

Nos. 21-15313, 21-15318

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY AND COUNTY OF HONOLULU,

Plaintiff-Appellee,

v.

SUNOCO LP, et al.,

Defendants-Appellants,

COUNTY OF MAUI,

Plaintiff-Appellee,

v.

CHEVRON USA INC., et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Hawaii,
Nos. 20-cv-00163, 20-cv-00470 (The Honorable Derrick K. Watson)

***AMICI CURIAE* BRIEF OF
GENERAL (RETIRED) RICHARD B. MYERS and
ADMIRAL (RETIRED) MICHAEL G. MULLEN,
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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INTEREST OF AMICI CURIAE¹

United States Air Force General (Retired) Richard B. Myers was appointed Vice Chairman of the Joint Chiefs of Staff by President Clinton in 2000 and was appointed by President George W. Bush in 2001 to become the 15th Chairman of the Joint Chiefs of Staff. In that capacity, he served as the principal military advisor to the United States President, Secretary of Defense, and the National Security Council. He served in that role until 2005.

General Myers joined the Air Force in 1965 through the ROTC program at Kansas State University. He served in the Vietnam War, where he flew over 600 combat hours in the F4 fighter jet, which used a specialized jet fuel produced by the private sector that allowed General Myers to accomplish his missions safely and effectively. He has held numerous commands and served in significant staff positions in the Air Force. General Myers has received numerous awards and decorations for his service, including, the Legion of Merit, the French Legion of Honor, and the Presidential Medal of Freedom. He received his fourth-star in 1997 and retired from active duty in 2005, after more than forty years of active service.

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. *Amici curiae* have accepted no payment for submission of this brief. Non-party Murphy USA, Inc. contributed money to counsel for *amici*, Shook, Hardy & Bacon LLP, which assisted with preparing and submitting this brief. All parties consent to *amici* filing this brief.

General Myers began serving as the Interim President of Kansas State University in late April 2016, and was announced as the permanent President on November 15, 2016.

United States Navy Admiral (Retired) Michael G. Mullen served as the 17th Chairman of the Joint Chiefs of Staff from 2007-2011 under both President George W. Bush and President Barack Obama. A graduate of the United States Naval Academy in 1968, Admiral Mullen served in the Vietnam War and commanded his first ship, the gasoline tanker USS Noxubee, from 1973-1975. The Noxubee carried a split cargo of aviation gasoline, motor gasoline, diesel fuel, jet fuel, and Navy special fuel. In its final deployment to the Sixth Fleet under Admiral Mullen's command, the Noxubee delivered over 5 million gallons of fuel vital to the Fleet's and forward bases' mission, operations, and readiness.

Admiral Mullen earned a Master's Degree in Operations Research in 1985 and, later that year, took command of the guided-missile destroyer USS Goldsborough. Admiral Mullen participated in Harvard University's Advanced Executive Management graduate program in 1991. He was promoted to Rear Admiral in 1997 and, in 1998, was named Director of Surface Warfare in the office of the Chief of Naval Operations (CNO).

Admiral Mullen is one of only four naval officers who has the distinction of receiving four, 4-Star assignments. In 2003, Admiral Mullen was named Vice

Chief of Naval Operations and was tapped to head the United States Naval Forces in Europe and NATO's Joint Force Command in Naples. He then was appointed Chief of Naval Operations in 2005, and, in 2007, he was nominated by George W. Bush to be the 17th Chairman of the Joint Chiefs of Staff. Admiral Mullen retired from this position in 2011 after serving for four years under both a Republican and a Democratic president.

The focus of this brief is not on the underlying merits of the litigation. *Amici* express no view, and take no position, on climate change policy questions. They file this brief because they strongly believe these important national and international policy issues should be addressed to Congress and the Executive Branch, not adjudicated piecemeal across the country in a multitude of state courts. Instead, this brief provides a history of the Federal Government's, particularly the United States military's, control and direction of the production and sale of gasoline, diesel, and specialized fuels to ensure that the military is "deployment-ready".

