No. 24-813

IN THE
Supreme Court of the United States

CHEVRON U.S.A. INCORPORATED; CHEVRON U.S.A. HOLDINGS, INCORPORATED; CHEVRON PIPE LINE COMPANY; THE TEXAS COMPANY; EXXON MOBIL CORPORATION,

Petitioners,

v.

PLAQUEMINES PARISH; PARISH OF CAMERON; STATE OF LOUISIANA; LOUISIANA DEPARTMENT OF ENERGY AND NATURAL RESOURCES,

Respondents.

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

BRIEF FOR THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The American Tort Reform Association ("ATRA") is a national, nonpartisan, nonprofit coalition of large and small businesses, trade associations, and professional firms. ATRA is dedicated to improving the civil justice system with a focus on promoting fairness, balance, efficiency and predictability in civil litigation. In addition to legislative efforts and public education outreach, one of ATRA's important functions is to file *amicus curiae* briefs in cases involving important civil justice issues. In this case, the Court will determine whether the federal defenses of federal officers will be heard in a federal forum or subject to local interests and prejudice. ATRA has a strong interest in ensuring that the federal officer removal statute, 28 U.S.C. §1442(a), is correctly interpreted to promote fairness in our judicial system.

SUMMARY OF ARGUMENT

Congress has long recognized the need to protect federal officers from "hostile state courts" when litigating federal immunity and other federal defenses. *Willingham v. Morgan*, 395 U.S. 402, 405–07 (1969). Indeed, one of the "primary purposes" of the federal officer removal statute "was to have such defenses litigated in the federal courts." *Id.* at 407. Throughout our Nation's history, federal officer removal has proved a critical safeguard to shield those entrusted with federal duties from "local interests or

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the brief's preparation or submission.

prejudice" at trial. *Arizona v. Manypenny*, 451 U.S. 232, 241–42 (1981).

The Louisiana coastal litigation demonstrates both the wisdom of and continuing need for federal officer removal. The Parishes and State seek to hold Petitioners liable for their World War II activities—activities that fulfilled their federal contract duties—under the Louisiana State and Local Coastal Resources Management Act of 1978 ("SLCRMA" or "the Act"). Petitioners have federal defenses that are not just colorable but compelling, including preemption, lack of fair notice under the Due Process Clause and federal immunity. Those defenses require an "impartial" federal forum, free from "local interests or prejudice." *Manypenny*, 451 U.S. at 242.

The need for a federal forum here is real. In 2016, the Louisiana Attorney General and the Parishes entered into a Joint Prosecution Agreement, in which they agreed *in writing* to uniformly reject all of Petitioners' defenses—including their federal defenses—regardless of the defenses' merit. They did so before those defenses were articulated, effectively prejudging them. As a result, the State and Parishes are not impartially enforcing the law. Making matters worse, the Parishes are represented by private counsel who seek to profit from these cases.

The resulting prejudice to the defendants and their federal defenses is demonstrable. It was on full display in *Parish of Plaquemines v. Rozel Operating Co.*, No. 60-996, 25th Judicial District Court for the Parish of Plaquemines (Division "B") ("*Rozel*")—a related case that was tried in state court while the petition for certiorari in this case was pending, after the district court lifted the stay of its remand order.

The *Rozel* defendants raised a compelling federal due process defense, citing SLCRMA's express language that excludes pre-1980 conduct from its scope. A government witness in *Rozel* testified that *at the time of trial* the state agency charged with administering and interpreting SLCRMA had declined to adopt the State and Parishes' litigation position that pre-1980 activities could violate SLCRMA. As the State and Parishes were bringing billion-dollar lawsuits, the state agency was "tell[ing] the regulated community" that activities that "predate 1980 are not a coastal management issue because they predate the program." *Amicus* Br. App. at 66a.[2] That is not and cannot be fair notice that

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[2] The materials in this brief's Appendix (the "*Amicus* Br. App.") can be deemed part of the record in these proceedings that do not need to be lodged with the Court.

