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

M-I L.L.C.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of any circuit split or conflict with this Court's cases, the Fifth Circuit's fact-bound application of this Court's decision in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), to hold that petitioners' state-law claims are preempted by the Clean Water Act warrants this Court's review.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Respondent M-I L.L.C. incorporates the petition's statement of parties to the proceedings (at ii).

M-I L.L.C. has two parent corporations: Smith International Acquisition Corporation and Schlumberger Technology Corporation. The indirect parent of Smith International Acquisition Corporation and Schlumberger Technology Corporation is Schlumberger Limited, a publicly traded corporation.

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STATEMENT

In *Ouellette*, this Court—relying on the federal government's primary control over matters concerning interstate water pollution—held that allowing claims under the law of a State in which a discharge did not occur would serve as an obstacle to effectuating Congress's full intent and purposes in the Clean Water Act. 479 U.S. at 493-94. In the case at bar, the discharge did not occur in the territory of *any* State—it happened on the Outer Continental Shelf, which is a federal enclave. In a straightforward application of *Ouellette*, the Fifth Circuit panel unanimously held that applying state law would stand as an obstacle to the accomplishment of Congress's full purposes in passing the Clean Water Act, which therefore preempts the state-law civil penalty claims here. Pet. App. 24-25. That fact-bound decision creates no conflict with any court. It is correct and consistent with this Court's cases. And it offends no principle of federalism. The petition should be denied.

1. BP acquired a lease from the U.S. government to explore and develop oil reserves in the Gulf of Mexico, approximately 50 miles south of Louisiana on the Outer Continental Shelf. BP contracted with a number of providers to drill the Macondo well at the site. In its limited role as a vendor, M-I provided drilling fluids on the rig.

2. On April 20, 2010, an explosion and fire occurred aboard the *Deepwater Horizon*, resulting in a release of oil that migrated down the Gulf Coast.

Pet. App. 2-3. Of the five M-I drilling fluid specialists working aboard the *Deepwater Horizon* that day, only one escaped injury. Two of the men lost their lives, and two others received serious injuries in the blast.

3. As pertinent here, eleven Louisiana parishes brought claims against various entities, including M-I, in the name of the State of Louisiana for harm to wildlife under Louisiana Revised Statute 56:40.1 ("Title 56"). Pet. App. 42-43. Title 56 provides:

> A person who kills * * * or injures any fish, wild birds, wild quadrupeds, or other wildlife and aquatic life in violation of this Title * * * [or] through the violation of any other state or federal law or regulation * * * is liable to the state for the value of each [animal].

La. R.S. 56:40.1. The Parishes allege that "[t]he oil spill was caused by [Respondents'] failure to comply with applicable statutes and regulations governing the exploration and production of minerals and the containment, removal and remediation of pollutants and contaminants in the event of a discharge or release."

4. Three federal statutes establish the framework for resolving the Parishes' claims. First, the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.* ("OPA"), provides sweeping remedies for oil spill-related damages. Second, the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), provides for penalties against those responsible for oil spills and preempts state-law claims. Third, the Outer Continental Shelf

Lands Act, 43 U.S.C. § 1331 *et seq.* ("OCSLA"), among other things, forecloses state-law claims.

5. *The Oil Pollution Act.* OPA establishes a comprehensive statutory scheme for allocating liability and providing compensation in the wake of an oil spill. See, e.g., *S. Port Marine, LLC* v. *Gulf Oil Ltd. P'ship*, 234 F.3d 58, 64-66 (1st Cir. 2000). As the Fifth Circuit has explained:

> [OPA] was intended to streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry.

Jefferson Block 24 Oil & Gas, L.L.C. v. *Aspen Ins. UK Ltd.*, 652 F.3d 584, 590 (5th Cir. 2011) (citation and quotation marks omitted). The statutorily defined "Responsible Part[ies]"—here, Respondents BP and Transocean—are strictly liable for all OPA-covered damages caused by an oil spill. 33 U.S.C. § 2702(a).

