No. 13-1424

In The Supreme Court of the United States

STATE OF LOUISIANA EX REL.
CHARLES J. BALLAY, DISTRICT ATTORNEY
FOR THE PARISH OF PLAQUEMINES, et al.,

Petitioners,

v.

BP EXPLORATION & PRODUCTION, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF CAMERON INTERNATIONAL CORPORATION

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QUESTIONS PRESENTED

The Deepwater Horizon oil spill occurred on the Outer Continental Shelf, "an area of exclusive Federal jurisdiction." 43 U.S.C. § 1333(a)(1). The oil later migrated into the waters and shore of Louisiana. Various Louisiana district attorneys have asserted claims under the Louisiana Wildlife and Fisheries law, which imposes penalties for injuries to wildlife. La. Rev. Stat. 56:40.1. The questions presented are:

1. Do the police powers of the States extend to pollution originating on the Outer Continental Shelf?

2. Even if Louisiana could otherwise apply its laws to pollution originating on the Outer Continental Shelf, is the Louisiana Wildlife and Fisheries law preempted by the Clean Water Act?

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state:

Cameron International Corporation is a publicly traded corporation and no parent or publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

This lawsuit arose out of the oil spill that accompanied the explosion and loss of the Deepwater Horizon, which was engaged in oil development from the Macondo deepwater offshore well pursuant to a federal lease on the Outer Continental Shelf. Respondent Cameron International Corporation manufactured a device called a "blowout preventer" that was sold to Transocean and installed on the pipe leading into the well.

Among the many lawsuits arising from this oil spill, the United States filed suit under the Clean Water Act ("CWA"), which permits recovery of civil penalties from the "owner, operator, or person in charge" of an "offshore facility from which oil . . . is discharged." 33 U.S.C. § 1321(b)(7). Cameron is not named as a defendant in that CWA lawsuit, which has been consolidated into the MDL proceeding.

In this case, eleven Louisiana parish district attorneys sued in state court, seeking to recover penalties under the Louisiana Wildlife and Fisheries law, which imposes penalties on any person "who, through the violation of any other state or federal law or regulation, kills or injures any . . . wildlife and aquatic life." La. Rev. Stat. 56:40.1 ("the Wildlife Statute"). These lawsuits were removed to the District Court for the Eastern District of Louisiana and consolidated into the MDL proceeding.

The district court exercised jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 43

U.S.C. § 1349(b)(1), and denied remand. *See* Pet. App. 155.

Defendants moved to dismiss for failure to state claims on which relief could be granted. The district court granted the motion, concluding that the claims were preempted by the CWA. Pet. App. 42 & n.5.

The district attorneys appealed, and the Fifth Circuit affirmed. The Fifth Circuit began by acknowledging that federal law necessarily governs any claims arising out of the offshore oil spill. There are two potential sources of federal law. First, because the oil spill arose out of operations conducted on the Outer Continental Shelf, OCSLA dictates that federal law applies: "[a]ll law applicable to the Outer Continental Shelf is federal law." Pet. App. 12 (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480-81 (1981)). Alternatively, the court acknowledged that some parties argue maritime law applies because the Deepwater Horizon was a vessel. Pet. App. 13.

Under OCSLA, state law may sometimes be borrowed as surrogate federal law. *See* Pet. App. 10, 12 (quoting 43 U.S.C. § 1333(a)(2)(A), which permits federal law to take its content from state law that is "not inconsistent with" federal laws and regulations). The district attorneys disclaimed this argument, arguing only for the application of state law as state law. Pet. App. 10. The Fifth Circuit noted that their briefs were premised on OCSLA not applying. Pet. App. 10.

But it was unnecessary for the Fifth Circuit to decide whether OCSLA or maritime law provided the relevant federal law. The Fifth Circuit could affirm without reaching this question because both regimes include the CWA. Pet. App. 14.

As an initial matter, the Fifth Circuit held that the historic police powers of the States do not permit them to apply their laws to interstate water pollution originating outside their borders. Pet. App. 20. Any remedies that the States had for such pollution came from federal, not state, law. Pet. App. 21.

