No. 13-1424

IN THE

Supreme Court of the United States

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 Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ANADARKO PETROLEUM CORP. AND ANADARKO E&P LP

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QUESTIONS PRESENTED

(1) Does state law apply of its own force to cases arising from oil and gas activity on the Outer Continental Shelf, "an area of exclusive federal jurisdiction," 43 U.S.C. § 1333(a)(1)?

(2) If state law does apply to cases arising from oil and gas activity on the Outer Continental Shelf, does federal law nonetheless preempt it?

CORPORATE DISCLOSURE STATEMENT

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

Anadarko E&P LP is a wholly owned subsidiary of Anadarko Petroleum Corporation.

Anadarko Petroleum Corporation is a publicly held corporation, and no parent or publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

In the opinion below, the Fifth Circuit held that Louisiana cannot apply its laws to a waterborne oil spill originating from federally regulated activities on the United States Outer Continental Shelf (the "OCS"). Petitioners contend that the opinion below is a "misapplication" of the preemption principles that apply to water pollution, articulated in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987). Pet. 3. That contention is incorrect; even if it were accurate, a misapplication of correctly stated law does not warrant this Court's review. See S. Ct. R. 10. There are plenty of other reasons why the Petition should be denied, as the other Respondents explain: the Fifth Circuit's decision creates no circuit split, conflicts with no precedent of this Court, and raises no issue of exceptional importance.

Anadarko writes separately to explain why this case is a poor vehicle for answering the question presented. Petitioners ask the Court to decide just one question—whether, "[i]n enacting the Clean Water Act, did Congress intend to strip the States of the ability to punish harm to their wildlife resulting from oil spills?" Pet. i. But there is more to this case than preemption. The Fifth Circuit's holding that Louisiana law is preempted is an alternative holding. The primary holding is a choice-of-law holding that Louisiana law does not even apply to OCS oil spills in the first place.

Located miles and miles from the outer limits of state territorial waters, the OCS never has been under any state's jurisdiction, nor have mineral-extraction activities there. The OCS is "an area of exclusive Federal jurisdiction," as Congress declared

in the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq*., and "[a]ll law applicable to the Outer Continental Shelf is federal law," so cases "involving events occurring on the Shelf [are] governed by federal law." *Gulf Offshore Co.* v. *Mobil Oil Corp*., 453 U.S. 473, 480–481 (1981). State law does not reach the OCS on its own, and while OCSLA sometimes uses state law to fill gaps in federal law—as "surrogate federal law," *id.* at 480—no one disputes that this is not one of those times.

In accordance with OCSLA, Louisiana law does not even apply to this case, so there is no occasion to decide whether federal law preempts it. Indeed, before this Court could consider preemption, it must consider choice of law. Yet the Petition completely fails to mention OCSLA—perhaps because the Fifth Circuit's unchallenged OCSLA choice-of-law holding is splitless, faithful to this Court's precedents, and reflects a straightforward application of OCSLA. Whatever the reason, Petitioners' decision to focus on preemption should be conclusive. The single-issue Petition should be denied.

STATEMENT

1. Respondent BP obtained a federal leasehold interest to exploit oil and gas resources on the OCS in the area of Mississippi Canyon Block 252. Anadarko was a non-operating investor in the leasehold. On April 20, 2010, the vessel *Deepwater Horizon*, a semi-submersible mobile offshore drilling unit, was temporarily attached to the seabed in Mississippi Canyon Block 252. While performing temporary abandonment operations on an exploratory well, the vessel lost well control, resulting in a blowout. See Pet. App. 102.

The vessel failed to bring the blowout under control, and hydrocarbons from the subsea reservoir flowed through the well into and up the vessel's drillstring, blowout preventer, and riser pipe, then were discharged onto and out of the vessel's operating deck and derrick. The vessel's blowout preventer and emergency disconnect system failed to engage. The hydrocarbons ignited, exploded, and burned, making the *Deepwater Horizon* structurally unsound. As the main body of the *Deepwater Horizon* sank two days later, it bent and broke the riser pipe, from which hydrocarbons continued to discharge into the Gulf of Mexico for 87 days. See Pet. App. 93.

