No. 19-30829

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PARISH OF CAMERON,
Plaintiff - Appellee

State of Louisiana, ex rel, JEFF LANDRY; STATE OF LOUISIANA, on behalf of Louisiana Department of Natural Resources, on behalf of Office of Coastal Management, on behalf of Thomas F. Harris,
Intervenors – Appellees

v.

BP AMERICA PRODUCTION COMPANY; CHEVRON PIPE LINE COMPANY; CHEVRON USA HOLDINGS, INCORPORATED; CHEVRON USA, INCORPORATED; EXXON MOBIL CORPORATION; KERR-MCGEE OIL & GAS ONSHORE, L.P.; SHELL OFFSHORE, INCORPORATED; SHELL OIL COMPANY; SWEPI, L.P.; TEXAS COMPANY,
Defendants – Appellants

On Appeal from the United States District Court
for the Western District of Louisiana (Summerhays, J.)
No. 2:18-cv-677

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5948

Thomas A. Lorenzen
Tyler A. O'Connor
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
tlorenzen@crowell.com
Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the Chamber of Commerce of the United States of America certifies that it does not have a parent corporation and that no publicly held corporation owns more than 10% of its stock.

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 26.1, 28.2.1, and 29.2, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

s/ Thomas A. Lorenzen
Thomas A. Lorenzen
Tyler A. O'Connor
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2500
tlorenzen@crowell.com

Counsel for Amicus Curiae

Amicus Curiae:

The Chamber of Commerce of the United States of America

Counsel for *Amicus Curiae*:

Thomas A. Lorenzen and Tyler A. O'Connor of Crowell & Moring LLP

Stephen P. Lehotsky and Michael B. Schon of U.S. Chamber Litigation Center

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts. To that end, the Chamber often files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community. *See, e.g.*, *Parish of Plaquemines v. Chevron USA, Inc.*, No. 19-30492 (5th Cir. 2019); *Latiolais v. Huntington Ingalls, Inc.*, 918 F.3d 406 (5th Cir. 2019), *reh'g en banc granted* 923 F.3d 427 (5th Cir. 2019); *County of San Mateo v. Chevron Corp.*, No. 18-15499 (9th Cir. docketed Mar. 27, 2018).

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus,* its counsel, or its members made a monetary contribution for preparation or submission of this brief. Counsel for Plaintiff-Appellee, Intervenor-Appellees, and Defendants-Appellants have represented that they do not oppose the filing of this brief.

Many of the Chamber's members perform vital functions for the United States in national defense, law enforcement, healthcare, communications, shipping, agriculture, energy, and other areas. In carrying out these functions, Chamber members are sometimes exposed to potential tort liability related to goods manufactured or services provided at the direction and under the supervision of the government of the United States. The Chamber and its members thus have a strong interest in ensuring the proper interpretation and application of the federal officer removal statute, which seeks to ensure that the federal courts, rather than state tribunals, resolve legal issues relating to the acts of a federal agency or to the acts of those acting at or under the direction or supervision of the federal government.

SUMMARY OF ARGUMENT

The federal officer removal statute seeks to prevent states from unduly interfering, through their tribunals, with federal prerogatives and to "prevent federal officers [or their agents] who simply comply with a federal duty from being punished by a state court for doing so." *State of La. v. Sparks*, 978 F.2d 226, 232 (5th Cir. 1992). Courts read the removal statute "broad[ly], . . . so as not to frustrate its underlying rationale." *Murray v. Murray*, 621 F.2d 103, 107 (5th Cir. 1980). The district court's opinion in this case, as in *Parish of Plaquemines v. Chevron USA, Inc.,* does neither, and in the process undermines the statute's goals.

Federal interests are at their zenith during times of war and national emergencies. The government's ability to order and allocate resources and industry's ability to respond with haste to such directives are crucial. And perhaps at no time has the government's prerogative to direct and control national resources been more necessary than during World War II, when it conscripted the entire petroleum industry into the country's war effort against the Axis powers.

Despite the historical consensus that the government commandeered the petroleum industry during World War II, the district court's opinion nonetheless held that such control was insufficient to warrant removal of the parties' dispute to federal court. The court dismissed evidence that the petroleum industry during World War II subordinated its own interest to assist the governmental war effort, and instead evaluated the defendants' entitlement to removal through a framework most typically applied only to cases involving formal government contractors. While it does not say so explicitly, the essence of the district court's opinion is that – despite evidence of the government's wartime control over the petroleum industry — the absence of a written contract with detailed specifications governing the defendants' wartime conduct is fatal to the defendants' claim for removal to federal court under the federal officer removal statute. In the absence of such an express contract, the district court's opinion dismissed the petroleum industry's subjugation to federal decision-makers during World War II as nothing more than compliance with a federal regulatory scheme, concluding that it cannot justify removal of the claims to federal court.

