No. 23-687

IN THE

# Supreme Court of the United States

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MRP PROPERTIES COMPANY, LLC; VALERO REFINING COMPANY-OKLAHOMA; PREMCOR REFINING GROUP INC.; ULTRAMAR, INC.; VALERO REFINING COMPANY-TENNESSEE; VALERO REFINING-TEXAS,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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**BRIEF OF *AMICI CURIAE* AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS AND WESTERN STATES PETROLEUM ASSOCIATION SUPPORTING PETITIONERS**

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## INTEREST OF *AMICI CURIAE*[1]

*Amicus* American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association

[1] Pursuant to Rule 37.2, *amicus* AFPM provided timely notice of its intention to file this brief to counsel for all parties. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief. For purposes of full disclosure, AFPM and WSPA note that Valero Energy Corporation, an

whose members include nearly all United States petroleum refining and petrochemical manufacturing capacity. *Amicus* Western States Petroleum Association (WSPA) is likewise a non-profit trade association that represents companies engaged in petroleum exploration, production, refining, transportation, and marketing in Arizona, California, Nevada, Oregon, and Washington.

AFPM and WSPA members supply consumers with a wide variety of products and services used daily in their homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, lubricants, and the chemicals that serve as building blocks in numerous diverse products, including plastics, clothing, medicine, and computers.

Many AFPM and WSPA members and their predecessors fulfilled the directives of the United States government during the World War II era, including supplying aviation fuel and other critical petroleum products to support the war effort. AFPM and WSPA believe that the Government should be held accountable for the pollution caused by its wartime directives under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Sixth Circuit's decision to the contrary is incompatible with this Court's prior articulation of operator liability under CERCLA and, if left standing, will frustrate the fulfillment of CERCLA's fundamental goals. That is why AFPM and WSPA submit this brief in support of Petitioners.

## SUMMARY OF ARGUMENT

This Court held in *United States* v. *Bestfoods*, 524 U.S. 51 (1998), that an entity is liable as an operator under

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affiliate of the six companies who are the petitioners in this case, is member of both organizations.

CERCLA if it "manage[s], direct[s], or conduct[s] operations specifically related to pollution." *Id.* at 66-67. That standard applies regardless of whether the entity in question is private or governmental. See 42 U.S.C. § 9620(a)(1) ("Each department, agency, and instrumentality of the United States * * * shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title."). The decision below artificially limits this operator-liability standard that lies at the heart of CERCLA. It would restrict CERCLA's reach to only those that engage in waste disposal and exempt those who are responsible for the waste generation in the first place. That error is incompatible with CERCLA's text and purpose—to "make polluters pay," *Agere Sys., Inc.* v. *Advanced Env't Tech. Corp.*, 602 F.3d 204, 228 (3d Cir. 2010); *Burlington N. & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 602 (2009) (CERCLA was enacted to promote cleanup of hazardous substances and "to ensure that the costs of such cleanup were borne by those responsible for the contamination.")—and would have far-reaching deleterious consequences across the CERCLA landscape.

This case provides an example of the injustice that would flow from the restrictive rule announced in the decision below. As the undisputed facts found by the district court show, in order to secure the supply of petroleum products needed to fight and win World War II, the U.S. Government exercised dictatorial control over the country's oil refineries. Cloaked in a panoply of new wartime powers, the U.S. Government told facilities what inputs to use and what outputs to make; shuffled supplies and intermediates between facilities; prevented refineries from using certain materials to make repairs and address potential leakage and pollution; conducted "hourly

militaristic inspections"; threatened companies with takeovers or crude oil withdrawal if they did not comply; and even seized facilities where production was inhibited due to labor disputes. Pet. App. 2a-3a, 76a. In this way, oil refineries were conscripted into the war effort as soldiers on the economic and material battlefield.

Although the efforts paid off in ultimate victory in the war, the fact remains that "[o]il refining is messy." *Exxon Mobil Corp.* v. *United States*, No. H-2386, 2020 WL 5573048, at *7 (Sept. 16, 2020). The U.S. Government ran the refineries to maximize production and minimize the use of materials that were needed elsewhere in the war effort. Significant waste and pollution were generated as a result of this straining of the facilities during wartime.

