No. 18-30652

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES A. LATIOLAIS,

Plaintiff – Appellee,

v.

HUNTINGTON INGALLS, INCORPORATED, formerly known as Northrop Grumman Shipbuilding, Incorporated, formerly known as Northrop Grumman Ship Systems, Incorporated, formerly known as Avondale Industries, Incorporated,

Defendant – Appellant.

On Appeal from the United States District Court
for the Eastern District of Louisiana

UNOPPOSED MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE EN BANC *AMICUS CURIAE* BRIEF

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5948

C. Frederick Beckner III
Counsel of Record
Eric D. McArthur
Tobias S. Loss-Eaton
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
rbeckner@sidley.com

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

James A. Latiolais v. Huntington Ingalls, Inc., No. 18-30652

CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

Under Federal Rule of Appellate Procedure 26.1 and Circuit Rule 28.2.1, the undersigned counsel of record certifies that the Chamber of Commerce of the United States of America is a nonprofit business federation. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The undersigned counsel of record also certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

I. PARTIES TO THE APPEAL

1. Defendant-Appellant:

Huntington Ingalls Incorporated (formerly known as Northrop Grumman Shipbuilding, Incorporated, formerly known as Northrop Grumman Ship Systems, Incorporated, formerly known as Avondale Industries, Incorporated, formerly known as Avondale Shipyards, Incorporated, formerly known as Avondale Marine Ways, Incorporated)

2. Counsel for Defendant-Appellant:

Gus A. Fritchie
Timothy F. Daniels
David M. Melancon
Edward W. Trapolin
Alison A. Spindler
Alex T. Robertson
Irwin Fritchie Urquhart & Moore LLC
400 Poydras Street, Suite 2700
New Orleans, Louisiana 70130
(504) 310-2100

Gregory G. Garre
Benjamin W. Snyder
Charles S. Dameron
Latham & Watkins LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207

3. Plaintiff-Appellee:

James A. Latiolais (deceased; succeeded by his surviving spouse, Shirley Ann Latiolais, and his children, James K. Latiolais, Corey M. Latiolais, and Tiffany Latiolais Potier)

4. Counsel for Plaintiff-Appellee:

Thomas M. Flanagan
Sean P. Brady
Anders F. Holmgren
Flanagan Partners LLP
201 St. Charles Avenue, Suite 2405
New Orleans, Louisiana 70170

Cameron R. Waddell
Jody E. Anderman
Claire Carville
Wadell Anderman, LLC
2222 Eastgate Drive
Baton Rouge, Louisiana 70816

II. ADDITIONAL PARTIES

The following additional parties and counsel of record are not parties to the appeal, but have an interest in the outcome of this appeal:

5. Eagle, Inc.

6. Counsel for Eagle, Inc.:

Susan Beth Kohn
April Ann McQuillar
Douglas Kinler
James R. Guidry
Simon, Peragine, Smith & Redfearn, LLP
Energy Centre, 1100 Poydras St., 30th Floor
New Orleans, Louisiana 70163

7. The McCarty Corporation

8. Counsel for The McCarty Corporation:

Susan B. Kohn
April A. McQuillar
Douglas Kinler
James R. Guidry
Simon, Peragine, Smith & Redfearn, LLP
Energy Centre, 1100 Poydras St., 30th Floor
New Orleans, Louisiana

9. Reilly-Benton Co., Inc.

10. Counsel for Reilly-Benton Co., Inc.:

Thomas L. Cougill
Jamie M. Zanovec
Jennifer D. Zajac
Jennifer H. McLaughlin
Willingham, Fultz & Cougill, LLP
Wells Fargo Bank Building
5625 Cypress Creek Pwky, 6th Floor
Houston, Texas 77069

11. Hopeman Brothers, Inc.

12. Counsel for Hopeman Brothers, Inc.:

Kaye N. Courington
Jeffrey M. Burg
Blaine A. Moore
Jonathan P. Hilbun
Courington, Kiefer & Sommers, LLC
616 Girod Street
New Orleans, Louisiana 70130

13. Liberty Mutual Insurance Company (as insurer of Wayne Manufacturing Co., Inc.)

14. Counsel for Liberty Mutual Insurance Company:

Kaye N. Courington
Jeffrey M. Burg
Blaine A. Moore
Jonathan P. Hilbun
Courington, Kiefer & Sommers, LLC
616 Girod Street
New Orleans, Louisiana 70130

15. CBS Corporation

16. Counsel for CBS Corporation:

John J. Hainkel, III
Angela M. Bowlin
James H. Brown
Frilot L.L.C.
1100 Poydras Street, Suite 3700
New Orleans, Louisiana 70163

17. International Paper Company

18. Counsel for International Paper Company:

Walter G. Watkins, III
Mary R. Arthur
Daniel S. Roberts
T. Petyon Smith
Elizabeth R. Penn
Forman Watkins & Krutz LLP
One Shell Square
701 Poydras Street, Suite 4350
New Orleans, LA 70139

19. Uniroyal, Inc.

20. Counsel for Uniroyal, Inc.:

Mary R. Arthur
Amy L. Maccherone
Forman Watkins & Krutz LLP
One Shell Square
701 Poydras Street, Suite 4350
New Orleans, LA 70139

III. AMICUS CURIAE

21. Chamber of Commerce of the United States of America

22. Counsel for the Chamber of Commerce:

C. Frederick Beckner III
Eric D. McArthur
Tobias S. Loss-Eaton
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Steven P. Lehotsky
Michael B. Schon
U.S. Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5948

/s/ *C. Frederick Beckner III*
C. Frederick Beckner III

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

UNOPPOSED MOTION FOR LEAVE TO FILE EN BANC *AMICUS CURIAE* BRIEF

The Chamber of Commerce of the United States of America respectfully requests leave to file the attached en banc *amicus* brief in support of Appellant and reversal.

