No. 07-563

In the Supreme Court of the United States

PETRO-HUNT, L.L.C., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that its previous decision in this case had established that petitioners' mineral rights would revert to the United States if they lay unused for 10 years.

2. Whether the court of appeals correctly adhered to the "law of the case" doctrine because no manifest injustice justified departing from that rule.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued Page

Constitution and statutes: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported. An earlier opinion of the court of appeals (Pet. App. 14a-43a) is reported at 365 F.3d 385. The order and judgment of the district court (Pet. App. 8a-13a) are unreported. An earlier opinion of the district court (Pet. App. 44a-73a) is reported at 179 F. Supp. 2d 669.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2007. A petition for rehearing was denied on July 30, 2007 (Pet. App. 74a-75a). The petition for a writ of certiorari was filed on October 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners brought this quiet title action to obtain a declaration that they are the owners, in perpetuity, of mineral rights in approximately 180,000 acres of federal land within the Kisatchie National Forest in Louisiana. The district court granted petitioners summary judgment based on what it found to be the preclusive effect of a 1951 federal judgment. Pet. App. 44a-73a. The court of appeals reversed, holding that petitioners' claims to the mineral servitudes could be barred by prescription. The court remanded for a determination as to which servitudes had prescribed. *Id.* at 14a-43a. This Court denied a writ of certiorari. 543 U.S. 1034 (2004) (No. 04-190). On remand, the district court held that petitioners still owned five servitudes (representing approximately 109,844.5 acres), but that the remainder had prescribed. Pet. App. 11a-13a. The court of appeals affirmed. *Id.* at 1a-7a.

1. Under Louisiana law, the mineral rights on real property cannot be owned as an estate separate from the land, but only as a right of servitude to enter the land and extract the minerals. La. Rev. Stat. Ann. § 31:21 (West 2000); *Frost-Johnson Lumber Co.* v. *Salling's Heirs*, 91 So. 207, 243-245 (La. 1920). Such mineral servitudes ordinarily prescribe (*i.e.*, revert to the landowner) if not used for a period of ten years. La. Rev. Stat. Ann. § 31:27(1) (West 2000); *Frost-Johnson Lumber Co.*, 91 So. at 243-245. The period of prescription for a servitude begins to run on the date the servitude is created, see La. Rev. Stat. Ann. § 31:28 (West 2000); *Ober* v. *Williams*, 35 So. 2d 219, 224 (La. 1948), and is interrupted only by "good faith operations" for the "discovery and production of minerals" under that servitude, La. Rev. Stat. Ann. § 31:29 (West 2000).

2. Petitioners claim the mineral rights at issue in this case as successors in interest to the Nebo Oil Company, which in turn was successor in interest to the Good Pine Oil Company. Pet. App. 23a, 30a. Five Louisiana timber companies formed Good Pine Oil in 1932 and conveyed to the new company all interests in oil, gas, and sulphur on their respective lands, to facilitate mineral exploration and production. *Id.* at 18a. This case involves servitudes originally conveyed by two of the five companies, Bodcaw Lumber and Grant Timber, through six separate grants. *Ibid.* Each of the six conveyances created multiple servitudes, because each involved mineral rights on several parcels of land, many of them noncontiguous. *Ibid.* Each of the six deeds conveying mineral rights to Good Pine Oil contained a clause contemplating that a ten-year prescriptive period would apply. *Id.* at 18a-19a.

Between November 1934 and January 1937, the United States acquired approximately 180,000 acres of land from Bodcaw Lumber and Grant Timber, in multiple distinct parcels, through nine sales and two judgments of condemnation. Pet. App. 19a. The United States acquired the lands for the Kisatchie National Forest, pursuant to the Weeks Law, ch. 186, 36 Stat. 961. Pet. App. 19a. Portions of the property acquired were burdened by 96 separate mineral servitudes in favor of Good Pine Oil (the Good Pine servitudes). *Ibid.*