If affirmed, the district court's order would frustrate the federal government's ability to respond to national emergencies and would unduly prejudice companies that yield to the government's authority and follow its directives during times of emergency without the benefit of a contractual relationship. This Court should clarify that a formal contractual relationship between the government and a government contractor is not a necessary predicate for federal officer removal and reaffirm that those "who lawfully assist the federal [government] in the performance of [its] official duty" are entitled to be heard in federal court. *Watson v. Phillip Morris Co., Inc.*, 551 U.S. 142, 150 (2007) (citation and internal quotation marks omitted). Any decision to the contrary would have far-reaching consequences that would undermine the purposes of the federal officer removal statute and hinder the government's ability to corral national resources during times of national exigency.

ARGUMENT

I. THE DISTRICT COURT'S OPINION ADVERSELY IMPACTS THE FEDERAL GOVERNMENT AND THE COMPANIES IT DIRECTS DURING TIMES OF WAR AND OTHER NATIONAL EMERGENCIES.

Federal officials may exercise a large measure of control over industry during times of war and national emergencies, but they do not always exercise such authority pursuant to the arms-length contracts that the district court essentially enshrines as the primary basis for federal officer removal. Instead, federal officials sometimes control industries through congressional enactments, issuance of executive orders, and other mechanisms that lack the characteristics of a formal federal government contract. Yet the result is the same — industry acts to respond to or meet the needs of the federal government, presented during times of war or other times of national emergency, through action taken under or pursuant to the direction of federal officials. Affirmance of the district court's order would adversely impact those companies, in every industry, that may dutifully serve the federal government during such times of war or other national emergency by subjecting the very types of disputes that the federal officer removal statute expressly reserves to federal courts — those arising out of

activities directed by the government — to resolution before state tribunals.

The federal officer removal statute, 28 U.S.C. § 1442(a)(1), was enacted specifically to ensure that those acting under color of federal office, including those acting pursuant to a federal officer's direction, are not impeded by a state court's potential holdings against them. The statute thus makes removal to federal court appropriate where a defendant can demonstrate that it is a "person" within the meaning of the statute; the defendant acted pursuant to a federal officer or agency's directions; there is a nexus between the defendant's actions taken pursuant to a federal directive and the plaintiff's claims; and the defendant can assert a colorable federal defense. *City of Walker v. Louisiana*, 877 F.3d 563, 569 (5th Cir. 2017). The district court's order unfairly deprives those companies enlisted into federal service of their right to avail themselves of a federal forum in cases arising out of actions they performed at the government's direction or under its supervision, *unless* the relationship was memorialized in a sufficiently detailed contract.

As *amicus curiae* explained in previous briefing to this Court, the government during World War II conscripted the American petroleum industry into the Nation's war effort. The President granted the Office of Petroleum Coordinator, later renamed the Petroleum Administration for War ("PAW"), "almost complete power over the petroleum industry," ROA.19-30829.6120, which it used to "deny or grant allocation of drilling supplies," to "virtually requisition[]" petroleum industry employees for the government's use, and to allocate, purchase, and control the price of oil. ROA.19-30829.6362. At the federal government's direction and under its control, the petroleum industry increased production by 30% during World War II, supplying six of the seven billion barrels of oil used by the United States and its allies during World War II for everything from toluene for TNT used in bombs to asphalt for airfields. ROA.19-30829.6086. Only by conscripting oil producers into "meeting every demand of the armed forces *in full and on time*" were the United States and its allies ultimately able to prevail. ROA.19-30829.6087.

Although the petroleum industry, in particular, was controlled and directed by the federal government during World War II, the

likelihood of being called into government service in the future is not unique to the petroleum industry, nor even to the defense and military procurement industries. During World War II, petroleum companies, rubber manufacturers, and automobile companies were conscripted to differing extents into the war effort. *See*, *e.g.*, *Henderson v. Bryan*, 46 F. Supp. 682 (S.D. Cal. 1942) (affirming the executive branch's authority to allocate and ration rubber tires when necessary for the war effort). And the government's authority to conscript industry during times of national emergency and war remains on the books.

