No. 22-715

IN THE

Supreme Court of the United States

CHEVRON USA, INC., *et al.*,

Petitioners,

v.

PLAQUEMINES PARISH, LOUISIANA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICI CURIAE BRIEF OF GENERAL (RETIRED) RICHARD B. MYERS AND ADMIRAL (RETIRED) MICHAEL G. MULLEN IN SUPPORT OF PETITIONERS

DANIEL B. ROGERS
SHOOK, HARDY & BACON LLP
201 South Biscayne Boulevard,
Suite 3200
Miami, FL 33131

TRISTAN L. DUNCAN
Counsel of Record
SHOOK, HARDY & BACON LLP
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550
tlduncan@shb.com

Attorneys for Amici Curiae

318974

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 6

ARGUMENT 10

I. During WWII, the Federal Government controlled oil and gas production in the manner it believed would best protect national security and win the war by directing Petitioners to produce more fuel using less steel 12

II. The oil and gas produced from Louisiana's coastal zone under the direction and supervision of federal officers, including specialized avgas for fighter planes, was essential to the Nation's military and its wartime efforts 16

III. Depriving Petitioners of the federal forum the Federal Officer Removal Statute was designed to provide presents national security risks by inviting parochial second-guessing of federal officers and deterring private parties from acting under federal officers 19

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

Cases

Agyin v. Razmzam,
986 F.3d 168 (2d Cir. 2021) 11

Baker v. Atl. Richfield Co.,
962 F.3d 937 (7th Cir. 2020) 11

Exxon Mobil Corp. v. United States,
2020 WL 5573048 (S.D. Tex. Sept. 16, 2020) 6

Jefferson Cnty. v. Acker,
527 U.S. 423 (1999). 20

Shell Oil Co. v. United States,
751 F.3d 1282 (Fed. Cir. 2014). 13, 14, 15

Watson v. Philip Morris Cos.,
551 U.S. 142 (2007). 4, 8, 11, 15, 19, 20

Willingham v. Morgan,
395 U.S. 402 (1969). 4, 19, 20

Statutes

28 U.S.C. § 1442. 19

Second War Powers Act 13

Page

Other Authorities

9 Cong. Deb. 461 (1833). 4, 19

Department of Energy, "Energy for the Warfighter: The Department of Defense Operational Energy Strategy," 14 June 2011, https://www.energy.gov/articles/energy-war-fighter-department-defense-operational-energy-strategy 7

Energy Security Forum, Washington, D.C., 13 October 2010, https://www.dvidshub.net/news/58040/mullen-military-has-strategic-imperative-save-resources 5

National Petroleum Council, *A National Oil Policy for the United States* (1949) 12

Navy Supply Corps Newsletter, NAVSUP Fuels: What the Fleet Runs On, Spring 2020, Available at: https://ufdcimages.uflib.ufl.edu/AA/00/04/80/19/00052/Spring-2020.pdf. 10

Statement of George A. Wilson, Director of Supply and Transportation Division, Wartime Petroleum Supply and Transportation, Petroleum Administration for War, Special Committee Investigating Petroleum Resources, S. Res. 36 (Nov. 28, 1945). . .14

Page

Statement of Ralph K. Davies, Deputy Petroleum Administrator of War, Special Committee Investigating Petroleum Resources, S. Res. 36 (Nov. 28, 1945) 2-ER-0271 12

Statement of Senator O'Mahoney, Chairman, Special Committee Investigating Petroleum Resources, S. Res. 36 (Nov. 28, 1945) 15

INTEREST OF *AMICI CURIAE*[1]

United States Air Force General (Retired) Richard B. Myers was appointed Vice Chairman of the Joint Chiefs of Staff by President Clinton in 2000 and appointed the 15th Chairman of the Joint Chiefs of Staff by President George W. Bush in 2001. In that capacity, he served as the principal military advisor to the President, Secretary of Defense, and the National Security Council. He served in that role until 2005.

General Myers joined the Air Force in 1965 through the ROTC program at Kansas State University. He served in the Vietnam War, where he flew over 600 combat hours in the F4 fighter jet, which used a specialized jet fuel produced by the private sector that allowed General Myers to accomplish his missions safely and effectively. He has held several commands, served in significant staff positions in the Air Force, and received numerous awards and decorations for his service, including the Legion of Merit, the French Legion of Honor, and the Presidential Medal of Freedom. He received his fourth star in 1997 and retired from active duty in 2005, after more than 40 years of active service. General Myers most-recently served as the President of Kansas State University from 2016 to 2021.