Rozel is one of the many cases related to this case for which this case has been designated the "lead appeal." The opinion below is *Plaquemines Par. v. BP Am. Prod. Co.*, 103 F.4th 324 (5th Cir. 2024), which was a consolidated appeal for purposes of oral argument of Fifth Circuit dockets No. 23-30294 and No. 23-30422. *See* Order, *Plaquemines Par. v. BP Am. Prod. Co*, No. 23-30294 (5th Cir. Sep. 1, 2023). The Fifth Circuit had previously designated No. 23-30294 the "lead appeal" for seven appeals from cases removed to the Eastern District of Louisiana under the federal officer removal statute and stayed other appeals until the lead appeal was resolved by the Fifth Circuit. *See* Order, *Plaquemines Par. v. BP Am. Prod. Co*, No. 23-30294 (5th Cir. May 26, 2023) (designating No. 23-30294 as the "lead appeal" and "vacat[ing] the briefing schedule and stay[ing] the appeals in cases 23-30225, 23-30303, 23-30291, 23-30304, 23-30285 and 23-30336").

One of those appeals, No. 23-30336, is the appeal from the district court order remanding *Rozel* to state court. *See* Notice of

SLCRMA's scope extends to pre-1980 conduct. The state trial court nonetheless summarily denied the motion, contrary to this Court's precedents, SLCRMA's text and the evidence at trial.

The state trial court also expressed sympathy for local interests. When reversing one of its pre-trial rulings in the defendants' favor, the court explained that it had not realized that its ruling would "gut" the government's evidence and "significantly less[en]" the dollar value of its case. *Amicus* Br. App. 32a–33a. On the record, the court questioned whether its initial ruling meant the State and Parishes would have a $2 billion damage claim instead of a $3 billion claim. *Id.* at 33a.

The court then issued a series of rulings, also contrary to SLCRMA's text and the trial evidence, gutting the defendants' case. The result: the jury returned a verdict for the State and Parishes, awarding them $745 million. In short, *Rozel* was a test case, and it confirms that only removal and a federal forum can protect the important federal interests at issue and the Petitioners' federal defenses.

ARGUMENT

I. The Louisiana Coastal Litigation Proves the Importance of Federal Officer Removal.

The Louisiana coastal litigation is the very kind of scenario that led Congress to enact the federal officer removal statute. Petitioners and similarly-situated

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Appeal, 23-30336 (filed on May 23, 2023). *Rozel* was remanded after the federal district court lifted the stay it previously granted pending appeal. *See Order, Parish of Plaquemines v. Rozel*, No. 2:18-cv-05189 (E.D. La Oct. 24, 2023). It was tried while the petition in this case was pending.

defendants—all of whom the Parishes and State now seek to hold liable under state law—have compelling federal defenses. A federal forum is thus necessary to ensure that local interests and prejudices do not prevent their fair adjudication. Congress has prescribed the solution: removal to an impartial federal forum.

A. The Removal Statute's Primary Purpose Was To Free Federal Officers from Local Interests and Prejudice.

The federal officer removal statute has a "long history" dating back to the early days of the Republic, as Congress has long recognized the need to protect those entrusted with federal duties from "hostile state courts" when litigating federal immunity and other federal defenses. *Willingham*, 395 U.S. at 405–07. "One of the primary purposes of the removal statute—as its history clearly demonstrates—was to have such defenses litigated in the federal courts." *Id.* at 407.

Federal officer removal "was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties." *Manypenny*, 451 U.S. at 241–42. "The act of removal permits a trial upon the merits of the state-law question free from local interests or prejudice." *Id.* The removal statute thus "safeguard[s] officers and others acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power." *Colorado v. Symes*, 286 U.S. 510, 517 (1932).

In light of that important purpose, this Court "has held that the right of removal is absolute for conduct

performed under color of federal office, and has insisted that the policy favoring removal should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)." *Manypenny*, 451 U.S. at 242 (internal quotation marks and citation omitted).