All but one of the 11 instruments of transfer stated that the conveyances were "subject to" one or more of the mineral deeds in favor of Good Pine Oil. Pet. App. 20a. Most of the instruments further stated that the "mention" of the mineral reservation was "solely for the purpose of limiting vendor's warranty * * * and *the recital of said Mineral Sale shall in nowise extend or en-*

large the same in point of time." *Ibid.* Five of the 11 instruments also contained additional mineral reservations in the name of Bodcaw Lumber or Grant Timber, which were to become effective upon the prescription of the servitudes held by Good Pine Oil. *Ibid.* Each of those five instruments stated that at the termination of the additional reservations, the United States would hold the land in "complete fee." *Ibid.*

3. In 1940, after the United States had acquired the property, the Louisiana legislature enacted a law changing the treatment of mineral rights on federal property. Act No. 315 (Act 315), 1940 La. Acts 1249 (Pet App. 77a). Act 315 provided that when land acquired by the United States is subject to a mineral servitude, that servitude is "imprescriptible," *i.e.*, will remain the beneficiary's in perpetuity even if not used. Act 315 § 1, 1940 La. Acts 1250. The Act was intended to facilitate the United States' acquisition of land, by permitting landowners to reserve mineral rights without the risk of losing those rights through prescription, and to allow Louisiana to continue to tax and regulate those mineral rights by preventing ownership from reverting to the United States. See *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 599-600 & n.18 (1973) (*Little Lake Misere*).

4. In 1948, the United States filed a declaratory judgment action against Nebo Oil to quiet title to a specific parcel of land, approximately 800 acres in size, on which Nebo Oil claimed a mineral servitude as successor in interest to Good Pine Oil and was threatening to begin drilling. Pet. App. 23a. The United States had purchased that parcel and several others (totaling 24,943.93 acres) from Bodcaw Lumber in one of the 11 acquisitions discussed above. *Ibid.* The servitude claimed by Nebo Oil had not been used for more than ten years, and the

United States contended that it had prescribed. *Ibid.* The United States sought an order permanently enjoining the company from entering the 800-acre parcel for mineral production. *Ibid.*

The district court denied the United States relief, holding that Act 315 had rendered the servitude "imprescriptible" and rejecting the government's arguments that Act 315 was unconstitutional as applied to servitudes on federal land that were created prior to Act 315's enactment. *United States* v. *Nebo Oil Co.*, 90 F. Supp. 73, 84-97 (W.D. La. 1950). The court of appeals affirmed. *United States* v. *Nebo Oil Co.*, 190 F.2d 1003, 1008-1010 (5th Cir. 1951) (*Nebo Oil*). The government had argued that Act 315's elimination of the rule of prescription for servitudes on federal land violated the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, the Contract Clause, Art. I, § 10, Cl. 1, and the Due Process Clause of the Fourteenth Amendment. The court of appeals held that the United States' "reversionary interest" in the minerals—*i.e.*, the interest in reclaiming mineral rights through prescription—was not "vested" under Louisiana law. 190 F.3d at 1008-1010. In granting final judgment, the district court decreed that the "oil, gas, and sulphur in, on and under the *lands described in the complaint* are vested in perpetuity in Nebo Oil Company, Inc., its successors and assigns." Pet. App. 24a n.23 (emphasis added).

5. This Court subsequently held in *Little Lake Misere* that federal common law, not Act 315, governs the prescription of servitudes on property acquired by the United States pursuant to a federal statute. In that case, the United States had acquired two parcels in Louisiana pursuant to the Migratory Bird Conservation Act (MBCA), 16 U.S.C. 715 *et seq.*, but Little Lake Misere

Land Co. retained mineral servitudes. *Little Lake Misere*, 412 U.S. at 582-583. The servitudes were to "terminate" if not used for a ten-year period, and then "complete fee title to said lands [would] become vested in the United States." *Id.* at 583. The Louisiana legislature subsequently enacted Act 315, and Little Lake Misere contended that the new statute made its servitudes imprescriptible. *Id.* at 584. This Court disagreed. First, it held that federal land acquisitions pursuant to the MBCA are governed by federal common law, not state law. *Id.* at 592-594. Second, although federal common law often borrows state law as the rule of decision, the Court held that Act 315 could not be borrowed with respect to federal acquisitions before its enactment, because doing so would deprive the United States of "bargained-for contractual interests" and therefore be "plainly hostile to the interests of the United States." *Id.* at 594-595, 597. The rule of decision was instead to be supplied instead either by federal common law or by "residual" state law (*i.e.*, Louisiana law without Act 315), either of which would give effect to the contractual 10-year prescriptive period. *Id.* at 604.

