No. 19-1189

IN THE

Supreme Court of the United States

BP P.L.C., ET AL.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR THE
AMERICAN PETROLEUM INSTITUTE
AS AMICUS CURIAE
SUPPORTING REVERSAL

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INTEREST OF THE AMICUS CURIAE[1]

The American Petroleum Institute ("API") is a nationwide, non-profit trade association that represents approximately 600 companies involved in every aspect of the petroleum and natural-gas industry. Its members range from the largest integrated companies to the smallest independent oil and gas producers. API's members include producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the industry. API is also the worldwide leading body for establishing standards that govern the oil and natural-gas industry.

This case is one of many that have been brought against the petroleum and natural-gas industry, all by state and local governments suing in their home courts, many represented by the same outside plaintiffs' counsel. Although API is not a party to this specific case, the governmental plaintiffs have named API as a defendant in several subsequent cases, contending that API's exercise of its First Amendment rights to advocate for its members and petition the government are actually a basis for tort liability. API has been among the defendants removing these cases to federal court based in part on the federal-officer removal doctrine. *See, e.g.*, *Delaware ex rel. Jennings v. BP America Inc.*, No. 20-cv-1429 (D. Del. removed Oct. 23, 2020). Accordingly, API has a concrete stake

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[1] All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

in the scope of appellate review of removal decisions in cases like this one.

Notably, the arguments for federal-officer removal have been made more extensively, and with considerably more historical detail, in the cases in which API is a party. Respondent disputed at the certiorari stage that the federal-officer basis for removal was meritorious. Br. in Opp. 31. In fact those arguments are far more substantial than the Fourth Circuit decision suggests.

API also has extensive familiarity with the uniquely federal interests that this litigation implicates. This case, as well as the cases that similar plaintiffs and their outside counsel have brought against API, raises cross-border issues that have always been the subject of federal, not state, common law. Because these claims arise under federal law, plaintiffs like respondent have no right to insist that they proceed in the Circuit Court for Baltimore City, and defendants like API have a right to remove these federal claims to federal court.

Even if it were not litigating these issues, API has over a century of institutional knowledge that can assist the Court. API is well situated to provide the Court with a historical perspective on the extensive federal involvement in the production of oil, gasoline, natural gas, and other petroleum products. API's members have a long history of contracting with the federal government to serve the government's priorities, step into the shoes of the government in rendering services, and provide the government with bespoke products that meet exacting specifications. Understanding that history is necessary to fully

understand the basis for federal-officer jurisdiction in cases like this one.

SUMMARY OF ARGUMENT

I. Because respondent's claims are so sweeping in nature—covering all of petitioners' fossil-fuel producing activities for the better part of a century—they readily relate to petitioners' extensive work for the federal government, under federal direction, during that same period. These decades of history demonstrate that petitioners had a sound basis for removing this case under the federal-officer removal statute, despite respondent's suggestion to the contrary. Br. in Opp. 31. Nothing in this case supports respondent's ill-founded fear that a "frivolous assertion of federal-officer jurisdiction" could be used to leverage broader appellate review of an "order" under § 1447(d). Federal courts have ample tools to police frivolous jurisdictional arguments, but the federal-officer removal in this case, supported by decades of evidence, is anything but frivolous. Indeed, this case highlights the importance of appellate review of the narrow but important set of remand orders where Congress expressly permitted it.

For decades, petitioners acted under the direction of federal officers to help fulfill the government's strategic needs. During the Second World War, petitioners and their predecessors fueled the war effort—literally—providing an essential resource that powered everything from naval destroyers to Willys MB Jeeps. Oil producers worked round-the-clock to ensure that the energy needs of the American armed forces were met without interruption. These patriotic efforts were compulsory; oil companies could either follow the

directives of the Petroleum Administration for War, or risk being shut out of the market.

Oil companies' unique relationship with the military did not end with World War II. In the decades that followed, including to the present day, oil and natural-gas companies have, on several significant occasions, worked to satisfy the United States military's energy demands, creating unique fuel products that meet the military's exacting specifications.

If any example best demonstrates how companies like petitioners have "acted under" federal officers, it is the Standard Oil Company of California's relationship with the United States Navy in the operation of the Elk Hills Naval Petroleum Reserve. Standard Oil answered to the Navy, which regarded the company as being "in the employ of the Navy" as far as the Reserve was concerned. The Navy leveraged that lopsided relationship to ensure that Standard Oil met the Navy's production needs—sometimes over Standard Oil's protest.

Oil and natural-gas companies have also "acted under" the direction of the federal government in the government's effort to achieve energy independence. During the nationwide fuel shortages precipitated by the 1973 oil embargo, Congress and President Nixon determined that the best way to meet the United States' energy needs while reducing dependence on foreign oil was to develop the promising resources of the Outer Continental Shelf (OCS). That development proceeded under federal direction: Congress even considered creating a national oil company to handle the drilling, extracting, and refining of OCS reserves. Ultimately, Congress enacted legislation that directed

the federal government to enlist the aid of private companies by entering into tightly controlled leasehold agreements. The terms of OCS leaseholds go far beyond traditional agency regulation—the federal government dictates almost every material aspect of production, and uses its royalty-in-kind program to have OCS lessees fill the government's reserves.

These are just a few significant examples of how oil and natural-gas companies have "acted under" federal officers. Claims like respondent's thus fall squarely within the sorts of actions that are removable to federal court under § 1442.

