No. _____

In the Supreme Court of the United States

TEXAS AROMATICS, L.P., ET AL.,
Petitioners,

v.

INTERCONTINENTAL TERMINALS COMPANY, L.L.C.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.*, applies to a spill that is 91% oil and 9% a "hazardous substance."

PARTIES TO THE PROCEEDING

The parties to the proceedings are listed on the cover. Petitioners, and plaintiffs-appellants below, are Texas Aromatics, L.P. ("Texas Aromatics"), Rio Energy International, Inc. ("Rio Energy"), Gunvor USA L.L.C. ("Gunvor"), Castleton Commodities Merchant Trading, L.P. and Castleton Commodities Merchant Asia Co. Pte. Ltd. (jointly, "Castleton"), Stolt Tankers B.V. ("Stolt"), and Petredec Trading (U.S.), Inc. ("Petredec"). Respondent, and defendant-appellee below, is Intercontinental Terminals Company, L.L.C. ("ITC").

CORPORATE DISCLOSURE STATEMENT

Petitioner Texas Aromatics has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

Petitioner Rio Energy has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

Petitioner Gunvor is a wholly-owned subsidiary of Pinesdale LLC, which is a wholly-owned subsidiary of Gunvor Group Ltd., and no publicly held corporation owns 10 percent or more of its stock.

Petition Castleton Commodities Merchant Trading, L.P. is an indirect, wholly-owned subsidiary of Castleton Commodities International LLC, and no publicly held corporation owns 10 percent or more of its stock.

Petitioner Castleton Commodities Merchant Asia Co. Pte. Ltd. is an indirect, wholly-owned subsidiary of Castleton Commodities International LLC, and no publicly held corporation owns 10 percent or more of its stock.

Petitioner Stolt identifies its ultimate parent company as Stolt-Nielsen Limited, a publicly held company traded on the Oslo stock exchange, and no publicly held corporation owns 10 percent or more of its stock.

Petitioner Petredec identifies its parent company as Petredec (Europe) Ltd., and no publicly held corporation owns 10 percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- Fifth Circuit Case: *Munoz v. Intercontinental Terminals Company, L.L.C.*, No. 22-20456 (Fifth Circuit) (affirming the district court's summary judgment on October 27, 2023 and denying timely petition for rehearing *en banc* on November 28, 2023).

- Lead Consolidated District Court Case: *In re Intercontinental Terminals Company, LLC, Deer Park Fire Litigation*, Lead Consolidated Case No. 4:19-cv-01460 (S.D. Tex.) (granting summary judgment for ITC on August 24, 2022, by adopting the Magistrate's Report and Recommendation dated July 2, 2021).

- Cases Consolidated into Lead Consolidated District Court Case: *Texas Aromatics LP v. Intercontinental Terminals Company LLC*, Case No. 4:20-cv-01387 (S.D. Tex.); *Rio Energy International Inc. v. Intercontinental Terminals Company LLC*, Case No. 4:20-cv-01863 (S.D. Tex.); *Gunvor USA LLC v. Intercontinental Terminals Company LLC*, Case No. 4:20-cv-01867 (S.D. Tex.); *Castleton Commodities Merchant Trading LP and Castleton Commodities Merchant Asia Co. Pte. Ltd. v. Intercontinental Terminals Company LLC*, Case No. 4:20-cv-01930 (S.D. Tex.); *Petredec Trading (U.S.), Inc. v. Intercontinental Terminals Company LLC*, Case No. 4:21-cv-00846 (S.D. Tex.); and *Stolt Tankers, B.V. v.*

Intercontinental Terminals Company LLC, Case No. 4:22-cv-00201 (S.D. Tex.).

There are no additional proceedings in any court directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit. This case concerns the scope of the Oil Pollution Act ("OPA") and presents an important question of federal law that has not yet been, but should be, settled by this Court. Sup. Ct. R. 10(c).

The question is whether OPA applies to an oil spill commingled with a relatively small amount of hazardous substance. The Fifth Circuit answered "no" and refused to apply OPA to 403,062 barrels of oil spilled into the Houston Ship Channel ("HSC") from ten oil storage tanks during a fire at an oil storage facility. Why? Because the 403,062 barrels of oil commingled with 38,426 barrels of xylene (*i.e.*, a mixture of 91% oil and 9% hazardous substance) after escaping the tanks as a result of the fire.

The Fifth Circuit thus adopted a new "single molecule" theory, holding that the commingling of an oil spill with *any amount* of hazardous substance bars the application of OPA and limits a polluter's liability to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The Fifth Circuit's opinion creates the following consequences:

1. <u>CERCLA Violations Immunize Polluters from OPA Liability</u>. The Fifth Circuit held that a polluter who discharges 403,062 barrels of oil into the HSC is completely immunized from OPA liability if

the same polluter concurrently discharges any amount of a CERCLA hazardous substance.

