No. 08-

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Constitution permits Congress to enact legislation dictating the retrospective remedy available to private parties in a single pending adjudication, while creating a different legal standard that will apply in all future proceedings of the same kind.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following were parties in the consolidated review proceedings before the court of appeals:

BP Exploration (Alaska) Inc.

BP America Production Company

BP Pipelines (Alaska) Inc.

ExxonMobil Pipeline Co.

Petro Star Inc.

Flint Hills Resources Alaska, LLC

Williams Alaska Petroleum Inc.

State of Alaska

Union Oil Company of California

Amerada Hess Pipeline Corp.

ConocoPhillips Alaska Inc.

ConocoPhillips Transportation Alaska Inc.

Koch Alaska Pipeline Co.

OXY USA Inc.

Tesoro Alaska Petroleum Co.

Unocal Pipeline Co.

RULE 29.6 STATEMENT

Petitioner Exxon Mobil Corporation has no parent company, nor is there any publicly held company owning 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Exxon Mobil Corporation ("ExxonMobil") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit is an unpublished but precedential decision (D.C. Cir. R. 32.1(b)(1)(B)) reported at 268 F. App'x 7 and reproduced in the Appendix to this Petition ("App.") at 1a-7a. Opinion 481 of the Federal Energy Regulatory Commission ("Commission") is published at 113 F.E.R.C. ¶ 61,062, and is reproduced at App. 89a-199a. Opinion 481-A of the Commission on rehearing is published at 114 F.E.R.C. ¶ 61,323, and is reproduced at App. 28a-88a. Opinion 481-B of the Commission on rehearing is published at 115 F.E.R.C. ¶ 61,287, and is reproduced at App. 8a-27a.

JURISDICTION

The court of appeals entered judgment on March 6, 2008. App. 1a. A petition for rehearing was denied on May 20, 2008. App. 200a-201a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGISLATIVE PROVISIONS INVOLVED

Relevant provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users ("SAFETEA-LU" or "Act"), Pub. L. No. 109-59, 119 Stat. 1144 (2005), are reproduced at App. 202a-203a.

INTRODUCTION

This case presents a separation-of-powers question of national significance: can Congress legislate the retrospective relief available in a single federal adjudication among private parties while creating a different prospective legal standard that applies to all other proceedings of the same kind? The court below answered "yes," thereby sanctioning congressional interference with pending adjudicative proceedings far beyond what this Court's precedents permit and what other lower courts have interpreted those predecents to allow.

Indeed, if the decision below is correct, then Congress may, without altering substantive law, undo monetary relief awarded to a *particular* private party in a *particular* proceeding simply because it does not like the result of that proceeding. That rule would invite the sort of shocking mischief evident in the legislation at issue here – a provision added to a sprawling appropriations bill at the last minute, at the behest of parties unhappy about the outcome of a particular litigated dispute among private entities, and without any recorded debate among the legislators. This Court's separation-of-powers case law has wisely avoided providing constitutional cover for case-specific legislation for which Congress pays no political price and which presents an opportunity for corruption on an unprecedented scale.

But the D.C. Circuit's decision calls into question the vitality of those precedents, especially *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). Despite this Court's more recent attempts to clarify its reach, *Klein* continues to bedevil lower courts and commentators alike. This case presents the Court with an opportunity both to reaffirm *Klein*'s core separation-of-powers principle and to dispel the

confusion that persists in the lower courts. The Court can do so, moreover, in a case where injustice is manifest. Certiorari should be granted.

STATEMENT OF THE CASE

The Trans Alaska Pipeline System ("TAPS") is a pipeline that transports crude oil from Alaska's North Slope to Valdez, Alaska. "Oil produced on the North Slope originates from several fields, each of which contains crude oil of differing characteristics" and thus varying qualities and values. App. 92a. The pipeline functions by combining all of the oil in a common stream that is transported to Valdez, with refiners (such as Williams Alaska Petroleum, Inc. and Petro Star, Inc., parties below)[1] removing certain petroleum products along the way. See generally *Exxon Co., USA* v. *FERC*, 182 F.3d 30, 34 (D.C. Cir. 1999); *OXY USA, Inc.* v. *FERC*, 64 F.3d 679, 685 (D.C. Cir. 1995). The end result is that each shipper receives at the Valdez terminus a quantity equal to the volume it injected at the north end, but the shipper "will not in all likelihood receive the same quality of oil at Valdez that it delivered to the pipeline." *Tesoro Alaska Petroleum Co.* v. *FERC*, 234 F.3d 1286, 1287 (D.C. Cir. 2000); *Exxon*, 182 F.3d at 34.