B. Petitioners Have Numerous Colorable Federal Defenses.

Petitioners here have asserted at least three colorable federal defenses—preemption, due process, and immunity—making this precisely the sort of case that "require[s] the protection of a federal forum." *Willingham*, 395 U.S. at 407. The threshold for asserting a colorable federal defense is low; the party asserting a federal defense need not "win his case before he can have it removed." *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999). Unsurprisingly, multiple federal judges have agreed that Petitioners' federal defenses are colorable.

1. First, as Judge Oldham explained in his dissent from the Fifth Circuit's panel decision below, Petitioners have raised a colorable federal preemption defense. *See* Pet. App. 62–63 (addressing the preemption defense and noting that Petitioners' "other defenses" might "also be colorable"). State laws are preempted where they conflict with federal law or "'where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Pet. App. 62 (quoting *Boggs v. Boggs*, 520 U.S. 833, 844 (1997)).

Petitioners contend that "federal regulations during WWII authorizing oil production activities conflict with the parishes' assertion that those same production activities were unlawful." Pet. App. 62. Petitioners further contend that to the extent those

federally-authorized wartime activities "violated Louisiana law, then it may have been impossible to comply with both the federal directives and Louisiana law." *Id.* at 62–63. As Judge Oldham concluded, that is "clearly enough to raise a colorable federal defense" of preemption. *Id.* at 63; *see also Par. of Plaquemines v. Riverwood Prod. Co.,* 2022 WL 101401, at *6 (E.D. La. Jan. 11, 2022) ("*Riverwood*") (finding that defendants had a "viable" preemption defense in a related case).

2. Petitioners have also raised a colorable federal due process defense. *See* Removing Def's. Opp'n to Joint Mot. to Remand at 28, *Plaquemines v. BP*, 2:18-cv-05256 (E.D. La Jan. 20, 2023). Due process requires that the government "give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). A government enforcement action "fails to comply with due process if the statute or regulation [being enforced] fails to provide a person of ordinary intelligence fair notice of what is prohibited." *Id.* Accordingly, a regulated entity cannot lawfully be liable under a statute that does not provide fair notice of the prohibited conduct. *See id.* at 258 (setting aside penalties given lack of fair notice).

Here, the Parishes and State seek billions of dollars in damages for Petitioners' alleged violations of SLCRMA. But the World War II activities that comprise their claim pre-date SLCRMA's 1980 effective date by decades. What is more, pre-1980 activities are expressly *excluded* from SLCRMA's scope. *See New Orleans City v. Aspect Energy, L.L.C.*, 126 F.4th 1047, 1054 (5th Cir. 2025) (holding that "the text of SLCRMA provides that 'uses legally

commenced or established prior to the effective date of the coastal use permit program shall not require a coastal use permit.'" (quoting La. R.S. § 49:214.34(C)(2))).

Compounding the fair notice problem, the Louisiana state agency charged with interpreting and administering SLCRMA has long maintained—both before *and after* these lawsuits were filed—that pre-1980 activities are not governed by SLCRMA. *See Amicus* Br. App. 61a–62a. These facts establish that Petitioners lacked fair notice in violation of due process, rendering it a "viable" federal defense in these cases. *Riverwood*, 2022 WL 101401, at *6.

3. Finally, Petitioners have raised a colorable federal immunity defense under several theories. Citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 (1988), Petitioners assert "government contractor immunity" because their predecessors "were government contractors and subcontractors that acted under the federal government's wartime direction." Removing Def's. Opp'n to Joint Mot. to Remand at 27, *Plaquemines v. BP*, 2:18-cv-05256 (E.D. La Jan. 20, 2023). That immunity should extend to government subcontractors as well. *See id.* In addition, their predecessors "acted under the government's direction and control" under "its war powers." *Id.* Indeed, "the powerful federal interest here is underscored by the extraordinary steps the Justice Department took during WWII to free oil companies from potential antitrust liability." *Id.*

C. The Government Lawyers Have Prejudged Petitioners' Federal Defenses, Demonstrating the Need for a Federal Forum.

Given Petitioners' colorable federal defenses, an "impartial" federal forum, free from "local interests or prejudice," should resolve them. *Manypenny*, 451 U.S. at 242. Indeed, the risk that, absent removal, local interests and prejudice will prevent an impartial evaluation of Petitioners' defenses is not theoretical. It is demonstrably real.