2. CERCLA Takes Precedence Despite OPA Also Covering Mixed Spills. The Fifth Circuit held that OPA and CERCLA are mutually exclusive liability regimes for all spills—even mixed spills containing substances indisputably covered by both statutes—while ignoring statutory text stating that removal costs under OPA include "removal of oil or a hazardous substance." 33 U.S.C. § 2701(30).

3. OPA Excludes Mixed Spills Despite U.S. OPA Recovery for Mixed Spill. The Fifth Circuit held that OPA can only apply to a 100% pure, unadulterated oil spill while ignoring that OPA's liability provision cross-references a statute allowing the United States to recover removal costs associated with removal of "oil or a hazardous substance," and ignoring that the United States has previously obtained a default judgment under OPA for a spill of oil mixed with hazardous substances. 33 U.S.C. § 2702(b)(1)(A) (cross-referencing 33 U.S.C. § 1321(c)(1)); *United States v. Mare Island Sales, LLC*, No. 2:07-cv-2378 (GEB) (EFB), 2008 WL 4279406, 2008 U.S. Dist. LEXIS 85339 (E.D. Cal. Sept. 16, 2008), *report and recommendation adopted*, 2008 WL 11391411, 2008 U.S. Dist. LEXIS 76435 (E.D. Cal. Sept. 29, 2008).

4. OPA Exclusion Applies Without Meeting Requisite Criteria. The Fifth Circuit held that any mixture *covered* by CERCLA is excluded from OPA when the statute says that a "substance" must be

"*specifically listed or designated*" as a hazardous substance under CERCLA to be excluded. 33 U.S.C. § 2701(23) (emphases added). The court ignored that a mixture of oil and xylene is not specifically listed as a hazardous substance under CERCLA.

5. Deference Given to Agency Interpretation That Contradicts Plain Text. The Fifth Circuit appeared to give deference to an incorrect agency interpretation of OPA, by the U.S. Coast Guard, when no deference is appropriate because the statutory text is clear, and when this Court has granted *certiorari* to revisit the scope of agency deference. *See Loper Bright Enters. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (May 1, 2023) (No. 22-451).

6. Opinion Leads to Absurd Results (*e.g.*, Single Molecule Defense). The Fifth Circuit's opinion leads to absurd results. For example, the Deepwater Horizon oil spill would not be covered by OPA if a single molecule of xylene (or any other hazardous substance) on the burned drilling rig mixed with the 3 million barrels of oil that spilled into the Gulf. For further example, consecutive discharges of oil and a hazardous substance would trigger liability under both OPA and CERCLA, while simultaneous discharges would trigger liability under only under CERCLA.

This Court should grant the petition to decide this important question of federal law and enforce the two environmental statutes consistently and as written—OPA applies to oil spills, CERCLA applies to

hazardous substance spills, and *both statutes* apply to mixed spills of oil and hazardous substances. OPA would indisputably apply to this spill if the spill "only" consisted of the 403,062 barrels of oil and not the 38,426 barrels of xylene (*i.e.*, hazardous substance). ITC should not be better off by violating two federal environmental statutes instead of one.

OPINIONS BELOW

The Fifth Circuit's opinion (App. 1-17) is reported at 85 F.4th 343 (5th Cir. Oct. 27, 2023). The Fifth Circuit's order denying rehearing *en banc* (App. 53-55) is unreported and available at 2023 U.S. App. LEXIS 31719 (5th Cir. Nov. 28, 2023). The district court's order granting summary judgment (ROA.22069) is unreported, available at 2022 WL 3651968, 2022 U.S. Dist. LEXIS 151875 (S.D. Tex. Aug. 24, 2022), and reproduced at App. 21-24. The district court magistrate judge's report and recommendation (ROA.16547) is unreported, available at 2021 WL 4081575, 2021 U.S. Dist. LEXIS 172480 (S.D. Tex. July 2, 2021), and reproduced at App. 25-52.

STATEMENT OF JURISDICTION

The Fifth Circuit issued its opinion on October 27, 2023, and its order denying Petitioners' timely petition for rehearing *en banc* on November 28, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

OPA Provisions: The pertinent provisions relating to the Oil Pollution Act include in part as follows.

- 33 U.S.C. § 2701(23) states:

> "[O]il" means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act[.]

- 33 U.S.C. § 2701(30) states:

> "[R]emove" or "removal" means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches[.]

- 33 U.S.C. § 2701(31) states:

> "[R]emoval costs" means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident[.]

- 33 U.S.C. § 2702(a) states:

> **In general.** Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.

