No. 14-438

In the Supreme Court of the United States

AMERICAN COMMERCIAL LINES, LLC, 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

The Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, provides a comprehensive scheme for allocating the costs of cleaning up oil spills. Under OPA, claims for damages or for the costs of mitigating oil pollution generally must first be submitted to the "responsible party." 33 U.S.C. 2713(a). If the responsible party fails to make payment within 90 days, the claimant may seek reimbursement from the Oil Spill Liability Trust Fund. 33 U.S.C. 2713(c); see 33 U.S.C. 2701(11). Payment by the Fund causes the United States to "acquir[e] by subrogation all rights of the claimant * * * to recover from the responsible party." 33 U.S.C. 2712(f).

The question presented is: Whether, in a suit by the United States against a responsible party, OPA displaces the responsible party's claims under general maritime law against third parties who received payment from the Fund.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 759 F.3d 420. The opinion of the district court (Pet. App. 14a-24a) is not published in the *Federal Supplement* but is available at 2013 WL 1182963.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2014. The petition for a writ of certiorari was filed on October 14, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, was enacted to address problems highlighted by the "unreasonably slow, confused and inadequate response by industry and government" to the

Exxon Valdez disaster that polluted Alaskan waters in 1989. S. Rep. No. 94, 101st Cong., 1st Sess. 2 (1989). The "failure to control the extent of the damage" from the spill was influenced, Congress found, by "the lack of effective oil spill response capabilities" and by the "lack of coordination between State and Federal agencies and the private companies involved in the spill and cleanup operations." S. Rep. No. 99, 101st Cong., 1st Sess. 2 (1989).

OPA addresses those deficiencies. Three aspects of the statutory scheme combine to address the costs of cleaning up an oil spill: (1) a statutory allocation of responsibility for performing the initial cleanup; (2) statutory obligations to pay for the cleanup in the first instance; and (3) the ultimate adjustment of expenditures and liabilities under the statute.

a. Cleaning up oil spills is specialized, technical, and expensive work in which significant resources (both equipment and personnel) must be rapidly deployed, ordinarily in response to an unexpected emergency. OPA provides a comprehensive national plan for oil spill cleanup, to ensure that action can be taken immediately in response to an accident and to minimize environmental damage.

The federal government is responsible for directing and coordinating oil spill cleanup when a disaster occurs. 33 U.S.C. 1321(c)(1)(A) and (B)(ii). A federal National Contingency Plan "provide[s] for efficient, coordinated, and effective action to minimize damage from oil" spills and coordinates the respective obligations of federal, state, and local government agencies. 33 U.S.C. 1321(d)(2)(A); see 40 C.F.R. Pt. 300 (National Contingency Plan). The United States Coast Guard has primary responsibility for directing oil spill

cleanup in the coastal zone, see 33 U.S.C. 1321(d)(2)(C); 40 C.F.R. 300.145, and participants in the petroleum industry, such as oil tankers, other vessels, and oil facilities, must establish their own approved plans for responding to discharges of oil, 33 U.S.C. 1321(j)(5).

b. OPA also allocates financial responsibility for the costs of cleaning up an oil spill. OPA identifies "responsible part[ies]," 33 U.S.C. 2701(32), who are strictly liable for certain damages and cleanup costs (referred to in the statute as "removal costs," see 33 U.S.C. 2701(31)):

> Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party * * * is liable for the removal costs and damages specified in subsection (b) of this section that result from [an oil spill] incident.

33 U.S.C. 2702(a). Among other things, OPA specifies which cleanup costs and damages are covered, 33 U.S.C. 2702(b) and (c); and it articulates principles of third-party liability, 33 U.S.C. 2702(d), defenses to liability, 33 U.S.C. 2703, and limitations on liability, 33 U.S.C. 2704.[1]

c. Finally, OPA provides a system for adjusting certain financial burdens incurred as a result of a spill, including reimbursement for those who contribute to

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[1] A responsible party can limit its total financial responsibility under OPA by reporting an oil spill promptly, cooperating with cleanup authorities, and showing that neither it nor a person acting on its behalf was grossly negligent, committed willful misconduct, or violated applicable federal safety, construction, or operating regulations. 33 U.S.C. 2704. In other circumstances, a responsible party may be entitled to a complete defense to liability for OPA removal costs and damages. 33 U.S.C. 2703(a).

the cleanup effort. With limited exceptions not at issue here, "all claims for removal costs or damages [must] be presented first to the responsible party." 33 U.S.C. 2713(a). As a result, the responsible party is typically first in line to pay any claims for removal costs or damages that may arise under OPA.

