No. ___

In the Supreme Court of the United States

BP EXPLORATION & PRODUCTION INC.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit erred by giving mere lip service to the rule of lenity and penal canon when imposing Clean Water Act civil fine liability under 33 U.S.C. § 1321(b)(7) on the owners of an offshore well, where oil discharged to federal waters not from the well itself but from a vessel and its associated equipment connected to the well.

PARTIES

The parties are the United States, BP Exploration & Production Inc., and Anadarko Petroleum Corporation.

CORPORATE DISCLOSURE

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

BP p.l.c. is a corporation organized under the laws of England and Wales. Shares of BP p.l.c. are publicly traded via American Depository Shares on the New York Stock Exchange and via ordinary shares on the London Stock Exchange. BP p.l.c. has no parent corporation, and no publicly held corporation owns 10% or more of the stock of BP p.l.c.

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PETITION FOR A WRIT OF CERTIORARI

BP Exploration & Production Inc. ("BPXP") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals panel's opinion and supplemental opinion are reported at 753 F.3d 570 (App1a-12a) and 772 F.3d 350 (App13a-26a). The court's order denying rehearing en banc and the accompanying dissent of six judges are at 775 F.3d 741 (App61a-64a). The district court's opinion is at 844 F. Supp. 2d 746 (App27a-59a).

JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. §§ 1331, 1333, 1345, 1355, and 33 U.S.C. §§ 1321(b)(7)(E) and 1321(n). BPXP timely appealed under 28 U.S.C. § 1292(a)(3). The court of appeals entered judgment on June 4, 2014, and denied rehearing on January 9, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

33 U.S.C. §§ 1319 and 1321 and 40 C.F.R. § 110.3 are reproduced in the Appendix.

STATEMENT OF THE CASE

By any measure, this case is exceptionally important, as six judges recognized in dissenting from the denial of rehearing en banc below. The government seeks from BPXP a Clean Water Act civil penalty approaching $13.7 billion that would be the largest such penalty in history by a factor of

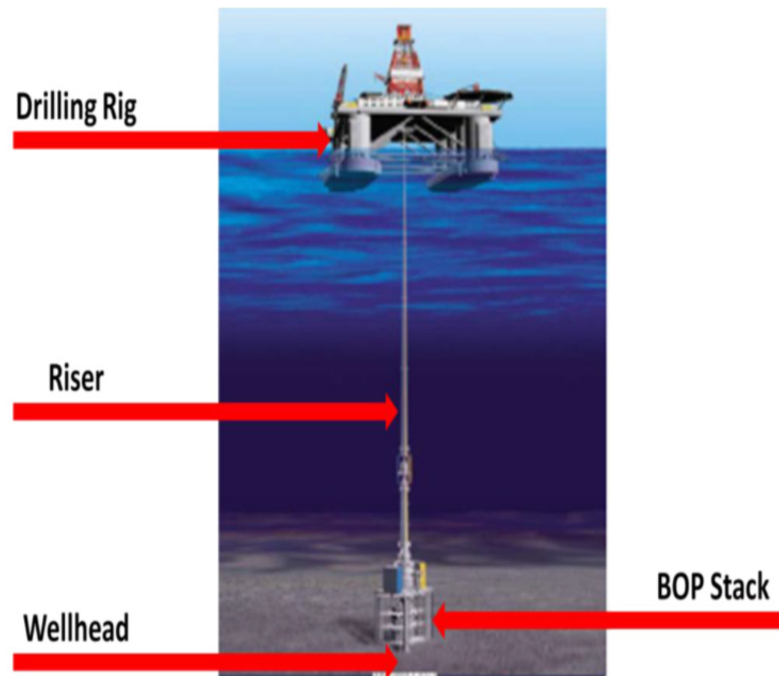
more than 400 and would represent more than half of all environmental enforcement proceeds ever collected by EPA through the Department of Justice. The magnitude of this case warrants the Court's review to ensure that this historically large penalty is collected, if at all, in a manner fully consistent with law.

The Court's review is also urgently needed to reaffirm the continued vigor of the constitutionally grounded rule of lenity and penal canon in environmental enforcement cases like this one. Here, the government, the district court, and the court of appeals panel (in an initial opinion and an unusual supplemental opinion) found BPXP liable by invoking four different, shifting interpretations of the statutory phrase "from which oil or a hazardous substance is discharged." The district court acknowledged the statutory text to be "of little help," and acknowledged that no on-point precedent existed. App50a. On appeal, a member of the panel remarked at argument that a key part of this statutory text was "like a Rorschach inkblot." Nonetheless, the courts below either entirely ignored the interpretive rules that require civil and criminal penalty statutes be strictly construed in a defendant's favor, or paid them mere lip service before brushing them aside to find BPXP liable. The six dissenting judges below understandably found that approach "concerning" and worthy of further review. App63a.

A. Factual Background

This case arises out of an oil spill of national significance from the *Deepwater Horizon* in the Gulf of Mexico. The *Deepwater Horizon*, a watercraft

colloquially called a "drilling rig," was a floating vessel rather than a fixed platform. The vessel and its "appurtenances," including a "marine riser" and "blowout preventer" ("BOP") were attached to the Macondo well as indicated in the figure below.



BPXP CA5 Opening Br. at 11 (No. 12-30883, Apr. 26, 2013)

Transocean owned and operated the *Deepwater Horizon*, and the riser and BOP. App2a-3a; App28a. The riser was a mile-long pipe, shown in the figure, leading down from the vessel to the top of the BOP. The BOP was a complex, five-stories-high, 400-ton device placed on top of the "wellhead" on the seabed. 5th Cir. No. 12-30883, Record on Appeal ("USCA5") 2394, 2397. The BOP's purpose was to control oil flowing out of the well and up through the riser. App3a. The BOP included safety mechanisms

designed to operate either automatically or via controls from the vessel to prevent spills. App3a.

The Macondo well had essentially no moving parts, and was located entirely beneath the Gulf of Mexico. USCA5 2392-94. BPXP and Anadarko Petroleum Company ("Anadarko") jointly owned the offshore lease block and the well. App2a; App28a. The well consisted largely of miles of pipe, called "casing," running from the wellhead under the BOP to oil-bearing sands approximately 13,000 feet below. Nat'l Comm'n on the BP Deepwater Horizon Oil Spill, Working Paper No. 6, *Stopping the Spill: The Five-Month Effort to Kill the Macondo Well* at 2 (Jan. 11, 2011), *available at* http://oscaction.org/resource-center/staff-papers/.