II. Claims like respondent's are also removable because they arise under federal law. As this Court has stressed twice over, "'[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law.'" *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972)). So when a plaintiff like respondent alleges that interstate and international emissions are responsible for harm caused in a locality, that sort of "transboundary pollution" claim cannot be resolved by a single state court applying its own common law, or by a patchwork of 50 different state laws. To ensure that appellate courts can consider the distinctly federal and interstate interests calling for the application of federal law, this Court should construe § 1447(d) in a manner that allows for review of all issues within an "order remanding a case . . . removed pursuant to section 1442."

ARGUMENT

Municipal plaintiffs like respondent have sought to impose tort liability for global climate change on the

theory that *all* of the emissions by companies like petitioners, taken together and over time, caused harm to their localities. That is a sweeping claim, in both time and geography, and for that reason it is removable on multiple grounds.

First, because such a claim is sweeping in time—covering everything that oil and natural-gas companies have done to produce and distribute fossil fuels for the better part of a century—it necessarily sweeps in those companies' work during that same period, under the direction of federal officers, to produce and distribute fossil fuels for the government. The unique and extensive relationship between petitioners and the government provides a sound basis for removal under 28 U.S.C. § 1442. And an "order" rejecting that federal-officer removal is squarely within the jurisdiction of the court of appeals under 28 U.S.C. § 1447(d).

Second, because such a claim is also sweeping in geography—targeting emissions that cross interstate and international boundaries—it can only sound in *federal* law. Because the court of appeals was required to review the entire "order," it should not have closed its eyes to the federal nature of respondent's claims. Because respondent and its fellow governmental plaintiffs advance claims that arise under federal law (however they may be labeled), this case and those like it belong in federal court.

I. The oil and natural-gas industry has a long history of working at the behest of the federal government and "acting under" federal officers.

Based on its myriad needs, from strategic bombers to the Strategic Petroleum Reserve, the federal gov-

ernment is extensively involved in directing the activities of private-sector oil and natural-gas companies. Because this case squarely relates to those federally directed activities, petitioners properly "removed [this case] pursuant to section 1442," the federal-officer removal statute, and they are entitled to appellate review of the district court's entire remand decision. 28 U.S.C. § 1447(d).

The federal-officer removal statute, 28 U.S.C. § 1442, "vindicates [] the interests of government itself; upon the principle that it embodies 'may depend the possibility of the general government's preserving its own existence.'" *Bradford v. Harding*, 284 F.2d 307, 310 (2d Cir. 1960) (Friendly, J.) (quoting *Tennessee v. Davis*, 100 U.S. 257, 262 (1879)). For that reason, this Court has long made clear that the statute must be "'liberally construed.'" *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007) (quoting *Colorado v. Symes*, 286 U.S. 510, 517 (1932)). And the statute's scope has only grown in recent years, because Congress expanded its reach in 2011.

An action may be removed to federal district court when it is against "any officer (or any person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). As this Court has observed, "[t]he words 'acting under' are broad." *Watson*, 551 U.S. at 147. And while the statute's application had previously been limited to suits that "grow[] out of conduct under color of office," *Willingham v. Morgan*, 395 U.S. 402, 407 (1969), in 2011 Congress expanded the statute's scope so that it covers claims "for *or relating to* any act under the color of [federal] office." Thus, unlike the version the Court has previ-

ously confronted, the statute has loosened the nexus required: from one of causation to one of mere connection or association. *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc).

Claims like respondent's are ultimately about global climate change, the result of "[c]umulative emissions . . . attributable to fossil fuels" since "the beginning of the industrial revolution." J.A. 25-26 n.4. Throughout that time period, significant aspects of petitioners' fossil-fuel production were undertaken at the direction of the federal government and "under" federal officers in "an effort to *assist*, or to help *carry out*, the duties or tasks" of the federal government. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 152 (2007). *First,* fossil-fuel companies were conscripted into the wartime effort to provide a steady supply of a vital resource for the armed forces. *Second,* respondent's claims also cover production at the Elk Hills Naval Petroleum Reserve, which was operated by the Chevron petitioners' predecessor "in the employ of the Navy" (and sometimes subject to the Navy's coercion). *Third*, the claims also reach oil and natural-gas companies' drilling and production activities on areas of the Outer Continental Shelf leased to them by the federal government itself—leaseholds granted to fulfill the federal government's objective of achieving energy security.

A. Fossil-fuel companies have acted under the direction of federal officers to provide essential military supplies.

Updating an observation by Napoleon, General Omar Bradley proclaimed that "the modern army . . . moves not on its stomach but on gasoline." Omar Bradley, *A Soldier's Story* 245 (1951). Not just on land but

at sea and in the air, the United States armed forces have depended on oil for more than 100 years. Petitioners have been "providing the Government with [more than one] product that it used to help conduct a war"—without which the war effort would have ground to a halt. *Watson*, 551 U.S. at 153-54.

The dramatic rise in the use of oil coincided with the transformation of the United States Navy from a fleet of coal-powered ironclads to a force of petroleum-consuming destroyers. Erik J. Dahl, *Naval Innovation: From Coal to Oil*, Joint Force Quarterly 54 (Winter 2000-2001), *available at* https://apps.dtic.mil/dtic/tr/fulltext/u2/a524799.pdf. In 1910, President Taft declared to Congress:

> As not only the largest owner of oil lands, but as a prospective large consumer of oil by reason of the increasing use of fuel oil by the Navy, the federal government is directly concerned both in encouraging rational development and at the same time inuring the longest possible life to the oil supply.