The Fifth Circuit has followed *Little Lake Misere* and held that land acquisitions under the Weeks Law are to be treated the same way as acquisitions under the MBTA. *Central Pines Land Co.* v. *United States*, 274 F.3d 881 (2001), cert. denied, 537 U.S. 822 (2002) (*Central Pines*). In *Central Pines*, as in this case and in *Nebo Oil*, the United States acquired land under the Weeks Law for the Kisatchie National Forest, subject to preexisting private servitudes, and prior to enactment of Act 315. *Id.* at 885. The Fifth Circuit held that the subsequent enactment of Act 315 could not affect those preexisting servitudes; that the ten-year prescriptive period

of "residual (pre-Act 315) Louisiana law" should govern; and that the servitudes on the Kisatchie Forest lands had prescribed for non-use. *Id.* at 888-892.

6. a. In February 2000, petitioners sued for a declaration that they are owners in perpetuity of the 96 Good Pine servitudes and that any mineral leases or offers to lease issued by the United States on the subject properties are null and void. Pet. App. 30a. The government conceded that the particular servitude that had been at issue in *Nebo Oil* was governed by the judgment in that case. *Id.* at 36a n.58. But the government argued that the remaining 95 servitudes were subject to the ordinary rule of prescription and that many had prescribed for non-use. See *id.* at 30a-31a & n.49. Petitioners sought summary judgment, arguing that the res judicata effect of *Nebo Oil* precluded the government's reliance on prescription, and in the alternative that several of the servitudes had been continuously used and had not prescribed. *Id.* at 31a-32a & n.49.

The district court granted petitioners summary judgment on the ground of res judicata. Pet. App. 44a-73a. The court held that *Nebo Oil* precluded the government from disputing the applicability of Act 315 to *any* of the servitudes at issue here. In the district court's view, the *Nebo Oil* decision had applied Act 315 not just to the 800-acre parcel named in the complaint in that case, but to the entire "24,943.93 acre tract" sold to the United States by Bodcaw Lumber, "of which the 800 acres was a part." *Id.* at 72a. As for the ten other land transfers not even partially addressed in *Nebo Oil*, the district court concluded that "the entire 180,000 acres was similarly situated to the 800 acres at issue in *Nebo Oil*," that the government had a "full and fair opportunity" to "litigate the application and constitutionality of Louisiana

Act 315 to this mineral property," and that "[t]he government should not be allowed to litigate now that which it could have litigated 50 years ago." *Id.* at 72a-73a.

b. The court of appeals reversed. Pet. App. 14a-43a. The court first held that res judicata (claim preclusion) did not bar the United States from asserting that the 95 servitudes not at issue in *Nebo Oil* were now prescribed. Application of res judicata would be proper only if this case involves the "same claim" as *Nebo Oil*, *i.e.*, if the two actions are "'based on the *same nucleus of operative facts*.'" Pet. App. 34a-35a (quoting *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir.), cert. denied, 527 U.S. 1004 (1999)). The court held that petitioners could not meet that standard. The government had brought the previous quiet title action because of Nebo Oil's threat to its rights in the particular 800-acre parcel alone. "[E]ach of the Good Pine servitudes was a distinct real [property] right under Louisiana law," and the United States' "claim with respect to each servitude depends on a unique set of operative facts." *Id.* at 38a. Therefore, "the operative facts" of *Nebo Oil* included only those necessary to prove the existence and "ten years' nonuse *of that particular servitude,*" not facts relating to the other Good Pine servitudes. *Ibid.* Although the facts relating to the prescription of each servitude might well be *similar*, true res judicata requires not just factual similarities, but a "sameness of operative facts." *Id.* at 37a. Because the rights to each servitude turned on distinct operative facts, res judicata did not bar claims concerning the 95 other servitudes.