Yet the decision below exempted the U.S. Government from any liability whatsoever for that pollution that occurred as a direct result of its dictates. It did so by propounding a narrow theory of CERCLA operator liability that attempts to distinguish pollution-generating activities from waste-disposal and environmental-compliance activities. But all of those activities—pollution generation, waste disposal, and compliance conduct—plainly fall within *Bestfoods*' broad standard that encompasses all who "manage, direct, or conduct operations specifically related to pollution." 524 U.S. at 66-67.

The wrong result in this case is only the tip of the iceberg. If left to stand, the Sixth Circuit's articulation of CERCLA operator liability will deepen the divide among courts on the appropriate interpretation of the *Bestfoods* standard and incentivize potential CERCLA defendants—private and governmental alike—to try to take advantage of this new loophole to liability for cleanup costs. This Court's review is needed to end this harmful

confusion and establish a uniform, national standard for operator liability under CERCLA.

## ARGUMENT

### I. THE U.S. GOVERNMENT EXERCISED ROBUST AND UNPRECEDENTED CONTROL OVER THE REFINING INDUSTRY DURING WORLD WAR II

The U.S. Government exercised sweeping control over domestic refineries during World War II. That level of extreme command-and-control economic direction was unprecedented then and has no modern analogue now. A review of this unique historical context of World War II generally and the respective roles of the U.S. Government and the petroleum industry during that period specifically will make plain the egregious consequences of decision below's artificial restriction of CERCLA liability.

The underlying facts in this case are undisputed and recorded in the underlying district court decision: During World War II, the U.S. Government recognized that securing a steady supply of a wide variety of petroleum products was critical to supporting the war effort. Pet. App. 34a ("Petroleum was critical to the United States during WWII, yielding everything from tires to bombs to heat for hospitals and kitchens"); see also Frey & Ide, A History of the Petroleum Administration for War 1941-1945, at 1 (1946) ("History of PAW"); see *ibid.* ("More than 500 different petroleum products were regularly used by the armed services. Without them, the warrior could neither fight nor live. With them, we were able to fight—and win.").

To maximize production of these critical petroleum products, the U.S. Government facilitated a rapid expansion of the petroleum industry through the establishment of a new government agency, the Petroleum Administration for War (PAW). *Ibid.* PAW

was established amidst a sweeping delegation of authority to and by the executive branch to fight World War II. These included:

- the First War Powers Act of 1941, Pub. L. 77-354, 55 Stat. 838 (1941), which was enacted for "the successful prosecution of the war, for the support and maintenance of the Army and Navy, [and] for the better utilization of resources and industries";
- the Second War Powers Act, Pub. L. No. 77-507, 56 Stat. 176 (1942), which authorized the Army and Navy to contract for supplies "necessary or appropriate for the defense of the United States" to be "assigned priority over any other contract or order," and empowered the President to allocate "material or facilities" to address any "shortage in the supply of any material or of any facilities" necessary to promote national defense; and
- Executive Orders 9024 and 9125, which established the War Production Board (WPB) and authorized it to "[e]xercise general direction over the war procurement and production program" and set government policies and plans for "war procurement and production." See Executive Order 9024, 7 Fed. Reg. 329 (Jan. 16, 1942); Executive Order 9125, 7 Fed. Reg. 2719 (Apr. 7, 1942).

PAW was very much in this same vein, established by executive order to "formulate plans and programs to assure for the prosecution of the war the conservation and most effective development and utilization of petroleum" in the Nation and "issue necessary policy and operating directives to parties engaged in the petroleum industry." Executive Order 9276, 7 Fed. Reg. 10091 (Dec. 2, 1942).

It is not hyperbole to say that PAW effected "[r]evolutionary changes in the relationship between the

oil industry and the federal government." Henry D. Ralph, *Federal Relationship with Oil Industry Solidified by War*, Oil & Gas Journal Vol. 43, No. 12, p. 79 (July 30, 1942). PAW exercised essentially total control over refinery operations, forcing the "the petroleum industry [to] virtually turn[] over its facilities to the command of the Government." *Ibid.* It "told the refiners what to make, how much of it to make, and of what quality." History of PAW at 219; see also Pet. App. 75a ("The record indicates that the Government dictated which petroleum products" the refineries could produce and "repeatedly determined" their "production levels"). Indeed, "[u]nder PAW direction, [refiners] ran their refining activities as though all were component parts of one huge refinery." History of PAW at 192; see also J.D. Gill, *Impact of War Keeps Profit Trend of Industry Downward*, Oil & Gas Journal Vol. 41, No. 20, p. 61, 221 (Sept. 24, 1942) (noting the "imposition of control over the operation of [the petroleum] industry by governmental agencies").