OPA also adjusts financial responsibilities through the Oil Spill Liability Trust Fund, which is administered by the Coast Guard's National Pollution Funds Center. See 33 C.F.R. Pt. 133. The Fund facilitates quick, effective oil spill cleanup by implementing OPA provisions that provide financial incentives for compliance. See 33 U.S.C. 2701(11); 26 U.S.C. 9509(a). The Fund's resources come from amounts collected as environmental taxes on crude oil and certain petroleum products, as well as payments received from specified environmental fines and penalties. 26 U.S.C. 9509(b).

The Fund helps ensure that particular OPA claimants are paid quickly. Claimants must first present their claims to the responsible party, 33 U.S.C. 2713(a), but if the responsible party has not paid the claim within 90 days, "the claimant may elect to * * * to present the claim to the Fund." 33 U.S.C. 2713(c)(2); see 33 C.F.R. 136.103(c)(2). Claims against the Fund must be filed with the National Pollution Funds Center and must be supported by evidence that relevant statutory criteria for a Fund payment have been met. 33 C.F.R. 136.201 and 136.203. The Fund, after adjudicating the claim, see 33 C.F.R. 136.105, may reimburse only those removal costs that are necessary and reasonable, see 33 C.F.R. 136.205.[2] Once

[2] The Fund is also authorized to pay outstanding cleanup costs and damages when a responsible party can limit its liability or

the Fund pays a claim, "the United States Government acquir[es] by subrogation all rights of the claimant * * * to recover from the responsible party." 33 U.S.C. 2712(f).

OPA creates a cause of action for costs and liabilities related to oil spill cleanup. If a claim is denied or remains unpaid by a responsible party, the claimant "may elect to commence an action in court against the responsible party." 33 U.S.C. 2713(c). Similarly, "[a]ny person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law." 33 U.S.C. 2715(a); see 33 U.S.C. 2712(f); 33 C.F.R. 136.115. OPA also authorizes "a civil action for contribution against any other person who is liable or potentially liable under this Act." 33 U.S.C. 2709. And a responsible party that has paid for initial cleanup but can limit its liability or assert a complete defense (see 33 U.S.C. 2704, 2703(a)) may bring suit against other entities, or file a claim with the Fund, to recover the removal costs and damages. 33 U.S.C. 2708.

The liability scheme created by OPA is limited to removal costs and statutory damages. 33 U.S.C. 2702(a). It does not encompass liability for other types of damages, such as hull damages to vessels involved in a collision that caused a spill. Claims for damages not subject to OPA are ordinarily governed by general maritime law. 33 U.S.C. 2751(e).

2. On July 23, 2008, the tug M/V MEL OLIVER was pushing a barge up the lower Mississippi River

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establish a complete defense, or if no responsible party is ever identified. 33 U.S.C. 2712(a)(4).

near New Orleans, Louisiana. Pet. App. 3a. The barge carried almost 10,000 barrels of fuel oil. *Ibid.* An ocean-going tanker, the M/V TINTOMARA, was heading downriver on the side of the river opposite from the tug and barge. *Ibid.* Without warning, the MEL OLIVER veered into the path of the TINTOMARA, which struck the barge and caused a significant amount of oil to spill into the Mississippi River. *Id.* at 15a.