The court of appeals observed that factual similarities that give rise to a common legal issue are more appropriately considered under the heading of collateral estoppel (issue preclusion). Pet. App. 37a. Turning to

that issue, the court held that collateral estoppel did not preclude the government from disputing Act 315's applicability, for two reasons. First, collateral estoppel applies only when an issue "actually litigated" in the first case is "identical" to an issue in the second case. *Id.* at 39a. The court determined that "*Nebo Oil* did not address" the "threshold choice-of-law issue" identified in *Little Lake Misere,* but had simply "assumed the applicability" of state law, including Act 315. *Id.* at 41a. Therefore, the applicability of federal common law was not "actually litigated" in *Nebo Oil*. *Id.* at 42a. Second, collateral estoppel governs resolution of a legal question "only when there has been no 'change in controlling legal principles'" since the earlier decision. *Id.* at 39a (quoting *Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1167 (5th Cir. 1981)). Here, "even if the choice-of-law issue had been raised in *Nebo Oil*," the subsequent decisions in *Little Lake Misere* and *Central Pines* would have sufficiently changed the governing law that collateral estoppel could not apply in any event. *Id.* at 42a-43a.

In light of the latter ruling, the court of appeals recognized that *Little Lake Misere* and *Central Pines* were controlling here, and that Act 315 could not bar the government from asserting the defense of prescription with respect to servitudes created before its enactment. Pet. App. 43a. Under the federal common law rule, the government was entitled to prevail on the defense of prescription as to any servitude that had lain unused for ten years. *Ibid.* Recognizing that petitioners had also sought summary judgment on the alternative ground that the servitudes had not prescribed, the court remanded for the district court to make that determination. *Ibid.*; see *id.* at 31a n.49.

c. Petitioners filed a petition for a writ of certiorari, which this Court denied. 543 U.S. 1034 (2004) (No. 04-190).

d. On remand, petitioners filed a "motion for trial" to determine "whether Act 315 of 1940 can be constitutionally applied [on] the facts of this case," which petitioners described as "essentially the facts in [*Nebo Oil*]." Mem. in Supp. of Mot. for Trial 1. Petitioners asserted that the Fifth Circuit had not actually decided the choice-of-law question and urged the district court to set that issue for trial. *Id.* at 1, 2, 7, 8. The district court denied petitioners' motion, stating that the "only issue" the court of appeals had left open on remand was "which of the '95 servitudes that were not at issue in *Nebo Oil*' ha[d] in fact prescribed for nonuse." Pet. App. 8a (quoting Pet. App. 43a).

The parties then stipulated that five servitudes—representing approximately 109,844.5 acres, out of the 180,000 acres of federal land at issue—had been in use and had not prescribed. Pet. App. 4a. The parties agreed that the remaining servitudes had prescribed. *Ibid.* The district court entered a judgment for petitioners in accordance with that stipulation. *Id.* at 10a-13a.

e. The court of appeals affirmed. Pet. App. 1a-7a. The court rejected petitioners' argument that its earlier choice-of-law ruling had been dictum; rather, the ruling was a "deliberate, considered statement" on a legal issue, as to which the facts were not in dispute. *Id.* at 4a-6a. The court also declined petitioners' request to depart from the law of the case and revisit the issues of res judicata and collateral estoppel, because petitioners had not shown "such manifest injustice as to warrant [an] exception" to the law-of-the-case doctrine. *Id.* at 6a.

ARGUMENT

The court of appeals properly reaffirmed its earlier holding that neither res judicata nor collateral estoppel distinguishes this case from the controlling decisions in *Little Lake Misere* and *Central Pines*. Neither the original decision nor the unpublished decision below in which the court of appeals adhered to the law of the case is in conflict with any other appellate decision. Indeed, petitioners affirmatively urge that this is a case whose "unusual facts" justify applying Act 315 retroactively despite the holdings of *Little Lake Misere* and *CentralPines*. Pet. 8. That contention does not meet this Court's criteria for review. The petition should therefore be denied.

