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

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITIONS FOR PANEL REHEARING AND FOR REHEARING EN BANC

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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 ("Chamber") certifies that it does not have a parent corporation and that no publicly held company has 10% or greater ownership in the Chamber.

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the National Association of Manufacturers ("NAM") certifies that it does not have a parent corporation and that no publicly held company has 10% or greater ownership in the NAM.

SUPPLEMENTAL STATEMENT 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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Erica Klenicki and Michael A. Tilghman II of the NAM Legal Center, on behalf of *amicus curiae* the National Association of Manufacturers

The Chamber of Commerce of the United States of America ("Chamber") and the National Association of Manufacturers ("NAM"), under Fed. R. App. P. 29 and Fifth Circuit Rule 29, move for permission to file the attached *amicus curiae* brief in the above-captioned matter. The Chamber and NAM respectfully request that this Court grant their motion for leave to file an amicus brief in support of Defendants-Appellants' petitions for panel rehearing and for rehearing *en banc*. In particular, *amici curaie* support Defendants-Appellants' argument that the panel decision affirming the lower court's denial of Defendants-Appellants' removal petition should be reconsidered by the panel or reversed by the Court *en banc* because Defendants-Appellants were acting under the direction and control of the federal government when producing and supplying crude oil for the use of the United States government's war objectives during World War II. In support of this Motion, the Chamber and NAM state the following:

In accordance with Fifth Circuit Rule 27.4, a*mici curiae* have contacted all other parties regarding the filing of this Motion and the accompanying brief. No party objects.

Federal Rule of Appellate Procedure 29(b)(2) allows any amicus, other than the United States, to file an amicus brief during consideration of whether to grant rehearing only by leave of the Court. To obtain the Court's leave, the motion must state "(A) the movant's interest; and (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3). "An amicus brief should normally be allowed when . . . the amicus has unique information or perspective that can help the court beyond the help that lawyers of the parties are able to provide." *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997)).

Further, "under the practice of this Court en banc consideration is limited to cases involving 'a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court [or] Fifth Circuit precedent.'" *U.S. v. Nixon*, 827 F.2d 1019, 1023 (5th Cir. 1987) (internal citations omitted). The attached brief explains why rehearing or rehearing en banc is justified on either or both grounds.

I. IDENTITY AND INTEREST OF THE AMICI CURIAE

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 three 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.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing large and small manufacturers in every industrial sector and in all fifty States. Manufacturing employs nearly 12.8 million Americans, contributes more than $2.77 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of private-sector research and development. NAM is a voice for the manufacturing community and the leading advocate for a policy agenda

that helps manufacturers compete in the global economy and create jobs across the United States.

Many of the Chamber's and the NAM'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 and NAM members are sometimes exposed to potential liabilities related to goods manufactured or services provided at the direction and under the supervision and control of the United States government. The Chamber, the NAM, and their members thus have a strong interest in ensuring the proper interpretation and application of the federal officer removal statute.

II. REASONS FOR ADDITIONAL ARGUMENT

For decades, the courts have read the federal officer removal statute broadly when determining the basis for federal jurisdiction. *See Murray v. Murray*, 621 F.2d 103, 107 (5th Cir. 1980). However, the panel decision interprets the removal statute too narrowly, undermining Congress's clear intent in both the passage and expansion of the federal removal statute in significant respects:

The decision of the panel undermines Congress's express direction that claims against a federal officer, or against a private party assisting a federal officer under the officer's direction and control, be heard by the federal courts. By unfairly consigning Defendants-Appellants to state court, the panel decision deprives them, and other companies that are enlisted into federal service during a national crisis, of their right to avail themselves of a federal forum in cases arising out of actions they performed at the government's direction. The panel decision thus undermines the removal statute's promise of protections, for those operating under federal authority, against the risk of local bias and unwarranted variation in the application of the law. Additionally, if allowed to stand, such decision would also hinder the ability of the government to obtain industry assistance during times of national emergency.

Further, the panel decision misreads the Supreme Court's standard for how the requisite relationship necessary for federal removal may be established. The panel decision improperly requires that any direction or control of a private party by the federal government be embodied in an express contract between a private party and an officer of the federal

government, or in a subcontract between that party and a direct government contractor, to justify removal of an action to federal court. However, this reading conflicts with established case law from the Supreme Court and other circuits, and thus disrupts the law on a question of exceptional public importance—federal officer removal for those industry members mobilized at the direction of the federal government during times of national emergency.

