No. 13-1424

IN THE

Supreme Court of the United States

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

Petitioners,

v.

BP EXPLORATION & PRODUCTION, INC., ET AL.

Respondents.

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

BRIEF OF TRANSOCEAN RESPONDENTS IN OPPOSITION

STEVEN L. ROBERTS
SUTHERLAND ASBILL & BRENNAN LLP
1001 Fannin Street
Suite 3700
Houston, Texas 77002
(713) 470-6100

KERRY J. MILLER
FRILOT, LLC
110 Poydras St., Suite 3700
New Orleans, LA 70163
(504) 599-8194

BRAD D. BRIAN
MICHAEL R. DOYEN
DANIEL B. LEVIN*
**Counsel of record*
MUNGER, TOLLES & OLSON LLP
355 So. Grand Avenue
35th Floor
Los Angeles, CA 90071
(213) 683-9100
Daniel.Levin@mto.com

September 15, 2014

QUESTION PRESENTED

In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), this Court held that the Clean Water Act preempted the law of a State affected by water pollution when applied to an out-of-state pollution source. *Ouellette* reconfirmed the longstanding principle that interstate water pollution is governed by federal law and the law of the source State, not by the laws of States that may be affected by pollution. The Fifth Circuit here applied the same principle, in straightforward fashion, to hold that the Clean Water Act preempted the application of Louisiana law to an oil spill in an area of exclusive federal jurisdiction above the Outer Continental Shelf.

The question presented is whether federal law allows every State affected by water pollution from an oil spill in an area of exclusive federal jurisdiction above the Outer Continental Shelf to apply its own laws to regulate the source of that pollution.

PARTIES TO THE PROCEEDINGS

Respondents Transocean Offshore Deepwater Drilling LLC, Transocean Holdings LLC, and Transocean Deepwater Inc. (collectively, "Transocean") incorporate the statement of parties to the proceedings from the Petition (Pet. ii).

CORPORATE DISCLOSURE STATEMENT

Transocean Offshore Deepwater Drilling Inc., Transocean Holdings LLC, and Transocean Deepwater Inc. are wholly owned subsidiaries of Transocean Ltd.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

FEDERAL STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

STATE STATUTES

INTRODUCTION

The Fifth Circuit held that the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1376, preempted the application of Louisiana law to oil pollution originating from the 2010 Macondo oil spill in the Gulf of Mexico. The Fifth Circuit's holding followed the rule affirmed in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), that States have no authority to regulate out-of-state sources of water pollution. Here, the oil pollution originated in waters that not only are beyond the jurisdiction of any State, but are above the Outer Continental Shelf—an area of exclusive federal jurisdiction.

The Fifth Circuit's decision is faithful to the holdings of *Ouellette* and this Court's other water-pollution decisions. Its reasoning follows directly from the settled preemption principles set out in those decisions. Petitioners' contention that the Fifth Circuit's decision conflicts with other decisions of this Court rests on inapposite cases that cast no doubt on the Fifth Circuit's reasoning. And far from creating any inter-circuit conflict, the Fifth Circuit's decision accords fully with cases across the circuits. Petitioners do not even attempt to identify any circuit split.

Rather than presenting any genuine conflict, the Petition asks this Court to intervene to create an exception to the settled rule articulated in *Ouellette*, so that Petitioners can apply a particular State's wildlife statute to the Macondo oil spill. Petitioners offer no principled basis for treating their particular state-law claims differently from other out-of-state pollution claims, which for decades have been

preempted by federal law. There is no such justification. Permitting multiple States to apply their own civil penalties and regulations to drilling operations on the Outer Continental Shelf would engender the very regulatory chaos that this Court sought to avoid in *Ouellette*.