---

1. Pursuant to Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of the brief. *Amici curiae* and their counsel have accepted no payment for submission of this brief and, instead, have been involved in the preparation and filing of this brief on a *pro bono* basis. The parties received timely notice of the intent of *amici curiae* to file this brief.

United States Navy Admiral (Retired) Michael G. Mullen served as the 17th Chairman of the Joint Chiefs of Staff from 2007-2011 under both President George W. Bush and President Obama. A graduate of the United States Naval Academy in 1968, Admiral Mullen served in the Vietnam War and commanded his first ship, the gasoline tanker USS Noxubee, from 1973-1975. The Noxubee carried a split cargo of aviation gasoline, motor gasoline, diesel fuel, jet fuel, and Navy special fuel. In its final deployment to the Sixth Fleet under Admiral Mullen's command, the Noxubee delivered over five million gallons of fuel vital to the Fleet's and forward bases' mission, operations, and readiness.

Admiral Mullen earned a Master's Degree in Operations Research in 1985 and, later that year, took command of the guided-missile destroyer USS Goldsborough. Admiral Mullen participated in Harvard University's Advanced Executive Management graduate program in 1991. He was promoted to Rear Admiral in 1997 and, in 1998, was named Director of Surface Warfare in the office of the Chief of Naval Operations.

Admiral Mullen is one of only four naval officers who has received four 4-Star assignments. In 2003, Admiral Mullen was named Vice Chief of Naval Operations and was tapped to head the United States Naval Forces in Europe and NATO's Joint Force Command in Naples. He then was appointed Chief of Naval Operations in 2005, and, in 2007, was nominated to be Chairman of the Joint Chiefs of Staff. Admiral Mullen retired from this position in 2011 after serving for four years under both a Republican and a Democratic President.

This brief does not focus on the merits of the litigation but, instead, on the appropriate venue for it. We take no position on the policy questions arising from land losses in Louisiana's coastal zone. We file this brief because the activities of Petitioners that allegedly caused those land losses were undertaken at the direction and under the control of the Federal Government to meet critically-important military and national-security objectives during World War II. The military believed the best way to win WWII was to maximize fuel production and minimize use of precious resources, like steel. The resulting directive to Petitioners and others in the industry was clear: discover, develop, and produce more petroleum products, but use the least amount of material possible in doing so.

The claims in this case arise directly from Petitioners' actions implementing those federal officers' prioritization directives. Petitioners' ramped-up production on the Louisiana coast during WWII, about which Respondents (hereinafter "the Local Governments") now complain, was done pursuant to orders from the Federal Government and the special federal agencies created to manage our Nation's petroleum resources for the war. In addition, the federal directives that Petitioners use less steel functionally prohibited use of steel well casings, which the Local Governments now claim (nearly eight decades later) should have been used to better protect the environment. Indeed, the upshot of the Local Governments' claims seems to be that WWII should have been prosecuted differently: federal officers should have prioritized local environmental interests more and national-security interests less, and Petitioners should have disobeyed federal directives and elevated local environmental protection concerns over national security.

We strongly believe that whether Petitioners should be held responsible for such federally-directed and -controlled activities should be addressed in federal—not state—courts, as prescribed by the Federal Officer Removal Statute, which provides for litigating claims against a "person acting under" a federal officer in federal courts. By enacting that statute, Congress expressed its judgment that such claims may not fairly get resolved in state court with local interests hostile to the broader national common good. Instead, an unbiased federal forum is the more fair and just venue for judging actions taken at the direction of federal officers.[2]

Here, removal ensures that a Louisiana state court cannot second-guess decisions made by federal officers almost 80 years ago that were designed to maximize the use of our Nation's natural resources to win WWII. Conversely, remanding sends the message to private parties that the direction they take from federal officers in support of national-security priorities may not be fairly judged and that they may be held liable years later for their actions under federal officers. That creates a serious risk that those private parties will not answer federal officers' call to action, which could have disastrous implications for our Nation.

---

2. *See Watson v. Philip Morris Cos.*, 551 U.S. 142, 147-48 (2007) (explaining that the statute was enacted to "protect federal officers" *and those aiding and assisting them* "from interference by hostile state courts," which may not agree with federal law and decisions, and thereby allow federal officers *and those acting under them* to mount a defense in a venue "where the authority of the law was recognized") (quoting *Willingham v. Morgan*, 395 U.S. 402, 405 (1969), and 9 Cong. Deb. 461 (1833)) (emphasis added).