Hearings Before H. Comm. on Naval Affairs on Estimates Submitted by the Secretary of the Navy, 64th Cong. 761 (1915).

During the Second World War, fossil-fuel companies were fully conscripted into the war effort. Oil became "a bulwark of our national security," Nat'l Petroleum Council, *A National Oil Policy for the United States* 1 (1949), and it became an essential ingredient for a number of wartime products—not just fuel, such as gasoline for jeeps and "avgas" (high-octane aviation fuel) for planes, but also chemicals like toluene, used to

make the explosive TNT. Petroleum Admin. for War, *A History of the Petroleum Administration for War, 1941-1945*, at 191 (John W. Frey & H. Chandler Ide eds. 2005). The D-Day assault carried gasoline ashore in jerricans, rapidly followed by underwater oil pipelines across the English Channel, to fuel tens of thousands of vehicles; "the need for gasoline was critical to the very end" of the war. Arnold Krammer, *Operation PLUTO: A Wartime Partnership for Petroleum*, 33 Tech. & Culture 441, 460 (1992).

Federal control over oil production was so pervasive during the Second World War that the petroleum industry practically became an "arm[] of this Government." Statement of Senator Joseph C. O'Mahoney, Chairman, Special Committee Investigating Petroleum Resources, *in* Petroleum Admin. for War, *Petroleum in War and Peace* 1 (1945).

To ensure that the country did not run out of oil, and to "induce and require American industries to participate robustly in the war effort," President Franklin Roosevelt appointed Interior Secretary Harold Ickes to serve as the Petroleum Coordinator for National Defense, and later to serve as the head of the Petroleum Administration for War (PAW). *See Exxon Mobil Corp. v. United States*, Nos. 10-2386, 11-1814, 2020 WL 5573048, at *10-*11 (S.D. Tex. Sept. 16, 2020), *appeal docketed*, No. 20-20590 (5th Cir. Nov. 13, 2020). At PAW's direction, oil companies worked round-the-clock to begin producing avgas as quickly as possible, and in "extraordinary" ways that often proved to be "uneconomical." *Shell Oil Co. v. United States*, 751 F.3d 1282, 1287 (Fed. Cir. 2014).

The PAW issued a number of "petroleum directives" and "petroleum administrative orders" that governed almost every material aspect of oil production. *Exxon*, 2020 WL 5573048, at *11 (explaining that PAW issued orders regarding "production, refining, treating, storage, shipment, receipt, and distribution within the industry of petroleum, petroleum products, or associated hydrocarbons"). "PAW told the refiners what to make, how much of it to make, and what quality." *Shell*, 751 F.3d at 1286 (citation omitted). Oil producers were also often told *how* to make their product, which meant refiners had to modify their equipment and their operations. W.J. Sweeney et al., *Aircraft Fuels and Propellants: Report of the AAF Scientific Advisory Group* 40 (1946) ("The refiner cannot build the equipment for making the fuel without knowing what its composition must be to meet the needs of the [aircraft] engine.").

The federal government also directed oil companies to erect two large pipelines—the "Big Inch" and "Little Big Inch" pipelines—to ensure that oil could be effectively transported from the oilfields of Texas to the Eastern Seaboard without being exposed to attack by German submarines. *E.g.*, *Schmitt v. War Emergency Pipelines, Inc.*, 175 F.2d 335 (8th Cir. 1949). These pipelines were operated "under contracts," with the operating entity, War Emergency Pipelines, Inc., serving "as agent" for the federal government "without fee or profit." *Id.* at 335-36.

Oil production may have been a patriotic duty, but it was hardly voluntary; companies had "no choice in contracting" and "little room to maneuver on contract terms." *Exxon Mobil*, 2020 WL 5573048, at *11. Failing to play by PAW's rules meant PAW would use its claws. "[D]isciplinary measures" included "restricting

transportation, reducing crude oil supplies, and withholding priority assistance." Telegram from P.M. Robinson, PAW Assistant Director of Refining, to Ralph K. Davies, PAW Deputy Administrator, *Refiners Who Did Not Reply to the Gasoline Yield Reduction Telegrams* (Aug. 12, 1942).

Oil companies continued to produce specialized forms of fuel at the federal government's direction on various occasions after the end of World War II. President Truman used the Defense Production Act of 1950 (DPA), ch. 932, 64 Stat. 798, to direct oil refineries to increase production of petroleum products and avgas. *Exxon*, 2020 WL 5573048, at *15. Fuel orders also became more specialized during the Cold War. Shell Oil Company, for example, produced jet fuel tailored to meet the unique needs of the U-2 spy plane and the SR-71 "Blackbird." Gregory W. Pedlow & Donald E. Welzenbach, *The Central Intelligence Agency and Overhead Reconnaissance: The U-2 and OXCART Programs, 1954-1974* at 61-62 (1992) (describing Shell Oil Company's development of "a special low-volatility, low-vapor-pressure kerosene fuel" designed to address the "need for a fuel that would not boil off and evaporate at the very high altitudes for which the aircraft was designed"). Providing specialized fuel meant more than just producing it—it also meant constructing special fuel facilities for handling and storage, which Shell Oil Company agreed to provide without any profit.

