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

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BRIEF OF THE BP AND MOEX RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Several Louisiana Parish subdivisions seek to impose civil penalties under state law on the activities of an oil rig that was physically connected to and drilling a well on federal Outer Continental Shelf territory submerged one mile under the waters of the Gulf of Mexico. The rig and well were thus located far beyond the bounds of Louisiana's—or any Gulf State's—jurisdiction over lands or waters.

The question presented is whether

(i) the federal Clean Water Act's comprehensive permitting process, the National Pollution Discharge Elimination System ("NPDES"), 33 U.S.C. § 1342, as interpreted in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); and/or

(ii) the federal Outer Continental Shelf Lands Act's instruction, *inter alia*, that "installations and other devices" on the Shelf are to be governed "as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State," 43 U.S.C. § 1333(a)(1),

taken singly or together, preempt or otherwise bar the Parish state-law penalties.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, undersigned counsel state:

BP America Production Company is not publicly traded. BP America Production Company is an indirect wholly owned subsidiary of BP p.l.c., which is the only publicly owned company in that chain of ownership.

BP Exploration & Production Inc. is not publicly traded. BP Exploration & Production Inc. is an indirect wholly owned subsidiary of BP p.l.c., which is the only publicly owned company in that chain of ownership.

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BP p.l.c. is a corporation organized under the laws of England and Wales. Shares of BP p.l.c. are publicly traded via American Depository Shares on the New York Stock Exchange and via ordinary shares on the London Stock Exchange. As of February 18, 2014, J.P. Morgan Chase held 28.51% of the shares in BP p.l.c. Otherwise, no publicly held corporation owns 10% or more of the stock of BP p.l.c.

MOEX Offshore 2007 LLC is not publicly traded. MOEX Offshore 2007 LLC's membership interests are wholly owned by MOEX USA Corporation. MOEX USA Corporation's stock is wholly owned by Mitsui Oil Exploration Co., Ltd. Seventy-three and fifty-eight hundredths (73.58%) of Mitsui Oil

Exploration Co., Ltd.'s shares are owned by Mitsui & Co., Ltd. Mitsui & Co., Ltd.'s shares are publicly traded in Japan and its American Depository Receipts are publicly traded in the United States.

MOEX USA Corporation is not publicly traded. MOEX USA Corporation's shares are wholly owned by Mitsui Oil Exploration Co., Ltd. Seventy-three and fifty-eight hundredths (73.58%) of Mitsui Oil Exploration Co., Ltd.'s shares are owned by Mitsui & Co., Ltd. Mitsui & Co., Ltd.'s shares are publicly traded in Japan and its American Depository Receipts are publicly traded in the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

In this case involving the *Deepwater Horizon* oil spill, Petitioners ask this Court to review a unanimous decision of the United States Court of Appeals for the Fifth Circuit, despite the absence of division in the lower courts and despite precedent from this Court that compels the outcome reached below.

Petitioners are Louisiana Parish governments claiming a right under state law to penalize conduct connected to the spill. Respondents are companies that owned the *Deepwater Horizon* drilling rig (Transocean), that owned shares of the leasehold on which drilling occurred (BP, Anadarko, and MOEX), or that were otherwise involved in drilling operations (M-I, Halliburton, and Cameron).

The spill began on the evening of April 20, 2010, with a loss of well control that allowed hydrocarbons to escape from the rig and its appurtenances. The *Horizon* was at that time attached to the seabed of the Outer Continental Shelf—specifically a site in the Gulf of Mexico identified by the Interior Department's Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEMRE") as "Mississippi Canyon Block 252," known more commonly as "MC252" or the "Macondo well." Pet. App. 24.

BOEMRE (or rather its predecessor, called the Minerals Management Service) issued one of the key permits under which BP and its co-lessees and contractors conducted exploratory drilling operations at MC252. Permitting authority belonged to the federal government alone because the Outer Continental Shelf ("Shelf" or "OCS") is an exclusive

federal enclave under the Outer Continental Shelf Lands Act ("OCSLA"). See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 217 (1986). Since the beginning of the nation, this vast expanse of submerged land has *always* been outside the jurisdiction of any State. See *Pacific Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 685 (2012); see also 43 U.S.C. § 1332(1).

No party disputes that the spill occurred on the Shelf, approximately 50 miles from Louisiana, the nearest State. Pet. 5. Therefore, the drilling and spill response activity at issue in this case is subject to federal control alone, and any attempted application of state law of its own force is preempted. See *Paul v. United States*, 371 U.S. 245, 268 (1963) ("only state law existing at the time of the [enclave's] acquisition remains enforceable"—but here, at no point were Shelf lands ever acquired from the States since Shelf lands *begin* as federal enclaves); see also *West River Elec. Ass'n, Inc. v. Black Hills Power and Light Co.*, 918 F.2d 713, 719 (8th Cir. 1990) (federal enclaves are not subject to state authority absent express congressional authorization). Just as state law of its own force surely could not penalize conduct at an arsenal on a federal military enclave, a State cannot regulate accidents on the Shelf occurring in the course of oil and gas exploration activities there authorized by Congress. Cf. *Symonds v. Day &Zimmerman, Inc.*, 981 F.2d 1255, 1992 WL 387003, *2 (5th Cir. Dec. 15, 1992) (federal law controls an employment dispute at enclave munitions plant).

The Shelf's nature as an exclusive federal enclave, along with this Court's ruling in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), that the Clean Water Act ("CWA") restricts the States to regulating

only *in-state* sources of water pollution, disposes of the assignment of error Petitioners urge here: that the Fifth Circuit mistakenly ruled that federal law preempts the application of state law to this Shelf incident. The Parishes' counterarguments cannot overcome the fact that the spill occurred on a federal enclave subject to exclusive federal jurisdiction and control under OCSLA and thus was subject to the CWA permitting authority of the federal government alone. See 33 U.S.C. § 1321(b)(1). As a result, the unanimous Fifth Circuit was entirely correct in affirming the district court's dismissal of Petitioners' claims. See Sections I-II, below.