Even if this Court were inclined to revisit longstanding precedent governing interstate water pollution, this Petition is a poor vehicle for undertaking such review. The state-law remedies Petitioners seek are in direct conflict with Federal law—a point noted by the district court, but which the Fifth Circuit did not have to reach. And by special congressional enactment, Louisiana and other Gulf States are entitled to share in the civil penalties collected by the United States under the CWA. There is no danger that States will be denied a chance to be compensated for damages arising from the Macondo oil spill.

The Petition should be denied.

STATEMENT

1. On April 20, 2010, the mobile offshore drilling unit *Deepwater Horizon* was engaged in drilling operations at the Macondo well, a facility located on the Outer Continental Shelf approximately fifty miles off the coast of Louisiana. There was a blowout in the well, resulting in an explosion and fire aboard the *Deepwater Horizon*. Oil spilled into the Gulf of Mexico. Some of that oil eventually reached the territorial waters of Louisiana.

2. After the blowout, District Attorneys for the Louisiana Parishes of Plaquemines, Orleans, Iberia,

St. Mary, Jefferson, LaFourche, St. Bernard, St. Charles, St. Tammany, Terrebonne, and Cameron ("Petitioners") sued Respondents in State court.

Petitioners' lawsuits alleged that Respondents were liable for civil penalties under the Louisiana Wildlife Protection Statute, La. R.S. 56:40.1. That statute authorizes penalties against any "person who . . . through the violation of any other state or federal law or regulation, kills or injures any fish, wild birds, wild quadrupeds, and other wildlife and aquatic life."

Petitioners alleged, among other things, that Respondents had caused the blowout by violating statutes, regulations, and permit conditions governing the exploration and production of minerals in the Macondo well. Petitioners further alleged that, "[a]s a result of the spill" from the Macondo well, Respondents had "unlawfully killed and/or injured" wildlife and aquatic life in Louisiana waters.[1]

3. Respondent BP removed Petitioners' suits to federal court based on the district court's original jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349(b)(1), which establishes federal jurisdiction over cases arising out of "any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf . . . ."

---

[1] *See, e.g.*, USCA5 14.24-25; USCA5 15.21-22; USCA5 16.28-29; USCA5 19.30; USCA5 21.43-44; USCA5 25.31-32; USCA5 26.16-17. Citations of "USCA5 (Vol.).(Page)" are to the multi-volume, paginated district court records submitted to the Fifth Circuit on appeal.

Petitioners' lawsuits were among thousands of cases consolidated as part of the Multidistrict Litigation in the Eastern District of Louisiana. To handle the enormous number of claims, the district court organized the claims into several "pleading bundles," and included Petitioners' claims along with the claims of other local government entities in "Bundle C."

4. After denying Petitioners' remand motions, the district court granted Respondents' motions to dismiss the state-law claims. Invoking this Court's decision in *Ouellette*, the district court held that the CWA preempted state-law claims seeking civil penalties, including Petitioners' claims under La. R.S. 56:40.1. Pet. App. 43 & n.5; *see also id.* at 60-77 (explaining preemption ruling in an order dismissing state-law penalty claims asserted by the States of Louisiana and Alabama).

The district court separately observed that Petitioners' claims under Louisiana's wildlife statute were uniquely problematic because "the amounts sought under La. R.S. 56:40.1 appear potentially duplicative of natural resource damage under [the Oil Pollution Act ("OPA")], *see* 33 U.S.C. §§ 2702(b)(2)(A), 2706, which are sought in this MDL." *Id.* at 43 n.5. In particular, the district court observed, "the fact that La. R.S. 56:40.1 is based on the 'value' of each animal injured or killed arguably resembles a compensatory claim, which would impermissibly overlap with recovery under OPA." *Id.* at 44 n.5. And the court noted that the method of valuation under the State statute was in conflict with the method required by federal law. *Id.*

5. The Fifth Circuit affirmed in a unanimous decision.

a. The court agreed with the district court that removal was proper under 43 U.S.C. § 1349 and 28 U.S.C. § 1441. The court noted that "the fact that the oil spill occurred because of [Respondents'] 'operations' in exploring for and producing oil on the [Outer Continental Shelf] cannot be contested." Pet. App. 6.

b. Next, the court held that federal law preempted Petitioners' state-law claims. The court recognized that Petitioners

> cannot prove [Respondents'] responsibility, or respective shares of responsibility, for wildlife injuries without alluding to the blowout's physical source, emissions from a well in the [Outer Continental Shelf], or its human source, errors or omissions related to the [*Deepwater Horizon*'s] production activity on the high seas above the [Outer Continental Shelf].

