No. 14-_____

IN THE

Supreme Court of the United States

ANADARKO PETROLEUM CORPORATION,

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 WRIT OF CERTIORARI

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QUESTION PRESENTED

The owners, operators, and persons in charge of a vessel or facility from which oil discharges into the environment are subject to civil penalties under the Clean Water Act, 33 U.S.C. § 1321. This Court and most lower courts interpret the word "discharge" in the Act as a "flowing or issuing out." Below, the Fifth Circuit adopted a new interpretation of "discharge" as a "loss" or "absence" of controlled confinement.

In this case, when a vessel called *Deepwater Horizon* was abandoning a deepwater well on the Outer Continental Shelf, the vessel's operators caused a blowout. Oil flowed from the subsea formation, through the Well, through the vessel and its appurtenances, and only then into the Gulf of Mexico. Applying its new interpretation of "discharge," the Fifth Circuit held that oil discharged from the Well because controlled confinement of oil was lost inside the Well—even though oil issued out into the environment only from the vessel. It therefore held Anadarko subject to civil penalties solely because it was a part-owner of the Well.

The question presented is:

When oil flows through a facility, into a vessel, then into the environment, does oil "discharge" from the facility such that an owner of the facility who neither owns nor controls the vessel is subject to civil penalties under 33 U.S.C. § 1321(b)?

PARTIES TO THE PROCEEDING

Petitioner is Anadarko Petroleum Corporation, which is a defendant in the District Court and was an Appellant in the Court of Appeals. BP Exploration and Production also was a defendant in the District Court and an Appellant in the Court of Appeals.

The United States is the Respondent. The United States filed suit against Anadarko Petroleum Corporation, among others, for civil penalties under the Clean Water Act, 33 U.S.C. § 1321(b)(7).

CORPORATE DISCLOSURE STATEMENT

Anadarko Petroleum Corporation is a publicly held corporation, and no parent or publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Anadarko Petroleum Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (Pet. App. 29a) is published at 844 F. Supp. 2d 746.

The original panel opinion of the Court of Appeals (Pet. App. 1a) is published at 753 F.3d 570 (Benavides, J., joined by King and Dennis, JJ.). The panel's supplemental opinion (Pet. App. 14a) is published at 772 F.3d 350.

The Court of Appeals' order denying Anadarko's petition for rehearing *en banc* (Pet. App. 64a), including the six-judge dissent by Judge Clement, is published at 775 F.3d 741.

JURISDICTION

The District Court exercised jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349, and under Fed. R. Civ. P. 9(h). Anadarko filed a timely appeal under 28 U.S.C. § 1292(a)(3). The judgment of the Court of Appeals was entered on June 4, 2014, and a timely petition for rehearing was denied on January 9, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The full text of Section 1321 is set forth in the Appendix (Pet. App. 68a). Relevant paragraphs include:

33 U.S.C. § 1321(a)(2):

> For the purpose of this section, the term— * * * 'discharge' includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping * * * .

33 U.S.C. § 1321(b)(3):

> The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C. 1331 *et seq*.] * * * in such quantities as may be harmful as determined by the President * * * is prohibited * * * .

33 U.S.C. § 1321(b)(7):

> 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 paragraph (3), shall be subject to a civil penalty * * * .

STATEMENT OF THE CASE

In dissenting from the denial of *en banc* review, six Fifth Circuit judges emphasized the "exceptional importance" of the question presented in this case, as well as the startling degree to which the panel opinion deviates from the clear statutory text, the decisions of this Court, and the decisions of other courts of appeals. Pet. App. 65a–67a. This case arises from the largest oil spill in U.S. history, and the Government has asked for the largest Clean Water Act civil penalty: it seeks over $1 billion from Anadarko alone, even though all agree Anadarko was merely a non-operating investor and minority owner of the Well with no control over the vessel that both caused the spill and was the direct source from which oil entered the environment.

That is not the only unprecedented aspect of the decision below. At the Government's urging, the court below adopted an entirely new and expansive interpretation of "discharge" that contradicts numerous requirements of the Act and settled precedent. Most troubling, under the decision below, the Government is newly empowered to seek penalties from the owners and operators of *every* facility and vessel connected with a spill, including a facility that did not release any oil into the environment.