Indeed, as explained in Section III, below, the state law penalties Petitioners seek are not even consistent with state law, providing an independent reason for the Supreme Court not to take this case. Petitioners also ignore the State of Louisiana's own settlement of the claims at issue with MOEX.

The Petition should be denied.

STATEMENT

1. Federal oversight of the *Deepwater Horizon* spill began within minutes of the explosion on the rig, with Coast Guard personnel launching a search-and-rescue effort, followed shortly by response and investigation operations. Within days, the federal government formed a comprehensive response infrastructure under the direction of the Federal On-Scene Coordinator ("FOSC"). Through the FOSC, the Unified Command, and the National Incident Command, the United States directed a military-style operation that engaged over 47,000 individuals,

thousands of vessels, and dozens of aircraft.[1] Numerous state agencies also participated in the Unified Command's response.

2. The United States and the five Gulf States have also been involved from the earliest days in assessing the incident's impact on natural resources. The National Oceanic and Atmospheric Administration ("NOAA") and the U.S. Fish and Wildlife Service, along with other entities including the affected States, act as a Trustee Council.[2] Since April 2010, the Trustees and BP have formed technical working groups to assess potential impacts on fish, shellfish, terrestrial, and marine mammals, turtles, birds, and other organisms, and their habitats. Teams of experts have also surveyed thousands of miles of shoreline and identified and implemented natural resource restoration projects. In fact, pursuant to BP's April 21, 2011 agreement to fund $1 billion in projects, the Trustees have developed early-restoration projects designed to "fast track" restoration activities.[3]

The federal government also sued, seeking civil penalties under the federal CWA against various Transocean entities as owner of the *Deepwater*

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[1] *The Ongoing Administration-Wide Response to the Deepwater BP Oil Spill*, http://www.restorethegulf.gov/release/2010/07/30/ongoing-administration-wide-response-deepwater-bp-oil-spill (official federal government spill portal).

[2] *Co-Trustees*, http://www.gulfspillrestoration.noaa.gov/about-us/co-trustees/.

[3] *Early Restoration*, http://www.gulfspillrestoration.noaa.gov/restoration/early-restoration/.

Horizon, and against BP Exploration & Production Inc., two Anadarko entities, and MOEX Offshore—all co-lessees of MC252—as well as against Lloyd's Syndicate 1036. See Complaint, *United States v. BP Exploration & Prod., Inc.*, No. 2:10-cv-04536 (E.D. La. Dec. 15, 2010).

In this suit, the United States sought civil penalties against Transocean, BP, and non-operating lessees Anadarko and MOEX Offshore under CWA Section 311 (33 U.S.C. § 1321), as well as declaratory and injunctive relief against all defendants under the Oil Pollution Act of 1990. *Id.* at First and Second Claims for Relief and Prayer for Relief. The United States also reserved its rights to bring additional claims, including for natural resource damages. *Id.* at Reservation of Rights and Notice. MOEX Offshore settled the CWA claims brought against it by the United States in February 2012.[4] And Transocean later settled such claims in January 2013.[5] A trial to assess federal civil penalties under the CWA against the remaining defendants, BP and Anadarko, is set to begin on January 20, 2015.[6] See *In re Deepwater*

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[4] U.S. Department of Justice, Press Release, http://www.justice.gov/opa/pr/2012/February/12-ag-231.html.

[5] U.S. Department of Justice, Press Release, http://www.justice.gov/opa/pr/2013/January/13-ag-004.html.

[6] Note that BP and Anadarko have interlocutory *en banc* petitions pending in the Fifth Circuit challenging a panel ruling that they are liable for CWA penalties. See *In re Deepwater Horizon*, No. 12-30883. The Fifth Circuit called for a response to these en banc petitions, which the United States filed on September 10, 2014. See Order, No. 12-30883 (5th Cir. Aug. 4, 2014).

Horizon, MDL 2179, Rec. Doc. 12592 (E.D. La. Mar. 21, 2014) (setting trial date).

3. A trio of federal statutes provide the framework for the federal government's response to the *Deepwater Horizon* incident or to any significant oil spill on the Shelf.

First, OCSLA declares that "the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition." 43 U.S.C. § 1332(1). Where there are gaps in federal law (and there are none here, given the penalty remedies available under the CWA and the compensatory remedies available under the Oil Pollution Act of 1990), OCSLA borrows from the law of a neighboring State, making it applicable as the federal rule of decision. See 43 U.S.C. § 1333(a)(2) (declaring such borrowed state law to be "the law of the United States"); *Gardes Directional Drilling v. U.S. Turnkey Exploration Co.*, 98 F.3d 860, 865 (5th Cir.1996) ("OCSLA uses state law to fill gaps in federal law").

Consequently, "[a]ll law applicable to the Outer Continental Shelf is federal law," even if it occasionally borrows its substance from the law of a neighboring State. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480 (1981). Taken together, therefore, substantive OCSLA provisions, other federal statutes, maritime law, and the "borrowed" content of State law provide a body of law that is "intended to govern the *full range* of potential legal problems that might arise in connection with operations on the Outer Continental Shelf." *EP Operating Ltd. P'ship v. Placid Oil Co.,* 26 F.3d 563, 569 (5th Cir. 1994) (emphasis added) (quotation

omitted); see also H.R. Rep. No. 95-590, at 128 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1534.