For instance, the Defense Production Act of 1950, 50 U.S.C. § 4501 et seq., has been employed by the President to control elements of domestic industry to respond to "military conflicts, natural or man-caused disasters, or acts of terrorism." *Id.* at § 4502(a)(1). When the Defense Production Act applies, the President may (i) require companies to perform orders at the President's direction, (ii) force companies to prioritize government orders at the expense of their existing agreements, and (iii) allocate materials, services, and facilities as the President deems necessary. *Id.* at § 4511.

And other laws empower the President or his or her delegates to requisition and direct resources in other industries. During national emergencies, the President may (i) "authorize the use or control of any [radio] station or device and/or its apparatus and equipment," 47 U.S.C. § 606(c), (ii) requisition the use of a vessel or merchant vessel owned by U.S. citizens, 46 U.S.C. § 56301, and (iii) allocate and require the transportation of coal for use by any electric power plant, 42 U.S.C. § 8374. Virtually every sector of industry may be called upon to serve the federal government in the appropriate circumstances, and given the nature of national emergencies, those relationships may not be formalized in as much detail, through an express contract, as would otherwise be the case in more typical circumstances.

In the event of war, the government expects all oars to row together, to varying degrees, in "an effort to *assist*, or help *carry out*, the duties or tasks of the federal [government]." *Watson*, 551 U.S. at 153 (emphasis in original). Companies, like those in the petroleum industry during World War II, that were conscripted into federal service had no choice but to accede to the government's guidance, control, and supervision without the opportunity to negotiate contracts limiting the

scope and extent of the government's authority. Affirming the district court's order would deprive those companies of the protections to which the government would be entitled if it were to perform those tasks itself, and would put companies "who simply comply with a federal duty" at risk of being subjected to state court proceedings that they would avoid but for their service to the government. *Sparks*, 978 F.2d at 232. *See also Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 134 (2d. Cir. 2008).

II. THE PETROLEUM INDUSTRY DURING WORLD WAR II "ACTED UNDER" FEDERAL CONTROL.

A. Removal Is Appropriate Where the Government Directs or Uses Private Industry to Achieve a Governmental Objective Regardless of Whether the Relationship is Effectuated Through Contract or Fiat.

A person is entitled to federal officer removal of claims against it if its relationship with the government is "an unusually close one involving detailed regulation, monitoring or supervision." *Watson,* 551 U.S. at 153. While the district court is correct that government contractors may demonstrate such a relationship through evidence of a government contract with detailed product specifications, the district court's insistence on evaluating defendants' wartime conduct through this very narrow framework—was there or was there

not a government contract?—is inconsistent with Supreme Court precedent. Indeed, the Supreme Court has been clear that a relationship warranting removal can be effectuated through contract or through other evidence of a "special relationship" so long as the company has "assist[ed], or . . . help[ed] carry out, the duties or tasks of the federal superior." *Id.* (emphasis omitted). The proper inquiry is whether the company's assistance went "beyond simple compliance with the law [*e.g.*, whether the industry is heavily-regulated] and help[ed] officers fulfill other basic governmental tasks" such as "helping the Government to produce an item that it needs." *Id.*

The petroleum industry's subjugation to federal prerogatives during World War II fits well within this framework. The PAW enlisted the domestic petroleum industry in the Allied war effort through fiat, and the United States Office of Production Management categorized oil producers as federal subcontractors by governmental directive. *See* Appellant's Br. at 50. The exigencies of war were used to justify substantial governmental control over the industry. The government "had authority to impose obligatory product orders on private companies, with noncompliance subject to criminal sanctions or

Government takeover." *Shell Oil Co. v. United States*, 751 F.3d 1282, 1285 (Fed. Cir. 2014). "Facilities that accepted such obligatory product orders had to prioritize government military contracts above all other contracts[,] . . . [and t]o the extent facilities relied on scarce raw materials, the Government could regulate supply chains to ensure continuing production." *Id.* *All* of this was in aid of the government's charge to ensure "adequate supplies of petroleum for military or other essential uses." *Id*. (citation and internal quotation marks omitted).