Under OPA, liability and damages are determined in a three-step process. First, the injured party presents its claim for damages to the designated Responsible Party. 33 U.S.C. § 2713(a). Second, if the Responsible Party rejects the claim or refuses to settle it within 90 days, the injured party has a statutory cause of action to sue the Responsible Party—and only the Responsible Party—for its damages. 33 U.S.C. § 2713(c). Third, once the Responsible Party pays compensation, it has a statutory cause of action against potentially liable third parties

for the portion of the damages for which the third party is liable. 33 U.S.C. § 2709.

6. *The Clean Water Act.* The CWA provides penalties for unlawful discharges of oil and other hazardous materials into navigable waters and reserves to the States the right to bring claims for discharges that occur *within state waters*. See 33 U.S.C. § 1321. The CWA thus preempts, as the Fifth Circuit held here, the application of a State's penalty statutes where, as here, the spill does not occur in that State's waters but on the Outer Continental Shelf, which is a federal enclave.[1]

7. *The Outer Continental Shelf Lands Act.* The Outer Continental Shelf consists of the "submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in [the Submerged Lands Act], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a). "[I]n enacting the OCSLA, Congress was most concerned with establishing federal control over resources on the Outer Continental Shelf." *Laredo Offshore Constructors, Inc.* v. *Hunt Oil Co.*, 754 F.2d 1223, 1227 (5th Cir. 1985). OCSLA establishes "national authority over the [Outer Continental Shelf] at the expense of both foreign governments and the governments of the individual states." *Tenn. Gas*

[1] The United States has sought CWA penalties against BP and other parties but not against M-I.

Pipeline v. *Houston Cas. Ins. Co.*, 87 F.3d 150, 153 (5th Cir. 1996).

Of particular importance here, section 1333 establishes that federal law governs on the Outer Continental Shelf. 43 U.S.C. § 1333(a)(1); *Tenn. Gas*, 87 F.3d at 153. Only when necessary to fill a "substantial gap[ ]" or "void[ ]" in the applicable federal law can courts adopt state law as surrogate federal law. See 43 U.S.C. § 1333(a)(2)(A); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 480 (1981) (internal quotation marks omitted); *Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352, 358 (1969).

8. Advancing various arguments, but all agreeing that the Parishes' state-law claims could not proceed as a matter of law, the defendants (including M-I) moved to dismiss those claims under Rule 12(b)(6). Pet. App. 53, 58-59. As relevant here, the district court dismissed the Parishes' claims in their entirety after adopting the preemption analysis set forth in a previous order. *Id.* at 43.

9. The Fifth Circuit affirmed. "[C]arefully consider[ing]" petitioners' arguments against preemption, the panel noted at the outset that "in starkest terms, had the blowout occurred in Texas state waters and caused pollution in Louisiana, the Parishes' Louisiana law claims would be squarely foreclosed." Pet. App. 14, 20. That is so, the panel explained, because "[f]ederal preemption of interstate water pollution claims has been a feature of United States

law for over a hundred years." *Id.* at 14-15 (citing *Missouri* v. *Illinois*, 200 U.S. 496 (1906)).

The panel then considered whether the fact that the discharge here occurred in *no* State's territorial waters, but in a *federal* enclave, made a dispositive difference—and determined that it did not. Under this Court's decision in *Ouellette*, which "forms a controlling backdrop for resolving claims caused by the blowout[,]" the panel reasoned that "[f]ederal law, the law of the point source, exclusively applies to the claims generated by the oil spill in any affected state or locality." Pet. App. 25.

The panel next considered petitioners' arguments concerning various federal-law savings clauses, but determined that "[w]ith *Ouellette* as the controlling law, there are no state remedies to 'save.'" Pet. App. 25. Instead, "OPA applies as the law of the OCSLA point source and, along with the CWA penalties, furnishes a comprehensive remedial regime for affected states' governmental and private claims." *Ibid.*

For that reason, the Fifth Circuit noted, its construction of the pertinent statutes "does not diminish the incentives for compliance with the CWA or the OPA or the point source states' additional laws concerning oil pollution." Pet. App. 32. That is so, the panel explained, because "federal laws' extravagant penalties, fines, criminal liability, and damage exposure that may be imposed on entities associated with oil pollution, even in the absence of the layering

of multiple affected states' laws, evidence a clear congressional policy of deterrence and retribution." *Ibid.*

Accordingly, because the district court "correctly concluded that the claims are preempted by the CWA as interpreted in *Ouellette*, and that Congress did not reject that interpretation explicitly or by negative implication in the CWA or when it passed the OPA[,]" the panel unanimously affirmed.[2] Pet. App. 32-33.