Id. at 11. As a result, the court concluded, "[f]ederal law covers the disaster in two ways." *Id.* at 12. "First, pursuant to OCSLA, '[a]ll law applicable to the outer Continental Shelf is federal law,' and all cases 'involving events occurring on the Shelf [are] governed by federal law . . . .'" *Id.* (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480-81 (1981)). Second, and alternatively, "maritime law applies here because the [*Deepwater Horizon*] is a vessel." *Id.* at 13. Under "either regime," the court explained, the law governing the discharges at issue in Petitioners' suits was the federal CWA. *Id.* at 14.

The court of appeals then held that the CWA preempted Petitioners' claims for penalties under La. R.S. 56:40.1. First, the court rejected Petitioners' reliance on the State's historic police powers. Even before Congress enacted the CWA, the court observed, federal common law, "not the competing laws of each affected jurisdiction, was applied to interstate water pollution." *Id.* at 21 (citing *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 106-07 (1972)). And the court recognized that this Court's decision in "*Ouellette* held that the states' ability to apply local law to out-of-state point sources of alleged water pollution was in conflict with the CWA." *Id.* (citing *Ouellette*, 479 U.S. at 494). Under *Ouellette*, "[f]ederal law, the law of the point source, exclusively applies to claims generated by the oil spill in any affected state or locality." *Id.* at 25.

Second, the court of appeals rejected Petitioners' arguments based on the "savings" clauses in OPA and the CWA, 33 U.S.C. §§ 1321(o), 2718(c). The court held that "there are no state remedies to 'save,'" because "[t]he 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." Pet. App. 25. Moreover, the court of appeals reviewed the text of both savings clauses and concluded that neither provision could "save" Petitioners' state-law claims. *Id.* at 26-32.

6. Petitioners did not seek panel rehearing or rehearing en banc.

REASONS FOR DENYING THE PETITION

The Opinion below is completely consistent with this Court's interstate pollution cases. The Fifth Circuit properly applied the longstanding principle that a State has no authority to regulate out-of-state sources of pollution, even if the pollution enters into and affects the State. Under that principle, Petitioners' claims are plainly preempted, for they are based upon oil pollution originating in waters beyond the State's jurisdiction.

Petitioners argue that the Fifth Circuit's decision conflicts with cases recognizing the States' police powers to *regulate wildlife* within the State's own territory. But these cases do not address a State's authority to police out-of-state pollution sources or the interplay between the CWA and state law. It is *Ouellette* and its progeny that control here, and the Petition fails to identify any conflict between those decisions and the Fifth Circuit's interpretation of the CWA.

The Petition does not argue that the Fifth Circuit's decision conflicts with a decision of any other circuit. Nor could it. Every other circuit that has considered preemption of state laws purporting to regulate out-of-state pollution has similarly relied on *Ouellette* and held state law preempted.

Finally, this case is an unsuitable candidate for reviewing broad questions about the scope of federal preemption of state laws penalizing oil pollution. The Petition merely quarrels with the Fifth Circuit's application of a well-established principle to a particular regulatory scheme and set of facts. The quarrel is not of national importance; indeed, it is of

no apparent consequence *in this case*. Even if state law were not generally preempted by the CWA, the Louisiana wildlife statute would fail here because its remedies conflict with those already available under OPA. Finally, federal law provides Petitioners ample means to seek compensation for harms they allegedly suffered from the Macondo oil spill.

