No. 22-30055

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PLAQUEMINES PARISH,
Plaintiff-Appellee

THE STATE OF LOUISIANA, EX REL. JEFFREY MARTIN LANDRY, ATTORNEY GENERAL; THE STATE OF LOUISIANA, THROUGH THE LOUISIANA DEPARTMENT OF NATURAL RESOURCES OFFICE OF COASTAL MANAGEMENT AND ITS SECRETARY, THOMAS F. HARRIS,
Intervenors-Appellees

v.

CHEVRON USA, INCORPORATED, AS SUCCESSOR IN INTEREST TO CHEVRON OIL COMPANY AND THE CALIFORNIA COMPANY; EXXON MOBIL CORPORATION, AS SUCCESSOR IN INTEREST TO EXXON CORPORATION AND HUMBLE OIL AND REFINING COMPANY; CONOCOPHILLIPS COMPANY, AS SUCCESSOR IN INTEREST TO GENERAL AMERICAN OIL COMPANY OF TEXAS,
Defendants-Appellants

On Appeal From the United States District Court
for the Eastern District of Louisiana (Vance, J.)
No. 2:18-CV-05217

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

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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 company has 10% or greater ownership in the Chamber.

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.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") 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 Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

Many of the Chamber's members perform vital functions for the United States while acting under the direction and control of federal officers. In carrying out these functions, Chamber members are sometimes exposed to potential liabilities related to goods manufactured or services provided at the direction and under the supervision and

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

control of the United States government. The Chamber and its members thus have a strong interest in ensuring the proper interpretation and application of the federal officer removal statute as Congress amended and expanded it in 2011.

SUMMARY OF ARGUMENT

By allowing claims against a federal officer or a private party assisting a federal officer under the officer's direction and control to be removed to federal court, the federal officer removal statute[2] seeks to (1) minimize interference by States with federal prerogatives and (2) "prevent federal officers [or their agents] who simply comply with a federal duty from being punished by a state court for doing so." *Louisiana v. Sparks*, 978 F.2d 226, 232 (5th Cir. 1992). The courts have long read the statute broadly "so as to not frustrate its underlying rationale." *Murray v. Murray*, 621 F.2d 103, 107 (5th Cir. 1980).

The district court's opinion undermines Congress's clear intent that such claims be heard by federal courts to protect those operating under such authority from local bias and unwarranted variation in the

[2] 28 U.S.C. § 1442(a)(1).

application of the law. So here, where Defendants-Appellants acted under federal direction to maximize production of crude oil and now, almost eight decades later, the State seeks to impose environmental liability for those operations.

Federal interests are strongest during times of war. The government's ability to order and allocate resources, and the industry's ability to respond with speed to such directives—such as occurred in the petroleum industry in World War II, when many producers abided by federal oil production directives to support the war effort—are vital to our nation's well-being.

By refusing to recognize such interests absent an express contract with the federal government, the district court's order frustrates the government's ability to respond to emergencies and unduly prejudices the companies who submit to its authority and directives during times of war. This, in turn hampers the government's ability to procure industry assistance during crises.

The district court's order should be reversed, preserving the principle established by the federal officer removal statute—those "who lawfully assist the federal [government] in the performance of [its] official

duty" are entitled to be heard in federal court, where local bias is less likely to affect the outcome of a case. *Watson v. Phillip Morris Co., Inc.*, 551 U.S. 142, 150 (2007) (cleaned up).

ARGUMENT

I. THE DISTRICT COURT'S ORDER UNFAIRLY AFFECTS PARTIES ACTING UNDER THE FEDERAL GOVERNMENT'S DIRECTION, THE GOVERNMENT ITSELF, AND THE ACHIEVEMENT OF IMPORTANT FEDERAL PURPOSES.

A. The District Court's Order Unfairly Deprives of a Federal Forum Companies That Were Conscripted to Provide Crucial Services to the Government During Wartime.

The district court's order unfairly deprives companies enlisted into federal service during wartime of their right to a federal forum in cases arising out of actions performed at the government's direction. At times, federal officials must exercise a large measure of control over companies in critical industries. The federal officer removal statute was enacted to ensure that those acting under the color of federal office or pursuant to a federal officer's direction are not encumbered or penalized by state action against them. Thus, to remove a proceeding under section 1442(a), a defendant must demonstrate that (1) it has asserted a colorable federal defense, (2) it is a "person" under the statute, (3) it has acted pursuant to

a federal officer's directions, and (4) the charged conduct is connected or associated with that act. *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (en banc). Here, the district court found all factors satisfied except the third. Thus, this case turns on whether Defendants-Appellants were "acting under" federal officers during WWII.

During wartime, specific industries may be called upon to assist the government. Several laws expressly empower the President or his delegates to requisition and direct private industry resources.[3] In wartime, the government expects essential industries "to *assist*, or help *carry out*, the duties or tasks of the federal [government]." *Watson*, 551 U.S. at 143.