Second, CWA Section 311(b)(7) prohibits and penalizes the discharge into the waters of the United States of two types of pollutants—oil and hazardous substances. See 33 U.S.C. § 1321(b)(7). The CWA also establishes the National Pollutant Discharge Elimination System ("NPDES"), which imposes operating restrictions on potential sources of water pollution. See 33 U.S.C. § 1342. NPDES permits set the maximum amount of covered pollutants that the permit-holder may discharge. Of course, that maximum can be set at zero—and often is.

Relevant to this incident, EPA NPDES General Permit 290000 was issued to govern operations in the portion of the Gulf of Mexico that includes the Macondo site on the Shelf. See Notice of Final NPDES General Permit, 72 Fed. Reg. 31,575 (June 7, 2007) ["Permit 290000"]. Shelf mineral lessees such as BP and mobile offshore drilling unit operators such as Transocean could avail themselves of Permit 290000, which establishes a range of restrictions on oil and gas operations, including a zero-discharge standard for "formation oil." Pet. App. 67 n.16 (district court below noting this point was specifically conceded by the State of Alabama—a party before it and an *amicus* of the Parishes on appeal).

Third, Congress enacted the Oil Pollution Act of 1990 ("OPA") in the wake of the *Exxon Valdez* incident to provide federal compensatory damages and cleanup remedies for oil pollution. See S. Rep. 101-94 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 730. OPA defines the "responsible part[ies]" for such spills (33 U.S.C. § 2701(32)); requires "responsible part[ies]" to pay both specified cleanup costs and

damages "that result from" the incident (33 U.S.C. §§ 2702(a)-(b)); and assigns carefully defined causes of action to recover six specified categories of damages to private or governmental claimants, respectively. See 33 U.S.C. § 2702(b)(2)(A)-(F).

Two federal agencies exercise authority under OPA. The Coast Guard administers the payment of private damages from the Oil Spill Liability Trust Fund. See 26 U.S.C. § 9509; 33 U.S.C. §§ 2701(11), 2712, and 2716; see also 33 C.F.R. parts 133 to 138. And NOAA oversees the Natural Resource Damage Assessment process described above. See 33 U.S.C. § 2706; see also 15 C.F.R. part 990.

4. In mid-2010, despite this comprehensive and interlocking background of federal regulation and oversight, several Louisiana Parishes sued in state court, advancing wildlife penalty claims under state law. See La. REV. STAT. § 56:40.1 *et seq.* After removal to federal court (which the Parishes no longer contest, having twice lost on that issue below), the cases were assigned to MDL 2179 in the Eastern District of Louisiana. There, BP and the other Respondents moved to dismiss the Parishes' claims along with those of other local government entities. The district court granted these motions in part and denied them in part, allowing only their federal law-based claims to go forward. See Pet App. 53-92. Specifically, the district court dismissed the States' claims brought under state law (including those seeking civil penalties), as preempted by the CWA. See *id.* 60-77.

The district court specifically rejected arguments by Alabama, Louisiana, and Petitioners that OPA's preemption savings clauses shielded state-law claims from CWA preemption. The district court held that

in OPA "Congress did not intend to change *Ouellette*'s interpretation of the CWA," and rejected the argument that "without state penalties, there is no incentive for a defendant to prevent its oil spill from entering state waters." *Id.* at 71.

The district court also concluded that the States were not harmed by the preemption ruling: "[T]he States may recover [in addition to removal costs under 33 U.S.C. § 2702(b)(1)] all OPA damages . . . which includes damage to natural resources and property, lost revenues and profits, and the cost of providing additional public services. See 33 U.S.C. § 2702(b)(2)." Pet. App. at 74. If anything, the district court pointed out that the implications of Petitioners' view that up to five separate Gulf States could separately and cumulatively penalize the same Shelf conduct raised serious due process concerns: "This would seem excessive given that the source of the discharge occurred in no State . . . . By contrast, had the source of the discharge occurred within a State, the discharger would certainly be on notice that penalties under federal law and the source State's law would apply." *Id.* at 76-77 (citing *BMW v. Gore*, 517 U.S. 559, 574 & n.22 (1996)).

5. The Fifth Circuit unanimously affirmed, relying on this Court's decision in *Ouellette*. In *Ouellette*, this Court held that one State may not apply its law to punish discharges to water from a paper mill in a neighboring State—even if the mill's discharges violate its NPDES permit—because doing so would conflict with the CWA. The Fifth Circuit explained that under *Ouellette*, "[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.

REASONS FOR DENYING THE PETITION

Since there is no relevant division among the circuits and no conflict with any controlling decision of this Court, the Petition should be denied. Both the district court and the Fifth Circuit correctly applied *Ouellette* to dismiss the Parishes' claims. Thus, it would not be productive for the Court to use its scarce resources to take up those merits issues anew.

Federal law provides two principal avenues for pursuing claims based on the spill. *First*, such remedies are chiefly established in the CWA, which provides for penalties measured in part by "the seriousness of the violation" and "the degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge." 33 U.S.C. § 1321(b)(8). Moreover, in the recently enacted RESTORE Act, Pub. L. 112-441, 126 Stat. 405 (July 6, 2012), Congress erected a complex regime for sharing any CWA penalties that may be collected with the Gulf States. Under this statute, close to 80% of any CWA penalties collected from the *Deepwater Horizon* spill will be devoted to restoration projects to be undertaken *inside* the Gulf States.[7] *Second*, OPA provides complementary compensatory

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[7] See U.S. Treasury Department, "Restore Act," http://www.treasury.gov/services/restore-act/Pages/default.aspx (explaining the distribution system for CWA penalties enacted by Congress in the RESTORE Act). Of course, the RESTORE Act was enacted *after* this spill occurred and thus cannot lawfully be consulted to control any merits questions here or in connection with CWA penalty liability, which remains under consideration below. However, if such penalties are assessed in the future under the CWA, the RESTORE Act will divide such penalties between the federal and state governments.

remedies, including allowing States and local governments to recover "all removal costs," 33 U.S.C. § 2702(b)(1)(A), as well as damages for the injury or destruction of their natural resources, *id.* § 2702(b)(2)(A).

