No. 14-123

IN THE

Supreme Court of the United States

BP EXPLORATION & PRODUCTION INC., ET AL.,

Petitioners,

v.

LAKE EUGENIE LAND & DEVELOPMENT, INC., ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a party to a class action settlement who advocated settlement approval before the district court, filed no notice of appeal, and appeared as an appellee urging affirmance, now seek to switch sides in order to overturn that same settlement through a petition for certiorari?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Respondents are a certified settlement class comprised of many thousands of businesses operating in the Gulf Coast region. While the Rule 29.6 Statement of Petitioners is correct, it is incomplete in one regard. Although no named class representatives are publicly traded corporations, among the underlying class members who have filed claims or who remain eligible to file claims for settlement benefits are publicly traded companies. Some of these publicly traded companies have sought settlement benefits directly on their own behalf. Others belong to business or trade associations which have sought benefits, such as local chambers of commerce. Because settlement benefits are handled through an independent Claims Administrator on a confidential basis, there is no court record of the names of the publicly-traded companies that are among the many thousands of settlement claimants and beneficiaries.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Treatises

INTRODUCTION

This case is about a contract that BP signed but now wishes it hadn't. BP negotiated a comprehensive class settlement to escape liability for the devastation caused by the Deepwater Horizon explosion. Now, however, BP has developed buyer's remorse and wants out of the agreement it entered into.

For all of BP's high-sounding legal arguments, the crucial fact is that BP got the deal it wanted and argued to both the district court and the Fifth Circuit that the settlement should be enforced and made binding. All the courts below agree that BP fully understood what it signed in 2012. As Judge Southwick wrote for the Fifth Circuit, "[t]here is nothing fundamentally unreasonable about what BP accepted but now wishes it had not." PA 91a.[1]

The Petition fails for three different reasons:

First, BP's Petition challenges the Fifth Circuit's approval of a class settlement for which BP advocated in the district court and did not preserve any timely appeal. The Rule 23 and Article III questions that BP now seeks to raise stem from an appeal in No. 13-30095 in which BP was an appellee urging affirmance. PA 1a-2a. BP now seeks to piggyback on a different case, No. 13-30315, which turns exclusively on questions of contractual interpretation regarding the evidentiary proof sufficient for claims submissions under the settlement, and does not implicate the putative

[1] "PA" designates the Petitioners' Appendix.

question presented. PA 78a, 82a. The question in the one case in which BP did appeal – correctly answered based on numerous factual findings by the district court and affirmed by the Court of Appeals – is simply how the terms of one provision of a massive Settlement Agreement should be applied. There was no issue presented to the Fifth Circuit in No. 13-30315 seeking to set aside the class settlement on Rule 23, Article III, or any other grounds.

Second, even were the Court to overlook the procedural obstacles to granting review, there is no conflict among the circuits on the issue presented by BP. No Circuit has decreed that a settlement class may include only those to whom a settlement payment will ultimately be made. Nor has any Circuit demanded that each settlement class member submit, as a precondition to either class membership or recovery, the same proof that would have been required at a trial. As the Court recently noted, requiring plaintiffs even in the litigation class setting to prove that all class members will recover damages as a condition of class certification is "putting the cart before the horse." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

Indeed, all Circuits have affirmed class settlements in a wide variety of cases in which some prove-up, beyond class membership, was required for a claims payment. In the more exacting litigation context, the Court last Term denied multiple petitions for certiorari by defendants who also asserted that Article III forecloses the certification of any class in which each class member has not

already established harm. Last Term's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S. Ct. 1377 (2014), which BP ignores, reaffirmed that causation is not a matter of subject matter jurisdiction but rather must be alleged with sufficient specificity to survive a motion to dismiss. *See id.* at 1391 n.6 (fact of injury "must be adequately alleged at the pleading stage in order for the case to proceed").

Furthermore, there is no merit in BP's main argument for seeking certiorari, namely that the present case is an appropriate vehicle for resolving a purported conflict between, *inter alia*, the Seventh Circuit's decision in *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672 (7th Cir. 2009), and the Second Circuit's decision in *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006). (Pet. at 15-23) As Judge Davis wrote for the Fifth Circuit panel below in rejecting precisely the same argument:

> This case is not a vehicle … for us to choose whether *Kohen* or *Denney* articulated the correct test…. For the purposes of the present case, these questions are entirely academic because *BP's standing argument fails under both the* Kohen *test and the* Denney *test*…. [B]oth the named plaintiffs and the absent class members contemplated by the class definition include only persons and entities who can allege causation and injury in accordance with Article III.

PA 18a. In short, the rulings below are factbound decisions that do not conflict with the decision of any other Circuit.

Third, this is a settlement of economic losses arising from America's worst environmental disaster. The settlement's complex terms raise no issues of generalizable concern. The Oil Pollution Act of 1990, 33 U.S.C. §2701, *et seq.*, the statutory claim at the center of this settlement, was designed by Congress in the wake of the *Exxon Valdez* disaster to bring swift and effective relief to communities suffering from the widespread effects of environmental calamities. BP, aided by a team of sophisticated attorneys and experts, specifically chose the categories of businesses and individuals that could claim compensation for objectively documented losses under the settlement.

Both the district court and the Court of Appeals held that the settlement agreement means what it says. The appeal in No. 13-30315, the only case in which BP preserved its rights of appeal, is fundamentally a matter of contract interpretation between parties to a complicated settlement negotiated intensively over several months.

This case presents no Circuit conflict and no issue of broad national importance beyond the resolution of the consequences of a single environmental catastrophe. None of the well-established criteria for certiorari provides any reason that this Court should grant review.

STATEMENT OF THE CASE

A. The Proceedings Below and the Dispute over Compensation for Business Economic Loss Claims Under the Settlement.

On April 18, 2012, BP entered into the *Deepwater Horizon* Economic & Property Damages Class Settlement Agreement, a 1000-plus page document, developed over eight months of intensive negotiations, designed to provide relief to a broad geographical range of businesses and individuals in eight distinct claims categories.[2] That settlement was approved by the district court on December 21, 2012. PA 271A.