Here, panel rehearing or, in the alternative rehearing *en banc*, is necessary because the panel decision (1) impacts matters of national importance (i.e. industry mobilization at the government's behest during times of national emergency), and (2) conflicts with the Supreme Court's *Watson* decision by failing to examine the entirety of the relationship between private parties and the federal government in determining whether those parties' actions were subject to federal direction or control. *See Watson v. Phillip Morris Co., Inc.,* 551 U.S. 142 (2007).

The Chamber and NAM thus move for permission to file an amicus brief further addressing the stated issues in support of Defendants-Appellants' petitions for panel rehearing and for rehearing *en banc*.

III. CONCLUSION

For the foregoing reasons, the Chamber and NAM respectfully request that the Court grant this motion for leave to file the accompanying amicus brief in this proceeding in support of Defendants-Appellants' petitions for panel rehearing and for rehearing *en banc*.

RESPECTFULLY SUBMITTED this 16th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. Rule 27(d)(2) because it contains 1,159 words. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the motion has been prepared in Century Schoolbook 14-point font using Microsoft Word 2010.

November 16, 2022

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 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
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INTEREST OF THE AMICI CURIAE[1]

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

of private-sector research and development. NAM is a voice for the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Many of the Chamber's and the NAM'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 and NAM members are sometimes exposed to potential liabilities related to goods manufactured or services provided at the direction and under the supervision and control of the United States government. The Chamber, the NAM, and their members thus have a strong interest in ensuring the proper interpretation and application of the federal officer removal statute.

SUMMARY OF ARGUMENT

The ability of private entities operating under the direction or control of the federal government in times of war and other crises to remove to the federal courts cases stemming from those operations is an issue of exceptional importance. The panel decision affirming the lower court's denial of Defendants-Appellants' removal petition in this case undermines Congress's express direction that claims against a federal officer, or against a private party assisting a federal officer under the officer's direction and control, be heard by the federal courts. The federal officer removal statute[2] allows such removal for two vital reasons: (1) to minimize interference by States with federal prerogatives, and (2) to "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). Under the 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

[2] 28 U.S.C. § 1442(a)(1).

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).

The panel's opinion undermines the removal statute's promise of protections, for those operating under federal authority, against the risk of local bias and unwarranted variation in the application of the law. So here, where Defendants-Appellants acted under federal direction to maximize the production of crude oil during wartime and now, almost eight decades later, the State seeks to impose liability for the alleged consequences of those federally-directed operations.

Federal interests are strongest during times of war. In such times, the government's ability to order and allocate resources, and private 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 of utmost importance to our nation's well-being.

By denying a federal forum to private businesses that acted under the government's direction to fuel the war effort, the panel decision prejudices business enterprises that submitted to government control during the war. Even worse, the panel decision hampers the

government's ability to procure industry assistance during future crises, frustrating the government's capacity to respond to emergencies. In addition, the panel decision needlessly conflicts with case law from the Supreme Court and other circuits, unsettling the law on a question of exceptional public importance. Rehearing by the panel, or in the alternative rehearing *en banc*, is therefore necessary and should be granted.

ARGUMENT

THE PANEL DECISION HAS MAJOR ADVERSE IMPACTS ON PARTIES ACTING UNDER THE FEDERAL GOVERNMENT'S DIRECTION, ON THE GOVERNMENT ITSELF, AND ON THE ACHIEVEMENT OF IMPORTANT FEDERAL PURPOSES.

A. The Panel Decision Mistakenly Denies a Federal Forum to Companies Conscripted to Provide Crucial Services to the Government During Wartime.

The panel decision unfairly—and erroneously—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. In times of crisis, federal officials often must exercise a large measure of control over companies in critical industries. The federal officer removal statute was enacted specifically 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 to federal court under 28 U.S.C. § 1442(a), a defendant must demonstrate that (1) it has asserted a colorable federal defense, (2) it is a "person" under the removal 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 panel found that Defendants-Appellants satisfied the first and second factors, but not the third—acting pursuant to a federal officer's direction (and thus did not reach the fourth). The key question thus is whether Defendants-Appellants were "acting under" federal officers' direction during WWII.