The crude oil Petitioners produced under federal officers' direction and control, and which the Federal Government would have otherwise had to make itself, is a quintessential example. The availability of Petitioners' products has been crucial to the success of our armed forces throughout our history, including when we served as Chairmen of the Joint Chiefs of Staff. Energy security is critical to our national security, particularly during wartime, including WWII. As Admiral Mullen once put it, "[e]nergy security needs to be one of the first things we think about, before we deploy another soldier, before we build another ship or plane, and before we buy or fill another rucksack."[3] We believe that it is critically important to send the right message to and foster the cooperation of key members of the private sector, like Petitioners, whose help is crucial for our national security.

This Court should therefore step in and prevent the second-guessing of federal decisions in potentially-hostile state courts and avoid the corollary "chilling effect" on private parties' willingness to undertake the activities essential to our energy and national security by granting certiorari, quashing the Fifth Circuit's decision, and holding that the Local Governments' claims should be litigated in federal court pursuant to federal officer removal jurisdiction.[4]

---

3. Energy Security Forum, Washington, D.C., 13 October 2010, https://www.dvidshub.net/news/58040/mullen-military-has-strategic-imperative-save-resources.

4. Of course, the Local Governments may ultimately prove their claims and prevail in federal court. We express no opinion on the merits of their claims. We just want to ensure that the merits are judged in a fair forum, where there is no potential bias against private parties because local interests diverge from the interests

INTRODUCTION AND SUMMARY OF THE ARGUMENT

To assist the Court in understanding the importance of granting review and why affirming remand implicates significant national-security concerns, this brief first discusses the Federal Government's—particularly, the United States military's—historical control and direction of Petitioners' production and sale of petroleum products that were essential for fueling the military during WWII. A substantial portion of Petitioners' federally-directed activities to ensure the military had sufficient war-time fuel occurred on the Louisiana coast.

The crude oil that Petitioners produced for the Federal Government, as well as the specialized products made from that crude, have been—and continue to be—"***crucial*** to the national defense," including but by no means limited to "fuel and diesel oil used in the Navy's ships; and lubricating oils used for various military machines."[5] As former Chairmen of the Joint Chiefs of Staff serving under both Democratic and Republican administrations and with over 80 years of combined service in the military, we can personally attest that petroleum products produced by companies like Petitioners, including those produced from activities in the Louisiana coastal zone, have been critical to national security, military preparedness, and

---

of the federal officers directing the conduct of the private parties in furtherance of national-security and military objectives.

5. *Exxon Mobil Corp. v. United States*, 2020 WL 5573048, at *31 (S.D. Tex. Sept. 16, 2020) (emphasis added); *see also id.* at *47 (noting the "value of [the] petroleum industry's contribution to the nation's military success").

combat missions. We are not alone in this belief. Military commanders, like General David Petraeus, universally emphasize that "[e]nergy is the lifeblood of our warfighting capabilities."[6]

To ensure the military has a dependable, abundant supply of the energy indispensable to our Nation's warfighting capacity, the Federal Government has directed, guided, and controlled Petitioners, through contracts and otherwise, to obtain oil and gas products, including specialized aviation fuels, sourced from the Louisiana coastal zone. But for Petitioners' production and supply of these fuels pursuant to the military's specialized requirements during WWII, the Federal Government would have had to manufacture them itself. Our national security depends on encouraging—not discouraging—such private sector assistance.

This brief explains why, in our view, the Local Governments' efforts to impose liability on Petitioners for those activities must be litigated in federal courts and not potentially-prejudiced state courts that may not give due weight to federal and national-security priorities. The extensive Federal Government involvement in—and direction and control of—Petitioners' activities in the Louisiana coastal zone during wartime directly implicates the Federal Officer Removal Statute and its underlying policy that litigation of claims relating to such federally-directed and -controlled activities must occur in federal courts.

---

6. Quoted in Department of Energy, "Energy for the Warfighter: The Department of Defense Operational Energy Strategy," June 14, 2011, https://www.energy.gov/articles/energy-warfighter-department-defense-operational-energy-strategy.