On April 20, 2010, the *Deepwater Horizon* experienced a "blowout." App3a; App28a. Oil and gas entered the well from the oil-bearing reservoir, rose past the wellhead, and arrived at the BOP. App28a-29a; App31. Transocean's crew failed to timely close the BOP's valves to prevent further flow of oil. App10a; *In re Deepwater Horizon*, 21 F. Supp. 3d 657, 756 ¶608 (E.D. La. 2014); *see also id.* 721-23 ¶¶392-405. Transocean's BOP also failed to automatically seal the well as it was designed to do; hence, oil and gas flowed up through the BOP and riser and exited onto the decks of the *Deepwater Horizon* vessel. App3a; App28a. On the decks, the flowing oil and gas caught fire in a large explosion that killed 11 men. App3a; App28a. The *Deepwater Horizon* burned before sinking to the bottom of the Gulf of Mexico. App3a. As the vessel sank, it drifted away from the wellhead, bending and damaging the riser pipe. App3a; USCA5 2398.

Oil and gas continued to flow out of the well, through the blowout preventer, into the damaged riser, and out into the Gulf of Mexico. App3a. Months after the blowout, as part of the government-led response to the ongoing spill, the riser was cut away just above the BOP, leaving a stub of pipe from which oil continued to flow. USCA5 2424. Oil continued to flow into the Gulf from the stub until a capping device was installed, approximately 86 days after the blowout. App3a. Throughout that entire period, all oil that reached the Gulf did so after passing through the valve system of Transocean's BOP, USCA5 7554, and through some length of Transocean's riser.

Following the spill, the United States initiated this action for civil penalties against BPXP, Anadarko, Transocean, and MOEX Offshore Exploration and Production Corp. ("MOEX"). MOEX was a minority co-lessee and thus a co-well owner with BPXP and Anadarko. MOEX entered into an early settlement. *See* Press Release (Feb. 17, 2012), *available at* http://www.justice.gov/opa/pr/moex-offshore-agrees-90-million-partial-settlement-liability-deepwater-horizon-oil-spill.

B. Statutory Background

In relevant part, the Clean Water Act ("CWA"), provides for civil and criminal penalties for oil spills. Many of those penalties key off predicate violations of 33 U.S.C. § 1321(b)(3).

33 U.S.C. § 1321(b)(3) prohibits "[t]he discharge of oil and hazardous substances" in "such quantities as may be harmful as determined by the President." 40 C.F.R. § 110.3 defines "harmful" quantities as those sufficient to "[c]ause a film or sheen" on water.

33 U.S.C. § 1321(a) defines numerous terms, including "discharge," which "includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping." *Id.* § 1321(a)(2).

In this case, the United States could have sought civil penalties under Section 1319, but proceeded under Section 1321(b)(7) instead. Section 1319 establishes civil and criminal penalties that apply to "*any* person" violating Section 1321(b)(3). Section 1319 penalties vary in severity according to scienter and other factors. *See, e.g.*, 33 U.S.C. §§ 1319(c)(1)-(3).

All agree that Section 1321(b)(7), by contrast, provides for civil penalties on a strict-liability basis against a limited group of persons:

> Any person who is the owner, operator, or person in charge of any vessel, onshore facility or offshore facility *from which oil or a hazardous substance is discharged* in violation of [33 U.S.C. § 1321(b)(3)], shall be subject to a civil penalty in an amount up to $25,000 per day of violation or an amount up to $1,000 per barrel of oil or unit of reportable quantity of hazardous substances discharged.

33 U.S.C. § 1321(b)(7)(A) (emphasis added); *see also id.* § 1321(b)(7)(D) (trebling fines for gross negligence or willful misconduct); *In re Deepwater Horizon*, MDL 2179, 2015 WL 729701 (E.D. La. Feb. 19, 2015) (ruling that EPA validly inflated the § 1321(b)(7)(D) per-barrel penalty to $4,300 during the April 2010 timeframe).

C. Procedural History

The United States sought per-barrel civil penalties under Section 1321(b)(7) from Transocean, and also from BPXP, Anadarko, and MOEX. App29a & n.5.

1. The government asserted that, for purposes of Section 1321(b)(7)(A), the same oil should be regarded as "discharged" "from" *both* the *Deepwater Horizon* vessel and the Macondo well. App49a; USCA5 6505; United States CA5 Answering Br. at 32 (No. 12-30883, July 26, 2013). The government claimed "[t]he terms 'include' and 'any' make clear Congress' intent that the term 'discharge' be construed *in the broadest possible sense*." USCA5 6505 (emphasis added). It added that "from" had a "common usage" such that there "was a single and continuous discharge 'from' the Macondo Well and the *Deepwater Horizon*" within the meaning of the statute. *Id.* Finally, the government contended that the statute unambiguously imposed liability on BPXP and Anadarko as Macondo well owners, such that the rule of lenity and the related canon requiring the strict construction of penal statutes had no application. United States CA5 Answering Br. at 20, 52-53 (No. 12-30883, July 26, 2013).

BPXP and Anadarko emphasized that Transocean owned and operated the *Deepwater Horizon* and its "appurtenances," including the BOP and riser. App50a. "Appurtenance" is a maritime term of art. "[M]aritime law ordinarily treats an 'appurtenance' attached to a vessel in navigable waters as part of the vessel itself." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 535 (1995). Here, it is undisputed that all oil that reached the

Gulf did so only after flowing through that riser. USCA5 7554 ¶18. Accordingly, BPXP maintained that, for purposes of Section 1321(b)(7), oil discharged into the Gulf only "from" Transocean's *Deepwater Horizon* and its appurtenances. BPXP CA5 Opening Br. at 58 (No. 12-30883, Apr. 26, 2013); BPXP CA5 Reply Br. at 29 (Aug. 23, 2013).

BPXP strongly disagreed with the government's contention that, notwithstanding the locational and strict liability character of Section 1321(b)(7), owners of multiple instrumentalities in a chain of oil production and distribution may be held liable for a single discharge of oil. BPXP CA5 Opening Br. at 39-46; BPXP CA5 Reply Br. at 2-18; BPXP CA5 Pet. for Reh'g En Banc at 10 (No. 12-30883, July 23, 2014). The relevant question, BPXP contended, is from *which* instrumentality did oil escape to the environment? BPXP CA5 Opening Br. at 39-46; BPXP CA5 Reply Br. at 2; BPXP CA5 Pet. for Reh'g En Banc at 9-10. Every drop of oil that reached the Gulf did so directly "from" the *Deepwater Horizon* vessel and its appurtenances (or, for a two-day period months after the spill began, from spill-response capping equipment after passing through Transocean's BOP and riser), never directly "from" the Macondo well. BPXP CA5 Opening Br. at 16; BPXP CA5 Pet. for Reh'g En Banc at 14.