REASONS FOR DENYING THE PETITION

I. The Parishes Do Not Identify Any Circuit Split, And None Exists

It is undisputed that the oil spill here occurred on a federal enclave—the Outer Continental Shelf—governed by federal law, not in any State's territorial waters. Under longstanding precedents of this Court, federal law controls to the exclusion of state law in these circumstances. Thus it is not surprising that the Parishes do not—and cannot—point to any other court of appeals that would have reached a different

[2] After the Fifth Circuit issued its decision in this appeal, the district court found that M-I was not liable for the blowout and oil spill, dismissed all remaining claims against M-I with prejudice, and entered final judgment for M-I under Rule 54(b). Final Judgment Pursuant to Fed. R. Civ. P. 54(b), *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, No. 10-MD-2179 (E.D. La. Sept. 4, 2014), ECF No. 13359.

conclusion than the Fifth Circuit here—that the Parishes' state-law civil penalty claims are preempted by federal law and were properly dismissed. That is reason alone to deny the petition.

II. The Fifth Circuit's Decision Is Correct And Consistent With This Court's Cases

With no circuit split in need of this Court's resolution, the Parishes weakly claim a conflict with this Court's cases (see Pet. 37), but otherwise seek error correction. See, e.g., Pet. 3 (contending that "the courts below improperly applied this Court's holding [in *Ouellette*]"); *id.* at 14 (asserting that the "Fifth Circuit failed to conduct the required conflict preemption analysis"). But there is no conflict, and even if this Court sits to correct error, which it does not, the petition still should be denied because there is no error to correct.

To start, the Fifth Circuit's decision is entirely consistent with—if not compelled by—this Court's decision in *Ouellette*. That case involved Vermont landowners who brought state-law nuisance claims against a New York company for pollution originating in New York waters but flowing into Vermont. 479 U.S. at 483-84. This Court began its analysis by noting that "control of interstate pollution is primarily a matter of federal law." *Id.* at 492. Examining the regulatory framework imposed by the Clean Water Act's nationwide permit system, the Supreme Court concluded that the state-law claims were preempted

because "[a]pplication of an affected State's law to an out-of-state source * * * would undermine the important goals of efficiency and predictability in the permit system." *Id.* at 496.

This Court thus held that where, as here, "a court considers a state-law claim concerning interstate water pollution that is subject to the [Clean Water Act]," and multiple States suffer pollution from the same source, the law of the source State—that is, the law of the State where the discharge occurred—applies. See *id.* at 487, 489-91. All other States are merely "affected" States, and the Clean Water Act "precludes a court from applying the law of an affected State against an out-of-state source." *Id.* at 494.

As the district court here correctly perceived, "*Ouellette*'s instruction is clear: only the law of the source State and federal law may apply." Pet. App. 68. Because, in this case, the discharge occurred within an exclusive federal enclave—the Outer Continental Shelf—there is no source State, and all five Gulf Coast States impacted by the spill (including Louisiana) are "affected States" precluded from applying their laws against out-of-state sources. Federal law governs, and the Parishes' state-law civil penalty claims are preempted under *Ouellette*.[3]

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[3] Contrary to the Parishes' argument (at 14 & 35), the Fifth Circuit did not improperly "[d]isregard[ ]" any "strong presumption" against preemption. No presumption—much less a "strong" one—applies where, as here, "the State regulates in an

(Continued on following page)

That *Ouellette* involved the Clean Water Act's permitting system is a distinction without a difference. See, e.g., Pet. 18-21. *Ouellette*'s instruction to focus on the law of the location of the discharge applies with equal force here to prevent conflicts between state law, impermissible regulation of out-of-state conduct, and interference with a comprehensive federal scheme. The Parishes' drumbeat that oil was not the pollutant in *Ouellette* is another distinction without a difference. This Court was clear: The Clean Water Act "precludes a court from applying the law of an affected State against an out-of-state source." *Ouellette*, 479 U.S. at 494. Nothing in *Ouellette* turned on the nature of the pollutant.