The Coast Guard responded to the spill. Pet. App. 15a. It identified two sources of the discharge as "responsible parties" under OPA: petitioner, which owned the barge; and D.R.D. Towing Inc. (DRD), the barge's operator. *Id.* at 5a. As a responsible party, petitioner arranged with two oil spill responders, Environmental Safety & Health Consulting Services, Inc. (ES&H) and United States Environmental Services, LLC (USES), to work on the cleanup. *Ibid.* The spill responders invoiced petitioner for their services, as OPA requires, but petitioner disputed some of the claims and did not pay the claims in full within the 90 days provided under the statute. *Ibid*; see 33 U.S.C. 2713(c)(2). Petitioner paid ES&H approximately $10.6 million but declined to pay an additional $3.9 million; it paid USES approximately $14 million but rejected USES's claims for an additional $4.4 million. Pet. App. 5a.

ES&H and USES presented their unpaid claims to the Fund. Pet. App. 6a. The Fund adjudicated the claims, denied claims that did not meet the statutory criteria for payment from the Fund, and paid the remainder. *Ibid.* ES&H was paid approximately $3 million from the Fund, and USES was paid approxi-

mately $1.50 million. *Ibid.* Neither challenged the Fund's determinations. *Id.* at 6a n.4.

3. a. The United States brought this action against petitioner and DRD,[3] seeking removal costs and damages under OPA and civil penalties under the Clean Water Act, including the removal costs ES&H and USES recovered from the Fund. Pet. App. 6a.[4] Petitioner filed third-party complaints seeking to join ES&H and USES as defendants under Federal Rule of Civil Procedure 14(c)(2), which applies to claims brought under admiralty or maritime law. Pet. App. 16a. Petitioner alleged that its contracts with ES&H and USES required the spill responders to produce certain documents to petitioner as a condition of receiving payment on their invoices; because ES&H and USES had failed to provide those documents, petitioner claimed it had no obligation to pay their invoices. *Id.* at 6a & n.5.[5] Because the same documents had

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[3] The assets of DRD appear to have been exhausted after the oil spill, and it has not participated in the litigation.

[4] A separate trial was held in a consolidated action to determine liability under general maritime law for certain damages caused by the collision. See generally *Gabarick* v. *Laurin Maritime (Am.) Inc.,* No. 08–2161, 2014 WL 4794758, at *1 (E.D. La. Sept. 25, 2014) (several limitation actions consolidated with interpleader action brought by DRD's insurers). After trial, the district court held DRD and the MEL OLIVER to be at fault for the collision with the TINTOMARA, and it imposed liability upon DRD and on the MEL OLIVER *in rem*. *Ibid.* See *Gabarick* v. *Laurin Maritime (Am.) Inc.*, 900 F. Supp. 2d 669 (E.D. La. 2012) (post-trial opinion), aff'd, 551 Fed. Appx. 228 (5th Cir. 2014), cert. denied, 134 S. Ct. 2824 (2014).

[5] Although petitioner contends in this Court that the spill responders furnished "phantom labor" and "untrained or illegal workers," Pet. i, petitioner's third-party complaints allege only that ES&H and USES failed to supply copies of specific immigra-

not been provided to the Fund, petitioner argued that the Fund likewise should not have paid the spill responders' claims. Petitioner sought to join ES&H and USES as defendants so that they could either indemnify petitioner (if petitioner were found liable to the Fund for the payments) or be held liable to the United States directly. *Ibid.*

The United States, ES&H, and USES moved to dismiss petitioner's third-party complaints. Pet. App. 6a. The district court granted the motions, holding that OPA displaces petitioner's maritime claims against the spill responders. *Id.* at 7a; see *id.* at 21a-24a. The court explained that OPA spoke directly to the third-party claims by providing the spill responders with a statutory right to obtain payment from the Fund, and by authorizing the United States to recover the Fund's payments from petitioner; those statutory remedies, the court concluded, displaced any general maritime law claims petitioner might otherwise have been able to assert against the spill responders. *Id.* at 22a. The court accordingly dismissed the third-party complaints and entered a final judgment under Rule 54(b) in favor of the spill responders. Judgment 1.

b. The court of appeals affirmed. Pet. App. 13a. It agreed with the district court that "OPA provides the exclusive source of law for an action involving a responsible party's liability for removal costs governed by OPA." *Id.* at 8a; see *id.* at 13a. In enacting OPA, the court reasoned, Congress created a "carefully