Finally, BPXP contended, to the extent Section 1321(b)(7) is ambiguous, it should be construed against the government under the rule of lenity and penal canon. USCA5 7041-42 (Anadarko); USCA5 7342 (BPXP adopting argument); BPXP CA5 Opening Br. 41-46; BPXP CA5 Reply Br. 11-14.

2. The district court concluded that the oil was discharged "from" the Macondo well, but *not* "from" the *Deepwater Horizon* and its appurtenances. App52a; App57a. It therefore granted summary judgment to the government against BPXP and Anadarko, App57a-58a, but denied summary judgment regarding Transocean's liability, finding materially disputed facts regarding whether Transocean was an "operator" of the well, App58a-59a.

By granting summary judgment against BPXP and Anadarko but not Transocean, the court appeared to accept BPXP's argument that the same oil could be discharged "from" only one instrumentality. The court also seemed to regard the statute as ambiguous concerning which instrumentality should bear civil penalty liability—it remarked that "[t]he CWA does not define 'from,'" "its definition of 'discharge' is of little help," and "no cases address[] this exact issue." App50a.

The district court's ultimate focus on BPXP and Anadarko thus closely tied to its view that they and not Transocean deserved to be held liable as a matter of public policy. The court reasoned that BPXP and Anadarko should pay CWA penalties because they stood to "profit directly" from the oil in the reservoir:

> Anadarko and BP were the ones directly engaged in the enterprise which caused the spill. They were the mineral lessees, they owned the well, and they stood to profit directly from the oil it produced. Thus, Congress intended that the cost of pollution would be borne by these parties. By contrast,

> Transocean … did not stand to profit directly from the oil.

App54a. The court thus ruled that oil "discharge[d]" "from" where "the uncontrolled movement of oil began"—which it concluded was the Macondo well, not the *Deepwater Horizon*. App57a.

3. BPXP and Anadarko appealed. *See* 28 U.S.C. § 1292(a)(3). Before appellate proceedings began, two significant developments occurred. *First*, although the district court had found only BPXP and Anadarko liable, Transocean settled its civil penalty claims for what the United States announced was an "unprecedented" $1 billion. *See* Press Release (Jan. 3, 2013), *available at* http://www.justice.gov/opa/pr/2013/January/13-ag-004.html. *Second*, after the district court's ruling, Congress passed the "RESTORE" Act. Pub. L. No. 112-141, Tit. I, Subtit. F, §§ 1601-08, 126 Stat. 405, 588-607 (July 6, 2012), also described by its leading proponent as "unprecedented" because it directed the expenditure of future proceeds from this still-pending, enforcement action. 158 Cong. Rec. S4761, S4763 (daily ed. June 29, 2012). The RESTORE Act creates a new "Gulf Coast Restoration Trust Fund," directs that 80 percent of CWA penalties collected in connection with the *Deepwater Horizon* incident (and only this incident) be deposited into that fund, and provides for distribution of the anticipated proceeds to the five Gulf Coast States and their citizens. RESTORE Act §§ 1602(b), 1603, 1605. The government pointed to the RESTORE Act in its Fifth Circuit brief. United States CA5 Answering Br. at 7-8 (No. 12-30883, July 26, 2013).

4. On appeal, the Fifth Circuit affirmed. While declining to embrace or reject the district court's "uncontrolled movement" test, App12a n.13, the panel announced a "loss of controlled confinement" test for determining the source of this spill. *Id.*; App6a-7a. The panel held that a "discharge" for CWA purposes occurs "from" the "point at which controlled confinement is lost," App7a, and found that point to be the Macondo well. *Id.*; App12a.

The panel acknowledged that "[t]he Clean Water Act is 'not a model of clarity.'" App5a (footnote omitted). One judge noted at argument that the term "from" was "like a Rorschach inkblot":

> The word "from," like I say, is like a Rorschach inkblot. And you can put any definition of several on top of that, and you can make it go right back down under the ground to the good Lord himself who forced this kick.

Oral Argument Audio at 29:31-:46, CA5 No. 12-30883, *at* http://www.ca5.uscourts.gov/OralArgRecordings/12/12-30883_12-4-2013.wma; *see also id.* at 12:33-:42.

The panel decision relied on, among other things, federal agency interpretations of the statute, including two decisions by EPA administrative law judges that were unpublished, not subjected to judicial review, and not cited in briefing. App8a & n.9 (citing *D&L Energy* and *Philadelphia Macaroni* decisions); App9a-10a (discussing *D&L Energy*). The panel also referenced the regulatory structure of the CWA. App5a (CWA achieves its purposes "by creating a regulatory framework and then

prohibiting any discharge in violation of the regulations.").

The panel opinion did not address the penal canon or rule of lenity. Rather, after making clear that it viewed BPXP and Anadarko as seeking "exceptions" to the CWA's liability rules, App11a, the panel stated that it was "aware of no case in which a court or administrative agency exempted a defendant from liability on account of the path traversed by discharged oil." App9a. According to the panel, the CWA establishes "an absolute liability system with limited exceptions, which are to be narrowly construed." App11a.

5. BPXP and Anadarko sought rehearing en banc. While those petitions were pending, the panel issued an unusual "supplemental opinion" reaffirming the result in its original decision. App13a-26a. The supplemental opinion newly conceded that "no prior reported cases have presented facts that are directly analogous to those in the present case." App21a. Yet, once again invoking prior enforcement practice, the panel maintained that the statute was not ambiguous; hence, the rule of lenity and penal canon did not apply:

> Here, because the text of Section 311, and the history of its application, clearly demonstrate that a vessel or facility is a point "from which oil or a hazardous substance is discharged," 33 U.S.C. § 1321(b)(7)(A), if it is a point at which controlled confinement is lost, we decline Appellants' appeals to the rule of lenity and the anti-penalty canon.

App26a.

The Fifth Circuit subsequently denied rehearing en banc—by a 7-6 vote with two recusals. App62a & n.*. Six judges dissented in an opinion by Judge Clement. *First*, the dissent remarked, the panel's "controlled confinement" test is atextual, and does not follow from the statute's liability provision or its definition of "discharge." App63a. "A rehearing en banc," the dissent noted, "would have allowed us to consider more faithful interpretations of the Act." *Id.* *Second*, the panel's supplemental opinion "suggest[ed] that the panel perceived an ambiguity in the CWA," which was "concerning because a clear line of precedent exists holding that ambiguities in civil-penalty statutes should be resolved in favor of the defendant." App63a-64a (citing cases).