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[2] BP independently pled guilty to numerous criminal charges arising from the oil spill: eleven felony counts of seaman manslaughter, 18 U.S.C. §1115; one felony count of lying to Congress, 18 U.S.C. §1505; violating the Clean Water Act, 33 U.S.C. §§1319(c)(1)(A) & 1321(b)(3); and violating the Migratory Bird Treaty Act, 16 U.S.C. §§703 & 707(a). *U.S. v. BP Exp. & Prod., Inc.*, No. 12-CR-292 (E.D. La. 11/15/12) (Vance, J.) ("Guilty Plea Agreement"). See also *Factual Allocution*, attached as Exhibit "A" to Guilty Plea, ("BP . . . engaged in neglect through which the following persons were destroyed...."). BP also reached a separate settlement with the SEC in which it admitted that it lied to its shareholders concerning the oil-spill flow rate. *SEC v. BP, plc*, No. 12-2774 (12/10/12).

The only dispute raised by the Petition concerns one of these eight categories covering what are termed Business Economic Loss ("BEL") claims.[3] BP advocated settlement approval and did not appeal final approval.

Instead, BP appealed only from a subsequent dispute over the administration and eligibility interpretation of the BEL portion of the settlement. That appeal was taken to what was termed the "BEL Panel" and was subject to repeated review by the Fifth Circuit in No. 13-30315. PA 78a, 295a, 364a, 379a, *In re Deepwater Horizon*, 732 F.3d 326 (5th Cir. 2013).

Independently, a small group of objectors appealed the class settlement approval before what is termed the Certification Panel. PA 2a. Despite having endorsed settlement approval, and despite appearing before the Certification Panel as an appellee, BP switched sides to attack the settlement and class certification when the courts refused to allow BP to change its position regarding the requirements for a business to establish causation. *Id.*

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[3] The entire settlement agreement was filed into the district court record as Rec. Doc. 6276-1 through 6276-46. The Causation Framework for Business Economic Loss (BEL) Claims, discussed *infra,* is contained within Exhibit 4B, and appears in the record as Rec. Doc. 6276-9. The separate Compensation Framework for BEL Claims is contained within Exhibit 4C, and appears in the record as Rec. Doc. 6276-10.

Notwithstanding the asserted class and constitutional grounds for certiorari, the Petition concedes that the sole dispute concerns BEL claims. Pet. at 4-5. At issue are the BEL eligibility and claims resolution procedures, a distinct subset of the massive settlement processes for many categories of property damage and economic loss claims, including, *inter alia*, the seafood industry, the workers on BP's clean-up vessels, and various businesses and individuals economically affected by the spill and its aftermath in the post-spill containment and clean-up effort.

The BEL claims are controlled by Exhibit 4 of the Settlement Agreement, a set of protocols that went into effect, subject to the execution of a release, even before final approval of the settlement.[4] Exhibit 4 defines both eligibility and the compensation formula and is the subject of the Petition. Every aspect of the Petition turns on an interpretation of Exhibit 4, a comprehensive claims process that is a product of settlement negotiations, not Article III or

[4] Unlike in most proposed class settlements, the parties agreed that an independent settlement program and trust would be established to accept, process, and pay eligible claims, prior to and independent of formal Rule 23 approval, subject to the execution of an individual release. SETTLEMENT AGREEMENT, §4.1 (establishing Court Supervised Settlement Program); §4.4 (Process for Making Claims); §5.12 (Settlement Trust creation); §21.3 (completion of claims processing even if class settlement not finally approved); §26.1 (regarding the binding effect of the Agreement on the Parties); Exhibit 26 (Individual Release).

Rule 23. PA 85a, 87a ("we now examine the methodology for presenting and processing those claims, as written in the Settlement Agreement and as interpreted by the claims administrator in the October 10, 2012, Policy Statement").

In nutshell form, when a business submits a BEL Claim to the Settlement Program, the claim is required under Exhibit 4B of the Settlement Agreement to pass a specific causation test under the requirements negotiated by the parties. In most cases, the business is required to pass what is termed the "V-Test" by proving, with objective business records, that its revenues declined after the 2010 spill, and then recovered in 2011. Generally, the level of proof required for compensation under the settlement corresponds to the obviousness of the nexus to the Spill; for example, businesses farther from the coast have to demonstrate a deeper "V", meaning a more precipitous decline in revenues following the Gulf oil spill, and then a more dramatic recovery subsequently. Causation is presumed for a narrow group of Seafood, Tourism, and other businesses immediately in the Gulf waterfront zone (what are termed "Zone A" claims). Those are not the claims that BP has questioned in the press or in its filings, and are not discussed in the Petition. Rather, the claims subject to BP's complaints are businesses not directly touched by the oil spill, but which instead claim economic loss in the resulting depressed business environment. PA 217a-218a. Thus, the list of objectionable claims compiled by BP's counsel and appended to the Petition is almost exclusively directed to BEL claims by businesses in "Zone C" and "Zone D." PA 420a-444a. All of these

businesses submitted contemporaneous financial records to satisfy the settlement's objective documentation requirements. There is nothing at issue except the application of the compensation schedules for Zones C and D under the terms of the settlement. That's it.

To make a claim for BEL recovery, businesses had to submit financial records or other affirmative evidence in satisfaction of the V-Test or other objective standards that BP agreed would be used to establish causation "for settlement purposes".[5] If a business claimant could not satisfy Exhibit 4B's objective causation tests, the claim would be denied. While all affected-area businesses that did not opt out of the class settlement are bound by its terms, class membership does not guarantee any recovery; over 2,840 BEL Claims have been denied for failure to prove causation.[6]

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[5] SETTLEMENT AGREEMENT, §12.1 (further explaining: "BP reached this conclusion after considering the factual and legal issues in the Action, the substantial benefits of a final resolution of the Action, the expense that would be necessary to defend the Action through trial and any appeals that might be taken, the benefits of disposing of protracted and complex litigation, and the desire of BP to conduct its business unhampered by the distractions of continued litigation over the Released Claims").

