evidence an intent to create a government contract "by operation of law" during the war, as the defendants claimed.[82]

The Parish then turned to the companies' central focus on the government's control over steel production and other materials. The companies maintain that wartime regulations governing the rationing of steel demonstrates that the government exercised strong control over the industry, making removal proper.[83] However, plaintiffs argue that absent evidence of the government directing the companies on the handling of E&P coastal environment issues, such as dredging or waste disposal, the

75. Original Brief of Plaintiff-Appellee and Intervenors-Appellees, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021) (No. 19-30492), 2019 WL 5458958, at *17.

76. *Id.* at *18.

77. *Id.* at *15.

78. *Id.* at *19.

79. *Id.*

80. *Id.* at *20.

81. *Id.*

82. *Id.* at *21.

83. Opening Brief of Defendants-Appellants, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2019) (No. 19-30492), 2019 WL 4238405, at *32.

companies' coastal environmental practices were not subject to federal control.[84]

Further, wartime rationing of materials cannot equate with government control and direction.[85] If this were the case, the federal government would be implicated in the control and direction of any industry using steel during WWII.[86] The Parish also argued that using rationing to determine federal officer removal would be absurd.[87] Wartime rationing affected the entire economy, but that does not mean the entire wartime economy was subject to federal control and federal officer jurisdiction.[88]

a. Production Rates

The first significant government activity that the defendants identified to show the government exercised control over the industry, thereby making federal officer removal proper, was the setting of production rates. According to the defendant-companies, the government determined production rates and ordered oil and gas companies to produce oil for military use.[89] However, the Parish claims that the companies were not ordered to meet quotas to maximize crude oil production.[90] Instead, such quotas were conservation measures, called "allowables," which limited production to avoid injury to oil and gas reservoirs.[91] Oil companies only faced consequences when they produced above their assigned allowable.[92] Additionally, PAW set production rates on a state-by-state basis, giving states discretion to allocate their total production. Such state rates sought to achieve an overall maximum efficient rate of production.[93]

Besides setting total statewide allowables, the Parish claims there is no evidence proving the federal government-controlled production rates for the oil field at issue.[94] The district court found the companies did not

84. Original Brief of Plaintiff-Appellee and Intervenors-Appellees, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021) (No. 19-30492), 2019 WL 5458958, at *21.
85. *Id.* at *22.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at *23.
90. *Id.*
91. *Id.*
92. *Id.* at *24.
93. *Id.*
94. *Id.*

identify a federal mandate ordering the companies to drill and produce these operational areas during wartime activities.[95]

b. Well Spacing

The Parish argued the companies mischaracterized the Rozel Report as challenging federal wartime well spacing requirements.[96] The companies incorrectly interpreted the report and asserted that Texaco spaced its wells too far apart, resulting in excessively long flowlines.[97]

The Parish maintained that the report said nothing about well spacing. Instead, the report's criticism regarding poor design of the overall layout of surface operations was based upon the long distances between the wells and tank batteries.[98] Such long distances between the wellheads and production equipment led to excessive impacts on the marsh.[99] The Parish argued that the well spacing involved the distance between wellheads, while flowlines transport product from wellheads to production facilities, and only the distance between the wells and the tank battery is important to the report's analysis.[100] Therefore, the companies' argument—that the Parish challenged wartime well spacing requirements, issued by the government—is unfounded because the Parish challenged the distance between the wells and tank batteries, not the required spacing between wells.[101]

c. Directional Drilling and the Vertical Wellbore Requirement

The Rozel Report stated that the use of directional drilling would lessen canal dredging and decrease impacts on the marsh environment.[102] However, the companies argued that Petroleum Administrative Order 11 (PAO-11) prevented them from drilling directionally.[103]

PAO-11 provided that an exception was needed before drilling directionally.[104] PAO-11 was amended shortly after it was issued to

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at *24–25.
99. *Id.* at *25.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at *26.

remove the exception requirement for directional drilling.[105] Therefore, the plaintiffs argued directional drilling was not prohibited during the war, and PAO-11 only required exceptions to drill directionally for an eight month period.[106] Additionally, there was no evidence that the government ordered the companies to do anything in the Potash Field involved in this case.[107] The companies referred to only one instance of federal involvement in the field: an application for an exception to Order M-68, later known as PAO-11, that required certain materials to drill ten wells directionally and contained less strict spacing requirements than those required by the order.[108] This application was granted.[109] The companies' expert even admitted that directional drilling was permitted during WWII.[110]

d. Steel Tanks and Saltwater Disposal Wells

The Rozel Report stated that the steel tanks and saltwater disposal wells provided a more reliable method of replacing unlined earthen pits to eliminate pollution and the need for excessive canals.[111] The companies argued that they were subject to government directives, such as OPC Recommendation No. 14 and an OPC press release, and were directed to use less steel in E&P operations.[112] Therefore, they could not have used the disposal methods in the report. The Parish, however, claims the directives did not preclude the companies from following the report's suggestions.[113]

OPC Recommendation 14 requested oil companies to perfect plans to conserve steel and other metals used in the manufacture of *containers to transport, store, distribute, and market petroleum products.*[114] The

105. *Id.*
106. *Id.*
107. The Potash Field is an oil and gas field in Plaquemines Parish. It is situated south of Uhlan Bay and southeast of John Bayou. *Potash Oil and Gas Field*, MAPCARTA, https://mapcarta.com/21021518 [https://perma.cc/K5HL-CWH9] (last visited Jan. 11, 2023). Original Brief of Plaintiff-Appellee and Intervenors-Appellees, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021) (No. 19-30492), 2019 WL 5458958, at *27.
108. Original Brief of Plaintiff-Appellee and Intervenors-Appellees, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021) (No. 19-30492), 2019 WL 5458958, at *26.
109. *Id.*
110. *Id.* at *27.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at *27–28.

companies did not point to any federal prohibition of the use of steel tanks and saltwater disposal wells used in E&P operations.[115]

Contrary to the defendants' argument, PAW orders encouraged the acquisition of materials for saltwater injection wells.[116] Preference Order P-98 incentivized the use of injection wells by allowing operators to use a preference rating to help them obtain materials for saltwater disposal or injection wells, among other things.[117] Preference Order P-98-b enhanced the preference rating for saltwater injection well materials by assigning higher preference ratings "to all deliveries of material to an operator for use in the petroleum industry."[118]

