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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

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Date: June 14, 2019

CERTIFICATE OF INTERESTED PERSONS

Under 5th Cir. R. 28.2.1, the undersigned counsel of record certifies that all interested persons and entities who have an interest in the outcome of this case are listed in the Certificate of Interested Persons contained in the Appellant's Supplemental *En Banc* Brief, except for the following listed persons and entities:

1. Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation and issues no publicly held stock.

2. Marc B. Robertson and Richard A. Samp are counsel for *amicus curiae* WLF in this matter.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Founded in 1977, Washington Legal Foundation (WLF)[1] is a public-interest law firm and policy center with supporters in all 50 States. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. To that end, it often appears as *amicus curiae* in this and other federal courts in important removal-jurisdiction cases. *See, e.g.*, *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019); *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014); *Flagg v. Stryker Corp.*, 819 F.3d 132 (5th Cir. 2016).

The Framers of the Constitution viewed the right of defendants to remove cases to federal court as an important safeguard against the tendency of some state courts to favor local plaintiffs over out-of-state defendants or federal-government defendants. Throughout our Nation's history, Congress has granted federal courts broad removal jurisdiction in those cases. It has repeatedly adopted measures to counteract devices used by plaintiffs' attorneys intent on frustrating the exercise of removal rights.

One such statute is the federal officer removal statute, 28 U.S.C. § 1442(a)(1). Recent panel decisions by this Court have condoned a narrow

[1] Under Fed. R. App. P. 29(a)(4)(E), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed money to the preparation and submission of this brief. Under Fed. R. App. P. 29(a)(2), all parties have consented to the filing of this brief.

interpretation of the federal officer removal statute that, in many instances, creates significant difficulties for federal officers (and those acting under federal officers) seeking to exercise their right to remove cases from state to federal court. The decision below reflects an antiquated and misguided view that removal is only available when the defendant satisfies a "causal nexus" test and shows "that its actions taken pursuant to the government's direction or control caused the plaintiff's specific injuries." *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 462 (5th Cir. 2016). But this view reflects the state of the law before the Removal Clarification Act of 2011 (the "2011 amendments"), which broadened the basis for removal of claims against officers or agents of the federal government and those working under its direction.

WLF is concerned that unless the Court uses this case to not only overturn the decision below but also to educate the lower courts that they need to realign their decisions with the 2011 amendments, the district courts will continue to adhere to their outdated view. WLF is also concerned that the fashionable interpretation and application of the statute, which places greater emphasis on the "causal nexus" test rather than the need for the defendant to have a "colorable federal defense," invites a premature merits determination when, at the removal stage, the inquiry should focus solely on the court's jurisdiction.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the Appellant's briefs. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

In September 2017, Plaintiff-Appellee James Latiolais sued Defendant-Appellant Avondale Industries ("Avondale," now known as Huntington Ingalls, Incorporated) in Louisiana state court, alleging his exposure to asbestos while working on a United States Navy ship, the USS *Tappahannock*, then docked at Avondale's shipyard. ROA.617-618; ROA.504. Throughout the 1960s, the United States Navy contracted with Avondale. *Id.* Latiolais worked pursuant to Navy orders; he did not perform any work for Avondale nor did he have contact with Avondale employees. ROA.554-555.

Avondale removed the case to federal district court under the federal officer removal statute, which authorizes the removal of a case by: "[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, in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). Latiolais moved to remand the case to state court, invoking this Court's decision in *Bartel v. Alcoa S.S. Co., Inc.*, 805 F.3d 169 (5th Cir. 2015), and subsequent cases applying that precedent. The district court granted his motion in May 2018. ROA.1404.

In remanding, the district court explained that it was bound by existing Fifth Circuit precedent that requires the defendant to show a "causal nexus" between the federal officer and the plaintiff's claims. This requires a showing that "the federal government was directing the defendant's conduct" and that such "federally-directed conduct caused the plaintiff's injuries." ROA.1404.

A divided panel of this Court affirmed. The majority stated that it was bound to follow Fifth Circuit decisions that were decided following the enactment of the 2011 amendments because "[i]n this court … what's past is prologue." *Latiolais v. Huntington Ingalls, Inc.*, 918 F.3d 406, 409 (5th Cir. 2019). While noting that "this court [in *Zeringue v. Crane Co.*, 846 F.3d 785 (5th Cir. 2017)] appeared to relax the causal nexus standard in light of the post-2011" amendments, the panel concluded that those cases did not depart from that standard. *Id.* at 409-10.