[6] APPELLEES' OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION, No. 13-30315 (Nov. 22, 2013) [Doc 00512450441] at p. 11 fn. 19 (citing Exhibit A to CLAIMS ADMINISTRATOR'S STATUS REPORT (Oct. 11, 2013) [Rec. Doc. 11646-1], at p. 3).

Indeed, BP has appealed claims awards through the settlement's internal appeals process on the grounds that causation criteria have not been met. In one case now before the Fifth Circuit, BP is challenging a finding by the Claims Administrator and affirmed by the Settlement Appeals tribunal that rejected the following causation challenge by BP: "Claimant does not pass the Settlement Agreement's objective causation test, and similarly has no damage under the terms of the Settlement Agreement."[7]

As the court below found, the parties sought no further evidence of causation than that which is required by the settlement, and BP waived any objection as the claims process was put into effect: "BP did not object in this appeal to a decision made in October 2012 that the claims administrator was not to look at potential alternative causes for claimants' losses." PA 93a.

In the event that a BEL Claim passes Exhibit 4B's causation test, the compensation owed to that business is determined under a separate compensation framework, Exhibit 4C. The dispute in No. 13-30315 arises not from the eligibility criteria under 4B, but focuses, rather, on the resulting compensation under 4C. No other part of the massive settlement is at issue here.

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[7] BP'S REQUEST FOR DISCRETIONARY COURT REVIEW, at 1, Exhibit "D", SEALED APPELLEE'S MOTION TO DISMISS, No. 13-31296 (5th Cir. 1/23/14) (Doc. 00512510816).

Each BEL Claim payout is a stand-alone and uncapped portion of the Settlement Agreement. Because the settlement is uncapped, the number or magnitude of BEL claims paid does not have any impact on any other BEL claimant, nor on the members of any other claims category.[8] In addition, BP expressly agreed that the Claims Administrator and Program Vendors would "evaluate and process the information in the completed Claim Form and all supporting documentation under the terms in the Economic Damage Claim Process to produce the *greatest* Economic Damage Compensation Amount" to BEL claimants and others.[9]

B. Settlement Approval and Claim Processing.

In support of final approval, BP submitted numerous expert declarations to the district court. Several of BP's economic experts confirmed the application of Exhibit 4B to BEL Claimants, and testified that the causation and compensation frameworks were consistent with economic reality. PA 218a-224a ("These requirements are a reasonable method of confirming that the business's failure was caused by the spill, and not by other factors. *See* Fishkind Decl. ¶ 102").

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[8] The Cobb Respondents erroneously assert that the settlement involves a fixed fund. See COBB RESPONDENTS' RESPONSE at 2-7.

[9] SETTLEMENT AGREEMENT, §4.3.8 (emphasis supplied).

BP also submitted the testimony of Professors John Coffee and Geoffrey Miller on the topics of settlement class certification and class action settlement approval. Both experts testified in support of the proposed settlement, submitting that the class definition was objectively ascertainable and that the proposed Class Settlement fully complied with Article III and Rule 23. *See, e.g.,* PA 249a-250a (tying scope of release to compensation for likely harms). Such declarations reflect BP's affirmative endorsement of the Settlement Agreement before the district court, including on the very issues now presented to this Court.

Around the same time, the Claims Administrator, who was already processing BEL claims through the Settlement Program, confirmed with the parties that Exhibit 4B's objective standards would be used to determine causation, "without regard to whether such losses resulted or may have resulted from a cause other than the *Deepwater Horizon* oil spill." PA 313a. BP's lawyers formally agreed with the Claims Administrator's Policy, and repeatedly represented to both the Claims Administrator and the district court that where "the accurate financial data establish that the claimant satisfies the BEL causation requirement, then all losses calculated in accord with Exhibit 4C are presumed to be attributable to the Oil Spill." PA 325a n. 15 (quoting letter of BP Counsel Mark Holstein to Claims Administrator).

C. The BEL Dispute and the Present Appeal.

More than three months later, and only after running new projections regarding the cost of the BEL claims, BP filed a separate lawsuit to enjoin the Claims Administrator from paying BEL Claims under what BP contended was a misinterpretation of the Compensation Framework, Exhibit 4C. This post-approval dispute turned on intricate matters of interpretation of the Settlement Agreement, negotiated by BP, which resolved the case: specifically, the fine-grained accounting techniques used to calculate compensation to BEL claimants. That appeal ultimately resulted in a decision remanding the case to the Claims Administrator to determine whether the definition of "Variable Profit" in Exhibit 4C should "match" expenses to the "corresponding" revenues under one interpretation of accounting standards. Initially, the district court rejected BP's interpretation, dismissed the suit against the Claims Administrator, and denied the injunction.[10] BP's appeal, docketed as No. 13-30315, led to the Fifth Circuit's October 2, 2013 decision, in which this interpretive accounting issue was remanded to the district court for further consideration on the accounting issues. PA 6a (describing *In re Deepwater Horizon I*, 732 F.3d 326 (5th Cir. 2013)). The district court, upon remand, in part reversed itself, agreed with BP as to some of the matching requirements, and has instructed the Claims Administrator to implement a new matching

[10] Dist. Ct. Rec. Docs. 8812 and 9202.

policy that is clearly beneficial to BP. PA 84a. The question of the proper accounting principles to determine the scope of harm to any particular claimant is a matter that continues through challenges and case-by-case determinations at the district court level. It is not presented in the Petition.