To address the disparities created, Respondent the Federal Energy Regulatory Commission ("FERC" or "Commission") in 1984 approved a settlement establishing a "Quality Bank" that "makes monetary adjustments [among] shippers in an attempt to place

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[1] On March 31, 2004, Williams sold its Alaska refinery to Koch Industries ("Koch"), but retained the liability for TAPS refunds prior to the date of sale. Flint Hills Resources Alaska, LLC is the Koch subsidiary currently operating that refinery.

each in the same economic position it would enjoy if it received the same petroleum at Valdez that it delivered to TAPS on the North Slope." *OXY*, 64 F.3d at 684. The Quality Bank requires that shippers that receive lower-quality oil at Valdez than they delivered to TAPS receive payments collected from (1) shippers who receive higher-quality oil at Valdez than they delivered, and (2) refiners who removed higher-quality cuts from the TAPS common stream.

Much of the protracted litigation over the last 20 years has focused on the valuation methods under the Quality Bank. As is relevant here, the Commission in 1993 approved a contested settlement that replaced its previous methodology with a "distillation" methodology. Under the latter, the crude oil stream is separated into its component "cuts" of petroleum products. Each cut – including "Resid," which is further refined to produce residual fuel oil – is then assigned a value based on the adopted formula. App. 93a-94a.

In the 1995 *OXY* decision, the D.C. Circuit upheld the distillation methodology. It also held, however, that the Commission's valuation of the Resid cut (among others) was arbitrary and capricious, and remanded for further proceedings. 64 F.3d at 693-96, 701. On remand, the Commission approved a settlement methodology proposed by nine parties but opposed by ExxonMobil and one other shipper, and applied it prospectively only. *Exxon*, 182 F.3d at 36-37.

On a second appeal, the D.C. Circuit sustained parts of the Commission's order, but also held that the Commission's "decision to apply the settlement prospectively was an abuse of discretion." *Id.* at 50. The court of appeals observed that "all of the TAPS shippers were on notice as of 1993 that the valuations

were contested," and "[t]he goals of equity and predictability are not undermined when the Commission warns all parties involved that a change in rates is only tentative and might be disallowed." *Id.* at 49 (internal quotation marks omitted). Here, "all of the parties participated in the proceedings before the agency," and thus "[a]ny reliance that they may have placed on the rates in light of these proceedings was unwarranted." *Id.* "[A]bsent detrimental and reasonable reliance," the D.C. Circuit stated, failure to apply the lawful valuations retroactively "allows some parties to keep some unlawful overcharges without any justification at all." *Id.* (internal quotation marks and alterations omitted).

Following the D.C. Circuit's decisions in *Exxon* and the separate *Tesoro* appeal, a hearing on a number of contested issues, including the proper valuation of the Resid cut, was held concurrently before Administrative Law Judges ("ALJ") of the Commission and the Regulatory Commission of Alaska (which has jurisdiction over intrastate TAPS transportation). App. 91a, 97a-99a. "The hearing took 108 days, with 19 witnesses, and 1474 exhibits introduced into evidence." *Id.* at 97a. On August 31, 2004, the FERC ALJ issued a comprehensive 949-page Initial Decision ("ID"), ruling in favor of ExxonMobil on many valuation issues. The ALJ, implementing the mandate of the court of appeals, ordered full refunds back to December 1, 1993 to correct the prior unlawful valuations. *Id.* at 193a-199a.