This Court long has taught that penalty statutes must not be stretched and that ambiguities in them must be construed in a defendant's favor. The Government's effort to expand penalty liability in this case therefore should have set off alarm bells. The lower courts paid them no heed. Instead, *every opinion* they issued adopted a different interpretation of the same civil penalty statute.

The six dissenting Fifth Circuit judges understood what is at stake: an ever-changing and expanding standard for oil-spill penalty liability sows confusion in an important industry concentrated in the Fifth Circuit. Given the massive potential penalties at issue, the consequences for the drilling industry, and the panel's stark break with settled precedent and clear statutory language, this Court should grant Anadarko's petition for certiorari.

I. STATUTORY BACKGROUND

1. 33 U.S.C. § 1321 extensively regulates the handling of oil and responding to oil spills within areas of federal jurisdiction. Of importance to this case, Section 1321 prohibits discharges of oil and imposes civil penalties for such discharges. The word "discharge" is a lynchpin of those statutory provisions. But, Congress did not say what the word "discharge" *means*. It listed only what the word "*includes*." *Id.* at § 1321(a)(2) (emphasis added). To wit, the word "'discharge' includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but excludes" four types of permitted discharges. *Ibid.*

Section 1321 prohibits two broad classes of discharges. *First*, it prohibits discharges "into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." *Id.* at § 1321(b)(3). *Second*, it prohibits discharges "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 * * * ." *Ibid.*

Prohibited discharges trigger Section 1321's penalty provisions. Clean Water Act penalties are intended to punish culpable conduct and deter discharges. See *Tull* v. *United States*, 481 U.S. 412, 422 (1987). Section 1321(b)(7) provides that "[a]ny 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" shall be "subject to" a civil penalty. 33 U.S.C. § 1321(b)(7)(A). Section 1321 codifies an express distinction between "vessels" and "facilities." A "vessel" is "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel." *Id.* at § 1321(a)(3). An offshore facility is "any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, *other than a vessel or a public vessel*." *Id.* at § 1321(a)(11) (emphasis added). A vessel, thus, cannot be a facility, and vice versa. The two categories are non-overlapping potential sources of a discharge.

There are, in short, three prerequisites for a person to be subject to civil penalties under Section 1321. *First*, there must be a prohibited discharge of oil. *Second*, a court must determine from which of three mutually exclusive locations—a vessel, onshore facility, or offshore facility—the oil discharged. *Third*, the court must identify the owners, operators, or persons in charge of the particular vessel or facility that discharged oil.

II. FACTUAL BACKGROUND

1. This case arises from the *Deepwater Horizon* oil spill in April 2010. Anadarko was a non-operating investor in Lease OCS-G 32306 for the Macondo Block on the Outer Continental Shelf in the Gulf of Mexico. See *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010*, 21 F. Supp. 3d 657, 671 (E.D. La. 2014). Anadarko had a 25% ownership interest in the Macondo Well; it had no control over operations and made no operational or well-design decisions. See Pet. App. 30a–31a, 33a–34a.

The majority interest holder and designated operator of the Macondo Lease was BP Exploration and Production, Inc. ("BP"). *Id.* at 30a, 33a. In that capacity, BP chartered a mobile offshore drilling vessel to drill the Macondo Well. *Ibid.* The vessel BP hired was the *Deepwater Horizon*, which was owned and crewed by Transocean. *Id.* at 30.

2. During drilling, the *Deepwater Horizon* was connected to the Well by two of its appurtenances. Pet. App. 30a–31a. Attached to the wellhead was the vessel's four-story-tall blowout preventer ("BOP"). *Id.* at 30a. The vessel used the BOP to control the flow of drilling fluids back and forth from the wellbore to the vessel. *Ibid.* In an emergency, the BOP was designed to interrupt an impending blowout. *Id.* at 2a. A mile-long riser pipe connected the *Deepwater Horizon*'s hull and operating deck to the BOP. *Ibid.*

During the temporary abandonment process, the vessel pumped cement for a plug down to the bottom of the Well, but the cement never sealed the Well. *Id.* at 3a. Mistakenly believing the Well had been

sealed, the *Deepwater Horizon*'s crew displaced the heavy drilling fluids—which were, in fact, the only barrier preventing oil and gas from flowing out of the formation and into the Well. See *id.* at 19a–20a.