- 33 U.S.C. § 2702(b) states:

> **(b) Covered removal costs and damages**
>
> **(1) Removal costs.** The removal costs referred to in subsection (a) are—
>
> **(A)** all removal costs incurred by the United States, a State, or an Indian tribe under subsection (c), (d), (e), or (l) of section 1321 of this title, under the Intervention on the High

> Seas Act (33 U.S.C. 1471 et seq.), or under State law; and
>
> **(B)** any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.
>
> **(2) Damages.** The damages referred to in subsection (a) are the following:
>
> **(A) Natural resources.** Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.
>
> ***
>
> **(E) Profits and earning capacity.** Damages equal to the 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.

- 33 U.S.C. § 2703 states:

> **(a) Complete defenses.** A responsible party is not liable for removal costs or

damages under section 2702 or this title if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail), if the responsible party establishes, by a preponderance of the evidence, that the responsible party—

(A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and

(B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions; **or**

> **(4)** any combination of paragraphs (1), (2), and (3).

- 33 U.S.C. § 2713(c) states:

> **(c) Election.** If a claim is presented in accordance with subsection (a) and—
>
> **(1)** each person to whom the claim is presented denies all liability for the claim, or
>
> **(2)** the claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to section 2714(b) of this title, whichever is later,
>
> the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

CERCLA Provisions: The pertinent provisions relating to the Comprehensive Environmental Response, Compensation, and Liability Act include in part as follows.

- 42 U.S.C. § 9601(14) states:

> The term "hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C.

§ 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. §§ 6901 *et seq.*] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. § 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C. § 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

- 42 U.S.C. § 9614(b) states:

> **Recovery under other State or Federal law of compensation for removal costs or damages, or payment of claims.** Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter.

- 40 C.F.R. § 302.4, includes a chart with hazardous substances under CERCLA, and can be found at: https://www.ecfr.gov/current/title-40/chapter-I/subchapter-J/part-302/section-302.4 .

Other Provisions: The pertinent provisions relating to the Federal Water Pollution Control Act and Resource Conservation and Recovery Act include in part as follows.

- 33 U.S.C. § 1321(b)(2)(A) states:

> The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as

> hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act), present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

- 33 U.S.C. § 1321(c)(1)(A) states:

  > The President shall, in accordance with the National Contingency Plan and any appropriate Area Contingency Plan, ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance[.]

- 40 C.F.R. § 261.3 states:

  > (a) A solid waste, as defined in § 261.2, is a hazardous waste if:

(1) It is not excluded from regulation as a hazardous waste under § 261.4(b); and

(2) It meets any of the following criteria:

(i) It exhibits any of the characteristics of hazardous waste identified in subpart C of this part. However, any mixture of a waste from the extraction, beneficiation, and processing of ores and minerals excluded under § 261.4(b)(7) and any other solid waste exhibiting a characteristic of hazardous waste under subpart C is a hazardous waste only if it exhibits a characteristic that would not have been exhibited by the excluded waste alone if such mixture had not occurred, or if it continues to exhibit any of the characteristics exhibited by the non-excluded wastes prior to mixture. Further, for the purposes of applying the Toxicity Characteristic to such mixtures, the mixture is also a hazardous waste if it exceeds the maximum concentration for any contaminant listed in table 1 to § 261.24 that would not have been exceeded by the excluded waste alone if the mixture had not occurred or if it continues to exceed the maximum concentration for any contaminant exceeded by the nonexempt waste prior to mixture.

(ii) It is listed in subpart D of this part and has not been excluded from the lists in subpart D of this part under §§ 260.20 and 260.22 of this chapter.

(iii) [Reserved]

(iv) It is a mixture of solid waste and one or more hazardous wastes listed in subpart D of this part and has not been excluded from paragraph (a)[.]

STATEMENT OF THE CASE

A. Factual Background

ITC owns and operates an onshore terminaling service facility in La Porte, Texas (the "Deer Park Facility"). The Deer Park Facility has 13.1 million barrels of capacity in 242 tanks, which store petrochemical liquids and gases, as well as fuel oil, bunker oil and distillates. It has five ship docks and ten barge docks, rail and truck access, as well as multiple pipeline connections.

On March 17, 2019, an above-ground storage tank containing naphtha caught fire at the Deer Park Facility. The naphtha tank was in an ITC tank farm consisting of fifteen 80,000-barrel capacity above-ground storage tanks. Eleven of the fifteen tanks held OPA products, including naphtha, pyrolysis gasoline, gasoline blendstock, and base oil. Two tanks held hazardous substances—xylene and toluene—but only the xylene tank burned. ROA.7436 (n.6). The toluene tank did not burn and remained intact after the fire. ROA.8868-8869 (fire marshal report with picture of the intact toluene tank). Two tanks were empty.