As an example of the extreme type of control PAW exercised over refineries, the following is a telegram order from PAW to regional refineries that limits how much crude oil they could process per day and orders them to "extract maximum quantities" of "100 and 91 octane number aviation gasoline and components thereof, toluene, butadiene, petroleum synthetics and petroleum coke" from the crude oil:

B. M. Scofield Ext. 3217. PETROLEUM ADMINISTRATION FOR WAR

GULF COAST WAR PLANT TELEGRAM REFINING DIVISION

Please note paragraphing WASHINGTON, D. C. ~~March 5,~~ 1943. 3/6/43

STRAIGHT WIRE

(Please send the following wire to the attached list of names. Fill in blank (1) with the refinery location, filling in blank (2) with Total Input.)

Until further advised and in accordance with Plan 15, Revised, you are now directed to limit the total input including crude, casing head, condensate and other raw materials for your ______(1)______ plant to ______(2)______ barrels per calendar day. From the total input you should extract maximum quantities of whichever of the following products are produced at your plant: 100 and 91 octane number aviation gasoline and components thereof, toluene, butadiene, petroleum synthetics and petroleum coke.

Ralph K. Davies, Deputy Petroleum Administrator, Gulf Coast War Plant Telegram (March 6, 1943). The Gulf Oil refinery in Port Arthur, Texas (one of the refineries subject to this litigation) was one of the refineries that received this telegram and specifically received an allotment of 120,809 barrels of crude per day. *Ibid.* As the district court found, this telegram order—and there were countless others—exemplifies the detailed control over inputs and outputs that PAW exercised over the petroleum industry. Pet. App. 36a (discussing PAW directives allocating crude to individual refineries and dictating outputs, and also noting "frequent directives for [refineries] to change yields").

Examining PAW's mechanisms of control in greater detail confirms that it had near-total power over refineries' inputs—down to specifying how many barrels per day a refinery could use. *Ibid.* Those allocations concerned not only how much crude oil could be used, but also what type. PAW decided, for example, which refineries got "sour high sulfur content crudes from west Texas and Venezuela," which had "corrosive qualities" and were therefore more likely to cause leaks in refinery equipment and resulting environmental contamination. History of PAW at 215.

PAW also directed when and how blending components could be used. In August 1941, for instance, PAW's predecessor agency prohibited refineries from using various blending agents, including iso-octanes, iso-pentanes, and neo-hexanes, "except for the production and manufacture of 100 octane aviation gasoline." Recommendation No. 8, 6 Fed. Reg. 5017, 5017-18 (Oct. 2, 1941).

Importantly, PAW's distribution of crude oil and blending components was both a carrot and a stick. A PAW Refinery Division official testified in deposition during another wartime claims case that "[t]he industry really had no—no choice in the matter. They either produced—the products in accordance with the instructions and directives of PAW or they would probably be denied an allocation of crude oil." Goldsmith Dep. Tr. at 82, *United States* v. *Shell Oil Co.*, No. cv-91-0589 (C.D. Cal. June 9, 1992). Chief Legal Counsel for PAW similarly testified that if a refinery wanted to opt out of making 100-octane aviation gasoline, for instance, PAW "would have shut him down; take away his materials and supplies. You didn't have to take him to court, for which I was fortunate. I just took away his materials and priorities. Usually you couldn't operate a week without it." Marshall Dep. Tr. at 83, *United States* v. *Shell Oil Co.*, No. cv-91-0589 (C.D. Cal. Aug. 8, 1991).

PAW's control over outputs was no less complete. PAW told refiners "what to make, how much of it to make, and what quality." History of PAW at 219. In addition to individual and regional telegrams like the one discussed above, PAW also issued broad directives to maximize the production of petroleum war products. See, *e.g.*, Recommendation 16, 6 Fed. Reg. 6433 (Dec. 15, 1941) (directing refiners to "increase[] immediately to the maximum" production of "all grades of aviation gasoline for military, defense and essential civilian use").

PAW issued a constant stream of these orders and directives, such that refineries were subject to an ever-shifting set of production demands:

> One of the wartime conditions which served to harass the refiners as much, perhaps, as anything else was the frequent need to change yields so as to produce, at all times, the maximum quantities of the most needed products. One day, refiners would have instructions from PAW to increase their yields of gasoline and cut down their yields of fuel oil. On another occasion, the evershifting requirements of war might call for exactly the opposite. And, adding to the difficulty, the orders often had to be dispatched in the form of telegrams, calling for changes to be made virtually overnight.