Oil and gas then flowed into and up the wellbore, into and through the *Deepwater Horizon*'s BOP, and then into and up the vessel's riser pipe. *Id.* at 30a. Drilling fluids, oil, and gas overflowed onto the *Deepwater Horizon*'s drilling floor and shot up the vessel's derrick. *In re Oil Spill by Oil Rig Deepwater Horizon*, 21 F. Supp. 3d at 726–27.

Efforts to engage the BOP failed, and the oil and gas ignited and exploded. Pet. App. 30a. The discharging oil and gas burned for 36 hours until the *Deepwater Horizon* sank. *In re Oil Spill by Oil Rig Deepwater Horizon*, 21 F. Supp. 3d at 667. As the vessel's main body sank, it bent and sheared the riser pipe, which was still connected to the BOP. Pet. App. 30a. Pressure in the subsea formation continued to force oil and gas into and up the wellbore, then into and through the disabled BOP, then into the vessel's broken riser pipe. *Id.* at 30a, 55a. The oil and gas then traveled the length of the riser pipe and ultimately discharged into the Gulf of Mexico from the opening at the riser's broken end. *Id.* at 30a. The discharge continued for 87 days, until a second BOP was placed on top of Transocean's BOP and riser stub. *In re Oil Spill by Oil Rig Deepwater Horizon*, 21 F. Supp. 3d at 667.

All parties agree that oil never discharged from the Macondo Well directly into the Gulf of Mexico. The only points from which oil and gas escaped confinement and flowed out into the environment were the *Deepwater Horizon* and its appurtenances. See *id.* at 30a–31a.

III. THE PROCEEDINGS BELOW

1. The Government filed suit for civil penalties against BP, Anadarko, Transocean, and others, pursuant to Section 1321(b)(7). Pet. App. 31a. In the Government's view, Transocean was subject to penalties as the "owner" or "operator" of the *Deepwater Horizon* because oil "discharged" from the vessel into the Gulf of Mexico. *Id.* at 52a–53a. Going further, the Government contended that Anadarko and BP were subject to penalties as owners of the Macondo Well because the oil the vessel discharged first passed through the Well and, for that reason, "discharged" from the Well. *Id.* at 39a. Anadarko contended that the vessel (and its appurtenances) was the only place "from which" oil "discharged." See *id.* at 20a. The District Court held that oil *did not* "discharge" from the *Deepwater Horizon* but "discharged" only from the Macondo Well. *Id.* at 61a. Adopting a novel interpretation of Section 1321(b)(7), the District Court concluded that oil "discharged" from the Well alone because the Well was the only "source of the uncontrolled movement of oil." *Id.* at 56a n.28.

2. Anadarko appealed. A panel of the Fifth Circuit (Benavides, J., joined by King and Dennis, JJ.) affirmed. The panel rejected the District Court's "source of the uncontrolled movement of oil" interpretation, instead holding that the word "discharge * * * denotes the loss of controlled confinement" of oil and that "a vessel or facility is a point 'from which oil or a hazardous substance is discharged' if it is a point at which controlled confinement is lost." Pet. App. 7a.

In applying its "loss of controlled confinement" interpretation to this case, the panel made a serious mistake of fact. It believed the Macondo Well "had been lined and sealed with cement" and that "[b]efore the *Deepwater Horizon* departed, this cement failed, resulting in the high-pressure release of gas, oil, and other fluids." *Id.* at 3a. The panel asserted that there was "no genuine dispute that controlled confinement was lost when this cement failed," *id.* at 7a, when, in fact, the opposite was true: it was undisputed that the Well had never been sealed by cement, so no cement seal could have "failed." See *id.* at 16a.

3. Anadarko petitioned for rehearing *en banc*. The panel responded with a "Non-Dispositive Published Opinion," admitting the mistake but deeming it "immaterial." Pet. App. 16a. Then, the panel articulated a new theory for Anadarko's liability. Whereas the panel's first opinion held Anadarko liable on the ground that cement had sealed the Well *and later failed*, the panel's second opinion held Anadarko liable on the ground that the cement *never sealed the Well in the first place*. See *id.* (holding that control was lost in the Well because "the cement in the Well ultimately failed to stop the flow of oil").