The United States invoked the DPA again during the OPEC oil embargo of 1973 to address critical shortages of oil needed by the military. S. Rep. No. 94-1, pt. 1, at 422 (1975); *see, e.g.*, Petroleum Products Under Military Supply Contracts, 38 Fed. Reg. 30,572, 30,572 (Nov. 6, 1973). In November and December 1973 alone,

the Department of the Interior ordered 22 companies to "supply a total of 19.7 million barrels of petroleum." *Hearing Before the Subcomm. on Nat'l Stockpile and Naval Petroleum Reserve, S. Comm. on the Armed Services*, 93rd Cong., 1st Sess. 73-74 (Dec. 10-11, 1973).

Today, the U.S. Department of Defense is the single largest consumer of energy in the country, and one of the world's largest consumers of petroleum and petroleum products. In 2019 alone, it spent $12.1 billion to purchase 94.2 million barrels of fuel products that conform to military specifications. U.S. Def. Logistics Agency, *Fiscal Year 2019: Fact Book* 27 (2019), *available at* https://www.dla.mil/Portals/104/Documents/Energy/Publications/FactBookFiscalYear2019_highres.pdf?ver=2020-01-21-103755-473.

Many of those purchases are for bespoke oil products that are not commercially available, manufactured only for the United States military at the Department of Defense's direction. Between 1983 and 2011, for example, Tesoro Corporation entered into a series of contracts with the Defense Logistics Agency (DLA) to supply it with military grade jet fuels. Contract for Commercial Items, Contract No. SC0600-12-D-0496 (Sept. 20, 2012) (placing an order for JP-8 military aviation fuel). The fuel had to survive under a certain set of conditions, so DLA was particular about how Tesoro was to manufacture it. For example, acting at DLA's direction, Tesoro included an additive that would get rid of an accumulated static charge, so that the fuel would not light on fire or set off sparks during a rapid refueling with a hot engine. *Id.* (incorporating terms from Solicitation SP0600-12-R-0061, at A-81, which instructed the injection of "Static Dissipator Additive" and "Fuel System Icing Inhibitor"); *see also* U.S. Dep't

of Defense, *Handbook Aerospace Fuels Certification* 9 (2014) (describing the function of static dissipater additives). It also added a fuel system icing inhibitor, so that the fuel would ignite (and not freeze) at high altitudes. Tesoro's specialized fuel was not an off-the-shelf product; it was a custom product made specifically at DLA's direction.

In producing what the military needed in war and peacetime, oil companies "acted under" federal officers, making claims related to those efforts removable under the federal-officer removal statute. Indeed, this Court in *Watson* suggested that a clear case for federal-officer removal would be when a private contractor is "fulfill[ing] the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war." 551 U.S. at 153-54 (discussing *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), which involved a private company's manufacturing of Agent Orange). For the better part of this century, that is what fossil-fuel companies have done—provide products that, "'in the absence of a contract with a private firm, the Government itself would have had to'" manufacture. *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 255 (4th Cir. 2017) (quoting *Watson*, 551 U.S. at 153-54); *accord Baker v. Atl. Richfield Co.*, 962 F.3d 937, 943 (7th Cir. 2020) ("the compulsion to provide the product to the government's specifications" indicated that the manufacturer "acted under federal authority"); *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016) (actions taken by a private contractor "while working under a federal contract to produce an item the government needed, . . . and that the government would have been forced to produce on its own, . . . easily satisf[y] the 'acting under' require-

ment of the § 1442(a)(1) inquiry" (citation omitted)); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008) (private companies may rely on federal-officer removal statute when "Defendants contracted with the Government to provide a product that the Government was using during war"). It is hard to imagine needs more fundamental and work more irreplaceable than petitioners' work to fuel the war effort—literally.

B. Standard Oil operated the Elk Hills Naval Petroleum Reserve "in the employ" of the United States Navy.

One key example of the industry's work at government direction, through both war and peacetime, is the Elk Hills Naval Petroleum Reserve. Petitioner Chevron U.S.A., Inc. and its predecessor, Standard Oil Company of California, carried out operations there at the Navy's express direction, for decades. Indeed, Standard Oil expressly operated the Reserve "in the employ of the Navy." While the court below held that Standard Oil did not "act under" a federal officer for purposes of removal jurisdiction, it did not consider the complete history of Standard Oil's operation of the Reserve under the Navy's control.

In 1912, two years after his pronouncement that the federal government was "directly concerned" with the production and supply of oil, President Taft "withdrew large portions of land in California" to create the Naval Petroleum Reserve No. 1 at Elk Hills. *United States v. Standard Oil Co. of Cal.*, 545 F.2d 624, 626-27 (9th Cir.

1976).[2] The Navy owned four-fifths of the reserve, and Standard Oil owned the remaining fifth. *Id.*

Congress intended for the Reserve's oil to remain "in the ground except when it was needed for national defense or to avoid damage to the field and the irretrievable loss of oil." U.S. Gen. Accounting Office, *Naval Petroleum Reserve No. 1: Efforts to Sell the Reserve*, GAO/RCED-88-198, at 2 (July 1988) ("GAO Report"), *available at* https://www.gao.gov/assets/220/210337.pdf. In the Reserve's early years, "the Navy and Standard Oil . . . had a 'gentleman's agreement' not to drill wells that would drain each other's reserves." *Id.* at 14.

