No. A-

IN THE

Supreme Court of the United States

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

v.

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

APPLICATION TO RECALL AND STAY MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PARTIES TO THE PROCEEDING

BP Exploration & Production Inc.; BP America Production Co.; and BP p.l.c. were defendants-appellees in No. 13-30095 below and defendants-appellants in No. 13-30315 below. They are applicants in this Court. Lake Eugenie Land & Development, Inc.; Bon Secour Fisheries, Inc.; Fort Morgan Realty, Inc.; LFBP 1, LLC, doing business as GW Fins; Panama City Beach Dolphin Tours & More, LLC; Zekes Charter Fleet, LLC; William Sellers; Kathleen Irwin; Ronald Lundy; Corliss Gallo; John Tesvich; Michael Guidry; Henry Hutto; Brad Friloux; and Jerry J. Kee represent the Economic and Property Damages Class that the district court certified, for settlement purposes only, on December 21, 2012. They were plaintiffs-appellees in No. 13-30315 below and are respondents in this Court. Bon Secour Fisheries, Inc., was also a plaintiff-appellee in No. 13-30095 below.

The Deepwater Horizon Court Supervised Settlement Program and Patrick A. Juneau, Jr., were defendants-appellees in No. 13-30329 (consolidated with No. 13-30315) below. Cobb Real Estate, Inc.; G&A Family LP; L&M Investments, Ltd.; Mad, Ltd.; Mex-Co, Ltd.; Robert C. Mistrot; Missroe, LLC; Earl Aaron; Janie Aaron; Zuhair Abbasi; Michael Abbey; and Mohammad Abdelfattah were plaintiffs-appellants in No. 13-30095 below. Ancelet's Marina, LLC; J.G. Cobb Construction, Ltd.; Ships Wheel; Allpar Custom Homes, Inc.; and Sea Tex Marine Service, Inc., were claimants-appellants in No. 13-30095 below. Mike Sturdivant; Patricia Sturdivant; James H. Kirby, III; James H. Kirby, IV; Susan Forsyth; Troy D. Morain; Stanley Paul Baudin, Esq.; Donald Dardar; Thien Nguyen; Daniel J.

Levitan (State Prisoner: #650607); Reynaldo Abreu; Adonay Aparecio; and Miguel Arellano were claimants-appellants in No. 13-30095 below but were terminated as parties to the appeal. Shanta, LLC; SSM Hospitality, LLC; Anjani Hospitality, LLC; Ashi Hotels, LLC; and OVS Investment, Inc., were plaintiffs-appellants in No. 13-30095 but were terminated as parties to the appeal. Gulf Organized Fisheries in Solidarity & Hope, Inc., was a movant-appellant in No. 13-30095 but was terminated as a party to the appeal.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of this Court, undersigned counsel state as follows:

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

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

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

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TO THE HONORABLE ANTONIN SCALIA, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Applicants BP Exploration & Production Inc., BP America Production Co., and BP p.l.c. (collectively, "BP") respectfully apply for an order recalling and staying issuance of the mandate of the March 3, 2014 judgment of the United States Court of Appeals for the Fifth Circuit in *In re Deepwater Horizon*, 744 F.3d 370 (5th Cir. 2014) ("*Deepwater Horizon III*"), pending the filing and disposition of a petition for a writ of certiorari seeking review of that judgment and the related judgment in *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) ("*Deepwater Horizon II*"). The Fifth Circuit denied BP's motion for a stay of the mandate in *Deepwater Horizon III* on May 27, 2014, and issued the mandate the following day without waiting for expiration of the normal seven-day period prescribed by Federal Rule of Appellate Procedure 41(b). Absent recall and stay of the mandate, BP will suffer irreparable injury.

INTRODUCTION

This Court should stay the Fifth Circuit's mandate pending the filing and disposition of a petition for a writ of certiorari seeking review of the frequently recurring and important question whether a district court can, consistent with Federal Rule of Civil Procedure 23 and Article III of the Constitution, certify a class settlement that includes numerous members who have suffered no injury plausibly traceable to the defendant's actions. Unless the mandate is recalled and stayed, countless awards totaling potentially hundreds of millions of dollars will be

irretrievably scattered to claimants that suffered no injury traceable to BP's conduct. Each of the criteria for recall and stay of the mandate pending resolution of this significant legal question are satisfied here.

First, there is a reasonable probability that certiorari will be granted. Confronted with BP's argument that the class action settlement agreement entered into between BP and a class of plaintiffs purportedly injured by the *Deepwater Horizon* oil spill could not be interpreted consistent with Rule 23 and Article III to require payment to claimants who have no plausible claim that their injuries were caused by the spill, the Fifth Circuit held in two related appeals that a class may be certified even when it includes vast numbers of members who were not injured by the defendant's conduct. These holdings deepen a circuit conflict on the question whether a class may be certified in those circumstances. Six courts of appeals have held that a class does not satisfy Rule 23 and Article III when it is defined to include many members who did not suffer an injury traceable to the defendant's conduct. Those courts of appeals would have rejected certification of a settlement class interpreted as the Fifth Circuit has done here. In contrast, one court of appeals has, like the Fifth Circuit in these appeals, upheld certification of a class even when numerous members of that class lack any claim against the defendant. This Court is likely to take the opportunity to resolve this conflict by granting BP's petition in order to establish a single, nationally uniform rule governing whether classes that include numerous uninjured members can appropriately be certified.

The Fifth Circuit's decisions are also irreconcilable with this Court's precedents, which hold that Rule 23 must be "interpreted in keeping with Article III constraints," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997), and that Article III standing must be satisfied at each "stag[e] of the litigation," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Fifth Circuit embraced an interpretation of the class that includes numerous members who lack standing to bring suit against BP because their losses were not caused by the spill. The Fifth Circuit justified this result based solely on the allegation of causal nexus made in the class complaint. Yet this approach impermissibly allows district courts to certify classes without "prob[ing] behind the pleadings," *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013) (citation omitted), and requiring the class proponents to "prove" that the requirements for certification are "*in fact*" established, *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011). The Fifth Circuit's approach permits the certification of a class that, as interpreted to include claimants with no injury caused by the spill, cannot satisfy the commonality and adequacy requirements of Rule 23(a), the predominance requirement of Rule 23(b)(3), and the bedrock standing requirements of Article III. In each of these respects, the question resolved by the Fifth Circuit is exceptionally important to the proper interpretation and implementation of Rule 23.