Third, the dissent stressed that the panel's initial and supplemental opinions contradicted one another. According to the dissent, although the panel now found that the Macondo well "never confined the hydrocarbons at all," App64a (referring to App16a), the panel nonetheless insisted in its supplemental opinion that "controlled confinement was lost in the well." App64a (referring to App17a). To reaffirm the panel's initial result, the dissent contended, the supplemental opinion thus effectively changed the test from "a loss of controlled confinement" to "an absence of controlled confinement." App64a.

In the dissenting judges' view, "[t]hese problems, coupled with the exceptional importance of the underlying issue, necessitated a rehearing." App63a.

REASONS FOR GRANTING THE WRIT

This exceptionally significant case affords an ideal vehicle for clarifying the continued vitality of the constitutionally grounded rule of lenity and penal canon in civil penalty cases in general and environmental enforcement actions in particular.

I. THIS CASE AND THE QUESTION PRESENTED ARE EXCEPTIONALLY IMPORTANT.

The significance of this case is not easily overstated. Judge Clement and five dissenting colleagues flagged "the exceptional importance of the underlying issue," App63a, including the continued vigor of the rule of lenity and penal canon in environmental enforcement actions. App63a-64a; App25a-26a. Underscoring the "exceptional importance" of this particular case are the billions of dollars in potential CWA liability BPXP now faces.

Given the high monetary and reputational stakes involved in major environmental enforcement actions like this one, few such cases are litigated to judgment. With the vast majority resolved by settlement, there is a limited body of Section 1321(b)(7) case law to which future defendants—let alone courts—may turn for guidance. Even after a quarter-century on the books, the CWA provisions most relevant here still lack "clarity" as to their proper metes and bounds. App5a (quoting *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990)). This historic case offers a vehicle to provide much-needed guidance on the continued vitality of the rule of lenity and penal canon in civil environmental penalty actions.

A. The Penalty Sought Here Dwarfs All Previous Environmental Penalties and Would Be Highly Detrimental to BPXP.

Staggering sums of money are at stake. The district court (1) enhanced the per-barrel penalties under 33 U.S.C. § 1321(b)(7)(D) by finding gross negligence and willful misconduct, *In re Deepwater Horizon*, 21 F. Supp. 3d 657 (E.D. La. 2014); (2) approved EPA's inflation of the penalties to $4,300 per barrel spilled, 2015 WL 729701 (E.D. La. Feb. 19, 2015); and (3) concluded that 3.19 million barrels of oil were discharged for penalty purposes. 2015 WL 225421 (E.D. La. Jan. 15, 2015). Although these rulings are still subject to challenge, their combined effect has led the government to call for an award from BPXP of between $12 billion and nearly $13.7 billion in CWA civil penalties.[*]

In sharp contrast, in the entire pre-*Deepwater Horizon* history of the CWA, the largest civil penalty ever paid under the Act was $34 million—approximately one four-hundredth the maximum

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[*] Premised on the finding of liability challenged here, a penalty trial against BPXP and Anadarko recently concluded. The ruling on the issues in that trial will not affect this petition. Nor should the interlocutory posture of this petition prevent review here. While the Court traditionally disfavors interlocutory petitions, that posture is not a categorical bar. *See, e.g., Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970 (2012); *Winter v. NRDC*, 555 U.S. 7, 20 (2008); Shapiro et al., SUPREME COURT PRACTICE 233-34 (10th ed. 2013) (collecting cases). Interlocutory review is generally undesirable where the question presented might be mooted by intervening developments. See William J. Brennan, Jr. *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983). No such practical possibility exists here.

amount the government now seeks from BPXP. *See* Press Release (Apr. 1, 2003), *available at* http://www.justice.gov/archive/opa/pr/2003/April/03_enrd_201.htm (Colonial Pipeline's settlement based on alleged grossly negligent CWA violations from seven discrete spills that discharged 1.45 million gallons of oil). Looking beyond the CWA, the largest Clean Air Act civil penalty in history is $100 million, paid by Hyundai and Kia. *See* Press Release (Nov. 3, 2014), *available at* http://www.justice.gov/opa/pr/united-states-reaches-settlement-hyundai-and-kia-historic-greenhouse-gas-enforcement-case .

Indeed, the total penalties assessed in 2014, via settlement or judgment, in all civil court cases brought on behalf of EPA was $56 million—less than half of one percent of the maximum penalty amount that the United States is seeking here. EPA, *Enforcement Annual Results Numbers at a Glance for Fiscal Year 2014*, *available at* http://www2.epa.gov/enforcement/enforcement-annual-results-numbers-glance-fiscal-year-fy-2014. In short, in addition to its precedential importance, this case—standing alone and measured in dollar terms—represents the majority of all EPA-related enforcement penalties ever recovered by the United States.

Finally, penalties of this extraordinary magnitude are being sought on top of BPXP's other extraordinarily large spill-related expenditures. In the wake of the *Deepwater Horizon* incident, BPXP has engaged in a $14.2 billion-and-counting response-and-clean-up effort; entered a $4 billion criminal plea agreement; and paid over $16.7 billion in legal claims. In all, BPXP's liabilities (counting amounts spent and provisioned) have totaled about

$35.7 billion net of insurance and settlement recoveries. *See* BPXP Proposed Findings of Fact and Conclusions of Law, Dkt. 14345 ¶¶ 685, 692, 693 (E.D. La. No. 10-MD-2179, Mar. 27, 2015).

B. This Case Affords a Rare Opportunity to Provide Guidance for Regulated Parties and Lower Courts in the Context of a Historically Large Claim for Civil Penalties.

Because so many large penalty cases end in settlement, judicial oversight of the real processes by which major penalty claims are liquidated is generally quite limited, making decisional authority sparse. App21a ("[N]o prior reported cases have presented facts that are directly analogous to those in the present case."); *see also* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 221 (1999) ("[A] trial is a prerequisite to precedent, and precedent is the cornerstone of our common law system. Settlement and precedent are therefore in tension with each other.").

The vast bulk of offshore drilling in U.S. waters occurs in the Fifth Circuit. Thus, as a practical matter, the court below has decided the issue addressed by this petition for the entire oil industry, which is of immense nationwide significance to the American economy. An overview of government data indicates that 88 percent (5,227 of 5,961) of all active offshore oil and gas leases, and 96 percent of all producing leases (those that have actually yielded oil or gas, 968 of 1,014), are in the outer Continental Shelf's Western and Central Gulf of Mexico Regions.

See Bureau of Ocean Energy Management, *Combined Leasing Report as of February 2, 2015*, *available at* http://www.boem.gov/Combined-Leasing-Report-February-2015/. Some leases may be worked from Alabama, which is in the Eleventh Circuit, but the vast majority, like the Macondo lease here, are within the Fifth Circuit's jurisdiction. This Fifth Circuit decision is thus certain to govern the lion's share of deepwater drilling activity.