The Fifth Circuit failed to recognize that the Local Governments' claims implicate significant federal interests because those claims conflict directly with Petitioners' obligations to the Federal Government during WWII. The circuit court wrongly found Petitioners' actions under the direction of these federal officers to be the type of mere regulatory oversight and complying with the law typically seen in the consumer product space. It equated the Food and Drug Administration's regulatory oversight of cigarette manufacturers at issue in *Watson* with the specially-created federal agencies' particularized directives to Petitioners in order to win the war against the Nazis.

The truth is that these federal agencies created during WWII directed and controlled Petitioners' activities to such an extent that they were essentially "one giant organization, under government direction and mobilized for war."[7] Petitioners were not merely complying with regulations to market a commercial product *to consumers*; rather, their activities were being orchestrated by federal officers to deliver specialized wartime products *to the military*—products the Federal Government would have otherwise needed to make itself to win the war.

The circuit court concluded that Petitioners were not acting under federal officers because there was purportedly "insufficient evidence of any contract, any payment, any employer/employee relationship, or any principal/agent arrangement."[8] That test makes little sense. The reality is that functional federal officer control

7. Record on Appeal ("ROA") 16062.

8. Petition at 5a (internal quotation marks omitted).

and direction many times occurs by necessity without such formalities. Those historical realities are consistent with what we understand this Court and other circuit courts had concluded is determinative—that liability for conduct undertaken at the direction of federal officers must be litigated in federal courts regardless of whether that direction and control is evidenced by an express contract, payment, employer/employee relationship, or principal/agent arrangement.[9] Instead, "special relationships," like we have here, are what matter.

This inconsistent authority across the country creates real-world problems. A citizen that is undisputedly taking direction from and being controlled by federal officers, but may lack the specific types of evidentiary support required by the Fifth Circuit, can have claims regarding those activities litigated in federal courts in some parts of the country, but not others. This seems contrary to what Congress intended when it created the Federal Officer Removal Statute and, from our perspective, is both unworkable and ultimately damaging to national security.

We believe that allowing state-court actions seeking to vindicate particular local interests—without providing adequate protections for those acting under federal officers—will undermine Congress's judgment that it is in the national interest to litigate such claims in federal court. Forcing Petitioners to face liability in state court for actions under federal officers sends the wrong message, discouraging private parties from taking needed federal direction. Allowing such actions to proceed in state court will also impede the ability to fashion the necessary

9. *See* Petition at 15–24 (explaining conflict between circuit decisions).

national, uniform rules and policies that, in our military experience, will best protect our vital national interests and best ensure our military is deployment-ready.

We hope this practical, historical, and informed perspective will be helpful to the Court in deciding that federal officer removal is appropriate here.

ARGUMENT

For more than a century—and to this day—the Federal Government has incentivized, directed, and controlled aspects of United States oil production and has reserved rights to take additional control of such operations for the benefit of the Nation's defense and security. As United States Navy Captain Matthew D. Holman explained:

> Fuel is truly the lifeblood of the full range of Department of Defense (DoD) capabilities, and, as such, must be available on specification, on demand, on time, every time. In meeting this highest of standards, we work hand-in-hand with a dedicated team of Sailors, civil servants, and contractors [*i.e.*, companies like Petitioners] to deliver fuel to every corner of the world, ashore and afloat.[10]

To ensure it has the fuels necessary for our Nation's security, the Federal Government has required and otherwise been inextricably involved in oil and gas companies' development of the Nation's domestic oil

10. Navy Supply Corps Newsletter, NAVSUP Fuels: What the Fleet Runs On, Spring 2020 at p. 10 (emphasis added), available at: https://ufdcimages.uflib.ufl.edu/AA/00/04/80/19/00052/Spring-2020.pdf.

resources for military use. Any claims arising from the historic production and sale of domestic oil and gas, including such activities occurring in the Louisiana coastal zone, necessarily implicate the Federal Government's historical and current role in this industry, including the extensive history of federal laws, contracts, and leases that supported and controlled significant portions of our Nation's fuel supply.

The Fifth Circuit's narrow focus for certain, specific evidence to show a person is "acting under" a federal officer failed to take into proper account the unique and special relationship Petitioners had with federal officers and agencies during WWII. The direction and control Petitioners received from the federal agency created specifically to administer petroleum production during WWII, as well as their subcontractor status in relation to the refineries, created the kind of subjection that plainly qualify as "acting under."