1. Petitioners assert (Pet. 12-21) that the court of appeals violated due process by "substitut[ing] its own findings of fact for those of the District Court" on the res judicata issue, and by "granting judgment" without "giving [petitioners] a chance to be heard." Pet. 12. Each of these contentions lacks merit. The court of appeals' first opinion decided a question of law; the court did not overturn any findings, order a premature judgment, or deprive petitioners of a hearing. In the decision below, rendered after remand, the court of appeals properly adhered to its previous ruling.

a. The court of appeals' initial opinion did not turn on any factual finding or issue. Rather, the dispute concerned whether the servitudes burdening the 95 parcels not at issue in *Nebo Oil* were governed by Act 315 because of the res judicata or collateral estoppel effect of the *Nebo Oil* judgment. The court of appeals resolved that dispute based on settled law and undisputed facts.

The district court had decided to apply preclusion because some of the 95 parcels were acquired in the same

deed as the *Nebo Oil* parcel, and because it thought the remaining parcels were "similarly situated." Pet. App. 72a. Petitioners contend (Pet. 15-16, 21) that those statements were factual findings entitled to deference on appeal. Those determinations, however, were made on summary judgment, not after a trial. And the court of appeals properly held that summary judgment was improper as a matter of law, because the facts on which the district court relied were legally irrelevant. Res judicata applies only when two actions share the same "nucleus of operative facts," Pet. App. 35a, and the court of appeals properly determined that the dispute in *Nebo Oil* was legally distinct from the subsequent dispute over the other 95 servitudes.

Thus, the district court may have been correct that, as petitioners assert, the United States acquired some of the other parcels in the "same deed" or "same transaction" as the 800-acre parcel in *Nebo Oil*. Pet. 15. But the court of appeals was correct that as a matter of law, each of the many parcels contained in the single instrument of conveyance was subject to distinct servitudes. Indeed, under Louisiana law, "a landowner cannot create a single servitude * * * on two or more non-contiguous tracts." *Cox* v. *Sanders*, 421 So. 2d 869, 873 (La. 1982) (citation omitted). "[I]f this is attempted by a single instrument, there are nevertheless as many servitudes * * * as there are non-contiguous tracts of land." *Ibid.* (citation omitted). The purported factual finding on which petitioners rely therefore was beside the point. See also pp. 16-19, *infra* (refuting petitioners' renewed challenge to the court of appeals' res judicata analysis).

b. There is also no merit to the argument (Pet. 16-21) that the court of appeals denied petitioners a mean-

ingful opportunity to address the applicability of Act 315, or that petitioners should have been granted a "trial on the merits" of that question. Pet. 21. The United States invoked federal common law in its opening brief on the first appeal, explaining why collateral estoppel could not apply because this Court has since rejected the retroactive application of Act 315 to federal land acquisitions. 02-30760 Gov't C.A. Br. 44-50. Petitioners responded that as to the facts of the particular acquisitions at issue in *Nebo Oil* and in this case, "there has actually been no change in the law," and that an acquisition on those facts was not controlled by *Little Lake Misere* and *Central Pines*. 02-30760 Pet. C.A. Br. 36. The court of appeals proceeded to address the choice-of-law issue, in a statement that the subsequent panel determined to be "deliberate" and "considered," with the full force of a holding. Pet. App. 5a.

Petitioners argue that they should be given a chance to demonstrate that retroactive application of Act 315 would not be "hostile" to federal property interests in the present case and that Act 315 therefore may be applied as the rule of decision, despite the holdings of *Little Lake Misere* and *Central Pines*. Pet. 15-16, 21. But the facts on which petitioners premise this argument are the facts found in *Nebo Oil*. Petitioners never sought an opportunity to develop the record further; on remand, they argued that "the facts of this case * * * are essentially the facts in [*Nebo Oil*]" and that these facts distinguish this case from the controlling precedents. Mem. in Supp. of Mot. for Trial 1. The court of appeals thus has held that federal common law bars the application of Act 315 on these facts, and neither the prior petition for a writ of certiorari nor the instant one has raised

the validity of petitioners' supposed factual distinction as a basis for review.