The Parish argued that the companies' observation that certain prohibited material for saltwater disposal wells in secondary recovery was irrelevant because the Rozel Report did not address secondary recovery.[119]

e. Dredging Canals and Building Roads

According to the Parish, the companies misunderstood the Rozel Report's opinion regarding dredging and roads.[120] The Report stated that the companies should have minimized land loss and pollution by limiting the number of roads built to central areas where land operations could be conducted, and "disregarded alternative measures in favor of the overuse of dredged canals."[121] Plaintiffs argued the Report did not suggest that dredging should have been completely avoided, or that road usage would have avoided dredging.[122] Nor does the report suggest the defendants should have used impractical systems of oilfield roads in the coastal area.[123]

Further, the plaintiffs said the defendants' claim—that the government encouraged them to use waterways and approved dredging throughout Louisiana, including Plaquemines Parish, during the war—was based on weak evidence.[124] The Parish also points out that the defendants relied on three Army Corps of Engineers (the Corps) permits issued under the Rivers and Harbors Act (RHA) permitting dredging in three locations,

115. *Id.* at *28.
116. *Id.*
117. *Id.* at *25–29.
118. *Id.* at *29.
119. *Id.*
120. *Id.* at *30.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at *30–31.

none of which involved the operation areas in this case or in *Rozel*. Additionally, none of the permits indicated a general intent to approve dredging throughout the State.[125]

2. Archetypical Case for Federal Removal

The Parish maintained that this is not an archetypical case for federal removal, despite the defendants' arguments.[126] In quoting *Watson*, the companies argued that the district court incorrectly characterized their wartime activities as merely subject to detailed regulation, rather than government control, since they performed a job the government would perform itself if no contract with a private firm existed.[127]

The Parish asserted that defendants misrepresented the *Watson* language. The Supreme Court merely distinguished *Winters* from *Watson* since *Winters* involved a private contractor performing a job the government would do in the absence of a private contract, whereas *Watson* did not involve a private contractor.[128] Furthermore, the Parish claimed there is no evidence that the federal government itself ever engaged in E&P activities relating to crude oil or natural gas.[129] During WWII, the oil industry eagerly produced as much crude oil and natural gas as necessary, so the federal government had no need to contract with any companies.[130] Therefore, this case is distinguishable from other cases in which companies were bound by government contracts to perform certain jobs.[131]

125. *Id.*

126. The companies claim this case represents "the archetypical case for federal officer removal" because the government's control over the oil industry during WWII epitomizes the circumstances in which a private person "act[s] under" a federal officer to assist in performing a critical government function. Opening Brief of Defendants-Appellants, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2019) (No. 19-30492), 2019 WL 4238405, at *47.

127. Original Brief of Plaintiff-Appellee and Intervenors-Appellees, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021) (No. 19-30492), 2019 WL 5458958, at *31.

128. *Id.*

129. *Id.* at *32.

130. *Id.*

131. *Id.* at *33.

3. Causal Nexus

The previous federal officer removal test required a causal nexus between the charged conduct and the asserted official authority.[132] The Parish argued that no causal nexus existed here.[133] Although this element of federal officer removal changed to the *Latiolais*'s "acting under" test, the Parish's causal nexus arguments remain persuasive.

First, the Parish asserted the defendants failed to identify a government contract or other evidence of significant government control over their operations.[134] Defendants also failed to support their claim that regulation alone can create a binding government contract.[135] A government contract must meet the requirements of an implied-in-fact contract: mutuality of intent to contract, consideration, lack of ambiguity in offer and acceptance, and actual authority on the government's part to bind itself in the contract.[136] Plaintiffs alleged these requirements were not met. Even if a court finds the companies to be contractors by operation of law, there is no evidence showing their activities in the Potash Field were subject to enough government control for federal officer removal.[137]

Plaintiffs further maintained that a causal nexus is missing when the charged conduct consists of discretionary acts free of federal interference.[138] In this case, the charged conduct consists of a violation of the SLCRMA, specifically Louisiana Revised Statutes section 49:214.336(D).[139] The SLCRMA was enacted in 1978, and the coastal permitting program became effective in 1980.[140] Plaintiffs never alleged that pre-1980 activities nor uses were actionable under the SLCRMA. Such activities or uses matter only to the application of the historical use exemption, and such uses met the statutory definition of a "use" when the

132. *See* Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387, 398 (5th Cir. 1998).

133. Original Brief of Plaintiff-Appellee and Intervenors-Appellees, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021) (No. 19-30492), 2019 WL 5458958, at *32.

134. *Id.* at *31.

135. *Id.* at *33.

136. *Id.* at *34.

137. *Id.*

138. *Id.*

139. LA. REV. STAT. § 49:214.336(D) (2022) provides a cause of action for damages and other relief when a regulated party violates a coastal use permit or fails to obtain a coastal use permit when required.

140. Original Brief of Plaintiff-Appellee and Intervenors-Appellees, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021) (No. 19-30492), 2019 WL 5458958, at *35.

SLCRMA coastal permitting program became effective in 1980. At that point, the SLCRMA required the companies to obtain a coastal use permit.[141] Regardless of whether the defendants qualify for the historical use exemption, the Parish asserted the companies still failed to obtain a coastal use permit 35 years after WWII ended.[142] The defendant-companies cannot attribute this failure to federal interference during the war, according to the plaintiffs.[143]

Under *Latiolais*, the charged conduct must be connected to or associated with an act pursuant to a federal officer's directions.[144] The Parish argued, even under this broader test, there is still no causal nexus or connection, because even a loose temporal relationship between the charged conduct and the alleged acts under color of federal office is lacking.[145]

B. The Companies' Argument

The defendant companies argued entitlement to remove the case to federal court since their actions during WWII occurred while "acting under" federal officers of PAW, and "that those actions were a direct and necessary result of those officers' instructions."[146] Further, they argued that, during the war, PAW and the oil industry worked so closely and continuously together "that it is often all but impossible to say where one left off and the other began."[147]

The companies claimed they acted under a federal officer's directions to assist them in performing government functions. The Parish asserted six actions the companies took—or failed to take—in violation of the SLCRMA. However, the companies claimed that these actions were "the direct consequences of federal government orders and instructions compelling production of the breathtaking volume of oil needed during

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141. *Id.*
142. *Id.*
143. *Id.*
144. Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286, 296 (5th Cir. 2020).
145. Original Brief of Plaintiff-Appellee and Intervenors-Appellees, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2021) (No. 19-30492), 2019 WL 5458958, at *36.
146. *Id.* at *38.
147. Opening Brief of Defendants-Appellants, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2019) (No. 19-30492), 2019 WL 4238405, at *33–34 (quoting PETROLEUM ADMINISTRATION FOR WAR, A HISTORY OF THE PETROLEUM ADMINISTRATION FOR WAR, 1941-1945 2 (John W. Frey & H. Chandler Ides eds., 2005)).