For more than a century, petroleum products have been essential for fueling the United States military around the world. The United States military constitutes the world's single largest institutional user of petroleum, the vast majority of which is created and supplied by private companies, like Defendants here, for the military's special and particularized needs. In *amici's* view, the use of such fossil fuels was

crucial to the success of the armed forces when *amici* served as Chairmen of the Joint Chiefs of Staff, and it remains crucial today to advance the Nation's paramount interest in national defense. As Admiral Mullen once put it, "[e]nergy security needs to be one of the first things we think about, before we deploy another soldier, before we build another ship or plane, and before we buy or fill another rucksack."² In light of that concern, *amici* believe this history and their experience demonstrate that litigation of Plaintiffs' Complaints in federal court is proper.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

These cases center on the global production, promotion, sale and consumption of oil and gas products that are used by virtually every person on the planet every single day. Plaintiffs seek to impose liability on Defendants' production, promotion, and sale of these essential products through claims brought in state courts around the country. Due to the extensive Federal Government involvement, particularly the United States military, in the development and growth of the domestic oil and gas industry, Plaintiffs' claims should be governed by federal law and adjudicated in federal courts.

² Energy Security Forum, Washington, D.C., 13 October 2010, <http://www.jcs.mil/speech.aspx?id=1472>; *see also* <https://www.dvidshub.net/news/58040/mullen-military-has-strategic-imperative-save-resources>

As former Chairmen of the Joint Chiefs of Staff serving under both Democratic and Republican administrations and with over 80 years of service in the military, we can personally attest that oil and gas products produced by the companies like the Defendants have been and continue to be critical to national security, military preparedness, and combat missions. We are not alone in this belief. Military commanders, like General David Petraeus, universally emphasize that “[e]nergy is the lifeblood of our warfighting capabilities.”³

A prime example is the non-commercial grade fuel the United States military contracts with private parties to develop—pursuant to unique and highly-detailed specifications—to meet the specialized requirements of military aircraft, like the SR-71 Blackbird (JP-7 fuel), the F-4 fighter flown by General Myers (JP-4 fuel), or Navy F-18s (JP-5 fuel) and today’s Air Force’s F-35 (JP-8 fuel), among many others. To meet these vital needs, the Federal Government has actively encouraged and directed private domestic exploration and production of oil and gas for more than 100 years.

Federal courts have properly recognized that petroleum products have been “*crucial* to the national defense,” including but by no means limited to “fuel and diesel oil used in the Navy’s ships; and lubricating oils used for various military

³ Quoted in Department of Energy, “Energy for the Warfighter: The Department of Defense Operational Energy Strategy,” 14 June 2011, <https://www.energy.gov/articles/energy-war-fighter-department-defense-operational-energy-strategy>.

machines.” *Exxon Mobil Corp. v. United States*, 2020 WL 5573048, at *31 (S.D. Tex. Sept. 16, 2020) (emphasis added); *see also id.* at *47 (noting the “value of [the] petroleum industry’s contribution to the nation’s military success”).

To ensure its military has a dependable, abundant supply of the energy indispensable to protect our nation’s economic and national security, the Federal Government has both incentivized, directed and contracted with Defendants to obtain oil and gas products, including specialized jet fuels. A substantial portion of the oil and gas used by the United States military are non-commercial grade fuels that are developed and produced by private parties, including many of the Defendants here, under the oversight and direction of military officials. But for Defendants’ production and supply of these fuels pursuant to the military’s unique requirements, the Federal Government would have had to manufacture them itself. Without these products, the military could not have accomplished the successes it has achieved, protected our citizens, and thwarted potential attacks.

Plaintiffs’ Complaints relate to and seek substantial relief from Defendants regarding their past and present production of oil and gas under the direction of the Federal Government. Their claims necessarily implicate and are subject to federal law, which places jurisdiction of these matters in federal courts. To assist the Court in understanding the full context of these important issues, this *amicus* brief provides an historical background of the Federal Government’s oversight and

control of the oil and gas industry and the critical importance of their products to the military, which underscores why federal jurisdiction is warranted here.

ARGUMENT

For more than a century, and to this day, the Federal Government has incentivized, directed and controlled aspects of United States oil production and has reserved rights to take additional control of such operations for the benefit of the Nation's defense, security and economy. As United States Navy Captain Matthew D. Holman recently explained:

Fuel is truly the lifeblood of the full range of Department of Defense (DoD) capabilities, and, as such, must be available on specification, on demand, on time, every time. In meeting this highest of standards, we work hand-in-hand with a dedicated team of Sailors, civil servants, and *contractors* [*i.e.*, companies like Defendants] to deliver fuel to every corner of the world, ashore and afloat.

