No. 14-123

In the
Supreme Court of the United States

BP EXPLORATION & PRODUCTION INC., ET AL.,
Petitioners,

v.

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

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

BRIEF OF HER BRITANNIC MAJESTY'S GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT[1]

Her Britannic Majesty's Government of the United Kingdom of Great Britain and Northern Ireland respectfully submits the following brief in this important matter. As a sovereign government and a major bilateral trading partner with the United States, Her Majesty's Government understands the importance of a fair and predictable legal climate. Although Her Majesty's Government takes no position on any points of interpretation of United States law, it notes that the combination of rulings now before this Court has produced an untenable and exceptionally important result. An international company that has gone to great lengths to restore the Gulf Coast, and to substantially and swiftly compensate those who were adversely affected by the Deepwater Horizon oil spill, is now being required to pay large sums to others who were *not* injured by the spill.

Her Majesty's Government has a two-fold interest in this matter. First, the Louisiana district court's rulings raise grave international comity concerns by undermining confidence in the "vigorous

[1] Pursuant to Sup. Ct. R. 37.2(a), *amicus* timely notified the parties in writing of its intent to file this brief. All parties consented through blanket consent statements filed with the Clerk or through correspondence with *amicus* counsel that accompanies this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

and fair resolution of disputes," Pet. App. 107a (Clement, J., dissenting), that the United States' trading partners have come to expect. Second, as a sovereign regulator, the United Kingdom fully appreciates the importance of responding forcefully and rapidly to large-scale accidents by (i) holding responsible parties fully accountable (ii) in a way that encourages corporate responsibility. Her Majesty's Government is concerned that the courts below have pursued the first of those objectives at a needlessly high cost to the second. As one of the dissents below explained, the decisions under review convert a fair and voluntary settlement into an opportunity for "undeserving non-victims" to profit. *Id.* at 389a. Those decisions thereby discourage other companies from accepting responsibility and taking swift corrective actions such as voluntary settlements in the future — to the detriment of all concerned.

In addition to being "one of the largest and most novel class actions in American history," *In re Deepwater Horizon*, 732 F.3d 326, 345 (5th Cir. 2013), this case has attracted considerable international attention due to both the gravity of the underlying disaster and the nature of the subsequent judicial proceedings. As the highest court of this land and a judicial body whose decisions are regarded with the utmost respect and attention throughout the common-law world and beyond, this Court should review the decisions below to articulate fair and uniform national rules that everyone — including international companies and foreign governments — may rely on in making investment and other decisions.

ARGUMENT

This brief takes no position on the points of law before this Court, which involve the interpretation of the United States Constitution and Rules of Civil Procedure. The combination of the lower courts' rulings is, however, of concern.

1. Her Majesty's Government understands that the Louisiana district court ordered petitioners to pay untold millions of dollars to "undeserving non-victims" of the Deepwater Horizon oil spill for losses the spill did *not* cause. Pet. App. 389a (Clement, J., dissenting). The court premised that ruling on petitioners' good-faith, voluntary agreement to provide compensation for losses the oil spill *did* cause. *See id.* at 307a–17a.

That holding cuts against the grain of our nations' shared legal tradition. It is a venerable common-law principle that plaintiffs must prove all of the elements of their claims. *See* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 295, 300–01 (1765). In negligence actions, that has long meant that, at a minimum, a plaintiff must prove that "the defendant's fault" caused the complained-of injury. *Mitchil v. Alestree*, 1 Vent. 295, 295, 86 Eng. Rep. 190 (K.B. 1676); *see also Knapp v. Salsbury*, 2 Camp. 500, 170 Eng. Rep. 1231 (K.B. 1810).

The lower courts' decisions in this case indicate that the United States has not departed from those fundamental common-law precepts in cases like this one. *See, e.g.*, Pet. App. 160a–61a; *id.* at 75a (Garza, J., dissenting). Indeed, those decisions explain that

proof of the causal connection between an injury and the defendant's conduct is not only essential to a plaintiff's negligence claim, but also required to establish standing under Article III of the United States Constitution. *See id.* at 10a.

Her Majesty's Government understands, however, that the Louisiana district court required petitioners to pay claims submitted by parties who merely *attest* to having been injured by the oil spill, and the court of appeals affirmed that conclusion over vigorous dissents. Pet. App. 90a, 92a. Petitioners agreed in the class-action settlement to compensate the people of the Gulf Coast for all economic losses suffered "as a result of" the oil spill. Agreement § 1.3.1.2 (ROA.13-30315.4071). The Louisiana court and the regional court of appeals accepted, however, "proof of loss as a substitute for proof of causation." Pet. App. 88a. In other words, if a business can show that it suffered a loss from some unrelated event (such as fire damage that occurred a year before the spill, *id.* at 420a), and the business alleges that the spill caused its loss, petitioners must pay the claim.