4. In a 7–6 vote, the Court of Appeals denied Anadarko's petition for rehearing. Pet. App. 64a–65a. Judge Clement dissented, joined by Judges Jolly, Jones, Owen, Elrod, and Southwick. *Id.* at 65a. In her view, because of the "discord" between the panel's original and supplemental opinions, "coupled with the exceptional importance of the underlying issue," rehearing should have been granted. *Ibid.*

Judge Clement explained how the denial of rehearing "ensures" that the Fifth Circuit's "precedent

concerning liability for oil spills under the Clean Water Act remains unclear." *Ibid.* "[T]he panel opinion's 'controlled confinement' test does not follow from" and is "inconsistent with the text of the [Clean Water Act]." *Ibid.* And the contradiction in the panel's opinions magnifies the problem: in shifting its grounds for subjecting Anadarko to penalties, the panel effectively discarded its short-lived "*loss* of controlled confinement" test for a new "*absenc*e of controlled confinement" test. *Ibid.* Judge Clement explained how the difference "is no abstruse, metaphysical distinction. An absence of confinement test is not only further from the text of the [Clean Water Act], it implicates a significantly broader swath of potentially liable actors." *Ibid.* Judge Clement stated that the supplemental opinion suggests an ambiguity in the statute, which is "concerning because a clear line of precedent exists holding that ambiguities in civil-penalty statutes should be resolved in favor of the defendant." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THE OPINION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS ON THE MEANING OF THE TERM "DISCHARGE"

The Fifth Circuit's interpretation of the word "discharge" in Section 1321 is novel and contradicts the interpretation that this Court and other courts of appeals give the word in other Clean Water Act cases. This Court holds that the term "discharge" in the Clean Water Act "commonly means a 'flowing or issuing out'" from a defined or contained space. *S.D. Warren Co.* v. *Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 375–76 (2006) (quoting WEBSTER'S NEW INTERNA-

TIONAL DICTIONARY 742 (2d ed. 1954)); *PUD No. 1 of Jefferson Cnty.* v. *Wash. Dep't of Ecology*, 511 U.S. 700, 725 (1994) (Thomas, J., dissenting) ("The term 'discharge' is not defined in the [Clean Water Act], but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted.'") (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 360 (1991)). When construing the Clean Water Act, other courts of appeals have adopted the same interpretation of "discharge" as an "issuing out" of containment. See *AES Sparrows Point LNG* v. *Wilson,* 589 F.3d 721, 731 (CA4 2009) (the term "discharge" refers to the "flowing or issuing out" of a liquid); *Oregon Natural Desert Ass'n* v. *U.S. Forest Serv.*, 550 F.3d 778, 783 (CA9 2008) (following *S.D. Warren* to describe discharge as a "flowing or issuing out"). Indeed, the Government itself has endorsed the same interpretation in other cases. See Brief for the United States as Amicus Curiae Supporting Respondent, *S.D. Warren Co.* v. *Me. Bd. of Envtl. Prot.*, 547 U.S. 370 (2006) (No. 04-1527), 2006 WL 42053, at *17 ("The term 'discharge,' in the relevant context of water, refers to the *physical release of the water from some confining source* or location, *viz.*, 'a flowing or issuing out.'") (emphasis added).

Those holdings apply with full force to Section 1321. In that section, Congress did not supply a different or unique definition for the word "discharge." It instead wrote that "discharge" "includes * * * any spilling, leaking, pumping, pouring, emitting, emptying or dumping." 33 U.S.C. § 1321(a)(2). Subject to that inclusive list of examples, the word "discharge" in Section 1321 takes its ordinary meaning as previously articulated by this Court. See *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995) (courts give

statutory words their ordinary meaning to the extent that they are not defined by statute).

The decision below conflicts with *S.D. Warren* and decisions from the Fourth and Ninth Circuits adopting the ordinary "issuing out" from containment definition of "discharge." All the parties below—even all the courts below—agreed that the only place where oil flowed or issued out of confinement and into the environment was from the *Deepwater Horizon* and its appurtenances. Nevertheless, the court below held that a discharge happens from the point "at which *controlled* confinement is lost [or absent]," regardless of where the oil actually issues out into the environment. Pet. App. 7a, 17a. The lower court's focus on "controlled confinement" is impossible to reconcile with Section 1321's text. See *id.* at 65a (Clement, J., et al., dissenting) (concluding panel opinion is "inconsistent with the text of the [Clean Water Act]."). What makes a movement of oil a prohibited "discharge" is whether it issued out of containment and entered the environment, not whether it was "controlled" or "uncontrolled" when it happened. Indeed, prohibited discharges may be controlled (such as "pumping," "pouring", "emptying," or "dumping") or uncontrolled (such as "spilling," "leaking," or "emitting").