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tion documents and of Hazardous Waste Operations and Emergency Response certificates showing that the individuals who undertook cleanup activities had received certain training in handling hazardous waste. 2:11-cv-2076 Docket entry No. 11, at 5 (Aug. 22, 2011).

calibrated liability scheme" for oil spill cleanups. *Id.* at 8a. The detailed statutory procedures for recovering removal costs—which require claimants first to seek payment from the responsible party, but also grant them the right to file a claim with the Fund, based on the Fund's criteria for payment, if the responsible party has not paid within 90 days—provides an "exclusive remedy for a claimant to recover statutory removal costs from a responsible party." *Id.* at 10a.

The court of appeals held that OPA accordingly "forecloses a responsible party from bringing a third-party complaint against a spill responder that has chosen to submit claims to the Fund after 90 days without payment." Pet. App. 10a. The court emphasized, however, that OPA nonetheless affords the responsible party an opportunity to object to Fund payments: a responsible party can raise its objections as a defense against claims by the United States for reimbursement of removal costs disbursed by the Fund to spill responders. *Id.* at 12a. Here, the court explained, petitioner may seek to show in the United States' action against it "that the Fund's payments to ES&H and USES were unnecessary, unreasonable, or not in compliance with the relevant statutory criteria for Fund payments," and it may "pursue a reduction of its liability to the Fund for reimbursement." *Ibid.*

ARGUMENT

The court of appeals correctly concluded that the Oil Pollution Act's comprehensive remedial scheme displaces petitioner's claims under general maritime law. There is no conflict among the courts of appeals

on any issue raised by the petition, and further review is not warranted.[6]

1. Federal courts lack the general common-law "power to develop and apply their own rules of decision." *Milwaukee* v. *Illinois*, 451 U.S. 304, 312 (1981). Therefore, "[w]hen Congress addresses a question previously governed by a decision rested on federal common law, * * * the need for such an unusual exercise of law-making by federal courts disappears." *American Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2537 (2011) (internal quotation marks and citation omitted); see *ibid.* ("[I]t is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest."). Thus, if Congress has legislated in a manner that "speaks directly to the question at issue," that statutory regime displaces any right to recovery that may have existed at common law. *Ibid.* (brackets and citation omitted). The test for displacement is not stringent: "Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest congressional purpose' demanded for preemption of state law." *Ibid.* (quoting *Milwaukee*, 451 U.S. at 317) (brackets omitted).

Under these principles, as the court of appeals correctly recognized, Congress's enactment of OPA displaced any rights petitioner may have had under general maritime law to recoup payments made to spill responders. OPA sets forth a "carefully calibrated liability scheme with respect to specific remedies" for damages and costs associated with oil spill cleanup.

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[6] Petitioner has also filed another certiorari petition related to this one. See *American Commercial Lines, LLC* v. *United States*, No. 14-466 (Oct. 20, 2014).

Pet. App. 8a. Petitioner's third-party complaints sought a judgment against ES&H and USES recovering "sums received from the [Fund] that were improperly paid to them." Pet. 6. That is an issue to which OPA "speaks directly." *American Elec. Power*, 131 S. Ct. at 2537. OPA therefore displaces the nonstatutory, general maritime law causes of action petitioner seeks to assert—or to have the United States assert—against ES&H and USES.

Petitioner argues (Pet. 9-12) that OPA's saving clause, 33 U.S.C. 2751(e), authorizes its maritime claims against the spill responders by providing that "this Act does not affect – (1) admiralty and maritime law" or the jurisdiction of federal courts over admiralty and maritime law. Pet. 9. Yet petitioner omits a key phrase: "*Except as otherwise provided in this Act*, this Act does not affect * * * ." 33 U.S.C. 2751(e) (emphasis added). As the court of appeals recognized, "OPA did 'otherwise provide[]'" when it established "a procedure for submission, consideration, and payment of cleanup expenses by the Fund when the responsible party fails to settle such claims within 90 days—the situation presented here." Pet. App. 11a-12a (brackets in original).

