Nos. 21-2728

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CITY OF HOBOKEN,

Plaintiff-Appellee,

v.

CHEVRON CORP., ET AL.

Defendants-Appellants,

On Appeal from the United States District Court for the District of New Jersey, No. 2:20-cv-14243 (The Honorable John M. Vazquez)

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

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 appointed the 15th Chairman of the Joint Chiefs of Staff by President George W. Bush in 2001. In that capacity, he served as the principal military advisor to the 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 40 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* have accepted no payment for submission of this brief. Non-party Murphy USA Inc. contributed money to counsel for *amici*, who assisted with preparing and submitting this brief. All parties consent to *amici* filing this brief.

General Myers is currently the President of Kansas State University, a position he has held since 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 Obama. A graduate of the U.S. 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, 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.

Admiral Mullen is one of only four naval officers who has received four, 4-Star assignments. In 2003, Admiral Mullen was named Vice Chief of Naval Operations and was tapped to head the U.S. 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, was nominated to be 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—which relate to activities undertaken by Defendants at the direction of and for the Federal Government, particularly the U.S. military—should be addressed at the federal level, not adjudicated piecemeal across the country in a multitude of state courts.

For more than a century, petroleum products have been essential for fueling the U.S. military around the world. The U.S. 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]

Amici believe this history and their personal, first-hand experience demonstrate that litigation of Plaintiff's Complaint (and similar state and municipal lawsuits filed around the country concerning climate change) belong in federal court pursuant to federal officer removal jurisdiction.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case centers on the global production, promotion, sale, and consumption of fossil fuels that, Plaintiff alleges, has caused increased greenhouse-gas emissions and global climate change, and, in turn, has given rise to a public nuisance, a private nuisance, and a trespass in the City of Hoboken, New Jersey. To remedy the alleged local harms of global climate change, Plaintiff requests compensatory, punitive, and treble money damages, an order compelling Defendants to abate the alleged nuisance and pay the costs of abatement, and injunctions precluding Defendants from engaging in unspecified future acts that Plaintiff claims constitutes a trespass. Due to the extensive Federal Government involvement in the development and growth of the domestic oil and gas industry and the critical importance and unique federal nature of both global anthropogenic

[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.

climate change and energy security, Plaintiff's claims should be adjudicated in federal court.

To assist the Court in understanding the full context of these important issues, this 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. American history is replete with concrete examples of federal officers—particularly the military—enlisting Defendants to produce, store, and supply oil and gas to support national defense and energy security. As former Chairmen of the Joint Chiefs of Staff with over 80 years of military service, we can personally attest that oil and gas products produced by Defendants and similar energy companies have been—and continue to be—critical to national security, military preparedness, and combat missions. Military commanders, like General David Petraeus, universally emphasize that "[e]nergy is the lifeblood of our warfighting capabilities."[3]

Federal courts have rightfully recognized that specialized petroleum products are "***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 machines." *Exxon Mobil Corp. v. United States*, 2020 WL

[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.

5573048, at *31 (S.D. Tex. Sept. 16, 2020) (emphasis added). To ensure the military has a dependable, abundant supply of energy for national security, the Federal Government has directed, incentivized, and contracted with Defendants to obtain oil and gas products.

A substantial portion of the oil and gas used by the U.S. military are non-commercial grade fuels developed and produced by private parties, including Defendants here, under the oversight and direction of military officials. A prime example is the fuel the U.S. military contracts with private parties to develop—pursuant to highly-detailed specifications—to meet the unique requirements of military aircraft, like the SR-71 Blackbird (JP-7 fuel), the F-4 fighter flown by General Myers (JP-4 fuel), Navy F-18s (JP-5 fuel), and today's Air Force's F-35 (JP-8 fuel), among many others.

By producing and supplying specialized fuels, Defendants filled a critical national need that the Federal Government would have otherwise had to undertake itself. Without these products, the military could not have achieved its successes, protected our citizens, and thwarted potential attacks.

The District Court failed to recognize that Plaintiff's claims implicate significant federal interests because they relate to Defendants' conduct acting under the direction of federal officers. The District Court wrongly found Defendants' historical actions under the direction of these federal officers to be

irrelevant—in contravention of this Court's clear precedents that alleged liability for such conduct must be litigated in federal courts.