Her Majesty's Government understands that this is not a theoretical example, but rather one of many similar examples of actual claims from the record of this case. *See* Pet. 8; *see also* Pet. App. 420a–444a. The dissenting judges below explained that the decision to ratify the Claims Administrator's elimination of the causation requirement has opened the door to these abuses. *See id.* at 388a–89a (Clement, J., dissenting); *see also id.* at 105a–06a (explaining that "the subsequent implementation [of

the settlement] has expanded those who can recover even to those who cannot trace their injuries to [petitioners'] conduct"); *id.* at 64a–65a & n.5 (Garza, J., dissenting) (explaining that the Claims Administrator "effectively eliminated" any causation requirement). News reports indicate that enterprising local lawyers have taken notice, with some offering to pursue compensation " 'for losses that are UNRELATED to the spill' " in return for contingency fees of up to 25 percent of the awards. Steven Mufson, *In New Orleans courts, the legal gusher BP cannot contain*, WASH. POST (Mar. 1, 2014) (quoting local advertisement) (emphasis in original).

In sum, the lower courts' rulings have dramatically expanded petitioners' scope of liability far beyond anything that would seem to be appropriate under our shared common-law traditions or that anyone would reasonably expect — either at the time of the underlying conduct or when petitioners chose to speed relief to genuine victims by entering into the settlement.

2. The lower courts' treatment of petitioners is exceptionally important for two reasons of particular concern to Her Majesty's Government. First, it undermines the fairness and trust necessary for international commerce. The United States and the United Kingdom conduct more than $200 billion in trade each year, one of the largest bilateral trade relationships in the world. *See* UK Trade & Investment, *Guidance: Exporting to the USA* (April

10, 2014).[2] United Kingdom businesses are responsible for 17% of all foreign direct investment in the United States — more than any other nation. U.S. Department of Commerce, *Foreign Direct Investment in the United States* 5 (Oct. 2013).[3] Petitioners and their corporate affiliates alone employ more than 20,000 Americans and indirectly support over 240,000 additional jobs in the United States. *See* BP, *US Economic Impact Report* 1–3 (2013).[4]

Such strong international economic relationships depend on trust and confidence that each country's nationals and companies will be treated equitably under the law. When a former Director of the Federal Bureau of Investigation found "pervasive" misconduct and abuse in the implementation of petitioners' settlement, the international community took note.[5] With the regional courts' issuance of split

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[2] *Available at* www.gov.uk/government/publications/exporting-to-the-usa/exporting-to-the-usa.

[3] *Available at* www.whitehouse.gov/sites/default/files/2013fdi_report_-_final_for_web.pdf.

[4] *Available at* www.bp.com/content/dam/bp/pdf/bp-orldwide/BP_US_EconomicImpactReport2013_v2.pdf.

[5] *See* Report of Special Master Louis J. Freeh, Independent External Investigation of the Deepwater Horizon Court Supervised Settlement Program 8–9, *In re Deepwater Horizon*, 10 M.D.L. 2179 (E.D. La. Sept. 6, 2013) ("[M]any of [the Claims Administrator's] key executives and senior attorneys engaged in conduct which the Special Master finds to be improper, unethical, or not in accordance with the [applicable] Code of Conduct. The nature and seriousness of this type conduct varied in degree but was pervasive and, at its extreme, may have constituted criminal conduct.").

decisions from which multiple respected judges strongly dissented — going so far as to say that their court had become a "party to [a] fraud," Pet. App. 389a (Clement, J., dissenting) — that concern grew. *See, e.g.*, Ed Crooks, *BP Warns of 'Staggering' Oil Spill Compensation Costs*, FINANCIAL TIMES (May 29, 2014).

The apparent "deep confusion" among United States courts on the issues in this case, Pet. App. 391a (Clement, J., dissenting); *see also id.* at 61a, 100a, 385a, provides further cause for concern unless and until this Court steps in to establish clear, uniform, and fair rules. In addition, precedents set in the United States court system may be followed around the world, a concern for both of our countries, as United States companies are often the largest investors in the energy sector.

This Court has repeatedly observed that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments" or otherwise engaging in foreign affairs. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976). Only this Court can provide that voice for the United States Judiciary by resolving important questions of law in consequential cases that implicate the confidence of foreign companies and governments in the United States legal system.

3. As a sovereign and regulator, the United Kingdom further appreciates the importance of responding forcefully, but not counterproductively, to environmental and other mass torts. In cooperation with government agencies at all levels, petitioners have taken responsibility by leading an

unprecedented effort to restore the Gulf Coast. They have spent approximately $27 billion on response, environmental cleanup, early restoration, and claims payments, and have surveyed 4,379 miles of shoreline as part of a wide-ranging remedial effort. *See* BP, *Gulf of Mexico: Four Years of Progress* 1–2 (2014).[6] Having voluntarily entered into "one of the largest settlements in history," Pet. App. 101a, petitioners have already paid approximately $13 billion for claims, advances, settlements and other payments to individuals, businesses, and governments. BP, *Gulf of Mexico*, *supra*, at 2.

The rulings under review may have the unintended consequence of discouraging such acts of corporate responsibility. Enlarging petitioners' liability to reach "even . . . those who cannot trace their injuries to [petitioners'] conduct," Pet. App. 106a (Clement, J., dissenting), based on petitioners' voluntary settlement, sends a strong signal to other companies that cooperation may not be a prudent disaster-management strategy. Providing incentives to resist rather than accept responsibility would benefit no one apart from the "undeserving non-victims," *id.* at 389a, who stand to profit from the lower courts' rulings.

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[6] *Available at* www.thestateofthegulf.com/media/79762/4-Years-of-Progress-Fact-Sheet-7-9-14.pdf.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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