History of PAW at 219; see also *id.* at 69 ("Yields of products were frequently changed at the Nation's refineries, almost overnight, despite the effect upon earnings * * * .").

These production orders and directives were backed not only by the War Powers Acts described above, but also by the President's authority under the Selective Training and Service Act of 1940 "to take immediate possession of any such plant * * * to manufacture therein such product or material as may be required." Pub. L. No 76-783, § 9, 54 Stat. 885 (1940). The statute specifically required companies to comply with orders placed by the President for a product or material that the company was capable of manufacturing. *Ibid.* In fact, one of the refineries subject to this litigation was seized for six months during a labor dispute. Pet. App. 13a.

The U.S. Government's control over non-petroleum materials also impacted refineries. As the decision below recognized, the "rationing of steel and other construction materials delayed repairs meant to address corrosion and

prevent unintended leaks, spills, and breaks." Pet. App. 3a (internal quotation marks omitted). As with crude allocation, materials allocation was also used as a threat to keep refineries complying with PAW's dictates. Indeed, PAW Chief Legal Counsel testified that he once took away the "materials priorities" for a refinery to force compliance, explaining the dire consequences of being denied materials priority:

> To run a refinery, or an oil well, you have to have a constant supply of materials and maintenance. Just run-of-the-mill stuff to keep the thing on—in operation. And you can take those essential parts away and the fellow goes down. He can't operate without it.

Marshall Dep. Tr. at 82.

This control manifested in less direct ways as well. For example, at the urging of the WPB, the American Standards Association during the war issued new pipe flange pressure standards to encourage use of cast-iron instead of steel "as a war measure." See American Standards Association, Pressure Rating for Cast-Iron Pipe Flanges and Flanged Fittings Class 125, B16a1-1943, 1 (Apr. 15, 1943); see also *Exxon Mobil Corp.*, 2020 WL 5573048, at *55 (finding that refineries in Texas and Louisiana were able to significantly improve their waste-handling facilities only after World War II when Government controls were lifted).

In sum, the U.S. Government effectively conscripted the Nation's refineries during World War II. They were drafted into the war effort and subject to PAW's orders as if they were soldiers on the battlefield. The exigencies of war forced PAW to place great strain on the refineries—by both restricting inputs and maintenance materials and demanding great quantities of an ever-changing array of outputs.

## II. THE DECISION BELOW ERRED IN CONCLUDING THAT THE U.S. GOVERNMENT'S WARTIME OPERATIONAL CONTROL OF REFINERIES DOES NOT AMOUNT TO OPERATOR CONTROL UNDER CERCLA

### A. The U.S. Government's near-total control of refineries during World War II renders it liable for pollution as an operator under CERCLA

CERCLA holds liable for cleanup costs "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). This standard deliberately focuses on operation of the *facility*, not on operation of the *disposal*. Accordingly, to be an operator under CERCLA, an entity must simply operate a *facility at which hazardous substances were disposed of*. Or, as this Court put it, "[u]nder the plain language of the statute, any person who operates a *polluting facility* is directly liable for the costs of cleaning up the pollution." *Bestfoods*, 524 U.S. at 65 (emphasis added).

The Court went on to explain what constitutes an operator:

> [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

*Id.* at 66-67. Accordingly, CERCLA operator liability is not limited to those that physically turn the valves at the plant. See *id.* at 71 ("[T]he statute obviously meant something more than mere mechanical activation of pumps and valves"). Anyone—including "the facility's

owner, the owner's parent corporation or business partner, or even a saboteur who sneaks into the facility at night to discharge its poisons out of malice"—can be deemed an operator of a facility. *Id.* at 65.

Of particular importance here is that CERCLA explicitly treats the U.S. Government the same as any other responsible party for purposes of operator liability: "Each department, agency, and instrumentality of the United States * * * shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title." 42 U.S.C. § 9620(a)(1); see also *FMC Corp.* v. *U.S. Dept. of Com.*, 29 F.3d 833, 840 (3d Cir. 1994) ("[W]hen the government engages in activities that *would* make a private party liable *if* the private party engaged in those types of activities, then the government is also liable. This is true even if no private party could in fact engage in those specific activities."). Thus, the U.S. Government—like any other party—is liable under CERCLA as a past facility operator if it "manage[s], direct[s], or conduct[s] operations specifically related to pollution." *Bestfoods*, 524 U.S. at 66-67.