Review by this Court is needed to align the Fifth Circuit with the ordinary meaning of "discharge" adopted by this Court and the Fourth and Ninth Circuits.

II. THE OPINION BELOW CREATES TROUBLING CONFUSION ABOUT WHETHER THERE CAN BE MULTIPLE SOURCES FOR A SINGLE DISCHARGE UNDER SECTION 1321

The original and supplemental opinions below create substantial confusion as to whether a single discharge can come from multiple facilities or vessels. Anadarko argued that Section 1321 limits penalties to the owners, operators, and persons in charge of a single source for each prohibited discharge. The panel rejected Anadarko's single-source arguments yet, at the same time, purported not to decide whether the owners, operators, and persons in charge of multiple sources could be subject to penalties for the same discharge.[1] The internal incon-

[1] The court below asserted that its conclusion "that controlled confinement was lost in the well *does not preclude* the possibility that controlled confinement was also lost elsewhere," like the vessel. Pet. App. 20a. It also repeatedly rejected Anadarko's textual arguments precisely because they required adoption of a single-source understanding of the word discharge. For example, Anadarko argued that in a circumstance involving a series of interconnected vessels, wells, and other facilities, it would be impossible to discern the precise place where "controlled confinement of oil was lost." *Ibid.* The panel brushed off that concern, stating that "Anadarko's hypothetical again assumes that there may only be a single point at which controlled confinement is lost * * * ." *Id.* at 27a. Along the same lines, Anadarko argued that no court had ever held the owners and operators of a facility liable for a discharge from a vessel connected to the facility, and that the cases on which the panel relied did not speak to that issue. *Ibid.* The panel criticized Anadarko's argument as "rooted in an assumption that only one instrumentality may be held liable for a given discharge * * * ." *Id.* at 23a.

sistency in the panel's opinions—the inconsistency between what the panel *did* and what it *said*—sows confusion on a previously settled matter of great importance to regulated entities involved in oil production.

A. The Court's "Multiple Source" Interpretation Is Unprecedented

Before the decision below, no court or agency enforcement action in the history of the Clean Water Act ever imposed penalties on more than one vessel or facility for a single discharge of oil. That is true, moreover, despite that it is common in the context of oil production to have multiple facilities and vessels interconnected with one another. Every discharge of oil from a pipeline necessarily involves upstream and downstream interconnected facilities or vessels. See *United States* v. *Coastal States Crude Gathering Co.*, 643 F.2d 1125, 1126–28 (CA5 1981) (pipeline discharge into nearby waterway); *United States* v. *Marathon Pipe Line Co.*, 589 F.2d 1305, 1306–07 (CA7 1978) (same). Yet, whether a court or agency conducted the penalty proceedings, only the owners, operators, or persons in charge of the precise vessel or facility from which oil directly entered the environment has ever been subjected to penalties.

Two noteworthy cases exemplify the usual course. Both involved the analogous situation where oil flows from an onshore facility or fueling vessel into a distinct but physically connected vessel, and from that receiving vessel into the navigable waters. In each case, the receiving vessel's owners and operators were subject to enforcement, not the owners and operators of the fueling vessel or onshore facility from which the oil originally flowed.

In *The Columbo*, 42 F.2d 211, (CA2 1930) (*per curiam*) (Hand, L., Chase, & Mack, JJ.), the Second Circuit applied a predecessor of the Clean Water Act with a similar requirement of a "discharge." At the time of the discharge, a steamer's eighteen oil tanks were being filled by a fuel barge docked alongside it. *Id.* at 212. The oil was pumped through valves at the forward and aft of the steamer. *Ibid.* Because a worker failed to close the aft valve, oil pumped from the barge into the steamer discharged into the river. *Ibid.* The court held that the steamer's owners were subject to a penalty under the statute for the discharge. *Ibid.* Nothing in the decision suggests that the fuel barge or its owners were also subject to a penalty for the discharge from the steamer.