The Petition should be denied.

I. The Fifth Circuit's Decision Is Consistent with this Court's Precedent

A. The Fifth Circuit Applied the Longstanding Principle that Federal Law and the Law of the Source State Govern Interstate Pollution

1. Even before Congress passed the CWA, it was well established under federal common law that a State has no authority to regulate or penalize water pollution that originates outside of its territory. That was so even if the pollution traveled into and affected the State. *See Milwaukee I*, 406 U.S. at 105 & n.6 (prohibiting Illinois from applying its law to pollution originating outside the State).

This Court reaffirmed that principle in *Ouellette*, holding that "the CWA precludes a court from applying the law of an affected State against an out-of-state source." 479 U.S. at 491-94. The Court recognized that the CWA had changed the landscape, displacing the federal common law that had previously governed interstate pollution. *Id.* at 489. But the Court held that the principle articulated fifteen years earlier in *Milwaukee I*—"that the

regulation of interstate water pollution is a matter of federal, not state, law"—remained unchanged. *Id.* at 488.

The Court explained that permitting States to regulate out-of-state pollution sources "would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" *Id.* at 493. State regulation would "upset[] the balance of public and private interests so carefully addressed by the [CWA]" and "undermine the important goals of efficiency and predictability[.]" *Id.* at 494, 496.

In *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), this Court again reaffirmed the principle that States have no authority to regulate out-of-state pollution sources. After reviewing the history of federal preemption, culminating in the CWA, the Court explained that "the Clean Water Act, taken 'as a whole, its purposes and its history' pre-empted an action based on the law of the *affected State*." *Id.* at 100 (quoting *Ouellette*, 479 U.S. at 493) (emphasis added). "[T]he only state law applicable to an interstate discharge," this Court made clear, "is 'the law of the *State in which the point source is located*.'" *Id.* (quoting *Ouellette*, 479 U.S. at 487) (emphasis added).

In affirming the dismissal of Petitioners' claims, the Fifth Circuit faithfully followed *Ouellette* and this Court's clear precedent governing interstate water pollution. No further review is necessary.

2. The Petition's attempts to distinguish *Ouellette* are without merit. At best, the Petition seeks

supposed error correction that does not provide a sufficient basis for this Court's review.

a. Petitioners argue that *Ouellette* is limited to cases involving pollution permitted under the CWA's permit system, 33 U.S.C. § 1342, and that it should not apply to oil pollution prohibited by the CWA. *Ouellette* and this Court's other interstate pollution cases are not so narrowly confined.

This Court recognized in *Milwaukee I* that the "overriding federal interest in the need for a uniform rule of decision" and the "basic interests of federalism" require that disputes relating to all interstate water pollution be governed by a clear and consistent rule. *Milwaukee I*, 406 U.S. at 105 n.6. This need for uniformity did not change after Congress passed the CWA.

Although *Ouellette* involved a violation of the CWA's permitting system under § 1342, the decision plainly states that a "court *must* apply the law of the State in which the point source is located" whenever it "considers a state-law claim concerning interstate water pollution that is subject to the CWA." *Ouellette*, 479 U.S. at 487 (emphasis added). Nothing in *Ouellette* suggests that a State may regulate out-of-state pollution that is prohibited rather than permitted by the CWA.

The out-of-state pollution here implicates the same "overriding federal interest in the need for a uniform rule of decision" grounding *Milwaukee I* and *Ouellette*. *Cf. Milwaukee I*, 406 U.S. at 105 n.6. As the Fifth Circuit recognized, entities conducting oil

drilling operations on the Outer Continental Shelf, such as the Macondo well, are subject to myriad federal regulations. Indeed, the Macondo well was governed by a National Pollutant Discharge Elimination System permit under the CWA, 33 U.S.C. § 1342. Pet. App. 24. If multiple States could impose additional regulations or penalties on oil spills, the resulting "chaotic regulatory structure" would conflict with Congress' judgments as reflected in the CWA. *Ouellette*, 479 U.S. at 497 (internal quotation marks omitted).

b. Petitioners' argument that there is no potential for conflict because the Louisiana wildlife statute merely adds additional penalties for an oil spill that is already prohibited by the CWA is meritless.

