21-249

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOANN ABBO-BRADLEY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF D.B., INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF T.B., INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF C.B., MELANIE HERR, ZACHARY HERR, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF C.H., AS PARENT AND NATURAL GUARDIAN OF H.H., ELENA KORSON, AS PARENT AND NATURAL GUARDIAN OF L.K., NATHAN E. KORSON,

Plaintiffs-Appellees,

V.

CITY OF NIAGARA FALLS, NIAGARA FALLS WATER BOARD, CONESTOGA-ROVERS & ASSOCIATES, CECOS INTERNATIONAL, INC., MILLER SPRINGS REMEDIATION MANAGEMENT, INC., OCCIDENTAL CHEMICAL CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO HOOKER CHEMICALS AND PLASTICS CORPORATION, OP-TECH ENVIRONMENTAL SERVICES, ROY'S PLUMBING, INC., SCOTT LAWN YARD, INC., SEVENSON ENVIRONMENTAL SERVICES, INC., GLENN SPRINGS HOLDINGS, INC.,

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of New York
(Case No. 20-cv-136) (District Judge Frank P. Geraci)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* in important removal-jurisdiction cases. *See, e.g.*, *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021); *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81 (2014).

INTRODUCTION AND SUMMARY OF ARGUMENT

Last month, the Supreme Court held that courts of appeals have jurisdiction to review an entire remand order when one ground for removal was the federal-officer or civil-rights removal statute. So—other than the Seventh Circuit, which already does so—courts of appeals will have to decide more issues in appeals from remand orders. This means that district courts' need for clarity on how to decide remand motions is greater now than ever before.

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing this brief.

Several defendants have removed cases to district courts in this circuit under the revival doctrine—sometimes called the revival exception. Under this doctrine, defendants' right to remove a case to federal court is "revived" if plaintiffs file an amended complaint in state court that asserts claims substantially different from those in the original complaint. Many courts—including the District Court here—have declined to decide whether the revival doctrine exists in this circuit. Rather, they have avoided the issue by holding that, even if defendants may remove cases under the revival doctrine, the doctrine did not apply in those cases.

But this approach has two problems. First, it maintains uncertainty for parties about whether the revival doctrine is alive and well in the Second Circuit. Only this Court or the Supreme Court can definitively resolve this uncertainty for the bench and bar. This case presents the perfect opportunity to clarify this important issue.

Second, given the uncertainty about whether the revival doctrine applies in this circuit, district courts go out of their way to avoid the issue by holding that even if recognized by this Court, the revival doctrine does not apply in those cases. This is a problem because it weighs unfairly

against removing cases to federal court. If this Court clarifies the law, district courts could faithfully apply it moving forward.

This Court should adopt the revival doctrine because it furthers the two purposes behind the thirty-day limit for defendants to remove cases to federal court. It does not grant defendants an advantage by seeing how cases play out in state court. Yet it stops plaintiffs from sandbagging some claims and then pouncing with amended complaints that defendants cannot remove to federal court.

Nor does recognizing the revival doctrine waste judicial resources. The revival doctrine applies only when the claims in the amended complaint differ substantially from those in the original complaint. So no resources are wasted by allowing removal after the filing of the amended complaint. In fact, it discourages plaintiffs from wasting judicial resources by withholding certain claims to avoid removal to federal court.

Finally, the revival doctrine applies here. The amended complaint quadrupled the number of sites that allegedly caused the residents' injuries. The three new sites had a different remediation plan and federal law made Occidental Chemical Corporation act differently at each site. This was a key change in the complaint. So Occidental could remove the

case under the revival doctrine. Because the case presents federal questions and was removable under the federal-officer removal statute, the District Court erred by remanding this case to state court.

STATEMENT

Nine years ago, residents of Niagara Falls sued Occidental, and others, in New York state court asserting common-law torts. They alleged that Occidental improperly remedied chemical contamination at the "Love Canal" landfill. *Cf.* J.A. 170-72 (spreadsheet of cases). The residents argued that the chemicals reached their homes, made them sick, and decreased their property values. *See generally id.* at 56-69.