Furthermore, uniquely to our knowledge, Congress has at once recognized the national significance of this civil penalty action and impelled the executive branch to assiduously pursue a large penalty recovery from BPXP. Specifically, Congress enacted legislation during the pendency of this enforcement action with an avowed goal of channeling the great majority of any fine money collected from BPXP specifically to five Gulf States—a monetary transfer that would occur only if executive branch officials aggressively and successfully obtained penalties from BPXP on behalf of the constituency in the Gulf States that the RESTORE Act creates. As this case now comes to the Court, executive officials have sought a penalty of historic magnitude, and the lower courts have arrived at the BPXP-is-liable conclusion that Congress incentivized the executive branch to pursue—albeit only after shifting interpretive rationales several times while nonetheless insisting that the CWA is unambiguous. These unique circumstances provide further cause for review.

Ordinarily, the government deposits fines and penalties collected under 33 U.S.C. § 1321 into the Oil Spill Liability Trust Fund. 26 U.S.C. § 9509(b)(8).

Such money typically is used for removal, prevention, and enforcement costs related to spills around the country. Under the RESTORE Act, however, 80 percent of CWA penalties collected in connection with the *Deepwater Horizon* incident—and only the *Deepwater Horizon* incident—are to be diverted to a separate and concentrated "Gulf Coast Restoration Trust Fund" and then distributed to the five Gulf Coast States and their citizens under the Act's guidance. RESTORE Act §§ 1602(b), 1603, 1605. During the Act's pendency, members of Congress, in particular Senator Landrieu, enthusiastically prophesized that BPXP would be held liable to fund these expenditures:

> We are so proud to have passed the RESTORE Act, which is going to take … *monies from a fine that is going to be levied by the courts very soon—very soon. This fine will be levied against BP ….*

158 Cong. Rec. S1661 (daily ed. Mar. 14, 2012) (emphasis added). Senator Landrieu acknowledged the unique nature of legislation setting aside the presumed proceeds to be collected from an identified defendant in a still-pending enforcement case:

> It has no precedent in Congress. It will, for the first time, set aside such a significant amount of money from a penalty that has yet to be determined *by a polluter that has been determined—BP* …. It will be the largest fine. … I hope this fine is as high as it can be …

158 Cong. Rec. S4761, S4763 (daily ed. June 29, 2012) (emphasis added).

Precisely because the Fifth Circuit narrowly denied rehearing en banc, BPXP is now facing a historically unprecedented call by the federal government to pay billions in civil penalties, with 80 percent of any recovery going to the Gulf States. And for this same reason, both defendants and "the district courts are now left to harmonize th[e] discord" between the Fifth Circuit panel's original and supplemental opinions, the latter "implicat[ing] a significantly broader swath of potentially liable actors." App64a. The Court should grant review both to ensure a correct outcome in this historic case—which Congress recognized as sufficiently important to address in targeted legislation—and to take up this opportunity to resolve a sharply drawn, unlikely-to-be-settled dispute over the continued potency of the rule of lenity and penal canon in a civil environmental penalty action.

II. THE COURT'S GUIDANCE IS NEEDED TO REAFFIRM THE VIGOR OF THE CONSTITUTIONALLY GROUNDED RULE OF LENITY AND PENAL CANON IN ENVIRONMENTAL CASES.

This case presents a rare opportunity for the Court to address doctrinal confusion over proper application of the rule of lenity and penal canon—to enforcement cases in general and to environmental enforcement actions in particular.

As matters stand, one line of lower court cases deliberately omits the constitutionally grounded rule of lenity and penal canon from the interpretive analysis of environmental statutes. Certain other cases, like the Fifth Circuit panel's first opinion below, simply overlook the rule of lenity and penal

canon without comment; another group, like the panel's second opinion, dutifully acknowledge the doctrines but give them no practical effect; and still others apply the rule of lenity and penal canon under different standards. This case presents an opportunity for the Court to afford much-needed guidance on the continuing need to apply these constitutionally grounded canons in a case involving what is far and away the largest environmental penalty ever sought by the United States.

A. The Rule of Lenity and Penal Canon Are Rooted in the Separation of Powers and Due Process.

The rule of lenity is grounded in the separation of powers. *See United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) (federal courts do not have the power to define crimes because "the power of punishment is vested in the legislative and not in the judicial department"). Specifically, the rule helps ensure legislative supremacy and democratic accountability by forbidding courts not just from defining common law crimes, but also from engaging in common-law reasoning to say what does and does not constitute prohibited conduct. *United States v. Bass*, 404 U.S. 336, 348 (1971) ("legislatures and not courts should define criminal activity"); Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW § 2.3 (2d ed. 2013) (this Court has invoked "the separation of powers doctrine … to support the proposition that Congress, by the enactment of an ambiguous statute, could not pass the law-making job on to the judiciary.").

Of course, the rule of lenity is also animated by the familiar due process concern that "fair warning"

be given "to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.); *see also Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (due process includes "fundamental principle that the required criminal law must have existed when the conduct in issue occurred") (internal marks and citation omitted).

The rule of lenity is thus a paradigmatic instance of the interlocking connection between the constitutional doctrines of separation of powers and due process. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012). As such, the rule emphatically is not a canon for divining what conduct Congress may actually have wished for a criminal statute to cover. Rather, the rule sets limits on the conduct that Congress and the Judiciary may constitutionally penalize under given statutory language. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992) ("[A] lenient interpretation of a criminal statute obviates inquiries into underlying due process concerns.").

The rule of lenity's interpretive cousin for civil cases, often referred to as the "penal canon," requires similarly narrow constructions of civil penalty statutes. This Court applied the penal canon in the leading civil case of *Commissioner v. Acker*, which involved a dispute over additional tax liability. 361 U.S. 87, 91 & n.4 (1959) (collecting cases). In terms consonant with criminal applications of the rule of

lenity, the Court declared, "penal statutes are to be construed strictly" to ensure that defendants are not "subjected to a penalty unless the words of the statute plainly impose it." *Id.* at 91. *Acker* cited a venerable line of civil cases stretching back nearly a century. *See, e.g.*, *Elliott v. E. Penn. R.R. Co.*, 99 U.S. 573, 576 (1878); *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 410 (1873); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. REV. 109, 131 n.92 (2010) ("The rule was applied not only to criminal statutes, but also to civil statutes considered penal by virtue of their stiff penalties.") (citing, *e.g.*, *Schooner Paulina's Cargo v. United States*, 11 U.S. (7 Cranch) 52, 67-68 (1812); *United States v. Open Boat*, 27 F. Cas. 354, 356 (C.C.D. Me. 1829) (No. 15,968) (Story, Circ. Justice); *Swift v. The Happy Return*, 23 F. Cas. 560, 561 (D. Pa. 1799) (No. 13,697)). Summarizing these precedents, Judge Endlich, author of a nineteenth-century interpretive treatise, concluded that "[i]t is *immaterial*, for the purpose of the application of the rule of strict construction, whether the proceeding prescribed for the enforcement of the penal law be criminal or civil." G.A. Endlich, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 331, at 456 (1888) (emphasis added).

