No. 04-190

In the Supreme Court of the United States

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

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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QUESTION PRESENTED

1. Whether the United States is barred under the doctrine of res judicata from claiming title to mineral servitudes previously on federal property within the Kisatchie National Forest in Louisiana on the ground that those servitudes had prescribed (reverted to the landowner) due to non-use, because another mineral servitude owned by a predecessor company had been held imprescriptible in *United States* v. *Nebo Oil Co.*, 90 F. Supp. 73 (W.D. La. 1950), aff'd, 190 F.2d 1003 (5th Cir. 1951) .

2. Whether the court of appeals erred in holding that collateral estoppel did not preclude the United States from litigating a choice-of-law issue in this case on the grounds that the issue was not actually litigated in *Nebo Oil* and, alternatively, that controlling legal principles were changed by *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 365 F.3d 385. The opinion of the district court (Pet. App. 61a-88a) is reported at 179 F. Supp. 2d 669.

JURISDICTION

The original judgment of the court of appeals was entered on March 31, 2004, and the revised judgment was entered on May 28, 2004. A petition for rehearing was denied on June 1, 2004 (Pet. App. 89a-91a). The petition for a writ of certiorari was filed on August 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Petro-Hunt, L.L.C., et al., brought this quiet title action to obtain a declaration that they are the owners, in perpetuity, of mineral servitudes granting them mineral rights on approximately 180,000 acres of federal land within the Kisatchie National Forest in Louisiana. In asserting ownership of those servitudes, petitioners relied on Louisiana Act No. 315 of 1940 (Act 315), 1940 La. Acts 1249 (Pet. App. 98a-99a) (La. Rev. Stat. Ann. § 31:149 (West 2000)), which purported to render mineral servitudes on federal land exempt from the longstanding Louisiana rule of prescription for non-use; and on the judgment in *United States* v. *Nebo Oil Co.*, 90 F. Supp. 73 (W.D. La. 1950), aff'd, 190 F.2d 1003 (5th Cir. 1951), which, relying on Act 315, granted one of petitioners' predecessors title to mineral servitudes associated with 800 acres of land. The district court held that title to the disputed mineral servitudes was res judicata under *Nebo Oil*. The court of appeals reversed and remanded. Pet. App. 1a-28a.

1. Under Louisiana law, ownership of minerals on real property cannot be held as an estate separate from the land, but the right to enter the land and extract minerals can be held separately in the form of a mineral servitude. *Frost-Johnson Lumber Co.* v. *Salling's Heirs*, 91 So. 207, 243-245 (La. 1920); La. Rev. Stat. Ann. § 31:21 (West 2000). Under Louisiana law, rights of servitude ordinarily prescribe (*i.e.*, revert to the landowner) if not used for a period of ten years. *Frost-Johnson Lumber*, 91 So. at 243-245; La. Rev. Stat. Ann. § 31:27 (West 2000). The period of prescription for a servitude begins to run on the date the servitude is created, see *id.* § 31:28; *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" pursuant to 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 (Nebo Oil), which was successor in interest to the Good Pine Oil Company (Good Pine Oil). Good Pine Oil was incorporated in 1932 as a joint venture of five Louisiana lumber companies (Good Pine Lumber, Trout Creek Lumber, Tall Timber Lumber, Bodcaw Lumber, and Grant Timber), which separately conveyed all mineral interests on their respective lands to Good Pine Oil to facilitate mineral exploration and production. Pet. App. 4a-5a. This case involves servitudes conveyed to Good Pine Oil through six separate grants by the Bodcaw Lumber Company and the Grant Timber Company. *Id.* at 5a. Because each of the six conveyances involved mineral rights on several parcels of land, many of which were noncontiguous, each conveyance created multiple servitudes. *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 5a-6a.

Between November 1934 and January 1937, the United States acquired approximately 180,000 acres of land from Bodcaw Lumber and Grant Timber through nine purchases and two judgments of condemnation. Pet. App. 6a & n.15. The United States acquired the lands pursuant to the Act of March 1, 1911 (Weeks Law), ch. 186, 36 Stat. 961 (16 U.S.C. 480, 500, 515-519, 521, 552, 563), for the Kisatchie National Forest. The property acquired included portions of the land covered by the six mineral deeds between Bodcaw Lumber, Grant Timber, and Good Pine Oil. At the time of acquisition,

the land was burdened by 96 separate mineral servitudes in favor of Good Pine Oil (the Good Pine servitudes). Pet. App. 6a. Five of the 11 instruments of transfer (the nine purchases and two condemnations) 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. Pet. App. 6a-7a. Each of those five instruments stated that at the termination of the additional reservations, the United States would hold the land in "complete fee." *Id.* at 7a-8a.

3. In 1940, after all of the conveyances at issue in this case were completed, the Louisiana legislature enacted Act 315, which provided that when land acquired by the United States is subject to a mineral servitude, that servitude is "imprescriptible" for non-use. Act 315 § 1, 1940 La. Acts 1250. The stated purpose of the Act was to facilitate the United States' acquisition of land for national forests and parks and military installations, by permitting landowners to reserve mineral rights without the risk of losing those rights through prescription. See *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 599 & n.16 (1973). Act 315 also served Louisiana's interest in taxing and regulating minerals on federal land by preventing ownership of the minerals from reverting to the United States. See *id.* at 599-600. The Louisiana Supreme Court has held that Act 315 is "retrospective in its operation," and applies to mineral servitudes in existence at the time of its passage. *Leiter Minerals, Inc.* v. *California Co.*, 132 So. 2d 845, 854 (1961).