1. In June 2016, then-Louisiana Attorney General Jeff Landry and the Parishes pursuing coastal litigation claims entered into a joint prosecution agreement (the "Agreement" or the "Joint Prosecution Agreement"). *See Amicus* Br. App. 9a, 14a. The Agreement governs the Office of the Attorney General and the Parishes in this case and in related coastal litigation cases.

Paragraph 6 of the Agreement provides:

> **Consistency of Claims and Defenses**: No party to this Agreement shall at any time expressly or impliedly endorse any substantive defenses or exceptions raised by any defendant in any claims filed by any party to this Agreement under SLCRMA. The parties to this Agreement agree that "in lieu" permits are "coastal use permits" as defined in SLCRMA and its regulations.

Id. at 13a. Under the Agreement's plain terms, the Louisiana Attorney General's Office and the Parishes have promised that they will not endorse any of

Petitioners' defenses—including their federal defenses—*regardless of the defense's merit.*

There can be no doubt that the Louisiana Attorney General and the Parishes entered into the Agreement without regard to any defense's merit. The Agreement was executed in 2016—years before discovery was undertaken and completed, and years before Petitioners identified and briefed their federal defenses. *See* Pet. App. 5–6 (acknowledging that "the *Rozel* report," obtained in discovery "in April of 2018," led Petitioners to invoke a "new legal theory" of federal officer removal); *Par. of Plaquemines v. Chevron USA, Inc.*, 7 F.4th 362, 371 (5th Cir. 2021) (finding that the "*Rozel* report . . . revealed an entirely new legal theory" permitting the defendants to seek federal officer removal). Put another way, the Louisiana Attorney General's Office and the Parishes agreed in 2016 to pre-judge *all* defenses, including federal defenses, meritless for all time—before they knew what the defenses or the facts were.

This prejudgment prejudices Petitioners by preventing the government lawyers from impartially evaluating Petitioners' defenses. Indeed, the Agreement violates the fundamental requirement that government attorneys faithfully and impartially execute the law. *See* La. Const. art. X, § 30 (requiring impartiality oath); *see also* La. Stat. Ann. § 42:161 (extending oath to "[a]ll public officers"); *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) ("A government lawyer 'is the representative not of an ordinary party to a controversy . . . but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.'") (quoting *Berger v. United*

States, 295 U.S. 78, 88 (1935)); *see also* B. Green & R. Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 816 (2020) ("The office of the Attorney-General is a public trust, which involves in the discharge of it, the exertion of an almost boundless discretion, by an officer who stands as impartial as a judge.") (quoting G. Sharswood, *An Essay on Professional Ethics* 95 (3d ed. 1869)).

Due to the Agreement, the government lawyers cannot be impartial. If they view the Petitioners' federal defenses as legally valid, they are *contractually bound* to refuse to endorse them—directly interfering with the government lawyers' ability to impartially execute the law. The Agreement also binds the Office of the Attorney General and the Parishes in the future, as it applies "at any time," and the "parties" to the Agreement are the "Louisiana Office of the Attorney General" and the Parishes, not individuals. *Amicus* Br. App. 13a, 14a–22a. Thus, if a new Attorney General or Parish council member views this case as preempted, barred by immunity, unconstitutional, time-barred, or meritless, he or she is prohibited from articulating that view at all, let alone to the courts.

2. The government lawyers' prejudgment is worsened by the direct financial interest the Parishes' private counsel has in the litigation's outcome. Plaquemines Parish and several other Parishes are represented by the Carmouche firm. *See Amicus* Br. App. 3a–7a (Sep. 12, 2013 Meeting Minutes of Plaquemines Parish Council); *id.* at 16a–18a (showing John Carmouche signing the Joint Prosecution Agreement on behalf of Vermilion, Cameron, and Jefferson Parishes). The Carmouche firm has been

"[t]he winner so far" of the "scramble" for these parish contracts—which carry the prospect of "big money" for lawyers who "could be rewarded with a fee amounting to a percentage of the total damages." T. Bridges & G. Russell, *In Louisiana's Coastal Litigation, Real Payday for Attorneys May Come From Suits Filed By Parishes*, THE TIMES PICAYUNE | NEW ORLEANS ADVOCATE (Oct. 15, 2016) (explaining that the parish contracts are coveted by lawyers "because there is no state law limiting their fee arrangement" when a Parish is the client). And the $745 million *Rozel* verdict—the verdict in only one of over forty coastal litigation cases—suggests that private counsel may seek to recover significant fees in each of these cases.