Navy Supply Corps Newsletter, NAVSUP Fuels: What the Fleet Runs On, Spring 2020 at p. 10 (emphasis added).⁴

To ensure it has the fuels necessary for our Nation's security, the Federal Government has required and otherwise been inextricably involved in oil and gas companies' development of the Nation's domestic oil resources both for

⁴ Available at: <https://ufdcimages.uflib.ufl.edu/AA/00/04/80/19/00052/Spring-2020.pdf>

governmental use and the use of billions of consumers. Any claims arising from the historic production and sale of domestic oil and gas necessarily implicate the Federal Government’s historical and current role in this industry, including the extensive history of federal laws, contracts and leases that supported and controlled significant portions of our Nation’s fuel supply. Accordingly, Plaintiffs’ claims belong in federal court.

I. Beginning in the early 20th century, the Federal Government developed and controlled significant oil production from domestic oil and gas companies to support national defense efforts.

There can be no reasonable debate that “[w]ar and preparation for it are fossil fuel intensive activities.” Neta C. Crawford, *Pentagon Fuel Use, Climate Change, and the Costs of War*, Brown University, Watson Institute, Costs of War Project, June 12, 2019.⁵ As a result, history reveals that “[t]he US military’s energy consumption drives total US government energy consumption.” *Id.*

More than a century ago, in 1910, President Taft implored Congress to develop domestic oil sources: “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 insuring the longest possible life to the oil

⁵ Available at:

<https://watson.brown.edu/costsofwar/files/cow/imce/papers/2019/Pentagon%20Fuel%20Use,%20Climate%20Change%20and%20the%20Costs%20of%20War%20Final.pdf>

supply.” *Hearings Before Committee on Naval Affairs of the House of Representatives on Estimates Submitted by the Secretary of the Navy*, 64th Cong. 761 (1915).

Within two years, on September 2, 1912, President Taft established by Executive Order the first “Naval Petroleum Reserve” at Elk Hills, California, taking the extraordinary step of withdrawing large portions of land from eligibility for private ownership and designating them instead to be used for the development of fuel resources to ensure the United States Navy was “deployment-ready” in the event of war. *United States v. Standard Oil Co. of Cal.*, 545 F.2d 624, 626-628 (9th Cir. 1976); *see also* U.S. Gov’t Accountability Off., GAO/RCED-87-75FS, *Naval Petroleum Reserves: Oil Sales Procedures and Prices at Elk Hills, April Through December 1986*, at 3 (1987) (“GAO Fact Sheet”) (“The Elk Hills Naval Petroleum Reserve (NPR-1) . . . was originally established in 1912 to provide a source of liquid fuels for the armed forces during national emergencies.”).⁶

Indeed, the defining characteristic of World War I was “the mechanization of armies” (*i.e.*, the prominence of tanks, aircraft and submarines), as a result of which “oil and its products began to rank as among the principal agents by which the Allies would conduct war and by which they could win it.” Ian O. Lessor, *Resources and Strategy: Vital Materials in International Conflict 1600 – The*

⁶ <http://www.gao.gov/assets/90/87497.pdf>

Present (1989) at 42. The necessity was echoed among the Allies, as British Cabinet Minister Walter Long expressed in an address to the House of Commons in 1917:

Oil is probably more important at this moment than anything else.

You may have men, munitions, and money, but if you do not have oil, which is today the greatest motive of power that you use, all your other advantages would be of comparatively little value.

Yergin, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY & POWER* (1991) at 177.

By 1917, American oil became vital for war efforts. As the Admiralty Director of Stores stated, “[W]ithout the aid of oil from America our modern oil-burning fleet cannot keep the sea.” Lessor, *Resources and Strategy* at 43. In response to the Allies’ cry for help, the United States provided over 80 percent of the Allied requirements for petroleum products and greatly influenced the outcome of the war. *Id.* (“A failure in the supply of petrol would compel the immediate paralysis of our armies, and might compel us to a peace unfavorable to the Allies.... The safety of the Allied nations is in the balance. If the Allies do not wish to lose the war, then, at the moment of the great German offensive, they must not let France lack the petrol which is as necessary as blood in the battles of tomorrow” (quoting Clemenceau’s letter to President Wilson)).