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,

in which Nebo Oil claimed a mineral servitude as successor in interest to Good Pine Oil. Pet. App. 9a. This 800-acre parcel was one of several parcels totaling 24,943.93 acres acquired by the United States from Bodcaw Lumber through a 1936 deed and encompassed a portion of one of the 96 servitudes at issue in this case. *Id.* at 10a; Pet. 19 n.18. The United States claimed that no drilling had been conducted on that servitude during the ten-year prescriptive period, and therefore the servitude had prescribed for non-use. Nebo Oil admitted, however, that its lessees intended to drill on the property. Pet. App. 107a. The United States sought an order permanently enjoining Nebo Oil from entering the 800-acre parcel for mineral production. *Id.* at 10a.

The district court denied the United States relief, holding that the servitude on the 800-acre parcel retroactively had been rendered "imprescriptible" by Act 315. See *Nebo Oil*, 90 F. Supp. at 84. The court of appeals affirmed. The court held that Act 315's elimination of the rule of prescription for servitudes on federal land did not dispose of federal property in violation of the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, did not violate the Contract Clause, *id.* Art. I, § 10, Cl. 1, and did not violate the Due Process Clause of the Fourteenth Amendment, *id.* Amend. XIV, because the United States' "reversionary interest" in the minerals—*i.e.*, the interest in reclaiming minerals through prescription—was not a "vested" right under Louisiana law. *United States* v. *Nebo Oil Co.*, 190 F.2d 1003, 1008-1010 (5th Cir. 1951). In granting final judgment for Nebo Oil, 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. 11a n.23.

5. In *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973), this Court invoked the choice-of-law doctrine outlined in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), to hold that Act 315 could not be applied retroactively to mineral reservations on lands acquired by the United States under the Migratory Bird Conservation Act, 16 U.S.C. 716 *et seq.* 412 U.S. at 602-603. In two transactions completed in the 1930s, the United States granted mineral reservations to the seller of the land, subject to a contractual provision that the servitude would "terminate" if not used for a ten-year period, and then "complete fee title to said lands [would] thereby become vested in the United States." *Id.* at 583 (citation omitted). The Court held that the court of appeals had erred by proceeding on the premise that state law governed the transaction. Because Act 315 would deprive the United States of "bargained-for-contractual interests" by abrogating the terms of the acquisition instruments relating to prescription, the Court held that Act 315 was "plainly hostile to the interests of the United States" and could not be "borrowed" as the rule of decision. *Id.* at 597. This Court held that the appropriate rule of decision instead was to be supplied by either federal common law or "residual" state law (*i.e.*, Louisiana state law without Act 315), both of which would give effect to the contract terms. *Id.* at 604.

In *Central Pines Land Co.* v. *United States*, 274 F.3d 881, cert. denied, 537 U.S. 822 (2001), the Fifth Circuit applied the reasoning of *Little Lake Misere* to existing mineral servitudes on property acquired by the United States under the Weeks Law for the Kisatchie National Forest. Although the court did not expressly overrule *Nebo Oil*'s constitutional analysis, the court rejected that

decision's premise that Louisiana Law (including Act 315) governed the transaction. The court held that Act 315 could not be borrowed as the rule of decision because, as in *Little Lake Misere*, it was hostile to the United States' interests in "obtaining the mineral rights via the default rule of prescription in place before Act 315." *Id.* at 891. The court held that the ten-year prescriptive period of "residual (pre-Act 315) Louisiana law" should govern the case, and concluded that the servitudes on the Kisatchie Forest lands had prescribed for non-use. *Id.* at 892.

6. In the early 1990s, in reliance upon *Little Lake Misere*, the United States began granting mineral leases on some Forest Service lands that had been burdened by Good Pine servitudes for which the period of prescription had run because of non-use. In February 2000, petitioners, who are successors in interest to Nebo Oil, brought suit in federal district court seeking a determination that they are owners in perpetuity of the 96 servitudes, that the mineral leases and lease offers issued by the United States were void, and seeking injunctive relief. Pet. App. 16a-17a. The government conceded that drilling operations had prevented prescription on several of the servitudes and that the servitude at issue in *Nebo Oil* was governed by the judgment in that case. But the government argued that the 95 mineral servitudes not at issue in *Nebo Oil* were subject to the ordinary rule of prescription for non-use and argued that ownership of several of the servitudes had reverted to the United States for non-use. *Id.* at 17a & n.49. Petitioners sought summary judgment, arguing that they were entitled to judgment as a matter of law because of *Nebo Oil* and that the doctrines of res judicata and collateral estoppel barred the United States

from contending that the servitudes had prescribed for non-use.

7. The district court granted summary judgment for petitioners on res judicata grounds. Pet. App. 57a-88a. The court held that *Nebo Oil* 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." The court concluded that the servitudes for "those minerals underlying the 24,943.93 acre tract were previously held imprescriptible and *res judicata* clearly applies." *Id.* at 87a. As for the ten land transfers not 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 of 1940 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 87a-88a.

8. The court of appeals reversed. Pet. App. 1a-28a. The court first held that the judgment in *Nebo Oil* did not bar the United States under the doctrine of res judicata from claiming that servitudes (other than the one on the 800-acre parcel at issue in that case) had prescribed for non-use. Because there was no dispute about the sameness of the parties, the competency of the prior court, or the finality of the prior judgment, the court of appeals concluded that the dispositive issue was whether *Nebo Oil* and this case involved the "same claim." *Id.* at 20a. Turning to the "transactional test" of the Restatement (Second) of Judgments, see Restatement (Second) of Judgments § 24(1) (1982), the court determined that the "critical issue" was whether the two

actions were "based on the *same nucleus of operative facts.*" Pet. App. 21a (quoting *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir.), cert. denied, 527 U.S. 1004 (1999)).