Second, for substantially the same reasons, there is a significant possibility that the Fifth Circuit's judgments will be reversed. Although the Fifth Circuit rejected en banc rehearing, BP's arguments on the question to be presented in this

Court garnered significant support from several Fifth Circuit judges, who emphasized that the Fifth Circuit's decisions conflict with precedents of this Court and of other federal courts of appeals. There is accordingly a significant possibility that BP will prevail on the merits.

Third, BP is likely to suffer irreparable harm if the Fifth Circuit's mandate is not stayed. The Fifth Circuit ordered the district court to stay payments on dubious claims "until this case is fully heard and decided." *In re Deepwater Horizon*, 732 F.3d 326, 345 (5th Cir. 2013) ("*Deepwater Horizon I*"). That stay remained in place, however, only "until the mandate . . . is issued." *Deepwater Horizon III*, 744 F.3d at 378. Thus, absent recall and stay of the mandate, hundreds of millions of dollars will be disbursed to thousands of claimants whose disputed claims will be the subject of BP's petition for certiorari. Because many claimants can be expected to "irrevocably expen[d]" their payments rather than wait for this Court to dispose of BP's petition for certiorari, "the resulting loss" to BP will be "irreparable." *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers).

Finally, the equities justify a stay. If the Fifth Circuit's mandate is not recalled, many awards will be paid to claimants whose losses were indisputably not the result of BP's conduct. Even if this Court grants certiorari and rules for BP on the merits, BP may have no practical way to recoup many of these wrongly paid awards. Equity strongly counsels against irretrievably "funnel[ing]" hundreds of millions of dollars in windfall payments "into the pockets of undeserving non-

victims." C.A. Doc. 00512636287, at 8 (No. 13-30315) (May 19, 2014) (Clement, J., dissenting from denial of rehearing en banc).

The Fifth Circuit's mandate should accordingly be recalled and stayed pending the filing and disposition of BP's petition for a writ of certiorari.

OPINIONS BELOW

The opinions of the court of appeals are published at 744 F.3d 370 and 739 F.3d 790. App. D, C. The court of appeals' orders denying rehearing and rehearing en banc, along with Judge Southwick's order on BP's petition for panel rehearing and Judge Clement's dissents from the denials of rehearing en banc, have not yet been published. App. E, F, G, H. The court of appeals' order denying BP's motion for stay of the mandate is available at Appendix I, and the mandate is available at Appendix J. The opinions of the district court are available at 910 F. Supp. 2d 891 and Dkt. Entry 12055 (Case No. 2:10-md-02179-CJB-SS (E.D. La.)).

JURISDICTION

The court of appeals filed its opinion in *Deepwater Horizon II* on January 10, 2014, and in *Deepwater Horizon III* on March 3, 2014. The court denied timely petitions for rehearing en banc in both appeals on May 19, 2014. This Court's jurisdiction will be invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The pertinent constitutional provision and rule are reprinted at Appendix K, *infra*.

STATEMENT

A. Factual Background

On April 20, 2010, an explosion on the drilling rig *Deepwater Horizon* caused an oil spill in the Gulf of Mexico. ROA.13-30315.12149. In April 2012, BP and attorneys representing a putative class of injured Gulf Coast residents and businesses reached a proposed class settlement of claims arising from the spill. *See* ROA.13-30315.1958-59.

The settlement agreement defines a class composed of individuals and entities that satisfy the agreement's geographic requirements and have claims falling within "one or more of the Damage Categories described in" the agreement. Agreement § 1 (ROA.13-30315.4069). The damage category relevant here is the "Economic Damage Category," which is limited to claimants that experienced "[l]oss of income, earnings or profits suffered . . . as a result of" the spill. *Id.* § 1.3.1.2 (ROA.13-30315.4071). An entity whose claim falls within that category may be entitled to compensation under the agreement's Business Economic Loss ("BEL") framework. *See id.* § 5.3.2 (ROA.13-30315.4095-4096).

To be eligible for compensation under the BEL framework, a BEL claimant must, *inter alia*, qualify as a class member and satisfy the requirements of the settlement agreement's Exhibit 4B. Subject to certain exceptions, Exhibit 4B requires BEL claimants to satisfy one of several revenue-based "causation" tests. Agreement Ex. 4B (ROA.13-30315.4260-75). These tests obviate the need for BEL claimants to prove in a trial that the spill caused their alleged injury. By its

terms, however, Exhibit 4B "does not apply to . . . Entities, Individuals, or Claims not included within the Economic Class definition." *Id.* at 1 n.1 (ROA.13-30315.4260). If a claimant satisfies the causal-nexus requirement for class membership and Exhibit 4B's revenue-related tests, among other requirements, then it is potentially eligible for compensation.

On December 21, 2012, the district court approved the settlement and certified a settlement class. The district court appointed a Claims Administrator to implement the settlement agreement and to head a court-supervised claims-processing program (the "Settlement Program"), subject to judicial review. Agreement § 4.3.10 (ROA.13-30315.4085). The district court's order certifying the class emphasizes that, under the settlement, "each class member traces his injury directly to the [spill]." ROA.13-30315.12190.

B. Proceedings Below

In January 2013, several objectors to class certification filed an appeal challenging the district court's order certifying the settlement class and approving the settlement (the "Certification Appeal"). Thereafter, in April 2013, BP filed an appeal (the "BEL Appeal") challenging the district court's approval of the Claims Administrator's interpretation of the agreement's compensation provisions.

In his brief in the BEL Appeal, the Claims Administrator conceded that he had paid claims "for losses that a reasonable observer might conclude were not in any way related to the Oil Spill." Br. for Appellees *Deepwater Horizon* Court Supervised Settlement Program, C.A. Doc. 00512252933, at 16 (No. 13-30315) (May

24, 2013). In processing and paying claims, the Claims Administrator was interpreting the settlement agreement to include within the class numerous claimants whose alleged injuries were not related to the spill, reasoning that as long as the revenue tests of Exhibit 4B were satisfied there was no need for "any further inquiry into whether or not the loss was factually caused by the oil spill." Dkt. Entry 12055, at 10.