Notwithstanding these OPA provisions designed to make them whole, and the fact that the United States has sought substantial penalties under the CWA that, if awarded, will benefit Louisiana, the Parish Petitioners seek to maintain state law-based civil penalties on top of the CWA penalty-sharing and OPA damage recovery that federal law offers. These state law penalties, which unlawfully attempt to punish Respondents for a spill arising within a federal enclave subject to comprehensive federal regulation, are the sole subject of the instant Petition.

I. Petitioners Cite No Division, or Even Confusion Among the Lower Courts, and None Exists.

Supreme Court review is most often prompted by a division in the lower courts. See S. Ct. R. 10(a), (b); see also*, e.g., Loughrin v. United States*, 134 S. Ct. 2384, 2388 (2014) ("We granted certiorari . . . to resolve a Circuit split . . . ."); *Abramski v. United States*, 134 S. Ct. 2259, 2265 (2014) (same); *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2202 (2014) (same). This Petition does not allege such a division because none exists.

The Petition's lone citation to precedent from another circuit presents no disagreement with the Fifth Circuit's opinion here. Specifically, the Petition refers to a First Circuit decision stating "that OPA preempts or otherwise supplants preexisting federal law." Pet. 30 (citing *South Port Marine LLC v. Gulf*

Oil Ltd. P'ship, 234 F.3d 58, 65 (1st Cir. 2000)). This reference appears as part of Petitioners' argument that OPA, by virtue of being later enacted and focused on oil spills specifically, somehow "preempts or otherwise supplants" the CWA and OCSLA. *Id.*

But *South Port Marine* holds no such thing. Instead, that case asked only whether OPA displaces "existing general admiralty and maritime law" regarding punitive damages. *South Port Marine*, 234 F.3d at 65. The First Circuit correctly held that it did.[8] But displacement of federal common law bears no relationship to reading one federal statute (OPA) to repeal by implication preexisting federal statutes (CWA and OCSLA). Federal statutes must be interpreted to harmonize with one another unless they are incapable of coexisting. See, *e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("so long as there is no 'positive repugnancy' between two laws . . . . a court must give effect to both."). Implied repeal is highly disfavored, and this Court has relied on the "presumption against implied repeals" specifically to rebuff prior efforts based on later-enacted statutes to limit the force of the CWA. See *Nat'l Assn of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 (2007) (refusing to read the Endangered Species Act as impliedly repealing portions of the CWA and other federal statutes).

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[8] Underscoring the lack of a circuit split, the Fifth Circuit has recently joined the First in recognizing OPA's displacement of maritime common law. See *United States v. Am. Commercial Lines, L.L.C.*, --- F.3d ----, 2014 WL 3511882 (5th Cir. Jul. 16, 2014). In fact, *American Commercial Lines* cites and relies upon the Fifth Circuit opinion in this very case. *Id.* at *3.

The presumption against implied repeals is difficult to overcome, whereas displacement of federal common law is far more easily triggered because displacement requires only that Congress "speak directly to a question" before federal common law must give way. *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981); see also *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) ("Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law.") (quoting *Milwaukee*, 451 U.S. at 317).

Petitioners do not suggest that any circuit has held that OPA impliedly—let alone expressly—repeals the CWA or OCSLA. Even if Petitioners were otherwise correct that their claims were covered by OPA's savings clauses (and they are not, see Part II.B., below), they have not identified a court anywhere in the country that would read such savings clauses to override other federal statutes with preemptive effect.

In contrast, the Fifth Circuit's application of *Ouellette* to prevent a State from applying its law to out-of-state discharges regulated by the CWA closely tracks the holdings of other courts around the country. See, *e.g., In re Operation of Mo. River Sys. Litig.*, 418 F.3d 915, 918 (8th Cir. 2005) (attempt to argue federal management of Missouri River water levels violated state water quality standards preempted following *Ouellette*); *Lane v. Champion Int'l Corp.*, 827 F. Supp. 701, 702 n.2 (S.D. Ala. 1993) (Alabama state law preempted by *Ouellette*); *State Line Fishing & Hunting Club, Inc. v. City of Waskom*, 754 F. Supp. 1104, 1113 (E.D. Tex. 1991) (prohibiting

application of affected State's law to a NPDES-permitted discharge).

Petitioners' disagreement with the lower courts is theirs alone. No court shares their view, and thus granting the writ of certiorari sought here is unnecessary.

II. The Lower Courts Have Correctly Stated and Applied the Law.

What remains of the Petition is a naked attempt to re-litigate the merits of issues that the lower courts twice resolved in Respondents' favor. Such petitions are disfavored. S. Ct. R. 10. Not only does the Petition ask for a third chance to make the same case but, even in that capacity, it is mistaken. The lower courts not only accurately applied settled legal principles on which there is no split of authority in the circuits or even in the district courts, the lower courts correctly applied those principles to the particular circumstances of this case.

A. Congress Has Established Exclusive Federal Control Over Drilling Operations on the Shelf and Exclusive Regulation of Oil Spills Originating There.

Where, as here, the source of pollution is on the Shelf—a federal enclave—pollution control is exclusively a matter of federal law. Otherwise state liability would interfere with the federal scheme, "upsetting the balance of public and private interests so carefully addressed by the [Clean Water] Act." *Ouellette*, 479 U.S. at 494. Accordingly, the Fifth Circuit correctly rejected Petitioners' attempt to enforce a separate and very different set of regulations of Louisiana's design.