Given the court of appeals' legal conclusion, the cases petitioner cites in support of remanding for further fact-finding are irrelevant. In both *Fountain* v. *Filson*, 336 U.S. 681 (1949) (per curiam), and *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963), this Court determined that there were disputed issues of fact that needed to be resolved before appellate review. See *Fountain*, 336 U.S. at 683; *Florida Lime & Avocado Growers*, 373 U.S. at 155-156. In this case, by contrast, the court of appeals held that Act 315 was inapplicable and, therefore, that any dispute over whether the facts found in *Nebo Oil* could also be found here was legally irrelevant to the choice-of-law question. (To be sure, there *was* a factual issue concerning which servitudes had prescribed; the court of appeals properly remanded for that determination.)

c. Petitioners' arguments for distinguishing *Little Lake Misere* and *Central Pines* are unavailing in any event.[1] Petitioners assert (1) that their "predecessors in title were promised by the government that if the surface of the land was sold to the government, the rules of prescription of mineral servitudes would not apply as a matter of federal law," Pet. 17 (citing *Nebo Oil*, 90 F. Supp. at 79, 82), and (2) that "the government did not intend to buy, and did not pay for the minerals" when acquiring the relevant land, *ibid.* (citing *Nebo Oil*, 90

[1] Contrary to petitioners' suggestion (Pet. 20), this Court did not "distinguish" the facts of *Nebo Oil* in *Little Lake Misere*. Rather, this Court simply noted the findings on which the Fifth Circuit relied in *Nebo Oil*, in the course of describing the "first federal court test of Act 315" in a series of federal and state cases that led up to *Little Lake Misere*. 412 U.S. at 586 & n.4.

F. Supp. at 86-90). When the government acquired the land in question, the sellers (Bodcaw Lumber and Grant Timber) had already alienated their mineral interests. Accordingly, the assertion that the United States did not pay for or intend to buy the minerals is beside the point: the United States could not purchase minerals from parties that did not own the mineral rights. Nor did the United States separately purchase or condemn the mineral servitudes. Rather, the United States acquired the sellers' *future* interest in recovering those rights, should the servitude owner fail to exercise them during the prescriptive period. See *Central Pines*, 274 F.3d at 891-892 (holding that there is a federal interest in the rule of prescription, where the United States acquired an estate in fee, subject to an outstanding, prescriptible private mineral interest).

Nor is it significant whether, as petitioners allege (Pet. 17), federal officials "promised" petitioners' predecessors that prescription would not apply to the outstanding mineral servitudes if the land were purchased by the United States. Because the United States contracted not with Good Pine, but with Bodcaw Lumber and Grant Timber after those parties had conveyed all of their mineral rights, no such promise could affect the choice of law governing the servitudes on the acquired property.

Furthermore, any such promise would run contrary to the terms of the conveyances. The private mineral servitudes were unquestionably subject to prescription, and the mineral deeds contained terms acknowledging that rule. Pet. App. 18a-19a. In several of the land deeds conveying the parcels to the United States, the parties expressly referred to the mineral deeds and provided that the land sale "*shall in nowise extend or en-*

*large * * * in point of time*" the prior mineral rights. *Id.* at 20a. Bodcaw then sought to reserve unto itself "all of the oil, gas and other minerals * * * for a period of ten years after the expiration of the rights of the said Good Pine Oil Company * * * under the laws of the State of Louisiana," and subject to various contractual terms of prescription.[2] *Ibid.* Finally, the land deeds provided that if Bodcaw's rights prescribed under such terms, the United States would become "vested" in a "complete fee in the land." *Ibid.* In other words, the relevant instruments demonstrate that the United States and Bodcaw specifically intended prescription to apply to the outstanding mineral interests, specifically bargained over the reversionary interest, and specifically made the reversionary interest itself subject to prescription. Application of Act 315 would clearly be hostile to the United States' interests in those circumstances, because it would deprive the United States of the benefit of its bargain.