Instead of looking at all the facts from a practical and functional perspective, the circuit court added additional hurdles, construing narrowly the circumstances for when a person is "acting under" a federal officer to those with a specific type of evidentiary support. Not only does the Fifth Circuit's test violate the rule that courts addressing federal officer removals must construe the facts liberally in support of removal,[11] the test requires ignoring the

11. *See Watson*, 551 U.S. at 147 (noting the Federal Officer Removal Statute must be "liberally construed"); *Agyin v. Razmzam*, 986 F.3d 168, 175 (2d Cir. 2021) (stating courts must "credit [the d]efendants' theory of the case when evaluating the relationship between the defendants' actions and the federal officer"); *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 945 (7th Cir. 2020) (stating courts should give the removing party "the benefit of all reasonable inferences from the facts alleged" in support of removal).

evidence demonstrating the monumental level of direction and control federal officers exercised over Petitioners' activities in supplying the energy products the military needed to win the war. Such an ill-conceived and narrow rule for when federal-officer removal is appropriate makes no sense in the face of existential conflicts, like WWII, and erroneously exalts form over substance.

I. During WWII, the Federal Government controlled oil and gas production in the manner it believed would best protect national security and win the war by directing Petitioners to produce more fuel using less steel.

WWII confirmed petroleum's role as a key American resource and underscored the government's interest in maintaining and managing it.

> Our overseas forces required nearly twice as many tons of oil as arms and armament, ammunition, transportation and construction equipment, food, clothing, shelter, medical supplies, and all other materials together. In both essentiality and quantity, oil has become the greatest of all munitions.[12]

Petroleum products have accordingly been described as "[a] prime weapon of victory in two world wars" and as "a bulwark of our national security."[13]

---

12. Statement of Ralph K. Davies, Deputy Petroleum Administrator of War, Special Committee Investigating Petroleum Resources, S. Res. 36, at 4 (Nov. 28, 1945)

13. National Petroleum Council, *A National Oil Policy for the United States* at 1 (1949)

In 1941, as the Nation prepared to enter WWII, its need for large quantities of oil and gas to produce high-octane fuel for planes ("avgas"), oil for ships, lubricants, and synthetic rubber far outstripped our capacity at the time. Avgas, in particular, was considered "the most critically needed refinery product during World War II and was essential to the United States' war effort."[14] Pursuant to authority provided by the Second War Powers Act and related statutes, the Federal Government created agencies to which it delegated the power to control petroleum production and distribution, direct the production of certain petroleum products, and manage resources.[15] This was specifically true with respect to Petitioners' petroleum-production activities on the Louisiana coast.

In the early 1940s, President Roosevelt established several agencies to oversee wartime petroleum production, including the War Production Board ("WPB") and the Petroleum Administration for War ("PAW"). The purpose of these federal agencies was to coordinate and maximize the resources our Nation could muster to protect ourselves and destroy our enemies' military power.[16] PAW centralized the government's petroleum-related activities for the war effort in a way never possible by industry action alone, strictly directing and controlling every phase of the industry, including crude oil production,

14. *Shell Oil Co. v. United States*, 751 F.3d 1282, 1285 (Fed. Cir. 2014).

15. ROA.13919-22, 13959-61, 14216-19, 14267-74, 14275-82, 14525, 14755, 14785, 14787, 14853-912.

16. ROA.10866, 13959-60.

refining, manufacturing, transporting, and distribution.[17] In this way, PAW's direction and control of the oil and gas industry during WWII was unique and went well beyond the regulatory and monitoring activities of modern federal agencies as well as the level of direction and control seen in typical government contracts.[18]

"PAW was further expected to designate for the military forces the companies in a given area from which the product could be secured, as well as the amount to be produced by each company and the time when the product would be available."[19] The Office of the Petroleum Coordinator for National Defense ("OPC"), PAW's predecessor, stated that "[i]t is ***essential***, in the national interest that the supplies of all grades of aviation gasoline for military, defense and essential civilian uses ***be increased immediately to the maximum***."[20] OPC also required that production levels be "fixed" in order to "efficiently," and to "the full[est] extent" possible, provide the grade of crude needed for avgas production for the military.[21] Thus, the Federal Government, including through PAW, took charge and provided the strategic direction and control needed to ensure the country had sufficient fuel for the war, including specialized avgas.