Plaintiff's claims implicate two issues of vital ***national*** concern: energy security and climate change. The inherently national and international scope of these issues necessitates that they be addressed in a uniform way, which can be accomplished most-efficiently and appropriately at the federal level. We believe that allowing a patchwork of state-court actions based on a myriad of state-law claims, seeking to vindicate particular local interests will stand as an impediment to and undermine the ability to fashion the necessary national, uniform rules and policies that will best protect these vital national interests. America cannot be put in a position where its adversaries have better warfighting and deployment capabilities because its domestic fuel supply has been diminished as a result of these lawsuits.

As the Supreme Court put it: "The appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: As with other questions of national or international policy, informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 428 (2011) ("*AEP*"). A state trial court in Hoboken applying New Jersey's nuisance

law and consumer protection statutes to a worldwide phenomenon is not the proper forum to wrestle with these national and international issues. Therefore, we provide the Court with this historical summary of the Federal Government's oversight and control of the oil and gas industry and the critical importance of their products to the military's need to be deployment-ready, which underscores why federal officer removal jurisdiction is warranted here and state court jurisdiction is improper.

ARGUMENT

For more than a century—and to this day—the Federal Government has incentivized, directed, and controlled aspects of U.S. oil production and has reserved rights to take additional control of such operations for the Nation's defense, security, and economy. As U.S. 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]

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

I. Plaintiff's Claims "Relat[e] to," and Seek to Hold Defendants Liable For, Defendants' Actions Taken Under the Direction of Federal Officers in Pursuit of Federal Government Policies.

In remanding this case to New Jersey state court, the District Court stated that Plaintiff's claims do not have any relationship to Defendants' actions taken under federal officers. *City of Hoboken v. Exxon Mobil Corp.*, 2021 WL 4077541, at *9-10 (D.N.J. Sept. 8, 2021) ("*Hoboken*"). We strongly disagree. The substance of Plaintiff's claims (the alleged impact of fossil fuels on global climate change) and the broad relief Plaintiff seeks (damages, an order of abatement, and injunctions) are indisputably connected to actions Defendants have taken over the last 100 years at the direction of the Federal Government. 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.

The Federal Officer Removal Statute, 28 USC § 1442(a)(1), allows claims to be removed to federal court when they are based upon or relate to Defendants' conduct acting under the direction of the Federal Government.[5] *Golden v. N.J. Inst. of Tech.*, 934 F.3d 302, 309 (3d Cir. 2019). This standard is "liberally construed to

[5] This statute authorizes removal where an action "is commenced in a State Court" and "is against" a "person ***acting under*** [an] officer[] of the United States…for or ***relating to*** any act under color of such office…." 28 USC § 1442(a)(1) (emphasis added).

cover actions that involve an effort to assist, or to help carry out, the federal supervisor's duties or tasks," and applies when there is "a 'connection' or 'association' between the act in question and the federal officer." *Id.* at 309-10. This Court has explained that a party is "acting under" a federal officer when it "provides a service the federal government would itself otherwise have to provide." *In re Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 469 (3d Cir. 2015).

Here, the Federal Government has done far more than simply regulate Defendants' activities. As we detail below, a large and material swath of Defendants' activities for which Plaintiff seeks relief—the production and sale of fossil fuels—was taken under direction of federal officers.

Given our country's vital interest in ensuring we have the fuels necessary for our citizens and military, the Federal Government has required, been inextricably involved in, and exercised substantial control and direction over Defendants' production of oil and gas, both for governmental use and the use of hundreds of millions of consumers. The past century has been marked by Defendants' extensive efforts, under contracts with and at the direction of the Federal Government, to provide this service critical to our national interest.

A. 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.[6] 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 and on the verge of World War I, President Taft implored Congress to develop domestic oil sources. 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 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) (emphasis added); *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

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

established in 1912 to provide a source of liquid fuels for the armed forces during national emergencies.").[7]

The defining characteristic of World War I was "the mechanization of armies" (*i.e.*, tanks, aircraft, and submarines); as a result, "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 Present* (1989) at 42. By 1917, American oil became vital for the Allied war effort. As the British Admiralty Director of Stores stated, "[W]ithout the aid of oil from America our modern oil-burning fleet cannot keep the sea." *Id.* at 43. In response to the Allies' cry for help, the U.S. provided over 80 percent of the Allies' requirements for petroleum products and greatly influenced the outcome of the war. *Id.*

World War II confirmed petroleum's stature as a vital resource and underscored the Federal Government's interest in maintaining and managing it. In 1941, the 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

[7] Available at: http://www.gao.gov/assets/90/87497.pdf.

(Fed. Cir. 2014) ("*Shell II*"). The Federal Government created agencies to control petroleum production and distribution, directed the production of certain petroleum products, and managed resources.