The Parishes' argument (at 20-21) that this case, unlike *Ouellette*, does not involve the balancing of competing interests or the possibility of conflicting state laws is simply wrong. The Parishes claim (at 22) that penalties would only be imposed based upon violations of federal law because any violations of state law regarding oil spills supposedly would also be violations of federal law. But, Title 56 imposes penalties for "the violation of *any* * * * state * * * law or regulation," not just laws regarding oil spills. La. R.S. 56:40.1. The possibilities for conflict abound.

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area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 90 (2000). This case involves two areas of significant federal concern—the exclusivity of federal law on the Outer Continental Shelf and the regulation of interstate pollution.

Applying the law of every State impacted by this spill would inevitably create conflicts and allow States to regulate conduct outside their borders, which *Ouellette* makes clear would be inconsistent with the Clean Water Act's regulatory scheme. Because the discharge did not occur in Louisiana, the Louisiana Parishes have no superior claim to apply Louisiana law over the law of any other Gulf Coast State.

The Parishes suggest (at 16) that additional penalties do not conflict with the Clean Water Act's scheme but enhance it by punishing and deterring offenders more. Contrary to the Parishes' assertion, however, Congress intended one ceiling—the source State's—not one for every affected State. That state law may have the same goal as federal law is not enough to avoid preemption under this Court's precedents where, as here, state law interferes with the means to achieve that goal. See, e.g., *Ouellette*, 479 U.S. at 493-94; *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Aside from their unsuccessful attempts to distinguish it, the Parishes try to get around *Ouellette* in two other ways—(1) by arguing that this Court's decisions in *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973), and *Lacoste* v. *Department of Conservation of Louisiana*, 263 U.S. 545 (1924), and not *Ouellette*, control here (Pet. 9-13 & 38), and (2) by relying on various federal-law savings clauses. *Id.* at 26-36. Neither argument succeeds in identifying either a conflict with this Court's cases or

an error on the Fifth Circuit's part—much less one that warrants correction by this Court.

First, the Parishes argue that this Court's decision in *Askew*, not *Ouellette*, controls here because, according to the Parishes, that case stands for the proposition that § 1321 of the CWA preserves state-law regulation of oil pollution that originates *outside* state waters. See, e.g., Pet. 24. Not so. For one thing, the spill in *Askew* apparently occurred adjacent to Florida's shore—not outside a State's waters, and certainly not on a federal enclave, as here. See 411 U.S. at 327.

For another thing, although the Florida statute in *Askew* allowed claims for "other damage incurred by the state and for damages resulting from injury to others," this Court noted that "the Federal Act [the Water Quality Improvement Act] in no way touches those areas." 411 U.S. at 332-33 (quotation omitted). Not so here, where OPA allows recovery for the same damages claimed by the Parishes—in contrast to the federal law in *Askew*, where this Court repeatedly emphasized that the federal law dealt only with the "actual cleanup costs incurred by the Federal Government." *Id.* at 335-36.

That the Fifth Circuit's decision poses no conflict with *Askew* is further confirmed by this Court's decision in *Skiriotes* v. *Florida*, 313 U.S. 69, 70, 75 (1941), which the petition does not cite, but which makes clear that a statute is within a State's police power "so far as applied to conduct within the territorial

waters of [that State], in the absence of conflicting federal legislation."

Similarly inapposite is *Lacoste*, which rejected a commerce clause challenge to a state tax on animal pelt dealers for pelts "taken *within the state*," "before they move in interstate commerce." 263 U.S. at 550-51 (emphasis added). *Lacoste* in no way stands for the broad proposition (or even suggests) that a State can regulate pollution sources *outside* its own territorial waters, much less in federal enclaves. It is true enough that *Lacoste* contains language (quoted by the Parishes) emphasizing the traditional role of the States in regulating wildlife and hunting. But there is certainly nothing in *Lacoste* suggesting that one State could regulate activities outside that State's borders, much less drilling activity occurring on a federal enclave where federal law is exclusive and the activity impacts multiple States.

Second, the Parishes rely heavily on savings clauses in OPA and the Clean Water Act. See Pet. 26-36. That reliance is misplaced. As an initial matter, a savings clause "does *not* bar the ordinary working of conflict pre-emption principles." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000); see also *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1748 (2011). And the plain text of the savings clauses at issue makes clear they do not save the Parishes' claims.