To begin with, the Court in *Ouellette* refused to draw a distinction between direct regulation, such as state permit requirements, and indirect regulation, such as state tort suits for compensatory damage. The Court concluded that the CWA preempted both. *Id.* at 498 n.19. The Court explained that the threat of state-law compensatory damages claims may compel the defendant "to adopt different or additional means of pollution control from those required by the [CWA], regardless of whether the purpose of the relief was compensatory or regulatory." *Id.*

This conclusion is consistent with other cases in which this Court has held that state-imposed penalties can conflict with federal law, even when the state law "has the same aim as federal law and adopts its substantive standards." *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012). Adding

additional State penalties as "supplemental sanction[s]" for violations of federal law, "incrementally diminishes" federal enforcement power and detracts from the "integrated scheme of regulation created by Congress." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 288-89 (1986) (internal quotation marks omitted); *see also id.* at 286 ("[C]onflict is imminent whenever two separate remedies are brought to bear on the same activity . . . ." (internal quotation marks omitted)); *Arizona*, 132 S. Ct. at 2502 ("Permitting the State to impose its own penalties for the federal offenses . . . would conflict with the careful framework Congress adopted."). The Fifth Circuit's preemption analysis is entirely consistent with these precedents.

B. The Fifth Circuit's Decision Does Not Conflict with Other Decisions of this Court

The Petition urges this Court to grant review to resolve purported conflicts between the Fifth Circuit's decision and this Court's precedent relating to federal preemption and the States' historic police powers. These conflicts are wholly illusory.

1. The Fifth Circuit's decision does not conflict with *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). *Askew* held that the CWA did not preempt a State statute governing oil spills "*in the State's territorial waters*." *Id.* at 327 (emphasis added). In reaching this conclusion, the Court noted that "a State, in the exercise of its police power, may establish rules applicable on land and water *within its limits*." *Id.* at 339 (emphasis added). The Court

recognized "the authority of the States to create rights and liabilities with respect to conduct *within their borders*." *Id.* at 340 (emphasis added). The Court cited other decisions upholding a State's power to regulate conduct *within its own territory*. *Id.* at 334 (citing *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941), holding a Florida statute was a proper exercise of the State's police powers "so far as [it] applied to conduct within the territorial waters of Florida" (internal quotation marks omitted), and *Manchester v. Massachusetts*, 139 U.S. 240, 266 (1891), holding that the right to control fisheries in a bay "must remain with the state which contains such bays" (internal quotation marks omitted)).

Askew did not address the State's power to regulate oil spills *outside* of its territorial waters or suggest that the State had such power. Nor did *Askew* offer any indication that *Ouellette* would not apply to out-of-state spills. Petitioner's contention that *Askew* carved out a special category of "sea-to-shore pollution" that is subject to state regulation regardless of where the pollution originates makes no sense. This argument would lead to the absurd conclusion that affected States, which have no authority to regulate pollution originating on neighboring States' land or in their inland waters, could nevertheless regulate pollution originating in neighboring States' territorial waters or in federal waters.

2. Nor does the Fifth Circuit's decision conflict with this Court's decisions recognizing the States' historic police powers to regulate wildlife within the State.

Lacoste v. Department of Conservation of State of Louisiana, 263 U.S. 545 (1924), upheld a Louisiana tax on animal pelt dealers for pelts "taken within the state," "before they move in interstate commerce." *Id.* at 550-51. The opinion includes general language recognizing the State's police power to impose the tax, but nowhere suggests that a State could regulate out-of-state hunting, let alone out-of-state pollution sources. And the Court's analysis under the Dormant Commerce Clause is utterly irrelevant here.