Although the ID did not purport to determine the amount of refunds (a task that would be performed by the Quality Bank Administrator after completion of the proceedings), ExxonMobil was entitled under the

ID to refunds in excess of $150 million. The Alaskan refiners, on the other hand, were found to have dramatically underpaid the Quality Bank for the oil they removed from the common stream. Williams and Petro Star had potential refund liability (for Resid alone) likely exceeding $100 million and $25 million, respectively, dating back to December 1, 1993.

A. Legislative Limitation Of Refunds

While the Commission's review of the ID was pending, Congress intervened. Language appeared in Committee reports of unrelated appropriations bills expressing concerns about any Quality Bank refunds for more than a 15-month period. H.R. Rep. No. 108-792, at 1640 (2004); S. Rep. No. 108-353, at 146 (2004). (Senator Stevens of Alaska at the time chaired the Senate Appropriations Committee, and Representative Young of Alaska was Chairman of the House Transportation and Infrastructure Committee). On April 14, 2005, Alaska Senators Murkowski and Stevens and Representative Young wrote to the Commission "to express our concern" about the ID's impact on Alaskan refiners and to urge the Commission to rule in their favor on the issue of refunds (an act of Congressional pressure on agency adjudication that itself potentially raised grave due process concerns[2]). D.C. Cir. Joint App. 1311-12 (R.1209). Shortly thereafter, the Senators and Representative Young introduced bills to abolish the Commission's power to order refunds that applied

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[2] As a matter of both separation of powers and due process, "[a]n administrative adjudication is invalid if based in whole or in part on congressional pressures." *ATX, Inc.* v. *USDOT*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) (alterations and internal quotation marks omitted).

just-and-reasonable valuations retroactively; those bills disclaimed any intent to interfere with ongoing agency adjudication, and instead applied prospectively to all TAPS Quality Bank adjustment orders issued after December 31, 2005. S. 822, 109th Cong. (2005), H.R. 2038, 109th Cong. (2005); see 151 Cong. Rec. S3736, S3751-53 (daily ed. Apr. 15, 2005); 151 Cong. Rec. E825, E826 (daily ed. Apr. 28, 2005).

The final legislation that emerged was far different. It was embedded as one provision (section 4412, App. 202a-203a) in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users ("SAFETEA-LU"), Pub. L. No. 109-59, 119 Stat. 1144 (2005), a massive $286 billion appropriations law. Section 4412 was tucked next to the provisions creating the infamous $452 million "bridges to nowhere" – "Don Young's Way," Pub. L. No. 109-59, § 4411, 119 Stat. at 1778, and the Bartholomew bridge that was to connect one Alaskan island with 50 residents to another remote Alaskan island, *id.* § 4410, 119 Stat. at 1778. See Michael Grunwald, *Pork By Any Other Name*, Wash. Post (Apr. 30, 2006), at B01. Congress held no hearings or floor debate on section 4412; it did not even appear in any bill until the conference report was issued on the evening of July 28, 2005. See Library of Congress, Thomas: Bills, Resolutions (last visited Aug. 13, 2008), http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00003:@@@X|TOM:/bss/d109query.html (detailing chronology and pre-conference bills).

The SAFETEA-LU was passed the next day. *Id.* The parent company of one of the refiners that benefitted from section 4412 bragged about the "hard-won federal legislation" relieving it of refund liability. ASRC, *Annual Report* 1 (2005), *available at* http://www.asrc.com/_pdf/_annualreportsASRC2005.pdf.

Section 4412 creates two rules relating to the Commission's power to order TAPS Quality Bank refunds. The first, subsection (b)(1), governs only this proceeding. It provides that "[i]n a proceeding commenced before the date of enactment of this Act, the Federal Energy Regulatory Commission may not order retroactive changes in TAPS quality bank adjustments for any period before February 1, 2000." Pub. L. No. 109-59, § 4412(b)(1), 119 Stat. at 1778, App 202a. There was *no* proceeding other than this one pending before FERC regarding the TAPS Quality Bank valuation methodology.