The Reserve saw a flurry of government-mandated activity during World War II, when "it became apparent that additional crude oil production would be required on the West Coast." *Id.* President Roosevelt threatened to condemn and seize Standard Oil's lands, but eventually Standard Oil and the Navy came to an arrangement. Both parties entered into a Unit Plan Contract ("UPC") that "govern[ed] the joint operation and production of the oil and gas deposits . . . of the Elk Hills Reserve." *Chevron U.S.A., Inc. v. United States*, 116 Fed. Cl. 202, 205 (2014). Under the UPC, Standard Oil and the Navy formed an operating committee to manage the Reserve's affairs, but the Navy had "absolute control over (1) the time and rate of exploration and development and (2) the quantity and rate of production." GAO Report 15; *see also Naval Petroleum*

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[2] Elk Hills played a role in the Teapot Dome scandal, which ultimately culminated with this Court invalidating the leases central to the scandal (and returning the land to federal control). *West v. Standard Oil Co.*, 278 U.S. 200 (1929).

Reserves: Hearings Before the Armed Servs. Investigating Subcomm. of the H. Comm. on Armed Servs., 93rd Cong., 1st Sess. 6 (Oct. 17-18, 1973) (statement of Robert G. Rothwell, Deputy Dir., Logistics and Commc'ns Div., Gen. Accounting Office) (remarking that, under the UPC, "the Navy is to have control over the exploration, prospecting, development, production, and operation of the reserve"). Because the Navy and Standard Oil had conflicting interests—the Navy wanted to keep as much oil in reserve as possible, while Standard Oil had financial incentives to produce as much as possible—the UPC was understood to vest "full and absolute power" in the Navy, with all conflicts decided in the Navy's favor. Unit Plan Contract Between Navy Dep't and Standard Oil Co. of Cal., Relating to Naval Petroleum Reserve No. 1 (Elk Hills) ("UPC"), §§ 3(a), 4(a), Recitals 6(d) (June 19, 1944) (conferring to the Navy "complete control over the development of the entire Reserve and the production of oil therefrom" and "exclusive control over the exploration, prospecting development and operation of the Reserve"); *see also Hearing on Amendment Proposed to Unit Plan Contract Governing Dev. and Operation of Naval Petroleum No. 1 (Elk Hills) Before the H. Comm. on Naval Affairs*, 79th Cong., 2d Sess. 3737-38 (Sept. 9, 1946) (statement of Gerald D. Morgan, Special Counsel to the Comm. on Naval Affairs) (conflicts of interest were "decided in the Navy's favor, . . . for absolute control over the time, manner, and rate of production is vested in the Secretary of the Navy").

The UPC reflected the Navy's deliberate intent to "operate the reserve through a contractor rather than with its own personnel." GAO Report at 15. The Navy viewed Standard Oil as the best candidate for operat-

ing the reserve, as "it was the only large company capable of furnishing the facilities for such a development program." *Elk Hills Development* 1 (Mar. 2, 1945), *in* Nat'l Archives and Records Admin., PI-31 470 Records Concerning Reserves in the U.S. and PAW Districts 1941-45. Like all other wartime production efforts, Standard Oil's contributions were viewed as acts of patriotism, an undertaking with "at cost with no profit to be received by the Company." *Id.*

Standard Oil's relationship with the Navy—one in which the Navy maintained complete control over production at the Reserve—continued from 1944 to 1975. GAO Report at 15. Throughout that 31-year relationship, it was always clear that the Navy was in charge. Indeed, Standard Oil's operating agreement with the Navy stated that the company was "in the employ of the Navy Department and is responsible to the Secretary thereof." Contract No. NOd-9930, Operating Agreement Between Navy Department and Standard Oil Company of California Relating to Naval Petroleum Reserve No. 1 (Elk Hills), at 3 (Nov. 3, 1971).

And Standard Oil acted at the Navy's command. After the UPC was signed, Congress ordered 65,000 barrels a day from the Reserve "to address fuel shortages on the West Coast and World War II military needs." GAO Report at 15. In the aftermath of World War II, production was dialed back to "stop damage to the reserves and the irretrievable loss of oil." *Id.* Later, in 1974, Standard Oil was pressured to produce 400,000 barrels a day in response to the energy crisis. When the company balked, the Navy reminded Standard Oil that it was "in the employ of the Navy and [had] been tasked with performing a function which is within the exclusive control of the Secretary of the Na-

vy to order accomplished." Mem. from George C. Dowd, Officer in Charge, Naval Petroleum Reserves in Cal. to Field Superintendent, US-NPR No. 1 (Elk Hills) 1-2 (Nov. 28, 1974).

Standard Oil stopped operations on the Reserve in 1975 but remained a member of the Reserve's operating committee. Soon thereafter, Congress explored whether to use the Reserve to reinforce the national oil supply at the height of the oil embargo and energy crisis. Congress enacted the Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, 90 Stat. 303, which "authorized and directed that [the Reserve] be produced at the maximum efficient rate for 6 years." U.S. Gen. Accounting Office, RCED-87-75FS, *Naval Petroleum Reserves—Oil Sales Procedures and Prices at Elk Hills, April Through December 1986,* at 3 (Jan. 1987), https://www.gao.gov/assets/90/87497.pdf. The Navy was solely responsible for production, *see* Robert Lindsey, *Elk Hills Reserve Oil Will Flow Again*, N.Y. Times (July 3, 1976), but Standard Oil's successor, Chevron U.S.A., continued carrying out certain operations for the Navy by taking on subcontracts to produce oil. Systematic Management Services, Inc., *History of Naval Petroleum Reserve No. 1 (Elk Hills) 1912-1987 (Draft)* 192 (May 15, 1989) (describing a dispute between Chevron and the United States Navy over the cost of new plant construction, which had been referred to the Secretary of Energy for final resolution but resolved prior to a decision).