On the issue of causation, however, the district court found that BP's settlement regrets were directly contrary to the positions BP advocated before the district court at the time of settlement approval and to the record BP had presented to the court. PA 317a-324a. Indeed, BP's lead counsel expressly told the district court that there would be no causation requirement beyond that set out in the settlement: "We've presumed causation. **It's irrebutable.**" PA 322a (emphasis in original). Based upon detailed factual findings recounting BP's affirmative representations concerning settlement structure and implementation, the district court held that BP was judicially estopped from changing positions after final approval, PA 326a, a ruling that was affirmed by the Fifth Circuit. PA 94a.

Again, BP's appeal in No. 13-30315 began as a challenge to the interpretation of the compensation framework, Exhibit 4C, and had nothing to do with the separate causation framework, Exhibit 4B. PA 330a – 331a n.22 (quoting Judge Southwick from *In re Deepwater Horizon I*). Indeed, when the appeal was initially argued in July of 2013, Judge Clement asked about the causation issue, and BP's counsel confirmed that Exhibit 4B was not in dispute. Pressed further, BP's counsel acknowledged that the

objective standards and requirements for causation were a negotiated compromise, for which BP received full and valid consideration. PA 340a.

D. The Separate Appeal to the "Certification Panel" in No. 13-30315.

Only after the October 2, 2013 decision in No. 13-30315 did BP change its position to argue that, wholly apart from the agreed-to objective tests under Exhibit 4B, either Article III or Rule 23 required an additional and unspecified causal-nexus test to be applied by the Claims Administrator. BP had never presented that issue to the district court nor preserved it in any of its appeals. The issue was raised in the settlement approval appeal, No. 13-30095, which had been brought by several groups of class-member objectors.

On January 10, 2014, the Fifth Circuit rendered its decision in No. 13-30095. PA 1a. The Certification Panel held that the Class Settlement Agreement fully complied with Article III, the Rules Enabling Act, and Rule 23. Even accepting the dissent's formulation of the standing requirements in a settlement class, the court found that the class "does not include any members who 'concede' that they lack any 'causally related injury,'" thus ending the inquiry under *Denney* v. *Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), "which does 'not require that each member of a class submit evidence of personal standing' so long as every class member contemplated by the class definition 'can *allege* standing.'" PA 22a. The Certification Panel held that

under "the Class Definition, therefore, the class contains only persons and entities that possess Article III standing." PA 21a.

E. The BEL Panel Ruling on Causation.

On March 3, 2014, the BEL Panel affirmed the district court's interpretation of the Settlement Agreement, and denied injunctive relief. PA 78a. The court found that BP's change of heart was an attempt to "dismantle the complex framework of exemptions, presumptions, and formulas that allow business claimants to submit evidence of their income and expenses before and after the BP-caused disaster." PA 88a. The requirements set forth in the Settlement Agreement may not be "as protective of BP's present concerns as might have been achievable" in negotiations, noted Judge Southwick, "but they are the protections that were accepted by the parties and approved by the district court." PA 90a-91a.

F. The En Banc Stage.

BP filed Petitions for Rehearing and Petitions for Rehearing *En Banc* in both appeals, which were all denied on May 19, 2014. PA 379a, 394a. In denying rehearing in No. 13-30315, the BEL Panel summarized this contractual dispute as follows:

> Through Exhibit 4B, the parties agreed that claims would be governed by an objective formulae. BP argues that an additional duty on the Claims

> Administrator exists to ensure that every claim contains a direct causal nexus to BP's conduct. That requirement does not arise under the agreed terms of Exhibit 4B, and it does not arise under constitutional or other requirements for a class action.

PA 372a. Consistent with the district court's fact findings, the panel held that causation was established by the settlement framework: "the Claims Administrator must establish causation for settlement purposes with respect to every claim under the specific criteria and formulae that BP and Class Counsel agreed would be utilized for that purpose." PA 376a.

REASONS TO DENY THE WRIT

I. BP Got What It Asked for Below.

BP's certiorari petition purports to address the conditions for approval of a class settlement, not the particulars of applying the BEL damages calculation. On the question presented, however, BP was a settlement proponent in the district court, and urged affirmance in the Circuit. BP cannot properly claim error below for at least two reasons.

First, BP did not appeal from the district court's approval of the class action settlement. "[A]n appellate court may not alter a judgment to benefit a nonappealing party." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). Thus, an appellee cannot seek to enlarge its rights (or curtail its opponent's rights)

on appeal unless it files a cross-appeal. 15A Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* §3904 (2d ed.). As this Court has held: "Absent a cross-appeal, an appellee . . . may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) (quoting *United States v. American R. Express Co.*, 265 U.S. 425, 435 (1924) (Brandeis, J.)).

As a result, the Fifth Circuit could not have erred in failing to refashion the settlement to BP's liking: "where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken." *Morley Const. Co. v. Maryland Cas. Co.,* 300 U.S. 185, 191 (1937) (citation omitted). Simply put, "an appellate court may not alter a judgment to benefit a nonappealing party. This Court, from its earliest years, has recognized that it takes a cross-appeal to justify a remedy in favor of an appellee." *Greenlaw*, 554 U.S. at 244-45. "Indeed, in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule." *Neztsosie*, 526 U.S. at 480. Because BP did not cross-appeal from the district court's order approving the settlement agreement and certifying the settlement class, BP cannot

properly enlist this Court to assign error to its own agreement.[11]