Because each of the Good Pine servitudes constituted a separate and "distinct real [property] right under Louisiana law," Pet. App. 23a, the court of appeals concluded that "the operative facts of the * * * actions would be distinct." *Ibid.* The court determined that the "most important[]" of the "operative facts" underlying the United States' claim in *Nebo Oil* was the "history of use or nonuse of that servitude," which determined the validity of the claim of prescription. *Id.* at 22a. The court noted that the "use histories of the other Good Pine servitudes were not operative facts of either the government's claim or Nebo Oil's defense to that claim." *Id.* at 23a-24a. The court explained that the district court's focus on "the factual similarities among the various servitudes and land acquisitions" reflected its confusion between res judicata (claim preclusion) and collateral estoppel (issue preclusion): while factual similarities were "potentially relevant for purposes of collateral estoppel, [they] are not relevant to *res judicata*." *Id.* at 22a. Finally, the court pointed out that the government had brought the quiet title action in *Nebo Oil* because of a threat to begin drilling on the 800-acre parcel alone, and observed that neither the district court nor petitioners "have identified a principle of *res judicata* that requires an owner of separate properties to litigate title to all of those properties in response to a threat to his right of full use and enjoyment of only one of them." *Id.* at 23a.

Although the district court had not expressly addressed collateral estoppel, the court of appeals ad-

dressed whether that doctrine would "limit[]" "the United States's defense of this action." Pet. App. 24a. The court of appeals concluded that the United States was not barred by collateral estoppel from arguing that Act 315 did not govern the servitudes under the choice-of-law principles set forth in *Little Lake Misere* because the choice-of-law issue was not litigated in *Nebo Oil*. Rather, the court of appeals concluded, it had only "assumed the applicability of Act 315" in *Nebo Oil* and "did not address" the issue. *Id.* at 26a. The court of appeals held in the alternative that even if the United States had litigated the choice-of-law issue in *Nebo Oil*, the United States was not precluded from advocating a different choice-of-law conclusion here in light of the intervening rulings in *Little Lake Misere* and *Central Pines*, because "collateral estoppel applies to 'pure question[s] of law' only when there has been no 'change in controlling legal principles,' " *id.* at 24a-25a (quoting *Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1166-1167 (5th Cir. 1981)). The court remanded the case "so that the district court can determine which servitudes have in fact prescribed," *id.* at 28a, noting that the United States had "conceded that sufficient drilling operations had interrupted the running of prescription on some of the servitudes." *Id.* at 17a n.49.[1]

ARGUMENT

The court of appeals correctly applied settled principles of res judicata and collateral estoppel to the particular facts of this case. Its factbound decision does not

[1] After petitioners filed a petition for rehearing, the court of appeals amended its opinion to cite additional authority for the proposition that collateral estoppel applies to pure questions of law only when there has been no change in controlling legal principles. Compare Pet. App. 25a n.63, with *id.* at 53a n.63.

conflict with any decision of this Court or of any other court of appeals. Further review is not warranted, particularly in view of the interlocutory posture of the case.

1. Petitioners contend (Pet. 7-20) that the court of appeals erred in holding that this case and *Nebo Oil* involved different claims and therefore erred by concluding that res judicata did not control the outcome of this case. They contend that the court of appeals "has effectively held that *res judicata* only bars claims actually litigated," when in fact it "requires litigants to litigate all of their related claims at once." Pet. 11-12. Although petitioners concede (Pet. 19 n.17) that the rule of prescription would apply differently to each of the 96 servitudes at issue depending on the individual drilling history of each servitude, petitioners argue (Pet. 12-14) that because the servitudes were part of six similar mineral conveyances, the government was obliged to litigate title to *all* of the servitudes in 1948 when it brought a quiet title action concerning the single 800-acre tract on which drilling had been threatened. Petitioners assert (Pet. 7) that the court of appeals' decision has created a "split among the circuits," and will result in the "wasting [of] valuable judicial resources" by encouraging property owners to litigate claims "an acre at a time." Pet. 9. All of those contentions are without merit.

a. "Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation on the *very same* claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *New Hampshire* v. *Maine*, 532 U.S. 742, 748 (2001) (emphasis added). In determining whether two suits involve the "same claim" for res judicata purposes, courts typically

employ the transactional test set forth in the Restatement (Second) of Judgments (1982). See *Nevada* v. *United States*, 463 U.S. 110, 131 n.12 (1983) (describing test); Pet. 12 n.11 (collecting authorities). Under that test, "the preclusive effect of a prior judgment extends to all rights the original plaintiff had 'with respect to all or any part of the transaction, or series of connected transactions, out of which the [original] action arose.'" Pet. App. 20a-21a (brackets in original) (quoting Restatement (Second) of Judgments § 24(1) (1982)). In applying that test, courts take a "pragmatic[]" approach, "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) of Judgments § 24(2) (1982). "[T]he critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts*." Pet. App. 21a (quoting *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir.), cert. denied, 527 U.S. 1004 (1999)). Petitioners do not dispute that the court employed the correct legal standard. Indeed, petitioners themselves advocate use of the Restatement's transactional test. See Pet. 12; accord Pet. C.A. Br. 22. Rather, petitioners simply contend that the court applied that inherently factbound test incorrectly to the circumstances of this case. Cf. generally *Sullivan* v. *Gagnier*, 225 F.3d 161, 166 (2d Cir. 2000) ("Any issue of preclusive effect depends on the specific facts and circumstances of each case."). That contention is without merit.