In 1977, Congress transferred responsibility for the Reserve to the U.S. Department of Energy. Chevron continued its operations on the Reserve as a subcontractor, and remained on the Reserve's operating committee. Between 1976 and the sale of the Reserve in

1998, the Reserve generated more than $17 billion in revenue under the "management" of the United States government. *See* U.S. Dep't of Energy, Office of Fossil Energy, *About NPR*, https://www.energy.gov/fe/services/petroleum-reserves/naval-petroleum-reserves.

The history of Standard Oil's relationship with the Navy demonstrates that the company's decades of operation at Elk Hills was done on "the Government agency's behalf." *Watson*, 551 U.S. at 156. Neither the Fourth Circuit nor the Ninth Circuit, which reached contrary conclusions about the relevance of the Reserve for removal purposes, took into account the full history of the relationship between Standard Oil and the Navy. Pet. App. 29a-30a; *Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 601-02 (9th Cir. 2020). The Fourth Circuit concluded that it could not discern whether Standard Oil was producing oil so that the Navy could fulfill its congressional mandate to produce, Pet. App. 29a ("no idea whether production . . . was carried out by Standard"), while the Ninth Circuit maintained that Standard Oil and the Navy were co-equals, citing the UPC and the operating committee. *See San Mateo*, 960 F.3d at 601-02. In fact, the history demonstrates that the Navy had delegated the Reserve's operations to Standard Oil, and Standard Oil was constantly reminded that it was "in the employ of the Navy." That is more than enough to demonstrate the sort of "special relationship" that is eligible for federal-officer removal. *Watson*, 551 U.S. at 157.

C. Companies must act under the direction of federal officers to carry out the federal policy of oil and natural-gas production on the Outer Continental Shelf.

The federal government's intimate involvement in oil production is by no means limited to the military context. Substantial amounts of the oil and natural-gas production that respondent challenges occur on the Outer Continental Shelf—an area that the federal government claims. Congress decided that development of the oil and gas resources on the OCS were essential to national energy security, and after initially proposing a national oil company to carry out that exploration, it decided to call on private companies to do that work. Lessees on the OCS carry out the federal government's directive to develop the resources, at rates of production controlled by the government.

During the 1970s, access to oil became an economic priority, in addition to being a longstanding military and national security concern. In the early part of the decade, oil was cheap and in demand, thanks to price controls that the Nixon administration implemented in 1971. By the end of 1972, it became increasingly clear that, in the words of Commerce Secretary Peter Peterson, "Popeye [was] running out of cheap spinach." William D. Smith, *Peterson Assures Oil Industry U.S. Will Act on Energy Needs*, N.Y. Times (Nov. 15, 1972). He predicted that, unless the United States acted "wisely on energy matters," "the security, prosperity, and freedom of action in foreign policy of the United States were in jeopardy." *Id.*

It did not take long for Secretary Peterson's prediction to come to pass. The 1973 Arab-Israeli War

caused major disruptions to the U.S. oil supply. American energy independence became an economic and national security priority, with President Nixon promising that, by the end of the 1970s, "Americans will not have to rely on any source of energy beyond our own." *Address to the Nation About National Energy Policy*, 1 Pub. Papers 973, 976 (1973).

President Nixon saw the Outer Continental Shelf (OCS) as part of the answer to solving America's energy crisis.[3] In 1953, Congress enacted the Outer Continental Shelf Lands Act (OCSLA) to ensure the "expeditious and orderly development" of the "vital national resource" of oil in "a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3). But under the original act, competition for leases in the OCS was "tepid," with "no assurance that the ultimate return to the Government was adequate." *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 154 (1981). To tackle the growing energy crisis, President Nixon directed the Secretary of the Interior to increase the leased acreage on the OCS to 10 million acres starting in 1975. U.S. Dep't of Interior, Fed. Energy Admin., *Outlook for Federal Goals to Accelerate Leasing of Oil and Gas Resources on the Outer Continental Shelf* 3 (1975), https://www.gao.gov/assets/120/114551.pdf.

Congress sought out more permanent measures to tap into the OCS. Like President Nixon, Congress

[3] The Outer Continental Shelf encompasses "all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a).

viewed a steady flow of oil and gas as a necessity for "a healthy economy," especially given that "alternative sources of energy" remained impractical "for years to come." H.R. Rep. No. 94-1084, at 48, 254 (1976).

One measure that Congress considered was a proposal by Senator Fritz Hollings to create a national oil company responsible for the development of oil and gas on the OCS. Senator Hollings' bill would have "authorize[d] and direct[d] the Secretary of the Interior to initiate a major program of offshore oil exploration—including deep drilling—in frontier areas of the Outer Continental Shelf." 121 Cong. Rec. S903, S903-04 (daily ed. Jan. 27, 1975) (statement of Sen. Hollings). Under Hollings' proposal, the federal government would use "the same drilling and exploration firms that are usually hired by oil companies." *Id.* at S904.