Occidental removed the case to federal court because, it argued, the case raised a federal question. *See* J.A. 120-21. Occidental said that it remedied the Love Canal under the Comprehensive Environmental Response, Compensation, and Liability Act. *See id.* at 146. The federal court held that the case did not raise a federal question and remanded it to state court. *Id.* at 146-68.

In 2020—over seven years after they sued—the residents filed an amended complaint. J.A. 370-448. The amended complaint introduced claims about three sites besides the Love Canal. *Id.* at 371-72. Occidental

again removed the case to federal court. This time it argued that removal was proper not only because the case involved a federal question but also because it acted at the direction of a federal officer when remedying the four sites. *See id.* at 26-44. Among other arguments, Occidental argued that removal was proper under the revival doctrine. *See id.* at 27. The District Court rejected all of Occidental's removal arguments and remanded the case to state court. Occidental appealed. *Cf.* 28 U.S.C. § 1447(d) (permitting the appeal because a ground for removal was the federal-officer removal statute).

While this appeal was pending, the Supreme Court held that the Court has jurisdiction to review the entire remand order. *See B.P.*, 141 S. Ct. at 1537-43. This Court thus has jurisdiction to decide whether this case raises a federal question, whether federal-officer removal was proper, and whether the revival doctrine applies.

ARGUMENT

I. THE COURT SHOULD RECOGNIZE THE REVIVAL DOCTRINE.

Under the removal statute, defendants must file the notice of removal "within 30 days after" they receive "a copy of the initial pleading" that includes the asserted claims. 28 U.S.C. § 1446(b)(1). But there is an

exception: when "the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days" of receiving "a copy of" the paper from which the defendant learns "that the case is one which is or has become removable." *Id.* § 1446(b)(3).

Occidental persuasively explains (at 21-42) why it filed its notice of removal within thirty days of receiving a copy of the amended complaint making the case removable to federal court. As it explains, the law there is clear and this case requires only a straightforward application of law to facts. But even if this Court could reverse on that ground, it should still address whether revival removal is available in this circuit. The revival doctrine "provides that a lapsed right to remove an initially removable case within thirty days is restored when the complaint is amended so substantially as to alter the character of the action and constitute essentially a new lawsuit." *Johnson v. Heublein Inc.*, 227 F.3d 236, 241 (5th Cir. 2000).

A. Clarity Is Needed About Whether Revival Removal Is Possible In The Second Circuit.

1. The District Court noted that this Court "has not addressed when, if ever, the revival exception may apply." S.A. 13 (quoting *Study Logic LLC v. 7-Eleven, Inc.*, 2019 WL 9047030, *3 (E.D.N.Y. July 25,

2019)). Other district courts have also acknowledged that this Court has not addressed the issue. *Rivera v. Berlin City's Vt Remarketed Autos, Inc.*, 2020 WL 289464, *3 (D. Vt. Jan. 21, 2020); *Casale v. Metro. Transp. Auth.*, 2005 WL 3466405, *4 (S.D.N.Y. Dec. 19, 2005). The lack of clarity on this issue harms the bench, the bar, and the parties.

District courts are left with a tough decision. They have three options—all with substantial problems. First, district courts can hold that the courts of appeals that have recognized the revival doctrine were wrong. The district courts can adopt the reasoning of other district courts that have cast doubt on the viability of the doctrine. *E.g.*, *Dunn v. Gaiam, Inc.*, 166 F. Supp. 2d 1273, 1279 (C.D. Cal. 2001). There are advantages to taking this path. This Court can review the issue only if a ground for removal was the federal-officer or civil-rights removal statute. *See* 28 U.S.C. § 1447(d). It also eliminates the need to decide whether the revival doctrine applies. This tactic, however, has disadvantages. It goes against the weight of authority from the courts of appeals and, as explained below, it is legally wrong.

Second, district courts can decide that the revival doctrine is a viable way to remove a case to federal court and then hold that the

doctrine applies. Viewed from a judge's perspective, this is the riskiest option. Rather than evade review by this Court, applying the revival doctrine guarantees that this Court will review the issue if any party appeals. *Cf. Durant, Nichols, Houston, Hodgson & Cortese-Costa, P.C. v. Dupont*, 565 F.3d 56, 62 (2d Cir. 2009) (this Court has a duty to *sua sponte* raise jurisdictional issues). Few district courts want this Court grading their homework, which in most cases can easily be avoided by remand.