The court acknowledged the changes in the law, however, stating that under the plain language of the statute, following the 2011 amendments, "the removal statute now requires *only* that a federal directive 'relates to'—but not necessarily has a causal relationship to—the Plaintiffs' injuries." *Id.* at 408. It found all Avondale's work "clearly related to the federal government's directive to employ asbestos insulation. Under the 'relating to' test, Avondale would preserve a federal venue." *Id.* at 409. But it was still bound to follow its precedents. When remanding the case, the panel expressed uneasiness with current Fifth Circuit precedent but

affirmed the district court decision "in hopes that our precedents will be reordered." *Id.* at 413.

SUMMARY OF ARGUMENT

When a party seeks remand of a case that has been removed to federal court, the relevant issue is whether the district court possesses subject-matter jurisdiction over the case. Article III jurisdiction exists if the case raises a federal question. While federal jurisdiction generally only exists when a plaintiff presents a federal question in a well-pleaded complaint, the federal officer removal statute provides an exception by allowing the *defendant* to assert federal jurisdiction. *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999). The centuries-long history of §1442 (dating back to 1815) shows that Congress has authorized federal courts to exercise that federal-question jurisdiction in any judicial proceedings involving acts performed by or in aid of federal officials. *See, e.g.*, *Mesa v. California*, 489 U.S. 121, 136 (1981).

For a defendant to assert Article III jurisdiction in a federal-officer case, it is not enough to allege merely that any allegedly wrongful conduct was performed in aid of federal officials. It must also plausibly allege that its defense raises a federal question; that is, that it possesses a plausible defense based on an issue of federal law. Avondale has made such an allegation; it alleges that it is immune from state tort liability under the federal-contractor defense recognized by *Boyle v. United*

Technologies Corp., 487 U.S. 500 (1988). Under the federal contractor defense, a contractor who performs work under government direction essentially "steps into the shoes of the sovereign and therefore enjoys sovereign immunity." Andrew E. Shipley & John F. Henault, *Federal Officer Removal: The Misunderstood Removal Statute*, Fed. Law., May 2013, at 72. The ever-broadening language of § 1442(a)(1) reveals that Congress intended removal rights to encompass, at a minimum, any federal contractor that pleads a plausible defense under *Boyle*. *See* H.R. Rep. No. 112-17, at 2 (2011).

WLF thus urges the Court to instruct the district courts to focus their federal-officer-removal inquiries on the colorable-federal-defense issue. WLF agrees with Avondale that reading a "causal nexus" requirement into § 1442(a)(1) is inconsistent with the statute's 2011 amendments. But we also agree with Judge Higginbotham that "causal nexus has little work to do once a court sequences its analysis to determine the availability of a colorable federal defense—here, the federal contractor defense—at the outset." *Legendre v. Huntington Ingalls, Inc.*, 885 F.3d 398, 405 (5th Cir. 2018) (Higginbotham, J., concurring).

The district court ordered remand without ever reaching whether Avondale adequately alleged a colorable federal defense. But the district court record is clear that Avondale did so, in its opposition to the motion to remand. Its brief showed that the government imposed reasonably precise specifications for the installation

of asbestos; Avondale complied with those specifications, and the federal government's knowledge of asbestos-related hazards was greater than Avondale's.

Importantly, a defendant resisting a remand motion need only establish a *colorable* federal defense to establish Article III jurisdiction. A ruling on a remand motion is not the proper occasion to conduct a mini-trial on whether the federal defense is meritorious. So long as the defense is colorable and the defendant can establish that the lawsuit is "for or relating to any act under color" of federal office, the defendant should remain in federal court. Article III federal-question jurisdiction does not require a party to assert a *meritorious* federal claim. Jurisdiction exists so long as the claim is not "immaterial" or "wholly insubstantial." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Defendants like Avondale who can meet that "colorable" standard have established Article III jurisdiction, and the 2011 amendments make clear that Congress did not require more to satisfy the removal requirements.

ARGUMENT

I. COURTS ANALYZING THE FEDERAL OFFICER REMOVAL STATUTE SHOULD FIRST ASK WHETHER THE DEFENDANT OFFERS A COLORABLE FEDERAL DEFENSE.

Typically, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). The federal officer removal statute

provides an exception to the general rule that a case may not be removed to federal court on the basis of a federal defense. *See Jefferson Cnty.*, 527 U.S. at 431.

Above all, the federal officer removal statute is a jurisdictional statute. In *Mesa v. California*, the Supreme Court held that the statute

> is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. … [It], therefore, cannot independently support Art. III "arising under" jurisdiction. Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes. The removal statute itself merely serves to overcome the "well-pleaded complaint" rule which would otherwise preclude removal even if a federal defense were alleged.