The court of appeals correctly determined (Pet. App. 22a) that the "most important[]" "operative facts" (*id.* at 21a) in *Nebo Oil* were the facts concerning the cre-

ation of the servitude on the 800-acre parcel in dispute and its subsequent use in drilling operations, and that those "operative facts" differed from the use histories for the remaining 95 mineral servitudes. Petitioners contend (Pet. 12-13) that that conclusion was erroneous because the six mineral conveyances and 11 land transactions implicated in this case involved common grantors and grantees, contained similar terms, and were made for similar purposes. But that argument fails to properly frame the issue in the context of the original litigation. *Nebo Oil* involved the stated intention of a predecessor corporation to drill on a specific 800-acre tract involving a servitude that the government claimed had prescribed for non-use. See Pet. App. 107a. Petitioners have cited no evidence that Nebo Oil then owned all of the Good Pine servitudes or had threatened to drill on other Good Pine servitudes that had prescribed. Indeed, at the time the government filed suit in that case, the largest of the Good Pine servitudes (covering more than 157,000 of the approximately 180,000 acres in question) were still in use and had not prescribed. Gov't C.A. R.E. 8, at 1-9. The United States therefore had no basis for suing to quiet title on the majority of the servitudes on the 180,000 acres, which were still in use for mineral production; nor did it have any reason to seek to quiet title to the lands not then in use (because there was no threat to use the land).[2] The court of appeals therefore correctly concluded that this case involves different "claims" than *Nebo Oil*. In any event,

[2] Far from promoting efficiency, as petitioners claim, the novel rule advocated by petitioners would itself "wast[e] valuable judicial resources" (Pet. 9) by requiring landowners preemptively to litigate title to tens of thousands of acres of property over which there is no current dispute.

the court of appeals' inherently factbound application of the Restatement test, which necessarily must "be applied with attention to the facts of [particular] cases," Restatement (Second) of Judgments § 24, cmt. b at 199 (1982), does not warrant further review. See generally *Nevada*, 463 U.S. at 131 n.12 (noting that transactional test is "not capable of a mathematically precise" application) (quoting Restatement (Second) of Judgments § 24, cmt. b, at 199 (1982)).

b. Petitioners err in contending (Pet. 7) that the court of appeals decision is an "extreme departure" from existing case law and a "rogue opinion" that warrants the exercise of this Court's supervisory power. Pet. 8. While petitioners assert (Pet. 18) that the government's emphasis on the separateness of the servitudes in this case is a "red herring," there is no dispute that the United States acquired its property interests from two different lumber companies in 11 separate transactions that each involved multiple parcels of land burdened by distinct servitudes. Petitioners do not adequately explain how a disparate group of properties with different use histories could be "a convenient unit for the purposes of trial" (Pet. 12 (quoting Restatement (Second) of Judgments § 24, cmt. b at 199 (1982))), such that they must be treated as the "same claim" for res judicata purposes.[3]

[3] Petitioners repeatedly invoke (Pet. 3, 9, 10) an opinion given in 1935 to Bodcaw Lumber Company by an Assistant Solicitor at the Department of Agriculture "to the effect that the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes." *Nebo Oil*, 190 F.2d at 1005. Petitioners cannot claim detrimental reliance on that letter because petitioners are successors in interest to *Good Pine Oil*, not Bodcaw Lumber, and Good Pine Oil acquired its servitudes before the representations in the letter were made. In addition, the letter was supplied to Bodcaw Lumber

Moreover, as noted by the court of appeals (Pet. App. 23a), petitioners have identified no authority for the proposition that the owner of separate parcels of land "must litigate title to all of those properties in response to a threat to his right to full use and enjoyment of only one of them." In fact, the law is to the contrary. Although the preclusive effect of *Nebo Oil* is a matter of federal res judicata law, cf. *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001), the long practice in Louisiana land-title cases may inform that determination. Cf. *ibid.* (advocating "adopt[ion], as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits"). It has long been the law in Louisiana that "separate tract[s] of land held under * * * separate title * * * may be separately litigated." *Board of Comm'rs* v. *Cockrell*, 91 F.2d 412, 417 (5th Cir.), cert. denied, 302 U.S. 740 (1937); accord *Lieber* v. *Ownership of Real Prop. Located in Caddo Parrish*, 501 So. 2d 957, 959 (La. Ct. App. 1987) ("The lands that were not included in the prior suit do not fit the requirement that the object be the same. * * * A cause of action is not split when the same parties bring two separate actions to

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after the three largest transactions at issue in this case (totaling over 130,000 acres) were completed, Gov't C.A. Br. 11-12, and several of the transfer instruments at issue in this case explicitly provided that at the end of all reservation periods, the United States would own the land "in complete fee." Pet. App. 7a-8a; *id.* at 118a. Even if the letter were relevant here, its existence would counsel *against* application of res judicata because the letter is an "operative fact" only for *some* parcels of land at issue in this case. Bodcaw Lumber alone sold the United States the 800 acres at issue in *Nebo Oil*. See 90 F. Supp. at 78. However, Bodcaw was one of two companies that sold the United States the land at issue in this case, and one of *six* companies that contributed property to Good Pine Oil.

determine the ownership of two separate tracts of land."); *State* v. *American Sugar Refin. Co.*, 32 So. 965, 965 (La. 1902) ("The plea of res adjudicata is without force, unless the object demanded in the former suit was *precisely the same* as that demanded in the action pending.") (emphasis added). The court of appeals' decision is fully in accord with that rule.