In addition, it has been reported that in 2023, Jeff Landry—the Louisiana Attorney General who signed the 2016 Joint Prosecution Agreement—"ran successfully for governor with the backing of trial lawyers, including Mr. Carmouche and his law partners, who donated $300,000 to a pro-Landry super PAC." M. Toth, *A Bad Business on the Bayou*, WALL ST. J. (Mar. 31, 2025). The article continues: "Mr. Landry appointed Mr. Carmouche to the Louisiana State University board of supervisors," *id.*—"one of the most sought-after appointments in state government," which comes with access to the "LSU board suite at football games" and "travel to one away football game every year with all expenses paid," T. Bridges, *Jeff Landry Names 7 to LSU Board, Including Oil and Gas Legal Foe John Carmouche*, THE TIMES PICAYUNE | NEW ORLEANS ADVOCATE (Jun. 14, 2024).

And the Carmouche firm has reportedly contributed to local judicial campaigns as well.

Perhaps most saliently, the media reports that: "Mr. Carmouche's firm and an associated PAC have contributed at least $10,500" to the campaign of Judge "Michael Clement of Louisiana's 25th Judicial District Court"—the judge who presided over the *Rozel* trial. Toth, *supra*.

Due to the Attorney General and Parishes' Joint Prosecution Agreement, this is *not* a case where private counsel's financial interest in the litigation can be cured by an impartial government lawyer's control and oversight. The government lawyers are themselves tainted by the contractual prejudgment, rendering the neutrality that due process requires for significant government enforcement actions entirely absent in this case.

* * *

The State and Parish lawyers' contractually-required rejection of the Petitioners' federal defenses, along with the Parish counsel's financial interest in this case, are powerful evidence of the "local interests or prejudice" that the federal-officer removal statute guards against. *Manypenny*, 451 U.S. at 242. Removal under the federal officer statute is necessary to ensure Petitioners' federal defenses are evaluated impartially.

II. The *Rozel* Trial Further Demonstrates the Need for a Federal Forum.

The record in *Rozel* further demonstrates the need for an impartial federal forum. The state trial court gave short shrift to the defendants' federal due process defense and indicated local interest on the record.

A. The State Trial Court Wrongly Rejected the *Rozel* Defendants' Federal Due Process Defense.

The *Rozel* defendants argued that they lacked fair notice that SLCRMA required them to obtain permits for their pre-1980 activities, such as federally-directed World War II activities. They argued that SLCRMA, by its terms, expressly provides that activities "legally commenced or established prior to the effective date of [SLCRMA] shall not require a coastal use permit." La. R.S. § 49:214.34(C)(2)).

In addition, the *Rozel* defendants cited a government witness' trial testimony about longstanding agency practice relating to SLCRMA. Specifically, the head of the state agency responsible for administering SLCRMA testified that the agency had *never*, in over 40 years, interpreted SLCRMA to govern activities commenced prior to its enactment. *See Amicus* Br. App. 66a; 122a. He admitted that the agency had "never once regulated an activity that began prior to 1980" or issued "a coastal use permit for an activity that began before 1980." *Id.* at 66a. He admitted that he was "not aware of anybody at the [agency] communicating to industry that they need [a] coastal use permit for activities that were commenced before October 1st, 1980." *Id.* at 69a–70a.