First, all parties have consented to the filing of this brief, and this motion is unopposed.

Second, as reflected in the panel opinion and this Court's grant of rehearing en banc, this case raises important questions about the scope of the federal officer removal statute, 28 U.S.C. § 1442(a)(1). *See Latiolais v. Huntington Ingalls, Inc.*, 918 F.3d 406, 412–13 (5th Cir.), *reh'g en banc granted,* 923 F.3d 427 (5th Cir. 2019). The Chamber believes that the attached brief will aid the Court's review of those issues. The brief discusses the text and legislative history of the statute, and explains the practical consequences for government programs of a narrow interpretation of the removal provision.

The Chamber has a substantial interest in this case. Many of the Chamber's members serve as federal contractors, performing vital functions for the United States in national defense, law enforcement, healthcare, agriculture, transportation, and other areas. In carrying out

these functions, Chamber members are sometimes exposed to potential tort liability related to goods manufactured or services provided at the request, and according to the exacting specifications, of the United States. The Chamber and its members thus have a strong interest in ensuring the proper interpretation and application of the federal officer removal statute as Congress amended and expanded it in 2011. The Chamber often files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including in cases affecting government contractors. *See, e.g.*, *Ruppel v. CBS Corp.*, 701 F.3d 1176 (7th Cir. 2012); *County of San Mateo v. Chevron Corp.*, No. 18-15499 (9th Cir. docketed Mar. 27, 2018).

June 14, 2019

Respectfully submitted,

/s/ *C. Frederick Beckner III*

C. Frederick Beckner III
Counsel of Record
Eric D. McArthur
Tobias S. Loss-Eaton
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
rbeckner@sidley.com

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5948

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

1. This motion complies with Federal Rule of Appellate Procedure 27(d)(2)'s length limitation because it contains 305 words, excluding the material exempted by Rule 32(f).

2. This motion complies with Rule 27(d)(1)(E)'s typeface and type-style because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

June 14, 2019

Respectfully submitted,

/s/ *C. Frederick Beckner III*

C. Frederick Beckner III

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June 2019, I caused the foregoing motion to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notice of this filing to all registered CM/ECF users.

Respectfully submitted,

/s/ *C. Frederick Beckner III*
C. Frederick Beckner III

Counsel for Amicus Curiae
Chamber of Commerce of the
United States of America

No. 18-30652

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES A. LATIOLAIS,

Plaintiff – Appellee,

v.

HUNTINGTON INGALLS, INCORPORATED, formerly known as Northrop Grumman Shipbuilding, Incorporated, formerly known as Northrop Grumman Ship Systems, Incorporated, formerly known as Avondale Industries, Incorporated,

Defendant – Appellant.

On Appeal from the United States District Court
for the Eastern District of Louisiana

EN BANC BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT AND REVERSAL

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5948

C. Frederick Beckner III
Counsel of Record
Eric D. McArthur
Tobias S. Loss-Eaton
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
rbeckner@sidley.com

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

James A. Latiolais v. Huntington Ingalls, Inc., No. 18-30652

CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

Under Federal Rule of Appellate Procedure 26.1 and Circuit Rule 28.2.1, the undersigned counsel of record certifies that the Chamber of Commerce of the United States of America is a nonprofit business federation. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The undersigned counsel of record also certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

I. PARTIES TO THE APPEAL

1. Defendant-Appellant:

Huntington Ingalls Incorporated (formerly known as Northrop Grumman Shipbuilding, Incorporated, formerly known as Northrop Grumman Ship Systems, Incorporated, formerly known as Avondale Industries, Incorporated, formerly known as Avondale Shipyards, Incorporated, formerly known as Avondale Marine Ways, Incorporated)

2. Counsel for Defendant-Appellant:

Gus A. Fritchie
Timothy F. Daniels
David M. Melancon
Edward W. Trapolin
Alison A. Spindler
Alex T. Robertson
Irwin Fritchie Urquhart & Moore LLC
400 Poydras Street, Suite 2700
New Orleans, Louisiana 70130
(504) 310-2100

Gregory G. Garre
Benjamin W. Snyder
Charles S. Dameron
Latham & Watkins LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207

3. Plaintiff-Appellee:

James A. Latiolais (deceased; succeeded by his surviving spouse, Shirley Ann Latiolais, and his children, James K. Latiolais, Corey M. Latiolais, and Tiffany Latiolais Potier)

4. Counsel for Plaintiff-Appellee:

Thomas M. Flanagan
Sean P. Brady
Anders F. Holmgren
Flanagan Partners LLP
201 St. Charles Avenue, Suite 2405
New Orleans, Louisiana 70170