As emergency crews worked to control the fire, a mixture of the various tank products, fire water, and firefighting foam accumulated in ITC's secondary containment area. On March 22, 2019, the secondary containment wall was breached, causing mixed oil and hazardous substances to spill into the HSC. The spill included in part 403,062 barrels of oil (*i.e.*, 16,928,604 gallons) from the ten destroyed oil storage tanks (including naphtha, base oil, gasoline blendstock, and

pyrolysis gasoline) and 38,426 barrels of xylene from the single destroyed hazardous substances storage tank. This spill into the navigable waters of the United States caused a shutdown of navigation on the HSC and resulted in the economic losses that Petitioners seek to recover here.

ITC does not dispute that those 16.9 million gallons qualify as "oil" under OPA. Nor does ITC dispute that the spill would be covered by OPA if the discharge consisted of "only" the 16.9 million gallons of oil that spilled from ITC's storage tanks. Instead, ITC argues that it has a complete defense to OPA liability because it also discharged an additional 38,426 barrels of xylene into the HSC.

B. District Court Proceedings

On April 17, 2020, Texas Aromatics (No. 4:20-cv-1387) filed its complaint against ITC asserting two claims arising exclusively under OPA: Count 1 for violation of OPA, and Count 2 for declaratory relief related to ITC's OPA liability. ROA.26167-26170. On May 28, 2020, Rio Energy (No. 4:20-cv-1863), and Gunvor (No. 4:20-cv-1867) filed substantially identical two-count complaints. ROA.26242-26244, 26310-26312. Castleton (No. 4:20-cv-1930) did the same on June 2, 2020. ROA.26377-26379. By order dated July 10, 2020, those four OPA complaints were consolidated into Lead Case No. 4:19-cv-1460 (hereinafter collectively referencing Texas Aromatics, Rio Energy, Gunvor, and Castleton as "OPA Plaintiffs"). ROA.6926.

On August 6, 2020, ITC and OPA Plaintiffs filed an agreed motion for leave for ITC to file a motion for summary judgment regarding claims under OPA, arguing that early resolution of OPA's application would streamline the consolidated proceedings, in which both individual and corporate plaintiffs asserted a variety of non-OPA claims against ITC arising from the March 2019 fire and subsequent oil spill at ITC's tank farm on the HSC. ROA.6984. The court granted the motion for leave on August 7, 2020. ROA.7059.

On September 4, 2020, ITC filed its motion for summary judgment regarding claims under OPA, arguing that ITC's concurrent violation of CERCLA is a complete defense to OPA. ROA.7425. OPA Plaintiffs filed their opposition on October 2, 2020 (ROA.8545) and an errata on October 5, 2020 (ROA.9011). ITC filed its reply on October 23, 2020. ROA.9167. ITC subsequently filed two notices of supplemental authority on February 24, 2021 (ROA.10616) and March 23, 2021 (ROA.11590), and OPA Plaintiffs filed responses to both on March 5, 2021 (ROA.10810) and March 30, 2021 (ROA.12084) respectively. Petredec (No. 4:21-cv-00846) filed its complaint asserting exclusively OPA claims on March 15, 2021. ROA.26440-26441. Petredec's action was consolidated into the lead action on April 5, 2021. ROA.26480.

On July 2, 2021, the magistrate judge issued an R&R recommending that the district court grant ITC's motion for summary judgment. ROA.16547. The R&R is unreported and available at 2021 WL 4081575, 2021 U.S. Dist. LEXIS 172480 (S.D. Tex. July 2, 2021). The

magistrate judge concluded that the alleged commingling of only one hazardous substance—xylene—with 403,062 barrels of oil bars all private OPA damages claims as a matter of law. *See* ROA.16567 (relying exclusively on the commingling of xylene to support recommendation). On July 16, 2021, OPA Plaintiffs filed their objections to the R&R (ROA.16830), and joined in the objections filed by Petredec (ROA.16775).

Stolt (No. 4:22-cv-00201) filed its original complaint on January 20, 2022. ROA.26494-26497. Stolt subsequently filed a first amended complaint on March 30, 2022 asserting a single cause of action under OPA. ROA.26540-26542. Stolt's action was consolidated into the lead action on April 1, 2022. ROA.26565.

Over a year after the magistrate judge issued her R&R, on August 24, 2022, the district court issued a three-page order adopting the R&R in full without a substantive analysis of the issues. ROA.22069. The district court's order granting summary judgment is unreported and available at 2022 WL 3651968, 2022 U.S. Dist. LEXIS 151875 (S.D. Tex. Aug. 24, 2022). The district court's final judgment dismissed all OPA claims in the consolidated matter, meaning the order was interlocutory as to those complaints that asserted both OPA and non-OPA claims, and final as to those complaints that exclusively asserted OPA claims. ROA.22070-22071 (identifying cases dismissed with prejudice); *see also* ROA.22083; ROA.23410.