2. Petitioners are also mistaken in their assertion (Pet. 22-28) that the court of appeals departed from the precedent of this Court or other circuits in its rulings on res judicata and collateral estoppel. Those arguments repeat the contentions in the petition for a writ of certiorari to review the court of appeals' prior decision in this

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[2] The Louisiana Supreme Court subsequently held that reversionary interests in minerals (upon prescription) cannot be owned or conveyed as an article of commerce under Louisiana law. See *McDonald* v. *Richard*, 13 So. 2d 712 (La. 1943); see also Pet. App. 21a n.16. This holding says nothing about the parties' intent here, or about the validity of the relevant contractual terms as a matter of federal common law. See *Central Pines*, 274 F.3d at 891-892.

case, which this Court denied.[3] They continue to lack merit.

a. Petitioners do not contest the res judicata standard applied by the court of appeals. Rather, petitioners simply contend (Pet. 23) that the court *misapplied* that standard to the circumstances of this case, and that the court should have held that the United States was required to litigate the prescription of all the servitudes on the parcels at one time, in *Nebo Oil*. But while all 13 parcels conveyed in the 24,943.93- acre land deed were burdened by Good Pine servitudes, not all of those servitudes were created in the 37,532.13-acre mineral deed cited by petitioners (Pet. 22) and addressed in *Nebo Oil*. See Gov't C.A. R.E. No. 7, at 4-8 (describing creation and use of servitudes 1 through 13).[4] Further, at the time the government filed suit in *Nebo Oil*, the largest of the Good Pine servitudes (covering over 157,000 of the approximately 180,000 acres conveyed in the 11 land transactions) were still in use and had not prescribed. See Gov't C.A. R.E. No. 8, at 1-2. The *Nebo Oil* litigation was prompted by a particular threat to drill on a single 800-acre parcel; the United States had no comparable cause to bring a quiet title action against servitude owners whose servitudes remained in use or were still within the prescriptive period.

In suggesting that the United States nevertheless "could have" litigated title to all or some of the servi-

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[3] The prior petition came in an interlocutory posture, see 04-190 Br. in Opp. 28-29, but the only subsequent development—petitioners successfully defeated prescription on more than half of the disputed acreage, see Pet. App. 4a—certainly does not make this case *more* certworthy.

[4] References in citations to "Gov't C.A. R.E." are to record excerpts filed in the first Fifth Circuit appeal, Nos. 02-30760 & 02-30786.

tudes (Pet. 23), petitioners confuse res judicata with permissive joinder. As the court of appeals here recognized, res judicata applies to all grounds or defenses available to the parties with respect to the specific claim, or nucleus of operative facts, at issue in the first judgment. Other disputes between the same parties that are *not* related to the same operative facts are not barred and may be litigated subsequently. See Pet. App. 34a & n.52 (citing *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979)). Res judicata does not compel a litigant to bring all "claims" (as factual groupings) that could permissibly have been joined in common litigation. See *Rosemann* v. *Roto-Die, Inc.*, 276 F.3d 393, 398 (8th Cir. 2002); *Dore* v. *Kleppe*, 522 F.2d 1369, 1374-1375 (5th Cir. 1975).

b. The court of appeals' collateral estoppel ruling rested on two grounds: first, that the choice-of-law issue was not actually litigated in *Nebo Oil*; second, that even if the issue were actually litigated, the determination would not be preclusive because of a change in the law. Petitioners do not address the former holding at all, which is sufficient reason to reject petitioners' challenge to the alternative holding.

Even if it were properly presented, petitioners' challenge would not warrant further review. The court of appeals' decision that a change in the law justifies setting aside collateral estoppel is not contrary to *United States* v. *Stauffer Chem. Co.*, 464 U.S. 165 (1984). In *Stauffer*, "there had been no change in controlling legal principles between the first and the second action." Pet. App. 42a n.73; see *Stauffer Chem. Co.*, 464 U.S. at 170 (noting that "[t]he Government does not argue * * * that controlling law or facts have changed"). Rather, the Court's decision turned on two distinct and unrelated exceptions to collateral estoppel. See *id.* at 170-