Cameron R. Waddell
Jody E. Anderman
Claire Carville
Wadell Anderman, LLC
2222 Eastgate Drive
Baton Rouge, Louisiana 70816

II. ADDITIONAL PARTIES

The following additional parties and counsel of record are not parties to the appeal, but have an interest in the outcome of this appeal:

5. Eagle, Inc.

6. Counsel for Eagle, Inc.:

Susan Beth Kohn
April Ann McQuillar
Douglas Kinler
James R. Guidry
Simon, Peragine, Smith & Redfearn, LLP
Energy Centre, 1100 Poydras St., 30th Floor
New Orleans, Louisiana 70163

7. The McCarty Corporation

8. Counsel for The McCarty Corporation:

Susan B. Kohn
April A. McQuillar
Douglas Kinler
James R. Guidry
Simon, Peragine, Smith & Redfearn, LLP
Energy Centre, 1100 Poydras St., 30th Floor
New Orleans, Louisiana

9. Reilly-Benton Co., Inc.

10. Counsel for Reilly-Benton Co., Inc.:

Thomas L. Cougill
Jamie M. Zanovec
Jennifer D. Zajac
Jennifer H. McLaughlin
Willingham, Fultz & Cougill, LLP
Wells Fargo Bank Building
5625 Cypress Creek Pwky, 6th Floor
Houston, Texas 77069

11. Hopeman Brothers, Inc.

12. Counsel for Hopeman Brothers, Inc.:

Kaye N. Courington
Jeffrey M. Burg
Blaine A. Moore
Jonathan P. Hilbun
Courington, Kiefer & Sommers, LLC
616 Girod Street
New Orleans, Louisiana 70130

13. Liberty Mutual Insurance Company (as insurer of Wayne Manufacturing Co., Inc.)

14. Counsel for Liberty Mutual Insurance Company:

Kaye N. Courington
Jeffrey M. Burg
Blaine A. Moore
Jonathan P. Hilbun
Courington, Kiefer & Sommers, LLC
616 Girod Street
New Orleans, Louisiana 70130

15. CBS Corporation

16. Counsel for CBS Corporation:

John J. Hainkel, III
Angela M. Bowlin
James H. Brown
Frilot L.L.C.
1100 Poydras Street, Suite 3700
New Orleans, Louisiana 70163

17. International Paper Company

18. Counsel for International Paper Company:

Walter G. Watkins, III
Mary R. Arthur
Daniel S. Roberts
T. Petyon Smith
Elizabeth R. Penn
Forman Watkins & Krutz LLP
One Shell Square
701 Poydras Street, Suite 4350
New Orleans, LA 70139

19. Uniroyal, Inc.

20. Counsel for Uniroyal, Inc.:

Mary R. Arthur
Amy L. Maccherone
Forman Watkins & Krutz LLP
One Shell Square
701 Poydras Street, Suite 4350
New Orleans, LA 70139

III. AMICUS CURIAE

21. Chamber of Commerce of the United States of America

22. Counsel for the Chamber of Commerce:

C. Frederick Beckner III
Eric D. McArthur
Tobias S. Loss-Eaton
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Steven P. Lehotsky
Michael B. Schon
U.S. Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5948

/s/ *C. Frederick Beckner III*
C. Frederick Beckner III

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Legislative Materials

AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber often files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including in cases affecting government contractors. *See, e.g.*, *Ruppel v. CBS Corp.*, 701 F.3d 1176 (7th Cir. 2012); *County of San Mateo v. Chevron Corp.*, No. 18-15499 (9th Cir. docketed Mar. 27, 2018).

Many of the Chamber's members serve as federal contractors, performing vital functions for the United States in national defense, law enforcement, healthcare, agriculture, transportation, and other areas. In carrying out these functions, Chamber members are sometimes exposed to potential tort liability related to goods manufactured or services provided at the request, and according to the exacting specifications, of the

United States. The Chamber and its members thus have a strong interest in ensuring the proper interpretation and application of the federal officer removal statute as Congress amended and expanded it in 2011.

All parties have consented to the filing of this brief, and the Chamber has moved for leave to file it. No party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than the Chamber, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The panel was correct that Congress's 2011 amendment of the federal officer removal statute abrogated the causal-nexus test this Court applied before. The amended statutory text, the legislative history, and the statute's purpose all support this conclusion.

A. The causal-nexus test conflicts with the statutory text as amended in 2011. That test derives from the prior statute's use of the word "for," as in "*for* any act under color of [federal] office." 28 U.S.C. § 1442(a)(1) (2006) (emphasis added). But the 2011 amendments supplemented this term with another, alternative way to show the requisite

connection to federal authority: "for *or relating to*." 28 U.S.C. § 1442(a)(1) (2012) (emphasis added). Adding this disjunctive phrase necessarily expanded the universe of acts that can serve as predicates for removal. Any other conclusion would disregard Congress's deliberate choice to amend the statute and render the words "or relating to" surplusage.