The government witness also confirmed that the agency had never "issued any notice to Chevron or any other user of the coastal zone" of any "change to require coastal use permits for activities that began before 1980." *Id.* at 66a. And he further admitted that the agency affirmatively "instruct[s]" its "employees to tell the regulated community" that activities that

"predate 1980 are not a coastal management issue because they predate the program." *Id.*

The *Rozel* defendants moved for a directed verdict on state and federal due process grounds, in light of this testimony and SLCRMA's text. *See Amicus* Br. App. 120a–122a. The state trial court summarily denied the motion, holding there was a difference "between an administrative enforcement and a judicial enforcement action." *Id.* at 122a. The government argued, and the court apparently agreed, that the agency's guidance and longstanding practice were based on an incorrect "assumption" about the legality of the defendants' operations that did not bind the Parishes, the Attorney General, the court, or the jury. *Id.* at 121a.

That analysis misses the point. Pronouncements and conduct by an agency can and do define fair notice for due process purposes. In *F.C.C. v. Fox Television Stations, Inc.*, this Court held that the government "fail[s] to provide a person of ordinary intelligence fair notice of what is prohibited" under the Due Process Clause when it "change[s] course" in interpreting a law and enforces a new interpretation to conduct that pre-dates notice of the change. 567 U.S. at 254 (internal quotation marks and citation omitted); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157 (2012) (holding that unfair surprise occurs where the "industry had little reason to suspect that its longstanding practice" was unlawful, because, "despite the industry's decades-long practice," the agency "never initiated any enforcement actions . . . or otherwise suggested that it thought the industry was acting unlawfully"); *id.* at 158 (holding that when "an

agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute"). Indeed, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

Here, the lack of fair notice was undeniable because *at the time of trial* the state agency administering SLCRMA had not adopted the State and Parish's litigation position that pre-1980 activities could violate SLCRMA. During *Rozel*'s pendency, the state agency was "tell[ing] the regulated community" that activities which "predate 1980 are not a coastal management issue because they predate the program." *Amicus* Br. App. at 66a. That is not and cannot be fair notice under the Due Process Clause.

The *Rozel* defendants, like Petitioners, had no way to know before the jury issued its verdict that their pre-1980 conduct was subject to SLCRMA. They certainly could not know in the 1940s that their wartime operations would result in massive liability in 2025 under a statute that expressly does not apply to pre-1980 conduct and was passed decades after their wartime activities had ended. This kind of due process defense is exactly why federal officer removal exists.

In addition, the state trial court excluded evidence showing that the state agency had repeatedly advised the *Rozel* defendants and other applicants that permits were not required for uses commenced—legally *or* illegally—before 1980. *Id.* at 72a–78a; *id.* at 92a–

106a (describing some of the exhibits the court excluded, including numerous instances of the agency informing applicants that permits were not required for uses commenced before 1980, even though in some instances "the activity was illegal[ly] commenced"). The court also precluded a former agency employee from testifying about how he applied SLCRMA's 1980 effective date. *Id.* at 154a–162a. As a result, the jury never heard that the *Rozel* defendants and other permit applicants were repeatedly told by the relevant state agency that they did not need coastal use permits for *any* activity commenced or established prior to 1980.

B. Other *Rozel* Rulings Confirm the Need for a Federal Forum.

The *Rozel* court's other rulings also demonstrate the need for a federal forum. The *Rozel* court repeatedly departed from SLCRMA's text and the trial evidence. Indeed, the numbers alone tell a story: all the defendants' directed verdict motions were denied, while all the government's directed verdict motions were granted. *See Amicus* Br. App. 110a–146a; 170a–171a.

1. The court reversed its pre-trial retroactivity ruling due to its impact on the government's case.

For example, the state trial court erroneously held that SLCRMA applied to *exclusively* pre-1980 harms—that is, harms caused by activities that commenced *and ended* prior to the Act's effective date.

Initially, the state trial court agreed with the *Rozel* defendants that SLCRMA could not apply retroactively to exclusively pre-1980 harms. The

court thus granted summary judgment for the defendants on retroactivity, holding that the defendants could not be liable "for alleged harm that occurred before the effective date of SLCRMA's coastal management program." *Amicus* Br. App. 23a–25a.

The government subsequently filed a motion for a new trial, seeking reconsideration of the ruling. *Id.* at 28a. The Parish's lawyer argued that the court's ruling would "prevent" the government "from presenting evidence of the pre-SLCRMA harm" and would "gut the [government's] case." *Id.* at 30a–31a.