Section 2718(a) of OPA states: "Nothing in this Act * * * shall affect, or be construed or interpreted as preempting, the authority of any State or political

subdivision thereof from imposing any additional liability or requirements with respect to—the discharge of oil or other pollution *within such State*." 33 U.S.C. § 2718(a)(1)(A) (emphasis added). Similarly, the CWA's savings clause saves from preemption state law "with respect to the discharge of oil or hazardous substance into any waters *within such State*." 33 U.S.C. § 1321(o)(2) (emphasis added). Both savings clauses on their face apply to discharges "within such State." The most natural meaning, then, is that OPA and the CWA save only state-law penalty claims for in-state discharges—not state-law penalty claims for out-of-state discharges, which are at issue here.

The Parishes resist that conclusion by invoking § 2718(c) of OPA, which provides: "Nothing in this Act * * * shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof * * * to impose, or to determine the amount of, any fine or penalty * * * for any violation of law[ ] relating to the discharge * * * of oil." *Id.* § 2718(c)(2). But if the Parishes were correct that § 2718(c) preserves state-law claims that relate to oil spills in any way, and not just to those originating in state waters, section 2718(c) would give them power to impose penalties relating to an oil spill occurring in another State or on the Outer Continental Shelf. Plainly, OPA does no such thing.

Under OCSLA, States have no authority to impose penalties relating to an oil spill on the Outer Continental Shelf, which is subject to exclusive federal law. See *Gulf*, 453 U.S. at 480; *Tenn. Gas*, 87

F.3d at 153. OCSLA is a carefully drawn federal scheme mandating the exclusive application of federal law on the Outer Continental Shelf. *Gulf*, 453 U.S. at 480. Even in cases (unlike this one) where state law is adopted as surrogate federal law—and the Parishes have expressly disclaimed that ground for applying state law (Pet. App. 10)—States have no "basis for a claim by the State 'for participation in the administration of * * * the areas outside of State boundaries.'" *Gulf*, 453 U.S. at 480, 482 (quoting S. Rep. No. 83-411, at 23 (1953)).

Yet that is exactly the argument the Parishes make—that § 2718(c) somehow allows them to apply state law to penalize conduct without respect to where the discharge occurred. As this Court has explained, however, it is "unlikely that Congress would use a means so indirect as the savings clauses in Title I of OPA [§ 2718] to upset the settled division of authority." *Locke*, 529 U.S. at 106; see also *Concepcion*, 131 S. Ct. at 1748. Section 2718(c) does not save the Parishes' state-law claims because, thanks to OCSLA, there is nothing left to save.

Taking a different tack, the Parishes argue that because § 2718(c) is not on its face limited to in-state discharges, it conflicts with the CWA's savings clause (which is so limited), and therefore OPA (as the most recent and specific statute) supersedes and supplants any possible preemption by the CWA. Pet. 29. That reading of the statute is impermissible, however, because it would negate the restriction imposed in § 2718(a).

Under the familiar rule of statutory construction that superfluity should be avoided, that reading must be rejected. See, e.g., *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (stating a statute should be "construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (citation and internal quotation marks omitted)). The better reading of the statute is that § 2718(a) preserves a State's current authority to impose additional liability for an oil spill within that State, while § 2718(c) simply clarifies that that authority includes imposing new liability or determining the amount of a penalty.

Given that the CWA and OPA together create the single federal law applicable to oil spills, it is not surprising that Congress used the same "within such State" language in both statutes' savings clauses, showing a clear intent that they be read coextensively to apply only to in-state discharges. See *Metro. Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 65 (1987). Again, the facts of this case—which involves a discharge that indisputably occurred in a federal enclave, and not the waters of *any* State—makes even more clear why the Parishes cannot rely on the savings clauses they cite—and why the dismissal of their state-law claims merits no further review.