Congress also expanded the statute using the broadest possible language. As the Supreme Court and this Court have repeatedly held, the statutory phrase "relating to" reaches "any subject that has 'a connection with, or reference to,' the topics the statute enumerates." *E.g.*, *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1197 (2017); *United States v. Hubbard*, 480 F.3d 341, 347 (5th Cir. 2007). This expansive language does not require a causal connection: An act may "relat[e] to" federal authority without being *caused* by it. Thus, as the panel concluded and other circuits have held, "given the addition of the words 'or relating to' in the 2011 revision of the statute . . . 'it is sufficient for there to be a connection or association between the act in question and the federal office.'" *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016); *accord Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017);

Caver v. Cent. Ala. Elec. Coop., 845 F.3d 1135, 1144 & n.8 (11th Cir. 2017). A causal link is not required.

B. To the extent it is relevant given the amended statute's plain language, the legislative history of the 2011 amendments bolsters this conclusion. Congress added the phrase "relating to" to § 1442(a)(1) to "broaden the universe of acts that enable Federal officers to remove to Federal court." H.R. Rep. 112-17, at 6, *reprinted in* 2011 U.S.C.C.A.N. 420, 425. Although the 2011 amendments were apparently aimed at ensuring that federal officers or agents could remove pre-suit discovery proceedings, "a statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.'" *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980). What matters is not "the concerns that initially motivated Congress," *United States v. Kay*, 359 F.3d 738, 753 (5th Cir. 2004), but "the breadth of the language" it used, *Louisiana Pub. Serv. v. FCC*, 476 U.S. 355, 372–73 (1986). And in all events, the legislative history suggests that Congress eliminated the causal-nexus test because it was an obstacle to removing pre-suit discovery cases.

C. Setting aside the causal-nexus test would also further the removal statute's purposes. The Supreme Court and this Court have emphasized that the federal officer removal provision—unlike other removal provisions—"must be 'liberally construed'" in favor of removal. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007); *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 462 (5th Cir. 2016). And for good reason: As Congress reiterated when it broadened the statute in 2011, "Federal officers or agents . . . should not be forced to answer for conduct asserted within their Federal duties in a state forum that invites 'local interests or prejudice' to color outcomes." H.R. Rep. 112-17, at 3.

That is no less true of parties that partner with the federal government, ranging from contractors in the governmental supply chain to local police agencies to informants. These parties can play vital roles in many aspects of the government's operations. Ensuring a federal forum for claims against them helps encourage private or local entities to work with the government and provide services that it might otherwise have to perform itself. Allowing such claims to proceed in potentially hostile state forums may dissuade these entities from providing much-needed services to the federal government.

Consistent with the statute's plain language, history, and purpose, this Court should now join the Third and Fourth Circuits in recognizing that the 2011 amendments abrogated the causal-nexus requirement.

ARGUMENT

THE CAUSAL-NEXUS TEST IS INCONSISTENT WITH THE STATUTE'S AMENDED TEXT, HISTORY, AND PURPOSE.

A. The Causal-Nexus Test Fails To Give Effect To The Amended Statutory Text.

"When faced with questions of statutory construction, we must first determine whether the statutory text is plain and unambiguous and, if it is, we must apply the statute according to its terms." *Burnett Ranches, Ltd. v. United States*, 753 F.3d 143, 148 n.9 (5th Cir. 2014). Here, the Court's analysis should "begin[ ] and end[ ] with the text," *id.*, because a causal-nexus requirement is incompatible with § 1442(a)(1)'s clear statutory language, as amended in 2011.

Until 2011, § 1442(a)(1) allowed removal of any "civil action . . . against . . . [t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof . . . *for* any act under color of such office." 28 U.S.C. § 1442(a)(1) (2006) (emphasis added). Now, the statute reaches any civil action "against or directed to" the listed parties "for *or relating to* any act under

color of such office." 28 U.S.C. § 1442(a)(1) (2012) (emphasis added); *see* Removal Clarification Act of 2011, Pub. L. No. 112-51 § 2(b), 125 Stat. 545. Congress's addition of "or relating to" unambiguously abrogates the causal-nexus requirement, for two reasons.

First, retaining the causal-nexus test would ignore the fact that Congress changed the statute. The causal-nexus test was expressly based on the prior statute's use of the word "for" in the phrase "for any act under color of [federal] office." *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) ("To . . . establish that the suit is '*for* a[n] act under color of office,' . . . the officer must show a nexus, a '"causal connection" between the charged conduct and asserted official authority.'" (emphasis in original)).[1] In the 2011 amendments, Congress left the word "for" untouched and added "relating to" as another, *disjunctive* way to satisfy the statute's requirements for removal: "for *or* relating to." Keeping the existing, pre-

[1] When the Supreme Court adopted the causal-nexus requirement, the then-applicable statute required that the suit be "on account of" any act under color of federal office. *See Maryland v. Soper (No. 1)*, 270 U.S. 9, 21 n.1 (1926) (quoting 39 Stat. 532, ch. 399, § 33); *see id.* at 33 (tying the "causal connection" requirement to the phrase "on account of"). After Congress replaced "on account of" with "for," the Court tied the causal-nexus requirement to the word "for." *See Acker*, 527 U.S. at 431.

amendment interpretation would thus violate both the presumption that "Congress . . . intends its amendment[s] to have real and substantial effect," *Stone v. INS*, 514 U.S. 386, 397 (1995), and the "basic interpretive canon[ ]" that "[a] statute should be construed so that effect is given to all its provisions," *Corley v. United States*, 556 U.S. 303, 314 (2009). As the panel said, refusing to expand the statute's reach in response to this amendment "simply does not give effect to the words 'relating to.'" *Latiolais v. Huntington Ingalls, Inc.*, 918 F.3d 406, 412 (5th Cir.), *reh'g en banc granted,* 923 F.3d 427 (5th Cir. 2019).