The land title cases that petitioners claim are "similar" to this case (Pet. 14-16) are inapposite. None stands for the proposition that a landowner must bring all claims relating to "similarly situated" parcels of land at the same time to avoid arguments that later suits are precluded. The cases cited by petitioners either apply the doctrine of collateral estoppel (issue preclusion) rather than the distinct doctrine of res judicata (claim preclusion), or involve litigation over the *same* tract of land rather than distinct (but similarly situated) parcels of property, or both.[4] Indeed, *Moore* v. *Swayne-Hunter*

[4] *Southern Pacific Railroad* v. *United States*, 168 U.S. 1 (1897), involved collateral estoppel, rather than res judicata, see *id.* at 48-49, as petitioners concede (Pet. 14 n.14). There, the Court held only that when a particular factual issue relating to title (there, the accuracy of a map showing legal boundaries of property) has been litigated between two parties in one action, the losing party may not reopen that issue when it arises in a subsequent suit between the same parties. *Id.* at 48-49. *Moore* v. *Swayne-Hunter Farms, Inc.*, 841 S.W.2d 308, 313 (Mo. Ct. App. 1992), explicitly states that it "involves application of the principles of collateral estoppel rather than * * * res judicata"; in any event, it held only that when parties had previously litigated ownership of a portion of a single tract of land, the judgment was binding on the parties for the remaining portion of *the very same tract of land*, not for "similarly situated" (Pet. 15) tracts. *Peasley* v. *State*, 424 N.Y.S.2d 995 (Ct. Cl. 1980), involved collateral estoppel rather than res judicata. *Id.* at 1000-1001. Furthermore, the two suits at issue there did not involve separate parcels of land; rather, the first suit determined that "the State had no title to *any portion* of the land," *id.* at 998 (emphasis

Farms, Inc., 841 S.W.2d 308 (Mo. Ct. App. 1992), cited by petitioners (Pet. 15), *directly refutes* petitioners' argument: the court there clearly indicated that "[b]ecause the present action involve[d] the 150 acres not [at issue] in the [earlier] condemnation action," the doctrine of res judicata did not apply; any preclusive effect would stem from application of the distinct doctrine of collateral estoppel. *Id.* at 313.

c. Petitioners assert (Pet. 7) that the decision of the court of appeals in this case has "unsettled" the law of res judicata and created a circuit split. While petitioners cite, without explanation, decisions of five other courts of appeals, they do not identify any conflict between the standards applied in those cases and that applied by the court of appeals in this case. Because each of the cited cases applied the Restatement's transactional test (or a comparable test) to legal claims that are very different

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added), including the portion that was the subject of the second suit. While *Nevada* v. *United States*, 463 U.S. 110 (1983), involved res judicata, it did not involve its application to prevent a party from litigating ownership rights to property distinct from that at issue in the first case; that case involved litigation over *the very same* property rights at issue in the first case (water rights in the Truckee River). *Id.* at 132. While *Nevada* emphasized the importance of the doctrine of res judicata in disputes involving real property, nothing in the Court's decision undermines the principle that claim preclusion is limited to the operative facts" of the initial proceeding. The most relevant of the cases petitioners cite is *Custer* v. *Hall*, 76 S.E. 183 (W. Va. 1912), which involved application of res judicata to two parcels of the same single tract of land that were the subject of an exceedingly complex intra-family dispute. *Custer* (like *Moore*, discussed in the text) involved res judicata under *state* law, however, and there was no indication in *Custer* that there were any differences between the parcels that could have affected title (as is the case with the different mineral-use histories on the servitudes here).

from those at issue here, they cannot be said to conflict with the court of appeals' decision in this case.[5]

d. Finally, petitioners err in contending (Pet. 11) that the court of appeals "confused" collateral estoppel and res judicata and "effectively held that *res judicata* only bars claims actually litigated." The court of appeals made clear that res judicata applies to all "grounds" or "defenses" "available to the parties" on the nucleus of operative facts constituting the claim at issue, "regardless of whether they were asserted or determined in the prior proceeding." Pet. App. 20a n.52 (quoting *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979)). But the fact that res judicata applies to all arguments that could have been made regarding a "common nucleus of operative facts" does not mean, as petitioners suggest (Pet. 12-13, 16-18), that res judicata applies to all distinct "claims" (as factual groupings) that could have been joined in

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[5] See *Havercombe* v. *Department of Educ.*, 250 F.3d 1, 4-5 (1st Cir. 2001) (applying Restatement transactional test to employment-discrimination claims); *Ragsdale* v. *Rubbermaid, Inc.*, 193 F.3d 1235, 1239 n.8 (11th Cir. 1999) (applying Restatement transactional test to False Claims Act claims); *Sure-Snap Corp.* v. *State St. Bank & Trust Co.*, 948 F.2d 869, 874 (2d Cir. 1991) (citing Restatement transactional test in resolving lender-liability claim); see also *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 17 (1st Cir. 2003) (in dispute involving right to funds in bank account, finding claims to be the same where the "substance" of the causes of action was "materially identical"); *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1078 (9th Cir. 2003) (holding that judgment in prior challenge to regulatory plan was res judicata because an "[i]dentity of claims exists when two suits arise from 'the same transactional nucleus of facts'"); *Bethesda Lutheran Homes & Servs., Inc.* v. *Born*, 238 F.3d 853, 857 (7th Cir. 2001) (stating that "for purposes of res judicata a claim is not an argument or a ground but the events claimed to give rise to a right to a legal remedy," in discussing claim of improper denial of Medicaid benefits).

common litigation. To the contrary, the courts of appeals have recognized that the doctrine of res judicata is not as broad as rules governing permissive joinder. See *Rosemann* v. *Roto-Die*, 276 F.3d 393, 398 (8th Cir. 2002); *Dore* v. *Kleppe*, 522 F.2d 1369, 1374-1375 (5th Cir. 1975).