In 1942, President Roosevelt established several agencies to oversee wartime petroleum production, including the War Production Board and the Petroleum Administration for War ("PAW"). The PAW centralized the Federal Government's petroleum-related activities and "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)).

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. 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 West Coast to supply the armed forces in the Pacific theatre," and Standard Oil was more experienced than the Federal Government to do so. Elk Hills Historical Documents at 1, 3-JA-389-392.

Congress "authorized the production at [Elk Hills] at a level of 65,000 [barrels per day] to address fuel shortages on the West Coast and World War II military needs." U.S. Gov't Accountability Off., *Naval Petroleum Reserve No. I: Efforts to Sell the Reserve,* GAO/RCED-88-198 (July 1988) ("GAO Report") at 15 (5-JA-910) https://www.gao.gov/assets/220/210337.pdf. 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).

B. 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 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 DPA to "force" the petroleum industry to "increase [its] production of wartime...petroleum products").

During the Cold War, the military commanded the development of more innovative fuels and continued its role as the major consumer and driving force behind domestic production. For example, Shell Oil Company was "called upon to invent" a specialized jet fuel, JP-7, to meet the unique performance requirements of the U-2 spy plane's high altitude and speeds.[8] Shell produced millions of gallons of JP-7 and other specialized fuels, under contracts containing specific testing and

[8] *See* Peter Suciu, *The SR-71 Was Super Fast, But It Required a Special Fuel That It Guzzled Like No Other*, The National Interest, 30 April 2020, available at: https://nationalinterest.org/print/blog/buzz/sr-71-was-super-fast-it-required-special-fuel-it-guzzled-no-other-149386; 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.

inspection requirements.[9] JP-7 continued to be used for spy planes, including the A-12 OXCART and the SR-71 Blackbird, and enabled our military aircraft to fly faster and higher than our adversaries.[10]

During the 1960s, U.S. energy consumption increased 51%. Jay Hakes, A Declaration of Energy Independence at 17 (2008). As demand continued to climb into the 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 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.

In 1975, Congress created the Strategic Petroleum Reserve ("SPR"), a "stockpile of government-owned petroleum 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.

[9] *See generally* 3-JA-454-469; 4-JA-470-681.
[10] Suciu, *The SR-71 Was Super Fast*, *supra.*

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-JA-285-286. The SPR 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 1[9]78, 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***." (Emphasis added); *see also* Steven Rattner, *Long-Inactive Oilfield is Open—for Now,* N.Y. Times (Oct. 31, 1977). 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 military was deployment-ready and to meet other Federal Government objectives.

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

To this day, the Federal Government contracts with private oil companies for massive amounts of special military fuels. In 2019, for instance, the DOD purchased 94.2 million barrels of military-spec compliant fuel products, totaling $12.1 billion.[11] The DOD contracts with private oil companies for JP-5 jet aviation fuels, F-76 marine diesel, and other Navy special fuels. *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. 7-JA-1476-1477.

These contracts, and similar contracts with other private entities,[12] including Defendants here, were not typical commercial agreements. The military does not use the same oil and gas as the average consumer, but demands highly specialized fuels to allow its equipment to do what normal, commercial vehicles do not. The federal contracts thus required the private companies to supply fuels with unique

[11] 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.
[12] 7-JA-1476-77; 6-JA-1083-88

additives to achieve important objectives, such as igniting without freezing at low temperatures in high altitudes and rapidly dissipating accumulated static charge. 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. *See* Dep't of Defense Handbook Aerospace Fuels Certification, MIL-HDBK-510A, at § 1.2.2 (Aug. 2014) 3-JA-300; Air Force Wright Aeronautical Lab., *Military Jet Fuels, 1944-1987*, AFWAL-TR-87-2062, Table 1, 2-9 (Dec. 1987) 3-JA-300; NREL, *Investigations of Byproduct Application to Jet Fuel*, NREL/SR-510-30611, at 4-6 (Oct. 2001). 3-JA-300. *See also* 3-JA-298-303, 3-JA-449, 4-JA-708-709, 6-JA-1136-1139, 6-JA-1150-1322, and 7-JA-1323-1353.

As former members of the Joint Chiefs of Staff, we are concerned about the impact this litigation could have on the military's need for acquiring specialized fuels. Purchasing fuel is critical to the military because it is the 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 in times of war and peace to make sure the U.S. military is ready for war, for peacekeeping missions, to deter future threats, and to prevent terrorism.