WWII and mandating limits on the use of scarce materials necessary to that production."[148]

1. "Acting Under Requirement"

First, the companies argued that they acted under a federal officer's directions because the government depended heavily on the oil industry during the war.[149] Oil proved to be vital to the Allies' success in WWII. Without it, airplane runways could not have been be built; TNT for bombs would not have existed; rubber tires could not have been made; gasoline for trucks, tanks, and airplanes would not have been produced; and guns and machinery would not have been lubricated.[150] In fact, by law, some oil companies became government contractors and had to prioritize defense orders from the government or face significant penalties.[151]

The companies referred to the OPC's directives issued to the oil industry, noting the OPC "controlled the supply of all critical materials and all operating supplies needed by almost every operator, large or small, in the business," to support their claim that the federal government asserted strong control over the oil industry.[152] When the OPC became the PAW, President Roosevelt vested PAW's administrator with "almost complete power over the petroleum industry."[153]

Further, the companies point to the government's exemption of the oil industry from antitrust laws to emphasize the government's control over the industry during the war.[154] According to Francis Biddle, the Attorney General during WWII, "acts performed by [the oil] industry under the direction of public authority, and designed to promote public interest and not to achieve private ends, do not constitute violations of the antitrust laws."[155]

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148. Opening Brief of Defendants-Appellants, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2019) (No. 19-30492), 2019 WL 4238405, at *33.

149. Id. at *33–36.

150. Keith Miller, *How Important Was Oil in World War II?*, HIST. NEWS NETWORK, https://historynewsnetwork.org/article/339 [https://perma.cc/Y3WE-65GE] (last visited Jan. 11, 2023).

151. Opening Brief of Defendants-Appellants, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2019) (No. 19-30492), 2019 WL 4238405, at *33-34.

152. *Id.* at *34.

153. *Id.* at *33–34.

154. *Id.* at *35.

155. *Id.*

The defendant companies also stated that the federal government allocated oil products for military and essential uses, and by 1945, the military used a third of the nation's oil production.[156] Additionally, the Office of Price Administration set oil prices, rather than the companies, further emphasizing the government's control over the industry.[157] PAW controlled almost every aspect of the oil industry, ranging from the volume of oil production to the availability of the materials needed to produce and transport oil. Defendants maintained these controls resulted in the actions challenged by the Parish in this case.[158]

a. Production Rates and Materials

The companies argued that the federal government's control of production and materials, specifically steel, supports a finding of proper federal officer removal jurisdiction. During the war, PAW controlled production rates, and the federal government required oil companies in Louisiana to comply with Louisiana's oil production quota to meet military demands.[159] The Parish claimed the intense production rates the companies complied with were in bad faith and "contravened prudent practices because they allegedly intensified wave action and subsidence that damaged marshes and levees."[160] However, the companies argued that the *government* set production rates based on wartime needs. In response, the Parish maintained that the companies should have slowed production, while the companies argued the wartime requirements and the indispensability of oil would not allow lower production rates.[161]

The government closely controlled and allocated scarce materials necessary for oil production. As the country experienced material shortages from the war, the government focused on conserving scarce materials. As a result, PAW consistently planned the oil industry's operations so the industry could "do more with less," or in other words, "meet essential production requirements with a minimum expenditure of critical materials."[162] The companies argued that many PAW requirements specified how oil companies should use steel, thereby forcing the companies to act in ways the Parish opposed.

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156. *Id.* at *36.
157. *Id.*
158. *Id.*
159. *Id.* at *37.
160. *Id.* at *36.
161. *Id.*
162. *Id.* at *38.

b. Well Spacing

PAW's directives regarding scarce materials determined well spacing and other decisions relating to vertical and directional drilling during WWII.[163] The Parish complained that companies should not have spaced wells widely and drilled vertically into oil reservoirs. Instead, they should have drilled wells directionally from a central location to reduce the need for dredging canals and decrease the amount of long flowlines for oil that increased leaks and spills.

The companies pointed to Conservation Order M-68, issued in 1941, which governed the spacing of oil field wells.[164] The order required companies to make new wells that "conform to a uniform spacing pattern of not more than one single well to each 40 surface areas."[165] An average well casing used over 60 tons of steel—equivalent to two large tanks that could have been used in the war effort.[166] By imposing these well spacing rules, PAW "prevented the drilling of wells virtually on top of one another," thus, allowing materials such as steel for use elsewhere.[167] PAW granted exceptions to these requirements only when consistent with governmental priorities, such as the increase in oil production.[168]

c. Directional Drilling and the Vertical Wellbore Requirement

According to the defendants, PAW also required drilling wells to maintain a vertical wellbore, rather than following what the Parish claimed to be the prudent practice of having multiple wells directionally drilled from the same well.[169] Vertical wellbores used less steel than directionally drilled wells.[170] Occasionally, the government granted exceptions to the vertical wellbore requirement when directional drilling proved better for

163. *Id.* at *41.
164. *Id.*
165. *Id.*
166. Casing is a series of steel pipes placed in a drilled oil well to stabilize the well, keep contaminants and water out of the oil stream, and prevent oil from leaching into the groundwater. Chris Burnett, *Oil Well Construction: Casing and Tubing*, THERMOFISHER SCI. (Mar. 3, 2015), https://www.thermofisher.com/blog/metals/oil-well-construction-casing-and-tubing/ [https://perma.cc/N9YF-PRW4]; Opening Brief of Defendants-Appellants, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2019) (No. 19-30492), 2019 WL 4238405, at *41.
167. Opening Brief of Defendants-Appellants, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2019) (No. 19-30492), 2019 WL 4238405, at *41.
168. *Id.* at *42.
169. *Id.*
170. *Id.* at *41.

penetrating reservoirs at advantageous angles, or when a surface area directly above a reservoir became inaccessible.[171] Defendants claimed federal officers, or PAW, ordered them to engage in vertical drilling, since PAW focused on maximizing oil production using a minimum amount of steel, instead of focusing on environmental impacts, which the Parish asserted would have been prudent.[172]

d. Steel Tanks and Saltwater Disposal Wells

The companies failed to install steel tanks at each well platform, and used earthen pits instead, "which leaked and seeped waste, produc[ing] saltwater and hydrocarbons into the marsh."[173] The companies responded by saying they did not install steel tanks in order to conserve more steel. Installing steel tanks at each well would have required significant quantities of steel and would have contravened the government's directive to use minimal amounts of steel and other metals, substituting materials when possible.[174]

The Parish argued the companies should have built saltwater reinjection wells to avoid salinization, pollution, and subsidence. In response, the companies argued that drilling saltwater reinjection wells was prohibited during WWII.[175] According to the companies, saltwater reinjection wells require thousands of feet of steel casing, tubing, and other steel equipment.[176] Additionally, the companies pointed to the Louisiana Department of Conservation's express statement in 1942–1943 regarding the federal government's wartime materials priority system's opposition to saltwater reinjection wells.[177] Further, PAW excluded saltwater disposal operations, such as saltwater reinjection wells, when it approved some materials for secondary oil recovery.[178] PAW even prohibited reinjection