The doctrinal lesson of *Ouellette* is simple: when a NPDES permit has been issued by a source State (or by EPA) to govern discharges within that State, an affected State may not apply its own law to add additional regulatory consequences to any such discharges, even if their effects are felt within the receiving State. See also *Illinois v. City of Milwaukee*, 406 U.S. 91, 102 (1972) (federal and not state law "controls the pollution of interstate or navigable waters").

In *Ouellette*, Vermont landowners brought common law claims against a New York paper mill for discharges that allegedly harmed their property. 479 U.S. at 484. Those discharges occurred exclusively in New York waters and were the subject of a NPDES permit issued by the State of New York. This Court rejected the landowners' claims, explaining that "application of Vermont law . . . would allow respondents to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act." *Id.* at 494. The existence of a NPDES permit made the discharges a matter of federal law, notwithstanding the landowners' allegation that the mill was "violating the terms of its [New York] permit." *Id.* at 498 n.18. Transgressing a NPDES permit is as much a concern of federal law as issuing one. Indeed, even when a State issues a NPDES permit, it is subject to EPA review. See *EPA v. California ex rel. Water Resources Control Bd.*, 426 U.S. 200, 207-08, 224 n.39 (1976).

Ouellette also rejected the argument that applying Vermont's state tort law was unobjectionable because it would merely *supplement* the CWA's regulatory directives. See 479 U.S. at 486-87. "In determining

whether Vermont nuisance law 'stands as an obstacle' to the full implementation of the CWA, it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *Id.* at 494 (citation omitted).

Thus, this Court made the point that the legal duties imposed by receiving States, when projected into a source State, could interfere with the conduct of parties acting under NPDES permits: "[A]t a minimum [the defendant] would have to change its methods of doing business and controlling pollution . . . . The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Id.* at 495.

After *Ouellette*, a similar issue arose when Oklahoma sought to apply its statutory water quality standards (which were themselves authorized by the CWA) to pollutant discharges occurring upriver in Arkansas. See *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). This Court approved EPA's grant of a permit to an Arkansas sewage treatment plant, notwithstanding Oklahoma's claim that its water quality standards prohibited the grant of such a permit. In doing so, the Supreme Court reaffirmed *Ouellette*, emphasizing that in interstate water pollution situations, *federal* authorities are exclusively entrusted with discretion to address impacts on States receiving out-of-state water pollution, and such affected States cannot take matters into their own hands to apply their own state law. Instead, the recourse for affected States and their citizens is to request EPA assistance. See *id.* at

100 n.6 ("The affected State may try to persuade the federal government or the source state to increase effluent requirements, but ultimately possesses no statutory authority to compel that result, even when its waters are adversely affected by out-of-state pollution." (emphasis and citation omitted)); see also *Ouellette*, 479 U.S. at 490 ("Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders.").

The lower courts correctly held that *Ouellette* and *Arkansas* govern the Louisiana Parishes' attempted application of state law to discharges in the federal waters of the Gulf of Mexico. NPDES General Permit 290000 authorized and controlled the drilling operations at the Macondo well. The *only* distinction between the NPDES permit applicable to BP here and the NPDES permit at issue in *Ouellette* is that New York issued the latter permit, whereas the federal EPA issued the NPDES permit here.

But that distinction only reinforces why the rationale for preemption is even *stronger* here than in *Ouellette*. In this case, EPA itself, not a State, issued the federal NPDES permit and EPA did so to govern conduct occurring exclusively on a federal submerged enclave or the mile of Gulf waters above. The overriding federal interest thus is even more stark. In addition, the risk identified in *Ouellette*—that duplicative regulation will alter a permitted party's behavior—is magnified because the Gulf of Mexico borders *five States*, as the Fifth Circuit stressed:

> [J]ust as with entities operating in point-source states, if entities engaged in developing the OCS were subjected to a multiplicity of state laws in addition to federal regulations,

> they could be forced to adopt entirely different operational plans or in the worst case be deterred by the redundancy and lack of regulatory clarity from even pursuing their OCS plans.

Pet. App. 24 (referring to such an outcome as fostering "legal chaos").

The over-deterrence and potential for chaotic conflict created by duplicative regulations fully responds to Petitioners' argument that Louisiana law cannot be preempted because "it merely imposes additional liability." Pet. 17. The applicable federal statutes set the appropriate balance by deciding how to weigh promoting resource development on the Shelf against the cost of imposing prophylactic measures or establishing financial incentives to avoid pollution. The States cannot recalibrate that federally chosen balance by applying state law to conduct which under *Ouellette* and OCSLA is governed exclusively by the source-law of federal NPDES Permit 290000 (and by applicable BOEMRE permitting issued pursuant to OCSLA).

After the EPA has struck "the balance of public and private interests so carefully addressed by" the NPDES permitting regime for water pollution, a State may not use its law to "upse[t]" it. *Ouellette*, 479 U.S. at 494. This is an elementary aspect of conflict preemption, which comes into play whenever a State interferes with the *means* of enforcement chosen by Congress. See *Arizona v. United States*, 132 S. Ct. 2492 (2012). In *Arizona*, the Court explained that a State may not add penalties even where the underlying conduct already violates federal law. *Id.* at 2502 ("Permitting the State to impose its own penalties for the federal offenses here would

conflict with the careful framework Congress adopted."); see also *id.* at 2503 ("Conflict is imminent whenever two separate remedies are brought to bear on the same activity."). Because they fail to appreciate this aspect of conflict preemption, Petitioners wrongly accuse the Fifth Circuit of "sidestep[ing] the conflict preemption analysis required by this Court." Pet. 18.

The Petition also disputes the Fifth Circuit's reasoning in applying *Ouellette* to this case. But that Parish argument not only offers no basis for granting the Petition, it is also wrong as a matter of law.