Congress ultimately did not adopt Senator Hollings's proposal for a national oil company. Instead, it opted to have the federal government enter into contracts with private energy companies to perform the very functions that Senator Hollings's proposed entity would have performed, with extensive oversight and control exercised by the government. To that end, Congress enacted the 1978 OCSLA amendments, which instructed the Secretary of the Interior to create oil and gas leasing programs on a five-year review period, with Interior to dictate the size, timing, and location of the lessees' activities. 43 U.S.C. § 1344(a)-(c).

OCS leases come with more than the usual palette of regulatory obligations. OCS lessees are contractually required to "develop[] . . . the leased area" and carry out extensive exploration, development, and production activities, so that they may "maximize the ultimate re-

covery of hydrocarbons from the leased area." U.S. Dep't of Interior, Bureau of Ocean Energy Mgmt., Oil and Gas Lease of Submerged Lands Under the Outer Continental Shelf Lands Act, Form BOEM-2005 § 10 (Feb. 2017) ("OCS Form Lease"), *available at* https://www.boem.gov/sites/default/files/about-boem/Procurement-Business-Opportunities/BOEM-OCS-Operation-Forms/BOEM-2005.pdf. Over the decades, lessees had also been instructed that they had no choice *but* to produce—*i.e.*, that they "shall conduct such OCS mining activities at such rates as the [government] may require" so that the leased area is "properly and timely developed." U.S. Dep't of Interior, Minerals Mgmt. Serv., Mineral Lease of Submerged Lands Under the Outer Continental Shelf Lands Act, Form MMS-2004 § 10 (June 1991).

The federal government also controls the rate of a lessee's production. Federal regulations allow the Department of Interior's Bureau of Safety and Environmental Enforcement to set a cap on the production rate of oil from wells on a lessee reservoir. 30 C.F.R. § 250.1159. The government has exercised its oversight authority on these production rates since 1974, 39 Fed. Reg. 15,885 (May 6, 1974) (approving OCS Order No. 11); the "significant burden" of production control was intended to ensure that there was enough oil in reserves to survive "a period of oil shortages and energy crises." 75 Fed. Reg. 20,271, 20,272 (Apr. 19, 2010). For onshore leases, the Bureau of Land Management (BLM) has the "right to specify rates of development and production in the public interest." U.S. Dep't of Interior, Bureau of Land Management, Offer to Lease and Lease for Oil and Gas, Form 3100-11 § 4 (Oct. 2008) ("BLM Lease"), *available at*

https://www.blm.gov/sites/blm.gov/files/uploads/Services_National-Operations-Center_Eforms_Fluid-and-Solid-Minerals_3100-011.pdf. For all leases, the government has the power to shut down operations entirely, "if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish or aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment." 43 U.S.C. § 1334(a)(1); *id.* § 1334(a)(2) (allowing for cancellation of lease); 30 U.S.C. § 226(i) (provision allowing for suspension of operations for onshore operations).

The government also has a heavy hand in setting the pricing and distribution of oil and gas produced from OCS leases. For example, the Secretary of the Interior may order an OCS lessee to offer part of their production "to small or independent refiners." OCS Form Lease § 15; 43 U.S.C. § 1337(b)(7) (explaining that an OCS lease must contain "a requirement that the lessee offer 20 per centum . . . to small or independent refiners"). In addition, "[i]n time of war or when the President of the United States shall so prescribe," the federal government has the "right of first refusal to purchase at market price all or any of the oil or gas produced from the leased area." OCS Form Lease § 15.

OCS leases also greatly benefit the government. For any OCS lease, the Secretary may take any royalty owed on oil and gas production in-kind and "for disposal within the Federal Government." 43 U.S.C. § 1353(a)(3). Indeed, in determining how much production satisfies a lessee's royalty obligations, the federal government has the right to determine the value of the production. OCS Form Lease § 6(b) ("The value

of production for purposes of computing royalty shall be the reasonable value of the production *as determined by the Lessor* . . . ." (emphasis added)); BLM Lease § 2 ("Lessor reserves . . . the right to establish reasonable minimum values on products . . . .").

These obligations are *in addition to* those typically expected of an agency-regulated entity. OCS leases require lessees to comply with not only "all applicable laws, regulations, orders related to diligence, sound conservation practices and prevention of waste," but also "the terms of [the] lease." OCS Form Lease §§ 10, 23. Every material aspect of drilling operations falls under the close scrutiny of the federal government—lessees must obtain an "approved exploration plan (EP), development and production plan (DPP) or development operations coordination document (DOCD)" before commencing operations. OCS Form Lease § 9. The federal government "regulate[s] all operations under a lease" to "[p]romote orderly exploration, development, and production of mineral resources," while "[p]revent[ing] damage to or waste of any natural resource, property, or the environment." 30 C.F.R. § 250.106. It also dictates when and how producers may test their wells, *id.* § 250.1151-52, and how often they may flare or vent their gas, *id.* § 250.1160-64.

The level of federal control and scrutiny for OCS leases goes beyond that of "intense regulation." *See Watson*, 551 U.S. at 153. The federal government looked to private contractors to tap into the OCS so that the country could fulfill a need that the government would have been forced to provide itself so that it could achieve energy security. *See Papp*, 842 F.3d at 813; *see also* p. 23, *supra* (describing how Congress deliberately selected an expanded OCS leasing program

in lieu of a national agency responsible for the manufacturing of oil products).