1. The BEL Decision

On October 2, 2013, in an opinion authored by Judge Clement, a panel of the Fifth Circuit (the "BEL Panel") vacated a decision of the district court that had approved a disputed methodology for calculating BEL compensation under the agreement. *Deepwater Horizon I*, 732 F.3d 326; *see also* C.A. Doc. 00512457612, at 3 (No. 13-30315) (5th Cir. Dec. 2, 2013) (per curiam).

Judge Clement also explained, in a portion of her opinion written only for herself, that the Claims Administrator's practice of making awards to claimants that did not satisfy the causal-nexus requirement raised serious concerns under Rule 23 and Article III. She emphasized that, if the settlement agreement were interpreted to include claimants with no colorable claims against BP, that interpretation would imperil the district court's certification of the class and final approval of the settlement. Rule 23 and Article III, Judge Clement explained, gave the district court "no authority to approve the settlement of a class that included members that had not sustained losses at all, or had sustained losses unrelated to the oil spill." *Deepwater Horizon I*, 732 F.3d at 343 (opinion of Clement, J.).

Accordingly, she concluded, "the district court should have rendered the Settlement lawful by adopting [an] interpretation" that "exclude[s] putative class members with no colorable legal claim." *Ibid*. Judge Southwick agreed that this portion of Judge Clement's opinion was "logical." *Id.* at 346 (Southwick, J., concurring).

The panel directed that payment of Settlement Program awards should be stayed to allow the judicial system to address the problems identified by the panel. Recognizing that BP would "have no practical way of recovering" any "improper awards" once they were "distributed to potentially thousands of claimants," 732 F.3d at 332 n.3, the panel ordered the district court to enter a "stay tailored so that" claimants that did not "experienc[e] actual injury traceable to" the spill would not receive payment "until this case is fully heard and decided through the judicial process," *id.* at 345. Judge Dennis dissented. *See id.* at 347.

On remand, the district court ordered the Claims Administrator to temporarily suspend BEL payments until the legal issues identified by the BEL Panel had been resolved. *See* Dkt. Entry 11928. But, on December 24, 2013, the district court upheld the Claims Administrator's refusal to limit class membership to claimants that were injured by the spill, concluding that the settlement agreement did not violate Rule 23 or Article III even though it was being interpreted to permit payments for injuries with no plausible causal connection to the spill. Dkt. Entry 12055, at 37.

BP promptly challenged this ruling in the Fifth Circuit, pointing to compelling record evidence that the Claims Administrator had awarded hundreds of

millions of dollars to thousands of entities whose purported losses were not plausibly caused by the spill. Those awards include $76 million to entities whose entire losses clearly had nothing to do with the spill, such as lawyers who lost their law licenses and warehouses that burned down before the spill occurred. C.A. Doc. 00512449491 ¶ 4 (No. 13-30315) (Nov. 21, 2013); *id.* App. A ¶¶ 1, 2. The illegitimate awards also included an additional $546 million to claimants that reside far from the coast and are engaged in business activities that bear no logical connection to the spill, such as commodity farms that sell in a nationwide or worldwide market or contingent fee law firms. *Id.* ¶ 5; *id.* App. A ¶¶ 9, 11, 23, 30, 38, 40, 43, 49, 51, 53.

2. The Certification Decision

On January 10, 2014, while BP's challenge to the district court's causal-nexus decision was pending, a different Fifth Circuit panel (the "Certification Panel") affirmed class certification in a divided decision. *Deepwater Horizon II*, 739 F.3d 790. Concluding that it was "not called upon to address" the settlement agreement's "appl[ication] . . . to each individual claim," the panel majority limited its analysis to the validity of the settlement agreement as written. *Id.* at 808. The Certification Panel therefore refused to consider the evidence presented by BP, which demonstrated that the Claims Administrator had expanded class membership to include "vast numbers of members who suffered no Article III injury," rendering the settlement invalid under Rule 23 and Article III. *Id.* at 799 (internal quotation marks omitted). Instead, the majority concluded that evidence

of numerous class members whose injuries are not traceable to the defendant's conduct is "simply irrelevant" at the Rule 23 certification stage. *Id.* at 806.

Under circuit precedent, the panel majority explained, "'[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct.'" 739 F.3d at 801-02, 806, 813, 821 (quoting *Mims* v. *Stewart Title Guaranty Co.,* 590 F.3d 298, 308 (5th Cir. 2009)). For purposes of Article III, the majority continued, a district court need not "probe behind the pleadings" to "consider the evidence regarding absent class members' standing" because, so long as "the class is defined so that every absent class member 'can *allege* standing,'" "it would be improper to look for proof of injuries beyond what the claimants identified in the class definition." *Id.* at 806 (citation omitted). "The result is no different," the majority concluded, under Rule 23. *Id.* at 821. For example, it explained, courts need not look beyond the pleadings "to resolve the merits of [a] common contention at the Rule 23 stage." *Id.* at 811. Instead, the majority held, it is sufficient that class members raise a common contention in the complaint. *Ibid.* The majority thus concluded that the requirements of Rule 23 and Article III were satisfied at the certification stage by each settlement class member's bare allegation of "loss . . . as a result of the [spill]." *See id.* at 802-04.

Judge Garza dissented, on the ground (which the majority did not dispute) that the Claims Administrator had interpreted the agreement in such a way to cause the class—"*as actually implemented*"—to "encompass individuals or entities

who could never truthfully allege or establish standing, at any stage of the litigation." 739 F.3d at 824. This modification rendered the class invalid under Article III, he explained, because the class now included numerous members who lacked standing to bring a claim against BP. *Ibid.* Moreover, because Rule 23 requires that the common questions "go to the validity of *each one of the claims*," Judge Garza concluded that commonality was defeated here because the class had been implemented to include members who were not harmed by the spill. *Id.* at 827.

3. The Causal-Nexus Decision

Finally, on March 3, 2014, a fractured BEL Panel rejected BP's challenges under Rule 23 and Article III to the Claims Administrator's implementation of the settlement agreement. *Deepwater Horizon III*, 744 F.3d 370. Judge Southwick's lead opinion was "written for the majority," but joined only in part by Judge Dennis. *See id.* at 380 (Dennis, J., concurring in part). Judge Southwick stated that the agreement's causal-nexus requirement, which "the certification panel relied upon in approving the class definition," "remained in place during the processing of claims" because each claimant must "attest, . . . under penalty of perjury, that [its] claim in fact was due to the [spill]." *Id.* at 377. Judge Southwick also reasoned that, under the settlement agreement, "proof of loss [was] substituted for proof of causation," but that this interpretation was permissible because (in light of the Certification Panel's ruling) it did not run afoul of Rule 23 or Article III. *Ibid.*

Judge Clement dissented. She emphasized that the Claims Administrator had "expanded" the agreement beyond the limits of Article III and thus had improperly "us[ed] the powers of the federal courts to enforce obligations unrelated to actual cases or controversies." 744 F.3d at 383. In doing so, the Claims Administrator had "raise[d] once again the Constitutional concerns that the majority claims were 'put to rest by the certification panel.'" *Ibid.* (quoting *id.* at 376 (opinion of Southwick, J.)).