2. Petitioners also contend (Pet. 20-29) that the court of appeals erred by holding that collateral estoppel does not bar the United States from contending that Act 315 does not govern the servitudes at issue in this case under the holdings of *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973), and *Central Pines Land Co.* v. *United States*, 274 F.3d 881 (5th Cir.), cert. denied, 537 U.S. 822 (2001). Specifically, they argue that the court of appeals erred in concluding that the threshold choice-of-law issue was not actually litigated during the *Nebo Oil* litigation. Pet. 26-28. Petitioners also argue (Pet. 20-26, 28-29) that the court of appeals erred by concluding, in a brief three-sentence alternative holding, that "even if the choice-of-law issue had been raised in *Nebo Oil*, changes in controlling legal principles prevent the United States from being precluded from litigating the issue in this case." Pet. App. 27a-28a. They contend that the Fifth Circuit has "substantially expanded" (Pet. 20) the change-of-law exception to collateral estoppel and thereby created a "[s]plit in the [c]ircuits." Pet. 24. Those arguments are without merit. Further review is not warranted, particularly because petitioners will not benefit unless the Court finds the court of appeals erred with respect to both of its alternative holdings.

a. It is well established that the doctrine of collateral estoppel applies only to matters "actually litigated." *Nevada*, 463 U.S. at 130 n.11 (citing *Parklane Hosiery*

Co. v. *Shore*, 439 U.S. 322, 326 n.5 (1979)); accord *Southern Pac. R.R.* v. *United States*, 168 U.S. 1, 48 (1897) (estoppel applies to a "right, question, or fact distinctly put in issue and directly determined"). Petitioners do not dispute that principle. They contend only that the court of appeals erred in its application of the principle to the particular facts of this case. Petitioners do not explain why this Court is better situated than the Fifth Circuit itself is to decide the fundamentally factbound question of which issues that court (and the district court) decided in *Nebo Oil*. See generally *Purdy* v. *Zeldes*, 337 F.3d 253, 260 n.7 (2d Cir. 2003) (stating that "[c]ollateral estoppel * * * is a fact intensive inquiry that is best determined on a case-by-case basis").

The court of appeals correctly determined that the choice-of-law issue was not litigated in *Nebo Oil*. The district court in *Nebo Oil* addressed three constitutional issues concerning the application of Act 315: (1) whether application of Act 315 to the 800-acre tract at issue would interfere with the United States' rights, under Article IV, Section 3, Clause 2 of the Constitution, to use and regulate property; see 90 F. Supp. at 84-88; (2) whether it would impair the obligation of contracts in violation of Article 1, Section 10 of the Constitution, see 90 F. Supp. at 88-95; and (3) whether it would violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment. See 90 F. Supp. at 95-100. The court of appeals in *Nebo Oil* addressed the same three issues. See 190 F.2d at 1008. The government's court of appeals brief in *Nebo Oil* listed five questions presented by the case, Pet. App. 119a-120a, and none of them involved choice of law.

Contrary to petitioners' suggestion (Pet. 27), the fact that the *Nebo Oil* courts applied state law does not mean that the courts "of necessity" recognized the choice-of-law issue and decided it. Rather, as the court of appeals concluded, the courts and the parties in *Nebo Oil* simply "assumed the applicability of Act 315," Pet. App. 26a, without ever addressing the choice-of-law issue. In *Little Lake Misere*, this Court held that it was error to assume the applicability of Act 315 to the federal acquisition of land in Louisiana, see 412 U.S. at 590-591 & n.8, and that the courts should instead perform a choice-of-law analysis under *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). See 412 U.S. at 590-592. Thereafter, in *Central Pines*—in which the court of appeals applied *Little Lake Misere* to hold that Act 315 could not be applied to pre-existing mineral servitudes, like those at issue in this case, on land acquired under the Weeks Law for national forests, see 274 F.3d at 891-892—the court of appeals stated that it did not need to decide whether *Little Lake Misere* overruled *Nebo Oil*, because *Nebo Oil* did not address the choice-of-law question. See *id.* at 889-890.

Petitioners err in contending (Pet. 27-28) that the district court in *Nebo Oil* actually did address the choice-of-law issue. The quotations from the district court opinion cited by petitioners (*ibid.*) are from a section of the opinion discussing the Property Clause of the Constitution, not choice of law. There, the district court cited cases discussing state laws regulating property in concluding that state laws that affected federal property would not violate the Property Clause if they did not "interfere with the purposes for which the United States purchased the land in question." *Nebo Oil*, 90 F. Supp. at 85; see also *id.* at 88. Petitioners' assertion (Pet. 28)

that the United States made a "choice-of-law" argument in its *Nebo Oil* brief and that the brief "even has a reference to the *Clearfield Trust* decision" (*ibid.*) is equally mistaken. The cited portion of the brief (Pet. App. 127a-128a) concerns the government's argument that Act 315 violated the Property Clause, and the citation to *Clearfield Trust* is embedded in a string citation within a lengthy block quotation from a decision of this Court concerning intergovernmental tax immunity. Pet. App. 127a-128a (quoting *United States* v. *County of Allegheny*, 322 U.S. 174, 182-183 (1944)).

b. Petitioners are likewise mistaken in contending (Pet. 20-26, 28-29) that the court of appeals misapplied the change-of-law exception to the collateral estoppel doctrine when it held that, even if the choice-of-law issue had been "actually litigated" in *Nebo Oil*, "changes in the controlling legal principles prevent the United States from being precluded from litigating the issue in this case." Pet. 27a-28a. It is hornbook law that collateral estoppel does not preclude relitigation of a legal issue previously decided between parties when there has been "an intervening change in the legal climate," "[e]ven when claims in two actions are closely related." Restatement (Second) of Judgments § 28, cmt. c (1982) at 276; *id.* § 28 and 28(2) at 273 ("relitigation of the issue in a subsequent action between the parties is not precluded" when "[t]he issue is one of law and * * * a new determination is warranted in order to take account of an intervening change in the applicable legal context"); 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4426, at 686 & n.5 (2d ed. 2002); see also *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 362 (1984) (declining to apply "the collateral-estoppel doctrine in the present case" because prior case was based

on analysis "*repudiated* by this Court's intervening pronouncement"); *Montana* v. *United States*, 440 U.S. 147, 161 (1979) (quoting *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948)).