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[11] BP previously argued that, over a 75-year span, four cases supported the proposition that a prevailing party could nonetheless appeal. BP Reply in Support of Application to Recall and Stay Mandate at 12-13 n.1, citing *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Camreta v. Greene*, 131 S. Ct. 2020 (2011); *Deposit Guar. Nat. Bank v. Roper*, 445 U.S. 326 (1980); and *Electrical Fittings Corp. v. Thomas & Betts*, 307 U.S. 241 (1939). These cases are inapposite and only confirm that BP should not be permitted to appeal. In three of the cases, the party seeking to appeal won below but along the way suffered an adverse ruling that it had opposed and that would "have a significant future effect ...." *Camreta*, 131 S. Ct. at 2030. *See id.* (officials won on qualified immunity but were allowed to appeal holding that they violated the Fourth Amendment); *Roper*, *supra* (class representatives were prevailing parties because the defendant tendered judgment, but they were allowed to appeal the denial of class certification); *Elec. Fittings*, *supra* (petitioners won a patent infringement suit on the basis of non-infringement, but they were "entitled to have [the] portion of the decree [finding that the patent was valid] eliminated"). None of these three cases involved a party, like BP, that successfully argued one approach in the district court and then appealed, taking the opposite approach. Each of the three involved the ability to continue pursuing a position advocated below. Finally, *Windsor* involved a legal challenge to the constitutionality of the Defense of Marriage Act. Even though the United States had abandoned its defense of the statute, the Court nonetheless recognized that the tendered tax payments and the refund refusal "establish[ed] a controversy sufficient for Article III

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Second, BP is judicially estopped from switching its position on the settlement. Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted). The doctrine "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *Id.* (citing 18 MOORE'S FEDERAL PRACTICE § 134.30, p. 134-62 (3d ed. 2000)). "[C]ourts have uniformly recognized that its purpose is to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. at 749-50 (internal quotation marks and citations omitted). *See also id.* ("judicial estoppel prevents parties from 'playing "fast and loose with the courts."').

The district court and the Court of Appeals both found that BP's subsequent change of heart was an attempt to "dismantle" the settlement that BP had advocated to the district court. PA 88a. The district court therefore held that BP was judicially estopped from subsequently claiming that the class definition admitted unsustainable claims. PA 317a. That ruling was part of the broad affirmance by the

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jurisdiction." 133 S. Ct. at 2686.

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Fifth Circuit, PA 94a. The estoppel ruling is not challenged (or even mentioned) in the Petition.

Here, as in *New Hampshire,* the record is clear that (1) BP's challenge to class certification is "clearly inconsistent" with its earlier vigorous defense of class certification; (2) BP successfully persuaded the district court to certify the class, such that judicial acceptance of BP's subsequent inconsistent position would "create 'the perception that either the first or the second court was misled'"; and (3) if not estopped, BP could "derive an unfair advantage or impose an unfair detriment on" the class by having class members bound into a settlement that has been materially altered. 532 U.S. at 750 (citations omitted).

In sum, BP is ill-suited to present these issues, since it agreed to the Class Settlement, decided which businesses would be included in the class definition, and supported Rule 23 approval in the district court.

II. There Is No Conflict of Law to Resolve.

A. There is No Circuit Split on Class Composition.

No Circuit has held that the definition of a settlement class must be drawn to include only those to whom a settlement payment will ultimately be made. Indeed, ten different Circuits have affirmed class settlements in a wide variety of cases in which some prove-up, beyond class membership, was

required.[12] Nor is this an area where the courts are ever likely to diverge. The MANUAL FOR COMPLEX LITIGATION, FOURTH §21.661 expressly recognizes that an "administrator or special master may be charged with reviewing the claims and deciding whether to allow claims that are late, deficient in documentation, or questionable for other reasons." Because the MANUAL is widely followed by federal courts throughout the country, there is unlikely to be a Circuit split on what the MANUAL counsels are best practices.

BP's putative conflict spotlights *Denney* v. *Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006). Pet.

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[12] For examples of Circuit cases describing proof-of-claim processes, *see, e.g., Olick v. John Hancock Mut. Life Ins. Co.*, 106 F. App'x 736, 737 (1st Cir. 2004); *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006) (noting "[w]e do not require that each member of a class submit evidence of personal standing"); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 525 (3d Cir. 2004); *ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co.*, 472 F.3d 99, 108 (4th Cir. 2006); *Union Asset Mgmt. Holding AG v. Dell, Inc.*, 669 F.3d 632, 640 (5th Cir. 2012); *Morris v. Tate (In re S. Ohio Corr. Facility)*, 24 F. App'x 520, 524 (6th Cir. 2001); *Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 245 (7th Cir. 2014); *In re Wireless Tel. Fed. Cost Recovery Fee Litig.*, 396 F.3d 922, 934 (8th Cir. 2005)**,** *reh'g & reh'g en banc denied*, 2005 U.S. LEXIS 4173 (8th Cir. 2005), *cert. denied*, *Stainless Sys. v. Nextel W. Corp.*, 546 U.S. 822 (2005); *Nakash v. NVIDIA Corp. (In re NVIDIA GPU Litig.)*, 539 F. App'x 822, 824-25 (9th Cir. 2013); *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1326 (11th Cir. 2002).

at 15. *Denney* concerned civil claims for fraudulent tax advice brought on behalf of all investors in tax shelters, regardless whether they had been audited or fined as a result. A non-settling defendant and several class members objected to a settlement class that included persons who might ultimately not recover damages. The class was challenged for including individuals who had received the allegedly improper advice but who had not been audited or for whom the statute of limitations had run for adverse governmental action. 443 F.3d at 264. The Second Circuit rejected these arguments, in a manner that presents no conflict, in favor of an objectively defined class comprised of *all* recipients of the improper tax advice: "[t]he future-risk members of the Denney class have suffered injuries-in-fact, irrespective of whether their injuries are sufficient to sustain any cause of action." *Id.* at 265.

Standing for purposes of a settlement class context is entirely consistent with the standing required for class membership in *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672 (7th Cir. 2009), and the Fifth Circuit's own *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298 (5th Cir. 2009). *See Deepwater Horizon II*, 739 F.3d at 801-802. No court has required proof of harm at the certification stage as a condition of Article III standing. Nor does Rule 23 require proof beyond what satisfies its provisions at the class certification stage. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1197 (2013) (a securities fraud class "was not required to prove the materiality of Amgen's alleged misrepresentations and omissions at the class-certification stage").