Second, Congress expanded the statute using deliberately broad language. As the panel recognized, "when the term 'relating to' appears in a statute, it implies broad and comprehensive coverage." *Id.* at 408. "[W]hen asked to interpret statutory language including the phrase 'relating to,'" the Supreme Court "has typically read the relevant text expansively." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (observing that the Supreme Court has characterized the phrase "relating to" in ERISA's preemption provision as having a "broad

scope" and an "expansive sweep" and being "deliberately expansive" and "conspicuous for its breadth").

Moreover, unlike connectors such as "for" or "on account of," the phrase "relating to" implies no necessary causal connection between the charged conduct and official authority. Objects or events can stand in many kinds of relations to one another besides causal relations. The "ordinary meaning of these words is a broad one—'to stand in *some* relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales*, 504 U.S. at 383 (emphasis added). Consistent with this plain meaning, "Congress characteristically employs the phrase to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates." *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1197 (2017).

The Supreme Court has thus applied the phrase "relating to" broadly in many contexts. *Morales* read this phrase in the Airline Deregulation Act's preemption provision to "express a broad pre-emptive purpose," reaching any "State enforcement actions having *a connection with or reference to* airline 'rates, routes, or services.'" 504 U.S. at 383–84 (emphasis added). *Appling* held that the phrase "statement respecting the

debtor's financial condition" in the bankruptcy code—which the Court read as synonymous with "relating to"—reaches any statement with "a *direct relation to or impact on* the debtor's overall financial status." 138 S. Ct. at 1761 (emphasis added). *Coventry Health Care* relied on "Congress' use of the expansive phrase 'relate to'" to give broad effect to the Federal Employees Health Benefits Act's preemption provision. 137 S. Ct. at 1197. And many cases have given the phrase "relates to" in ERISA's preemption provision its "broad common-sense meaning." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990). Thus, a state law "'relates to' an employee benefit plan, in the normal sense of the phrase, if it has *a connection with or reference to* such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–97 (1983) (emphasis added); *accord New York State Blue Cross Plans v. Travelers Ins.*, 514 U.S. 645, 656 (1995).

This Court, too, has given the statutory phrase "relating to" a broad meaning. *United States v. Hubbard* broadly construed a criminal statute "refer[ring] to prior convictions under state laws 'relating to' abusive sexual conduct." 480 F.3d 341, 346–47 (5th Cir. 2007) ("The ordinary meaning of these words [relating to] is a broad one . . . ." (alteration in origi-

nal)). And *Peters v. Ashcroft* similarly construed an immigration provision covering convictions for violating a law "relating to a controlled substance," noting that "the Supreme Court has traditionally afforded an expansive reading of 'related to.'" 383 F.3d 302, 306–07 (5th Cir. 2004); *cf. Pennzoil Exploration, Prod. v. Ramco Energy*, 139 F.3d 1061, 1067 (5th Cir. 1998) (noting in the arbitration context that "relating to" has an "expansive reach").

Given the expansive "ordinary meaning" of "relating to," § 1442 now allows removal of any claim with "some relation" to, *Morales*, 504 U.S. at 383, or "a connection with," *Coventry Health Care*, 137 S. Ct. at 1197, an act under color of federal office. As other circuits have recognized, "the addition of the words 'or relating to' in the 2011 revision of the statute" means that "it is sufficient for there to be a connection or association between the act in question and the federal office." *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016); *see also Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017) ("§ 1442(a)(1) requires . . . only that the charged conduct *relate to* an act under color of federal office."); *Caver v. Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1144 & n.8 (11th Cir. 2017) ("The phrase 'relating to' is broad and requires only 'a "connection" or

"association" between the act in question and the federal office.'"). This expansive test does not require a causal link. An act can "relate to" or have some "connection with" federal authority without being caused by it. *See Sawyer*, 860 F.3d at 258 (the district court erred by requiring a "strict causal connection"); *In re Commonwealth's Motion to Appoint Counsel*, 790 F.3d 457, 471 (3d Cir. 2015) (concluding that the amended statute no longer requires proponents of removal "to demonstrate that the acts for which they [a]re being sued occurred at least in part *because of* what they were asked to do by the Government" (internal quotation marks omitted)).

The panel was thus correct that "[a]pplying the post-2011 statutory language . . . would authorize removal of many more cases than the causal nexus test permits." *Latiolais*, 918 F.3d at 412. Here, for example, the plaintiff claims that Avondale, which built and refurbished naval vessels, "negligently failed to warn him about asbestos hazards." *Id.* at 408. "Because Avondale ran its own safety department free of Navy directives," the panel majority concluded that its alleged failure to provide asbestos warnings "is not an act under color of federal office, so Avondale is not being sued 'for' a federal act." *Id*. at 412. Even so, "Avondale's failure

to warn about asbestos certainly 'relates to' its federal act of building the ships." *Id*. Thus, as the panel recognized, rejection of the causal-nexus requirement "would change the outcome of this appeal." *Id.* The same would be true in any number of other cases. *See, e.g.*, *Sawyer*, 860 F.3d at 258 (finding "a sufficient 'connection or association'" even though the plaintiff challenged "warnings that were not specified by the Navy," because the defendant complied with Navy directives to provide related asbestos warnings); *Papp*, 842 F.3d at 813 (similar).[2]