The second provision, subsection (b)(2), declares the law of general and prospective application for all other TAPS Quality Bank proceedings: "In a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding." *Id.* § 4412(b)(2), 119 Stat. at 1778-79, App. 202a-203a. Subsection (c) in turn requires shippers to file claims within two years after they arise, and requires the Commission to issue a final order "[n]ot later than 15 months after the date on which a claim is filed." *Id.* § 4412(c)(2), 119 Stat. at 1779, App. 203a. Thus, prospectively in every TAPS Quality Bank proceeding other than this one, subsections 4412(b)(2) and (c) together authorize the Commission to order retroactive Quality Bank adjustments back to the original claim, with no limitation on refunds if (as here) proceedings are extended by repeated judicial vacatur of the Commission's orders.

By enacting a February 1, 2000 cutoff date, section 4412(b)(1) deprives ExxonMobil of approximately $125 million in Resid refunds.[3] Senator Murkowski later defended this "Congressional intervention in regulatory/legal disputes" because in her view "the process appeared to be broken and was not capable of producing a fair and timely resolution of the conflict," blaming what she perceived as ExxonMobil's "hardening of settlement terms." App. 204a-205a (Letter from Sen. Lisa Murkowski to R.W. Tillerson (Aug. 22, 2005)).

B. Commission's Implementation Of Section 4412(b)(1)

Because section 4412(b)(1) forbade refunds for periods before February 1, 2000, in reviewing the ID the Commission addressed only whether refunds back to that date should be ordered. App. 183a. On that question, the Commission rejected the arguments against refunds of the "Eight Parties" who opposed ExxonMobil. The Commission stated that "no public interest is at stake," for "the issue is determining how a pool of money is to be divided among shippers, and does not involve the public at large." *Id.* at 185a. It found no merit in claims that refunds were inequitable, because the refiners were on notice in 1993 that the prior, provisional valuation methodology was subject to change. *Id.* at 186a-192a.

C. The Opinion Below

ExxonMobil filed a petition for review that, among other things, challenged section 4412(b)(1) as unconstitutional. The court of appeals dispensed

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[3] The legislation also deprives the State of Alaska of approximately $31 million in royalties and taxes that would have been paid on the refunds.

with ExxonMobil's separation-of-powers challenge in a single sentence, holding that "any claim that Congress's decision here unconstitutionally exercised judicial power is foreclosed by [its] decision in *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001)." App. 4a. The court likewise rebuffed Exxon's challenge under the Fifth Amendment, holding that section 4412(b)(1) had a rational basis because "Congress could easily have concluded that limiting the retroactivity of refunds would help provide certainty to parties affected by FERC's decision." *Id.*

REASONS FOR GRANTING THE PETITION

The decision of the D.C. Circuit in this case grants Congress a blanket license to dictate the retrospective monetary relief available to private parties in a single case without having to apply that same rule prospectively. This is not only a blatant exercise of a core judicial function, but also one that encourages aggrieved litigants to run to their local members of Congress in the hope of undoing unfavorable judicial rulings. The potential for corruption in such an enterprise is both real and unacceptable. Because the enactment affects only the particular private litigants to the specific controversy being litigated, the normal legislative check on adopting a rule of general applicability is eliminated. This is not separation of powers; it is arrogation of power, and it is unconstitutional. The rule below – which broadly applies to adjudications not only in administrative agencies but also in federal courts – conflicts with the precedents of this Court and is contrary to the teachings of numerous courts of appeals. This Court's review is imperative.

I. THE DECISION BELOW CONFLICTS WITH PRECEDENTS OF THIS COURT.

A. The Separation Of Powers Forbids Congress From Dictating The Results Of A Single Pending Adjudication Without Changing The Generally Applicable Law.

As James Madison foresaw, intrusions of Congress upon the powers of other branches require the greatest vigilance: "Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments," thus extending its power "beyond the legislative sphere." The Federalist No. 48, at 332-34 (James Madison) (J. Cooke ed., 1961). "To forestall the danger of [this] encroachment," *Metro. Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (citing Federalist 48), this Court has repeatedly held that Congress may not "'invest itself or its Members with either executive power or judicial power,'" *id.* (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)). "'It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.'" *United States* v. *Brown*, 381 U.S. 437, 446 (1965) (quoting *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 136 (1810)).