The third option is the most appealing to district courts; it is the option the District Court and other district courts in this circuit have chosen. *See* S.A. 13; *Rivera*, 2020 WL 289464 at *4; *Study Logic LLC*, 2019 WL 9047030 at *3. Courts try to split the baby by assuming that defendants can invoke the revival doctrine and then finding that the doctrine does not apply. This accomplishes two goals. First, it avoids judicial review unless a ground for removal was the federal-officer or civil-rights removal statute. Second, it is less likely to draw objections from counsel and the parties because it focuses on the merits of the revival claim rather than on whether the revival doctrine is a viable argument. There are few, if any, downsides for a district court to taking this route. But it does cause problems for attorneys and parties.

2. Attorneys face a difficult decision when an amended pleading is filed that could arguably allow revival removal. Do they argue that the revival doctrine applies and remove the case to federal court? Or do they stick it out in state court because neither this Court nor the Supreme Court has explicitly recognized the revival doctrine? Neither option is attractive.

Attorneys who opt not to seek revival removal could cost their clients their chance at a more favorable federal forum. It is no secret that certain state forums are plaintiff friendly and that removal ensures that defendants receive a fair trial. *Cf.* The Federalist No. 81, 547 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws."). Staying in state court means that the clients are facing an uphill battle. So attorneys could face potential discipline for failing to invoke the revival doctrine. Clients could also sue if they lose the case and allege that it was malpractice for the attorneys not to try revival removal.

But there are also downsides to invoking the revival doctrine. Many of these risks are due to the uncertainty facing counsel in this circuit. As

noted, district courts are motivated to avoid review by assuming that the revival doctrine exists in this circuit and then finding that the doctrine does not apply in that case. This means that courts are placing an unfair thumb on the scale against removal. Rather than neutrally examine whether the revival doctrine applies, district courts find that defendants failed to satisfy the revival doctrine's requirements.

An attorney who tries to invoke the revival doctrine could therefore be running up the bill without a real shot at getting the case removed to federal court. The client has to pay for the motion-to-remand briefing—possibly for both sides—and then bear all the costs associated with proceeding in state court. *See* 28 U.S.C. § 1447(c). In short, all this accomplishes is a small delay and a higher legal bill.

That different judges in the same district have taken different paths when defendants argue for revival removal underscores this uncertainty. Again, most district courts choose to assume that the revival doctrine exists and then find it does not apply. *E.g.*, *Study Logic LLC*, 2019 WL 9047030 at *3. Yet in the same district, another district court may deny a remand motion because of the revival doctrine. *See Residents*

& Fams. United to Save Our Adult Homes v. Zucker, 2017 WL 5496277, *5-13 (E.D.N.Y. Jan. 24, 2017).

In deciding whether seeking revival removal is appropriate, attorneys and parties should not have to guess based on which district judge the assignment wheel stops. Rather, they should know with certainty that no matter the district judge assigned to a case, the same legal standard will apply. Here, that means certainty that the district court will recognize the revival doctrine and faithfully decide whether it applies. But uncertainty persists because this Court has not addressed the viability of the revival doctrine. This Court should end the uncertainty by deciding that the revival doctrine is a viable way to remove a case to federal court.

B. This Court Should Not Create A Circuit Split By Declining To Recognize The Revival Doctrine.

1. The Fifth, Seventh, and Tenth Circuits have recognized the revival doctrine. *Johnson.*, 227 F.3d at 241; *Wilson v. Intercollegiate (Big Ten) Conf. Athletic Ass'n*, 668 F.2d 962, 965 (7th Cir. 1982); *Henderson v. Midwest Ref. Co.*, 43 F.2d 23, 25 (10th Cir. 1930). And because the Fifth Circuit first recognized the revival doctrine in 1956, *Cliett v. Scott*, 233 F.2d 269, 271 (5th Cir. 1956), it is binding precedent in the Eleventh

Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*). If it refuses to recognize the revival doctrine, this Court would be the first court of appeals to do so. It should not become the outlier in this area because the Fifth, Seventh, and Tenth Circuits are correct; in appropriate cases, an amended complaint transforming the asserted claims revives defendants' right to remove.