4. The Denials of Rehearing En Banc

BP timely sought rehearing of the Certification Panel's January 10 decision and the BEL Panel's March 3 decision. On May 19, 2014, the BEL Panel denied panel rehearing. Judge Southwick issued an opinion accompanying that denial, holding that parties to a settlement could, consistent with Article III, "stipulat[e] to the form of the proof that would demonstrate causation," and that Exhibit 4B constituted such a stipulation. C.A. Doc. 00512642831, at 11 (No. 13-30315). Judge Clement dissented from the opinion. *See id.* at 4 n.*.

That same day, the Fifth Circuit announced the denial, by an eight-to-five vote, of BP's petitions for rehearing en banc in both appeals. C.A. Doc. 00512636271, at 1 (No. 13-30095); C.A. Doc. 00512636287, at 4 (No. 13-30315). Judge Clement, joined by Judges Jolly and Jones, dissented from the denials. Judge Clement reiterated that the Claims Administrator's implementation of the settlement agreement was "irreconcilable" with both the settlement agreement's causal-nexus requirement for class membership and with Article III. C.A. Doc.

00512636271, at 2-3 (No. 13-30095). She also "incorporated by reference" Judge Garza's refutation of the Certification Panel's Rule 23 analysis. *Id.* at 2 n.2 (citing *Deepwater Horizon II*, 739 F.3d at 821-29 (Garza, J., dissenting)). And she reemphasized that, under the Fifth Circuit's decisions, "the class of people who will recover from this settlement continues to include significant numbers of people whose losses, if any, were not caused by BP." C.A. Doc. 00512636287, at 8 (Clement, J., dissenting from denial of rehearing en banc) (No. 13-30315). The decisions accordingly would "funnel" windfall payments "into the pockets of undeserving non-victims." *Ibid.* Judge Clement's dissents indicate that Senior Judge Garza would have joined each dissent if he had been "able to vote as an active member of the en banc panel." C.A. Doc. 00512636271, at 2 & n.1 (No. 13-30095); C.A. Doc. 00512636287, at 5 n.1 (No. 13-30315); *see also* C.A. Doc. 00512642831, at 4-12 (No. 13-30315).

On May 27, 2014, the BEL Panel denied BP's motion to stay the mandate in the BEL Appeal. Under Federal Rule of Appellate Procedure 41(b), the mandate was therefore scheduled to issue, and the stay of payments to BEL claimants would then have been dissolved, on or about June 3, 2014. On May 28, however, the Fifth Circuit issued its mandate forthwith, enabling the Claims Administrator to resume paying BEL claims absent recall and stay of the mandate by this Court pending its consideration of BP's petition for a writ of certiorari.

REASONS FOR GRANTING THE APPLICATION

Under 28 U.S.C. § 2101(f), a Circuit Justice is authorized to stay the mandate of a court of appeals pending the filing and disposition of a petition for a writ of certiorari. The applicant seeking such a stay must satisfy three conditions: "First, there must be a reasonable probability that certiorari will be granted . . . . Second, there must be a significant possibility that the judgment below will be reversed. And third, assuming the applicant's position on the merits is correct, there must be a likelihood of irreparable harm if the judgment is not stayed." *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers). A Circuit Justice will issue a stay if those prerequisites are satisfied and the balance of equities favors a stay. *See id.* at 4-5. The same standard applies after the lower court has issued its mandate. *See*, *e.g.*, *John Doe Agency* v. *John Doe Corp*., 488 U.S. 1306, 1308 (1989) (Marshall, J., in chambers) (applying same standard). For the reasons set forth below, all of the applicable considerations strongly support recall and stay of the mandate here.

I. BP SATISFIES THE PREREQUISITES FOR A STAY.

A. There Is A Reasonable Probability That This Court Will Grant Certiorari.

Certiorari is reasonably likely here because the Fifth Circuit's decisions widen an existing circuit conflict on the question whether a district court may, consistent with Rule 23 and Article III, certify a class that includes numerous members who have suffered no injury traceable to the defendant's conduct. In addition, certiorari is reasonably likely because the decisions below conflict with

numerous and important aspects of this Court's Rule 23 and Article III precedents. The decisions below address a significant and recurring question in the context of class certification, and this Court is reasonably likely to grant review to establish a uniform approach to that issue.

1. The Fifth Circuit's Decisions Conflict With Decisions Of Other Courts Of Appeals And Further Deepen A Circuit Conflict On The Question To Be Presented.

The Fifth Circuit upheld the settlement in this case even though the settlement class, as interpreted, contains many members that unquestionably have not suffered any injury caused by BP. That decision conflicts with the holdings of six other courts of appeals, and exacerbates a deep circuit conflict on the permissibility of certifying such a class under Rule 23 and Article III.

In *Halvorson* v. *Auto-Owners Insurance Co.*, for example, the Eighth Circuit held that, under Article III and Rule 23, "each member" of a class "must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision." 718 F.3d 773, 778 (8th Cir. 2013). In that case, a class of policyholders sued their automobile insurance company for alleged underpayments on medical expenses. *Id.* at 774. The district court concluded that Rule 23's predominance requirement was satisfied on the ground that the class members "suffered the same injury, if any, since their claims were handled in a uniform manner." *Id.* at 776-77. The Eighth Circuit reversed the certification order. Emphasizing that the record did not indicate that all class members could show Article III standing, the Eighth Circuit held that certification was improper

because individual questions regarding injury and damages (including the absence of injury and damages for some class members) predominated. *Id.* at 779-80. Because individualized inquiries would be necessary to determine whether any given class member could show an injury traceable to the defendant's conduct, the court concluded, those questions would predominate over common issues and certification was therefore improper. *Ibid.*

Similarly, in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, the D.C. Circuit held that Rule 23 requires putative class members to "show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy." 725 F.3d 244, 252 (D.C. Cir. 2013) (citing *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623-24 (1997)). In that case, a class of individuals that used freight shipping sued major freight railroads, claiming that the railroads' alleged price-fixing scheme had caused the class members to overpay. *Id.* at 247-48. Instead of showing individual, traceable injury, the plaintiffs attempted to satisfy Rule 23(b)(3)'s predominance requirement by relying on statistical models to establish an "inference of causation" and show injury-in-fact as to the individual class members. *Id.* at 250. The court of appeals rejected that approach, vacating the district court's order certifying the class and requiring the class proponents to present sufficient "common evidence to show *all* class members suffered *some* injury." *Id.* at 252 (first emphasis added).