In this Court's landmark decision in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), the Court held that Congress is forbidden from exercising the judicial power not only directly, but also indirectly by passing laws that dictate the results in pending

cases. In *Klein*, the administrator of the estate of a Confederate sympathizer sought to recover the proceeds of cotton abandoned to federal treasury agents. The decedent had taken an oath of allegiance to the United States and received a presidential pardon. This Court's precedent held that such an oath satisfied the loyalty requirement of the reimbursement statute. In 1870, while Klein's case was pending, Congress passed legislation providing that a presidential pardon that recited a recipient's participation in rebellion conclusively proved disloyalty, and directing the dismissal of any pending reimbursement action for lack of jurisdiction. *Id.* at 132-34.

The *Klein* Court declared the statute unconstitutional because it sought to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. It made no difference that the legislation targeted a case arising from the Court of Claims, an Article I tribunal. See *Ex Parte Bakelite Corp.*, 279 U.S. 438, 454 (1929). Congress simply lacked "constitutional authority *to control the exercise of [this Court's] judicial power* and that of the court below by requiring this Court to set aside the judgment of the Court of Claims by dismissing the suit." *Pope* v. *United States*, 323 U.S. 1, 8 (1944) (emphasis added) (explaining *Klein*).

This Court has subsequently clarified that the prohibition of *Klein* "does not take hold when Congress 'amends applicable law.'" *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (alteration omitted) (quoting *Robertson* v. *Seattle Audobon Soc'y*, 503 U.S. 429, 441 (1992)). The key distinction for separation-of-powers purposes is that

Congress may "compel[] changes in law, not findings or results under old law." *Robertson*, 503 U.S. at 438.

In *Robertson*, public interest groups in two separate suits had secured injunctions under various environmental statutes against timber harvesting in forests inhabited by the spotted owl. *Id.* at 432-33. Congress then passed the Northwest Timber Compromise ("NTC"), which provided that "'management of areas according to" its terms met "the statutory requirements that are the basis for'" the two injunctions. *Id.* at 437. This Court found no violation of the *Klein* rule because the NTC had "modified the old provisions" of existing law governing forward-looking relief. *Id.* at 438. *Robertson* thus confirms that Congress may intervene to change the results in pending cases, but only by "'prescrib[ing] general rules for the government of society'" rather than dictating the outcome of a single pending case. See *Brown*, 381 U.S. at 446.

The reason for this rule is simple. When Congress legislates for the generality of cases, it can be expected to act cautiously to ensure that the general public interest is being properly balanced and protected. When Congress adopts a rule for a single pending adjudication involving particular private parties and a very different rule for future disputes, in contrast, the inherent check on abuse is eliminated. *Klein* and its progeny eliminate that risk by depriving Congress of that power.

B. Section 4412(b)(1), By Prescribing A Remedy Rule For This Single Case Different From The Rule Applicable To All Other TAPS Quality Bank Refund Proceedings, Violates The Separation Of Powers.

Section 4412(b)(1) does not amend applicable law; instead, it impermissibly directs results in a single pending adjudication under old law – *i.e.*, it limits the refunds that the Commission could award the private parties to this particular case only. Section 4412(b)(1) is thus a straightforward violation of the rule of *Klein*. This is not a circumstance where Congress amended the law governing the Commission's refund power and the tribunal simply applied the new law to a matter pending before it. Here, Congress *did* amend the generally applicable law governing refunds in section 4412(b)(2), but did not make that new law applicable to this case.

Were it applied to this case, the rule of section 4412(b)(2) would allow full refunds to ExxonMobil back to 1993. Section 4412(b)(2) provides that the Commission may order refunds to shippers for any period from the final lawful just-and-reasonable order to a date 15 months before the Commission's first adjustment order. Here, the Commission's first order adjusting valuations was issued on November 30, 1993. So, under the section 4412(b)(2) rule, refunds could have been ordered back to September 1992 (if otherwise permitted by law). Section 4412(b)(2) imposes no cap based on the number of years between the final and the first adjustment order, nor does it limit the refunds where proceedings have been protracted by repeated judicial reversal of the Commission. Congress dictated that result for this

case alone, by operation of the special rule of section 4412(b)(1).