The petroleum industry is no stranger to federal direction during wartime. *See*, *e.g.*, *Henderson v. Bryan*, 46 F.Supp. 682 (S.D. Cal. 1942) (affirming Executive's authority to allocate and ration rubber tires when

[3] *See*, *e.g.,* 50 U.S.C. § 4511(a) (authorizing President to "allocate materials, services, and facilities . . . to promote the national defense"); 47 U.S.C. § 606(c) (empowering President, in times of war, to "use or control" any radio "station or device and/or its apparatus and equipment"); 46 U.S.C. § 56301 (allowing, in times of war, requisition of a vessel or merchant vessel owned by U.S. citizens); 42 U.S.C. § 8374 (empowering Executive, in times of war, to allocate and require transportation of coal for use by any electric power plant). None of these statutes requires that the government enter into a contract to exercise its wartime authority.

necessary for the war effort). Indeed, during WWII, the President ordered the Petroleum Administration for War ("PAW") to "issue necessary policy and operating directives" to the petroleum industry, to "provide adequate supplies of petroleum for military, or other essential uses" and "[e]ffect the proper distribution of such amounts of materials…." Exec. Order No. 9,276, 7 Fed. Reg. 10,091 (Dec. 4, 1942). The petroleum industry had no choice but to submit to the government's guidance, control, and supervision of its activities. *See*, *e.g.*, ROA.13955 (quoting PAW's assistant director of refining explaining that there was no "freedom to make a choice between contracting and not contracting"); ROA.13923-25 (quoting PAW's chief counsel explaining how PAW coerced compliance by wielding "big club" of control over steel and critical materials needed to operate oil wells). Affirming the district court's order would deprive companies of protections to which the government itself would be entitled had it performed such tasks directly. *See Watson*, 551 U.S. at 153 ("The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks.").

B. The District Court's Order Interferes with the Government's Ability to Order and Maintain Military Resources and Equipment.

Courts have cautioned against "scattering" claims against those operating under federal direction across various state courts; such a practice would "have a chilling effect on manufacturers' acceptance of government contracts" and provision of other assistance to the government, and "the vagaries of state tort law would deter military procurement." *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 134 (2d. Cir. 2008).

The underlying concern rests on a fundamental economic principle: if claims against those operating under federal direction may be prosecuted before hostile state courts, the companies likely to serve the government when needed might raise their prices or abandon their products and services lines to account for increased litigation risks.[4] It is therefore vital to the nation's defense that such parties be able to mount their defenses in a federal forum. The district court's order consigning

[4] *See* 14C Fed. Prac. & Proc. Juris. § 3726 (rev. 4th ed.).

Defendants-Appellants to state court thus will hinder the government's ability to procure goods during future crises.

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

A. Removal Is Appropriate in Cases Where the Government Has Used Private Industry to Achieve a Governmental Objective.

An entity falls within the removal statute when the relationship is one "involving detailed regulation, monitoring, or supervision" by the federal government to fulfill a government objective. *Watson*, 551 U.S. at 153. Seeking removal requires demonstration that a "special relationship" existed with the government. *Id.* at 157. This analysis does *not* turn on the narrow question whether a contractual relationship existed, but instead on whether the company "assist[ed], or … help[ed] carry out, the duties or tasks of the federal superior." *Id.* at 153 (emphasis omitted). The proper inquiry is whether that assistance went "beyond simple compliance with the law and help[ed] officers fulfill other basic governmental tasks," such as "helping the Government to produce an item that it need[ed]" to fulfill a government purpose. *Id.* [5]

[5] Indeed, as the Supreme Court has noted, the modern federal officer removal statute has its roots, in part, in the conscription of civilians to assist federal revenue

Few contracts have ever provided the federal government with the *extraordinary* real-time level of control it exercised over the petroleum industry during WWII. There, the government controlled access to the petroleum industry's supply chains, dictated the specifics of the industry's operations, supervised companies' use of critical materials, and allocated petroleum at government-determined prices. *Shell Oil Co. v. United States*, 751 F.3d 1282, 1286 (Fed. Cir. 2014). Without industry submission to its directives, the government would have been left to produce its own petroleum to fuel its war effort.

The shipbuilding industry found itself similarly situated during the war, and this Court has held that that industry was acting pursuant to federal direction. *See Wilde v. Huntington Ingalls, Inc.*, 616 F. App'x 710, 713 (5th Cir. 2015) (holding that defendant acted under federal authority because "the federal government would have had to build those ships had [the defendant] not done so"). The district court should have similarly held so here.

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agents in law enforcement duties, a situation where a contract may not necessarily be present. *Watson*, 551 U.S. 149-59 (discussing early history of removal statute pertaining to revenue officers).

