No. 08-212

In the Supreme Court of the United States

EXXON MOBIL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether Section 4412(b)(1) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1778 (2005), is unconstitutional under *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rule:

Statutes and rule—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 08-212

EXXON MOBIL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported. The pertinent opinions of the Federal Energy Regulatory Commission (Pet. App. 8a-199a) are reported at 113 F.E.R.C. ¶ 61,062, 114 F.E.R.C. ¶ 61,323, and 115 F.E.R.C. ¶ 61,287.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2008. A petition for rehearing was denied on May 20, 2008. The petition for a writ of certiorari was filed on August 18, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

Section 4412(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1778-1779 (2005), provides:

> **(1) IN GENERAL.—**
>
> In a proceeding commenced before the date of enactment of this Act, the Federal Energy Regulatory Commission may not order retroactive changes in TAPS quality bank adjustments for any period before February 1, 2000.
>
> **(2) PROCEEDINGS COMMENCED AFTER THE DATE OF ENACTMENT.—**
>
> In a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding.

STATEMENT

1. The Trans Alaska Pipeline System (TAPS) transports crude oil from the North Slope to the Gulf of Alaska. The pipeline is used by multiple shippers. The composition of the crude oil streams introduced by the shippers into the pipeline varies with the source of the streams, and those variations in turn affect the value of the oil being shipped. Because each shipper's stream of oil is intermingled in the pipeline, the composition (and

hence value) of the oil introduced by a shipper at one end of the pipeline may be higher or lower than the value of the blended oil that the shipper withdraws at the other end. See generally *OXY USA, Inc.* v. *FERC*, 64 F.3d 679, 684-685 (D.C. Cir. 1995).

To account for these variations in value, the carriers that operate the pipeline employ a quality bank. A quality bank is an accounting mechanism in which each shipper's oil stream is assigned a value based on its composition, and shippers with lower-value streams pay quality-bank adjustments that are used to compensate shippers with higher-value streams. *OXY USA*, 64 F.3d at 684.

The rates charged to TAPS shippers, including quality-bank adjustments, are regulated by the Federal Energy Regulatory Commission (Commission) pursuant to the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), as amended.[1] In 1984, the Commission approved the use of a so-called gravity methodology to determine the value of shippers' oil streams and calculate TAPS quality-bank adjustments. 29 F.E.R.C. ¶ 61,123. Five

---

[1] The Interstate Commerce Act, which had been codified in Title 49 of the U.S. Code, was largely repealed by Congress when Congress enacted Title 49 (including provisions derived from the Interstate Commerce Act) as positive law in 1978. However, Congress did not repeal the Act's provisions to the extent that they involved functions and authority of the Interstate Commerce Commission related to the "transportation of oil by pipeline." See Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(c), 92 Stat. 1470; see also *Frontier Pipeline Co.* v. *FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006); cf. 49 U.S.C. 1-27 (1976 & Supp. I 1977) (codifying Part I of the Interstate Commerce Act, as amended, which governs, *inter alia*, the transportation of oil by pipeline) (reproduced at 49 U.S.C. App. §§ 1-27, at 521-571 (1988)). The Federal Energy Regulatory Commission now exercises that authority to the extent its relates to the establishment of pipeline rates and charges. 49 U.S.C. 60502.

years later, the Commission initiated an investigation to determine whether the gravity methodology remained just and reasonable. In doing so, the Commission specified that "any change in methodology should be effected prospectively." 49 F.E.R.C. ¶ 61,349, at 62,264-62,265 (1989). The Commission conducted its review pursuant to Section 13(2) of the Interstate Commerce Act, which authorizes the Commission to "institute an inquiry * * * concerning * * * any of the provisions of [part I of the Act]," but disallows the Commission from issuing "orders for the payment of money." 49 U.S.C. 13(2) (1976); cf. 49 U.S.C. 27 (1976).

In 1993, the Commission determined that the gravity methodology was no longer just and reasonable and approved a proposed settlement adopting a different methodology, known as a distillation methodology, that divides crude oil into "cuts" based on the temperatures at which each cut is distilled and assigns an economic value to each cut. 65 F.E.R.C. ¶ 61,277 (1993). In keeping with its 1989 decision, the Commission made the change in methodology prospective. The Commission reasoned that because the gravity methodology had been approved by the Commission, the TAPS carriers were justified in relying on it until it was changed, and giving retroactive effect to the change in methodology would violate the filed-rate doctrine. *Id.* at 62,292.