The court of appeals' alternative holding correctly applied that basic principle. Assuming, *arguendo*, that the choice-of-law issue was "actually litigated" in *Nebo Oil* and, accordingly, that *Nebo Oil* is to be read as holding that Act 315 can be retroactively applied against the United States under choice-of-law principles, that holding has been overruled. *Little Lake Misere* held that Act 315 could not be applied retroactively to mineral reservations granted by the United States on lands acquired under the Migratory Bird Conservation Act. 412 U.S. at 602-603. In *Central Pines*, the Fifth Circuit applied the reasoning of *Little Lake Misere* to hold that Act 315 could not be applied retroactively to existing mineral servitudes on land that, like the property involved in this case, the United States acquired in the 1930s under the Weeks Law for the Kisatchie National Forest.[6] 274 F.3d at 891. *Central Pines* "rejected the presumption in *Nebo Oil* that Louisiana law governed the terms of the transactions at issue." Pet. App. 15a. Thus, the court of appeals correctly concluded that "changes in the controlling legal principles prevent the United States from being precluded from litigating the issue in this case." *Id*. at 27a-28a. See, *e.g.*, *Monahan* v. *New York City Dep't of Corr.*, 214 F.3d 275, 290 (2d Cir.), cert. denied, 531 U.S. 1035 (2000); *Spradling* v. *City of*

[6] Petitioners' suggestion (Pet. 21) that *Little Lake Misere* expressly distinguished *Nebo Oil* on its facts is mistaken. The Court noted the facts of *Nebo Oil* in the factual section of the opinion, see 412 U.S. at 586, and only noted without comment the observations of the court of appeals in that case. *Id*. at 586 & n.4.

Tulsa, 198 F.3d 1219, 1222 (10th Cir. 2000). The Restatement emphasizes that reexamination is particularly appropriate where, as here, "one of the parties is a government agency responsible for continuing administration of a body of law" and applying collateral estoppel would "give one [party] a favored position in current administration of a law." Restatement (Second) of Judgments § 28, cmt. c at 278 (1982). If the change-of-law exception were not applied here, petitioners would be placed at an unfair advantage (see *id.* at 276) vis-a-vis other servitude holders on federal land, for whom the rule of prescription undeniably applies.[7] See *Central Pines, supra*. Cf. generally *Limbach*, 466 U.S. at 363 (refusing to apply collateral estoppel where doing so would put litigant in a favored position "based upon a now repudiated legal doctrine," while competitors would have liability "determined upon the basis of the fundamentally different approach adopted" in intervening decision).

Petitioners contend (Pet. 22-26) that the court of appeals' decision in this case conflicts with *United States* v. *Stauffer Chemical Co.*, 464 U.S. 165 (1984), and the decisions of other courts of appeals. That argument confuses two distinct collateral estoppel exceptions.

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[7] Petitioners' claim (Pet. 22) that "a party who has lost in federal civil litigation cannot relitigate the very same case years later just because the underlying constitutional provision * * * has 'evolved,'" concerns res judicata (claim preclusion), not issue preclusion. For the reasons set forth above, see pp. 11-19, *supra*, petitioners' res judicata claim is without merit. The authorities cited by petitioners (Pet. 22) are inapposite. See 18 Charles A. Wright et al., *supra*, § 4415, at 369-370 (discussing claim preclusion); *Tomlin* v. *McDaniel*, 865 F.2d 209 (9th Cir. 1988) (discussing motions for relief from judgment under Fed. R. Civ. P. 60); *United States* v. *Real Prop. Described as 3947 Locke Ave.*, 164 F.R.D. 496 (C.D. Cal. 1995) (same).

The Restatement (Second) of Judgments provides that parties are not precluded from relitigating an "issue of law" previously decided between them when *either* "(a) the two actions involve claims that are substantially unrelated, *or* (b) a new determination is warranted to take account of an intervening change in the applicable legal context." Restatement (Second) of Judgments § 28(2) (1982) (emphasis added). See generally *Burlington N. R.R.* v. *Hyundi Merch. Marine Co.*, 63 F.3d 1227, 1229 (3d Cir. 1995) (noting distinction). The exception for "substantially unrelated" actions reflects a concern for development of the law and is based on the notion that "[a] rule of law declared in an action between two parties should not be binding on them for all time * * * when other litigants are free to urge that the rule should be rejected." See Restatement (Second) of Judgments § 28(2), cmt. b, at 275-276 (1982). The change-of-law exception reflects a concern for the equitable administration of the law after legal principles have already changed. *Id.* § 28(2), cmt. c.