---

17. ROA.10866-68, 16085.

18. ROA.10868-69.

19. Statement of George A. Wilson, Director of Supply and Transportation Division, Wartime Petroleum Supply and Transportation, Petroleum Administration for War, Special Committee Investigating Petroleum Resources, S. Res. 36 at 212 (Nov. 28, 1945).

20. *Shell Oil*, 751 F.3d at 1286 (quoting OPC Recommendation No. 16) (emphasis added).

21. ROA.15299.

At the direction of the Federal Government, the oil companies increased avgas production "over twelve-fold from approximately 40,000 barrels per day in December 1941 to 514,000 barrels per day in 1945, [which] was crucial to Allied success in the war."[22] In this way, federal officers' direction and control of Petitioners' activities was much more extensive than the type of modern regulatory authority exercised over companies to ensure the safety of products for consumers, which this Court found insufficient to justify federal officer removal in *Watson*. It is also well beyond the type of direction and control seen in the federal contracts that other courts regularly find sufficient for federal-officer removal.

Rather, federal officers' direction and control over petroleum production during WWII rose to such a level that the industry was basically part of the Federal Government itself. "No one who knows even the slightest bit about what the petroleum industry contributed … can fail to understand that it was, without the slightest doubt, ***one of the most effective arms of this Government***" in fulfilling the government's core defense functions.[23] The industry provided, under Federal Government control, products that were essential for the government to carry out its duty to defend the Nation.

22. *Shell Oil*, 751 F.3d at 1285.

23. Statement of Senator O'Mahoney, Chairman, Special Committee Investigating Petroleum Resources, S. Res. 36, at 1 (Nov. 28, 1945) (emphasis added).

II. The oil and gas produced from Louisiana's coastal zone under the direction and supervision of federal officers, including specialized avgas for fighter planes, was essential to the Nation's military and its wartime efforts.

A prime example of how the Federal Government took charge of the Nation's petroleum exploration, development, and production activities for the war effort during WWII involved activities in Louisiana's coastal zone. To meet increasing wartime demand for petroleum products, in 1942, PAW established allowable production levels in Louisiana and designated certain Louisiana coastal fields as "critical fields essential to the war program."[24] This federally-directed ramped-up production from Louisiana coastal fields during WWII made the State the third largest oil producer in the country.[25] The WPB imposed similar orders and directives, including uniform well spacing patterns, with exceptions granted only if PAW determined it was needed to promote the war effort, such as producing needed avgas components.[26] As wartime petroleum demands increased, the Federal Government, through WPB and PAW, made materials available to the industry and relaxed well-spacing requirements to allow increased production.[27]

---

24. ROA.13909, 13938-39, 13966-68, 15321-40.

25. ROA.10874-75.

26. ROA.13928-36, 14247, 14279-80, 15084-87, 15089-92, 15094-97, 15099, 15101, 15103, 15111, 15113-125, 15135-49, 15151, 15153-60, 15162-65, 15167-68, 15170, 15617-744.

27. ROA.13933-36, 14247, 14279-80, 15153-60, 15162-65, 15167-68, 15170, 15172-82, 15184-223.

The Federal Government also directed and controlled the transport of crude from the fields to refineries, including the construction of pipelines, in order to manufacture petroleum products for the war and ensure the utmost efficiency in doing so.[28] In particular, PAW directed the allocation of specific volumes of crude produced from Louisiana coastal fields to specific refineries in order to maximize the production of critical war products for Federal Government contracts, while using the least amount of crude.[29]

The avgas these refineries were coordinated and directed by the Federal Government to produce in vast quantities—and for which the Federal Government was the sole purchaser—was perhaps the most critical product to fuel the war efforts and the Allies' aerial supremacy.[30] Crude producers, like Petitioners, faced both PAW direction of production practices and amounts as well as subcontractor obligations that could be enforced by the Federal Government.[31]

Equally important, the Federal Government, through PAW and WPB, directed and controlled the allocation of

---

28. ROA.13909, 13939-43, 13959-61, 14225-41, 14283-84, 14562, 15342-43, 15354, 15363.

29. ROA.13910, 13938, 13944-55, 13948, 13972-80, 13981-14006, 14008-36, 14038-59, 14061-78, 14080-159, 14161-90, 14192-208, 14210-284, 15306-07, 15309-19, 15402, 15420, 15441, 15447-52, 15454-56, 15482-515, 15517-63, 15565-67, 15569-73, 15575-77, 15746-68, 15770-73, 15779, 15796-16027, 16104-107, 16289-310, 16320-21, 16381-84.