As the Seventh Circuit explained, there are two reasons for the thirty-day time limit to remove a case to federal court. First, it ensures that defendants do not have an "undeserved tactical advantage" by "wait[ing] and see[ing] how" the case is going in state court "before deciding whether to remove the case to" federal court. *Wilson*, 668 F.2d at 965. Second, it "prevent[s] the delay and waste of resources" that can occur when a case starts anew in federal court after extensive state-court proceedings. *Id.* Recognizing the revival doctrine does not detract from either goal. In fact, it furthers both goals.

First, a defendant gains no advantage by seeing how the state court rules on matters that are only tangentially related to the amended complaint removed to federal court under the revival doctrine. The concern motivating the thirty-day limit for removing a case to federal

court is to bar defendants from learning how the state court views a claim before removing it to federal court. That is why in *Johnson* the Fifth Circuit affirmed the district court's order finding that the amended complaint revived the defendants' right to remove. There, the state court's rulings on a claim that the defendants defaulted on a promissory note gave the defendants no indication how the state court would consider a fraud claim. *See Johnson*, 227 F.3d at 239-42.

Declining to recognize the revival doctrine, however, would give plaintiffs an unfair advantage. It would exacerbate the concerns that other courts have cited when embracing the doctrine. Without the revival doctrine, plaintiffs could "deliberately hold[] back [their] strong federal cards hoping to induce the defendant[s] to waive [their] right to remove the original complaint." *Wilson*, 668 F.2d at 966. This Court should not encourage such maneuvering by plaintiffs. Rather, it should put all parties on equal footing. This means not allowing defendants to see how a state court treats some claims before removing the case to federal court. But it also means ensuring that plaintiffs don't game the system by sandbagging larger claims in the hope that defendants do not remove the

case to federal court within thirty days. The only way to do so is to recognize the revival doctrine.

Second, recognizing the revival doctrine does not lead to a waste of judicial resources. For the doctrine to apply, the amended complaint must differ substantially from the original complaint. This means that little, if any, action has happened on the amended complaint's reshaped claims. Rather, whether a federal court or state court hears the case, the parties need not repeat any actions.

Recognizing the revival doctrine saves judicial resources. If the Court were to hold that defendants forever lose their right to remove a case after thirty days, plaintiffs could file a complaint alleging bogus federal claims. Then, after the time for removal has lapsed, plaintiffs could file an amended complaint raising legitimate federal claims and jettisoning their original claims. This would waste the judicial resources expended on the original complaint.

This case highlights these concerns. The residents waited over seven years to add the three new CERCLA sites to their amended complaint. If they chose to do so, the residents could gloss over the Love Canal claims and focus solely on these three new sites. This would waste

all the judicial resources expended over seven years. The only way to prevent this waste of judicial time and treasure is to recognize the revival doctrine.

True, plaintiffs can continue to pursue claims that they raised in their original complaint. But for the revival doctrine to apply, those claims must be minor compared to the amended complaint's claims. Any judicial resources wasted on the original claims are thus outweighed by the risk of more wasted judicial resources detailed above. Because recognizing the revival doctrine, on balance, wastes no judicial resources, the revival doctrine does "not thwart the purposes of the thirty-day rule." Heather R. Barber, *Removal and Remand*, 37 Loy. L.A. L. Rev. 1555, 1581 (2004) (citing *Johnson*, 227 F.3d at 242).

2. Some district courts have questioned the viability of the revival doctrine. *E.g.*, *Burke v. Atl. Fuels Mktg. Corp.*, 775 F. Supp. 474, 477 (D. Mass. 1991). These courts have focused mainly on the 1988 amendments to Section 1446. *See id.*; *see also* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669-70 (1988) (amendments to removal procedure). But in *Johnson*, the Fifth Circuit persuasively explained away these district courts' errors.