In 1995, the D.C. Circuit affirmed the Commission's adoption of the distillation methodology. *OXY USA*, 64 F.3d at 689-692. The court of appeals also sustained the Commission's determination "that it lacked the authority to apply the new methodology retroactively." *Id.* at 699. The court reasoned that the Commission lacked statutory authority to order retroactive adjustments under Section 13(2) of the Interstate Commerce Act and

that, because shippers were not on notice that a change in the methodology was possible, a retroactive change would have violated the principles underlying the filed-rate doctrine. *Id.* at 699-700.

Although the court of appeals sustained the Commission's adoption of the distillation methodology, the court remanded to the Commission to recalculate the value of several cuts, including the so-called resid cut. In 1997, the Commission approved a settlement regarding the valuation of resid and other cuts. 81 F.E.R.C. ¶ 61,319. Once again, the Commission made the resulting changes prospective. *Id.* at 62,467.

In 1999, the D.C. Circuit issued a decision that sustained the Commission's approval of most of the terms of the 1997 settlement, but it remanded for further proceedings regarding the valuation of the resid cut. *Exxon Co.* v. *FERC*, 182 F.3d 30. In addition, the court of appeals held that the Commission had discretion to give retroactive effect to the changes in the quality-bank adjustments. *Id.* at 49-50. For the first time in this proceeding, the court adopted a "strong equitable presumption in favor of retroactivity that would make the parties whole," and held that the filed-rate doctrine was not an obstacle to retroactive adjustments "because all of the TAPS shippers were on notice as of 1993 that the valuations were contested." *Id.* at 49. The court did not hold that retroactivity was required, but ruled that the Commission had abused its discretion by not providing an adequate explanation of why it chose to make the changes prospective. *Id.* at 49-50.

2. The remand proceeding was still pending before the Commission when, in August 2005, Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU),

Pub. L. No. 109-59, 119 Stat. 1144. Section 4412 of SAFETEA-LU places statutory deadlines and time limits on administrative proceedings involving TAPS quality-bank adjustments. 119 Stat. 1778.

Section 4412(c)(1) provides that TAPS quality-bank claims must be filed with the Commission no later than two years after they arise. 119 Stat. 1779. Section 4412(c)(2) requires that the Commission issue a final order with respect to any such claim within 15 months after the claim is filed. *Ibid.* Finally, Section 4412(b) places statutory limits on the length of any retroactive changes in TAPS quality-bank adjustments ordered by the Commission. For proceedings pending at the time of SAFETEA-LU's enactment, the Commission may not order retroactive changes "for any period before February 1, 2000." 119 Stat. 1778 (Section 4412(b)(1)). For proceedings commenced after the enactment of SAFETEA-LU, retroactive changes are limited to "the 15-month period immediately preceding the earliest date of the first order of the [Commission] imposing quality bank adjustments in the proceeding." 119 Stat. 1778-1779 (Section 4412(b)(2)).

3. The Commission issued its remand decision in October 2005. Pet. App. 89a. Among other things, the Commission adopted a new formula for valuing the resid cut. The Commission ordered that the new resid valuation should be applied retroactively to February 1, 2000, the cutoff date established by Section 4412(b)(1). *Id.* at 166a-167a. The Commission noted that the parties had presented a variety of "equitable and other arguments" against retroactivity, but reasoned that since Section 4412(b)(1) now limits the permissible duration of the refund period, "those arguments no longer have the

same validity that they might have had if the refund period was back to December 1, 1993." *Ibid*.

4. Petitioner and other parties filed petitions for review in the D.C. Circuit, raising a variety of challenges to the Commission's latest decision. Petitioner contended, *inter alia*, that Section 4412(b)(1) is unconstitutional under *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). As discussed further below, *Klein* invalidated a Reconstruction-era federal statute that required courts to treat the acceptance of a Presidential pardon as conclusive proof of disloyalty for purposes of suits seeking recovery of property seized during the Civil War, and that purported to divest this Court and the Court of Claims of jurisdiction over any suits predicated on such pardons. Petitioner asserted that Section 4412(b)(1) is unconstitutional under *Klein* and that the Commission therefore should have awarded refunds without regard to the statutory time limit.

The court of appeals rejected all of the challenges to the Commission's decision and denied the petitions for review in a brief, unpublished judgment order. Pet. App. 1a-7a. The panel disposed of petitioner's *Klein* argument in a single sentence:

> As to petitioners' separation of powers argument, any claim that Congress's decision here unconstitutionally exercised judicial power is foreclosed by our decision in *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001).

Id. at 4a. The court's decision not to publish the order signifies that "the panel sees no precedential value in that disposition" and that the order does not "alter[], modif[y], or significantly clarif[y] a rule of law previ-

ously announced by the court." D.C. Cir. R. 36(a)(2)(B) and (c)(2).