First, the Petition fixates on the supposed fact that the discharge in *Ouellette* violated CWA Section 1342, whereas the discharge here violated CWA Section 1321. Pet. 21-22. This argument fails at the outset because a violation of a NPDES permit issued under CWA Section 1342 *is* a violation of CWA Section 1342. See also 33 U.S.C. § 1319(a) (delineating the penalties for violating Section 1342, among other CWA provisions). Permit 290000, which governs here, entirely prohibited the discharge of "formation oil." Pet. App. 67 n.16 (a point notably conceded by the Parishes' *amicus*, the State of Alabama). The oil involved in the *Deepwater Horizon* spill originated in the MC252 formation and hence the *Deepwater Horizon* spill violated Section 1342. While true that this spill violated *both* Section 1342 and Section 1321,[9] *Ouellette* fully applies because a

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[9] An oil spill can clearly trigger penalties under both Section 1321 and Section 1319 (which applies to violations of Section 1342, among others). See 33 U.S.C. § 1321(b)(11) (forcing the United States to elect to seek penalties under Section 1321 or 1319, but not both).

violation of a Section 1342 NPDES permit is sufficient to bring that case into play.

Moreover, the Parishes' argument regarding CWA Sections 1342 versus 1321 would fail even if Section 1321 were the only CWA provision that had been violated. Petitioners contend that preemption analysis should differ depending on whether Congress decided to allow some discharge of a pollutant (their flawed vision of what Section 1342 does) or sought to disallow any and all discharges (which is what Section 1321 actually does). Pet. 21-22. This distinction is irrelevant, even if it were accurate (and it is not because Petitioners overlook the existence of zero-discharge NPDES permits).

The holdings in *Ouellette* and *Arkansas* apply equally whether the lawful discharge level is set at zero or greater than zero. Indeed, *Arkansas* reversed a ruling that "the Clean Water Act prohibits granting an NPDES permit under the circumstances of this case (i.e., where applicable water quality standards [under 33 U.S.C. § 1313] *have already been violated*)." *Arkansas*, 503 U.S. at 107 n.12 (emphasis added) (quotations omitted); see also Pet. App. 67-68 (district court dispatching the same claim made by Petitioners because "fatal to the States' argument is the fact that the Vermont plaintiffs in *Ouellette* specifically alleged that the discharges violated the . . . NPDES permit. In other words, like the instant matter, the discharge in *Ouellette* was alleged to be universally unlawful."). The Parishes are simply rehashing long-dead arguments rejected by this Court in *Ouellette* and *Arkansas*.

CWA Section 1321 wholly disallows oil spills in harmful quantities into waters of the United States, but that provision of law is no less federal than the

one that sometimes allows small discharges under Section 1342, so long as such discharges occur under permits. Thus, Petitioners' attempted distinction of *Ouellette* and *Arkansas* fails.

Second, the Petition disputes the Fifth Circuit's distinction of *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), Pet. 11-12 & 24, and faults the lower court for failing to distinguish an irrelevant case decided under the Commerce Clause, *Lacoste v. Dep't of Conservation*, 263 U.S. 545 (1924), Pet. 9-10. Neither of these arguments is persuasive.

The Fifth Circuit was correct that *Askew* differs from this case because *Askew* involved discharges *within state waters*. *Askew*, 411 U.S. at 327. Thus, state law could impose penalties consistent with the CWA, unlike in the current case. This distinction is precisely why the Fifth Circuit concluded that *Ouellette* is the controlling case. Pet. App. 27 n.13. In response, Petitioners seize on *Askew*'s allusion to the Torrey Canyon oil spill in England, which allegedly would have fallen outside of state territorial waters had it occurred in the Gulf of Mexico. Pet. 24 n.4 (ignoring, of course, that England's national vs. sub-national division of authority does not even mirror the system of American federalism). But that brief reference is a thin reed on which to build an inference that this Court intended to authorize States to layer their regulations on top of federal regulations to reach activities occurring in the exclusive federal enclave of the Shelf. The reference to Torrey Canyon is irrelevant *dictum*, while the subsequent decision in *Ouellette* is binding, on-point precedent.

Accordingly, Petitioners' theory that States have an inviolable police power to regulate all "sea-to-shore" pollution crumbles. Pet. 9-14. Beyond their

misreading of *Askew*, they have no basis for that assertion, and the later *Ouellette* decision leaves no doubt that States are barred from regulating discharges originating outside their boundaries and subject to the comprehensive NPDES regime.

Lacoste is even less applicable. The Parishes describe it as creating a rule that any state action designed to protect wildlife is presumptively within the State's police power and therefore protected by the presumption against preemption. Pet. 9-10. The problem is that *Lacoste* was neither a preemption case (it concerned the Commerce Clause), not did it address out-of-state pollution. In fact, the Court emphasized that the tax at issue in *Lacoste* applied exclusively to "skins and hides taken from wild fur-bearing animals or alligators *within the state*." 263 U.S. at 548 (emphasis added).

In sum, the district court and the Fifth Circuit correctly applied *Ouellette* to conclude that the CWA preempts the application of law other than the law of the source jurisdiction (here, federal law, per OCSLA). The "balance of public and private interests" struck by Congress, *Ouellette*, 479 U.S. at 494, conflicts with any state attempt to regulate the same Shelf conduct. Petitioners' contrary position is both legally flawed and undeserving of Supreme Court review.

B. No Savings Clause Precludes Preemption Under *Ouellette*.

Petitioner's argument that a grab bag of savings clauses allow the Parishes to seek state-law penalties reads like nothing more than a miniature merits brief. That is likely because Petitioners have no basis for seeking certiorari other than their assertion that

the lower courts were wrong. Ultimately, however, none of the savings clauses that Petitioners identify accomplishes what they hope.