489 U.S. at 136; *see also* Fred J. Meier, *et al.*, *Federal Officer Removal: Watson Would Fly with FAA Designees*, 72 J. Air L. & Com. 485, 489 (2007).

The Seventh Circuit, in a case very similar to this one, emphasized the central importance of the colorable-federal-defense requirement, which "creates Article III jurisdiction." *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1180 (7th Cir. 2012). The requirement that the defendant present a colorable federal defense "represents an exception to the well-pleaded complaint rule, which would ordinarily defeat jurisdiction when the federal question arises outside of the plaintiff's complaint." *Id.* (citing *Mesa*, 489 U.S. at 136).

Because a case removed under the federal officer removal statute satisfies Article III jurisdictional requirements by virtue of the colorable federal defense,

courts should begin with this analysis. In his concurrence in *Legendre*, Judge Higginbotham expressed concern over the "lack of focus on the colorable federal defense element" in various Fifth Circuit opinions. 885 F.3d at 404 (Higginbotham, J., concurring). He found that, by focusing on "causal nexus," district courts are often drawn into considering the sufficiency of a plaintiff's state-law claim rather than the grounds for removal. *Id.* Doing so "tends to invite a premature merits determination." *Id.* at 405. This is certainly an undesirable outcome, as a hearing on a remand motion is not an appropriate occasion to conduct a mini-trial.

As Judge Higginbotham notes, the federal-colorable-defense element is "the predicate for removal under the statute." *Id.* at 404. In an asbestos case such as this one (and *Legendre*), the Supreme Court's analysis of the federal-contractor defense in *Boyle* should guide the court's inquiry. *Legendre*, 885 F.3d at 405.

Boyle involved a wrongful death action against an independent contractor who supplied military helicopters to the United States. The plaintiff brought suit in federal district court as a diversity action. The defendant countered that federal law preempted the plaintiff's state-law tort claims.

Justice Scalia, writing for the Court, found that the liability of independent contractors performing work for the federal government is of unique federal concern. *Boyle*, 487 U.S. at 504. The Court next asked whether a "'significant

conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' … or the application of state law would 'frustrate specific objectives' of federal legislation." *Id.* at 507 (internal citations omitted). It found that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." *Id.* at 512. The Court held that a federal defense contractor is immune to state tort liability if it can show: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in use of the equipment that were known to the supplier but not to the United States." *Id.* "The underlying rationale in *Boyle* is that the contractor, in manufacturing products pursuant to government direction, steps into the shoes of the sovereign and therefore enjoys sovereign immunity." Shipley & Henault, *supra*, at 72.

When a federal contractor seeks to remove a lawsuit based on the federal-contractor defense, *Boyle* provides a straightforward test for determining whether the contractor has alleged a colorable federal defense. If the contractor's allegations are sufficient, the federal court has Article III jurisdiction. The *Boyle* test largely boils down to whether a federal contractor presents a "significant conflict" between a federal policy and the operation of state law. *Boyle*, 487 U.S. at

512. Once the court answers the question of whether a colorable federal defense is available, the "causal nexus" test "has little work to do." *Legendre*, 885 F.3d at 405.

The Court would be well-served by following that approach. Avondale provides a colorable federal defense here as "the government imposed reasonably precise specifications on [Avondale] requiring the installation of asbestos; Avondale complied with those specifications; and the federal government's knowledge of asbestos-related hazards was greater than Avondale's." Appellant's Supplemental Br. at 13.

The Supreme Court has emphasized the importance of the colorable-federal-defense element. "Historically, removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties." *Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981) (citing *Willingham v. Morgan*, 395 U.S. 402, 405-06 (1969)). Thus, the main focus of a removal inquiry should be on whether a colorable federal defense exists. That defense creates Article III jurisdiction even when the plaintiff's claim does not arise under federal law. And § 1442(a)(1)'s purpose is "to allow the validity of the officer's federal defense to be adjudicated in a federal forum." *Willingham*, 395 U.S. at 407. Congress seeks to ensure that state courts will not interfere with the exercise of federal law, so it allows federal

officers (and those acting under federal officers) to remove even though the complaint itself does not raise a federal claim and would not otherwise be removable. *See* Meier, et al., *supra*, at 489. So the colorable-federal-defense requirement, *not* the causal nexus test, determines whether a case is removable.

The Supreme Court has rejected a "'narrow, grudging interpretation' of the removal statute, recognizing 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.'" *Jefferson Cnty.*, 527 U.S. at 431 (citing *Willingham*, 395 U.S. at 407). Because of § 1442(a)(1)'s broad scope, courts "do not require the officer virtually to win his case before he can have it removed." *Id.* Focusing primarily on the colorable-federal-defense requirement ensures that the statute remains a jurisdictional one.