The U.S. Government far surpassed that operator liability standard through its total control of refineries during World War II. As detailed above, PAW directed refinery operations across the country as though all petroleum facilities "were component parts of one huge refinery." History of PAW at 192; see also Pet. App. 2a (the decision below acknowledging that the U.S. Government told "refineries what to produce and when to produce it," rationed and allocated the crude oil to refineries to produce the mandated products, and "regulated industry wages and prices").

As the decision below recognized, that command-and-control regime had serious environmental consequences:

> [T]o produce what the government requested using the crude oil it allotted, refineries sometimes changed their manufacturing techniques. These changes led to more waste production and corroded refinery equipment, increasing leakage and spillage. Compounding this problem, government rationing of steel and other construction materials delayed repairs meant to address corrosion and prevent unintended leaks, spills, and breaks.

Pet. App. 3a (internal quotation marks omitted). The U.S. Government should be responsible for that resulting contamination as an operator of the refineries under CERCLA.

**B. The decision below concluded otherwise only through a series of three legal errors that mangle CERCLA's operator standard**

Despite the U.S. Government's pervasive control of refineries during World War II, the Sixth Circuit declined to hold it responsible under CERCLA because it "did not 'operate' Valero's refineries during the war." Pet. App. 10a. The court's reasoning was that the U.S. Government did not make "the key management decisions related to waste"; did not work "'day-to-day' with petroleum's hazardous byproducts"; and did not make "broader, strategic decisions about waste disposal" or specifically site waste disposal areas. *Id.* at 8a. It arrived at that incorrect conclusion by making three legal missteps: misapplying the *Bestfoods* standard, declining to assess the totality of the circumstances, and failing to analyze the facts through the lens of CERCLA's primary directive to "make polluters pay." *Agere Sys.*, 602 F.3d at 228.

1. First, the decision below cannot be squared with the basic principle that waste- or pollution-generating

activities are specifically related to pollution and relevant to the determination of operator liability. That bedrock of CERCLA law stems from the two primary pieces of guidance this Court provided in *Bestfoods*: (1) that an operator "directs the workings of, manages, or conducts the affairs of a facility," and (2) that an operator "must manage, direct, or conduct operations specifically related to pollution." 524 U.S. at 66-67. Reading these two standards together, it is plain that a pollution-producing standard is the appropriate measure of operator liability. And it is equally clear that the U.S. Government easily met that standard by directing the affairs of refining facilities during World War II.

Nevertheless, the Sixth Circuit and some other lower courts have latched on to the last clause in the *Bestfoods* discussion of operator liability to reach the contrary result. *Bestfoods* states that an "operator must manage, direct, or conduct operations specifically related to pollution, *that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations*." *Bestfoods*, 524 U.S. at 66-67 (emphasis added). The decision below reads that additional text to strictly limit the universe of actions that could result in operator liability. Specifically, it focused on "day-to-day work with hazardous waste" and making "strategic decisions about waste management, say by choosing to store waste onsite rather than offsite or by adopting processes that lead to leakage or spillage." Pet. App. 5a-6a. Because the U.S. Government did not engage in those specific actions—at least according to the Sixth Circuit—it escaped CERCLA liability. *Id.* at 7a-14a.

But while managing operations related to leakage and disposal and making decisions about compliance with environmental regulations certainly are ways to meet the operator liability standard, they are not the only actions that can be "specifically related to pollution." *Bestfoods*,

524 U.S. at 66-67. Accordingly, the last clause in the *Bestfoods* discussion of operator liability is best read as two examples of activities that could meet the operator liability standard, not as an exclusive list. After all, the vast majority of environmental regulations were not promulgated until after EPA's formation in 1970, with the upshot being that "decisions about compliance with environmental regulations" are largely irrelevant to cases dealing with contamination that occurred before that time. See Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 Va. Envtl. L.J. 75, 76 (2001) ("[P]rior to 1970, environmental protection law in the United States was essentially non-existent.").

Indeed, three circuits have held that waste- or pollution-producing activities are also "specifically related to pollution" and therefore relevant to the determination of operator liability. See *United States* v. *Nature's Way Marine, LLC*, 904 F.3d 416, 421 (5th Cir. 2018); *United States* v. *TIC Inv. Corp.*, 68 F.3d 1082, 1088 n.5 (8th Cir. 1995); *FMC Corp.* v. *U.S. Dep't of Com.*, 29 F.3d 833, 843 (3d Cir. 1994).