There is also no tension between the Opinion below and *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1978). *Baldwin* upheld a Montana law that charged nonresidents more than residents for a license to hunt elk in Montana. The Court rejected challenges under the Privileges and Immunities Clause and Equal Protection Clause. *Id.* at 388, 391. Like *Lacoste*, *Baldwin* has nothing to do with interstate water pollution.

As the Fifth Circuit recognized, Petitioners' argument ignores the fact that, unlike the in-state conduct at issue in *Lacoste* and *Baldwin*, the oil spill that harmed Louisiana wildlife occurred *outside* the State in federal waters that are subject *only* to federal law.

Indeed, in *Baldwin*, this Court made clear that the "States' interest in regulating and controlling those things they claim to 'own,' including wildlife, is by no means absolute" and cannot "preclude the proper exercise of federal power." *Baldwin*, 436 U.S. at 385-86.

3. Nor, finally, does the Fifth Circuit's decision conflict with precedent recognizing a general presumption against preemption. To begin with, no such general presumption could override the specific preemption holding of *Ouellette.* And no presumption against preemption applies when States regulate "in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000).

It is beyond question that there has been a history of significant federal presence in the regulation of activity on the Outer Continental Shelf. *See Gulf Offshore Co.*, 453 U.S. at 479 (recognizing "Outer Continental Shelf to be an area of 'exclusive federal jurisdiction'" (quoting 43 U.S.C. § 1333(a)(1))); *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 357 (1969) ("[F]ederal law is 'exclusive' in its regulation of [the Outer Continental Shelf] . . . ."). Likewise, there has been a long history of federal regulation of interstate water pollution. *See Ouellette*, 479 U.S. at 488 ("[T]he regulation of interstate water pollution is a matter of federal, not state, law . . . .").

Because the Fifth Circuit's decision does not conflict with any decision of this Court, review should be denied.

C. The Fifth Circuit's Interpretation of the CWA and OPA Savings Clauses Is Consistent with this Court's Precedent

Petitioners argue that the savings clauses in the CWA and OPA allow their state-law claims. But nothing in the Fifth Circuit's interpretation of those clauses conflicts with this Court's precedent or with the law of any other circuit. Petitioners are merely

seeking error correction and, in any event, the Fifth Circuit's interpretation of the savings clauses was correct.

1. As the Fifth Circuit's decision correctly recognized, this Court held nearly a century ago that savings clauses "preserve but do not create state law claims." Pet. App. 25 (citing *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 162 (1920), and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223-27 (1986) (Death on the High Seas Act savings clause "d[oes] not implicitly sanction the operation of state wrongful death statutes on the high seas," it only "preserve[s] the state courts' jurisdiction to provide wrongful death remedies under state law for fatalities on territorial waters")); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (savings clause does not prevent the ordinary operation of conflict preemption principles). The Fifth Circuit's holding that the CWA and OPA savings clauses do not permit States to apply penalties to out-of-state water pollution is entirely consistent with this long-established principle.

2. Nothing in the text of either the CWA or OPA helps Petitioners. The CWA savings clause has three paragraphs, but the paragraph expressly addressing a State's authority to "impos[e] any requirement or liability with respect to the discharge of oil" saves only state laws regulating oil spills "*within* such State," not state laws purporting to regulate out-of-state spills. 33 U.S.C. § 1321(o)(2).[2]

---

[2] The other two paragraphs of § 1321(o) are inapposite. Paragraph (1) indicates that nothing in § 1321 modifies the obligations of an owner or operator of a vessel or facility for