Two decades later, World War II confirmed petroleum's role as a key American resource and underscored the government's interest in maintaining and managing it. Statement of Ralph K. Davies, Deputy Petroleum Administrator of War, Special Committee Investigating Petroleum Resources, S. Res. 36, at 4 (Nov. 28, 1945) ("Our overseas forces required nearly twice as many tons of oil as arms and armament, ammunition, transportation and construction equipment, food, clothing, shelter, medical supplies, and all other materials together. In both essentiality and quantity, oil has become the greatest of all munitions.") 2-ER-0271; National Petroleum Council, *A National Oil Policy for the United States* at 1 (1949) ("A prime weapon of victory in two world wars, [oil] is a bulwark of our national security.").

In 1941, as the United States prepared to enter World War II, its need for large quantities of oil and gas to produce high-octane fuel for planes ("avgas"), oil for ships, lubricants and synthetic rubber far outstripped the Nation's capacity at the time. Avgas, in particular, was viewed as "the most critically needed refinery product during World War II and was essential to the United States' war effort[.]" *Shell Oil Co. v. United States*, 751 F.3d 1282, 1285 (Fed. Cir. 2014) ("*Shell II*"). The Federal Government created agencies to control petroleum production and distribution; it directed the production of certain petroleum products; and it managed resources.

In 1942, President Roosevelt established several agencies to oversee wartime petroleum production, including the War Production Board (“WPB”) and the Petroleum Administration for War (“PAW”). The PAW centralized the government’s petroleum-related activities. The “PAW told the refiners what to make, how much of it to make, and what quality.” *Shell II*, 751 F.3d at 1286 (quoting John W. Frey & H. Chandler Ide, *A History of the Petroleum Administration for War, 1941-1945*, at 219 (1946)).

“PAW was further expected to designate for the military forces the companies in a given area from which the product could be secured, as well as the amount to be produced by each company and the time when the product would be available.” Statement of George A. Wilson, Director of Supply and Transportation Division, Wartime Petroleum Supply and Transportation, Petroleum Administration for War, Special Committee Investigating Petroleum Resources, S. Res. 36 at 212 (Nov. 28, 1945). The Office of the Petroleum Coordinator for National Defense stated that “[i]t is *essential*, in the national interest that the supplies of all grades of aviation gasoline for military, defense and essential civilian uses *be increased immediately to the maximum*.” *Shell II*, 751 F.3d at 1286 (quoting Office of Petroleum Coordinator for National Defense Recommendation No. 16). (emphasis added).

To maintain and preserve a sufficient fuel supply, the Navy sought complete control over development of the entire Elk Hills Reserve and production of oil

therefrom. On March 21, 1942, President Roosevelt “stated that if satisfactory arrangements could not be promptly concluded with [Standard Oil of California], the Secretary of the Navy was authorized to start condemnation proceedings through the Department of Justice to acquire the property” for the Federal Government. *See* U.S. Gov’t Accountability Off., *Naval Petroleum Reserve No. I: Efforts to Sell the Reserve*, GAO/RCED-88-198 at 14 (July 1988), (“GAO Report”)⁷.

The Navy and Standard Oil entered into the Elk Hills Unit Plan Contract that President Roosevelt approved on June 28, 1944, “to govern 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 (Fed. Cl. 2014); *see also* Statements of Commodore W.G. Greenman, U.S. Navy, Director, Naval Petroleum Reserves, Hearing Records at 3693–94. (“[T]he agreement between the Navy and Standard . . . placed the control of production from both Standard [Oil] and Navy lands under the absolute control of the Secretary of the Navy.”).

Although the Navy could have developed the resources on the Reserve itself, it chose to hire Standard Oil to operate the Reserve to maximize production as quickly as possibly because “[a] substantial increase in production... was urgently requested by the Joint Chiefs of Staff to meet the critical need for petroleum on the

⁷ Available at: <https://www.gao.gov/assets/220/210337.pdf>

West Coast to supply the armed forces in the Pacific theatre,” and Standard Oil was more qualified than the Federal Government itself to do so. Elk Hills Historical Documents at 1, 5-ER-807-810.