171. *Id.* at *42.
172. *Id.* at *42–43.
173. *Id.* at *43.
174. *Id.*
175. *Id.* at *44.
176. *Id.*
177. *Id.* The material priority system rationed steel, copper, and aluminum based on an industry's productive capacity. The system assigned a preference rating when a contract to produce certain military supplies was entered into. The rating was then used by the contractor when ordering raw materials and parts to build the end item. FRANK N. SCHUBERT, MOBILIZATION 7 (1994), https://history.army.mil/documents/mobpam.htm [https://perma.cc/6CW5-2GMQ].
178. Opening Brief of Defendants-Appellants, Par. of Plaquemines v. Chevron USA, Inc., 7 F.4th 362 (5th Cir. 2019) (No. 19-30492), 2019 WL 4238405, at *44.

wells preventing subsidence when permitting secondary oil recovery operations.[179]

e. Tubing

To save materials, the companies used thinner tubing—i.e., minimizing the amount of steel needed for casing by using thick tubing to prevent failures of tubular walls and leakage—rather than fulfilling the Parish's wishes.[180] PAW allowed oil companies to conserve steel and other materials by selecting the minimum practicable sizes and weights of oil well casing and tubing strings. PAW even directed a committee to plan for reductions in oil well casing steel "through standardization, use of substitute material in pipe, changes of weights and grades of casing of deep wells, and recovery of intermediate protection pipe."[181] Although these substitutions derogated from previous safety regulations, oil companies were required to follow them during wartime.[182]

f. Dredging Canals and Building Roads

The war effort demanded dredging canals—rather than building roads—to access drilling sites, even if such dredging resulted in the marsh collapsing over the area.[183] Louisiana's marshy terrain rendered canals a more efficient form of transportation when compared to roads, which required the construction and maintenance of roadbeds, bridges, drainage systems, the use of heavy equipment, scarce materials, and substantial labor.[184]

Additionally, the companies had limited access to truck transportation during the war, and instead were forced to use barges, resulting in regular large-scale crude oil movements between oil fields on the Gulf Coast.[185] The federal government approved this barge activity because it made oil production quotas easier to meet.[186] Thus, during wartime, the government encouraged companies to utilize canals over roads, and approved state-wide dredging, including companies in Plaquemines Parish.[187]

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179. *Id.*
180. *Id.* at *45.
181. *Id.* at *44.
182. *Id.*
183. *Id.* at *45–46.
184. *Id.* at *46.
185. *Id.*
186. *Id.*
187. *Id.*

2. The Archetypical Case for Federal Officer Removal

According to the companies, the wartime relationship between the oil industry and the government calls for federal officer removal because the government's control over the industry during the war was characteristic of the circumstances in which a private person "acts under" a federal officer to assist in performing a critical government function.[188]

On appeal, the companies argued that the district court incorrectly rejected their federal officer removal effort. The district court found that the wartime relationship between the defendants and the federal government were "mere oversight regulation," and thus, insufficient for federal officer removal.[189] However, the companies maintained that the government's dependence on the oil industry and control of the industry's production and materials illustrated proper federal officer removal jurisdiction.[190] During WWII, the government retained more control over the companies and oil production than it does today. Now, the defendant-companies are subject to "detailed regulation, monitoring, and supervision," but do not contend as acting under federal officers or agencies.[191] However, today's regulations pale in comparison to the federal government's wartime directives. During the war, the companies performed a job the government itself would perform, if not for the contracts with private firms.[192]

3. Causal Nexus

The district court ruled that the government's actions did not cause the Parish's injuries, noting that exceptions to government directives existed, allowing operators to stray from regulations.[193] The companies argued the government had to grant the exceptions, emphasizing the federal government's management over oil production during WWII.[194]

The companies further maintained that they acted as federal contractors by operation of law when supplying oil to refineries during the war.[195] In 1941, the federal government issued a regulation defining "Defense Order" to include orders placed by the government and

188. *Id.* at *47.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at *47–48.
193. *Id.* at *48.
194. *Id.*
195. *Id.* at *49.

government contractors for material or equipment required to fill the contracts or purchase orders, so long as such material or equipment was delivered under government contracts.[196] The companies argued that federal orders controlled their wartime oil production. The companies supplied their oil to refineries, which then supplied the federal government. Therefore, the companies subjected themselves to legal obligations, liabilities, and punishment at the hands of the federal government, if they did not comply with the directives.[197] Moreover, the Fifth Circuit held that government contractors producing essential materials to the government acted under federal officers for removal purposes.[198]

III. THE VARIOUS "ACTING UNDER" TESTS AMONG THE CIRCUIT COURTS

The "acting under" requirement of the federal officer removal statute has caused quite a stir among courts in recent years. A variety of tests exist among the circuits when it comes to determining whether federal officer removal is proper, specifically in regards to the "acting under" requirement of section 1442. This variety causes confusion, leaving parties wondering what exactly qualifies for federal officer jurisdiction.

This variety and uncertainty necessitates a decision from the U.S. Supreme Court on what test to apply in land loss litigation cases. The Court must elaborate on what satisfies the "acting under" requirement of section 1442. Until such a decision is rendered, oil and gas defendants in land loss cases will continue to engage in a game of tug of war—attempting to remove their cases then appealing when a court finds removal improper.

A. The Fifth Circuit

As previously mentioned, the Fifth Circuit Court of Appeals deviated from its prior federal officer removal test to better follow Congress's 2011 amendment of section 1442.[199] Most notably, the new test requires the defendant to show the charged conduct is connected or associated with an act pursuant to the federal officer's directions, a considerable change from the previous causal nexus requirement.

196. *Id.* (quoting Amendment of Priorities Regulation No. 1, 6 Fed. Reg. 6680, 6681 (Dec. 24, 1941)).

197. *Id.*

198. *Id.* at *49–50.

199. *See* Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286 (5th Cir. 2020).