Rather than confronting the difficult separation-of-powers issues this extraordinary legislation presents, the D.C. Circuit stated that its prior precedent in *National Coalition* required that the legislation be upheld. App. 4a. The reasoning of the court of appeals is unsound. In *National Coalition*, after interest groups had filed a lawsuit challenging federal agencies' plans for constructing a World War II Memorial on the National Mall, Congress passed a law altering the legal requirements for the Memorial and barring judicial review. 269 F.3d at 1093-94. Even though the legislation affected only the Memorial, the D.C. Circuit reasoned that Congress had the "power to address a specific problem," and accordingly "s[aw] no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit." *Id.* at 1097.

The problem with the panel's reliance on *National Coalition* is that that decision is perfectly reconcilable with the rule of *Klein*, but does not remotely support the constitutionality of section 4412(b)(1) of SAFETEA-LU. First, the issue in *National Coalition* was prospective in nature; it was to determine whether the agency could lawfully go forward to build the World War II Memorial on the terms that the agency proposed. Congress had unquestionable power to regulate the Memorial's construction even after the agency had acted, and a private party's filing of a lawsuit could not deprive Congress of that power. That conclusion follows from this Court's decision in *Miller* v. *French*, 530 U.S. 327, 347 (2000), which held that legislation that overturns a judicial decree of prospective relief does not offend the separation of powers.

Second, Congress may always legislate regarding "a *legitimate* class of one" where such a class exists, *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S 425, 472 (1977) (emphasis added), and the Memorial was a "unique public amenity." *Nat'l Coal.*, 269 F.3d at 1097. A law is generally applicable even if it affects a class of one or a few, and Congress was not disabled from addressing the issues relating to the Memorial simply because it was unique.

Here, there is no legitimate class of one; the class is TAPS Quality Bank adjustment proceedings. Congress has the power to legislate regarding the Commission's refund power in all such proceedings and to apply that law retroactively as well as prospectively. If Congress had simply capped or extinguished the Commission's refund power for all TAPS Quality Bank proceedings generally, and made that rule applicable to this case, ExxonMobil would have no separation-of-powers claim. But a law that does not legislate for the relevant class of cases, and simply dictates the remedy in a single case in the class and does not apply that rule in the future, is precisely the kind of congressional exercise of judicial power that violates *Klein*. Cf. *Hurtado* v. *California*, 110 U.S. 516, 535 (1884) ("Law . . . . must be not a special rule for a particular person or a particular case . . . .").

The court below disregarded these distinctions, and thus announced a rule of unprecedented sweep that applies not only to agency adjudications, but also to any adjudication in court (since *National Coalition* itself addressed separation of powers vis-à-vis Article III courts). Under the decision below, Congress has unbridled power to intervene in any single case to dictate the retrospective monetary relief to be paid by one private party to another.

Nor can section 4412(b)(1) be defended as having a rational basis. "Robbing Peter to pay Paul" has never been a rational "policy meriting judicial favor," *Mickel-Hopkins, Inc.* v. *Frassinetti*, 278 F.2d 301, 306 (4th Cir. 1960), and the justification for the legislation conjured up by the D.C. Circuit – "that limiting the retroactivity of refunds would help provide certainty to parties affected by FERC's decision," App. 4a – simply ignores reality. Only section 4412(b)(2) could affect prospective decisions of the refiners and shippers because only that provision applies to transactions after the Act's effective date. And in any event, the primary beneficiary of section 4412(b)(1) no longer even operates in Alaska and thus could not benefit from any "certainty" the legislation provided. See *supra* at 3 & n.1. There was accordingly no basis, let alone a rational one, for legislation that served principally to transfer money from one private party to another. Cf. *Kelo* v. *City of New London*, 545 U.S. 469, 477 (2005) ("[T]he sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*."); *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (not "a rightful exercise of legislative authority" to pass "a law that takes property from A. and gives it to B").