In harmony with those decisions, the Seventh Circuit recognized in *Kohen* v. *Pacific Investment Management Co.* that "a class should not be certified if it is

apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." 571 F.3d 672, 677 (7th Cir. 2009). Applying that rule, the Seventh Circuit affirmed certification because the defendant had failed to show that the class actually encompassed individuals who had not been injured by the defendant's conduct. *Id.* at 678. In *Parko* v. *Shell Oil Co.*, by contrast, the Seventh Circuit reversed class certification because (among other reasons) the plaintiffs had failed to establish that class members suffered a common injury. 739 F.3d 1083 (7th Cir. 2014). In that case, a class of homeowners brought suit against oil companies for alleged contamination of the water supply underneath the class members' homes. *Id.* at 1084. Although the Seventh Circuit concluded that the class members had Article III standing, it held that certification was improper because the plaintiffs "ha[d] presented no theory, let alone credible evidence, of a connection between the leaks [and] property values . . . that would justify a class action on behalf of all the property owners whose properties sit above groundwater that contains an amount of benzene considered dangerous to human health . . . if drunk." *Id.* at 1087. And the court of appeals emphasized that "there is, as yet[,] . . . no evidence that any of [the groundwater] is ever drunk"—and thus whether some class members had suffered an injury caused by the defendants. *Ibid.* (emphasis omitted). As a result, the plaintiffs had failed to demonstrate that common questions regarding injury-in-fact or damages predominated over individual issues.

The Second Circuit has also adopted the rule that "no class may be certified that contains members lacking Article III standing." *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). Applying that rule in *Denney*, the Second Circuit affirmed certification because all members of the class *had* suffered some injury, and it was "clear" that "these injuries [were] fairly traceable to the alleged conduct of defendants." *Id.* at 265-66.

Finally, the Tenth and Eleventh Circuits have concluded that an inability to show that individual class members suffered actual injury precludes class certification. In *Bussey* v. *Macon Cnty. Greyhound Park, Inc.*, for example, the Eleventh Circuit reversed a class certification order because the district court had failed to conduct a "rigorous analysis" to determine whether class members had actually suffered identifiable losses. — F. App'x —, No. 13-12733, 2014 WL 1302658, at *6 (11th Cir. Apr. 2, 2014). The court of appeals explained that the putative class members' inability to show that they were injured by the alleged misconduct "b[ore] directly on the issue of predominance," and required reversal of the certification order. *Id.* at *6-*7.

In *Chieftain Royalty Co.* v. *XTO Energy, Inc.*, the Tenth Circuit vacated a certification order because the district court had failed to evaluate whether individual class members actually suffered the alleged injury that formed the basis of the class-wide claims. 528 F. App'x 938, 943-44 (10th Cir. 2013). The class comprised individuals who were allegedly underpaid royalties owed to them under lease agreements for natural gas wells. *Id.* at 940. The court of appeals faulted the

district court for failing to "consider the individualized questions that are likely to arise," such as whether, under the language of each individual lease contract, each class member had actually suffered the claimed injury (*e.g.*, breach of contract). *Id.* at 943-44.

In conflict with these decisions, the Fifth Circuit refused in these appeals to enforce the limits imposed by Rule 23 and Article III. The court below expressly upheld the settlement agreement as lawful and consistent with Rule 23 and constitutional standing requirements even when construed to allow payments to a class including numerous members that have no injury traceable to the oil spill. *Deepwater Horizon III*, 744 F.3d at 376-77 & n.1.

At least one other court of appeals has also held that class certification can be appropriate even when individual class members have no colorable claim against the defendant. In *Sullivan* v. *DB Investments, Inc.*, the Third Circuit affirmed the certification of a proposed class of diamond purchasers—both direct and indirect purchasers—who sued the dominant diamond wholesaler for alleged antitrust violations. 667 F.3d 273, 285-86 (3d Cir. 2011) (en banc). The Third Circuit upheld the class of indirect diamond purchasers even though "a large proportion of the Indirect Purchaser Class lack[ed] any valid claims under applicable state substantive law," concluding that the lack of statutory standing for some class members "does not establish a concomitant absence of other predominantly common issues." *Id.* at 305, 307. That decision was fractured and included a strong dissent. As explained in the dissenting opinion, "for there to be any common

questions, all class members must have at least some colorable legal claim." *Id.* at 344 (Jordan, J., dissenting). The dissent reiterated that, "[w]hen a federal court issues an order certifying that there are questions of fact or law common to all class members, it necessarily concludes, whether explicitly stated or not, that all class members have at least some colorable legal claim." *Id.* at 356. The Third Circuit's approach—like the Fifth Circuit's here—would thus not have regarded the fact that numerous members of the class lacked any claim against the defendant as a bar to class certification.

That, however, only underscores the division within the lower courts. The Second, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits would have rejected certification of a settlement class construed in the manner upheld here. Each of those circuits would have held that, to satisfy Rule 23 (and, in some cases, Article III), "each member" of a class "must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision." *Halvorson*, 718 F.3d at 778; *see also In re Rail Freight*, 725 F.3d at 252; *Parko*, 739 F.3d at 1087; *Kohen*, 571 F.3d at 677; *Denney*, 443 F.3d at 264; *Bussey*, 2014 WL 1302658, at *6; *Chieftain Royalty*, 528 F. App'x at 943-44. Given the deep division of authority among the courts of appeals, there is a strong probability that the Court will grant certiorari to establish a single, nationally uniform rule governing whether a district court may certify a class that contains numerous members who did not suffer an injury traceable to the defendant's conduct.