In a short opinion, the Fifth Circuit affirmed the district court's ruling in *Plaquemines Parish v. Chevron* and found that the oil companies were not acting pursuant to a federal officer or agency's directions when they "ramped up wartime oil production," thus, removal was improper.[200] In particular, the court found insufficient evidence of "any contract, any payment, any employer-employee relationship, or any principal-agent relationship indicating that the companies acted under a federal officer or agency's direction."[201] Even if the companies were subcontractors, the Fifth Circuit noted that the mere status as subcontractors would not establish that the companies acted under a federal officer's directions.[202] Further, the court was not persuaded by the companies' argument that they had "an unusually close and special relationship with the government" so they acted under the federal government's direction.[203] Simply being subject to federal regulations is insufficient for an entity to act under a federal officer or agency; there must be an effort to actually assist or to help carry out the federal government's tasks.[204] A party's compliance with the law does not constitute an effort to carry out or assist with the government's objective, and simply being subject to intensive regulations and cooperating with the federal government is insufficient to confer federal jurisdiction.[205]

The Fifth Circuit also applied this reasoning in *Glenn v. Tyson Foods, Inc.*, a recent case arising out of another national emergency: the COVID-19 pandemic.[206] In early 2020, COVID-19 rapidly spread across the U.S., prompting federal and state officials to declare emergencies, enact lockdown and stay-at-home orders, impose mask mandates, and restrict business operations.[207] One such order came from President Donald Trump, whose April 2020 executive order (EO 13917) urged meatpacking

200. Plaquemines Par. v. Chevron USA, Inc., 22-30055, 2022 WL 9914869 (5th Cir. 2022).

201. *Id.* at *2.

202. *Id.* at *3.

203. *Id.*

204. *Id.*

205. *Id.*

206. Glenn v. Tyson Foods, Inc., 40 F.4th 230 (5th Cir. 2022).

207. Proclamation No. 9994, 85 Fed. Reg. 15,337 (March 18, 2020). *State Emergency Health Orders During the Coronavirus (COVID-19) Pandemic, 2021-2022*, BALLOTPEDIA, https://ballotpedia.org/State_emergency_health_orders_during_the_coronavirus_(COVID-19)_pandemic,_2021-2022#Active_COVID-19_emergency_orders_by_state [https://perma.cc/M2DN-ZX5Z] (last updated Jan. 9, 2023).

plants to remain open during the pandemic to prevent food shortages as consumers stockpiled food in anticipation of lockdown orders.[208]

On March 16, 2020, President Trump issued guidelines outlining steps individuals could take to slow the virus's spread.[209] Such guidelines encouraged individuals to stay home if they felt sick, to quarantine if someone in their household tested positive for COVID-19, to avoid large social gatherings, and to work or engage in schooling from home when possible.[210] However, the guidelines included a special instruction for those who worked in a "critical infrastructure industry," such as "healthcare services and pharmaceutical and food supply," stating that those workers "have a special responsibility to maintain [their] normal work schedule."[211]

In April and May 2020, President Trump invoked the Defense Production Act (DPA) and declared meat and poultry "critical and strategic materials."[212] The DPA allows the President to direct private companies to prioritize federal contracts in exigent circumstances and to control the distribution of any scarce material as long as it is material to national defense and when "the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material."[213] Further, President Trump emphasized the importance of the continued operation of the meat and poultry industries, stating that closures of such facilities "undermin[ed] critical infrastructure" during a time of emergency.[214]

The U.S. Department of Agriculture (USDA) also issued a statement reiterating the importance of keeping the facilities open while maintaining the health and safety of employees.[215] The USDA stated it would work with meat processors and state and local officials to ensure they followed

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208. Exec. Order No. 13,917, 85 Fed. Reg. 26313 (Apr. 28, 2020).

209. *See The President's Coronavirus Guidelines for America: 30 Days to Slow the Spread*, THE WHITE HOUSE (Mar. 16, 2020), https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf [https://perma.cc/U4SS-CQ5P].

210. *See id.*

211. *Id.*

212. Exec. Order No. 13,917, 85 Fed. Reg. 26313 (Apr. 28, 2020).

213. 50 U.S.C. § 4511(a); *see also* Buljic v. Tyson Foods, Inc., 22 F.4th 730, 735 n.3 (8th Cir. 2021) n.3.

214. Exec. Order No. 13,917, 85 Fed. Reg. 26313 (Apr. 28, 2020).

215. *USDA to Implement President Trump's Executive Order On Meat and Poultry Processors*, USDA (Apr. 28, 2020), https://www.usda.gov/media/press-releases/2020/04/28/usda-implement-president-trumps-executive-order-meat-and-poultry [https://perma.cc/7E5X-F3RE].

the guidelines of the Center for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) to keep employees at meat-processing facilities safe.[216]

In response to the pandemic, Tyson took precautionary measures such as "suspend[ing] its commercial business travel, forbad[ing] non-essential visitors from entering its facilities, and requir[ing] non-critical corporate employees to work remotely."[217] The plaintiffs in this case alleged that they or their relatives contracted COVID-19 while working at Tyson facilities in Texas.[218] Some of these employees died from COVID-related complications.[219] The plaintiffs filed suit in Texas state courts, alleging that Tyson directed employees to work in close quarters, contrary to the CDC's guidelines.[220] Further, the plaintiffs alleged that Tyson implemented a "work while sick policy" and encouraged sick employees to continue working at the facility by offering a large cash bonus for three months of perfect attendance.[221] Tyson invoked the federal officer removal statute, arguing it was acting under the directions of federal officials by working with the federal government to prevent "an unprecedented national emergency from spiraling into a national food shortage."[222] The district courts found that federal jurisdiction was improper, and remanded the cases to state courts.[223]

On appeal, the Fifth Circuit Court of Appeals employed the same reasoning as the Eighth Circuit in a similar case: *Buljic v. Tyson Foods, Inc*.[224] First, the court rejected Tyson's argument that the government's designation of the food industry as "critical infrastructure" meant the company was acting under federal officials' directions.[225] The court noted that although federal officials did designate the industry as critical and encouraged employees of those industries to keep working, this guidance was nonbinding and public health-related decisions ultimately remained with state and local authorities.[226] The court also noted that the list of critical infrastructure industries included nursing homes, weather

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216. *Id.*
217. *Buljic*, 22 F.4th at 737.
218. Glenn v. Tyson Foods, Inc., 40 F.4th 230, 234 (5th Cir. 2022).
219. *Id.*
220. *Id.*
221. *Id.*
222. Brief for Appellants, Glenn v. Tyson Foods, Inc., 40 F.4th 230 (8th Cir. 2021), 2021 WL 5754770, at *35–36.
223. *Glenn*, 40 F.4th at 234.
224. *See Buljic*, 22 F.4th at 730.
225. *Id.* at 234–35.
226. *Id.* at 235.

forecasters, clergy, dry cleaners, and many other private-sector industries.[227] The court explained that Congress could not have intended to "deputize all of these private-sector workers as federal officers," and that the government's designation was simply strong advice to state and local governments that these industries should stay open despite COVID-19's spread.[228]