D. Because Plaintiff's claims are associated with and connected to Defendants' global production and sale of fossil fuels, those activities taken at the direction of federal officers are relevant to—and not "remote" from—Plaintiff's claims.

When Plaintiff's Complaint is 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 Plaintiff seeks 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.

Despite the Federal Government's well-documented historical involvement in and control over a significant portion of Defendants' production and sale of fossil fuels, the District Court dismissed these activities as "remote" and "not relevant" to Plaintiff's claims. As we see it, that conclusion disregards the nature of Plaintiff's allegations, its theory of causation, and the realities of global climate change as Plaintiff itself alleges.

The District Court did not dispute the essential national interest in maintaining an adequate supply of fossil fuels for military and civilian use. However, it concluded Plaintiff's claims were not premised on Defendants' actions in producing fossil fuels under the direction of federal officers and that Plaintiff's

allegations about Defendants' production and sale of fossil fuels "only serve to tell a broader story." *Hoboken* at *9-10 (quoting *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 467 (4th Cir. 2020), *rev'd*, 141 S. Ct. 1532 (2021)). We strongly disagree.

We believe that it is important for courts to focus on the core of a lawsuit's allegations, not someone's self-serving characterizations of it, to determine its true nature. In a similar climate-change case brought by Plaintiff's neighbor, the City of New York, the Second Circuit explained that "[a]rtful pleadings cannot transform [Plaintiff's] complaint into anything other than a suit over global greenhouse gas emissions." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021).

The same is true here: Plaintiff's claims—at their core—implicate global fossil-fuel production and consumption. The District Court's description of Plaintiff's claims as exclusively about alleged misrepresentations, and only tangentially related to Defendants' production and sale, ignores the breadth of Plaintiff's allegations, the substantial relief sought, and the nature of climate change that necessarily implicates ***global*** production and consumption. *See, e.g.*, *id.* at 92 ("[T]he City does not seek to hold the Producers liable for the effects of emissions released in New York, or even in New York's neighboring states. Instead, the City intends to hold the Producers liable, under New York law, for the effects of emissions made around the globe over the past several hundred years.").

As we see it, Plaintiff's allegations about production and sale are central to its claims. The damages about which Plaintiff complains and seeks relief are not the product of some local-sourced pollution. Rather, Plaintiff seeks relief from Defendants for the impact their ***worldwide*** production and sale have on ***global*** climate change and, in turn, the impacts global climate change has on Hoboken.

The District Court described the Complaint as "contend[ing] that Defendants' production, marketing, and sale of fossil fuels has been a 'substantial factor' in skyrocketing carbon dioxide (CO_2) emissions," that such rising "CO_2 emissions is a driving force in climate change," and that, "in turn, is causing climate disruption and damage throughout the world, including in Hoboken." *Hoboken* at *1 (quoting Complaint ¶¶ 41-42). Plaintiff's claims seek relief in the form of Defendants' "paying for the effects of climate change," the "actual cause" of which Plaintiff alleges is Defendants' "accelerating extraction, production, marketing and sale of fossil fuels." *Id.* at *2 (quoting Complaint ¶ 194). The Public Nuisance, Private Nuisance, and Trespass claims in Plaintiff's Complaint explicitly seek a judgment that the production and sale of fossil fuels is a public nuisance. *See* Complaint at ¶¶ 291-92, 295, 301, 309, 319, 321, 326, 335, 336. The Complaint's *Prayer for Relief* seeks an order of abatement and an injunction against future conduct, which would have a significant impact on Defendants' future activities in producing and selling oil and gas, including for the military.

History teaches that a material portion of this fossil-fuel production and use, which Plaintiff labels a nuisance and trespass, is done under the supervision and control of the U.S. military and other federal officers in furtherance of federal interests. And given the role the Federal Government has played (and still plays) in directing and controlling a significant part of Defendants' production, it is clear that Plaintiff's claims are for—and ***relate to***—conduct ***acting under*** those federal officers. The role of the military in directing the purchase of specialized fuels and using those fuels in prosecuting national interests and protecting America against foreign enemies directly relates to Plaintiff's claims about the impacts of such activities on global climate change and, in turn, its impacts on Hoboken.

To avoid that obvious conclusion, the District Court apparently believed that a defendant's actions under a federal officer need to be the ***sole*** cause of the harm for which the plaintiff seeks relief. But that is not consistent with the statute or the cases interpreting it. The statute requires only that the conduct "relat[e] to" Plaintiff's claims, which this Court has said can be shown through a mere "connection" or "association." *Golden*, 934 F.3d at 310. Defendants' activities done under the direction of federal officers are not only connected and associated with, but directly linked to, Plaintiffs' own causation theory: that use of fossil fuels leads to climate change.