B. The Petroleum Administration for War's Directives Extended Beyond Mere Regulation That Simply Required Compliance

The district court overlooked the petroleum industry's central role in supplying fuel to the government during WWII and the government's supervision of the production process when it characterized the relationship between the government and the oil producers as one of mere "regulation" insufficient to bring the industry's actions within the relevant statute. In so doing, the court relied on language in *Watson* explaining that "simple compliance with the law" does not render one an agent of the government under Section 1442. 551 U.S. at 154. But the government's conscription of the petroleum industry was not "mere regulation," and *Watson*'s language upon which the district court relied is therefore inapposite. The district court erred in characterizing intense direction and control *for the government's benefit* as traditional regulation. *Watson* involved FTC supervision of the sale of cigarettes *to the public*, not provision of an essential product for the government during wartime.

Unlike normal regulations, the directives issued by PAW conscripted industry participants to produce, refine, and transport

petroleum to support the government's wartime objective of ensuring the military had enough fuel to function. *See generally Exxon Mobil Corp. v. United States*, No. H-10-2386, 2020 WL 5573048 (S.D. Tex. Sept. 16, 2020); *Watson*, 551 U.S. at 151–52 (distinguishing between mere "compliance" with regulation and helping "assist" or "carry out the duties or tasks of [a] federal superior").

In the absence of the petroleum industry's assistance, the government would have had to either procure oil elsewhere—not an adequate option during WWII—or produce its own. The Supreme Court has explained removal is appropriate where one "provid[ed] the Government with a product that it used to help conduct a war." *Watson*, 551 U.S. at 154. Subjecting the petroleum industry to suit in state court, when the claims involve actions taken at the direction of a federal officer in response to a war, contravenes the removal statute's purpose.

C. Even Absent a Contract, a Supplier Relationship with a Government Contractor Is Sufficient to Bring an Entity within the Jurisdiction of the Federal Courts.

As discussed in Subsection II.A, the case law establishes that this Court's analysis *does not* turn on whether a formal contractual relationship existed between the sued entity and the government. The

district court misread *Watson* to *require* the existence of a contract to establish the relationship covered by the removal statute. *See* ROA.17563. However, the *Watson* Court examined the entire record before it for evidence of a "special relationship" between the government and the defendant, including *without limitation* "evidence of any contract, any payment, any employer/employee relationship, or any principal/agent arrangement." 551 U.S. at 156-57. In other words, the existence of a contract is just one of *many* ways in which one might show that one acted under federal direction.

The district court also asserted that, absent a government contract, an entity cannot act pursuant to federal direction, even if it is providing crucial input for fulfilling another's express contract with the government, ROA.17563-64 (for instance, a *refiner's* contractual obligation to refine and deliver fuel to the government for the war effort, which in turn required production of oil by the petroleum industry). Essentially, the district court read into *Watson* a contract and a subcontract requirement, when *Watson* requires neither; *Watson* instead requires only *indicia* of governmental control extending beyond mere regulation.

Requiring a supplier to prove the existence of a subcontract with a direct government contractor conflicts with case law concluding that one "acting under" a federal officer need not have a contractual relationship. *See*, *e.g.*, *Caver v. Cent. Ala. Elec. Coop.*, 845 F.3d 1135 (11th Cir. 2017) (in light of electric cooperative's unusually close and detailed regulatory relationship with government, and in accordance with the liberal construction of §1442(a)(1), cooperative was "acting under" federal officer despite lack of contract); *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1179-81 (7th Cir. 2012) (corporation supplying Navy turbines satisfied "acting under" requirement even without a contract); *Schwindt v. Cessna Aircraft Co.*, No. CV485-472, 1988 WL 148433, at *2 (S.D. Ga. Aug. 31, 1988) (supplier to company with government contract can assert military contractor defense in product liability suit— thus warranting federal removal—even absent a subcontract).

A supplier relationship with a direct government contractor is more than sufficient to bring Defendants-Appellants into the removal statute's purview. *See*, *e.g.*, *Jackson v. Avondale*, 469 F.Supp.3d 689, 708 (E.D. La. 2020) (subcontractor who installed wallboard fulfilled "an essential component of the construction process laid out in the contract between

[another defendant] and the government … and helped the government perform a job that it would otherwise have [had] to perform itself"). The district court erred in holding that Defendants-Appellants were not acting under federal direction simply due to the absence of a direct contract between them and the government. Under *Watson*, the district court should have considered all factors in favor of removal, including PAW's direction of production and the Defendants-Appellants' supplier obligations to the refineries.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed.

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Dated: March 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2022, I electronically filed the foregoing 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 2,584 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;

(iii) all required privacy redactions have been made;

(iv) the hardcopies submitted to the Clerk are exact copies of the ECF submission; and

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Dated: March 21, 2022

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