This Court repeatedly heard claims last Term that Article III standing was a bar to class certification unless the entitlement to recovery of each class member is established as a predicate to class certification. These petitions were filed by defendants who, unlike BP, actually contested class certification, and certiorari was uniformly denied. *See Butler v. Sears*, 727 F.3d 796 (7th Cir. 2013), *cert. denied,* 134 S. Ct. 1277 (2014); *Glazer v. Whirlpool Corp.,* 722 F.3d 838 (6th Cir. 2013), *cert. denied,* 134 S. Ct. 1277 (2014); *see also BSH Home Appliances Corp. v. Cobb*, 134 S. Ct. 1273 (2014) (denial of certiorari from unpublished opinion, on same issue as *Butler* and *Glazer*). Even so, the Seventh Circuit is another of the putative sources of conflict identified in the Petition. [13] *See also Suchanek v. Sturm Foods, Inc.,* No. 13-3843, 2014 WL 4116493, at *6 (7th Cir. Aug. 22, 2014) ("If the court thought that no class can be certified until

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[13] In BP's earlier Reply in support of a stay in this Court, BP dismissed the no standing cases as "entirely irrelevant" to this Petition. Reply at 8. To the contrary, the question presented by BP here is virtually identical to that in both *Butler* ("Whether a product liability class may be certified where it is undisputed that most members did not experience the alleged defect or harm") and *Whirlpool* ("Whether a class may be certified under Rule 23(b)(3) even though most class members have not been harmed and could not sue on their own behalf"). *See* Pet. for Writ of Cert., *Sears, Roebuck & Co. v. Butler*, No. 13-430, 2013 U.S. Briefs 430 (Oct. 7, 2013); Pet. for Writ of Cert., *Whirlpool Corp. v. Glazer*, No. 12-322, 2012 U.S. Briefs 96255 (Sept. 14, 2012).

proof exists that every member has been harmed, *it was wrong*.") (emphasis added).

B. BP Ignores the Court's Recent Decision in *Lexmark*.

The court below found that the BP class consisted only of persons who had properly alleged standing under Article III: "BP's standing argument fails under both the *Kohen* test and the *Denney* test," concluded the Certification Panel, because both the named plaintiffs and the absent class members "include only persons and entities who can allege causation and injury in accordance with Article III." PA 18a.

Nor were the rulings of the courts below based on untested assertions: prior to the settlement in this case, the class claims bundled together in the district court in a class action master complaint for property damages and economic loss claims had been tested for plausibility on motions to dismiss by BP and other defendants.[14]

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[14] *See In re Oil Spill,* 808 F. Supp. 2d at 947 (granting in part and denying in part motions to dismiss by BP and other Defendants directed against the "B1 Master Complaint," which served as both a class action complaint and a master pleading into which individual businesses and other plaintiffs could join: "The 'BI' bundle includes all claims for private or non-governmental economic loss and property damages. There are in excess of 100,000 individual claims encompassed within the B1 bundle.").

Last Term, this Court similarly distinguished a motion to dismiss for failure to state a claim from the standing necessary for Article III subject matter jurisdiction: "[i]f a plaintiff's allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed; if they are sufficient, then the plaintiff is entitled to an opportunity to prove them." *Lexmark Int'l v. Static Control Components,* 134 S. Ct. 1377, 1391 n.6 (2014). BP does not even mention *Lexmark,* though the decision is remarkably on point. [15] *Lexmark*

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[15] In its reply in support of a stay, BP attempted to respond to respondents' reliance on *Lexmark* by arguing that because *Lexmark* involved a motion to dismiss, it actually "undercuts respondents' arguments by emphasizing that Article III standing 'requires' 'that the plaintiff's injury be fairly traceable to the defendant's conduct." BP Reply in Support of Stay at 5. Yet BP does not mention *Lexmark* despite devoting all of Section II to the argument that "the Fifth Circuit's decisions are inconsistent with this Court's cases."

The fact that *Lexmark* involved a motion to dismiss (for lack of statutory standing under the Lanham Act) rather than a class settlement is a distinction without a difference. The Court in *Lexmark* held that the existence of a statutory cause of action turned on the allegations of harm (like the claims against BP under the OPA). Thus, "the question [the *Lexmark* case] presents is whether [respondent] Static Control falls within the class of plaintiffs whom Congress has authorized to sue …." 134 S. Ct. 1387. Here, the fact that BP and other defendants had already lost on their motions to dismiss does not work to deprive the plaintiff class of Article III standing; rather it confirms their standing under the

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furthers a line of cases in which this Court has sought to limit the use of Article III as a jurisdictional barrier to the ability of federal courts to resolve the merits of disputes. *Cf. Reed Elsevier, Inc. v. Muchnick,* 559 U.S. 154, 161 (2010) (summarizing limits on "drive-by" jurisdictional rulings in favor of "claim-processing rules" based on the substantive merits of the cause of action).

Moreover, following the rulings on the initial motions to dismiss, no party sought to challenge the district court's denial of such motions. Instead, negotiations by BP to resolve the class claims ensued and the settlement was reached before trial. "[H]ad the class in this case been certified under Rule 23 for further proceedings on the merits rather than for settlement," the Court of Appeals observed, "the district court might ultimately have had occasion to apply a stricter evidentiary standard." PA 27a. But, quoting *Amgen,* the Certification Panel correctly observed that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." PA 10a.

Nor are any of this Court's major standing cases germane to this dispute. In *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), this Court addressed the question of whether public interest watchdogs have a requisite stake in civil actions to enforce the environmental laws where the suing plaintiffs could allege no traceable harm to themselves individually:

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relevant statutory standard.