Petitioner is also mistaken in contending that a conflict exists among the courts of appeals "as to the extent a statute like OPA displaces general maritime law claims." Pet. 7 (capitalization altered). The decision below appears to be the first by a court of appeals addressing whether OPA displaces a responsible party's recoupment claims against a spill responder. See Pet. 10-11 (noting the lack of decisions directly on point). In a related context, however, the First Circuit held that OPA displaced the availability of puni-

tive damages under general maritime law. *South Port Marine, LLC* v. *Gulf Oil Ltd. P'ship*, 234 F.3d 58, 65 (2000) ("Congress intended the enactment of the OPA to supplant the existing general admiralty and maritime law" regarding the availability of punitive damages). Because OPA represents a "comprehensive federal scheme for oil pollution liability," the court concluded that "Congress intended the OPA to be the sole federal law applicable in this area of maritime pollution." *Id.* at 64-65. *South Port Marine* is fully consistent with and supports the decision below.

Petitioner contends (Pet. 8-9) that the decision in this case conflicts with *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981), but that is incorrect. *Oswego Barge* held that a precursor to OPA, the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1321, displaced "non-FWPCA remedies against a discharging vessel for cleanup costs." *Oswego Barge*, 664 F.2d at 344. Petitioner points to dicta in *Oswego Barge* to the effect that "the federal judiciary has a more expansive role to play in the development of maritime law than in the development of non-maritime law." Pet. 8 (quoting 664 F.2d at 335-336). Yet the court of appeals nevertheless found that maritime law remedies for the costs of oil spill cleanup had been displaced legislatively, because the FWPCA "establishe[d] a comprehensive remedial scheme" for addressing those claims. *Oswego Barge*, 664 F.2d at 339-340. That reasoning applies with equal force to OPA.[7]

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[7] Petitioner also challenges various statements made by the district court. Pet. 11-13. But the petition seeks review of the judgment of the court of appeals, not the judgment of the district court. See 28 U.S.C. 1254(1) (authorizing Supreme Court review of "[c]ases in the courts of appeals").

2. As an alternative ground for certiorari, petitioner contends (Pet. 16-19)—although it does not include the issue as a question presented—that this Court should grant review to "confirm that [petitioner] properly invoked Federal Rule of Civil Procedure 14(c)(2)." Pet. 16 (capitalization altered). Petitioner argues that allegations in its third-party complaints against ES&H and USES, if true, would entitle the United States to file claims against the spill responders under either the False Claims Act or the Program Fraud Civil Remedies Act. Pet. 18-19. Therefore, petitioner concludes, "[t]he third-party complaint should not have been dismissed at least in so far as it sought a direct judgment in favor of the United States against ES&H and USES pursuant to Fed. R. Civ. P. 14(c)(2)." Pet. 19.

But that issue is not implicated here, because as petitioner admits, "[t]he District Court held that [petitioner] had properly invoked Rule 14(c)." Pet. 16 n.8. The court dismissed petitioner's claims against ES&H and USES because those claims had been displaced, not because petitioner had improperly invoked Rule 14(c)(2). It is also unclear why the potential availability of a fraud action *by the United States* would support petitioner's own claims against the spill responders. If petitioner has grounds to believe that the United States seeks reimbursement from it for claims paid by the Fund in contravention of OPA, those grounds "may [be] assert[ed as] defenses to limit its liability for reimbursement."[8] Pet. App. 9a.

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[8] Petitioner alleges in its complaint that the spill responders failed to produce immigration and hazard training certificates. But even if that allegation were true, it would not, by itself, prove that the Fund had been defrauded. The Fund does not require a

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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claim for removal costs to be supported by either type of document because it confirms immigration status and training by other means. See generally 8 C.F.R. 274a.2(b)(4) (limiting the use of the immigration forms petitioner sought from the spill responders); 33 C.F.R. 155.1040(j)(8) and (10)(iii) (providing for advance Coast Guard certification of qualified spill-response organizations).