At bottom, Congress here deprived ExxonMobil of retrospective compensation for the Quality Bank's underpayments to ExxonMobil for its Alaska crude streams dating back to 1993. If Congress has the power to do that, a defendant can use its influence (legitimate or otherwise) in Congress to secure legislation that would limit the amount of economic or noneconomic damages that a court could award to a specific, badly injured plaintiff in a single pending case, without amending the laws governing damages

generally. Or a politically powerful employer could obtain legislation to limit back pay to victimized employees (or a class of employees) in a single unfair labor practice proceeding before the National Labor Relations Board, or in a single pending Title VII employment discrimination case in federal court, without amending the law governing back pay generally.

The decision below eviscerates *Klein*; if it is allowed to stand, there is no limit on congressional power to have any individual judicial case among private parties decided as Congress wishes. It is a fundamental principle that every party in an adjudication stands before the court or agency as equal, and the Constitution leaves no room for the politicization of inherently judicial disputes over the monetary compensation one private party owes to another. It corrupts the adjudicatory process if any dissatisfied litigant can instead have the issue of retrospective liability or monetary relief decided politically by Congress. Justice Powell's words ring true here:

> Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority."

INS v. *Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring) (footnote omitted). Contrary to the

statement of one Alaska senator, App. 204a, there was nothing "broken" about the process of Commission adjudication and judicial review by Article III courts. Congress – more specifically, the Alaska congressional delegation – just disliked the results. But that does not give Congress the power to limit the retrospective remedy that a court or agency may award to private parties in a single pending case under existing law.

II. THE D.C. CIRCUIT'S READING OF *KLEIN* CONFLICTS WITH THAT OF OTHER COURTS AND PRESENTS A RECURRING ISSUE OF NATIONAL IMPORTANCE.

In extending *National Coalition* to legislation that affects the availability of retrospective relief only in a single pending case, the decision below confirms the D.C. Circuit's departure not only from this Court's separation-of-powers precedents, but also from the sound reading of *Klein* adopted by other circuits. As explained above, the D.C. Circuit here refused to read *Klein* as prohibiting Congress from "changing the rule of decision in a pending case," and rebuffed the argument that the statute in *National Coalition* was unconstitutional because it targeted only the construction of a single monument and one pending lawsuit. 269 F.3d at 1096-97.

This narrow interpretation conflicts with the manner in which other lower courts have correctly construed *Klein*. The Seventh Circuit's decision in *Lindh* v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997), is illustrative. Writing for the en banc court in *Lindh*, Judge Easterbrook summarized the *Klein* line of cases as recognizing Congress's power to "make rules that affect classes of cases." *Id.* at 872. But Congress cannot, he continued, "tell courts how to decide a

particular case." *Id.* Thus, while it may "prescribe maximum damages for categories of cases, or provide that victims of torts by federal employees cannot receive punitive damages," Congress "cannot say that a court must award Jones $35,000 for being run over by a postal truck." *Id.* (citations omitted).

The *Lindh* court's reading of *Klein* has been echoed by other circuits, creating a breach between the D.C. Circuit and various regional courts of appeals on a critical – and recurring – constitutional question. See *Crater* v. *Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007) (under *Klein* "Congress may not predetermine the results in any given case"), *cert. denied*, 128 S. Ct. 2961 (2008); *Green* v. *French*, 143 F.3d 865, 874 (4th Cir. 1998) (Luttig, J.) (statute was constitutional under *Klein* and its progeny in part because Congress had not "mandated a particular result in any pending case"), *abrogated on other grounds by Williams* v. *Taylor*, 529 U.S. 362 (2000); see also *Shawnee Tribe* v. *United States*, 423 F.3d 1204, 1217-18 (10th Cir. 2005) (recognizing that "Congress cannot dictate findings or command specific results in pending cases," and upholding statute that "itself purports neither to compel a particular decision in the case before [the court] nor to decide how the law applies to our specific facts").