III. This Case Is A Poor Vehicle

To recap, the Parishes claim no circuit split, their asserted conflict with this Court's cases is illusory,

and they identify no error requiring this Court's correction. Most fundamentally, the Fifth Circuit's decision is entirely consistent with, if not compelled by, this Court's decision in *Ouellette*. But even if this Court were to disagree, however, that would not change the ultimate result in this case, because the Parishes' claims were properly dismissed for several alternative, independent reasons pressed by the defendants in the courts below. This case is therefore not an appropriate vehicle, and the petition should be denied for that reason, too. Cf. *South Dakota* v. *Kansas City S. Indus., Inc.*, 880 F.2d 40, 41 (8th Cir. 1989), cert. denied, 493 U.S. 1023 (1990) (certiorari denied where, unlike here, federal law was in conflict but state law furnished an independent ground for affirming the court of appeals).

M-I argued in the alternative below, for example, that dismissal was proper on the additional ground that OCSLA governs this dispute, federal law controls under OCSLA, and OCSLA only permits the application of state law as surrogate federal law to the extent it (i) is needed to fill a gap in federal law, and (ii) poses no conflict with federal law. No gap in federal law exists for the Parishes' state-law civil penalty claims to fill, and even if it did, those claims impermissibly conflict with federal law. The Parishes'

claims were properly dismissed for those reasons, too.[4]

OCSLA states that the Outer Continental Shelf "appertain[s] to the United States and [is] subject to its jurisdiction, control, and power of disposition as provided in this [Act]." 43 U.S.C. § 1332(1). Given the vital national resources found under the Outer Continental Shelf, OCSLA extends federal law to the Shelf and "all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom." 43 U.S.C. § 1333(a)(1).

Here, it is undisputed that the *Deepwater Horizon* was operating above the Outer Continental Shelf at the time of the incident. And OCSLA applies to any device temporarily attached to the Outer Continental Shelf if its presence on the Shelf is to explore, develop, or produce resources from the Shelf. *Demette* v. *Falcon Drilling Co.*, 280 F.3d 492, 497 (5th Cir. 2002), overruled on other grounds, 589 F.3d 778 (5th Cir. 2009). There is also no dispute that the *Deepwater Horizon* was attached to the Outer Continental Shelf by a drill pipe (see Pet. App. 62) and exploring resources from the Outer Continental Shelf at the time of the incident. See *id.* at 6.

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[4] To be clear, this is not an argument about federal law preempting state law. It is about whether state law can be adopted as surrogate federal law.

OCSLA therefore applies and requires the application of federal law, which in turn requires the dismissal of the Parishes' state-law civil penalty claims. Under OCSLA's choice-of-law provision (§ 1333(a)(1)), federal law applies because this case involves an incident that occurred on the Outer Continental Shelf. See *Gulf*, 453 U.S. at 480 (stating that "[a]ll law applicable to the Outer Continental Shelf is federal law"). State law only applies if there is a gap in federal law that state law should be adopted as a surrogate to fill. *Ibid.* Because there is no gap to fill here, federal law governs.

Specifically, OPA already provides for recovery of virtually all economic damages from an oil spill, including all natural resources damages and damages specific to governmental entities. See 33 U.S.C. § 2702(b)(A). OPA defines "natural resources" broadly to include fish, wildlife, and "other such resources." 33 U.S.C. § 2701(20). Thus, as the district court recognized, the State of Louisiana's complaint seeking OPA damages is duplicative of the Parishes' claim under Title 56, which covers "fish, wild birds, wild quadrupeds, and other wildlife and aquatic life." La. R.S. 56:40.1; Pet. App. 43 n.5 ("[I]t bears mention that the amounts sought under La. R.S. 56:40.1 appear potentially duplicative of natural resources damage under OPA."). OPA leaves no "gap" in federal law to fill, and thus no need for surrogate law. *LeSassier* v. *Chevron USA, Inc.*, 776 F.2d 506, 509 (5th Cir. 1985) ("[A] gap does not exist * * * where Congress provided

a specific statutory provision * * * to address" the alleged harm. (internal citation omitted)).

Even if there were a gap to fill, which there is not, state law could not apply here (as "borrowed" federal law) because it would be inconsistent with OPA. Congress enacted OPA to provide a comprehensive remedy for parties claiming economic damages arising out of an oil spill. *Rice* v. *Harken Exploration Co.*, 250 F.3d 264, 266 (5th Cir. 2001) (citing S. Rep. No. 101-94, reprinted in 1990 U.S.C.C.A.N. at 723); *S. Port Marine*, 234 F.3d at 64-66. Under OPA's scheme, injured parties submit their claims to the Responsible Party and receive full compensation under strict liability. 33 U.S.C. § 2702(a).