Alternatively, even if the States had "some residual police power to apply to this OCSLA-originated discharge," the CWA, as interpreted in *International Paper v. Ouellette*, 479 U.S. 481 (1987), preempts the application of state law to out-of-state point source discharges. Pet. App. 20-25. Thus, "[f]ederal law, the law of the point source, exclusively applies to claims generated by the oil spill." Pet. App. 25.

Under this federal regime, "there are no state remedies to 'save'" with savings clauses. Pet. App. 25. Even if there were, the Fifth Circuit held, these claims do not fit within the savings clause of either the CWA or the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2701 *et seq.* Pet. App. 26-32.

On September 4, after this petition was filed, the district court entered findings of fact and conclusions of law regarding liability for the oil spill. The court reaffirmed its ruling from the bench during trial that

Cameron is not liable and entered judgment accordingly under Rule 54(b).

REASONS FOR DENYING THE PETITION

Petitioners contend that this Court should grant certiorari to resolve a question of preemption under the CWA. But the petition does not acknowledge the broader legal framework that governs the dispute. Because an important and intertwined preliminary question – the applicability and effect of OCSLA – went unresolved by the Fifth Circuit, this case provides a poor vehicle in which to address the question presented.

Even aside from the vehicle issues, certiorari is not warranted. The Fifth Circuit's analysis of preemption under the CWA is a correct application of this Court's decision in *International Paper v. Ouellette*, 479 U.S. 481 (1987). No circuit split is alleged, and the question presented is neither important nor frequently recurring. At best, the petition seeks error correction, and further review is not warranted.

I. This Case Is a Poor Vehicle.

This case is a poor vehicle for addressing the issues of CWA preemption argued in the petition. There is a preliminary issue, undecided in the decision below, that would significantly complicate this Court's analysis.

The Fifth Circuit noted – but did not resolve – uncertainty about the relevant federal law. The Fifth Circuit suggested that either OCSLA or maritime law may govern. *See* Pet. App. 12-13 ("OCSLA Section 1333(a)(1) and admiralty law constitute alternative, not overlapping, regimes of federal law.").

This uncertainty is significant because if (as Cameron contends) OCSLA applies, there is no question that the Louisiana Wildlife Statute does not apply as state law. Under OCSLA, federal law applies "as if the outer Continental Shelf were an area of exclusive Federal jurisdiction within a state." 43 U.S.C. § 1333(a)(1). "All law applicable to the Outer Continental Shelf is federal law. . . ." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480 (1981). Thus, federal law exclusively "governs injuries arising from activity on an OCSLA situs, even if the injury occurs elsewhere." Pet. App. 12 (citing *Alleman v. Omni Energy Servs. Corp.*, 580 F.3d 280, 286 (5th Cir. 2009)).

Further complicating the issue, OCSLA may borrow state law as surrogate federal law to the extent that it is "applicable and not inconsistent with . . . other Federal laws and regulations." 43 U.S.C. § 1333(a)(2)(A); *see also Gulf Offshore*, 453 U.S. at 480 (discussing this borrowing). But as the Fifth Circuit noted, Petitioners disclaimed this argument. Pet. App. 10. And even if the "borrowing" argument had been raised below, whether state law should be "borrowed" under OCSLA is a different issue than

whether the CWA preempts state law, the sole question briefed in the petition.

The Fifth Circuit could affirm without resolving the federal-choice-of-law issue because both regimes include the CWA and the OPA, Pet. App. 14, and it resolved the case under these statutes. But if this Court were to grant review, it would be necessary to consider the larger framework of federal law, including whether OCSLA independently precludes application of state law.

If certiorari were granted, Cameron would press its argument that OCSLA applies and precludes application of the Wildlife Statute, independent of the CWA. This Court would necessarily consider these issues without the benefit of a lower circuit court decision. Even if this Court were interested in resolving these issues, it should wait for a case in which these intertwined issues have both been decided in the lower court.

II. The Decision Below Is Correct.

The Fifth Circuit correctly held that Louisiana may not regulate water pollution originating outside its borders. There are two grounds. First, Louisiana's historic police power does not extend to regulating water pollution outside its borders, even if this pollution migrates to within Louisiana's borders. Second, even if state authority could extend this far, the Wildlife Statute is preempted by the CWA.

A. The police powers of the States do not extend to regulating water pollution originating outside their borders.

The police powers of the States do not extend to regulating extraterritorial pollution. Interstate water pollution has historically been governed by federal common law, not state law: "Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Illinois v. City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 107 n.9 (1972) (quoting *Texas v. Pankey*, 441 F.2d 236, 241-42 (10th Cir. 1971)).