First, although the Petition spends pages justifying its applicability, the *OPA savings clause* in 33 U.S.C. § 2718(c) requires only four words to disqualify itself as inapplicable. Pet. 26-32. That provision begins: "[*n*]*othing in this Act*, the Act of March 3, 1851 [the Limitation Act], or section 9509 of Title 26 [regarding the Oil Spill Liability Trust Fund] . . . ." 33 U.S.C. § 2718(c) (emphasis added). By its plain terms, then, Section 2718 applies only to preemption that might otherwise have been created by OPA, the Limitation Act of 1851, or by the Oil Spill Liability Trust Fund housed in Title 26. The fact that Section 2718(c) identifies two other laws besides OPA by name demonstrates that Congress knew how to bring the CWA within Section 2718(c) if it had so desired. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1076 (2011) ("If all three were intended to be preserved, it would be strange to mention specifically only two, and leave the third to implication.").

Petitioners go to great lengths to avoid the first four words of the very clause on which they purport to rely. In that vein, their next move is to argue that the CWA and OPA are actually the same statute because Congress intended to create a "*single* Federal law" to govern every aspect and consequence of oil spills. Pet. 29 (emphasis original). This alleged intent—not memorialized in the statute's text—supposedly "supersede[s]" any preemption under the CWA. *Id.* As explained above, the only authority Petitioners offer for the assertion that OPA "supersedes" preexisting federal statutes is the

irrelevant displacement of federal common law by OPA. See *supra* n.8 and accompanying text. As this Court similarly held in *Ouellette*, a savings clause that begins "nothing in this section," is limited to preemption caused only by that particular statutory section. See *Ouellette*, 479 U.S. at 493 (such a clause "does not purport to preclude pre-emption of state law by other provisions of the Act"). The same analysis applies to the OPA savings clause's "[n]othing in this Act" restriction.

Second, Petitioners appeal to savings clauses in the CWA. Pet. 35-36 (citing 33 U.S.C. § 1321(o)). The text of these savings clauses contains a similar limitation, for each begins by providing that "[n]othing *in this section*" shall create a preemptive effect of a defined type. 33 U.S.C. § 1321(o)(1)-(3) (emphasis added). But preemption under the CWA's NPDES regulatory scheme occurs under Section 1342, not Section 1321.[10] Compare *Ouellette*, 479 U.S. at 493 (dispensing with a similar savings-clause argument).

Petitioners' only response is that Section 1342 cannot preempt state laws regulating or penalizing oil discharges because "oil does not even fall within the definition of 'pollutant' which may be regulated under an NPDES permit." Pet. 20 n.2. This argument fails on multiple grounds.

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[10] Ironically, Petitioners suggested that preemption does not apply to their state-law wildlife penalty claims based on the supposed differences between Section 1321 and Section 1342 of the CWA. See *supra* at 19-21. When one actually examines the text of the Clean Water Act, however, the real differences between those provisions *only reinforce* that the Section 1342 preemption explicated in *Ouellette* is fully applicable here.

First, Petitioners did not preserve the argument that oil is not a CWA "pollutant" below and thus have waived it. See, *e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010). In the Fifth Circuit, cursory treatment in a footnote is inadequate to preserve an issue for appeal. See, *e.g., Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347, 356 n.7 (5th Cir. 2003) (noting that the appellant made a contested argument in a footnote but finding it nevertheless waived because "[a]rguments that are insufficiently addressed in the body of the brief, however, are waived.").

Second, 33 U.S.C. § 1362(6) comprehensively defines CWA "pollutant" to be virtually "any kind" of substance that enters water and explicitly includes "biological materials," Pet. 20 n.2, such as fossil fuels. See *In re Deepwater Horizon*, 753 F.3d 570, 572 (5th Cir. 2014) (noting that "oil" is one of the Section 1362(6) pollutants); accord *cf. Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007) (referring to the "sweeping definition of 'air pollutant'" in the CWA's sister statute, the Clean Air Act).

Third, we know of no court that has accepted the dubious assertion that oil spilled into water would not constitute a CWA "pollutant." To the contrary, numerous courts have held that oil and associated waste are CWA pollutants. See *United States v. M/G Transp. Servs., Inc.*, 173 F.3d 584, 590 (6th Cir. 1999) (residue of burned lube-oil filters created CWA pollutants); *Washington Public Interest Research Grp. v. Pendleton Woolen Mills*, 11 F.3d 883, 884 (9th Cir. 1993) (wastewater containing oil was a CWA pollutant); *United States v. Hamel*, 551 F.2d 107, 109-13 (6th Cir. 1977) (rejecting an argument much like the one Petitioner makes here and holding that

Section 1362(6) embraces "oil" as a "pollutant" at least because Congress meant to carry over into the CWA prohibitions on the discharge of those substances restricted by the Refuse Act, including oil).

Fourth, one of the exceptions set out in Section 1362(6) clearly implies that oil discharged through an oil well system constitutes a CWA pollutant. See 33 U.S.C. § 1362(6) (term "pollutant" "does not mean . . . water, gas, or other material which is injected into a well *to facilitate production of oil or gas*, or water derived *in association with oil or gas production* and disposed of in a well") (emphasis added). Here, of course, the oil itself flowing through the *Deepwater Horizon*'s appurtenances into the Gulf was the impetus behind the Parishes' penalty actions, not any additives to oil injected into the Macondo well aimed at fostering oil production.

Petitioners' argument from Section 1321(o)(2), specifically, has the additional deficiency of applying only to discharges within a State's territorial waters. 33 U.S.C. § 1321(o)(2). As the Fifth Circuit explained, this "provision does not save a state's laws where the discharge did not occur 'within' the state." Pet. App. 26.