ARGUMENT

Petitioner contends that Section 4412(b)(1) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1778 (2005), impacts ongoing administrative proceedings before a federal agency in a manner that is unconstitutional under *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). Pet. 11-23. That claim is without merit. The unpublished order of the court of appeals is correct and does not conflict with *Klein*, any other decision of this Court, or any decision of any other court of appeals. No further review is warranted.

1. *Klein* arose out of efforts to recover property seized by Union military authorities during the Civil War. Under the Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863), a person whose property had been seized by the military could recover its value in the Court of Claims upon a showing that, *inter alia*, the claimant "ha[d] never given any aid or comfort to the present rebellion." § 3, 12 Stat. 821. In *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870), this Court held that receipt of a Presidential pardon was conclusive proof of loyalty and entitled the recipient to return of his property. In response, Congress enacted a statute providing that no Presidential pardon should be admissible as proof of loyalty; that acceptance of a pardon without written protest or disclaimer should be treated by the courts as conclusive evidence of the claimant's disloyalty; and that the Court of Claims and this Court were required to dismiss for want of jurisdiction any pending claims for recovery of property based on a

Presidential pardon. Act of July 12, 1870, ch. 250, 16 Stat. 235; see *Klein*, 80 U.S. (13 Wall.) at 132-134, 143-144.

At the time that the legislation was enacted, the claimant in *Klein* had already obtained a judgment in his favor from the Court of Claims on the basis of a Presidential pardon, and an appeal from that judgment was pending before this Court. Acting on the basis of the intervening legislation, the United States moved to dismiss the appeal and to direct the Court of Claims to dismiss the underlying suit. This Court denied the motion on the ground that the legislation was unconstitutional and proceeded to affirm the lower court's judgment on the merits. 80 U.S. (13 Wall.) at 142-148.

The Court held that the legislation impermissibly "impair[s] the effect of a pardon, and thus infring[es] the constitutional power of the Executive." *Klein*, 80 U.S. (13 Wall.) at 147. In addition, the Court concluded that "Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Ibid.* The Court observed that the legislation in question "prescribe[d] a rule for the decision of a cause in a particular way" and could not be sustained "without allowing one party to the controversy to decide it in its own favor." *Id.* at 146. The Court acknowledged that Congress has the authority under Article III to make exceptions to the appellate jurisdiction otherwise conferred on the Court, but it asked: "Can [Congress] prescribe a rule in conformity with which the court must deny to itself the [appellate] jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This questions seems to us to answer itself." *Id.* at 146-147.

This Court has elaborated on the meaning of *Klein* in subsequent decisions. In *United States* v. *Sioux Nation*, 448 U.S. 371 (1980), the Court explained that the statute in *Klein* was unconstitutional "in two respects." *Id.* at 404. "First, [the statute] prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." *Ibid.* "Second, the rule prescribed by the proviso '[was] also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.'" *Id.* at 404-405 (citation omitted). As the Court explained, "the fact that Congress was attempting to decide the controversy at issue in the Government's own favor" was "of obvious importance to the *Klein* holding." *Id.* at 405. In addition, despite *Klein*'s reference to legislation "prescrib-[ing] a rule of decision in a case pending before the courts" (80 U.S. (13 Wall.) at 146), "later decisions have made clear that [*Klein*'s] prohibition does not take hold when Congress 'amend[s] applicable law,'" as opposed to directing the disposition of cases under existing law. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)).

Section 4412(b)(1) of SAFETEA-LU does not have any of the attributes that this Court found to be constitutionally problematic in *Klein* and identified as such in subsequent decisions. First, unlike the statute in *Klein*, which infringed on the pardon power, Section 4412(b)(1) does not trench on any of the President's powers under Article II. Second, Section 4412(b)(1) does not—indeed, cannot—violate "the limit which separates the legislative from the judicial power" (80 U.S. (13 Wall.) at 147), because it regulates the rate-setting authority of an Ex-

ecutive Branch agency, not the judicial power of an Article III court. Petitioner cites no case, and we know of none, in which *Klein* has been held to limit Congress's powers vis-a-vis administrative agencies.[2] Third, be

---

[2] In related contexts, this Court has recognized that the adjudicatory functions of federal agencies are subject to the control of Congress in ways that the "judicial power of the United States" under Article III is not. For example, while separation-of-powers principles prevent Congress from reopening final judgments of Article III courts, this Court has held squarely that Congress is free to reopen final adjudications of federal agencies. Compare *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370, 381 & n.25 (1940) (private Act of Congress requiring federal agency to reopen final worker's compensation decision does not violate separation-of-powers principles because decision was issued by an agency rather than by a court), with *Plaut*, 514 U.S. at 232 (holding that law requiring federal courts to reopen final judgments violates the separation of powers; distinguishing *Paramino Lumber* and related decisions on the ground that they involved non-Article III adjudicatory bodies and emphasizing that "nothing in our holding today calls [such cases] into question").