OPA's savings clause likewise does not permit Petitioners' claims. That clause provides that "[n]othing in this Act, the Act of March 3, 1851 (46 U.S.C. § 183 et seq.) [the Limitation of Liability Act], or section 9509 of Title 26 [the Oil Spill Liability Trust Fund]" prohibits the United States or States from, among other things, imposing fines for oil spills. *Id.* § 2718(c). But, as the Fifth Circuit recognized, the savings clause does not reference the CWA. Pet. App. 29-30. To be sure, OPA and the CWA are closely related and together form an integrated and comprehensive federal law governing oil spills. But the federal fines for oil spills are imposed by the CWA, 33 U.S.C. § 1321(b), not by OPA, and the CWA's savings clause, which appears in the very same section of the CWA that establishes the penalties for oil spills, saves state penalties *only for discharges within the State*, *id.* § 1321(o).[3]

---

damages to publicly or privately owned property. *Id.* § 1321(o)(1). It says nothing about a State's authority to impose penalties—which is addressed by Paragraph (2). Paragraph (3) generally saves state laws not in conflict with the Section itself. *Id.* § 1321(o)(3). Applying the general clause to state regulation of out-of-state discharges, however, would create conflict with the more specific § 1321(o)(2), which saves only state regulation of in-state oil spills.

[3] The Fifth Circuit also recognized numerous additional problems with Petitioners' interpretation of § 2718(c), including that their theory would have required the court to conclude that in OPA Congress impliedly repealed the CWA's more specific savings clause, which is limited to in-state discharges. Pet. App. 30-31. But, in fact, OPA actually amended the CWA's saving clause, § 1321(o)(2), to add language regarding removal costs while leaving the restriction to in-state discharges intact. Pub. L. No. 101-380, 104 Stat. 484, 532 (1990) (codified as 33 U.S.C. § 1321(o)(2)). It makes no sense to conclude that at the same

II. The Petition Does Not Present Any Circuit Conflict

Petitioners do not even attempt to argue that the Opinion below creates any circuit conflict. It demonstrably does not. The courts of appeals have uniformly applied the long-established rule recognized by *Ouellette*: only federal law and the law of the *source State* may govern interstate pollution claims.

In *North Carolina, ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010) (Wilkinson, J.), for example, the Fourth Circuit applied *Ouellette* in the context of air pollution to prevent an affected State from regulating a discharge originating within a neighboring State. The court held that "[t]here is no question that the law of the states where emissions sources *are located* . . . applies in an interstate nuisance dispute." *Id.* at 306. "The Supreme Court's decision in *Ouellette* is explicit: a 'court must apply the law of the State in which the point source is located.'" *Id.* (quoting *Ouellette*, 479 U.S. at 487).

In *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194-97 (3d Cir. 2013), the Third Circuit also applied *Ouellette* in the context of the Clean Air Act. The court of appeals noted that *Ouellette* construed the CWA as "allow[ing] States to impose higher standards on *their own* point sources." *Id.* at 194 (emphasis added) (quotation marks and alteration omitted). In light of the similarities between the CWA and the Clean Air Act, including their respective

---

time that Congress was amending § 1321(o)(2), it was impliedly repealing the provision by enacting § 2718(c).

savings provisions, the court of appeals followed *Ouellette* and held that "the Clean Air Act does not preempt state common law claims" where the claims are "based on the law of the state where the *source* of the pollution is located." *Id.* at 197 (emphasis added).

The Sixth Circuit similarly relied on *Ouellette* in *Her Majesty the Queen in the Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989), to hold that the CWA authorizes plaintiffs to bring claims "pursuant to the law of the *source* State," but not under the law of the *affected* State. *Id.* at 343 (internal quotation marks omitted).

The D.C. Circuit relied on *Ouellette* to reject an argument that a state permit was required before FERC could approve a license for a dam, explaining that "[t]he Commission is clearly only required to obtain a certification from the state where the discharge originates." *Nat'l Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1483 (D.C. Cir. 1990).