This Court cited *Milwaukee I* favorably in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), explaining that "the regulation of interstate water pollution is a matter of federal, not state, law." *Id.* at 488. Nor did the CWA alter this balance. Under the CWA, "[e]ven though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders." *Id.* at 490.

Petitioners claim that the authority to regulate pollution originating outside the State "involves historic police powers" that this Court has "long recognized." Pet. 10.

This assertion is incorrect. The cases cited by Petitioners all involve regulation of in-state activities.

Two cases cited by Petitioners – *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 391 (1978); *Lacoste v. Department of Conservation*, 263 U.S. 545, 552 (1924) – involve state regulation of activities involving wild animals within their borders. Similarly, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), involved state regulation of conduct within its territorial waters: "The Florida Act imposes strict liability for any damage incurred by the State or private persons as a result of an oil spill **in the State's territorial waters**. . . ." *Id.* at 327 (emphasis added).

In the absence of contrary direction from this Court, the Fifth Circuit properly followed *Milwaukee I*'s explanation that a State may not apply its laws to regulate water pollution originating outside its borders. There is no tension in this Court's decisions, and the Fifth Circuit's analysis was correct.

B. Even if Louisiana could regulate water pollution originating outside its borders, the CWA preempts the Louisiana Wildlife Act.

Because Louisiana law does not apply to water pollution originating on the Outer Continental Shelf, it is unnecessary even to consider preemption under the CWA. Nonetheless, the Fifth Circuit correctly held that the CWA preempts the Louisiana Wildlife Statute.

Specifically, this is field preemption. This Court held in *Ouellette* that the CWA occupies the entire field of water pollution regulation: "In light of this pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, it is clear that the only state suits that remain available are those specifically preserved by the Act." *Ouellette*, 479 U.S. at 492; *see also id.* (noting Congress's intent "to dominate the field of pollution regulation").

Petitioners fault the Fifth Circuit for "fail[ing] to conduct the required conflict preemption analysis." Pet. 14.

This criticism is misplaced. Conflict preemption analysis is unnecessary where Congress has displaced the entire field. *See Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (discussing field preemption generally). Under *Ouellette*, the only question is whether an action under the Louisiana Wildlife Statute is a state suit "specifically preserved by the [CWA]." The Fifth Circuit correctly held that it is not.

First, the savings clauses in the CWA are found in Section 1321(o)(1)-(3). All three begin, "Nothing in this section shall. . . ." As this Court recognized in *Ouellette*, such a limitation "does not purport to preclude pre-emption of state law by other provisions of the Act." *Ouellette*, 479 U.S. at 493. Here, the savings clauses do not preclude field preemption by the CWA as a whole.

Turning to the particular savings clauses of the CWA, Section 1321(o)(2) specifically addresses "the discharge of oil":

> Nothing in this section shall be construed as preempting any State . . . from imposing any requirement or liability with respect to the discharge of oil . . . into any waters within such State. . . .

33 U.S.C. § 1321(o)(2). This allows States to regulate only oil discharged directly into their waters, not oil discharged elsewhere that later migrates into a State's waters.

Petitioners do not dispute the Fifth Circuit's interpretation of Section 1321(o)(2). Pet. 35. They instead rely on Section 1321(o)(3), which provides:

> Nothing in this section shall be construed . . . to affect any State or local law not in conflict with this section.

33 U.S.C. § 1321(o)(3). In Petitioners' view, this sentence replaces the CWA field preemption with ordinary conflict preemption. Pet. 36.

But Petitioner's interpretation would render Section 1321(o)(2) surplusage. Section 1321(o)(3) would encompass it entirely. Thus, the Fifth Circuit correctly read Section 1321(o)(3) – like Section 1321(o)(2) – as limited to the States' historic powers to regulate conduct within their borders. Pet. App. 27.