Tyson argued that the company had a "special relationship" with the federal government, unlike other critical industries.[229] For example, Tyson and other meat processors were required to have USDA inspectors on-site before the pandemic, and this "cooperation" only grew during the pandemic.[230] However, the court held that this relationship only showed that Tyson and other meat processors were merely subject to heavy regulation.[231] Quoting *Buljic*, the Fifth Circuit stated that "being 'subject to pervasive federal regulation alone is not sufficient to confer federal jurisdiction.'"[232] The court went even further and compared Tyson's argument to tobacco manufacturer Philip Morris's argument in *Watson v. Philip Morris Companies, Inc.*[233] In *Watson*, the U.S. Supreme Court held that Philip Morris was not acting under a federal official when the company began running tests the Federal Trade Commission (FTC) previously conducted on the tar and nicotine content of cigarettes.[234] The FTC stopped such testing because of the cost, but "published the results of [the tests Philip Morris conducted] in annual reports to Congress, just as it had when it ran the tests itself."[235] Philip Morris argued that the company satisfied the "acting under" requirement because it carried out a task previously carried out by the federal government, but the Court rejected the argument, pointing out that the company did not have a contract with the government.[236]

Lastly, the court reiterated the Eighth Circuit's holding regarding Tyson's argument that various communications from federal officials

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227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*; Brief for Appellants, Glenn v. Tyson Foods, Inc., 40 F.4th 230 (8th Cir. 2021), 2021 WL 5754770, at *35–36.
231. Glenn v. Tyson Foods, Inc., 40 F.4th 230, 235 (5th Cir. 2022).
232. *Id.* (*quoting* Buljic v. Tyson Foods, Inc., 22 F.4th 730, 739 (8th Cir. 2021)).
233. *Glenn*, 40 F.4th at 236; Watson v. Philip Morris Co., Inc., 551 U.S. 142 (2007).
234. *Id.*; *Watson*, 551 U.S. 142.
235. *Id.*
236. *Glenn*, 40 F.4th at 236; *Watson*, 551 U.S. at 153.

required Tyson to keep its plants open. While Tyson maintained that these communications were directives or orders from federal officials, the court held that the communications were simply encouragement from the government to stay open.[237] Further, President Trump's executive order, in which he invoked the DPA, "had no immediate legal effect" and "merely delegated the President's DPA authority to the Secretary of Agriculture"[238] The USDA's letters encouraged meat processors to follow CDC and OSHA guidelines, and was not an order. "[The USDA's website] stated that the Secretary would exercise delegated DPA authority in the future 'if necessary,' which it never was."[239] Therefore, Tyson did not show it was acting under a federal officer's direction as required for removal under section 1442.

The Fifth Circuit's decision marks a unique approach to determining whether federal officer jurisdiction exists. The following sections discuss several relevant cases in which other circuits evaluated the acting under requirement of the federal officer removal statute differently.

B. The Third Circuit

In *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Association of Philadelphia*, the court found that the Federal Community Defender met the "acting under" requirement of section 1442.[240] This case involved Pennsylvania and several Pennsylvania counties' "efforts to bar attorneys from the Capital Habeas Unit of the Federal Community Defender Organization for the Eastern District of Pennsylvania (Federal Community Defender) from representing clients in state post-conviction proceedings."[241] The Federal Community Defender removed each motion to federal court.[242]

The Third Circuit determined that the Federal Community Defender was acting under a federal officer's direction. First, the court noted that the Federal Community Defender is a non-profit entity created through the Criminal Justice Act (CJA).[243] The purpose of the Federal Community Defender is, in part, to implement the CJA's aims and purposes of providing counsel to federal defendants and indigent federal habeas corpus

237. *Glenn*, 40 F.4th at 237.
238. *Id.*
239. *Id.*
240. In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia, 790 F.3d 457, 461 (C.A.3 (Pa.), 2015).
241. *Id.*
242. *Id.*
243. *Id.* at 469.

petitioners.[244] Further, the Federal Community Defender must adopt bylaws consistent with representation under the CJA and a similar code of conduct to the code of conduct for Federal Public Defender Organizations.[245] This relationship, according to the court, shows that the Federal Community Defender assists and helps the Administrative Officer of the United States Courts (AO) to carry out a federal officer's duties or tasks of implementing the CJA.[246]

Additionally, to receive federal funds, the Federal Community Defender must maintain detailed financial records, annually report its activities and expected caseload, and return unused funds to the AO.[247] The Federal Community Defender and its employees are prohibited from practicing law "outside the scope of his or her official duties with the grantee."[248] The Third Circuit held that this limitation emphasizes the control the AO exercised over the Federal Community Defender.[249]

The court also reasoned that the Federal Community Defender's conduct the plaintiff complained of does not have to be committed at the behest of a federal agency; "it is sufficient for the 'acting under' inquiry that the allegations are directed at the relationship between the Federal Community Defender and the AO."[250] Lastly, the court noted that without the Federal Community Defender, the government would be forced to provide the service itself.[251] Therefore, the court found that the relationship between the Federal Community Defender and the federal government was sufficiently close enough to warrant federal officer removal.

Under the Third Circuit's analysis, *Plaquemines Parish v. Chevron* would likely be removable under section 1442, considering the regulations imposed on the defendants in both cases.

C. The Seventh Circuit

Likewise, if *Plaquemines Parish v. Chevron* and other land loss cases were filed in the Seventh Circuit, the defendant-companies would likely succeed in removing the cases to federal court. In *Baker v. Atlantic Richfield Co.*, the Seventh Circuit found federal officer removal proper when a private company produced "critical wartime commodities" such as

244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 470.
249. *Id.*
250. *Id.*
251. *Id.* at 469.

lead and zinc then provided those products to the federal government.[252] In 2017, residents of a Chicago housing complex sued several companies that manufactured industrial materials at a refinery that previously stood on the same land as the complex.[253] The plaintiffs alleged that the companies polluted the soil at and around the modern-day housing complex, exposing the residents to dangerous substances like lead and arsenic.[254] The plaintiffs specifically alleged that Atlantic Richfield contaminated the land between 1938 and 1965, and that two other companies, E.I. du Pont de Nemours and Company and the Chemours Company, contaminated the land from 1910 to 1949.[255] The companies removed the case to federal court, asserting removal was proper in part because Atlantic Richfield's predecessor operated refineries and plants that produced white lead carbonate, zinc oxide, and lead—materials that were critical wartime commodities—near the modern-day complex during WWII.[256] The companies argued that those materials were required to make essential military and civilian goods and the companies had to follow strict federal specifications when producing them.[257] Further, the companies pointed out that the federal government controlled prices and sometimes mandated the companies prioritize their sales to rubber and paint companies holding defense contracts.[258]

The Seventh Circuit found the defendants acted under the federal government by assisting the federal government's wartime efforts.[259] The court explained that the companies had a special relationship with the government because it provided the government with materials necessary to the war effort.[260] Without the assistance of the companies, the court reasoned, the federal government would be left to manufacture the necessary goods itself.[261]

This case largely mirrors *Plaquemines Parish v. Chevron*. The companies involved in both cases provided essential materials during wartime and were all subject to strict federal regulations and specifications. Further, the companies did not have contracts with the government, except the only contract existing in *Baker* involved Atlantic

252. Baker v. Atl. Richfield Co., 962 F.3d 937 (7th Cir. 2020).
253. *Id.*
254. *Id.* at 940.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at 942.
260. *Id.*
261. *Id.*

Richfield's predecessor contracting with the government to provide zinc oxide. However, despite the similarities between the cases, the Fifth and Seventh circuits have reached opposite conclusions on the issue of removal.