“Shortly after the unit plan contract was signed, the Congress, according to DOE, authorized the production at [the Elk Hills Reserve] at a level of 65,000 B/D [barrels per day] to address fuel shortages on the West Coast and World War II military needs.” GAO Report at 15. Production reached this “peak of 65,000 barrels per day in 1945.” GAO Fact Sheet at 3. At the direction of the Federal Government, the oil companies increased avgas production “over twelve-fold from approximately 40,000 barrels per day in December 1941 to 514,000 barrels per day in 1945, [which] was crucial to Allied success in the war.” *Shell II*, 751 F.3d at 1285. “No one who knows even the slightest bit about what the petroleum industry contributed ... can fail to understand that it was, without the slightest doubt, ***one of the most effective arms of this Government***” in fulfilling the government’s core defense functions. Statement of Senator O’Mahoney, Chairman, Special Committee Investigating Petroleum Resources, S. Res. 36, at 1 (Nov. 28, 1945) (emphasis added).

II. During the second half of the 20th Century, the Federal Government continued to exercise substantial control and direction over the production of oil and gas.

In 1950, President Roosevelt’s successor, President Truman, established the Petroleum Administration for Defense (“PAD”) under authority of the Defense Production Act of 1950, Pub. L. No. 81–774 (“DPA”). The PAD ordered production of oil and gas to ensure adequate quantities of avgas for military use. *See Exxon*, 2020 WL 5573048, at *28; *see also id.* at *15 (detailing the government’s use of the Defense Production Act of 1950 to “force” the petroleum industry to “increase [its] production of wartime . . . petroleum products”).

During the Cold War era, the U.S. military commanded the development of more innovative military fuels and continued its role as the major consumer and driving force behind domestic production. For example, Shell Oil Company developed and produced specialized JP-7 jet fuel to meet the unique performance requirements of the U-2 spy plane’s high altitude and speeds.⁸ For the related work done for the A-12 OXCART, Shell Oil Company produced millions of gallons of specialized fuel under contracts containing specific testing and inspection

⁸ *See* Gregory W. Pedlow & Donald E. Welzenbach, *The Central Intelligence Agency and Overhead Reconnaissance: The U-2 and OXCART Programs, 1954-1974* 61-62 (1992), <https://www.archives.gov/files/declassification/iscap/pdf/2014-004-doc01.pdf>; Ben Rich & Leo Janis, *Skunk Works* 73, 113 (1996).

requirements.⁹ Such special fuels, like the JP-7 for the SR-71 Blackbird, “which Shell Oil was called upon to invent,” enabled our military aircraft to fly faster and higher than our adversaries. Peter Suci, *The SR-71 Was Super Fast, But It Required a Special Fuel That It Guzzled Like No Other*, *The National Interest*, 30 April 2020 (“The SR-71 didn’t use standard aviation fuel, but a special military specification fuel called MIL-T-38219, or Jet Propellant 7. Shell Oil was called upon to invent a compound blend to meet the military’s requirements....”).¹⁰

During the 1960s, U.S. energy consumption increased 51%, compared to only 36% during the previous decade. Jay Hakes, *A Declaration of Energy Independence at 17* (2008). As demand continued to climb into the early 1970s, domestic supply failed to keep pace and the Nation faced a precarious shortage of oil.

To address the “immediate and critical” petroleum shortages in the military brought by the 1973 OPEC Oil Embargo, the Federal Government invoked the DPA to bolster its reserves with additional petroleum from domestic oil and gas

⁹ Concurrence in Contract No. SH-515 with Shell Oil Company, Project OXCART (Sept. 20, 1963) 5-ER-925-927; Contract No. AF33(657)-13272 (SH-516) (June 30, 1964) 5-ER-928-963; Contract No. AF33(657)-12525 (SH-55) Sept. 20, 1963) 5-ER-964-999; Concurrence in Contract No. SH-514 with Shell Oil Company, New York, N.Y. (June 28, 1963) 5-ER-1000-1036; Contract No. AF33(657)10449 (SH-513) (Feb. 25, 1963) 6-ER-1038-1085; Contract No. AF33 (657)-8582 (SH-512) (Sept. 13, 1962) 6-ER-1086-1133; Summary of OSA Activities for Week Ending 21 August 1963 (August 23, 1963) 6-ER-1134-1140.

¹⁰ Available at: <https://nationalinterest.org/print/blog/buzz/sr-71-was-super-fast-it-required-special-fuel-it-guzzled-no-other-149386>.

companies. Twenty-Fourth Annual Report of the Activities of the Joint Committee on Defense Production, S. Rep. No. 94-1, Pt. 1, at 442 (Jan. 17, 1975, 1st Sess.). The Interior Department subsequently issued directives to 22 companies to supply a total of 19.7 million barrels of petroleum during the two-month period from November 1, 1973, through December 31, 1973, for use by the DOD.