Their reasoning is sound. In *FMC*, for instance, the U.S. Government required a rayon manufacturing facility to change which product it was making, supplied the necessary raw materials, and "knew that generation of hazardous waste inhered in the production process." *FMC*, 29 F.3d at 837-38. "Given this degree of control, and given the fact that the wastes would not have been created but for the government's activities, the government is liable as an operator." *Id.* at 844.

*FMC*'s analysis reflects the reality that waste- and pollution-generation is inherent in the production process for some industries. This was particularly true for the

refining industry during World War II. As one district court found when assessing a similar wartime refinery case, "[o]il refining is messy." *Exxon Mobil*, 2020 WL 5573048, at *7. Specifically, "[i]t produces oil, water, and other substances that combine to make toxic sludges and contaminate water flows," and "[t]hese wastes often include chemicals from the refining process, such as acids, leads, and hydrocarbons." *Ibid.*

Of course, once waste is generated, it must be disposed of or otherwise handled or controlled. Drawing a false line between "waste-generating" activities and "waste-disposal activities"—as the decision below did—ignores this basic reality of industrial production and forces an artificially narrow view of CERCLA operator liability.

Accordingly, this Court should reject the Sixth Circuit's narrow re-interpretation of *Bestfoods* and reaffirm the broad standard of operator liability this Court set out: an operator "must manage, direct, or conduct operations specifically related to pollution." 524 U.S. at 66. Waste- and pollution-generating activities, including historical industrial production operations, are "specifically related to pollution" under *Bestfoods*. The U.S. Government's pervasive control of refineries during World War II plainly meets that standard.

2. Second, the decision below did not consider the totality of the circumstances in its analysis. CERCLA operator liability should be assessed based on consideration of the totality of the circumstances. See, *e.g.*, *United States* v. *Twp. of Brighton*, 153 F.3d 307, 327 (6th Cir. 1998) (Moore, J., concurring) (opining that the proper disposition in light of the recent *Bestfoods* decision was to "remand this issue to the district court so that it may reconsider whether the totality of the circumstances demonstrate Brighton Township's activities in relation to the dump site involved actual control over the facility such

that the Township should be considered an operator under CERCLA"). After all, as this Court has made clear, CERCLA operator liability means "something more than mere mechanical activation of pumps and valves, and must be read to contemplate 'operation' as including the exercise of direction over the facility's activities." *Bestfoods*, 524 U.S. at 71.

Rather than assessing the totality of the circumstances, the decision below downplayed the U.S. Government's level of control by considering each component only in piecemeal fashion:

> Emergency rationing is a paradigmatic regulatory tool. So are orders directing manufacturers to prioritize production of key products. So are mandatory inspection regimes. By wielding these powers, regulators do not 'operate' the industries they regulate any more than extensive regulation of a private company makes the regulated party a state actor.

Pet. App. 9a-10a (internal citations and quotation marks omitted). As a result, the Sixth Circuit suggests that the U.S. Government during World War II was nothing more than a "run-of-the-mill regulator[]" that cannot be held responsible for the waste generated under its direction.

As detailed above, however, the U.S. Government was anything but a "run-of-the-mill" regulator of the petroleum industry during World War II. See *supra* Part I. What the Sixth Circuit seems to ignore is that these actions were not taken in isolation, but instead were cumulative directives that impacted waste generation and constrained disposal options.

Considering the totality of the U.S. Government's "exercise of direction" over petroleum refineries during World War II, it did not *just* direct prioritization of key petroleum products, *just* ration and allot crude oil to

refineries, or *just* mandate inspections—it took all of these actions and more to ensure maximum petroleum product production to support the war effort. "PAW told refiners what to make, how much of it to make, and what quality." History of PAW at 219. These directives were frequent and ever-changing: "For example, PAW would telegram refineries to increase gasoline yields and decrease fuel-oil yields but then telegram the opposite soon after—often requiring refineries to change operations and equipment virtually overnight." Pet. App. 36a-37a (internal quotation marks omitted). Further, these directives included requirements to generate largely new products like high-octane aviation gasoline at maximum quantities using new facilities. See *id.* at 68a (noting that the Government approved construction of a new machine to "produce high-octane avgas for the war effort" at one of the refineries at issue in this case).