2. The Decisions Below Conflict With This Court's Precedents.

Certiorari is also reasonably likely because the decisions below conflict with this Court's precedents.

a. The decisions below conflict with this Court's precedents governing the requirements for class certification.

First, as re-defined by the Claims Administrator and embraced by the Fifth Circuit, the class would not satisfy Rule 23(a)(2)'s requirement that there be "questions of law or fact common to the class." This Court held in *Wal-Mart Stores, Inc.* v. *Dukes* that, to satisfy this commonality requirement, class members must have suffered the "same injury." 131 S. Ct. 2541, 2551 (2011). Claimants whose purported injuries did not result from the spill cannot have suffered the "same injury" as those who actually did suffer spill-related loss. By dispensing with the requirement that class members' injuries must have a plausible nexus to the defendant's conduct, the Fifth Circuit has eviscerated the commonality requirement. The Fifth Circuit insisted that there would be common questions regarding BP's liability across the class, *Deepwater Horizon II*, 739 F.3d at 810-11, but those questions are irrelevant to the thousands of claimants now included in the class (under the Claims Administrator's interpretation) even though they have no legal quarrel with BP's conduct, *see id.* at 827 (Garza, J., dissenting).

Second, unless interpreted to include a meaningful causal-nexus requirement, the settlement would fail Rule 23(a)(4)'s requirement that the class representatives "will fairly and adequately protect the interests of the class." As

this Court emphasized in *Amchem*, "[a] class representative must be part of the class and *possess the same interest* . . . as the class members." 521 U.S. at 625-26 (emphasis added) (quotation omitted). This "structural protectio[n]" is particularly important in the settlement context, where the class representative negotiates on behalf of absent class members. *See Dewey* v. *Volkswagen Aktiengesellschaft*, 681 F.3d 170, 189 n.19 (3d Cir. 2012). As interpreted by the Claims Administrator, the class here would not satisfy this adequacy requirement, because class members that have suffered no harm caused by BP's conduct cannot possibly have the "same interest" as those genuinely harmed by the spill.

Third, as interpreted by the Claims Administrator and upheld by the Fifth Circuit, the class here would not satisfy Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." This Court has explained that the predominance inquiry is especially critical in a class where "individual stakes are high and disparities among class members great." *Amchem*, 521 U.S. at 625. To satisfy this predominance requirement, proponents of a class must show, *inter alia*, a reliable, common methodology for measuring class-wide damages that is tied to the plaintiffs' theory of liability. *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013); *see Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013) ("*Comcast* holds that a damages suit cannot be certified to proceed as a class action unless the damages sought are *the result of the class-wide injury that the suit alleges*." (emphasis added)). In this case, however, the disparity between class

members is stark: As modified by the district court, the class yokes together claimants that suffered spill-related losses with others whose losses are entirely unrelated to the spill, awarding damages without any connection to the theory of liability. Proponents of such a class cannot "affirmatively demonstrate" that they satisfy the predominance requirement, *Dukes*, 131 S. Ct. at 2551; *Comcast*, 133 S. Ct. at 1432, as uninjured claimants have no damages to "measure" at all—let alone damages tied to the defendant's liability and measurable on a "classwide" basis. *Id.* at 1433; *see also In re Rail Freight*, 725 F.3d at 379 (holding that a method of calculating damages that "detects injury where none could exist . . . shred[s] the plaintiffs' case for certification").

b. The Fifth Circuit's decisions also conflict with this Court's precedents holding that Rule 23 and Article III are not mere pleading requirements.

This Court has held that Rule 23 must be "interpreted in keeping with Article III constraints" and with the Rules Enabling Act, which "instructs that rules of procedure" such as Rule 23 "'shall not abridge, enlarge or modify any substantive right.'" *Amchem*, 521 U.S. at 613 (quoting 28 U.S.C. § 2072(b)). By affirming the Claims Administrator's expansion of the class to include claimants whose injuries are not plausibly traceable to the spill, the Fifth Circuit embraced a modified class definition that includes numerous members that lack standing to bring suit against BP. Rather than confront that undisputed fact, the Fifth Circuit pointed to the class complaint and the settlement agreement's attestation requirement. *See Deepwater Horizon III*, 744 F.3d at 376-77; *Deepwater Horizon II*, 739 F.3d at 802-

04. But this refusal to consider the actual implementation of the settlement disregards the federal courts' duty to ensure that Article III standing is satisfied at each "stag[e] of the litigation," and that the elements of Article III standing are not reduced to "mere pleading requirements." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *accord Lewis* v. *Casey*, 518 U.S. 343, 358 (1996).

Especially in a class settlement such as this one, where the agreement makes the implementation of the settlement subject to ongoing district court review, sole reliance on the class definition to determine whether Article III's requirements are satisfied is insufficient in the face of documented implementation practices and interpretive rulings that modify the class definition to permit recovery by numerous entities that cannot show an injury traceable to the spill. As Judge Garza stated in dissent, while "the words 'as a result of' [the spill] remain in the text of the Class Definition, the Amended Complaint, and the Settlement Agreement," they "have no significance to determining who is eligible to participate in the settlement." *Deepwater Horizon II*, 739 F.3d at 824 (Garza, J., dissenting).

Judge Southwick's opinion on denial of panel rehearing exacerbates the conflict with this Court's precedents. That opinion holds that parties to a class settlement may "stipulat[e] to the form of . . . proof that would demonstrate" an element of Article III standing. C.A. Doc. 00512642831, at 11. But that conclusion directly conflicts with this Court's holdings that "no action of the parties can confer subject-matter jurisdiction upon a federal court," *Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982), and that parties "may

not confer jurisdiction either upon this Court or the District Court by stipulation," *California* v. *LaRue*, 409 U.S. 109, 112 n.3 (1972), *overruled in part on other grounds by 44 Liquormart* v. *Rhode Island*, 517 U.S. 484, 515 (1996).

3. The Fifth Circuit's Decisions Raise Important Questions That This Court Should Resolve.

Certiorari is also reasonably probable because the Fifth Circuit's holdings raise issues of exceptional importance regarding district courts' obligations to police a class definition as implemented to ensure its ongoing conformity with Rule 23 and Article III. *See Houchins* v. *KQED, Inc*., 429 U.S. 1341, 1345 (1977) (Rehnquist, J., in chambers) (noting that a stay may be warranted in a case of "sufficient importance").