OPA Plaintiffs timely filed their Notice of Appeal on August 26, 2022. ROA.22090. Stolt (ROA.23410, 23415) and Petredec (ROA.23418) filed their Notices of Appeal on September 22, 2022. Like OPA Plaintiffs, Stolt and Petredec asserted only OPA claims in their operative complaints and joined the Fifth Circuit appeal.

C. The Fifth Circuit's Opinion

On November 28, 2022, Petitioners, as plaintiffs-appellants, filed their joint opening brief with the Fifth Circuit. On January 27, 2023, Respondent, as the defendant-appellee, filed its appellee's brief. On February 17, 2023, Petitioners filed their joint reply brief. On July 10, 2023, the Fifth Circuit heard oral argument.

On October 27, 2023, the Fifth Circuit issued its opinion (App. 1-17), reported at 85 F.4th 343 (5th Cir. Oct. 27, 2023), holding that the district court (1) correctly interpreted OPA's definition of "oil" to exclude a commingled mixture of oil and CERCLA-regulated "hazardous substances" and (2) correctly granted ITC's motion for summary judgment and dismissed the OPA claims. On November 10, 2023, Petitioners filed a petition for rehearing *en banc*, which was denied on November 28, 2023 (App. 53-55), and is unreported and available at 2023 U.S. App. LEXIS 31719 (5th Cir. Nov. 28, 2023). On December 6, 2023, the Fifth Circuit entered its final judgment (App. 18-20) affirming the judgment of the district court.

The Fifth Circuit's opinion, addressing an issue of first impression, held—as a matter of law—that the commingling of an oil spill with any amount of hazardous substance removes the spill from OPA coverage. That sweeping ruling has the following corollaries: (1) a polluter is immunized from OPA liability with a CERCLA violation; (2) OPA and CERCLA are mutually exclusive for any and all spills—even mixed spills containing substances that are indisputably covered by both statutes—and CERCLA takes precedence over OPA for mixed spills; (3) OPA excludes mixed spills despite the United States having previously succeeded in recovering for mixed spills under OPA; (4) the OPA exclusion applies without meeting the requisite criteria; (5) deference may be given to an incorrect agency interpretation that contradicts the plain text of the statute; and (6) the opinion will lead to absurd results (*e.g.*, one molecule of hazardous substances avoids OPA liability; OPA applies when oil and hazardous substance spills are consecutive, but not when they are concurrent).

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit Has Sharply Narrowed the Scope of an Important Federal Statute in a Manner at Odds With Its Text and Purpose.

The Fifth Circuit's decision grossly misinterprets OPA and effectively sidelines the statute as a deterrent and remedy for oil spills whenever, as is commonplace, the oil spill also involves other hazardous substances. The court's interpretation is at odds with the statutory text and ignores the statute's principal purpose.

1. A Mixed Spill of Oil and Xylene is Covered by the Plain Text of OPA.

OPA was enacted in 1990 in response to the Exxon Valdez oil spill. *United States v. Am. Commercial Lines, L.L.C.*, 875 F.3d 170, 173-74 (5th Cir. 2017). Unlike CERCLA, OPA provides a private right of action to recover economic damages resulting from oil spills, 33 U.S.C. § 2713(c)(2), which is not subject to traditional limitations on liability found in general maritime law, including the economic loss rule of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). *See In re Settoon Towing, L.L.C.*, 859 F.3d 340, 352 (5th Cir. 2017) (noting that "OPA nullifies the *Robins Dry Dock* limitation").

The conclusion that OPA applies to mixed spills is supported by the plain text of two different OPA provisions—33 U.S.C. § 2701(30) and 33 U.S.C.

§ 2702(b)(1)(A). The Fifth Circuit's opinion ignores these two provisions entirely.

First, the Fifth Circuit ignores that one form of damages available to the United States under OPA is "removal costs." 33 U.S.C. § 2702(b). "Removal costs" are defined as "costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident." 33 U.S.C. § 2701(31). Critically, "removal" is defined in OPA as "containment and removal of ***oil or a hazardous substance***. . . ." *Id.* § 2701(30) (emphasis added). This reference to "hazardous substance" is not a stray reference in an obscure regulation; it is intentionally included in the statutory text of OPA.