The royalty-in-kind program in particular demonstrates that OCS leasing arrangements are "special relationship[s]," not just vehicles for "considerable regulatory detail and supervision." *Watson*, 551 U.S. at 157. The program goes "beyond simple compliance with the law"; the government uses the compelled contributions of royalties-in-kind to "fulfill . . . governmental tasks" and secure its strategic objectives. *Id.* at 153-54.

Take, for example, the Strategic Petroleum Reserve (SPR), which Congress created in part to "reduce the impact of disruptions in supplies of petroleum products, [and] to carry out obligations of the United States under the international energy program." 42 U.S.C. § 6231(b). The federal government has repeatedly used OCS royalties-in-kind to fill the SPR so that the United States can maintain its mission of energy independence. The most prominent example came in the wake of the September 11th attacks, when President Bush directed the Department of Interior to "fill the SPR to 700 million barrels using royalty in kind oil produced from OCS Gulf of Mexico leases." Statement of R.M. "Johnnie" Burton, Director, Minerals Management Service, U.S. Dep't of Interior, Before the S. Comm. on Energy and Nat. Resources (Apr. 19, 2005), https://www.doi.gov/ocl/ocs-program. And filling the SPR means hiring private contractors to take and maintain the federal government's bounty. *See, e.g.*, Procedures for the Acquisition of Petroleum for the Strategic Petroleum Reserve, 71 Fed. Reg. 65,376, 65,377 (Nov. 8, 2006) (noting that "DOE contracted with commercial entities to receive the royalty oil at

offshore production facilities and transfer it to the SPR, either directly or by exchange for other crude oil meeting SPR quality specifications"); U.S. Dep't of Energy, *Strategic Petroleum Reserve Annual Report for Calendar Year 2010*, at 16 (Nov. 2011) ("Under the [St. James marine terminal] lease agreement, Shell provide[d] for all normal operations and maintenance of the terminal and [wa]s required to support the Strategic Petroleum Reserve as a sales and distribution point in the event of a drawdown."). The government, in turn, has used its stockpile during major energy crises, such as Hurricane Katrina and oil supply disruptions caused by end of the Gaddafi regime in Libya. U.S. Dep't of Energy, Office of Fossil Energy, *History of SPR Releases*, https://www.energy.gov/fe/services/petroleum-reserves/strategic-petroleum-reserve/releasing-oil-spr; *see also* 42 U.S.C. § 6241 (authorizing SPR drawdowns upon the making of presidential findings of an emergency supply shortfall).

The federal government's leasing program carries out an important strategic need, and lessees do so at comprehensive federal direction. A lawsuit over fossil fuels developed from those leaseholds plainly relates to work performed under federal officers.

II. Claims concerning interstate emissions are removable because they arise under federal common law.

Although the federal-officer removal statute provides ample basis for removing claims "for or relating to" the production of fossil fuels, federal common law also provides a substantial basis for removing climate-change claims like the ones presented by respondent here. While "[t]here is no federal general common

law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), there is "federal decisional law in areas of national concern," particularly for "subjects within national legislative power where Congress has so directed, or where the basic scheme of the Constitution so demands." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011) (citation and internal quotation marks omitted). As this Court remarked in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* at 103.

Tort claims alleging harm arising from interstate and international emissions are exactly the sort of "transboundary pollution" claims that are exclusively committed to federal law. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012). While plaintiffs bringing climate change claims try to sidestep the application of federal common law by focusing in part on fossil-fuel production and promotion, allegations about cross-border emissions by oil and natural-gas producers lie at the root of their claims. *E.g.*, J.A. 84-85 (alleging that petitioners "caused approximately 15 percent of global fossil fuel product-related CO2 between 1965 and 2015"); *see also City of N.Y. v. BP P.L.C.*, 325 F. Supp. 3d 466, 471-72 (S.D.N.Y. 2018) (rejecting the plaintiff's framing of its claims as ones about "defendants' production and sale of fossil fuels," given that "the amended complaint makes clear the City is seeking damages for global-warming related injuries resulting from greenhouse gas emissions"), *appeal docketed*, No. 18-2188 (2d Cir. argued Nov. 22, 2019).

These claims are exactly the sort for which no state sovereign has a superior interest, thus necessitating "a

uniform standard of decision." *City of N.Y.*, 325 F. Supp. 3d at 472. The harm alleged here (and in other climate change cases) is one that is widespread and crosses state lines, making the decisional interest a federal one. *See Am. Elec. Power*, 564 U.S. at 421 (noting the existence of "federal common-law suits brought by one State to abate pollution emanating from another State"); *Kivalina*, 696 F.3d at 855-56 (treating a claim of "transboundary pollution" as one of "widespread harm" that can be decided as "a federal common law public nuisance claim"). Legal claims regarding climate change necessarily depend on a confluence of actions occurring all around the world over decades, if not centuries, *City of N.Y.*, 325 F. Supp. 3d at 472, some of which include significant work that fossil-fuel companies undertook at the federal government's command to further the national interest. A patchwork of 50 different laws simply does not work for a problem that, as alleged, necessarily involves all 50 states. To ensure that the federal interests embodied in the federal common law on "transboundary pollution" are adequately protected, a federal court of appeals must be able to consider the relevance of federal common law in determining whether a case should stay in federal court, especially when that case presents *both* substantial actions taken by those "acting under" a federal officer and claims that such actions led to an environmental tort crossing state lines. That is only possible if this Court interprets § 1447(d) to allow for the review of *any* issue in an order remanding a case removed under § 1442.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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