That the lower courts have divided over *Klein*'s ultimate import is not, however, surprising. *Klein* is "a notoriously difficult decision to interpret," *Biodiversity Assocs.* v. *Cables*, 357 F.3d 1152, 1170 (10th Cir. 2004) (McConnell, J.), and has been recognized as "a puzzling case," William D. Araiza, *The Trouble With* Robertson*: Equal Protection, The Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 Cath. U. L. Rev. 1055, 1074 (1999). See generally Richard H.

Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 99-100 & nn.4-5 (5th ed. 2003) (chronicling varying interpretations of *Klein* and scholarly treatment of the case). This Court's more recent decisions construing *Klein* have fueled rather than quelled the interpretive fire. Indeed, while appearing in one breath to cabin *Klein*'s reach in *Plaut*, the Court just two months later cited with approval *Klein*'s rule-of-decision principle in holding that Congress lacked the authority to "instruct[] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate." *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 430 (1995).

Lower court judges have understandably viewed the language in *Lamagno* as a signal that *Klein*'s core principle remains intact and has not been, as the D.C. Circuit effectively held here, gutted by subsequent decisions. See, *e.g.*, *Crater* v. *Galaza*, 508 F.3d 1261, 1264 (9th Cir. 2007) (opinion of five judges dissenting from denial of rehearing en banc), *cert. denied*, 128 S. Ct. 2961 (2008).

Nor are the questions about *Klein* going away on their own. To the contrary, *Klein*-based challenges have remained abundant in recent years. *Klein* has been at the center of various circuit decisions on the constitutionality of a provision in the Antiterrorism and Effective Death Penalty Act of 1996 that limits the circumstances under which federal courts may grant habeas corpus relief to prisoners in state custody. See, *e.g.*, *Evans* v. *Thompson*, 518 F.3d 1, 9 (1st Cir. 2008), *petition for cert. filed*, No. 08-5370 (U.S. July 14, 2008); *Crater*, 491 F.3d at 1128; *Lindh*, 96 F.3d at 872. It also played a key role in the litigation involving Congress's widely publicized effort to provide a federal forum for the parents of

Terri Schiavo to seek relief from adverse state-court rulings. Compare *Schiavo ex rel. Schindler* v. *Schiavo*, 404 F.3d 1270, 1274 (11th Cir. 2005) (en banc) (Birch, J., specially concurring) (legislation unconstitutional under *Klein*), with *id.* at 1281-82 (Tjoflat, J., dissenting from denial of rehearing en banc) (finding no constitutional infirmity). And *Klein* has recently been invoked in challenges to the Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005), a federal statute requiring the dismissal of certain high-profile lawsuits against firearms manufacturers. See *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 395 (2d Cir. 2008); *Dist. of Columbia* v. *Beretta U.S.A. Corp.*, 940 A.2d 163, 172-73 (D.C. 2008). These cases have presented serious, hotly contested issues and have often produced impassioned dissents. See *Evans* v. *Thompson*, 524 F.3d 1, 2 (1st Cir. 2008) (Lipez, J., joined by Torruella, J., dissenting from denial of rehearing en banc), *petition for cert. filed*, No. 08-5370 (U.S. July 14, 2008); *Crater*, 508 F.3d at 1261 (Reinhardt, J., joined by Pregerson, Gould, Paez, and Berzon, JJ., dissenting from denial of rehearing en banc); *Davis* v. *Straub*, 445 F.3d 908, 911 (6th Cir. 2006) (Martin, J., joined by Daughtrey, Moore, Cole, and Clay, JJ., dissenting from denial of rehearing en banc), *cert. denied*, 127 S. Ct. 929 (2008).

In short, the D.C. Circuit's reading of *Klein* is in sharp tension, if not outright conflict, with that of other circuits. What is more, the meaning of *Klein* has been and remains a matter of raging dispute. If *Klein* is no longer good law, then this Court should preside over its burial. If its rule has any vitality, then section 4412(b)(1) of SAFETEA-LU violates the separation-of-powers principles deeply embedded in

the Constitution. In either case, the D.C. Circuit's resolution of this recurring constitutional issue of national importance warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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