Congress also authorized preliminary activity to develop Elk Hills and other National Reserves to their full economic potential. *See* Supplemental Appropriation Act of 1974, Pub. L. No. 93-245 (1974).¹¹ At this point, Standard Oil withdrew from operating Elk Hills to concentrate on other federal objectives:

[T]he current domestic energy situation is so serious that all oil companies are devoting their available resources to the discovery and production of new oil reserves. The President has requested that every effort be made to increase production of petroleum, and Standard is focusing its attention on this objective.

Letter from J.R. Grey, Standard Oil, to Jack L. Bowers, Acting Secretary of the Navy, requesting to terminate its position as Operator of the Elk Hills Reserve (Jan. 7, 1975) 3-ER-397.

In the 1975 Energy Policy Conservation Act, Congress created the Strategic Petroleum Reserve (“SPR”), a “stockpile of government-owned petroleum

¹¹ Available at: <https://uscode.house.gov/statutes/pl/93/245.pdf>

managed by the Department of Energy [created] as a response to gasoline supply shortages and price spikes. . . to reduce the impact of disruptions in supplies of petroleum products and to carry out U.S. obligations under the 1974 Agreement on an International Energy Program.” Pub. L. No. 94-163, 89 Stat. 871; *see* H.R. Rep. No. 115-965, at 3 (2017), 3-ER-398-399. The Act declared it national policy “to store up to 1 billion barrels of petroleum products, provides for an early reserve, to contain at least 150 million barrels by December 1878 [sic], and for an eventual storage system of at least 500 million barrels by December 1982. It [was] estimated that a 500 million barrel reserve, combined with conservation measures, [could] essentially replace lost imports, for a period of 6 months for the most likely interruptions.” Statement of Hon. John F. O’Leary, Administrator, Federal Energy Administration, Hearing before the Committee on Interior and Insular Affairs, U.S. Senate, on FEA’s Strategic Petroleum Reserve Plan, at 30 (Feb. 4, 1977).

The following year, Congress enacted the Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, 90 Stat. 303, 307-308 (1976), which reopened the Elk Hills Reserve and “directed that [the Reserve] be produced at the *maximum efficient rate for 6 years*.” *See also* Steven Rattner, *Long-Inactive Oilfield is Open—for Now*, N.Y. Times (Oct. 31, 1977). 8-ER-1480 Then-Commander Roger Martin, the naval officer in charge of the facility, explained: “We expect to reach a level of about 100,000 barrels daily in a few months, and

300,000 by the end of [the] 1970's." Robert Lindsey, *Elk Hills Reserve Oil Will Flow Again*, N.Y. Times (July 3, 1976). All of these endeavors expanded the Federal Government's control and direction of the production of oil and gas. This oversight was necessary to ensure the United States military was deployment ready and to meet other Federal Government objectives.

III. Over recent decades, the Federal Government has looked to private contractors to supply specialized military fuels, which the Government would have had to otherwise produce itself.

In more recent years, the Federal Government has continued to contract with private oil companies for massive amounts of special military fuels. In 2019, for instance, the Department of Defense alone purchased 94.2 million barrels of military-spec compliant fuel products, totaling \$12.1 billion in procurement actions.¹² Instead of making these fuels itself, the DOD contracted with private oil companies for JP-5 jet aviation fuels, F-76 marine diesel, and other Navy special fuel. *See* Katherine Blakeley, "Fighting Green: How Congress and the Pentagon Make Defense Policy" (Ph.D. diss., UC-Santa Cruz, 2017), 4, 75-142, 221, 246, 283. 2-ER-0191-192.

As just one example, the Defense Logistics Agency (DLA) entered into more than a dozen contracts with Tesoro Corporation from the 1980s through the 2010s

¹² Def. Logistics Agency Energy, Fiscal Year 2019 Fact Book (2019) at 4, 27, https://www.dla.mil/Portals/104/Documents/Energy/Publications/FactBookFiscalYear2019_highres.pdf?ver=2020-01-21-103755-473.

for military jet fuel, such as JP-4, JP-5, and JP-8. *See* Tesoro Corporation Exemplary Contracts for Highly Specialized Military Jet Fuel at 7-ER-1142-1362.