In *United States* v. *Tex-Tow, Inc.*, 589 F.2d 1310, 1312 (CA7 1978), the Seventh Circuit applied a predecessor version of Section 1321(b) to impose penalties on the owners of a vessel that was temporarily docked at an onshore fueling facility while its tanks were being filled with oil, *id.* at 1312–16. There was a puncture in the hull through which the oil escaped into the water. *Id.* at 1312. The court held that the vessel was the "discharging facility" for penalty purposes. *Id.* at 1316.[2]

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[2] See also, *e.g.*, *United States* v. *Chotin Transp., Inc.*, 649 F. Supp. 356, 358 (S.D. Ohio 1986) (barge being loaded with gasoline when "tank overflowed and gasoline was discharged directly into" river liable under the Clean Water Act); *Liberian Poplar Transps., Inc.* v. *United States*, 26 Cl. Ct. 223, 224 (Ct. Cl. 1992) (same); *United States* v. *The Catherine*, 116 F. Supp. 668, 669 (D. Md. 1953) (same under predecessor to the Clean Water Act).

The court below tried to mask its holding's novelty by citing inapposite cases where oil exited a facility, then traveled across land before reaching water. See Pet. App. 8a–9a n.9 (citing cases). No one disputes that a "discharge" occurs when a facility releases oil into the environment, be it land, air, or water. Here, the Well did not release oil into the environment; oil traveled from the Well (a distinct source) into a vessel (another distinct source) that was attached to the Well for the specific purpose of controlling and confining fluids flowing back and forth from the Well. The vessel alone released oil into the environment.[3]

B. Confusion About Multiple Sources For A Single Discharge Threatens Substantial Harm

Congress carefully balanced important interests in enacting Section 1321. On the one hand, it wanted to punish and deter the act of discharging oil into the environment. On the other hand, it knew that various facilities and vessels are commonly interconnected during oil production, and it wanted to en-

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[3] The movement of oil from a facility into a vessel is not a prohibited "discharge" under Section 1321. Several provisions of Section 1321 contemplate oil traveling back and forth from vessels to facilities, but none refers to such movement as a "discharge." See 33 U.S.C. § 1321(j)(5)(B) (requiring owners and operators of vessels or facilities that "*transfer*[] noxious liquid substances * * * to or from a vessel" to prepare "*discharge*" response plans) (emphasis added); *id.* at § 1321(f) (limiting liability for removal costs for "a vessel *carrying* oil or hazardous substances") (emphasis added); *id.* at § 1321(j)(5)(F) (prohibiting vessel from "handl[ing], stor[ing], or transport[ing] oil" without a spill response plan).

courage such production, especially on the Outer Continental Shelf. Congress achieved both goals by dividing all discharges of oil as coming from three mutually exclusive potential sources: vessels, onshore facilities, or offshore facilities. See 33 U.S.C. § 1321(b)(7)(A). The statute defines each category so there is no overlap. A vessel is anything that can be used as a means of transportation *on the water*; an offshore facility is every sort of facility on or under the water *except for a vessel*; and an onshore facility is any sort of facility *on land*. *Id.* at §§ 1321(a)(3), (10), (11). By defining non-overlapping sources and using a disjunctive "or" when imposing penalties on a discharging "vessel, onshore facility, *or* offshore facility," Congress made clear that multiple sources cannot be combined, and a single discharge can come from only one source. *Id.* at § 1321(b)(7)(A) (emphasis added); *United States* v. *Woods*, 134 S. Ct. 557, 566–67 (2013) (disjunctive use of "or" indicates "alternatives").

Congress's division of all potential discharge sources into three non-overlapping categories is a critical structural feature of Section 1321. Special rules and obligations apply to each category. For example, vessels, onshore facilities, and offshore facilities each have different limitations of liability, 33 U.S.C. § 1321(f); different "owners or operators," *id.* at § 1321(a)(6); different spill response plans, *id.* at § 1321(j)(5); and different recordkeeping and inspection requirements, *id.* at §§ 1321(m)(1)–(2).

This structure makes Section 1321 easy to apply. One need only locate the place where oil is issuing out of confinement and entering the environment and ask who owns, operates, or controls that particular facility or vessel, regardless of its interconnection

with other facilities or vessels. And it guards against over-deterrence by protecting from penalties the owners and operators of interconnected facilities and vessels who may lack control over the source from which oil escapes.