[2] The "for or relating to" element is distinct from the "colorable federal defense" element. *See Mesa v. California*, 489 U.S. 121, 132 (1989). A removing defendant still needs to establish a colorable federal defense. *See, e.g., Jowers v. Lincoln Elec. Co.*, 617 F.3d 346, 352 (5th Cir. 2010). But especially in light of the expanded "for or relating to" test, the colorable federal defense requirement has no necessary bearing on whether the claim has a sufficient connection to acts taken under color of federal office. *See Acker*, 527 U.S. at 432 (reasoning, before 2011, that "demanding an airtight case on the merits in order to show the required causal connection" would "defeat the purpose of the removal statute"); *but cf. Legendere v. Huntington Ingalls, Inc.*, 885 F.3d 398, 404–05 (5th Cir. 2018) (Higginbotham, J., concurring) (suggesting that, at least where the defense is federal immunity, the pre-2011 "causal nexus analysis begins to take the same shape as the colorable federal defense inquiry" under *Boyle*). This distinction is underscored by the wide range of defenses that qualify, which do not depend on *Boyle* or a connection to acts taken under color of federal office. *See, e.g.*, *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1235 (8th Cir. 2012) (preemption, under Federal Employees Health Benefits Act); *Pretlow v. Garrison*, 420 F. App'x 798, 801–02 (10th Cir. 2011) (same, under federal employment statutes); *City of Cookeville v. Upper Cumberland Elec. Membership Co.*, 484 F.3d 380, 391 (6th Cir. 2007)

In short, the causal-nexus test depended on the pre-amendment statute's specific, narrow language ("for"). Congress supplemented that language with another, alternative test that sweeps far more broadly (". . . or relating to"). And the statute's expansive new language requires no causal connection. That is enough to conclude that Congress abrogated the causal-nexus test through the 2011 amendments—especially given the Supreme Court's command "that [this] statute must be 'liberally construed.'" *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007).

B. The 2011 Amendments' Legislative History Does Not Support The Causal-Nexus Test.

Given the statute's clear text, the Court need not consider legislative history. *E.g.*, *Boyle v. United States*, 556 U.S. 938, 950 (2009) (declining to consider legislative history given "the clear but expansive text of the statute"); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 377 (5th Cir. 2009) (en banc) ("Only after application of the principles of statutory construction, including the canons of construction, and after a conclusion that the statute is ambiguous may the court turn to legislative history.").

(same, under Rural Electrification Act). The two elements—"for or relating to" and "colorable federal defense"—are distinct.

But if the Court does consider the legislative history of the 2011 amendments, it will find more evidence that Congress intended to abrogate the causal-nexus test.

The Removal Clarification Act of 2011 is concise, *see* Pub. L. No. 112-51, 125 Stat. 545, and so is the accompanying House Report. The Report explains the relevant change in just two sentences: "Section 2(b) rewrites [§] 1442 by permitting removal by Federal officers 'in an official or individual capacity, for or relating to any act under color' of their office. *This is intended to broaden the universe of acts that enable Federal officers to remove to Federal court*." H.R. Rep. 112-17, at 6, *reprinted in* 2011 U.S.C.C.A.N. 420, 425 (emphasis added). As other courts have noted, this explanation bolsters the conclusion that § 1442(a)(1) is now "more permissive." *Papp*, 842 F.3d at 813; *see also Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1250 (9th Cir. 2017) ("Congress passed the Removal Clarification Act . . . because Congress felt that the courts were construing the statute too narrowly.").

To be sure, the 2011 amendments were apparently motivated by a specific, recurring problem: "a plaintiff who contemplates suit against a Federal officer petitions for discovery without actually filing suit in State

court." H.R. Rep. 112-17, at 4. Courts (including this Court) had held that such actions were not removable because they were not "civil actions," and Congress meant to override that conclusion. *Id*. at 3–4. The plaintiff here has thus argued that the 2011 amendments had "one purpose—addressing federal officers' vulnerability to 'pre-suit discovery' in state courts," and that the amendments should be read to do nothing more. Resp. to Reh'g Pet. 8. This argument has two fatal flaws.

First, it confuses the problem that prompted Congress to act with the scope of its chosen remedy. The Supreme Court "frequently has observed that a statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.'" *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980). This Court has likewise noted that Congress may "ultimately adopt[ ] [a] more generally-worded" provision that reaches beyond "the concerns that initially motivated Congress." *E.g.*, *United States v. Kay*, 359 F.3d 738, 753 (5th Cir. 2004). Thus, evidence of a specific "catalyz[ing]" force for a particular statute "does not define the outer limits of the statute's coverage." *New York v. FERC*, 535 U.S. 1, 21 (2002); *see also Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 128–29

(2003) (although Congress had a "primary concern" in mind, it "wrote expansively," and the statute's broad language controlled); *Louisiana Pub. Serv. v. FCC*, 476 U.S. 355, 372–73 (1986) (although the statute was "designed to overrule" a specific case, "the breadth of [its] language" covered other areas).