II. THE FEDERAL OFFICER REMOVAL STATUTE SHOULD BE BROADLY APPLIED.

The right of removal is broad, and the federal officer removal statute is especially broad. Courts have consistently held that the federal officer removal statute protects "federal officers from interference by hostile state courts." *Willingham*, 395 U.S. at 405. Congress intended the statute to apply broadly and "this policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)." *Id.* at 407. In enacting the 2011 amendments to the federal officer removal statute, Congress clarified the statute's broad sweep.

A. Other Examples of Removal Statutes Confirm that Removal Is a Favored Right.

The history of other federal removal statutes confirms the idea that the federal officer removal statute is to be broadly construed. The Framers contemplated that diversity jurisdiction and removal jurisdiction would play a vital role in our federal system of government. As the Supreme Court recognized in one of its earliest landmark cases, the Constitution was designed for the benefit of *all* citizens—not just plaintiffs who "would elect the national forum" but also defendants who sought to "try their rights, or assert their privileges before the same forum." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 348 (1816).

Congress has adopted many statutes to facilitate removal of cases from state to federal court by out-of-state defendants. The Class Action Fairness Act (CAFA) provides the best example of such a statute. Congress adopted it to ensure a federal forum for all large class actions involving parties of diverse citizenship. For many years, some lower federal courts held a misguided view that federal removal jurisdiction is disfavored and that all doubts regarding removal jurisdiction should be strictly construed against the defendant. The Supreme Court rejected this view and found that "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014).

In a recent *en banc* decision, this Court broadly supported the right of defendants to remove cases from state to federal court, and held that plaintiffs could not block removal by joining extraneous parties to eliminate federal diversity jurisdiction. *Flagg v. Stryker Corp.*, 819 F.3d 132, 136 (5th Cir. 2016). The fraudulent-joinder doctrine serves important federalism interests by ensuring that defendants have the access to federal courts that the Framers intended to grant them.

Congress, the Supreme Court, and this Court have all held that removal should be favored when it involves cases that implicate unique federal interests or are of national importance. And though the Supreme Court in *Dart Cherokee* did not address the propriety of presumptions against removal outside the CAFA context, no court has held that a presumption against removal arises in federal officer removal cases.

B. The Supreme Court and Federal Appellate Courts Broadly Construe the Federal Officer Removal Statute.

Even before the 2011 amendments, the Supreme Court emphasized the broad sweep of § 1442(a)(1). In *Willingham*, the Court stated that "the test for removal should be broader, not narrower, than the test for official immunity." 395 U.S. at 405. *Willingham* discussed the history and purpose of the federal officer removal statute. Citing a decision from 1880, the Court said

> the Federal Government "can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members."

Id. at 406 (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1880)). The Court found that "[f]ederal jurisdiction rests on a 'federal interest in the matter'" and the right of removal should be "absolute" whenever a state court suit is brought for an act taken "'under color' of federal office." *Id.* The removal statute, according to the Court, "is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce a federal law." *Id.* at 406-07.

The Supreme Court and other federal courts have consistently bolstered the policy considerations of *Willingham*. Historically, some lower federal courts have strictly construed removal statutes and "resolve[d] all doubts about the propriety of removal in favor of retained state court jurisdiction." *See, e.g., Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993). But that presumption has never applied to the federal officer removal statute, which must be "liberally construed." *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 147 (2007) (citing *Colorado v. Symes*, 286 U.S. 510, 517 (1932)); *see also*, Shipley & Henault, *supra*, at 72. This Court shares that view, noting that "[a]lthough the principle of

limited federal court jurisdiction ordinarily compels us to resolve any doubts about removal in favor of remand … courts have not applied that tiebreaker when it comes to the federal officer removal statute in light of its broad reach." *Savoie*, 817 F.3d at 462.

C. The Removal Clarification Act of 2011 Eliminated the Need for a Causal Nexus.

In 2011, Congress amended the federal officer removal statute "to ensure that State courts lack the authority to hold Federal officers criminally or civilly liable for acts performed in the execution of their duties." H.R. Rep. No. 112-17, at 2. When the modern statute was first enacted in 1948, it expansively provided for removal of state-court suits brought against a federal "officer (or any person acting under that officer)" if the suit involved liability "for any act under color of such office." 28 U.S.C. § 1442(a)(1) (2000). The 2011 amendments expanded the statute, now allowing federal officers or those working under them to remove any state-court proceeding "for *or relating to* any act under color of such office." 28 U.S.C. § 1442(a)(1) (2011) (emphasis added). In the amendments' legislative history, Congress expressed concern that plaintiffs "would potentially subject Federal officers to harassment, thereby compromising Federal Government Operations." H.R. Rep. No. 112-17, at 2.