B. The Court's Guidance on the Continued Vitality of These Constitutionally Grounded Canons in the Context of Environmental Statutes Is Urgently Needed.

Fifteen years ago, Justices Thomas and O'Connor dissented from the denial of certiorari in *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), a

CWA criminal enforcement action arising from an oil spill. Their dissent was prompted by the view that courts too readily accept the proposition that "public welfare" considerations allow the broad construction of penalty statutes and especially of environmental penalty statutes. *See Hanousek v. United States*, 528 U.S. 1102, 1105 (2000) (Thomas, J. dissenting from denial of certiorari) (certiorari should have been granted because "the Courts of Appeals invoke [the public welfare doctrine] too readily" and a "further delineat[ion of] its limits" is required).

And *Hanousek* itself grew out of a similarly razor-close en banc dispute like this one. *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993) (denying rehearing 6-5). *Weitzenhoff* was a CWA criminal prosecution of sewage plant managers. Judge Kleinfeld (joined by Judges Reinhardt, Kozinski, Trott, and T.G. Nelson) argued that the "panel reach[ed] its surprising result in surprising ways." *Id.* at 1295 (Kleinfeld, J., dissenting). *First*, the dissenters maintained that the statute was clear in running against the prosecution. But they noted that the panel conceded the CWA was ambiguous in relevant respect and yet had still deliberately refused to apply lenity. *Id.* *Second*, the panel invoked the public welfare doctrine, which should have "ma[de] the rule of lenity especially important." *Id.* at 1296. The result was to engender "confusion by rhetorical suggestion." *Id.*

As the decision here involving the *Deepwater Horizon* spill indicates, fifteen years later, interpretive approaches like *Hanousek* and *Weitzenhoff* that effectively read the rule of lenity and penal canon out of environmental enforcement

actions continue in the lower courts. This sharply drawn dispute thus affords an excellent vehicle for clarifying the continued vitality of these venerable canons.

While the first Fifth Circuit opinion failed to mention the rule of lenity or penal canon, it appeared to look for ultimate guidance from the broad purposes of the CWA and, relatedly, from a rule that would place on BPXP and Anadarko the burden of identifying an express "exception" to Section 1321 civil penalty liability. The first opinion began its analysis as follows:

> The Clean Water Act is "not a model of clarity." .... Yet it is, in some respects, not overly complex. The legislation attempts to eliminate the introduction of any kind of pollutant—everything from paint and pesticides to rocks and dirt—into the waters of the United States. 33 U.S.C. §§ 1251(a), 1362(6). The Act does so by creating a regulatory framework and then prohibiting any discharge in violation of the regulations. *See* 33 U.S.C. §§ 1252, 1311–1313,1316–17, 1319, 1329, 1342.

App5a.

The opinion thus conceded statutory ambiguity, while contending that interpretive guidance should be drawn from the overriding congressional purpose of prohibiting all unauthorized "discharges." Furthermore, the opinion reasoned, "[t]his Court, in particular, recognizes the section as 'an absolute liability system *with limited exceptions*, which are to be narrowly construed.' *United States v. W. of Eng.*

Ship Owner's Mut. Prot. & Indem., 872 F.2d 1192, 1196 (5th Cir. 1989)." App11a (emphasis added). The opinion thus appeared to read *West of England Ship Owners* to mean that CWA penalty liability attaches to anyone who handles oil that is eventually spilled, unless an express "exception" to liability can be identified. Relying on these premises, the opinion concluded: "Therefore, by the express terms of the statute, Anadarko and BP 'shall be subject to a civil penalty' calculated in accordance with statutory and regulatory guidelines. *Id.* § 1321(b)(7)(A)." App12a. Notably, the opinion omitted any mention of the rule of lenity or penal canon.

That approach effectively embraces, without acknowledgment, the approach of courts and commentators who would completely exclude the constitutionally grounded rule of lenity and penal canon from the interpretation of environmental statutes. This is perhaps best illustrated by the fact that the first panel opinion acknowledged ambiguity, App5a, yet ignored the rule of lenity and penal canon entirely, and by the fact that the panel's second opinion simply asserted that ambiguity was dispelled by statutory context and history, App25a-26a, without attempting to explain how Rorschach-level ambiguity in the word "from" could be resolved by consulting intrinsic or extrinsic statutory evidence.

The panel's approach thus stands in contrast to the Second Circuit's decision in *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643 (1993). *Plaza Health* applied the rule of lenity to conclude that a person acting to discharge pollutants without use of a device such as a pipe or conveyance did not qualify as a CWA "point source." 3 F.3d at 646, 649. *Plaza*

Health acknowledged "[t]he broad remedial purpose of the CWA to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a)." *Id.* at 647. *Plaza Health* nonetheless concluded that "[t]he narrow questions posed by this case, however, may not be resolved merely by simple reference to this admirable goal." *Id.* *Plaza Health*'s recognition that the CWA's overarching purposes cannot override the rule of lenity stands in stark contrast to the Fifth Circuit's decision below, which was largely driven by reliance on the CWA's aspirational goal of eliminating all water pollution.

In the wake of *Plaza Health*, certain commentators assailed that decision's analysis, reasoning that environmental penalty cases should be treated as special situations. *See, e.g.*, Robin L. Greenwald, *What's the "Point" of the Clean Water Act Following United States v. Plaza Health Laboratories, Inc.?: The Second Circuit Acts as a Legislator Rather Than As A Court*, 60 BROOK. L. REV. 689 (1994). Under this view, "[b]ecause environmental statutes are public welfare statutes, a reasonable person should know that his or her activity is subject to stringent public regulation, and thus courts generally apply a broad construction to such statutes' terms." *Id.* at 715-16. As things stand today, several courts have embraced the proposition that "public welfare" considerations trump the rule of lenity in the interpretation of environmental statutes. *See, e.g.*, *Hanousek*, 176 F.3d 1116, *cert. denied*, 528 U.S. 1102 (Thomas and O'Connor, J.J., dissenting from denial of certiorari); *see also* Katherine A. Swanson, Comment, *The Cost of Doing Business: Corporate Vicarious Criminal Liability for*

the Negligent Discharge Of Oil Under the Clean Water Act, 84 WASH. L. REV. 555, 564 (2009) ("[M]ost courts never reach the rule of lenity in the public welfare context because they find Congress's intent unambiguously established a public welfare statute.").