Second, the Fifth Circuit ignores that the liability provision of OPA—which contains the damages provision relied upon by Petitioners (33 U.S.C. § 2702(b)(2)(E))—provides that OPA liability extends to "removal costs incurred by the United States . . . under subsection (c), (d), (e), or (l) of section 1321 of this title." 33 U.S.C. § 2702(b)(1)(A). The cross-referenced statute, 33 U.S.C. § 1321(c)(1), specifically refers to removal of "oil ***or a hazardous substance***." 33 U.S.C. § 1321(c)(1) (emphasis added). Again, the Fifth Circuit ignores this statutory language that plainly contemplates OPA's application to spills that involved non-oil "hazardous substances."

The Fifth Circuit's interpretation of OPA violates the fundamental canon of statutory

construction—that if the language in the statute is "plain and unambiguous, it must be given effect." *BMC Software, Inc. v. Commissioner*, 780 F.3d 669, 674 (5th Cir. 2015) (citation omitted). The references to "hazardous substances" in the text of OPA are plain enough, and the Fifth Circuit ignored them to achieve a result that fundamentally narrows the scope of the statute. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (emphasizing "one of the most basic interpretive canons, that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'") (citation omitted).

But these are not the only principles of statutory construction that the Fifth Circuit overlooked. The statutory coverage and exclusion terms in OPA and CERCLA are mirror-images of each other and must be interpreted consistently. *Compare* 33 U.S.C. § 2701(23), *with* 42 U.S.C. § 9601(14) (both coverage statutes using the terms "hazardous substance" and "petroleum"). Interpreting complementary statutes differently—*i.e.*, concluding that CERCLA's definition of "hazardous substances" *includes* hazardous substances commingled with oil, but OPA's definition of "oil" *excludes* oil commingled with hazardous substances—violates another canon of statutory construction. *See BNSF Ry. Co. v. United States*, 775 F.3d 743, 756 (5th Cir. 2015) (recognizing "elementary principle of statutory construction that similar language in similar statutes should be interpreted similarly") (citation omitted). If mixed spills are covered under CERCLA, they are covered under OPA.

The Fifth Circuit's interpretation, however, strays from this bedrock principle by holding that one federal statute designed to remediate hazardous substances spills—CERCLA—*preempts or displaces* another federal statute designed to remediate oil spills—OPA, *despite the fact that the spill is over 90% oil*. This conflicts with the reasons OPA was enacted, including the need to remedy "inadequate cleanup and damage remedies" under existing laws, establish a "comprehensive system of liability and compensation for damages caused by oil pollution," and "internalize those costs [associated with oil-spill cleanup] within the oil industry." *Savage Servs. Corp. v. United States*, 25 F.4th 925, 930 (11th Cir. 2022) (citations omitted); *see also Rice v. Harken Exploration Co.*, 250 F.3d 264, 266 (5th Cir. 2001). The correct rule when dealing with complementary federal environmental statutes is the opposite: "When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115 (2014). As explained above, nothing in the actual text of OPA precludes its application to mixed spills. Indeed, OPA states the opposite.

A mixed spill consisting of 91% oil and 9% xylene is covered by the plain text of OPA. Yet the Fifth Circuit failed to even mention, much less address, the reference to "hazardous substance" in 33 U.S.C. § 2701(30) or the cross-reference to "hazardous substance" in 33 U.S.C. § 2702(b)(1)(A) (cross-referencing 33 U.S.C. § 1321(c)(1)). The Fifth Circuit's refusal to address this statutory language is grave

error that merits this Court granting this petition. Congress did not list "any discharge covered by CERCLA" in its list of "Excluded discharges," 33 U.S.C. § 2702(c), nor did it list "any violation of CERCLA" in its "Defenses to liability," 33 U.S.C. § 2703, including "Complete defenses." On the contrary, Congress expressly stated that mixed spills are covered by OPA.

2. A Mixed Spill of Oil and Xylene Does Not Fall within OPA's Exception.

The Fifth Circuit's opinion is based on the incorrect premise that any mixture "covered" by CERCLA is excluded by statute from OPA. In doing so, the court's statutory interpretation again ignored the actual text of the OPA statute and instead relied on misconstrued legislative history and unpersuasive agency interpretation. OPA states that a "substance" must be "specifically listed or designated" under CERCLA to be excluded, not simply "covered" by CERCLA. 33 U.S.C. § 2701(23). In reaching its incorrect conclusion, the Fifth Circuit rewrites the text of OPA's actual exclusion as reflected in this strikethrough:

> "oil" means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is ~~***specifically listed or designated as a hazardous substance*** under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response,~~

> ~~Compensation, and Liability Act (42 U.S.C. 9601) and which *is*~~ ***is subject to the provisions of that Act*** [42 U.S.C. § 9601 et seq.]