Straightforward statutory interpretation and long-established case law thus dispose of each of Petitioners' attempts to stretch various savings clauses to shield from federal preemption their attempt to recover duplicative penalties.

III. The Present Case Is a Poor Vehicle to Review the Issues Petitioners Advance.

1. Quite apart from the bar posed by federal preemption, the Parishes' lawsuit should never have

been filed—even as a matter of purely Louisiana state law. As the Petition makes clear, the Parishes brought suit under the Louisiana Wildlife Statute, La. Rev. Stat. 56:40.1, *et seq*. *E.g.,* Pet. i, 4-7. The Petition curiously never mentions the more specific Louisiana Oil Spill Prevention and Response Act ("LOSPRA"), La. Rev. Stat. 30:2451, *et seq*., however. That statute is an entry-level bar to the Parishes' suit, and Respondents have preserved its objections under state law to the validity of the Parishes' suit at every stage of this litigation.

LOSPRA provides that it is "the *exclusive authority* on oil spill prevention, response, removal, and the limitations of liability" under Louisiana law. La. Rev. Stat. §§ 30:2496 (emphasis added), 30:2454(22); see also *id*. § 30:2480(G); LOSPRA Reg. § 115(A). The Act establishes a comprehensive and detailed regime governing the assessment and determination of natural resource damages claims, and any alleged violation of LOSPRA is subject to that Act's provisions. See *id.* § 30:2491(A) ("The provisions of this Chapter shall supersede . . . any conflicting laws of this state."); *id.* § 30:2496.

The *only* exception to LOSPRA's exclusivity is a civil suit that can be brought for the very same state law wildlife losses by the Department of Wildlife and Fisheries ("LDWF"), one of the OPA Trustees. See La. Rev. Stat. § 30:2491(B). But the wildlife claims here were not brought by LDWF, but by Parish District Attorneys. The diversion of potential state funds to Parishes in oil spill situations was apparently deemed inappropriate by Louisiana's state legislature. Accordingly, the Parish wildlife

suits here are not even authorized as a matter of *Louisiana law* and therefore must be dismissed.[11]

2. In addition to the other arguments set forth above, certiorari should be denied as to Petitioners' claims against MOEX Offshore and MOEX USA because those two entities have settled with the State of Louisiana.

On June 18, 2012, the Eastern District of Louisiana entered a Consent Decree in MDL 2179 between the United States and the MOEX entities. Consent Decree, MDL 2179, Rec. Doc. 6698 (E.D. La. June 18, 2012). This consent decree provided for the payment of monies to resolve civil penalty claims in specified amounts to the United States and five Gulf Coast States, including the State of Louisiana. Consent Decree ¶ 8. Those penalties were payable only if the State provided the MOEX Defendants with

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[11] Significantly, LOSPRA also makes clear that, "[i]n any action to recover natural resources damages, the coordinator, in consultation with any other state trustees, shall make the determination whether to assess natural resource damages and the amount of damages . . . ." La. Rev. Stat. § 30:2480(A); LOSPRA Reg. § 101(D) (similar). The wildlife penalty claims here, which are based on a per-animal fine, are quite likely disguised natural resource damage claims. And any dispute over such claims by Louisiana, including the amount of such claim, "shall be referred to mediation as a prerequisite to the jurisdiction of any court." La. Rev. Stat. § 30:2480(G); *see also* LOSPRA Reg. § 133(A) ("No state trustee or responsible party may invoke the jurisdiction of any court over a disputed natural resource damage assessment claim unless and until the assessment claim has been referred to mediation pursuant to this Section."). Thus, these suits also fail to meet LOSPRA's express prerequisite that the parties mediate.

an executed Release and Covenant Not to Sue ("Release"). *Id*. ¶¶8, 9.

The State of Louisiana timely provided the MOEX Defendants with a duly-executed Release. That instrument released the MOEX entities from "any claim or cause of action for civil or administrative penalties under the laws of the State of Louisiana … which the State of Louisiana now has, ever had, or may have, now or in the future … arising out of or relating in any way to the Deepwater Horizon Incident." Consent Decree at App'x B3, at 43. The Fifth Circuit acknowledged the Release and its effect in its opinion. See Pet. App. 1-2 n.1.

The Release precludes the Parishes' claims against the MOEX entities. The law on which the Parishes' Petition is based—Louisiana's Wildlife Recovery Statute, La. Rev. Stat. §56:40.1 *et seq.*—is a law of the State of Louisiana. Assessments under the Wildlife Recovery Statute are civil penalties. See La. Rev. Stat. §§ 56:40.4, 56:40.9. And that statute requires that penalties be sought on behalf of the State of Louisiana. See La. Rev. Stat. § 56:40.4. Because all of these elements are met, the Parishes' claims against the MOEX entities have already been released.

Because the Parishes' claims against the MOEX entities have been released, this Petition is moot as to those entities. The Parishes have articulated no ground for proceeding against the MOEX entities despite the Release; instead, the Petition ignores the MOEX entities' dispositive argument. Even if the Parishes later try to contrive some argument against application of the Release, it would raise unique issues regarding the Consent Decree, Louisiana's unusual wildlife penalties statute, and the *sui generis*

interaction between the two. Such circumstances make this case plainly unsuitable for certiorari.

* * *

In light of these two alternative grounds for dismissing the Parishes' suit, this Court should not credit the Petition's strained assertion that this case is the "best vehicle" for addressing preemption under the CWA and OCSLA. Pet. 36.

CONCLUSION

Petitioners ask this Court for a third opportunity to brief the issues on which they have twice lost in well-considered opinions. They identify no division in the lower courts and no violation of Supreme Court precedent to justify putting the Court and Respondents to the cost and delay of a third bite at the apple. This Petition is nothing more than a "coming attractions" merits brief.

The Petition should be denied.

Respectfully submitted,

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