Oil from the incident is alleged to have caused harm throughout the Gulf region, including the harm to Louisiana wildlife alleged by Petitioners.

2. Petitioners are District Attorneys of eleven Louisiana Parishes. They filed suit in state court, seeking to impose state-law penalties on Respondents for the *Deepwater Horizon* oil spill. Their cases were removed to federal court and consolidated with ongoing multi-district litigation in the Eastern District of Louisiana. In November 2011, the district court dismissed all state-law claims filed by Alabama and Louisiana, including their claims for civil penalties under state law. In December 2011, the district court applied that holding to Petitioners' cases and dismissed them, too. See Pet. App. 38–39.

3. A panel of the Fifth Circuit affirmed. After confirming that removal of Petitioners' cases was proper, Pet. App. 5–9, the court of appeals considered whether Petitioners can impose Louisiana state-law penalties on Respondents for environmental harms the *Deepwater Horizon* oil spill allegedly caused within the state of Louisiana. For three in-

dependent reasons, the court concluded that Petitioners' state-law claims cannot proceed. *First*, citing OCSLA and precedents of this Court and of the Fifth Circuit, the court of appeals held that, under Section 1333(a), "Federal law governs injuries arising from activity on an OCSLA situs even if the injury occurs elsewhere." *Id.* at 12. *Second*, the court held that federal maritime law covers Petitioners' case because the *Deepwater Horizon* was a vessel engaged in maritime activity. *Id.* at 13. *Third*, apart from the choice-of-law rules that preclude applying Louisiana law to OCS activities, the court held that federal law preempts state laws applied to any water pollution originating outside the state. *Id.* at 14–17. The court of appeals rejected Petitioners' many arguments that this settled principle of preemption has been undermined by federal statutes (like the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2762) enacted since this Court decided *Ouellette* in 1987. See Pet. App. 17–32.

SUMMARY OF ARGUMENT

Principles of preemption govern where state and federal jurisdiction overlap. Because state law does not apply of its own force to the OCS or activities occurring there, there is no applicable state law for federal law to preempt. Neglecting OCSLA, Petitioners miscast this case as about preemption only. That makes the case an inappropriate vehicle for this Court to consider the preemption question Petitioners pose.

ARGUMENT

I. THIS CASE IS A POOR VEHICLE FOR THE QUESTION PRESENTED.

A. OCSLA Section 1333 Controls This Case.

OCSLA Section 1333(a)(1) extends federal sovereignty over the OCS (undersea lands far outside the territorial waters of any state) and things either permanently or temporarily attached to it. Federal sovereignty over the OCS is exclusive:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to 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 * * * to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State * * *. 43 U.S.C. § 1333(a)(1)

The purpose of Section 1333(a)(1), as this Court explained, is "'to assert the exclusive jurisdiction and control of the Federal Government of the United States over the seabed and subsoil of the outer Continental Shelf, and to provide for the development of its vast mineral resources.'" *Gulf Offshore*, 453 U.S. at 479 n.7 (quoting S. Rep. No. 83-411, at 2 (1953)). Section 1333(a)(1) thus confirms that state law does not and cannot ever apply of its own force to activities occurring on the OCS or to cases arising from those activities. "All law applicable to the Outer Continental Shelf is federal law," and all cases "in-

volving events occurring on the Shelf [are] governed by federal law * * *." *Id.* at 480–481; see *Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352, 357 (1969); see also *Olsen* v. *Shell Oil Co.*, 708 F.2d 976, 980 n.2 (CA5 1983); cf. *Paul* v. *United States*, 371 U.S. 245, 268 (1963) (holding that "a State may not legislate with respect to a federal enclave" except in limited circumstances inapplicable in this case); *Continental Oil Co.* v. *London Steam-Ship Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1037 (CA5 1969) (in cases involving vessels on the waters above the OCS, "Louisiana law is as irrelevant as that of Pakistan.").