33 U.S.C. § 2701(23) (emphasis and strikethrough added).

Contrary to the Fifth Circuit's conclusion, oil commingled with xylene is not a "specifically listed or designated" hazardous substance within the meaning of OPA's exclusion. Under 33 U.S.C. § 2701(23), CERCLA-regulated materials are excluded from OPA's oil definition only if they meet ***two*** criteria: they must be "***specifically listed or designated*** as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of [CERCLA] ***and*** …subject to the provisions of that Act." (Emphases added.) The Fifth Circuit focuses only on the second criterion, ignoring the requirement that the substance must also be "specifically listed or designated."

Oil mixed with xylene—or even the broader classification of oil mixed with any hazardous substance—appears nowhere on the hazardous substance lists promulgated under CERCLA, and the Fifth Circuit identifies no such listing. *See* 40 C.F.R. § 302.4, Table 302.4. The regulation itself distinguishes between "Listed" and "Unlisted" hazardous substances, showing that they are not the same thing. *Compare* 40 C.F.R. § 302.4(a), *with* § 302.4(b).

While ITC relies upon a mixture regulation under the Resource Conservation and Recovery Act ("RCRA") to support its claim that only CERCLA covers commingled spills, that regulation states that certain mixtures are *covered* by RCRA if they contain a *listed* substance, not that the entire mixture is "listed." *See* Appellee's Brief at 30-31 (citing 40 C.F.R. § 261.3). Federal law distinguishes between a "covered" mixture and a "listed" substance in that mixture. *See Am. Chemistry Council v. EPA*, 337 F.3d 1060, 1062 (D.C. Cir. 2003) (addressing RCRA rule "treating as a 'hazardous waste' any substance that is either mixed with or derived from a *listed* hazardous waste") (emphasis added). The mixture of oil and xylene is not a "listed" substance because oil is expressly excluded from coverage under CERCLA, 42 U.S.C. § 9601(14), and xylene is an indigenous component of crude oil. *Wilshire Westwood Assocs. v. Atl. Richfield Corp.*, 881 F.2d 801, 802 (9th Cir. 1989); ROA.8584. The Fifth Circuit incorrectly concluded that a mixture of oil and xylene falls within OPA's statutory exception.

3. An Agency's Administrative Claim Denial is Not Entitled to Deference.

The Fifth Circuit referenced the Coast Guard's administrative denial of certain claims arising from the ITC spill, suggesting that the court gave some weight to that agency interpretation. However, the Coast Guard's position that OPA cannot apply to mixed spills is contrary to the plain language of the statute, so no deference is appropriate. *See BMC Software*, 780 F.3d at 675 (refusing to give *Skidmore*

deference to agency action that "runs counter to the plain language" of the statute) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). To the extent deference principles are implicated (they are not), these informal agency adjudications (which were never subject to notice-and-comment rulemaking or judicial review) are not entitled to *Skidmore* deference because they are not persuasive, for the reasons explained above. *See Kornman & Assocs. v. United States*, 527 F.3d 443, 454 (5th Cir. 2008).

Indeed, like the Fifth Circuit's opinion, the Coast Guard's analysis ignores OPA's reference and cross-reference to hazardous substances. The Coast Guard's analysis, also like the Fifth Circuit's opinion, failed to consider the *Mare Island* court's contrary conclusion that the federal government "states a claim under these provisions of OPA and the Federal Water Pollution Control Act," notwithstanding the presence of hazardous substances in a commingled oil spill. *Mare Island*, 2008 WL 4279406, at *3, 2008 U.S. Dist. LEXIS 85339, at *9. In another case, this Court recently granted *certiorari* to revisit whether deference to incorrect agency interpretations is ever appropriate. *See Loper Bright Enters. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (May 1, 2023) (No. 22-451).

4. The Fifth Circuit's Opinion Leads to Absurd Consequences.

The Fifth Circuit's statutory interpretation transformed a 91% oil spill into a 0% oil spill even though the commingled hazardous substance was a

single-digit percentage of the spill (and an indigenous component of crude oil). While this result is extreme, nothing in the court's opinion prevents even more extreme outcomes in future cases based on the presence of a *de minimis* amount of hazardous substance. The court held that the presence of 9% hazardous substance removed the spill from OPA coverage. However, based on the logic of the court's opinion, the same result would occur if that 9% was reduced to 1% or 0.1% or 0.01%. The opinion creates a new and atextual defense to OPA liability that merits this Court's review.

Given the ubiquitous presence of hazardous substances on oil platforms, vessels, and onshore storage facilities, the Fifth Circuit's decision threatens to eviscerate OPA and strip private parties of the economic loss remedy that Congress intended to provide for all oil spills, not just 100% pure ones. Would the Deepwater Horizon spill fall outside of OPA coverage if that drilling rig leaked a small amount of hazardous substances along with the 3 million barrels of oil that spilled into the ocean? The answer is "***Yes***" under the Fifth Circuit's sweeping rationale—the commingling of oil with any amount of hazardous substance takes the mixture out of OPA coverage. *Munoz v. Intercontinental Terminals Company, L.L.C.*, 85 F.4th 343, 350 (5th Cir. 2023) (noting "the particular concentration of hazardous substances 'regardless of how low a percentage' is not relevant to liability determinations under CERCLA").