The decision below indicates that, fifteen years after the dissents from the denial of certiorari in *Hanousek*, an interpretive approach that would broadly construe penalty statutes in environmental cases in favor of the government continues to find favor in some lower courts. Although the court below did not cite *Hanousek* or *Weitzenhoff*, and although it issued a second opinion paying lip service to the penal canon, there is no indication the court seriously considered giving a narrow construction to the CWA, as opposed to simply construing it expansively to impose liability on BPXP. Indeed, even though it acknowledged that the CWA is "not a model of clarity," the appellate court nonetheless found—in contrast to *Plaza Health* but in keeping with decisions from other courts—that BPXP and Anadarko are liable to pay civil penalties.

The need for guidance to the Fifth Circuit and other courts regarding the continued vitality of the constitutionally grounded rule of lenity and penal canon in environmental cases could scarcely be more compelling.

C. The Court Should Also Address Other Aspects of the Diverging Approaches to the Rule of Lenity and Penal Canon.

This Court's intervention is urgently needed to clarify that the constitutionally-grounded rule of lenity and penal canon retain vigor and remain an

important dimension of interpretive analysis for all punitive statutes. Whenever these canons are discarded—whether on account of a supposed "public welfare" exception as in *Hanousek* or *Weitzenhoff*, or inattention as in the Fifth Circuit's first panel decision, or paying them mere lip service as in the Fifth Circuit's second panel decision—the cause of justice suffers and courts are liable to err. Relatedly, however, the Court should use this case to clarify additional aspects of the diverging ways in which these canons are applied today, apart from courts' tendencies to give policy-driven constructions to environmental statutes.

The traditional articulation of the rule of lenity and penal canon, which prevailed for centuries, holds simply that penal statutes are to be "construed strictly." *See, e.g.*, *King v. Page & Harwood*, 82 Eng. Rep. 550, 550 (1648) ("for the statute … being a penal law, it shall be taken strictly and not extended to equity."); *Wiltberger*, 18 U.S. at 77 ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."); *see also Bolles v. Outing Co.*, 175 U.S. 262, 265 (1899); *United States v. Harris*, 177 U.S. 305, 310 (1900); *United States v. Baltimore & O. S. W. Ry. Co.*, 222 U.S. 8, 13 (1911); *United States v. Brown*, 333 U.S. 18, 25 (1948); *Acker*, 361 U.S. at 91; *United States v. Lanier*, 520 U.S. 259, 266 (1997); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 394 (2003).

This centuries-old interpretive rule has, however, become less clear in recent decades. The divergence in courts' understanding of the rule appears to have begun with *Huddleston v. United States*, 415 U.S. 814, 831 (1974). *Huddleston* was the first case to

state as follows: "We perceive no *grievous ambiguity* or uncertainty in the language and structure of the Act." *Id.* at 831 (emphasis added). Fairly read in context, this passage appears to mean only that the rule of lenity is properly deployed last in a line of analysis, once statutory ambiguity has been found otherwise unsusceptible to resolution. *Compare Bass*, 404 U.S. at 347 (concluding a statute was ambiguous after "seiz(ing) everything from which aid can be derived") (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.)).

Nonetheless, a forceful new adjective—like "grievous"—can alter the course of the law in unanticipated ways. *Cf. Berkey v. Third Avenue Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.) ("Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."). Perhaps predictably, *Huddleston*'s novel wording had consequences for on-the-ground operation of the rule of lenity, as commentators recognize. *See, e.g.*, Stephen Wisotsky, *How to Interpret Statutes—Or Not: Plain Meaning and Other Phantoms*, 10 J. APP. PRAC. & PROCESS 321, 331-32 (2009) ("The tug of war over the rule of lenity shifted ground dramatically in *Huddleston* …."); Matthew Kapitanyan, *Beyond Wargames: How the Computer Fraud and Abuse Act Should Be Interpreted in the Employment Context*, 7 I/S J. L. & POL'Y FOR INFO. SOC'Y 405, 449-50 (2012) ("The Supreme Court has increasingly watered down its formulation of the lenity rule, applying it only in the face of 'grievous ambiguity' ….") (citing Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2423-24 (2006) (collecting cases)).

In the wake of *Huddleston*, the Fifth Circuit has applied the rule of lenity's "grievous ambiguity" formulation at least 14 times, albeit never in a civil context before this case. *United States v. Gonzalez-Medina*, 757 F.3d 425 (5th Cir. 2014); *United States v. Rainey*, 757 F.3d 234 (5th Cir. 2014); *United States v. Pruett*, 681 F.3d 232 (5th Cir. 2012); *United States v. Polydore*, 493 F. App'x 496 (5th Cir. 2012); *United States v. Block*, 635 F.3d 721 (5th Cir. 2011); *United States v. Nichols*, 371 F. App'x 546 (5th Cir. 2010); *United States v. Dison*, 573 F.3d 204 (5th Cir. 2009); *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009); *United States v. Salazar*, 542 F.3d 139 (5th Cir. 2008); *United States v. Edelkind*, 525 F.3d 388 (5th Cir. 2008); *United States v. Lamm*, 392 F.3d 130 (5th Cir. 2004); *United States v. Aguilar-Caballero*, 233 F.3d 574 (5th Cir. 2000); *United States v. Roberson*, 102 F.3d 549 (5th Cir. 1996).

Even so, other appellate decisions have continued to employ the longstanding, undiluted "strict construction" formulation in civil and criminal cases. *See, e.g.*, *Christensen v. Qwest Pension Plan*, 462 F.3d 913, 919 (8th Cir. 2006); *U.S. ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 734 (10th Cir. 2006); *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 819 (3d Cir. 1994); *First Nat'l Bank of Gordon v. Dep't of Treasury*, 911 F.2d 57, 65 (8th Cir. 1990).

Furthermore, even the Court's rule of lenity decisions have not consistently deployed the newer "grievous ambiguity" formulation as against older formulations. *See, e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) ("[I]f our recourse to traditional tools of statutory construction leaves *any doubt*

about the meaning of 'tangible object,' as that term is used in § 1519, we would invoke the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'") (emphasis added); *Skilling v. United States*, 561 U.S. 358, 365 (2010) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); *Moskal v. United States*, 498 U.S. 103, 107 (1990) ("we have always reserved lenity for those situations in which a *reasonable doubt* persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.") (emphasis added).

As matters stand today, there are no clear boundaries, nor any acknowledgments of the absence of such boundaries, as between the criminal rule of lenity and the civil penal canon. Nor is there clarity as to whether these separation-of-powers and due-process-grounded canons should continue to apply with their traditional strict force or be diluted to some extent. The Court should use this case as an opportunity to clarify the occasions for applying the rule of lenity and penal canon and the contours of a proper interpretive analysis once they have been found applicable.