As a result, even if "the legislative history forcefully support[ed] the view that the major purpose of" the 2011 amendment to § 1442(a)(1) was to address pre-suit discovery against federal officers or agents, "applying the statute in accordance with its terms" is still the proper approach. *United States v. Turkette*, 452 U.S. 576, 591 (1981). And Congress used terms that on their face, in the House Report's words, "broaden the *universe of acts* that enable Federal officers to remove to Federal court," H.R. Rep. 112-17, at 6 (emphasis added)—not just the *type of proceedings* that can be removed.

Second, the plaintiff's argument overlooks evidence that abrogating the causal-nexus requirement was necessary to permit removal of the pre-suit discovery cases that concerned Congress. The Removal Clarification Act was first proposed as H.R. 5281 in 2010. *See* H.R. Rep. 112-17, at 2. The hearing on this "predecessor bill," *id.*, focused on the problems

created by state "pre-suit discovery procedures," which "muddied the waters of the Federal removal statute," *Hearing before the Subcomm. on Courts & Competition Policy of the Comm. on the Judiciary of the House of Representatives on H.R. 5281*, 111th Cong. 1 (May 25, 2010) (Serial No. 111-128). These pre-suit discovery proceedings included not only actions intended to discover evidence supporting federal officers' or agents' liability, but also actions intended to gather information they possessed that was relevant to litigation between third parties.[3] And the committee heard testimony that adding "relating to" was necessary to permit removal of these proceedings: "Because the amended § 1442 would now include proceedings that do not seek to impose civil liability or a criminal

[3] *See, e.g.*, *Hearing on H.R. 5281*, 111th Cong. at 10 ("In other cases, private individuals or corporations may seek the testimony of Federal officials performing investigatory functions for regulatory agencies. Officials from the Federal Aviation Administration, for example, could be subpoenaed in litigation among private parties over liability for an airline crash."); *id.* at 42 (discussing a case in which testimony from FBI technicians was sought by a state-court murder defendant to determine whether their views differed from the state's expert's views); *id.* at 63 (discussing case in which a federal employee was ordered to appear for examination in connection with a plaintiff's effort to garnish another federal employee's wages).

penalty on the federal officer, H.R. 5281 allows removal not only in proceedings 'for' acts under color of the federal office but also in proceedings 'relating to' such acts." *Id.* at 68 (Statement of Prof. Arthur D. Hellman).

This makes sense. In many of the pre-suit discovery cases about which Congress was concerned, the causal-nexus test would not be satisfied. For example, consider the above-noted case in which a state-court murder defendant sought testimony from FBI technicians to determine whether their views differed from the state's expert's views. *See id.* at 42. In such a case, there is no "'causal connection' between the charged conduct and asserted official authority," *Acker*, 527 U.S. at 424, because there is no "charged conduct" at all. There is simply a request for information relating to the federal officers' duties.[4] The legislative history thus suggests that Congress was justifiably concerned that the existing

[4] Likewise, a federal officer in such a case has no "colorable federal defense" *to liability*, since no liability is alleged. But removal is appropriate because the officer may—and often must, under government policy—resist a subpoena on federal-law grounds. *See Touhy v. Ragen*, 340 U.S. 462, 464–70 (1951) (FBI official properly followed regulations by refusing to provide government documents in response to subpoena issued to him); *Louisiana v. Sparks*, 978 F.2d 226, 235 & n.16 (5th Cir. 1992) (collecting § 1442(a) cases holding "that the sovereign immunity doctrine bars enforcement of [a] subpoena").

requirement that the suit be "for" an act done under color of federal office, with its causal-nexus requirement, would preclude removal of pre-suit discovery proceedings that Congress concluded should be removable, and that Congress addressed that problem by adding "or relating to."

Thus, even if Congress meant to ensure that pre-suit discovery cases could be removed, it had good reason to abrogate the causal-nexus test in service of that goal. And it chose to do so using language that applies equally to all federal officer cases, whether pre-suit or otherwise. The statute's amended text cannot be read to allow removal of pre-suit discovery cases "relating to" federal authority, but not other types of cases "relating to" it. The "for or relating to" standard applies without distinction to *every* court proceeding "against or directed to" the specified classes of defendants. 28 U.S.C. § 1442(a)(1) (2012). Congress's focus on pre-suit discovery proceedings may explain *why* it adopted the broad language it did, but it does not limit the scope of that language.

C. The Purposes Behind Federal Officer Removal Militate Against The Causal-Nexus Test.

Finally, the policies behind federal officer removal support a broader interpretation of the amended statute. Although courts generally

say that a "removal statute should be strictly construed in favor of remand," *Manguno v. Prudential Prop. Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002), the opposite is true here. The Supreme Court has consistently "rejected a 'narrow, grudging interpretation'" of the federal officer removal statute, *Acker*, 527 U.S. at 431, making clear that it "must be 'liberally construed,'" *Watson*, 551 U.S. at 147; *see also Willingham v. Morgan*, 395 U.S. 402, 406 (1969) ("The federal officer removal statute is not 'narrow' or 'limited.'"). Courts "take from [the statute's] history a clear command from both Congress and the Supreme Court that when federal officers and their agents are seeking a federal forum, we are to interpret section 1442 broadly in favor of removal." *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 462 (5th Cir. 2016) (quoting *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006)).