30. ROA.13953-55, 14211, 14248-49, 14259-60, 15579-80, 16095-98, 16100-102, 16109-151.

31. *See* Petition at 2–3, 10–12, 16–18, 26–27.

materials, like the steel and copper used in oil exploration and production machinery, because those materials were also critical to competing wartime efforts, such as building ships, planes, artillery, and munitions.[32] As PAW's Director of Production put it, the 60-plus tons of steel needed for a petroleum well casing could build two large fighting tanks.[33] PAW's Administrator similarly asked with respect to "[e]very proposal or application for materials … could any less critical material be substituted?"[34] The Federal Government used this power over allocations of materials as leverage to control the industry and ensure it complied with federal directives.[35]

In short, the Federal Government determined that the best means-and-methods to support the war efforts required using the fewest precious resources to discover, develop, and produce the most fuel possible—and directed Petitioners and others in the industry to do so.[36] Petitioners' alleged misconduct—like extracting too much oil and not using steel tanks and more steel in well casings and saltwater reinjection wells—arises directly from Petitioners following the decisions by federal officers to ramp up production and prioritize the use of certain materials to support the military and win the war. The resolution of these conflicts between federal directives and

32. ROA. 10878-79, 13920, 13926, 14216-19, 14267-85, 15041-43.

33. ROA.13926, 15041-43.

34. ROA.13926-27, 15046-48, 15051-52.

35. ROA.10871-72.

36. ROA. 10878-80, 13927-29, 13936-37, 13944, 14271, 14923-25, 15069-70, 15074-75, 15077-82, 15084-87, 15105-09, 15262, 15290-95, 15378-81, 15617-744, 16069-73.

newly-minted state environmental requirements—and whether Petitioners have any liability for following those federal directives—belongs in federal court.

III. Depriving Petitioners of the federal forum the Federal Officer Removal Statute was designed to provide presents national security risks by inviting parochial second-guessing of federal officers and deterring private parties from acting under federal officers.

We have serious concerns about the broader implications of and message sent by requiring that this case be litigated in state court. Our Nation needs private parties, like Petitioners, to answer the call of duty when asked by the Federal Government to use their expertise to assist with our national defense. Our national security depends, in many ways, on such public-private partnerships, where our citizens step up to use their skills to assist their country by taking direction from the government. That must be encouraged, not deterred.

One of the key ways in which the Federal Government has incentivized private parties to take its direction is by ensuring that, if someone attempts to hold them liable for such actions, the private parties have the right to have those actions judged in a federal venue, "where the authority of the law was recognized," free "from interference by hostile state courts" that may not agree with federal law and decisions.[37] The Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1), accordingly

37. *Watson*, 551 U.S. at 147-48 (quoting *Willingham*, 395 U.S. at 405, and 9 Cong. Deb. 461).

authorizes removal to federal court of "[a] civil action ... that is against or directed to ... any person acting under [a federal] officer ... for or relating to any act under color of such office."

The "statute's 'basic' purpose is to protect the Federal Government from the interference with its 'operations' that would ensue were a State able, for example, to" apply its laws and impose its judgment on "'officers and agents' of the Federal Government 'acting ... within the scope of their authority.'"[38] To achieve that purpose, this Court has consistently eschewed a narrow interpretation of the statute and, instead, required a "liberal construction"—meaning all doubts are resolved in favor of removal, not remand.[39] Courts considering federal officer removal accordingly "credit" the defendant's—not the plaintiff's—"theory of the case."[40]

Petitioners correctly contend that the remand decision here violates these established principles.[41] Instead of construing the facts in favor of Petitioners and crediting their theory of the case, the courts below did the opposite and imposed a stricter standard. Furthermore, the lower courts imposed a requirement, found nowhere in the statute or this Court's precedents, that a person can establish they were "acting under" a federal officer only

38. *Watson*, 551 U.S. at 150 (quoting *Willingham*, 395 U.S. at 406).

39. *Id.* at 147.

40. *Jefferson Cnty. v. Acker*, 527 U.S. 423, 432 (1999); *see also* note 11, *supra.*

41. *See* Petition at 24–30.

with evidence of an express contract, payment, employment relationship, or formal agency arrangement. That should not be the controlling test, and as we understand it, is not the controlling test.