Applying state law, however, would result in an injured party being required to submit any OPA claim to the Responsible Party and simultaneously file suit under state law against all potentially liable parties (and seek to prove liability against all defendants under standards higher than strict liability). That result would be at odds with congressional intent as expressed in OPA's strict liability scheme. It would also conflict with OPA's intent that state penalty statutes apply only to in-state discharges. See *supra* 9-11, 13-16. Applying state law would be inconsistent with federal law—so state law does not apply for that reason, too.

Moreover, under OPA, "'the value of the damage is established by looking at the affected ecosystem—or in this case, ecosystems—as a whole,'" rather than

on a per animal basis, as under Title 56. Pet. App. 44 (district court's opinion quoting Melissa Trosclair Daigle, *The Value of a Pelican: An Overview of the Natural Resource Damage Assessment under Federal and Louisiana Law*, 16 OCEAN & COASTAL L.J. 253, 266-67 (2011)). Moreover, recovery under Title 56 would duplicate the OPA damages sought by the State of Louisiana—and OPA expressly prohibits such "double recovery under this Act for natural resource damages." 33 U.S.C. § 2706(d)(3).

Thus state law—such as the civil penalty statutes here—may not be adopted as surrogate federal law under OCSLA. Instead, OPA—in conjunction with the CWA—provides the exclusive scheme of recovery. The dismissal of the Parishes' state-law civil penalty claims as preempted by the Clean Water Act was proper for that additional reason. Accordingly, because any disagreement by this Court with the Fifth Circuit's reasoning would not alter the propriety of its judgment in this case, this case is a poor vehicle, and the petition should be denied for that reason, too.

IV. The Fifth Circuit's Decision Poses No Threat To States' Traditional Police Powers

No one disputes that States have strong interests in protecting their wildlife and combating oil spill pollution within their borders. But those types of interests were not enough to overcome preemption in *Ouellette*, and they are not enough to overcome preemption here.

As this Court explained in *Ouellette*, "control of interstate pollution is primarily a matter of federal law." 479 U.S. at 492. This Court has "long recognized" that principle. *Arkansas* v. *Oklahoma*, 503 U.S. 91, 110 (1992). If anything, the federal interests are at their peak here because *multiple* States—none with a superior claim to apply its own law—allege injuries. States certainly have police power to clean up pollution or protect wildlife within their borders, but that power is not unlimited, particularly where, as here, a valid exercise of federal authority is concerned. See *Baldwin* v. *Fish & Game Comm'n*, 436 U.S. 371, 385-86 (1978).

Contrary to the Parishes' overheated rhetoric, the Fifth Circuit's decision hardly renders Title 56 or any other state civil penalty statute a nullity. Title 56, for example, still applies in appropriate cases, such as in response to a spill in Louisiana's territorial waters. The Fifth Circuit's decision in no way interferes with State police power to do things like scrub beaches or lay booms. Indeed, OPA specifically provides a mechanism for States to recover for clean-up costs and damage to natural resources and property. See 33 U.S.C. §§ 2702(b), 2706(a)(2). To suggest that the Fifth Circuit's ruling somehow sounds the death knell for state authority to respond to oil spills is simply wrong.

In addition to the strong federal interest in controlling interstate pollution, there is also a strong federal interest in regulating conduct on the Outer

Continental Shelf. OCSLA makes the Outer Continental Shelf an area of exclusive federal jurisdiction. *Gulf*, 453 U.S. at 479. Congress's paramount interest in enacting OCSLA was to establish federal control over resources on the Outer Continental Shelf. *Laredo*, 754 F.2d at 1227. For that reason, "[a]ll law applicable to the Outer Continental Shelf is *federal* law." *Gulf*, 453 U.S. at 480 (emphasis added). The Fifth Circuit's decision simply (and correctly) applied that well-established rule to the facts of this case. It created no conflict, committed no error, and offended no principle of federalism. Further review is unnecessary and unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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