"We have consistently held," the Court confirmed, "that a plaintiff raising only a generally available grievance about government … and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Id.* at 573-74. *See also Lewis v. Casey,* 518 U.S. 343, 358 (1996) (finding that Article III standing is not a "mere pleading requirement[]" but instead requires claim of specific harm).

The lack of standing of a self-defined bystander to the dispute has no bearing on a business claiming economic harm from the responsible party under an expansive compensation statute like the Oil Pollution Act. The Fifth Circuit thus accepted *Lujan*'s and *Lewis*'s requirement that the elements of Article III standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case [which] must be supported … with the manner and degree of evidence required at the successive stages of the litigation," PA 12a, and correctly held that the evidentiary frameworks set forth in the Settlement Agreement "are an agreed-upon methodology for presenting proof establishing that a claimant's loss was caused by the *Deepwater Horizon* disaster." PA 372a.

The lower court rulings are entirely consistent with general standing law that allows a claim by a party facing a "reasonable probability of future harm." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754 (2010). At issue in *Monsanto* was the standing of alfalfa farmers who feared potential contamination of their crops if genetically-altered

seeds were allowed to come on the market. The "conventional alfalfa farmers" claimed "a reasonable probability" of potential future harm, as well as costs of testing and obtaining foreign seeds to avoid compromised alfalfa. *Id.* at 2743, 2754. This Court concluded that "[s]uch harms, which respondents will suffer even if their crops are not actually infected with the Roundup ready gene, are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis." *Id.* at 2755.

Because BP settled these claims, the individual merits of each claim have never been litigated. At the same time, BP's repeatedly voiced assertion that uninjured parties are being compensated is unsupported. No court has ever found that any claim without a traceable injury was deemed eligible for payment. Standing at the pretrial, pre-summary judgment stage of litigation is a matter of adequate pleading, not of ultimate proof, and all the more so in the settlement context in which the fact of settlement obviates the need for trial. Nonetheless, per *Lexmark,* actions for economic damages can proceed to trial (and hence logically, as here, to settlement) once plaintiffs have adequately alleged the elements of their claims at the pleading stage.

III. The Petition Presents a Fact-Specific Question of No Significance Beyond the Immediate Settlement of Litigation

This case is nothing more than a falling out between settling parties. Every aspect of the dispute

turns on the terms of the intricate settlement. With huge potential liabilities, and grave uncertainties about the application of substantive law, the parties settled the case, and they are now bound by their consent. If BP is now unhappy with the deal it entered into, so be it. This Court does not engage in error correction, much less offer a second bite at the apple for a party regretting its contractual choices.

Parties settle cases to avoid the risks and expenses of trial. The point of settlement is that there be no trial, which in the class action context means that there will be no individual-specific proof of liability or damages. *See Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 620 (1997) (finding that manageability requirement of class actions not applicable in settlement because "the proposal is that there be no trial"). Further, even in the class action context, the parties are free to contract for "relief greater than that which plaintiffs could reasonably have expected to achieve at trial." *Evans v. Jeff D.,* 475 U.S. 717, 743 (1986).

Settle on an advantageous basis is what BP did, or at least it thought so at the time. BP was sued under the expansive liability standards of the Oil Pollution Act ("OPA"), 33 U.S.C. §2702(b)(2)(E), which allows recovery for "loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant." The boundaries of OPA liability are untested, and BP together with other defendants failed in seeking dismissal of the underlying OPA claims. *In re Oil Spill,* 808 F. Supp.

2d at 947. The settlement was a solution to the broad liability exposure, including for punitive damages, presented by the broad group of claimants who had survived motions to dismiss.

BP's Petition thus begins with the false premise that the settlement class "includes vast numbers of members who have not suffered any injury caused by the defendant." Pet. at 2. This is contrary to the record and to the findings of the courts below.[16] Both the district court and the Court of Appeals have interpreted the Settlement Agreement consistent not only with its clear and unambiguous language, but also with BP's numerous statements and representations about how the Class Definition and Causation Framework were to be applied to BEL Claims.

The BEL Panel summarized the finding of the Court of Appeals and the district court as follows:

> Neither the Settlement Agreement's terms nor its implementation ignore causation. Instead, the parties explicitly contracted that traceability between the

[16] BP confuses the facts of record with extrajudicial claims it advanced through an unprecedented series of advertisements attacking claimants, plaintiffs' counsel, and even the Claims Administrator. The full page ads ran many times a week in the New York Times, Wall Street Journal and other high-visibility newspapers. The ads stopped only when this Court denied BP's application for a stay.

> defendant's conduct and a claimant's injury would be satisfied at the proof stage, that is, in the submission of a claim, by a certification on the document that the claimant was injured by the *Deepwater Horizon* disaster.

PA 89a. As a result, BP's legal arguments are wholly predicated on facts contrary to those found by multiple lower courts. *Cf., e.g., Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (Supreme Court "cannot undertake to review concurrent findings of fact by two courts below…."). In other words, prior to even reaching the questions BP asks this Court to review, the Court would have to wade into the record and reverse two lower courts' (correct) findings of fact.

Even if the Court were inclined to recreate a fact record, BP provides no evidentiary support for its argument. When BP states that the record reflects many awards to parties not entitled to recover, every citation is to a self-serving declaration by one of BP's own lawyers, not to any finding below. *See* Pet. at 8-9 (citing Declaration of Allison Rumsay, partner at Arnold & Porter, presenting untested lawyer say-so not accepted by any court, PA 416-444).[17]

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[17] The three *amicus* briefs filed in support of BP – by the Government of the United Kingdom, *et al.*, the U.S. Chamber of Commerce, *et al.,* and the Federation of German Industries, *et al.* – offer nothing new and provide no basis for this Court to grant review. First, like BP, all of the *amici* ignore the fatal problem that BP supported