As the history above indicates, the Federal Government needed the entire industry to act as one and could not accomplish that goal with individual contracts. As that history also indicates, regardless of any particular contracts or formalized employment/agency relationships, Petitioners' exploration-and-production activities in the Louisiana coastal zone during WWII were unquestionably taken under the subjection, direction, and guidance of federal officers, including federal officers controlling things like Petitioners' production levels and material usage, to produce a product for the Federal Government that it would otherwise have had to produce itself.

It is contrary to commonsense and the purpose of the statute to only focus on the specific things noted by the Fifth Circuit in deciding if a person is "acting under" a federal officer. Again, we are not dealing with companies that are simply complying with the law by making products for consumers pursuant to long-standing federal regulations designed to ensure commercial products are safe for people and the environment. We are instead dealing with companies that provided the crude for the specialized products for our military pursuant to directives from new federal agencies, which were specifically created to help the Nation and its allies win WWII. Whether those companies had the specific types of evidence the Fifth Circuit said is needed to show "acting under" is beside the point because the record abounds with other evidence of "acting under" that has been deemed

sufficient by this Court and other circuits.[42] At bottom, the actions for which Petitioners are now being judged were taken at the direction and under the control of federal officers, and Petitioners are thus entitled to have those activities judged in an unbiased federal forum.

Based on our military experience, we are concerned that affirming the remand decision here could adversely impact our national security. Subjecting private parties to potential liability in state court for their actions taken at the direction of federal officers could have a dangerous deterrent "chilling effect." Private actors, like Petitioners, will be dis-incentivized to step up and take direction from the Federal Government in service of our country for fear of becoming liable after the fact—even more than three-quarters of a century later, based upon new, subsequently-devised state law rules. That has catastrophic implications for our national defense. It severely inhibits our military's deployment and warfighting capabilities, which maintain their superiority, in large part, through activities taken by private parties at the direction of federal officers—*e.g.*, the companies that make our planes, tanks, and specialized avgas (among other things).

Our concern about such a chilling effect is not an abstract hypothetical. In the aftermath of 9-11, and in the subsequent military actions in Afghanistan and Iraq, our Nation needed certain specialized protective equipment from the private sector, which the military did not have at the time. And we needed this new equipment on short notice. If private sector parties with the capability of producing the equipment had said "no," we would have

42. *See* Petition at 15–24.

been left in the lurch. Our troops would have been at a far greater risk in seeking to accomplish our national-security objectives.

That is why it is so important not to dis-incentivize the private sector's contributions. While our military can anticipate and plan for many things, it cannot anticipate everything. In those instances, when national security depends on immediate and decisive action, we need private actors who will heed the call and assist federal officers in executing strategic objectives. Accordingly, regardless of the evidentiary test applied by the Fifth Circuit here, the reality is the circumstances of this case fit squarely within the Federal Officer Removal Statute's "acting under" text and the reasons for federal jurisdiction in the first place.

Conversely, refusing to construe the statute to cover the type of activities Petitioners engaged in here will discourage private parties from taking federal-officer direction, which, in turn, will no doubt weaken our armed forces while strengthening those of our enemies that have appropriately treated, incentivized, and been supported by their private sector. Absent such cooperation from the private sector, the Federal Government would need to produce these necessary items on its own, raising the potential (as in other countries) of nationalization of military production efforts. Reversing the remand order to allow Petitioners' conduct acting under federal officers to be judged in a federal forum will send the right message to private parties and make them more likely to accept the federal direction that is essential to our national security.

Our constitutional oath is:

> I [*state your full name*], having been appointed a (*rank*) in the United States (*Military Branch*), do solemnly swear (*or affirm*) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter. So help me God (*optional*).

That oath necessarily includes a commitment to ensure that the military has sufficient capabilities to accomplish its missions based upon the specifications the military requires, like particularized fuels to operate vehicles, ships and planes. When the best, and sometimes only, way to ensure the availability of those key resources is a cooperative private sector, we must make certain these actions taken under federal officers and critical to our national security are fairly judged only in a federal forum. That is where this case belongs.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court should grant the Petition and vacate the order to remand this action to state court.

Respectfully submitted,

Tristan L. Duncan
Counsel of Record
Shook, Hardy & Bacon LLP
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550
tlduncan@shb.com

Daniel B. Rogers
Shook, Hardy & Bacon LLP
201 South Biscayne Boulevard,
Suite 3200
Miami, FL 33131

Attorneys for Amici Curiae