"[T]he only change made by the 1988 amendment to § 1446(b) was the addition of the one-year limitation applicable to diversity actions that were not removable as initially filed." *Johnson*, 227 F.3d at 242-43. The relevant part of Section 1446—subsection (b)(3)—"has remained substantially the same since its revision in 1949." *Johnson*, 227 F.3d at 243. So the revival doctrine "was not superseded or affected by the 1988 amendment." *Id.* (citing *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348 (1961)).

Other district courts question the revival doctrine given how rarely courts apply it. *See Dunn*, 166 F. Supp. 2d at 1279. But the factors discussed above explain this lack of case law. First, only district courts in four circuits must apply the revival doctrine. Second, because many circuits have not recognized the revival doctrine, the incentives push district courts to assume that it exists and then find that it doesn't apply in their cases. Finally, it is somewhat rare for plaintiffs to be so brazen as to employ tactics that require invocation of the revival doctrine. So rather than show that the revival doctrine is unviable, the dearth of cases applying the doctrine shows the need for clarity on the issue.

* * *

District courts in this circuit have often noted the lack of direction from this Court on the revival doctrine. This uncertainty hurts the bench, the bar, and the parties. The courts of appeals that have addressed the issue are unanimous—the revival doctrine exists. This Court should follow the sound reasoning of those courts and recognize the revival doctrine now.

II. OCCIDENTAL PROPERLY REMOVED THE AMENDED COMPLAINT UNDER THE REVIVAL DOCTRINE.

The District Court assumed that the revival doctrine exists but held that Occidental failed to prove that it applies in this case. Because the District Court reached the merits of Occidental's arguments, this Court need not remand the case to the District Court to resolve the issue in the first instance. Rather, after it recognizes the validity of the revival doctrine, the Court should hold that the doctrine applies here and reverse the District Court's order.

A. The Amended Complaint Substantially Changed The Residents' Claims Against Occidental.

As the Fifth Circuit explained, the revival doctrine applies when the amended complaint "so substantially [alters] the character of the action and constitute[s] essentially a new lawsuit." *Johnson*, 227 F.3d at

241. The residents' amended complaint substantially altered the nature of the case.

1. The amended complaint added three new sites where the residents allege Occidental failed to properly remedy chemical contamination. Factually, these three sites differed substantially from the Love Canal site on which the original complaint focused:

- The three new sites are geographically diverse. *See* J.A. 2364.
- Different chemicals caused problems at each site. *Id.* at 3730.
- Each site received the chemicals at different times. *Id.* at 3722 (citation omitted).
- Different lawsuits were filed to cover the cleanup of the sites. *Id.* (citation omitted).
- The CERCLA consent decrees required different people to clean up the sites at different times. *Id.* (citation omitted).
- Unlike in the Love Canal claim, the residents alleged that there were ongoing problems at the three new sites. *See id.* at 287.

These changes are like those the Fifth Circuit found triggered the revival doctrine in *Johnson*. There, the original complaint alleged that

the defendants defaulted on a promissory note. *Johnson*, 227 F.3d at 239-40. The amended complaint, however, asserted a fraud claim. *Id.* at 241-42. The facts necessary to prove a fraud claim differ from those needed to prove a breach of contract claim. Here, the facts necessary to prove that Occidental is liable for conduct at the Love Canal site differ markedly from those needed to show that Occidental is liable for conduct at the other three sites added in the amended complaint.

2. At least three courts have held that a key change to potential remedies in an amended complaint is enough to invoke the revival doctrine. In *Zucker*, the original complaint alleged claims under the Americans with Disabilities Act, while the amended complaint added a First Amendment claim. 2017 WL 5496277 at *3-4. Because the remedies sought for the First Amendment claim differed from those for an ADA violation, the court held that the case was properly removed to federal court. *See id.* at *7-9. Here, the amended complaint sought different types of relief for the three new sites because it alleged that there were continuing problems at those three sites. *Cf.* J.A. 352 (the most general request for relief possible). This change was enough for Occidental to invoke the revival doctrine.