Moreover, the Wildlife Statute conflicts with the CWA in numerous ways. Most obviously, the state

statute would permit liability to be imposed on Cameron, which cannot be held liable under the CWA. *See* 33 U.S.C. § 1321(b)(6)-(7) (limiting liability to an "owner, operator, or person in charge" of an offshore facility). And the penalties of the Wildlife Statute, which are based on the value of the wildlife, conflict with CWA penalty provisions that impose a cap on liability based on the duration of the violation or the amount of oil discharged and require the penalty amount to be based on specific policy considerations. *See* 33 U.S.C. §§ 1321(b)(7), (8).

For these reasons, this action under the Wildlife Statute is not a state suit "specifically preserved by the [CWA]." *Ouellette*, 479 U.S. at 492. The Fifth Circuit correctly held that it was preempted.

Nor does the savings clause of the OPA alter this analysis. The OPA provides, "Nothing in this Act . . . shall in any way affect . . . the authority of . . . any State . . . to impose . . . any fine or penalty (whether criminal or civil in nature) for any violation of law relating to the discharge, or substantial threat of a discharge, of oil." 33 U.S.C. § 2718(c).

This provision is inapplicable on its face. As the Fifth Circuit held, this savings provision is limited to preemption by the OPA – it does not preclude preemption by the CWA. Pet. App. 30.

Petitioners argue, in effect, that the OPA was an implied repeal of the CWA. *See* Pet. 29 (arguing that the OPA "superseded" the CWA).

But such implied repeals are strongly disfavored. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). The better approach is the Fifth Circuit's, reading the two statutes in *pari materia* to conclude that the OPA does not permit States to regulate discharges occurring outside their territorial waters. Pet. App. 29.

In enacting the OPA, Congress actually modified Section 1321(o)(2) of the CWA, without removing the "waters within such State" limitation, strongly indicating that Congress did not intend to broaden state authority over oil discharges. And given that the OPA was passed after *Ouellette*, Congress was aware that the authority of States was already limited to discharges within their territorial waters.

Indeed, such a conclusion is necessary to avoid an absurd result. Under *Ouellette*, if the oil spill had occurred in the waters of a neighboring State, there is no question that the Louisiana Wildlife Statute would not apply. *Ouellette*, 479 U.S. at 494 ("[T]he CWA precludes a court from applying the law of an affected State against an out-of-state source."); *accord Arkansas v. Oklahoma*, 503 U.S. 91, 100 (1992) ("[T]he only state law applicable to an interstate discharge is 'the law of the State in which the point source is located.' "). It would be irrational for Louisiana to have greater authority to apply its laws to an oil spill on the Outer Continental Shelf – "an area of exclusive Federal jurisdiction," 43 U.S.C. § 1333(a)(1) – than it would have to apply its laws to an oil spill in the waters of a neighboring State.

The Fifth Circuit's opinion provides a consistent and coherent rule: Louisiana may regulate only water pollution originating within its waters. Louisiana has no authority to apply its laws to regulate water pollution originating elsewhere, either in the waters of a neighboring State or on the Outer Continental Shelf.

The decision below correctly held that the police powers of Louisiana did not extend to water pollution originating outside its borders. And in the alternative, the Fifth Circuit correctly held that the CWA preempted the Wildlife Statute and that the OPA did not save the statute from preemption under the CWA. There is no need for further review.

III. This Question Does Not Warrant This Court's Review.

In any event, this case does not present a question warranting this Court's review. Most significantly, no circuit split is alleged.

Nor does this case present an issue of extraordinary importance meriting review in the absence of a circuit split. The Fifth Circuit's legal analysis will not have any broader effect beyond these two statutes. And the decision is limited to relatively narrow facts – oil spills occurring on the Outer Continental Shelf that result in the migration of pollution into state waters. Without both criteria – a spill on the Outer Continental Shelf and migration into state waters – the issue cannot arise.

Petitioners suggest this issue is "recurring," Pet. 37, but they provide no citation. In fact, the issue has never previously arisen. No circuit court has ever addressed this question before this case.

And if Petitioners are correct that the issue will recur, there is no reason that this Court's ordinary decision process should not be followed. This Court can wait for other circuits to address the issue, providing the benefit of additional analysis should this Court choose to consider the issue in the future. Should a circuit split develop, this Court could grant certiorari at that time. No harm would come from further percolation.

At the moment, there is no circuit split and no issue of exceptional importance. Petitioners merely request error correction of a well-reasoned Fifth Circuit opinion. Further review is not warranted.

CONCLUSION

Respondent Cameron International Corporation respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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