The Fifth Circuit's sweeping rationale has impacts far beyond Petitioners. It forecloses OPA

remedies that Congress enacted to benefit public institutions, including the federal government, states and their political subdivisions, public trustees, and private citizens. 33 U.S.C. § 2702(b)(2). The opinion forecloses recovery of economic losses based solely on the happenstance that an enormous oil spill was accompanied by a small discharge of a hazardous substance. A party in ITC's position might be wise to keep small amounts of CERCLA substances on hand to "accidentally" spill in the event of an oil-only discharge to keep the consequences of OPA at bay. A party may instead wishfully rely on first responders using a kind of oil dispersant with CERCLA substances to form a mix that extinguishes OPA liability.

These absurd consequences can be avoided by interpreting the two statutes consistently and as written—OPA applies to oil spills, CERCLA applies to hazardous substance spills, and *both statutes* apply to mixed spills of oil and hazardous substances. *See* 42 U.S.C § 9614(b) (CERCLA statute prohibiting double recovery for same removal costs or damages "pursuant to any other Federal or State law"). Concurrent violation of CERCLA is not an absolute defense to OPA. The Court should grant this petition to reach that common-sense conclusion.

B. The Fifth Circuit's Decision is at Odds With Other Courts.

While no other circuit has addressed the question presented, Petitioners' position that OPA applies to mixed spills is not novel—it is the same

position taken by the federal government in the past. The United States has obtained a default judgment *under OPA* for removal costs arising from *a mixed spill* consisting of "oil, oily waste and hazardous substances." *Mare Island*, 2008 WL 4279406, at *1, 2008 U.S. Dist. LEXIS 85339, at *3. In particular, the United States sought costs "to remove approximately 47,000 gallons of oil, oily waste and hazardous substances" from the M/V Quapaw, and "[a]pproximately 100,000 gallons of oily water and 4,900 gallons of diesel, oil, and hazardous substances" from the M/V Moctobi. 2008 U.S. Dist. LEXIS 85339, at *3-4. The *Mare Island* court found that "the facts as plead by plaintiff establish that it is entitled to recover the costs for removal of oil spilled from defendants' vessels, the M/V Quapaw and the M/V Moctobi," and that liability was found "[p]ursuant to 33 U.S.C. § 2702(a), of the OPA." *Id.* at *7. The judgment in *Mare Island* is consistent with the plain language of 33 U.S.C. § 2701(30), which expressly covers removal costs for "oil or a hazardous substance." Again, the Fifth Circuit failed to even mention *Mare Island*—a critical case that Petitioners cited repeatedly throughout their briefing. *See* Opening Br. at 23, 28, 30, 44, 45.

Mare Island's holding that OPA liability extends to discharges of oil and hazardous substances is confirmed by recent authority. In 2023, another federal court reached the same conclusion. *See Crum v. GL NV24 Shipping, Inc.*, No. 2:22-CV-85, 2023 WL 5962097, at *16, 2023 U.S. Dist. LEXIS 162572, at *51 (S.D. Ga. Sept. 13, 2023) ("Thus, discharge of a 'hazardous substance,' a recoverable cost under

Section 2702(b)(1) [of OPA], includes substances 'other than oil.' 33 U.S.C. § 1321(b)(2)(A).").

As a final housekeeping matter, the Fifth Circuit's opinion, at footnote 7, states that "Plaintiffs make several additional arguments on appeal that are either conclusory, unpreserved, or asserted positions that this opinion rejected." App. 16. While it is unclear which arguments the court is referring to, all arguments presented in this petition were fully briefed and preserved on appeal. *See, e.g.*, Opening Br. at 22-25 (statutory construction), 26-29 (extra-statutory materials), 29-31 (absurd consequences), 39-46 (plain language), 46-52 (mirror-image coverage and exception terms), 52-53 (burden of proof on statutory exceptions), 54-56 (legislative history), 57-58 (deference principles), 60-62 (displacement analysis), 63 (absurd results and policy consequences), and 63-66 (liability for substantial discharge threat and oil portion of spill); Reply Br. at 12-16 (summarizing arguments), 16-25 (statutory construction), 25-27 (statutory exception), 30-34 (authorities on mixed spills), 34-36 (deference principles), 36 (duplicative or inconsistent coverage issues), and 37 (liability for substantial discharge threat and oil portion of spill).

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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