174; accord *Beverly Health & Rehab. Servs.* v. *NLRB*, 317 F.3d 316, 323 n.2 (D.C. Cir. 2003) (applying one of these distinct exceptions). Likewise, in *Burlington Northern Railroad Co.* v. *Hyundai Merchant Marine Co.*, 63 F.3d 1227 (3d Cir. 1995), there had been no "intervening change in the applicable legal context." *Id.* at 1238; accord *Steen* v. *John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 914 (9th Cir. 1997) (same); *North Ga. Elec. Membership Corp.* v. *City of Calhoun*, 989 F.2d 429, 434 (11th Cir. 1993) (same); *Disabled Am. Veterans* v. *Commissioner*, 942 F.2d 309, 314 (6th Cir. 1991) (same).

Nor does the court of appeals' decision conflict with *O'Leary* v. *Liberty Mutual Insurance Co.*, 923 F.2d 1062 (3d Cir. 1991). In that case, the Third Circuit held that the exception for changes in law did "not permit a party to relitigate an issue * * * arising out of the same transaction or set of operative facts—e.g., the same automobile accident—that formed the basis of the first action." *Id.* at 1069. That statement simply acknowledged that the change-of-law exception to the doctrine of collateral estoppel (issue preclusion) cannot be used as a basis for re-litigating matters that would be barred by res judicata (claim preclusion).[5] See *Federated Dep't Stores* v. *Moitie*, 452 U.S. 394, 398 (1981) (stating that "the res judicata consequences of a final, unappealed judgment" are not "altered by the fact that the judgment * * * rested on a legal principle subsequently overruled in another case"). The *O'Leary* court expressly noted a party's right to re-litigate a legal issue, based on "an intervening change in the applicable law, * * * *in an action arising out of a new incident*." 923

[5] *Precision Air Parts, Inc.* v. *Avco Corp.*, 736 F.2d 1499 (11th Cir. 1984), cert. denied, 469 U.S. 1191 (1985), similarly involved res judicata, not collateral estoppel. See *id.* at 1503.

F.2d at 1069. That is precisely the rule the court of appeals applied here.

3. Petitioners also fail to justify further review in this case based on an alleged conflict over the "panel rule" (the rule that one panel may not overrule law established by another). While acknowledging that the court of appeals "discussed the law of the case doctrine and its exceptions" when declining to disturb the original panel's rulings in the present case, petitioners assert that the court of appeals "apparent[ly]" relied instead on the "panel rule." Pet. 28. Petitioners' premise is simply wrong: the panel rule was not the basis for the decision below.

Petitioners criticize the panel rule because it admits of fewer exceptions than the law-of-the-case doctrine. See Pet. 30. The court of appeals has stated that it may depart from the law-of-the-case doctrine to avoid "a manifest injustice." *E.g.*, *Fuhrman* v. *Dretke*, 442 F.3d 893, 896-897 (5th Cir. 2006) (quoting *United States* v. *Becerra*, 155 F.3d 740, 753 (5th Cir. 1998)). According to petitioners, the panel rule has no such exception.

The distinction does not matter in this case, however, because the court of appeals plainly applied the more permissive law-of-the-case doctrine, but determined that petitioners did not qualify for any exception. Petitioners' extended discussion about *other* cases in which the panel rule purportedly "supplant[s]" the law-of-the-case doctrine, Pet. 30-33, is simply irrelevant. Indeed, petitioners have not identified any difference between the Fifth and Ninth Circuits' approaches that would affect the outcome of this case. Instead, petitioners merely assert that neither the panel rule nor the law-of-the-case

doctrine should apply,[6] or that the court of appeals erred by holding that the facts of this case do not meet the "manifest injustice" standard. Those fact-bound contentions merit no further review and are incorrect in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioners assert (Pet. 33) that the Fifth Circuit treated as law of the case a pronouncement that was actually dictum. The second Fifth Circuit panel—including Judge Dennis, author of the prior decision—properly concluded that its "deliberate, considered statement" about the inapplicability of Act 315 was holding, not dictum. Pet. App. 5a. This Court does not grant certiorari to review a court of appeals' interpretation or characterization of its own prior opinions.