As the court of appeals correctly concluded (Pet. App. 28a n.73), in *Stauffer*, "there had been no change in controlling legal principles between the first and the second action," and that decision instead discussed the distinct exception to collateral estoppel for "'unmixed questions of law' arising in 'successive actions involving unrelated subject matter.'" *Ibid.* (quoting *Stauffer*, 464 U.S. at 170, and *Montana*, 440 U.S. at 162); see also *Stauffer*, 464 U.S. at 170 ("The Government does not argue * * * that controlling law or facts have changed."); *Burlington N.*, 63 F.3d at 1238 (noting that there had been no "intervening change in the applicable legal context"). Unlike *Stauffer* and *Burlington Northern*, this case involves both an issue of law and a change in

the controlling legal principle, and the government has not invoked the distinct exception to collateral estoppel principles addressed in those cases. See Pet. App. 27a n.73. Consequently, there is no requirement that the present case be "substantially unrelated" to *Nebo Oil* for the change-of-law exception to apply. See Restatement (Second) of Judgments § 28, cmt. c, at 276 (1982) (change-of-law exception applies "[e]ven when claims in two actions are closely related").

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 relitigating issues that would be barred by res judicata (claim preclusion). 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 relitigate a legal issue, based on changes in the law, "in an action arising out of a new incident." *Ibid.* That is precisely the rule the court of appeals applied here. The other cases cited by petitioners are inapposite.[8]

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[8] See *Steen* v. *John Hancock Mut. Ins. Co.*, 106 F.3d 904, 914-915 (9th Cir. 1997) (declining to apply change-of-law exception to a "factual conclusion" made in earlier decision where parties had not shown that

3. Petitioners assert (Pet. 30) that the government "has not paid" for the mineral interests at issue in this case, and that judgment for the government would be tantamount to a taking of property without just compensation, in violation of the Fifth Amendment. Petitioners did not raise that issue before the court of appeals, see Pet. C.A. Br. 1-51, and therefore it "is not properly before" this Court. *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). Nor have petitioners even listed that among the questions presented by their petition. But see Sup. Ct. R. 14.1(a). In any event, that claim is meritless.

While the district court in *Nebo Oil* found that the United States did not seek to acquire and did not specifically pay for mineral rights when acquiring the 24,943.93 acres of land that included the 800-acre parcel at issue in *Nebo Oil*, that does not necessarily mean the same is true of the other ten land transactions (eight deeds of sale and two judgments in condemnation) at issue in this case that were not discussed in *Nebo Oil*. In any event, petitioners are mistaken in suggesting (Pet. 30) that because the government did not purchase the land *specifically to obtain the mineral rights*, it had no

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the intervening decision "constituted a change in the law"); *North Ga. Elec. Membership Corp.* v. *City of Calhoun*, 989 F.2d 429, 436 (11th Cir. 1993) (declining to apply exception where "[t]here has been no intervening change in the law"); *Precision Air Parts, Inc.* v. *AVCO Corp.*, 736 F.2d 1449, 1504 (11th Cir. 1984) (declining to apply change-of-law exception under doctrine of res judicata when change in law was not "moment[o]us"), cert. denied, 469 U.S. 1191 (1985). *Beverly Health & Rehab. Servs., Inc.* v. *NLRB*, 317 F.3d 316, 323 n.2 (D.C. Cir. 2003), did not address the change-of-law exception, but rather discussed the distinct exception for "unmixed questions of law arising in successive actions involving unrelated subject matter" that was at issue in *Stauffer* and *Burlington Northern*.

expectation of obtaining residual mineral interests through prescription. The government purchased the land (and petitioners' predecessors separately acquired their mineral interests) before enactment of Act 315 and against a background rule that mineral servitudes would revert to the property owner if not used for a period of ten years. Thus, at the time petitioners' predecessors acquired their mineral servitudes, there was no doubt that the servitudes were subject to prescription. Likewise, at the time the United States acquired the land subject to those servitudes, there was no basis in Louisiana law for asserting that the government's acquisition altered the nature of the servitudes or the rights of the servitude holders who were not parties to the transactions. Moreover, several of the instruments transferring the land to the United States explicitly recognized that the servitudes were subject to prescription, stating that at the end of a specified reservation period, "the United States would hold the land in 'complete fee.'" Pet. App. 7a-8a. Because the rule of prescription and the attendant right of reversion were implicit in all of the transactions at issue in this case, judicial recognition of that fact neither enlarges the government's property interests nor diminishes petitioners' property interests.[9]

4. Finally, this Court ordinarily does not review interlocutory decisions of the sort at issue here. *Brotherhood of Locomotive Firemen* v. *Bangor &*

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[9] Petitioners are likewise mistaken in their view (Pet. 30) that *Nebo Oil* made a "determination" with respect to the entire 180,000 acres of land at issue here. As the court of appeals noted in this case, the district court's final decree in *Nebo Oil* specifically limited the scope of its determination to "the lands *described in the complaint*," Pet. App. 11a n.23 (quoting final decree), *i.e.*, the 800-acre tract specifically delimited in the complaint. See *id*. at 101a (complaint).

Aroostock R.R., 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); see generally Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). The court of appeals did not render final judgment on the merits of petitioners' suit, which remains pending in district court, but simply held that petitioners are not entitled to summary judgment on grounds of res judicata or collateral estoppel. Contrary to petitioners' claim (Pet. 6) that the court of appeals "seemed to rule for the government on the title issue," the court explicitly left open the issue of legal title and remanded the case "so that the district court can determine which servitudes have in fact prescribed," Pet. App. 28a, noting that the United States had "conceded that sufficient drilling operations had interrupted the running of prescription on some of the servitudes." *Id.* at 17a n.49. Petitioners may yet obtain a declaration that they continue to possess some of the mineral servitudes at issue, and in any event, they will be able to seek review of any final judgment entered by the district court. The lack of finality of the judgment below is "of itself alone" a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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