Moreover, it is the international demand for fossil fuels and their associated international production—not any alleged misrepresentations made to New Jersey consumers—that gives rise to Plaintiff's alleged nuisance. Plaintiff should not be allowed to avoid federal officer removal by pleading "novel"[13] claims that ignore all intervening steps in its own causal chain (from the sale of fossil fuels to anyone, anywhere, including to the military) and its own theory of causation (that all uses comingle to cause global warming, of which military sales are a part) to its alleged injuries. Put differently, Plaintiff should not be allowed to dissect up the causal chain by isolating its consumer failure-to-warn claims to avoid federal jurisdiction given its worldwide causation theory, of which military sales play a key part and which this suit's outcome will impact.

Requiring that federal officer removal be predicated on a *de facto* "sole cause" theory misapplies the low bar (the "relat[es] to" standard), disregards the broad statutory language, and violates the principle (recognized by this Court and the District Court) of liberally construing the allegations ***in favor of*** federal officer removal. A recent Fourth Circuit decision confirms that Plaintiff's claims "relat[e] to" the government-directed conduct for purposes of federal officer removal. *Cnty. Bd. Of Arlington Cnty., Va v. Express Scripts Pharm., Inc.*, 996 F.3d 243, 257 (4th

[13] The original Fourth Circuit panel in *Baltimore*, 952 F.3d at 467 n.10, agreed with Defendants that Plaintiff's theory focusing on Defendants' statements and omissions, rather than production, is a "novel" one.

Cir. 2021) (holding that when defendant engages in conduct pursuant to a federal government contract that plaintiff claims contributes to a public nuisance, the claims "relate to" the contract and "[t]hat is sufficient to satisfy the federal officer removal statute").

II. Our Nation's Vital Interests in Fuel Security and Climate Change Must be Addressed in a Uniform Way, Which Will Not Occur If Defendants Are Subject to a Patchwork of State-Court Actions Seeking to Enforce Their Respective State Laws.

At the end of the day, we are concerned that the upshot of this litigation and the broad relief it seeks would negatively impact strong national interests in fuel security and military readiness. Fuel security is a crucial national interest and is especially critical to the U.S. military, in times of both war and peace, to power ships, tanks, and aircraft, provide energy to run bases, stations, and detachments, and enable numerous operations. ***It should thus come as no surprise that the US military is the single largest purchaser and consumer of fuel in the United States***.

Climate change is likewise an issue of critical national (indeed, global) importance. Greenhouse-gas emissions are a form of transboundary air pollution and thus present a matter of uniquely federal concern, rather than a State or local matter. *See AEP*, 564 U.S. at 422 ("Greenhouse gases once emitted become well mixed in the atmosphere; emissions in New Jersey may contribute no more to flooding in New York than emissions in China.") (cleaned up); *City of New York*,

993 F.3d at 85-86 ("Global warming presents a uniquely international problem of national concern. It is therefore not well-suited to the application of state law.").

Litigating Plaintiff's claims against Defendants in a decentralized way under various states' laws in a myriad of state courts will serve to undermine these vital national interests and create the potential for a "chaotic confrontation between sovereign states." *N. Car., ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 301 (4th Cir. 2010) ("*TVA*") (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496-97 (1987)). It would also subject Defendants to potential liability and injunctions under a patchwork of state laws, without a uniform guide. Courts have recognized that this would "risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *City of New York*, 993 F.3d at 93; *see also id.* ("And as states will invariably differ in their assessment of the proper balance between these national and international objectives, there is a real risk that subjecting the Producers' global operations to a welter of different states' laws could undermine important federal policy choices.").

Allowing Plaintiff to obtain its requested "injunction would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for

clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *TVA*, 615 F.3d at 296; *see also United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 311 (1947) ("And because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition, as well where Congress has not acted affirmatively as where it has, they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.").

While it is important to continue to look for "greener" ways to fuel the military, the reality is the U.S. 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 Nation at a significant competitive disadvantage. It would weaken our armed forces while strengthening those of our adversaries. 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 includes our commitment to "support and defend the Constitution of the United States against all enemies, foreign and domestic," which necessarily includes a commitment to ensure 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 protect 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,

By: /s/ Tristan L. Duncan

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CERTIFICATE OF COMPLIANCE

I am the attorney for the amici. This brief contains 6,417 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.

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Date: November 22, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

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