Defendants will enter into class settlements only if they can rely on district courts to implement those agreements in a manner consistent with governing law. *See*, *e.g.*, C.A. Br. of Chamber of Commerce, *et al.*, C.A. Doc. 00512571093, at 2 (Mar. 24, 2014) (noting that the Fifth Circuit's interpretation of Rule 23, by upending the expectation that settlements will be executed as written, makes "settlement a far riskier and much less desirable option" for defendants). The Fifth Circuit's holdings undermine the certainty necessary to enter such settlements. Resolving the circuit conflict exacerbated by the decisions below is thus crucial to class-action defendants.

Resolving that conflict is also important to legitimate class members. Rule 23 is designed to aggregate the claims of a "cohesive" group of those injured in the same way by the defendant's conduct, *Amchem*, 521 U.S. at 623—in part to avoid

intra-class conflicts that risk jeopardizing the rights of absent class members, *see*, *e.g.*, *id.* at 620 (Rule 23's requirements are "designed to protect absentees by blocking unwarranted or overbroad class definitions" and they "demand undiluted, even heightened, attention in the settlement context"). When a class definition can be modified to permit those who have not been harmed by the defendant to make claims on settlement funds, the rights of legitimate class members may be imperiled.

Of course, in addition to its implications for future class settlements in general, this particular case also raises important issues because of its sheer magnitude. The Claims Administrator has already awarded more than $76 million to entities whose losses had nothing to do with the spill, as well as an additional $546 million to claimants that are located far from the spill and are engaged in businesses whose revenues and profits bear no logical connection to the spill. C.A. Doc. 00512449491 ¶¶ 4-5 (No. 13-30315). The BEL Panel's refusal to enjoin such awards exposes BP to significant losses for claims that it never agreed to pay. That "enormous potential liability" is a sufficient reason, standing alone, for Supreme Court review. *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari).[1]

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[1] In its opposition to BP's motion below to stay the mandate, counsel for the class noted that "BP was an appellee" in the Certification Appeal and that the Fifth Circuit "affirmed the judgment below." C.A. Doc. 00512641937, at 1 (No. 13-30315) (May 27, 2014). But BP was an appellant in the BEL appeal, and its arguments that class certification could not be upheld unless the settlement agreement is interpreted to include a meaningful causal-nexus requirement for class membership were rejected by both the Certification Panel and the BEL Panel majorities. Thus,

B. There Is A Significant Possibility That The Judgments Below Will Be Set Aside.

The same reasons that make review by this Court probable also demonstrate that there is a significant possibility that this Court will set aside the Fifth Circuit's judgments. In *Dukes*, for example, this Court reaffirmed that a district court must conduct "a rigorous analysis" to determine whether Rule 23 is satisfied. 131 S. Ct. at 2551 (internal quotation marks omitted). And, just last Term, the Court reiterated that a proper Rule 23 analysis may require "the court to probe behind the pleadings." *Comcast*, 133 S. Ct. at 1432 (internal quotation marks omitted). BP's petition for certiorari will ask this Court to ensure that proponents of certification rigorously define any proposed classes to exclude claimants who lack any colorable claim, and that courts do not allow settlements to be implemented in a manner that

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[Footnote continued from previous page]
it is both decisions together that have injured BP, by concluding that the settlement agreement can be interpreted to eliminate the causal-nexus requirement for class membership without running afoul of Rule 23 and Article III. Indeed, the BEL Panel expressly relied on the Certification Panel's decision in stating that it "d[id] not perceive any basis for saying Article III, Rule 23, and the Rules Enabling Act are violated" by the interpretation it adopted. *Deepwater Horizon III*, 744 F.3d at 376 n.1 (opinion of Southwick, J.). BP intends to seek review of both decisions in a single petition challenging the Fifth Circuit's adverse resolution of the Rule 23 and Article III issues. *See* S. Ct. R. 12.4. The Fifth Circuit's erroneous approach to Rule 23 and Article III directly harms BP by making possible the BEL Panel's misinterpretation of the settlement agreement, and thus BP has standing to seek vacatur of both decisions in this Court. And even if BP were incorrectly viewed as a prevailing party below with respect to the Certification Appeal, that would not undermine its ability to seek review in this Court. *See Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 334 (1980) (permitting appeal "from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Article III"); *see also*, *e.g.*, *Elec. Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, 242 (1939).

eviscerates the requirements of Rule 23 and Article III. This Court's recent decisions make clear that there is a significant possibility that the Court will set aside the judgments here and, at a minimum, require more rigorous analysis of causal nexus.

Moreover, the divided nature of the Fifth Circuit's rulings confirms that BP has a significant possibility of success on the merits: Numerous appellate judges have already agreed with BP's Rule 23 and Article III arguments. *See Deepwater Horizon II*, 739 F.3d at 822-29 (Garza, J., dissenting); C.A. Doc. 00512636271, at 2 & n.2 (No. 13-30095) (Clement, J., dissenting from denial of rehearing en banc, joined by Jolly and Jones, JJ.); *id.* at 1, 2 n.1 (indicating that Jolly, Jones, Clement, Owen, and Elrod, JJ., voted in favor of rehearing en banc, and that Judge Garza would have so voted "if he had been able to vote as an active member of the en banc panel"); C.A. Doc. 00512636287, at 4, 5 n.1 (No. 13-30315) (same). Judge Southwick initially found Judge Clement's analysis "logical," *Deepwater Horizon I*, 732 F.3d at 346 (Southwick, J., concurring), but ultimately concluded that the Certification Panel's decision left no "basis for saying Article III [and] Rule 23 . . . [we]re violated at the claims processing stage that ha[d] not already been addressed by the prior panel," *Deepwater Horizon III*, 744 F.3d at 376 n.1 (opinion of Southwick, J.). There is a significant possibility that a majority of this Court will agree with the positions that were endorsed by Judges Garza, Jolly, Jones, and Clement; that Judge Southwick originally found "logical"; and that six circuit judges would have reheard en banc.