These contracts, and similar contracts with other private entities, including the Defendants here, were not typical commercial agreements. The federal contracts required the private companies to supply fuels with unique additives to achieve important objectives, such as igniting without freezing at low temperatures in high altitudes and rapidly dissipating accumulated static charge. *See* Dep't of Defense Handbook Aerospace Fuels Certification, MIL-HDBK-510A, at § 1.2.2 (Aug. 2014) 3-ER-469; Air Force Wright Aeronautical Lab., *Military Jet Fuels, 1944-1987*, AFWAL-TR-87-2062, Table 1, 2-9 (Dec. 1987) [hereinafter "Air Force Lab, *Military Jet Fuels*"] 3-ER-470; NREL, *Investigations of Byproduct Application to Jet Fuel*, NREL/SR-510-30611, at 4-6 (Oct. 2001) 3-ER-416.

When Plaintiffs' Complaints are viewed within the historical context of the Federal Government's pervasive control and direction of oil and gas production, particularly to ensure the operations and readiness of our military, it is clear that Plaintiffs seek to hold Defendants liable for actions taken under the direction of federal officers in pursuit of Federal Government policies. These policies include, but are by no means limited, to securing the national defense by developing fossil fuel resources, like specialized jet fuels, that the Federal Government would have

had to otherwise secure itself. This is more than sufficient to permit removal of this case from state to federal court.

IV. Oil and gas, including specialized fuels, produced under the direction and supervision of federal officers, have been and continue to be essential to the United States military.

As former members of the Joint Chiefs of Staff, we can provide a first hand and unique perspective on the need for acquiring specialized fuels for the United States military. The purchase of fuel is critical to the United States military because, as noted, it is the single largest consumer of fuel in the United States, if not the world. It uses fuel to power tanks, helicopters and fighter jets, run surveillance, electrify barracks, heat military installations and enable numerous other operations. Fuel is necessary to the United States military in times of war and in times of peace to make sure the military is ready for war, for peacekeeping missions, to deter future threats and to prevent terrorism.

Importantly, the military does not use the same oil and gas used by the average consumer. Instead, to achieve its paramount goal of protecting our national security, the military demands highly specialized fuels for many of its operations because its equipment needs that special fuel to do what normal, commercial vehicles do not do. The United States military has not, and does not, have the knowledge or experience to produce these specialized products on its own. It relies on the private companies, many of which are Defendants in these lawsuits, to

manufacture these fuels. Given the vital importance of these fuels, the military has, and continues to, closely direct and supervise these private parties and demands that the fuels meet the exact specifications required for military operations.

While it is important to continue to look for ‘greener’ ways to fuel the military, the reality is the United States military must always take into account its enemies’ own fossil fuel uses and potential superior deployment abilities because of those uses. The United States could go it alone and unilaterally strip itself of higher-performing fossil fuels, but that risks putting the United States at a significant competitive disadvantage. It would weaken our armed forces while strengthening those of other countries.

Stated differently, energy security and national security go hand-in-hand; we cannot achieve national security without first accomplishing energy security. As a result, reduction in fossil fuel use can be accomplished only through comprehensive international, multi-lateral negotiations and treaties led by the Legislative and Executive branches. This is how reduction of nuclear weapons was achieved during the Cold War.

At bottom, our experience has taught us that private production of oil and gas, particularly specialized fuels, are essential to our military operations and thus our national security. Our constitutional oath is: “I [*state your full name*], Do solemnly swear (*or affirm*) that I will support and defend the Constitution of the United

States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God (*optional*).” That oath necessarily includes a commitment to ensure that the military has sufficient fuel to accomplish its missions based upon the specifications the military requires. In order to adhere to that oath, it is the duty of military officers to enable a plentiful supply of particularized fuels to operate vehicles, ships and planes. Because energy is essential to our protection of our Nation, its people and the world at large, the decision of how much is appropriate must be left with the Federal Government and the branches of the Federal Government tasked with our foreign policy and national security.

CONCLUSION

Because the federal government and U.S. Military exerted for over 100 years, and continues to exert to this day, direction, control and oversight over the oil and gas industry, including Defendants here, and, in particular, directs their production of specialized fuels for unique military purposes, these cases belong in federal court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am the attorney for the amici. This brief contains 6,484 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. R. 32(a)(5) and (6), because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2016, Times New Roman 14-point font.

I certify that this brief is an *amicus* brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

Date: July 26, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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