After the 2011 amendments, federal appeals courts quickly recognized that Congress effectively eliminated any "causal nexus" requirement. *See, e.g.*, *In re*

Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia, 790 F.3d 457, 471 (3d Cir. 2015) (holding "it is sufficient for there to be a 'connection' or 'association' between the act in question and the federal office"); *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017) (agreeing that "relating to" "broaden[ed] the universe of acts that enable federal removal such that there need only be a *connection or association* between the act in question and the federal office") (emphasis in original).

But post-2011 decisions of this Court continue to follow the "causal nexus" test that pre-dates the new statute. *See Bartel*, 805 F.3d at 172. In *Bartel*, mariners and representatives brought asbestos actions in state court against civilian contractors who had operated Navy-owned ships on which the mariners worked. To support removal, the defendant must show "that a causal nexus exists between the defendants' actions under color of federal office and the plaintiff's claims." *Id.* at 172 (citing *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998)). The panel did not address the 2011 amendments. Rather, it ultimately held that the defendants did not demonstrate the requisite causal nexus. In light of that holding, it did not consider whether the defendants had presented a colorable federal defense. *Id.* at 174-75.

Savoie followed *Bartel* and also applied the causal nexus test. There, the panel found that the plaintiffs' negligence claims against the shipyard owner for

asbestos exposure were not removable because the shipyard defendant did not "demonstrate that its contracts with the government prevented it from taking … protective measures" to prevent exposure. *Savoie*, 817 F.3d at 463. In the absence of such a showing, the Court held, the requisite causal nexus was missing. The Court did, however, find a causal nexus between the government's instructions to the shipyard and the strict-liability claims for the "mere use of asbestos." *Id.* at 465-66. The panel found that "removal of the entire case is appropriate so long as a single claim satisfies the federal officer removal statute." *Id.* at 463 (citing Wright & Miller, § 3726). But the court stated that the case was not necessarily removable, as the district court had not yet considered whether the defendant had asserted a colorable federal defense. *Id.* at 466. As with *Bartel*, had *Savoie* first considered whether a colorable federal defense existed, the case would have been removable at the outset.

WLF urges this Court to follow the lead of other federal appeals courts that have considered this issue and abandoned the atextual "causal nexus" test. Since 2011, this Court has on occasion concluded that Congress intended to broaden § 1442(a)(1) when it inserted the "relating to" language. Writing for the panel that initially heard this case, Judge Jones wrote that, after the 2011 amendments, "the removal statute now requires only that a federal directive 'relates to'—but not necessarily has a causal relationship to—the Plaintiffs' injuries." *Latiolais*, 918

F.3d at 408. She stated that the amendments broadened the basis for removal and noted that one post-2011 Fifth Circuit decision "appeared to relax the causal nexus standard in light of the post-2011 'relating to' language." *Id.* at 409 (citing *Zeringue*, 846 F.3d at 793). But because previous cases like *Bartel*, decided after Congress enacted the 2011 amendments, adhered to the causal nexus test, the panel was bound by those decisions. *Id.* at 409. Avondale argued that its contact with the plaintiff "occurred solely because of its contracts with the federal government." *Id.* at 411. The panel noted, "This contention might have prevailed but for the discussions in our other cases." *Id.* But adhering to the causal nexus test as established by *Bartel*, the panel concluded that remand was required—without addressing whether Avondale had adequately alleged a colorable federal defense. *Id.* at 411 (citing *Legendre*, 885 F.3d at 402).

This case provides an ideal vehicle to reconsider the impact of the 2011 amendments on the federal officer removal statute in the Fifth Circuit. As the panel said earlier, "Congress specifically added the words 'relating to' into § 1442. Those words have meaning, and the meaning is plainly broader than that of the predecessor provision." *Id.* at 412. Indeed, the earlier panel remanded in "hopes that our precedents will be reordered." *Id.* at 413.

CONCLUSION

WLF asks the Court to reverse the decision of the district court. In particular, WLF urges the Court to determine that Avondale presents a colorable federal defense and that federal contractors who do so are entitled to remove under § 1442(a)(1) without consideration of a "causal nexus."

Respectfully submitted,

/s/ Richard A. Samp

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation (WLF). Pursuant to Fed. R. App. P. 32(a)(7)(B), I hereby certify that the forgoing brief contains 4,633 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 with 14-point Times New Roman font.

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I hereby certify that on June 14, 2019, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court of the U.S. Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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