Petitioner suggests (at 12) that the Court of Claims was not an Article III court, and hence that *Klein* cannot have rested solely on Article III concerns. But *Klein* itself clearly understood the Court of Claims to be an "inferior court" under Article III. See 80 U.S. (13 Wall.) at 144-145 & n.§ (explaining that "the Court of Claims has exercised all the functions of a court" after Congress repealed a provision that prevented that court from exercising Article III power, and that the Court of Claims in *Klein* "is thus constituted one of those inferior courts which Congress authorizes") (citing *Gordon* v. *United States*, 69 U.S. (2 Wall.) 561 (1865) (disposition)); *United States* v. *Jones*, 119 U.S. 477, 478 (1886) (reporting *Gordon* decision, which holds that the statutory provision that Congress repealed had prevented the Court of Claims from exercising "judicial power" under Article III because, before the repeal, the Court of Claims' resolution of claims did not entitle litigants to payment absent further action by the Secretary of the Treasury); *Gordon* v. *United States*, 117 U.S. 697, 698-699, 704 (1865) (opinion of Taney, C.J.); see also *Plaut*, 514 U.S. at 218 (describing *Klein* as invalidating "legislation that require[d] federal courts to

cause TAPS quality-bank adjustments involve financial claims by private shippers against each other, rather than claims by or against the federal government, this is not a case in which "Congress [is] attempting to decide the controversy at issue in the Government's own favor." *Sioux Nation*, 448 U.S. at 405. Finally, *Klein* "does not take hold when Congress 'amend[s] applicable law,'" *Plaut*, 514 U.S. at 218 (quoting *Robertson*, 503 U.S. at 441), and that is precisely what Section 4412(b)(1) does: together with Section 4412(b)(2), it alters the law governing "retroactive changes in TAPS quality bank adjustments," 119 Stat. 1778, by placing legislative time limits on the reach of such changes.

2. In disposing of the *Klein* claim in this case, the court of appeals found it sufficient to rely on the court's earlier decision in *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001). Pet. App. 4a. The plaintiffs in *National Coalition* brought suit to enjoin the construction of the then-proposed World War II Memorial on the National Mall, claiming that various agencies had violated the National Environmental Policy Act and other federal statutes. While the suit was pending, Congress enacted a statute that exempted construction of the memorial from all of the statutes invoked by the plaintiffs and barred judicial review of the agency decisions underlying the construction. *National Coal.*, 269 F.3d at 1093-1094.

---

exercise the judicial power in a manner that Article III forbids" by "prescrib[ing] rules of decision to the Judicial Department" in pending cases) (citation omitted); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568-569 (1962) (plurality opinion) ("[s]urely no such concern would have been manifested [in *Klein*] if it had not been thought that the Court of Claims was invested with judicial power" under Article III).

The court of appeals rejected the plaintiffs' challenge to the constitutionality of the legislation under *Klein*. 269 F.3d at 1095-1097. In so doing, the court held that the law was not unconstitutional under *Klein* merely because it was aimed at one pending suit involving a single legal controversy. The court explained that where a statute's specificity does not "violate[] some substantive constitutional provision limiting Congress's power to address a specific problem, such as the ban on Bills of Attainder or (in some instances) the Equal Protection clause, * * * we see no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit." *Id.* at 1097.

Petitioner does not take issue with the D.C. Circuit's decision in *National Coalition*. To the contrary, petitioner concedes that *National Coalition* is "perfectly reconcilable with the rule of *Klein*." Pet. 15. Instead, petitioner argues that the unpublished order in this case represents a fundamental departure from *National Coalition* that adopts a new (and, in petitioner's view, unwarranted) separation-of-powers rule.