Federal district courts likewise adhere to the *Ouellette* rule. *See, e.g.*, *Lane v. Champion Int'l Corp.*, 827 F. Supp. 701, 702 n.2 (S.D. Ala. 1993) (holding that, in a suit filed by owners of land located in Alabama regarding release of dioxins into a waterway in Florida, "the substantive law of Florida—the source state—will govern"); *State Line Fishing & Hunting Club, Inc. v. City of Waskom, Tex.*, 754 F. Supp. 1104, 1113 (E.D. Tex. 1991) ("The state law of the source state (Texas) and not the affected state (Louisiana) applies to determine whether defendant's discharge of effluents into State Line Lake constitutes a nuisance.").

Simply put, the Fifth Circuit's decision is consistent with settled law across the circuits.

III. The Petition Does Not Present a Question of Recurring Importance Warranting this Court's Review

The Petition asks the Court to review the Fifth Circuit's application of a settled rule to a particular State's regulatory scheme; it does not raise a question "of recurring national importance." Pet. 37.

1. The controlling principle, again, is a settled one. Federal law governs interstate water pollution, leaving room only for the law of the source State to supplement federal law. The CWA, OPA, and this Court's decision in *Ouellette* reflect that longstanding rule. Petitioners do not appear to challenge that general rule. Rather, they ask this Court to carve out a specific exception allowing them to apply Louisiana's wildlife protection statute to out-of-state oil spills originating on the Outer Continental Shelf. This Court should not grant review merely to provide a narrow exception to the general rule that has governed interstate water pollution for decades.

2. The preemption issues presented by the Louisiana wildlife statute are particularly unsuited for review. Even if States generally had authority to impose penalties for oil spills on the Outer Continental Shelf that affected their coastlines, Petitioners' claim under the Louisiana wildlife statute would still fail on preemption grounds. As the district court recognized, the wildlife statute calls for penalties based on the "value" of the wildlife taken. La. R.S. 56:40.1. But Louisiana (and the other Gulf

States) are already seeking damages for the loss of natural resources under OPA, 33 U.S.C. § 2702(b)(2)(A). OPA expressly prohibits "double recovery . . . for natural resource damages," *id.* § 2706(d)(3), which makes it unlikely that Petitioners could ever recover under the Louisiana wildlife statute. Moreover, as the district court recognized, the "per animal" method of valuation prescribed by the Louisiana statute conflicts with OPA's method for valuing natural resources. Pet. App. 44 n.5. Thus, even apart from preemption by the CWA, the wildlife statute is in conflict with OPA's remedial scheme. The Fifth Circuit never had to reach these issues, which Respondents raised as alternative grounds for affirmance on appeal. But because Petitioners' claims would fail even independent of the reasons on which the Fifth Circuit relied, the issue raised in the Petition does not warrant review.

3. Finally, there is no danger that States will go uncompensated after the Macondo oil spill. Not only does OPA provide a comprehensive scheme of compensatory damages, including for damages to natural resources, Pet. App. 17-18, Congress passed the RESTORE Act in 2012, directing that eighty percent of the CWA civil penalties the federal government collects from the Macondo spill will be directed to the Gulf States, Pub. L. No. 112-141, §§ 1601-08, 126 Stat. 405 (2012) (codified at 33 U.S.C. § 1321(t)). The Fifth Circuit's recognition that Petitioners' claims are preempted does not deprive any State or local government from seeking full compensation for the oil spill or from fully protecting the State's natural resources.

CONCLUSION

For the reasons stated above, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVEN L. ROBERTS
SUTHERLAND ASBILL & BRENNAN LLP
1001 Fannin Street
Suite 3700
Houston, Texas 77002
(713) 470-6100

KERRY J. MILLER
FRILOT, LLC
110 Poydras St., Suite 3700
New Orleans, LA 70163
(504) 599-8194

BRAD D. BRIAN
MICHAEL R. DOYEN
DANIEL B. LEVIN*
*Counsel of record
MUNGER, TOLLES & OLSON LLP
355 So. Grand Avenue
35th Floor
Los Angeles, CA 90071
(213) 683-9100
Daniel.Levin@mto.com