C. BP Will Likely Be Irreparably Harmed If A Stay Is Not Issued.

A stay is necessary to prevent irreparable harm to BP. Without a recall and stay of the mandate, the temporary injunction that was formerly in place—which prevented the Claims Administrator from paying awards to claimants that cannot plausibly trace their injury to the spill—will remain dissolved. *See Deepwater Horizon III*, 744 F.3d at 378. The Settlement Program will therefore begin paying awards to claimants whose losses lack any colorable nexus to the spill. Before the injunction took effect, the Settlement Program had paid out more than *two billion dollars* in BEL claims, *see* Dkt. Entry 11894-1, at 3, at least a quarter of which lacked a plausible connection to the spill, *see* C.A. Doc. 00512449491 ¶¶ 4-5 (No. 13-30315). In addition, nearly *$1 billion dollars* in unpaid BEL awards have accumulated to date, and payment of such awards will resume now that the injunction has been lifted. *See* Dkt. Entry 12815-1, at 4. Given the past rate of improper awards, BP will incur staggering costs absent a stay—far exceeding the actual injury caused by the spill.

BP's practical inability to recover all of the improper payments constitutes irreparable harm. Unless a stay is issued, many BEL claimants are likely to "irrevocably expen[d]" the BEL payments that they receive "before this Court will be able to consider and resolve [BP's] claims." *Scott*, 131 S. Ct. at 4 (Scalia, J., in chambers). It will therefore be extremely difficult—and in many instances, impossible—for BP to "recou[p]" improper BEL payments once they are made. *Ibid.* Indeed, the Fifth Circuit has already acknowledged that "BP will have no practical

way of recovering these funds [once they are distributed] should it prevail," *Deepwater Horizon I*, 732 F.3d at 332 n.3 (majority opinion), since BP cannot feasibly expect to sue and collect in full from each of the thousands of claimants receiving unjustified awards.

Circuit Justices have routinely concluded that an applicant would suffer irreparable harm where, as here, a judgment would cause the applicant to pay out money that likely could not be recovered in full. *See*, *e.g.*, *Heckler* v. *Turner*, 468 U.S. 1305, 1308 (1984) (Rehnquist, J., in chambers) (finding a likelihood of irreparable injury where it was "extremely unlikely that the Secretary [of Health and Human Services] would be able to recover funds improperly paid out" under a federal assistance program); *Mori* v. *Int'l Bhd. of Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers) (concluding that stay criteria were satisfied where funds held in escrow "would be very difficult to recover should applicants' stay not be granted"); *Edelman* v. *Jordan*, 414 U.S. 1301, 1302-03 (1973) (Rehnquist, J., in chambers) (partially staying judgment where it was "extremely unlikely that petitioner, should he succeed in this Court, would be able to recover funds paid out . . . to respondent welfare recipients" while respondent could "collect from petitioner all of the back payments found due" if the petition was denied).

Resuming disputed payments would inflict still further irreparable injury on BP in the form of unrecoverable administrative costs. The settlement agreement requires BP to fund "all reasonable and necessary expenses incurred in connection with the operation of the Settlement Program." Agreement § 5.12.1.1.3 (ROA.13-

30315.4109). BP has already spent more than $500 million to that end. Dkt. Entry 10949-1, at 1. Resuming payments for losses unrelated to the spill will inevitably increase these costs, which will have been wasted if BP ultimately obtains relief and the calculations have to be redone under a corrected interpretation of the settlement agreement. Because these "administrative expenses" are "not likely [to] be recoverable," *Scott*, 131 S. Ct. at 4 (Scalia, J., in chambers), they constitute further irreparable harm to BP in the absence of a stay.

II. THE EQUITIES STRONGLY SUPPORT A STAY.

The balance of equities also strongly favors staying the Fifth Circuit's mandate. Unless the mandate is recalled and stayed, many awards will be paid to entities whose losses were indisputably not caused by the spill. Many other claimants likely to be paid are entities whose business activities bear no logical relation to Gulf waters and the damage those waters sustained. The Claims Administrator has repeatedly deemed such claimants to be members of the class and entitled to compensation, despite the absence of any plausible causal nexus to the spill. Once these thousands of claimants are paid, BP will have no practical way to recoup the bulk of these payments even if this Court grants certiorari and holds for BP on the merits. Equity strongly counsels against "funnel[ing]" hundreds of millions of dollars in windfall payments "into the pockets of undeserving non-victims." C.A. Doc. 00512636287, at 8 (Clement, J., dissenting from denial of rehearing en banc).

Moreover, in contrast to the irreparable harm BP would suffer absent a stay, granting this application would not substantially harm legitimate claimants. The injunction originally ordered by the BEL Panel was a "tailored" one, *Deepwater Horizon I*, 732 F.3d at 345, intended to ensure that awards are not paid to claimants whose loss—because of the location of their business, the industry they work in, or some other factor—is unlikely to have been caused by the spill. Many claimants whose losses were caused by the spill would continue to be paid through provisions of the settlement agreement addressing other categories of claims: seafood, individual economic loss, property damage, subsistence, vessels of opportunity, and vessel physical damage. These categories of claimants would be unaffected by a stay of the Fifth Circuit's mandate pending disposition of BP's petition. *See U.S. Postal Serv*. v. *Nat'l Ass'n of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1303 (1987) (Rehnquist, J., in chambers) (granting a stay where "[c]ontinuation of the status quo will not work an irreparable harm on" respondent).

CONCLUSION

For the foregoing reasons, the Fifth Circuit's mandate should be recalled and stayed pending the filing and disposition of a petition for a writ of certiorari.

Respectfully submitted.

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May 28, 2014

No. A-

IN THE

Supreme Court of the United States

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

v.

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

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this 28th day of May 2014, I caused one copy of the foregoing Application To Recall And Stay Mandate Pending The Filing And Disposition Of A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit to be served by commercial carrier for next-day delivery (with a copy by electronic mail) on the counsel identified below, pursuant to this Court's Rule 29.3. All parties required to be served have been served.

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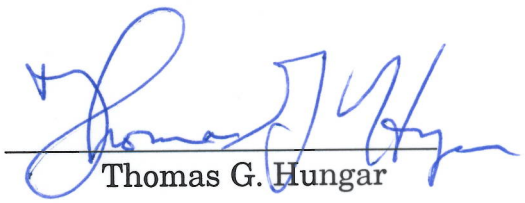
Counsel for Deepwater Horizon *Court Supervised Settlement Program and Patrick A. Juneau, in his official capacity as Claims Administrator of the* Deepwater Horizon *Court Supervised Settlement Program administering the* Deepwater Horizon *Economic and Property Damages Settlement Agreement, and in his official capacity as Trustee of the* Deepwater Horizon *Economic and Property Damages Settlement Trust*



Thomas G. Hungar