In contrast, blending vessels, offshore facilities, and onshore facilities together as a common source of a single discharge would upset Section 1321's meticulous structure and frustrate important statutory goals. For example, if a single discharge can come both from a "vessel" and an "offshore facility," then what limitation of liability would apply under 33 U.S.C. § 1321(f)—the limitation for a vessel or for an offshore facility? Section 1321 has no answer, and neither does the Government or the court below. Section 1321's clarity also is important to its notice requirements. *Id.* at § 1321(b)(5). The "person in charge" of a vessel like the *Deepwater Horizon* should not have to debate the semantics of "discharge" to know he must immediately notify the Coast Guard when oil and gas begins spewing from the vessel's derrick. The "multiple sources" interpretation urged by the Government below and endorsed by the court of appeals would make hash of Section 1321's requirements.

The decision below is evidence enough of the mischief created by a "multiple source" interpretation of discharge. The court below reasoned (albeit circularly) that "[i]t *is immaterial that oil flowed through parts of the vessel* before entering the Gulf of Mexico" because "liability is unaffected by the path traversed by the discharged oil." Pet. App. 8a, 12a (emphasis added). This pronouncement is startling in light of Section 1321's clear text. A vessel is not a mere "path" which oil may "traverse" on its way to

water. *Ibid.* Rather, vessels are statutorily defined as wholly distinct potential sources of a discharge. In other words, Congress specifically obliged owners and operators of vessels to ensure that their vessels do not discharge oil even where the oil in the vessel first passes through a facility (which is inevitable). That the court below labeled as "immaterial" the undisputed fact that the oil in this case discharged directly from the vessel into the environment shows just how far removed its decision is from the Clean Water Act's text and purposes.

III. THE OPINION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING LENITY AND FAIRNESS IN INTERPRETING PENALTY PROVISIONS

The decision below violates deeply established interpretive rules governing penalties. This Court holds that a penal statute shall not be construed to "exclude the natural meaning of [a] word used in the statute, in order to create a penalty," for to do so would disregard "the elementary rule that a penalty is not to be readily implied, and, on the contrary, that a person or corporation is not to be subject to a penalty unless the words of the statute plainly impose it." *Keppel* v. *Tiffin Sav. Bank*, 197 U.S. 356, 362 (1905). Accord, *Comm'r of Internal Revenue* v. *Acker*, 361 U.S. 87, 91 (1959); *Elliott* v. *East Pennsylvania R. Co.*, 99 U.S. 573, 576 (1878) ("Penalties are never extended by implication. They must be expressly imposed or they cannot be enforced.").[4] In-

[4] Lower courts long have reached the same conclusion. See *United States* v. *J.H. Winchester & Co.*, 40 F.2d 472, 474 (CA2 1930) (when construing "a penal statute, where, if the language is ambiguous, the courts lean in favor of the defendant"); *Hat-*

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stead, when construing any penal statute, whether civil or criminal, "all reasonable doubts concerning its meaning ought to operate in favor of the" defendant. *Harrison* v. *Vose*, 50 U.S. 372, 378 (1850); *United States* v. *Reese*, 92 U.S. 214, 219 (1875) ("This is a penal statute, and must be construed strictly."). And because Section 1321's discharge prohibitions have criminal applications, see 33 U.S.C. § 1319(c), the words in Section 1321 also are subject to the rule of lenity, which similarly requires that any "ambiguities in the statute be resolved in the defendant's favor" because courts "cannot add to the statute what Congress did not provide." *United States* v. *Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (CA2 1993) (applying the rule of lenity in a Clean Water Act case).

This is a prime case for applying those interpretive rules. Not even the panel could decide whether the word "discharge" connoted a *loss* of controlled confinement or an *absence* of it. That internal inconsistency was not lost on the dissenting judges, who rightly observed that the panel's shifting interpretation of Section 1321 suggests, at least, that Section 1321 is not clear in this case, which necessitates a ruling for Anadarko. Pet. App. 66a (Clement, J., et

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fried, Inc. v. *Comm'r of Internal Revenue*, 162 F.2d 628, 633 (CA3 1947) ("[I]t is well-settled that in the application of penalties 'all questions in doubt must be resolved in favor of those from whom the penalty is sought.'") (citation omitted); *Acker* v. *Comm'r of Internal Revenue*, 258 F.2d 568, 573 (CA6 1958) (same); see also 70 C.J.S. Penalties § 4 ("Statutory provisions for penalties must be strictly construed, and may not be extended by construction to acts that are not within the intention of the legislature to penalize.") (citations omitted).

al., dissenting) (noting the panel opinions conflicted with "clear line of precedent * * * holding that ambiguities in civil-penalty statutes should be resolved in favor of the defendant"). This is especially important here, because the purpose of the civil penalty is to punish culpable conduct that causes a spill, and to prevent future oil spills by deterring similar conduct. See *Tull*, 481 U.S. at 422. The panel's unprecedented interpretation is not needed to serve those legislative purposes. The narrower, ordinary meaning interpretation of "discharge" comports with the underlying purposes of Section 1321 by subjecting to penalties the "owners, operators, and persons in charge" who are in the best position to prevent the discharge from happening in the first place—here, the "owners, operators and persons in charge" of the vessel from which oil escaped containment and entered the environment.