There are good reasons for this approach. As the 2011 House Report explains, the statute's purpose "is to take from State courts the indefeasible power to hold a Federal officer or agent criminally or civilly liable for an act allegedly performed in the execution of their Federal duties." H.R. Rep. 112-17, at 3. "Congress wrote the statute because it deems the right to remove under these conditions essential to the integrity and

preeminence of the Federal Government within its realm of authority." *Id.* And Congress was, and remains, concerned about allowing suits implicating federal authority to remain in state court: "Federal officers or agents . . . should not be forced to answer for conduct asserted within their Federal duties in a state forum that invites 'local interests or prejudice' to color outcomes." *Id.* "In the absence of this constitutionally based statutory protection, Federal officers . . . could be subject to political harassment, and Federal operations generally would be needlessly hampered." *Id.* The Supreme Court has long expressed similar concerns. *See Watson*, 551 U.S. at 150 (explaining that "[s]tate-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials"); *Tennessee v. Davis*, 100 U.S. 257, 263 (1879) (removal protects "the operations of the general government" from state interference).

These concerns apply equally to those in the governmental or military supply chain and others working under the direction of federal officers. These private or local partners are an essential part of the federal government's operations, often performing jobs that the government would otherwise have to perform itself. *See NASA v. Nelson*, 562 U.S. 134, 139 (2011) ("Contract employees play an important role in NASA's

mission, and their duties are functionally equivalent to those performed by civil servants."); *Watson*, 551 U.S. at 153–54 ("The assistance that private contractors provide federal officers . . . helps officers fulfill . . . basic governmental tasks."). These functions involve everything from defense procurement, *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), to scientific research, *Nelson*, 562 U.S. at 139, to civil engineering, *Yearsley v. Ross Constr. Co.*, 309 U.S. 18, 19 (1940). The Supreme Court has thus recognized the "'uniquely federal' interest" in potential "civil liabilities arising out of the performance of federal . . . contracts." *Boyle*, 487 U.S. at 505–06.

That is true especially in the national-security arena. This Court has recognized that "[t]he welfare of military suppliers is a federal concern that impacts the ability of the federal government to order and obtain military equipment at a reasonable cost." *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998). "Federal interests are especially implicated where, as in this case, the Defense Department expressly issued detailed and direct orders to the defendants to supply a certain product." *Id.* And "state courts may circumvent . . . the govern-

ment contractor defense, if they are unsympathetic to defendants." *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 134 (2d Cir. 2008). There is thus a strong federal interest in providing a federal forum to hear federal contractors' defenses. *See Willingham*, 395 U.S. at 407 (emphasizing that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court").

What is more, ensuring a federal forum for government contractors encourages them to do business with the United States. *See Isaacson*, 517 F.3d at 134 (noting that "the scattering of Agent Orange claims throughout the state courts would have a chilling effect on manufacturers' acceptance of government contracts"). It is not unusual for Congress to provide protections or immunities to "encourage[] the private sector to become involved" in important government priorities. *See Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 63 (1978) (nuclear power); *see also Bruesewitz* v. *Wyeth*, 562 U.S. 223, 228 (2011) (noting that Congress adopted the National Child Vaccine Injury Act, under which manufacturers are "generally immunized from liability" for tort claims, to "coax manufacturers back into the market"). The same reasoning applies here. Pri-

vate companies will be more inclined to accept the vital work of the government if they know that a lawsuit relating to that work will at least be heard in a neutral federal forum familiar with the governing federal law.

These same concerns apply even more strongly to other parties that partner with the federal government to support important federal missions. *See, e.g.*, *Texas v. Kleinert*, 855 F.3d 305, 312 (5th Cir. 2017) (local police officer working with federal task force was federal officer); *Kriss v. Bayrock Grp. LLC*, No. 13 CIV. 03905 LGS, 2014 WL 715660, at *3 (S.D.N.Y. Feb. 25, 2014) ("Persons cooperating with and providing confidential information to federal law enforcement are an example of private parties courts have found to be acting under the direction of a federal officer or agency . . . ."). Because these entities typically are not paid to work with the federal government, they cannot offset the risk of state-court liability by charging more for their work. It is thus even more important that these parties be able to raise their federal defenses in a federal forum, lest they be dissuaded from partnering with the federal government.

CONCLUSION

For the reasons set forth above and in the appellant's briefs, the district court's remand order should be reversed.

June 14, 2019

Respectfully submitted,

/s/ *C. Frederick Beckner III*

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5948

C. Frederick Beckner III
Counsel of Record
Eric D. McArthur
Tobias S. Loss-Eaton
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
rbeckner@sidley.com

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 29(a)(5)'s type-volume limitation because it contains 4,835 words, excluding the material exempted by Rule 32(f).

2. This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type style requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

June 14, 2019

Respectfully submitted,

/s/ *C. Frederick Beckner III*
C. Frederick Beckner III

Counsel for Amicus Curiae
Chamber of Commerce of the
United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June 2019, I caused the foregoing brief to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notice of this filing to all registered CM/ECF users.

Respectfully submitted,

/s/ *C. Frederick Beckner III*

C. Frederick Beckner III

Counsel for Amicus Curiae
Chamber of Commerce of the
United States of America