D. The Eighth Circuit

Nearly identical to *Tyson v. Glenn*, the Eighth Circuit case of *Buljic v. Tyson Foods, Inc.* also provided the oil and gas *Chevron* defendants with a glimmer of hope. However, the Supreme Court declined to hear this case, too.

A COVID-19 outbreak occurred at Tyson's Waterloo, Iowa facility in March and April 2020.[262] The *Buljic* plaintiffs alleged that Tyson's executives and supervisors knew of the outbreak, but did not provide workers with enough masks or other protective equipment, nor did they enforce sufficient social distancing measures.[263] Additionally, plaintiffs alleged that Tyson transferred workers from another Iowa facility that had temporarily suspended its operations because of an outbreak to the Waterloo facility without testing or quarantining those employees, and telling other employees that sick co-workers had the flu, not COVID-19.[264] Allegedly, local officials visited the Waterloo facility in April 2020 and urged Tyson to temporarily close the plant.[265] Eventually, Tyson closed the plant from April 22, 2020, to May 7, 2020.[266] Local officials reported more than 1,000 COVID-19 infections among the 2,800 employees at the Waterloo facility.[267] Among those infected employees were the plaintiffs' relatives, who subsequently died from the disease.[268]

Like the Fifth Circuit in *Plaquemines v. Chevron* and *Glenn v. Tyson Foods, Inc.*, the Eighth Circuit held that the cases were not eligible for removal under section 1442 because Tyson was not "acting under" a federal officer when the plaintiff's relatives contracted COVID-19.[269] The Eighth Circuit found that Tyson and other meat processors being subject to "pervasive federal regulation" was insufficient to confer federal jurisdiction. Instead, a private entity must "go beyond simple compliance

262. Buljic v. Tyson Foods, Inc., 22 F.4th 730, 737 (8th Cir. 2021)
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*

with the law and help officers fulfill other basic governmental tasks."[270] Tyson argued that the federal government *did* enlist the company to help fulfill a basic governmental task: "ensuring that the national food supply would not be interrupted during an unprecedented national crisis."[271] However, the Eighth Circuit reasoned that just because an industry is "critical" does not mean that every entity within that industry fulfills a basic governmental task, nor does it mean that workers within that "critical" industry act under the direction of federal officers.[272] While the government has an interest in ensuring a stable food supply, processing meat is not the government's task.[273] Therefore, the federal government merely designating an industry as critical is not sufficient to "federalize an entity's operations and confer federal jurisdiction."[274]

Tyson further argued that communications from federal officials, such as President Trump's Coronavirus Guidelines for America and the USDA's statements, constituted federal directives.[275] However, the Eighth Circuit found that these communications from the federal government merely emphasized the meat processing industry's importance and encouraged the industry to remain operational during the pandemic.[276] The communications did not "direct or enlist Tyson to fulfill a government function or even tell Tyson specifically what to do."[277] The court also noted that despite the government's encouragement to remain open, Tyson's Waterloo facility temporarily closed because of outbreaks, indicating that Tyson retained "complete, independent discretion over the continuity of its operations."[278]

Lastly, the court addressed Tyson's argument that the company was under the federal government's direction, as evidenced by President Trump's invocation of the DPA.[279] Tyson argued that President Trump had invoked the DPA *informally*, and thus, had enlisted private parties like Tyson to carry out the government's duty before he issued EO 13917,

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270. *Id.*
271. Brief for Appellants, Buljic v. Tyson Foods, Inc., 22 F.4th 730 (8th Cir. 2021), 2021 WL 770501, at *30.
272. *Buljic*, 22 F.4th at 740.
273. *Id.*
274. *Id.*
275. Brief for Appellants, Buljic v. Tyson Foods, Inc., 22 F.4th 730 (8th Cir. 2021), 2021 WL 770501, at *30.
276. *Buljic*, 22 F.4th at 740–41.
277. *Id.* at 741.
278. *Id.*
279. *Id.*

which *formally* invoked the DPA.[280] The issuance of the executive order was merely a formalization of "the unprecedented federal involvement in ensuring the national food supply that commenced with the declaration of a nationwide emergency and the invocation of the critical infrastructure emergency plans."[281] The Eighth Circuit rejected Tyson's argument, not because the government's action in the pandemic's early days were informal, but because they did not contain directives to carry out the government's tasks.[282] Instead, the actions indicated a "cooperative approach," and simply encouraged various industries to continue operations while heeding health and safety guidance from the government.[283]

E. The Eleventh Circuit

The Eleventh Circuit has also held in *Caver v. Central Alabama Electric Cooperative* that a private company supplying electricity to rural Alabama was entitled to federal officer removal because it was acting under a federal officer's directions or regulations to fulfill a governmental task.[284] In *Caver*, members of the Central Alabama Electric Cooperative (CAEC) brought a class action against CAEC, alleging that the cooperative refused to pay out excess revenues to its members.[285] CAEC removed the case to federal court, pointing out that the federal government loans capital to CAEC and highly regulates CAEC.[286]

The court found that CAEC was acting under a federal officer because CAEC and other rural electric companies are subject to stringent regulations imposed by the federal government.[287] The Rural Electrification Administration (REA) supervised the planning, construction, and operations of the facilities it finances as a lending agency.[288] Because the REA was treated as a lending agency and not just a public utility regulatory body, any loans made by the REA's successor,

280. Tyson specifically pointed to a tweet from President Trump that read, "[t]he [DPA] is in full force, but haven't had to use it because no one has said NO!" Brief for Appellants, Buljic v. Tyson Foods, Inc., 22 F.4th 730 (8th Cir. 2021), 2021 WL 770501, at *34–35.

281. *Id.* at *36–37.

282. *Buljic*, 22 F.4th at 741.