And again, it allotted not only the amount of crude oil each refinery could process but also the specific type of crude and other inputs refineries could use, all while taking other measures (like rationing steel and pressuring standards groups to change their construction recommendations to allow for use of inferior materials) to prevent refineries from employing effective leak and corrosion prevention. See *supra* Part I.

That exceeded mere regulation and crossed over into exercising "substantial control" and taking "active involvement in the activities" of refining facilities, including activities directly related to the generation of waste and contamination. *FMC*, 29 F.3d at 843. Not only did the Government's directives to maximize production necessarily increase waste, but the Government also prevented refineries from effectively managing waste and preventing leaks through steel rationing and other measures.

3. Third, the decision below frustrates CERCLA's fundamental goal of "mak[ing] polluters pay." *Agere Sys.*, 602 F.3d at 228. The Sixth Circuit's restrictive standard for operator liability is fundamentally incompatible with that aim. It allows both governmental and private actors to escape liability for *generating* waste and pollution so long as they refuse to take responsibility for *managing and disposing* of that waste and pollution. Here, for example, the U.S. Government benefitted greatly from the waste- and pollution-generating activities it ordered. The refining industry collectively had "the responsibility for victory" of the war. History of PAW at 1 (quoting Charles E. Wilson, executive vice chairman of the War Production Board). Yet the Sixth Circuit's standard relieves the U.S. Government of responsibility for the corresponding contamination. Such a rule artificially narrows the scope of CERCLA's powerful remedial provisions.

Here, it is important to keep in mind that operator liability is binary but not zero-sum. In other words, more than one party can be responsible for contamination at a given site. The facility owner is also liable under CERCLA as a past owner and potentially as a past operator as well, meaning that the respective responsibility for the contamination will generally be assessed through equitable allocation. 42 U.S.C. § 9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."). But to fully assess the respective responsibilities of the refineries as compared to the U.S. Government and hold all responsible parties accountable, the U.S. Government must be liable as an operator. Otherwise, it has no responsibility whatsoever for the pollution it caused.

## III. THIS IS AN IMPORTANT ISSUE THAT WARRANTS THE COURT'S REVIEW

As detailed in the Petition, the decision below is not a one-off case. Other CERCLA claims have been brought against the U.S. Government by companies who owned and/or operated refineries during World War II. See, *e.g.*, *Exxon Mobil*, 2020 WL 5573048, at *1 (refineries in Texas and Louisiana filed CERCLA claims against the U.S. Government); *United States* v. *Shell Oil Co.*, 294 F.3d 1045, 1048 (9th Cir. 2002) (CERCLA counterclaims filed by several California refineries resulted in a decision that the U.S. Government was an "arranger" under CERCLA and liable for all cleanup costs associated with disposal of benzol waste). Subjecting these claims to different standards and different results in different circuits is inequitable, all the more so since the defendant in each of these lawsuits—the U.S. Government—is the same.

Congress drafted CERCLA to be retroactive: "[B]y imposing liability upon former owners and operators, Congress manifested a clear intent to reach conduct preceding CERCLA's enactment." *United States* v. *Olin Corp.*, 107 F.3d 1506, 1513 (11th Cir. 1997). To support CERCLA's goal of holding past polluters liable for resulting contamination, CERCLA contains a permissive statute of limitations that does not run from the date of the contaminating activities or even the discovery of contamination, but rather runs from the dates of cleanup or, alternatively, the date a settlement or judicial order ordering payment of costs is entered. See 42 U.S.C. §§ 9613(g)(2), (g)(3). For this reason, lawsuits seeking to recoup cleanup costs can be brought many decades later—exactly as Congress intended. See, *e.g.*, *Exxon Mobil Corp.* v. *United States*, 335 F. Supp. 3d 889, 908-909, 916 (S.D. Tex. 2018) (assessing the statute of limitations under CERCLA applicable to claims to recover costs associated with World War II-era pollution and concluding that the

statute of limitations had not even started to run because ongoing removal activities continued at both facilities at issue). Accordingly, the treatment of wartime claims such as those involved here is very much a live and important issue for purposes of CERCLA.

Equally important is that although this case is about the U.S. Government's liability as an operator under CERCLA, the question presented is of much broader import. Whether courts should artificially constrain CERCLA operator liability to only "waste disposal" activities rather than pollution- and waste-producing activities is critical to all CERCLA operator liability adjudications, regardless of who the defendant is. This case squarely presents that question.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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