III. THE FIFTH CIRCUIT'S ERRONEOUS DECISION WARRANTS CORRECTION.

The Fifth Circuit erred by issuing conflicting opinions—one that moved away from the controlling text (the loss of control theory) and another that moved even further away (the absence of control theory)—while incongruously maintaining that both legal tests were clear enough from the face of the

statute to overcome the presumption in BPXP's favor based on the lenity and penal canons.

The CWA makes liable the "owner, operator, or any person in charge of any vessel … or offshore facility from which oil … is discharged in violation of paragraph (3)." 33 U.S.C. § 1321(b)(7)(A).

A discharge "includes … spilling, leaking, pumping, pouring, emitting, emptying, or dumping." *Id.* 1321(a)(2). "[P]aragraph (3)" prohibits discharges into water or onto shorelines in "*harmful quantities*," *id.* § 1321(b)(3) (emphasis added), which the governing regulation defines as those sufficient to "[c]ause a film or sheen" on water. 40 C.F.R. § 110.3.

When oil moves from one confined instrumentality to another without escaping, no "sheen" on environmental waters or shorelines can be created; hence, no CWA violation can possibly occur. The salient statutory question is, accordingly, which instrumentality is the one "from which oil … [was] discharged in violation of paragraph (3)?"

Here, not a drop of oil entered the Gulf "from" the Macondo well. Rather, with the exception of a two-day period months after the spill began (when oil also passed through spill-response capping equipment installed under the government's control), every drop of oil that reached the Gulf entered the Gulf directly from the *Deepwater Horizon* vessel. USCA5 7554 ¶18.

In light of the text and structure of the CWA, as applied to the undisputed facts, none of the interpretations ventured below can be correct.

First, neither the Fifth Circuit's "controlled confinement" test, nor the district court's

"uncontrolled movement" test are anywhere in the statute, precedent, or regulations predating the *Deepwater Horizon* incident. The predicate for liability is a "discharge" in harmful quantities, which can only occur when oil enters the environment, and "[c]ause[s] a film or sheen" on water. The lower courts' discussions of "controlled confinement" and "uncontrolled movement" indefensibly replace key statutory terms with a test spun from whole cloth, on the basis of common-law-like policy reasoning. The six circuit judges dissenting from denial of rehearing readily identified this error. App63a ("[T]his 'loss of controlled confinement' test is inconsistent with the text of the CWA.").

Moreover, BPXP also could not be liable under the first panel decision's "loss of controlled confinement" test, because even if negligence-laden concepts like "*controlled* confinement" could permissibly be imported into the CWA—which they cannot—it would remain true that "controlled confinement" of oil was lost only after oil flowed past Transocean's BOP and exited into the environment through Transocean's riser. BPXP and Anadarko pointed to these errors in their petitions for rehearing.

Second, BPXP also could not be liable under the panel's second opinion. Rather than changing the outcome in response to rehearing petitions, the panel changed its test. As Judge Clement would later point out, the second panel opinion contradicted the first and effectively required an *absence*, rather than *loss*, of controlled confinement. App64a. Again, however, a "controlled confinement" test of any species is nowhere in the CWA. The CWA actually

defines "discharge" as "spilling, leaking, pumping, pouring, emitting, emptying, or dumping," 33 U.S.C. § 1321(a)(2), and it makes liability turn on whether a discharge into the environment has eventually reached water in "harmful quantities." The Fifth Circuit's focus on the negligence-laden concept of "*controlled* confinement"—implying tort-style duties of proper control—is thus untethered to the statutory focal point; namely, the presence or absence of a discharge to the outside environment, traceable to a specific location, that reaches waters of the United States in harmful quantities.

Third, the panel bypassed the need to make a ruling on the validity of the "single-source" locational test that BPXP staunchly advocated as the proper CWA liability rule. *See* BPXP Opening CA5 Br. § I; BPXP Reply CA5 Br. § I; BPXP CA5 Reh. Pet. at 9-11; BPXP CA5 Addendum at 6-8 (No. 12-30883, Nov. 19, 2014). Under the terms of the statute and its definitions, owners of vessels like Transocean were obligated to ensure that their vessels did not discharge oil. 33 U.S.C. §§ 1321(a)(3) & 1321(b)(7)(A). Offshore facilities like the Macondo well were defined to be mutually exclusive of such vessels precisely to erect clear lines of responsibility between vessel owners versus offshore facility owners. 33 U.S.C. § 1321(a)(11). Yet, despite the fact that it was undisputed that the oil here was discharged directly from the *Deepwater Horizon* and its appurtenances, the panel went off in search of a theory of indirect discharge based on a prior loss (or absence) of "controlled confinement" to affirm the district court's result.

The panel's second opinion sidestepped BPXP's textually-rooted, single-source interpretation of the statute only by deflecting the issue and focusing on the supposed irrelevance of Transocean's settlement. Notwithstanding the district court's holding that 33 U.S.C. § 1321(b)(7) was entirely inapplicable to Transocean's *Deepwater Horizon* and appurtenances, Transocean was *willing to settle* for an "unprecedented" billion dollars. The panel's supplemental opinion stated that "[b]ecause the Transocean entities settled, we did not need to consider whether the oil discharged from the well might also have constituted a 'discharge' from the *Deepwater Horizon*." App20a. But the relevant point is not the settlement itself but the panel's skirting of the pivotal question of single-source versus multiple-source liability—against the backdrop of Transocean's elephant-in-the-room resolution of claims it had successfully parried, up to that point, in the district court.

Finally, even if there were any intuitive force behind the panel's engrafting of an extra-textual "controlled confinement" concept onto the CWA, it is passing strange for the panel to insist that the statute is so clear that the rule of lenity and penal canon are irrelevant. App25a-26a. The district court and the Fifth Circuit acknowledged interpretive difficulties at every juncture, yet the two courts propounded three different versions of an atextual test, and the Fifth Circuit expressly declined comment on the district court's test. App12a n.13 ("We do not adopt the district court's interpretation of § 1321(b)(7)(A) to the extent that such an interpretation differs from our own."). And as six dissenting judges recognized, the panel's

"supplemental opinion" itself suggests that the CWA penalty statute is at least sufficiently ambiguous to invoke the penal canon. App63a-64a. Here, not one of the lower courts' or the government's conflicting policy-based readings of the CWA penalty provisions is remotely well-enough tethered to the statute to justify subjecting BPXP to the financial hardship and stigma of the unprecedented billions of dollars in penalties sought by the government.

CONCLUSION

The petition for a writ of certiorari should be granted.

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