No. 19-30492

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE PARISH OF PLAQUEMINES
Plaintiff-Appellee

v.

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

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; CONOCO PHILLIPS 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 (Feldman, J.)
No. 2:18-cv-05217

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

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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 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.

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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.*, *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-Appellees, Intervenor-Appellees, and Defendants-Appellants (other than Riverwood Production Company), have represented that they do not oppose this motion. Riverwood Production Company is a nominal defendant. It was never served, has not entered an appearance in this appeal, and is no longer licensed to do business in Louisiana.

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 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 as Congress amended and expanded it in 2011.

SUMMARY OF ARGUMENT

The federal officer removal statute seeks to prevent states from unduly interfering 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 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. If affirmed, the district court's order would frustrate the federal government's ability to respond to such emergencies and unduly prejudice companies who yield to the government's authority and follow its directives during times of emergency. This Court should reverse the district court 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).

ARGUMENT

I. THE FEDERAL GOVERNMENT AND THE COMPANIES IT DIRECTS DURING TIME OF WAR ARE ADVERSELY AFFECTED BY THE DISTRICT COURT'S ORDER.

A. The District Court's Order Unfairly Deprives of a Federal Forum Those Companies Providing Crucial Service to the Government.

The district court's order adversely impacts those companies, in every industry, who may dutifully serve the federal government during war or other national emergency. Federal officials may exercise a large measure of control over industry during times of war and national emergencies. 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 a

defendant's actions taken pursuant to a federal directive and a plaintiff's claims; and the defendant can assert a colorable federal defense. *City of Walker v. Louisiana through Dep't of Transp. and Dev.*, 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.

During World War II, the government drafted all manner of industry into the war effort, with the oil industry all but an appendage of the federal government. The President granted the Office of Petroleum Coordinator, later renamed the Petroleum Administration for War ("PAW"), "almost complete power over the petroleum industry," ROA.11011, which it used to "deny or grant allocation of drilling supplies," "virtually requisition[]" petroleum industry employees for the government's use, and allocate, purchase, and control the price of oil. ROA.11253. 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.10981. 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.10982.

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 authority exercised by the government during that period remains on the books.

The Defense Production Act of 1950, 50 U.S.C. § 4501 et seq., has been employed by the President to control 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 contracts or orders at the President's direction, (ii) force companies to prioritize government contracts and 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. For example, in time of war the President may (i) "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. During time of war, virtually every sector of industry may be called upon to serve the federal government in the appropriate 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, which were conscripted into federal service had no choice but to accede to the government's guidance, control, and/or supervision. *See id.* at 151–52. Affirming the district court's order would deprive those companies of the protections to which the government itself would be entitled if it were to perform those tasks. And affirming the district court would put companies "who simply comply with a federal duty" at risk of being punished by a state court for doing so. *Sparks*, 978 F.2d at 232. *See also Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 134 (2d. Cir. 2008) (affirming the district court's order identifying the risk that "state courts may circumvent *Boyle v. United Technologies Corp* . . . the Supreme Court's preeminent decision on the government contractor defense if they are unsympathetic to defendants" as a reason for permitting federal removal).

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

Even when the government is not at war, "[t]he welfare of military suppliers is a federal concern that impacts the ability of the federal government to order and maintain military equipment at a reasonable cost." *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th

Cir. 1998) (quoting *Winters v. Diamond Shamrock Chem. Co.*, 901 F. Supp. 1195, 1200 (E.D. Tex. 1995)). Courts have cautioned against the risks of "scattering" claims across various state courts because it would likely "have a chilling effect on manufacturers' acceptance of government contracts," and "the vagaries of state tort law would deter military procurement." *Isaacson*, 517 F.3d at 134 (citing *In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 451 (E.D.N.Y. 2004)).

This recognizes a fundamental economic principle: if claims are likely to be scattered across possibly hostile state courts, those companies which are most likely to service the federal government will either raise prices or abandon product lines to account for the increased litigation risks. The district court's order thus not only impacts companies who provide services to the government, but also impairs the government's ability to procure goods at a reasonable cost even during times when there is no pressing national emergency.

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

A. Removal Is Appropriate Where the Government Uses Private Industry to Achieve a Governmental Objective.

The PAW enlisted the domestic petroleum industry into the Allied war effort through fiat. 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. . . . 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." *Shell Oil Co. v. United States*, 751 F.3d 1282, 1285 (Fed. Cir. 2014). 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 further in favor of removal. Federal contractors "fall within the terms of the federal officer removal statute . . . when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring or supervision." *Watson,* 551 U.S. at 153. A person seeking

removal must demonstrate that a "special relationship" existed between the company and the government. *Id.* at 157. The analysis does not turn on whether a contractual relationship existed, but on whether the company has "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 the company's assistance went "beyond simple compliance with the law and helps officers fulfill other basic governmental tasks" such as "helping the Government to produce an item that it needs." *Id.*

Few if any contracts even provide the government with the extreme level of direct control it exercised over the petroleum industry during World War II. 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. And unlike companies who 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." *Shell Oil Co.*, 751 F.3d 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 the Petroleum Industry During World War II Was Merely Subject to Federal Regulation.

Not only did the District Court overlook the petroleum industry's 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 and the petroleum industry's conscription into and participation in the Allied war effort.

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, regulations typically impose limitations on a company's ability to effectuate its own objectives where those objectives might run afoul of federal policy as expressed in a statute.

The federal government's conscription of the petroleum industry does not bear the hallmarks of such regulation. The directives issued by the PAW often dictated operations at specific oil fields in real time, *see, e.g,* ROA.10963; ROA.10988; and compelled the industry to produce

at its maximum level of production in order to supply the military's staggering demand for oil. Unlike generally applicable regulations, the directives issued by the PAW were issued in furtherance of the federal government's own objectives. *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." *Watson*, 551 U.S. at 154.

Subjecting industry to suit in a state court where it is acting at the direction of a federal officer in response to a war or other national emergency—in the same circumstances in which the federal government would be entitled to removal of the action to federal court—contravenes the purpose and intent of the federal officer removal statute. It is also likely to dissuade private businesses from producing products that the government is likely to demand during such

emergencies, lest the company then be hauled into state court based on its response to the federal government's directives.

CONCLUSION

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

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Dated: September 4, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2019, 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 2,676 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: September 4, 2019

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