Under Section 1333(a)(2), state laws may be adopted as surrogate federal law for "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon," as long as the state laws are "not inconsistent with this [Act] or with other Federal laws and regulations." 43 U.S.C. § 1333(a)(2)(A). Section 1333(a)(2) is narrower than Section 1333(a)(1) in that it does not apply to "installations and other devices * * * *temporarily* attached to the seabed." 43 U.S.C. § 1333(a)(1) (emphasis added). Drilling vessels like the *Deepwater Horizon*, then, are exclusively federal under Section 1333(a)(1) and are not subject to state law as surrogate federal law under Section 1333(a)(2).

The Fifth Circuit correctly understood the interplay between Sections 1333(a)(1) and (a)(2) and held that the *Deepwater Horizon* and the events surrounding the oil spill are subject only to federal law. Pet. App. 12–14. At the time of the incident, the *Deepwater Horizon* was an OCSLA situs under Section 1333(a)(1) because, it was "temporarily attached to the seabed * * * for the purpose of exploring for, developing, or producing resources therefrom." Leg-

islative history and uncontroverted Fifth Circuit precedent reinforce that a semi-submersible drilling rig like the *Deepwater Horizon* becomes an OCSLA situs under Section 1333(a)(1) whenever temporarily attached to the seabed of the OCS. See H.R. Rep. No. 95-590, at 128 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1534; see also *Diamond Offshore Co.* v. *A&B Builders, Inc.*, 302 F.3d 531, 544–545 (CA5 2002) *overruled in part on other grounds by Grand Isle Shipyard, Inc.* v. *Seacor Marine, LLC*, 589 F.3d 778, 788 (CA5 2009) (en banc). Notably, Petitioners did not even try to argue that Louisiana law applies to this case as surrogate federal law under Section 1333(a)(2). See Pet. App. 10.

B. Petitioners' Disregard Of OCSLA Is A Substantial Vehicle Problem.

The Petition does not address Section 1333 at all. Indeed, Petitioners seem oblivious to the OCSLA choice-of-law issues that precede the preemption issues they seek review of—even though the OCSLA issues were briefed, argued, and decided below. For instance, Petitioners' characterization of the Fifth Circuit's ruling as an "intrusion into historic" state police powers has it backwards. Pet. 14. The OCS and activities on it historically have been beyond the reach of state police powers—even when injuries from those activities manifest elsewhere. See Pet. App. 12. Congress knew that developing OCS resources would affect coastal states, but subordinated their interests to the national interest in developing OCS resources. See 43 U.S.C. § 1332; see also *id.* § 1345. So, across the stages in which an offshore lease is developed, states have no more than an advisory role subject to the federal government's final say. See generally *Mobil Oil Exploration & Produc-*

ing SE, Inc. v. *United States*, 530 U.S. 604, 609–610 (2000).

Similarly, Petitioners' reliance on two saving clauses—33 U.S.C. § 1321(o) and 33 U.S.C. § 2718—cannot overcome OCSLA and sustain their state-law claims. The statutory text of both accords with the general rule that a "saving clause does not create anything; it merely preserves from repeal what is already there." *Gorbach* v. *Reno*, 219 F.3d 1087, 1094 (CA9 2000). In light of Section 1333(a)(1), *no state law* is "already there" for the two saving clauses to preserve.

Ultimately, even if certiorari were granted, and even if the Court held that state law was not preempted as applied to an oil spill originating outside state territorial waters, Petitioners would gain nothing. As the Fifth Circuit recognized, Section 1333(a)(1) is an independent rationale for dismissal, and Petitioners have not challenged it. A holding that is not challenged in a petition for certiorari is waived. See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645–646 (1992). And there is no way to construe Petitioners' preemption-focused question presented so that it even arguably encompasses OCSLA. See S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). That should seal Petitioners' fate.

Respectfully submitted,

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