The *Rozel* defendants argued that the motion for reconsideration was motivated by the Parish counsel's financial interests. Specifically, the "plaintiffs have the calculations for pre- versus post-1980 land loss" and were trying "to get their damages number from $2 billion to $3 billion" by introducing evidence of exclusively pre-1980 harm. *Id.* at 29a.

The court reversed its ruling, echoing concerns about the government's ability to maximize its damage award. The court stated, "I think [the Parish's lawyer] Mr. Carmouche said it best: It's going to—it's going to gut his case in terms of what this looks like moving forward." *Id.* at 32a. The court continued that in issuing its prior ruling, it had not "intended . . . to hamstring [the] presentation of evidence." *Id.* at 34a.

The court also questioned whether its prior ruling would "really turn it from a $3 billion to a $2 billion case" and cause the case to be worth "significantly less." *Id.* at 33a. The court then reversed its previous

ruling and allowed the government to present evidence of exclusively pre-1980 harm. *Id.* at 35a.[3]

On the merits of this issue, SLCRMA speaks for itself. SLCRMA's permitting program has an express effective date. *See id.* at 25a. And SLCRMA provides damages only "for uses conducted within the coastal zone without a coastal use permit *where a coastal use permit is required*"—which by definition excludes liability for pre-1980 harm, because the permitting program did not exist and thus coastal use permits were not required before 1980. La. R.S. § 49.214.36(E) (emphasis added).

2. The court eliminated causation, supersizing the government's land-loss damages.

The state trial court also ruled in the government's favor on causation. As a result, the government collected hundreds of millions of dollars in damages despite the absence of any link between the damage and the *Rozel* defendants' conduct.

SLCRMA limits the availability of damages to restoration costs "*for* uses conducted within the coastal zone without a coastal use permit where a coastal use permit is required or which are not in accordance with the terms and conditions of a coastal use permit." La. R.S. § 49:214.36(E) (emphasis added). In other words, the Act ties restoration costs to the harm *actually caused* by the defendant's unlawful use.

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[3] At trial, the defendants sought a directed verdict on exclusively pre-1980 harm, which the court denied. *See Amicus* Br. App. at 137a–140a. The court provided no further explanation of its ruling. *Id.* at 140a.

At the close of the government's case, the defendants moved for a directed verdict based on the government's failure to prove causation, particularly with respect to its claimed land loss injuries—the vast majority of the jury's damage award. *See Amicus* Br. App. at 110a. The government's own witnesses testified that multiple causes—including hurricanes, sediment deprivation, sea-level rise, the Army Corps of Engineers' changes to the Mississippi River's flow, and natural subsidence—*all* contributed to land loss. *See, e.g.*, *id.* at 86a. No witness linked any specific land loss to the *Rozel* defendants' alleged SLCRMA violations. To the contrary, the government's witnesses admitted that they could *not* allocate specific land loss to the defendants' operations. *See, e.g.*, *id.* at 41a; 87a.

The government conceded as much, stating: "with regard to causation, the argument on land loss is made in the abstract." *Id.* at 112a. "[T]here's no remedy here where we can say, 'They're casting judgment for 10 acres or 12 acres or 20 acres of particular surveyed area.' That's not what the remedy is. The remedy is restoration of land to cure the damage they caused." *Id.* "So again, I don't think the law requires that we prove any particular tract of land or any particular amount of land because that is not what [we are] seeking." *Id.* at 113a. To the extent other factors contributed to land loss, the government's counsel argued that they caused "cumulative impacts with indivisible damages" for which defendants should be liable. *Id.* at 114a.

The court's ruling on causation in its entirety is as follows:

> [O]n issue one, causation, land loss and allocation, this Court finds that the evidence presented, although difficult, perhaps for the jurors to determine the allocation, I believe the evidence presented would support an ability of these jurors to reach a verdict in their favor, and therefore, on causation and allocation of land loss, the directed verdict is denied.

Id. at 116a.