That the relationship between the government and the petroleum industry was effectuated through fiat weighs in favor of removal, rather than against it. The government controlled access to the petroleum industry's supply chains, dictated the pace and specifics of operations, and allocated petroleum at government-determined prices, all without the protections often afforded in contracts. And unlike companies that enter into contracts voluntarily, the petroleum industry was forced into service for the ultimate purpose of providing "adequate supplies of petroleum for military or other essential uses." *Id*. at 1285. Without the petroleum industry's forced cooperation, the government would have been left to produce its own petroleum to run its war effort. *See*

Wilde v Huntington Ingalls, Inc., 616 F. App'x 710, 713 (5th Cir. 2015) (holding that the defendant acted under federal authority because "the federal government would have had to build those ships had [the defendant] not done so"). *See also Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012).

B. The District Court Erred In Concluding that the Petroleum Industry Was Merely Subject to Federal Regulation.

Not only did the District Court overlook the petroleum industry's key role in supplying petroleum to the government, but it incorrectly characterized the relationship between the government and the defendant oil producers as one of mere "regulation" insufficient to bring the petroleum industry's actions within the scope of the removal statute. *See Watson*, 551 U.S. at 154 (holding that "simple compliance with the law" does not justify removal under Section 1442). The lower court thus failed to identify the obvious distinction between a generally applicable regulation (such as an environmental regulation that protects public health or safety) and the petroleum industry's conscription into and participation in the Allied war effort through direction from the federal government.

Regulations tend to derive from substantive statutes, passed by the Congress and signed into law by the President, that set forth standards for health, safety, the national welfare, and the proper functioning of markets, as examples. *See, e.g.,* Executive Order 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (defining "regulation" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ."). Agencies implement such statutes through regulations prescribing obligations with which regulated entities must comply to fulfill the statute's goals. *See Jochum v. Pico Credit Corp. of Westbank, Inc.*, 730 F.2d 1041, 1047 (5th Cir. 1984) (noting that regulations implement statutory mandates). To this end, general regulations typically impose limitations on the manner in which a company may effectuate its own objectives and ensure each company's behavior is consistent with federal policy as expressed in a statute.

The district court cites two cases, *Watson* and *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, which are paradigmatic examples of companies acting pursuant to a general regulatory scheme and are distinguishable from the government's

control and conscription of the petroleum industry during World War II. In *Watson*, the tobacco industry tested its products pursuant to the "FTC's detailed rules about advertising, specifications for testing, and requirements about reporting results," 551 U.S. at 157, while *In re MTBE* related to industry's compliance with the Clean Air Act's regulations requiring the use of certain oxygenates in fuel. *In re MTBE Prods. Liab. Litig.*, 488 F.3d 112, 126 (2d. Cir. 2007). In both cases, regulated entities pursuing their own interests were subject to government regulations protecting the public from the hazards of the entities' private activities. In neither instance did the regulated entities assist the government in fulfilling a governmental objective, *i.e.,* in neither case was the regulated entity either selling tobacco or fuel at the government's direction or for a governmental purpose; rather, each was pursuing its own ends, subject only to general federal regulatory requirements intended to protect other interests (health and the environment) against the harms that might result from unregulated conduct.

The federal government's conscription of the petroleum industry does not bear the hallmarks of such general regulation of private

conduct to protect the public. The directives issued by the PAW often dictated operations at specific oil fields in real time, and compelled the industry to reach its maximum level of production in order to supply the military's staggering demand for oil. Unlike generally applicable regulations, such as those at issue in *Watson* and *In re MTBE*, the directives issued by the PAW were issued in furtherance of the federal government's own objectives and not merely as limitations on private industry's self-interested behavior. *See Watson*, 551 U.S. at 151–52 (distinguishing between "compliance" with a regulation and helping "assist" or "carry out the duties or tasks of [a] federal superior"). In the absence of the petroleum industries' assistance, the government would have had to either procure oil elsewhere—which was not an option during World War II—or produce its own oil. And as the Supreme Court has explained, removal is appropriate where the party seeking removal has "provid[ed] the Government with a product that it used to help conduct a war." *Id.* at 154.

The Court should clarify that a contractual relationship between the government and the party seeking removal is not the *sine qua non* of federal officer removal and that the government's comprehensive

control of the petroleum industry during World War II entitles the petroleum industry to a federal forum for acts committed under federal control.

CONCLUSION

For the reasons set forth above and in the appellants' brief, the district court's order should be reversed.

s/ Thomas A. Lorenzen
Thomas A. Lorenzen
Tyler O'Connor
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
tlorenzen@crowell.com

Dated: January 13, 2020

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Thomas A. Lorenzen
Thomas A. Lorenzen

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,172 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f);

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Century Schoolbook;

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Dated: January 13, 2020

s/ Thomas A. Lorenzen
Thomas A. Lorenzen