During wartime, specific industries may be called upon to assist the government. Several laws expressly empower the President or his delegates to make requisitions and direct private industry resources.[3]

[3] *See*, *e.g.,* 50 U.S.C. § 4511(a) (authorizing the President to "allocate materials, services, and facilities … to promote the national defense"); 47 U.S.C. § 606(c) (empowering the 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 the 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 with a conscripted entity to exercise its wartime authority.

Specifically, 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 the Executive's authority to allocate and ration rubber tires when 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 to "[e]ffect the proper distribution of such amounts of materials…." Exec. Order No. 9,276, 7 Fed. Reg. 10,091 (Dec. 4, 1942). The industry had no choice but to submit to the government's guidance, control, and supervision of its activities.

B. The Panel Decision Hampers the Government's Ability to Order and Maintain Resources and Equipment in Times of Crisis, Including Wartime.

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 on the 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 might narrow, or even 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, where the risks of local bias are minimized. By consigning Defendants-Appellants to state court and construing the removal statute unduly narrowly, the panel decision, if allowed to stand, will hinder the government's ability to procure goods during future crises.

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

C. The Panel Decision Misreads *Watson* and Unjustifiably Departs from Other Circuits' Case Law Regarding the "Acting Under" Requirement of the Federal Officer Removal Statute.

The panel decision misreads *Watson* to require that any "guidance or control" by the federal government be contained in an express contract between a private party and the federal government, or in an express subcontract between a private party and a direct government contractor. *Watson*, however, contains no such requirement. *See Watson*, 551 U.S. at 143 ("The relevant relationship here is that of a private person 'acting under' a federal 'officer' or 'agency.' . . . In this context, 'under' must refer to what the dictionaries describe as a relationship involving acting in a certain capacity, considered in relation to one holding a superior position or office, and typically includes subjection, guidance, *or* control.") (emphasis added). Requiring a supplier to prove that the federal government's guidance or control was embodied in a contract with the government or a subcontract with a direct government contractor, without reference to other indicia of control (such as the extraordinarily pervasive web of regulations and orders that governed the operation of the petroleum industry during World War II), conflicts with case law concluding that one "acting under" a federal officer need not have a

contractual relationship to establish the necessary federal control. *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), entity was "acting under" federal officer despite lack of contract); *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1179-82 (7th Cir. 2012) (corporation supplying Navy turbines, which "worked hand-in-hand with the government," satisfied "acting under" requirement; opinion does not suggest that a contract with the government is required to meet this requirement). To require that the guidance or control come from the contract or subcontract conflicts with *Watson* and creates an unnecessary circuit split.

Indeed, the panel itself noted that, while "such relationships are *often* evidenced by governmental contracts, … evidence of *any* payment, *any* employer/employee relationship, or *any* principal/agency arrangement can *also* indicate the requisite delegation of legal authority to act on the Government's behalf." *Plaquemines Parish v. Chevron USA, Inc.*, No. 22-30055, 2022 WL 9914869, at *2 (5th Cir. Oct. 17, 2022) (emphasis added) (internal quotations and citations omitted). The panel

thus expressly accepted that the existence of an express contract is *not* required to establish an "acting under federal direction" relationship between a private party and the federal government. That makes sense: while a contract is often a signal of a federal officer's direction and control of a private party, the relationship can also be established by evidence of course of conduct, such as by evidence of a principal/agency arrangement or by evidence of pervasive control (such as the conscription of an entire industry that the PAW carried out during World War II through its orders, directives, and regulations). Notwithstanding this express acknowledgment, the panel neglected to undertake any such analysis in considering the agency relationship with the federal government that Defendants-Appellants aver as the basis for removal.

The panel decision directly impacts matters of national importance—specifically, industry mobilization at the government's behest in times of crisis. And the decision conflicts with other circuits' case law, misreading the Supreme Court's *Watson* decision as requiring that the government's direction and control of a private entity be contained in a contract or subcontract to establish the requisite

relationship. Rehearing by the panel or rehearing *en banc* is therefore warranted.

CONCLUSION

For the foregoing reasons, the Court should grant Defendant-Appellants' petition for panel rehearing or, in the alternative, their petition for rehearing *en banc*.

Dated: November 16, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 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 29(b)(4) because it contains 2,321 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: November 16, 2022

/s/ Thomas A. Lorenzen
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