Instead of fulfilling Congress's purposes, the opinion below confounds them by endorsing a new and expansive application of Section 1321 that tends to shift penalty liability away from the place where the discharge *actually* occurred (the vessel). That new interpretation enables the Government to seek more than $1 billion in civil penalties from Anadarko as a non-operating owner of the Macondo Well, despite that Anadarko has been held to have no fault or culpability related to the spill, had no control over the vessel or its operations that caused the spill, and was in no position to prevent the discharge.[5]

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[5] Penalties in this case have not yet been finally determined, but that is no reason to delay review. Even putting aside the staggering size of the penalty sought by the Government below, the determination that Anadarko has *violated the*

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IV. IMMEDIATE REVIEW IS WARRANTED

As the six dissenting judges emphasized, this case presents issues of "exceptional importance" that warrant immediate review. Pet. App. 65a. Absent review, the decision below threatens to create serious problems and uncertainty for vital segments of the national economy. Moreover, this is a path-marking case under one of the most important environmental laws involving the largest and most complex oil spill in the Nation's history. Given its strategic location, the Fifth Circuit hears most of the cases involving drilling on the Outer Continental Shelf, especially deepwater drilling. Little good would be served by letting the errors below linger in the hope that other courts of appeals will serve as corrective forums. Only immediate review by this Court can address the significant and national problems created by the decision below.

The panel's new definition of "discharge" is totally unworkable in the real world. So is its tacit endorsement of multiple sources for a single discharge. Consider a complex, interconnected system where 24 separately owned and operated offshore wells connect to a vessel, which connects to a pipeline, which

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Act and is therefore subject to penalties standing alone has significant adverse impact on Anadarko that justifies review. See *Rollins Envtl. Services (NJ) Inc.* v. *U.S. E.P.A.*, 937 F.2d 649, 654 n.2 (CADC 1991) (Edwards, J., concurring) (noting that even without assessment of penalties, being "unfairly * * * labeled a 'law breaker' * * * can be used against the company in assessing penalties with respect to any future violations"); 33 U.S.C. § 1321(b)(8) (mandating that in assessing [Clean Water Act] civil penalties, courts and agencies "shall" consider, among other things, prior violations).

connects to a floating platform, which interconnects with an interstate pipeline, which interconnects with an onshore facility dozens of miles away. Consider further that oil flows through the entire system based solely on pressure from the underground reservoir. These are the facts of an actual case, *E.P. Operating Co.* v. *F.E.R.C.,* 876 F.2d 46, 47–48 (CA5 1989), although not one involving a discharge. Under the standards announced below, how could a fact-finder determine the precise point where "controlled confinement is lost" within that system, much less determine how many distinct vessels or facilities upstream from that point should also be considered a source of the discharge?

The panel's novel interpretation of Section 1321 creates needless confusion and changes an easy-to-administer rule that has worked well for decades. Not even the panel appeared to understand fully its interpretation—the panel, for instance, was unable to say the extent to which its "loss [or absence] of controlled confinement" test is different from the district court's equally unprecedented "source of uncontrolled movement" test. See Pet. App. 13a 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."). Lower courts undoubtedly will struggle with it, too, as will the regulated industry. Indeed, the court's attempt at clarification in its supplemental order only further added to the vagueness and impracticality of its analysis. See *id.* at 67a (Clement, J., et al., dissenting) (explaining that the supplemental opinion's recasting of its "loss of controlled confinement" test to an "absence of controlled confinement" test is "not only further from the text of the [Clean Water Act], it implicates a sig-

nificantly broader swath of potentially liable actors," and "district courts are now left to harmonize this discord").

Such vagueness and uncertainty should not be permitted to linger, especially in the context of penalty statutes where the Court has long applied the rule of lenity and the anti-penalty canon to avoid interpretations that broaden their reach or that generate unpredictable outcomes. See Part III above.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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