More egregiously, in *Green v. FCA Corp.*, the plaintiffs' initial complaint sought only an accounting. 2015 U.S. Dist. LEXIS 50986, *1 (M.D. Fla. Apr. 17, 2015). The amended complaint added Florida Securities and Investor Protection Act, Florida Adult Protective Services Act, fraud, and breach of fiduciary duty claims. *Id.* at *2. These claims sought new remedies. The court found that this change in the complaint revived the defendant's right to remove the case. *Id.* at *2-3. Here, the residents sought different remedies for the three new sites. This too changed the nature of the case enough to revive Occidental's right to remove the case.

A change in the type of remedy sought is not the only way to show that the amended complaint changed the action enough to revive defendants' right to remove. In *MG Bldg. Materials, Ltd. v. Paychex, Inc.*, the court held that an amended complaint that expands potential financial liability triggers the revival doctrine. 841 F. Supp. 2d 740, 746 (W.D.N.Y. 2012). Here, Occidental's potential liability skyrocketed when the number of CERCLA sites quadrupled. *See* J.A. 3730-31. So Occidental properly removed the case to federal court under the revival doctrine.

There are no hard-and-fast rules for deciding when an amended complaint revives defendants' right to remove a case to federal court. *Wilson*, 668 F.2d at 966; *cf.* Joseph H. Varner III et al., *Clear! Reviving the Right to Removal*, 64 Fed. Law. 32, 35 (June 2017) (*Wilson*'s "analysis provides the benchmark for" applying the revival doctrine). Here, the amended complaint combines two factors that courts have found sufficient to revive the right to remove a case to federal court—a change in the facts needed to prove a claim and increased liability exposure. Yet the District Court held that the revival doctrine does not apply here. That was a legal error.

B. Federal Courts Have Jurisdiction Over The Residents' Complaint.

1. Because the amended complaint revived Occidental's right to remove the case to federal court, removal was appropriate if the case could have originally been filed in federal court. *See* 28 U.S.C. § 1441(a). The residents could have sued in federal court because the case raises a federal question. *See id.* § 1331; *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (federal-question jurisdiction existed when "the vindication of a right under state law necessarily turned on some construction of federal law" (quotation omitted)).

To vindicate the residents' state-law negligence claim, a court must interpret CERCLA. To prevail on a New York negligence claim, the residents must show that Occidental breached a duty that injured them. *See Rodriguez v. City of New York*, 101 N.E.3d 366, 371 (N.Y. 2018). The only duty the residents claim that Occidental breached is the duty to remedy the four sites under CERCLA. *See* J.A. 176. So two core elements of the residents' claims turn on the scope of Occidental's federal duty and whether Occidental breached that duty.

To resolve this question, a court cannot look to state law. These consent decrees are not a creation of the New York Legislature. Nor are they part of the State's common law. So the court must look to CERCLA and the consent decrees that cover the four sites. Because this case raises a federal question, the residents could have sued in federal court.

2. The District Court also had jurisdiction because the case was removable under 28 U.S.C. § 1442(a)(1). This Court has explained that, to invoke this statute, "a defendant who is not himself a federal officer must demonstrate that (1) the defendant is a person under the statute, (2) the defendant acted under color of federal office, and (3) the defendant

has a colorable federal defense." *Agyin v. Razmzan*, 986 F.3d 168, 174 (2d Cir. 2021) (cleaned up). Here, all three requirements are satisfied.

First, Occidental is a person. *See New York v. Mountain Tobacco Co.*, 942 F.3d 536, 548 (2d Cir. 2019) (citing 1 U.S.C. § 1). Second, Occidental's remediation of the four sites is governed by consent decrees that EPA oversees. Working under EPA-supervised consent decrees constitutes acting under color of a federal officer. *See City of St. Louis v. Velsicol Chem. Corp.*, 708 F. Supp. 2d 632, 661-62 (E.D. Mich. 2010). Third, Occidental has a colorable federal defense. Federal law prohibits Occidental from doing what the residents want without EPA approval. *See* 42 U.S.C. § 9622(e)(6). As all three requirements for federal-officer removal were satisfied, this was an independent ground for federal jurisdiction. Thus, the District Court erred by remanding this case to state court.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Second Circuit Rule 29.1(c) because it contains 4,611 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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