283. *Id.*

284. Caver v. Cent. Ala. Elec. Coop., 845 F.3d 1135 (11th Cir. 2017).

285. *Id.* at 1137–38.

286. *Id.*

287. *Id.* at 1143.

288. *Id.*

the U.S. Department of Agriculture Rural Utilities Services (RUS), must follow the agency's regulations and the Rural Electrification Act (RE Act).[289] The RE Act authorizes the REA to grant loans "for rural electrification and the furnishing of electric energy to persons in rural areas."[290] CAEC and RUS had a loan agreement that allowed CAEC to make distributions to its members.[291]

According to the Seventh Circuit's analysis, the significant federal regulations CAEC and other rural electric cooperatives are subject to are not alone sufficient to satisfy federal officer removal, but they do exemplify a "close and extensive relationship between CAEC and RUS, as well as RUS's significant level of control over CAEC's operations."[292] Additionally, the court found that CAEC assisted RUS with accomplishing its duties, further supporting removal.[293]"[Rural electric cooperatives] are instrumentalities of the United States. They were chosen by Congress for the purpose of bringing abundant, low cost electric energy to rural America."[294] The court examined the REA's history, explaining that the REA was created to guide and control the process of bringing electricity to rural communities.[295] To accomplish that goal, Congress and President Franklin D. Roosevelt allowed the REA to loan money to state entities, which would then work to expand electricity to rural areas under the REA's supervision, to fund its objective of expanding electricity to rural areas.[296] Therefore, the CAEC "helps assist or carry out the duties of RUS and works closely with RUS to fulfill the congressional objective of bringing electricity to rural areas that would otherwise go unserved."[297] If the CAEC did not provide assistance to the RUS, the government would have to carry out the task itself in the absence of a contract with a private firm.[298]

The extensive regulations CAEC is subject to can be likened to the regulations and directives PAW issued to the defendant oil and gas companies in *Chevron*. If the RUS regulations and the original purpose of the REA were sufficient to find removal proper, then the oil and gas

289. *Id.*
290. *Id.* at 1138.
291. *Id.* at 1139.
292. *Id.* at 1143.
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.* at 1144.
298. *Id.*

companies' relationship with PAW to produce oil during wartime requires a closer examination.

IV. SOLUTION

The Fifth and Eighth Circuits seem to find that if there is no contract between the government and the private entity involved, the private entity is not acting under a federal officer. On the other hand, the Third, Seventh, and Eleventh Circuits hold that a federal officer's direction or control is not limited to a contractual relationship. Instead, if a private entity is providing a product or service that accomplishes an important government purpose, a federal officer's direction and control may be an order, regulation, or contract.

In early 2023, the U.S. Supreme Court denied certiorari in both *Plaquemines Parish v. Chevron* and the two *Tyson* cases. Although the denials do not necessarily mean the Court agrees with the opinions of the Fifth and Eighth Circuits, it means the Court does not find that the issue is important enough to necessitate an answer now. However, this is far from correct. The Supreme Court must grant certiorari in one of the dozens of Louisiana land loss litigation cases to resolve the conflict among the circuits regarding the "acting under" requirement for federal officer removal. The Court's decision is vital to several important cases, the entire oil and gas industry as a whole, and the industry's future in Louisiana. Additionally, whether cases with similar facts are removed based on federal officer removal should not depend on which circuit court heard the case. Enumerating a clear, uniform rule is necessary for the land loss cases to finally be decided on the merits rather than focusing on where the case will be heard.

Specifically, the U.S. Supreme Court should adopt the approaches of the Fifth and Eighth Circuits. The Fifth and Eighth Circuits focus on the existence of a contract between the parties, which should be the proper focal point of the "acting under" inquiry. The circuits that do not focus on the existence of a contract focus on the relationship between the government and private person or entity and the level of control or guidance the government has over that person or entity. That focus is not the ideal standard for such cases. Removing a case under the federal officer statute because a private person or entity simply complies with federal laws, rules, or regulations cannot become the uniform standard. If this were the case, anyone who files federal taxes could argue they are entitled to federal officer jurisdiction since they must follow extensive rules and regulations to complete that task. Airplane passengers who comply with the Federal Aviation Administration's rules on an airplane or the

Transportation Security Administration's rules in an airport could also argue that they were acting under a federal officer's direction. Allowing for such interpretations would be absurd. Being subject to, and following, federal regulations is not enough for federal officer jurisdiction. Sure, the taxpayer or airplane passenger may be helping or assisting the federal government in some way, but these people clearly are not "acting under" a federal agency or the federal government for removal purposes.

The Supreme Court must reiterate its prior holding in *Watson*. In that case, the Court held that federal officer removal jurisdiction is proper if the private parties were "authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law."[299] More specifically, the Court must emphasize that these types of relationships are identified by government contracts, payment, an employer-employee relationship, or a principal-agent relationship.[300] Finding removal proper in a case that lacks a solid contract or relationship is questionable. Removing a case because of a "special relationship" arising out of the federal government merely setting an industry's rules and regulations, no matter how strict or extensive such rules are, is not the level of control required for a party to "act under" a federal officer. This requirement must be evidenced by a clear contractual relationship to avoid providing parties with the benefits of a federal forum when such a forum is not actually necessary nor warranted.

CONCLUSION

To finally put an end to the long game of tug-of-war between plaintiffs and defendant-companies in a variety of cases, the Supreme Court must grant certiorari in one of over 40 Louisiana land loss cases. Circuit courts are split when it comes to determining what constitutes "acting under" a federal officer's direction, and this confusion has resulted in cases being removed simply because of whichever circuit court happens to hear the case. If the Supreme Court grants certiorari eventually, the Court should reiterate the Fifth and Eighth Circuit Courts' decision in *Parish of Plaquemines v. Chevron*, finding that removal is improper because the defendant oil companies lack the necessary evidence to prove they were acting under the federal government: a contract, payment, and employer-employee relationship, or a principal-agent relationship.

Oil and gas companies remain vital to Louisiana's economy, but they have caused damage that continues to harm the ever-eroding coast. This

299. Watson v. Philip Morris Co., Inc., 551 U.S. 142, 143 (2007).
300. *Id.* at 156.

damage can be mitigated by restoring the coast and discouraging harmful oil exploration activities. Finding federal officer removal improper in a Louisiana land loss case is essential to discouraging such harmful activities and protecting Louisiana's coast.

The United States Supreme Court should grant certiorari in one of the dozens of land loss cases to clear up the confusion surrounding federal officer removal. The Court's decision, no matter what it is, would have precedential effect for cases arising out of the recent COVID-19 pandemic, as seen in the *Tyson* cases, but would also reach back years to WWII, when oil and gas companies ramped up not only oil production, but also the erosion of Louisiana's coast.