The short answer is that petitioner's characterization of the panel's order is at odds with the panel's own understanding of its decision. The rules of the D.C. Circuit require the publication of any decision that "alters, modifies, or significantly clarifies a rule of law previously announced by the court." D.C. Cir. R. 36(a)(2)(B). The panel's decision not to publish the present order thus signifies that the panel itself did not understand the order to "alter[], modif[y], or significantly clarif[y]" (*ibid.*) the legal rules announced in *National Coalition*, and did not regard the order as having any other "precedential value." *Id.* R. 36(c)(2). That is hardly a surprising conclusion, for the order says nothing more than that peti-

tioner's *Klein* claim "is foreclosed by our decision in *National Coalition*." Pet. App. 4a. Thus, contrary to petitioner's suggestion, the order leaves the state of the law in the D.C. Circuit regarding *Klein* exactly where it stood when the court issued its published decision in *National Coalition*—a decision that petitioner neither quarrels with nor asks this Court to disapprove.

As *National Coalition* demonstrates, the fact that legislation is directed at pending litigation does not render it unconstitutional under *Klein*, even if the legislation is confined to a single suit and even if it determines the outcome of the suit. 269 F.3d at 1097; *Apache Survival Coal.* v. *United States*, 21 F.3d 895, 901-904 (9th Cir. 1994); see also *Robertson*, 503 U.S. at 437-441. Indeed, petitioner itself concedes that *Klein* permits Congress to enact legal rules that are specific to an individual case as long as the case constitutes a "legitimate class of one." Pet. 16 (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 472 (1977)). Petitioner's complaint is that, in this particular instance, Congress did not have a legitimate basis for treating the pending TAPS quality-bank proceeding differently from future proceedings. *Ibid.*

As the court of appeals recognized in *National Coalition*, whether or not a particular "class of one" is "legitimate" is a concern of other constitutional doctrines, such as equal protection, not the separation-of-powers doctrine. In this case, the court of appeals rejected petitioner's separate equal protection challenge to Section 4412(b)(1) (Pet. App. 4a), and petitioner does not seek review of that equal protection holding here. It was right to do so, for Congress had ample grounds for treating the pending proceeding differently from future

ones.[3] In any event, whether the pending proceeding qualifies as a "legitimate class of one" is a factbound question of no consequence beyond the confines of this litigation itself, and hence one that does not warrant this Court's review.

3. Contrary to petitioner's suggestion (Pet. 19-20), there is no conflict between the decision of the D.C. Circuit in this case and the decisions of other courts of appeals. Like the decision here, each of the decisions cited by petitioner sustained rather than invalidated the constitutionality of a challenged statute under *Klein*. *Lindh* v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997); *Crater* v. *Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007); *Green* v. *French*, 143 F.3d 865, 875 (4th Cir. 1998), cert. denied, 525 U.S. 1090 (1999), abrogated on other grounds by *Williams* v. *Taylor*, 529 U.S. 362 (2000). Moreover, in the course of rejecting *Klein* claims, these decisions emphasize that "[r]egulating relief is a far cry from limiting the interpretive power of the courts" under *Klein*. *Lindh*, 96 F.3d at 872; *Crater*, 491 F.3d at 1128 (quoting *Lindh*); *Green*, 143 F.3d at 875. And to the extent that

---

[3] Prior to the D.C. Circuit's decision in late 1999 in *Exxon Co.* v. *FERC*, 182 F.3d 30, the shippers in this proceeding may have assumed that any changes by the Commission in quality-bank adjustments would be given effect only prospectively, as the Commission and the court itself had done at earlier points in the proceeding, and thus conducted their business affairs in reliance on the rates in effect at the time. Cf. pp. 3-5, *supra*. By adopting a refund cutoff date of February 2000, shortly after the date of the court's decision in *Exxon*, Congress legitimately gave protection to any such reliance interests. See Pet. App. 4a. In future proceedings, in contrast, the "strong equitable presumption in favor of retroactivity" announced in *Exxon*, 182 F.3d at 49, will be known to shippers from the outset of the proceedings, and hence such reliance interests in contested rates will be more attenuated.

any of them contain language that may be read as questioning the permissibility of legislating with respect to a particular pending suit, that language is dicta, for none of the decisions involved such legislation.

Petitioner cites a variety of other recent appellate decisions in which the constitutionality of a federal statute has been challenged under *Klein*. Pet. 21-22. But in every one of those cases, the *Klein* claim has been rejected. Petitioner has failed to identify any decision by any court of appeals that holds an Act of Congress to be unconstitutional under *Klein*, and we know of none other than the Ninth Circuit decision that this Court reversed in *Robertson*. If and when a court of appeals actually strikes down a statute under *Klein* in the future, this Court will have ample opportunity to address any unresolved questions regarding the reach of *Klein* that may arise at that time. Until and unless that happens, there is no need for the Court to review a uniform body of decisions, of which the unpublished order here is only the latest, that have consistently found federal legislation to satisfy *Klein*'s requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

NOVEMBER 2008