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Even a cursory review of the record shows that the lower court findings are well supported. In letters, briefs, e-mails, declarations, proposed findings, and during hearings before the court, BP's attorneys and experts repeatedly confirmed that the parties intended the settlement framework to be the sole controlling evidentiary framework. BEL claimants established their eligibility through the objective causation requirements set forth in Exhibit 4B and established their entitlement to

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the settlement below and thus cannot now challenge the settlement on appeal. Second, parroting BP's arguments, all three *amici* mischaracterize the decisions below as approving a settlement that includes class members who were not injured by the oil spill. United Kingdom Br. at 3; U.S. Chamber Br. at 3-4, 10-11; Federation of German Indus. Br. at 4-5, 7. See also COBB RESPONDENTS' RESPONSE at 2-7) (repeatedly making this same mischaracterization). These *amici* simply ignore all of the findings to the contrary by the Fifth Circuit: "[B]oth the named plaintiffs and the absent class members contemplated by the class definition include only persons and entities who can allege causation and injury in accordance with Article III." PA 18a. Finally, *amici* claim that the decisions below will discourage corporate defendants from settling disputes or even doing business in the United States (United Kingdom Br. at 8; U.S. Chamber Br. at 5; Federation of German Indus. Br. at 15), but precisely the opposite is true. Corporate defendants (both foreign and domestic) should take comfort in the decisions below, which hold that a party will be legally bound by a contract that it voluntarily signed.

compensation through revenue and variable profit declines as determined under Exhibit 4C. For purposes of the settlement, compliance with Exhibits 4B and 4C was stipulated to establish harms attributable to the Spill, with no further factual investigation to determine whether the declines might have been due to other causes.[18] Even at the initial arguments in the Fifth Circuit, BP insisted that the causal-nexus issue was not before the Court, and explained that the objective standards and requirements for causation were a negotiated compromise. PA 340a.

In the actual settlement appeals process mandated by the settlement agreement, the question of causation with regard to specific claimants is independently and adequately reviewed. Indeed, BP has availed itself of the settlement procedures to challenge individual issues of causation. For example, in one of the cases currently before the Fifth Circuit, BP asserted, "Claimant does not pass the Settlement Agreement's objective causation test

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[18] The district court opinion quotes the Settlement Administrator, who, with the consent of the parties, decreed, "The Settlement Agreement does not contemplate that the Claims Administrator will undertake additional analysis of causation issues beyond those criteria that are specifically set out in the Settlement Agreement. Both Class Counsel and BP have in response to the Claims Administrator's inquiry confirmed that this is in fact a correct statement of their intent and of the terms of the Settlement Agreement." PA 313a (emphasis removed).

…."[19] In another case, also currently on appeal to the Fifth Circuit, the internal appeals tribunal over BP's evidentiary challenge held that: "the award in favor of claimant is affirmed.… These calculations allow the claimant to satisfy the appropriate causation test."[20]

Far from rejecting causation, the claims process makes express determinations of the causal link of harms to the Deepwater Horizon, exactly as mandated by the settlement agreement. That BP is currently appealing those determinations in the Fifth Circuit shows an independent and adequate ground for relief – yet another reason to deny certiorari.

Evidently suffering from a case of buyer's remorse, BP only subsequently began to argue that Rule 23 and the Rules Enabling Act somehow required the Settlement Agreement to be interpreted differently. The claim that "unrebutted record evidence" establishes awards to businesses "whose purported losses were not fairly traceable to the spill," Pet. at 8, is unsupportable. The settlement is paying claims pursuant to a formula that BP itself told the district court was narrowly tailored to viable claims:

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[19] BP'S REQUEST FOR DISCRETIONARY COURT REVIEW, at 1, Exhibit "D", SEALED APPELLEE'S MOTION TO DISMISS, No. 13-31296 (5th Cir. 1/23/14) (Doc. 00512510816).

[20] *Brief of Sealed Appellee*, No. 13-31302, at 8 (5th Cir. 6/9/14) (Doc. 00512657245).

> [T]he class definition takes pains to specify a list of exclusions, for two reasons: (1) to exclude claims that BP does not believe are even colorably compensable under OPA or maritime law; and (2) to avoid the inclusion of claims that could not be efficiently resolved by a definable and administrable claims framework…. The result is a class that is neither sprawling nor under-inclusive, but instead carefully tailored to what the parties could reasonably agree on against the backdrop of the uniform body of OPA and maritime law that the Court has ruled is applicable….[21]

At bottom, the only issue is whether the parties to the settlement contract intended and agreed that eligibility for recovery under the terms of the settlement would be governed by the objective causation requirements in Exhibit 4B of the Settlement Agreement, or, as BP contended after settlement approval, there would be a second undefined, unspecified, and non-contractual causation analysis. PA 93a. Even the dissents point only to other, non-BEL issues not addressed in the Petition, as raising questions about settlement

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[21] *See* BP MEMO IN SUPPORT OF MOTION FOR FINAL SETTLEMENT APPROVAL (Aug. 13, 2012) [Rec. Doc. 7114-1], at pp. 11-12.

claims where causation is presumed, as with oyster beds that were wiped out after the oil spill.[22]

The claims below continue to be processed, some approved and some denied, in accordance with the requirements of the settlement, as all courts below have found. Neither *Lujan* nor *Lewis*, nor any other decision of this Court, supports the notion that Article III impedes the ability of the class to enforce the carefully crafted settlement at issue here – a settlement that BP agreed to and vigorously defended below.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

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[22] *See* PA 397a-398a (Clement, J., dissenting from denial of rehearing en banc) ("Section I of Exhibit 4B establishes that certain individuals and entities, based solely on their geographical location or the nature of their enterprise, 'are not required to provide *any evidence* of causation.' This subset of claimants is entitled to a presumption of causation. Standing alone, geographical proximity, or the nature of one's enterprise, is insufficient to satisfy Article III causation"); *see also Deepwater Horizon II*, 739 F.3d at 823 (Garza, J., dissenting) (same).

Respectfully Submitted,

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