In short, despite the admitted lack of evidence tying the defendants' operations to any specific land loss, the concession that damages could not be allocated, and the statutory text requiring such proof, the court ruled that the *Rozel* defendants could be required to remedy *all* land loss regardless of cause. Indeed, the damages were the cost of restoring all the land to its original condition if the defendants were found to have caused some damage at some point in time. For wartime activities, that could potentially mean restoring all land lost from the 1940s to today regardless of the cause of that land loss.

As a result of this ruling, the *Rozel* jury's land loss award was super-sized, encompassing harm caused by natural forces and third-party activities over which the defendants had no control or knowledge.

3. The court departed from SLCRMA's text and Fifth Circuit precedent in interpreting the Act.

Finally, one of the critical issues in this case is whether operations that were commenced before 1980 are exempted under SLCRMA. SLCRMA's permitting program took effect in 1980 and prohibits parties from "commenc[ing]" a "use" of the Louisiana coastal zone

"without first applying for and receiving a coastal use permit." La. R.S. § 49:214.30(A)(1). "Use" is defined as "any use or activity within the coastal zone which has a direct and significant impact on coastal waters." *Id.* § 49:214.23(13). SLCRMA creates a cause of action against parties that violate or fail to obtain the requisite coastal use permit. *Id.* § 49:214.36(D)–(E).

The statute also contains an exception to the permitting requirements, which provides that "[i]ndividual specific uses legally commenced or established prior to the effective date of the coastal use permit program shall not require a coastal use permit." *Id.* § 49:214.34(C)(2); *see also* 43 La. Admin. Code Pt. I, § 723(B)(8)(a) (Louisiana Coastal Resources Program provision also providing that "[n]o use or activity shall require a coastal use permit if . . . the use or activity was lawfully commenced or established prior to the implementation of the coastal use permit process").

Citing SLCRMA's plain text, the Fifth Circuit has held (in a diversity case) that a defendant "is excepted from the statute's permitting requirements and the [government] has no claim against it" for uses commenced "before SLCRMA's effective date in 1980." *New Orleans City*, 126 F.4th at 1052. Importantly, the Fifth Circuit rejected the government's argument that there is an "exception-to-the-exception" for uses that were commenced pre-1980, but have undergone a "change" post-1980. *Id.* at 1053. The Fifth Circuit stated that whether or not such an exception-to-the-exception might have been a "prudent policy," "that policy is not found in SLCRMA." *Id.* at 1054. SLCRMA's text states "explicitly, and without exception or caveat, that activities legally commenced

prior to the effective date of the coastal use permit program *shall not* require a coastal use permit." *Id.* (internal quotation marks omitted).

At summary judgment, the *Rozel* court disagreed with that ruling, holding that a permit was required if the pre-1980 activities changed at all after SLCRMA was enacted—even though, as the Fifth Circuit recognized, SLCRMA contains no such exception. *See Amicus* Br. App. 199a.

The court reaffirmed that view at trial. At the close of the government's case-in-chief, the *Rozel* defendants moved for a directed verdict, because the government failed to provide any evidence that the defendants' pre-1980 operations were not lawfully commenced or established as of SLCRMA's effective date. *See id.* at 128a–133a. Indeed, a government witness *conceded* that some of the defendants' operations were legal and authorized prior to 1980. *Id.* at 129a. The government sought to minimize this testimony by arguing that the pre-1980 uses had changed after 1980 and were no longer governed by the grandfather clause. *Id.* at 130a.

The trial court denied the defendants' directed verdict motion, holding there was sufficient evidence for the jury to find SLCRMA's exception inapplicable. *Id.* at 133a. It did so, again, despite SLCRMA's text and the evidence at trial. *See New Orleans City*, 126 F.4th at 1054.

* * *

The combined effect of these rulings was liability without fair notice and damages that were grossly disproportionate to the defendants' alleged SLCRMA violations. In light of this record, Petitioners' federal defenses should be heard in a federal forum.

CONCLUSION

The Court should reverse the Fifth Circuit's decision and order the Louisiana coastal litigation removed to federal court.

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Respectfully submitted,

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