No. 17-99

IN THE

Supreme Court of the United States

BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY — EAST; *et al.*,

Petitioners,

v.

TENNESSEE GAS PIPELINE COMPANY, L.L.C., *et al.*,

Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TENNESSEE GAS PIPELINE COMPANY, L.L.C., et al.
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF LAW PROFESSORS FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* SUPPORTING PETITIONERS

Amici curiae, a group of law professors, respectfully move for leave to file the attached brief in support of the Petition for a Writ of Certiorari. *Amici* timely notified counsel for Petitioners and Respondents of their intent to file a brief in support of Petitioners and requested counsel's consent to the filing of the brief. Petitioners' counsel and counsel for

a number of the Respondents consented to *Amici* filing their brief. None of the Respondents' counsel advised *Amici* that they opposed the request. Nevertheless, *Amici* did not receive written consent to their request from the remaining Respondents and, therefore, file this Motion out of an abundance of caution.

Amici are law professors who teach and research, *inter alia*, in the areas of environmental law, natural resources law, coastal protection, administrative law, and property law. This case concerns whether federal courts have "arising under" jurisdiction over cases that present questions of state law affecting claims by states and their political subdivisions for damages caused to their natural resources and, in particular, here, the coastal wetlands of the State of Louisiana. In this case, those state-law questions have been left largely undecided by the state courts of Louisiana, a state that has expressed a great interest in its natural resources through its state constitution, statutes, and jurisprudence, including opinions of its highest court. Although the federal courts accepted removal jurisdiction on the ground that the claims presented federal issues, they actually considered and expounded upon important – but unresolved – questions of state law raised by Petitioners' claims. As Petitioners contend in their petition, the case presents inherently state, not federal, issues.

Amici have a great interest in the important jurisdictional issues presented by this case and, accordingly, respectfully request leave to file a brief in support of Petitioners.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the "substantial[ity]" and "federal-state balance" requirements of *Grable* are satisfied whenever a federal law standard is referenced to inform the standard of care in a state-law cause of action, so long as the parties dispute whether federal law embodies the asserted standard.

2. Whether a federal court applying *Grable* to a case removed from state court must accept a colorable, purely state-law claim as sufficient to establish that the case does not "necessarily raise" a federal issue, even if the court believes the state court would ultimately reject the purely state-law basis for the claim on its merits.

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MISCELLANEOUS

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici respectfully file this brief *amici curiae* in support of Petitioners and ask this Court to grant the Petition for a Writ of Certiorari.[1]

[1] *Amici* timely notified each party that they intended to file this brief in accordance with Rule 37(2)(a) of this Court. Petitioners and a number of Respondents have consented, in writing, to the filing of this brief. None of the remaining Respondents have

NATURE OF THE *AMICI*'S INTEREST

Amici are twenty-seven professors at law schools throughout the country and abroad, who teach and research in the areas of environmental law, natural resources law, coastal protection, administrative law, and property law, among others. *Amici* have also written books and articles in those fields of law. *Amici* have a strong interest not only in the underlying issues in this case concerning liability for damage to the coastal wetlands of Louisiana but also in the legal protection of sensitive shorelines and wetlands in general. *Amici* also have a strong interest in the jurisdictional questions presented by this case, namely, whether federal courts have "arising under" jurisdiction over purely state-law claims for environmental damage solely because they reference federal-law standards of care. A list of *Amici* is included in Appendix 1 to this brief.

SUMMARY OF ARGUMENT

Louisiana is home to a quarter of all of the coastal wetlands in the United States. Louisiana's wetlands provide the citizens of Louisiana with an array of services, ranging from recreational (boating, fishing, and bird watching) to commercial (fishing, shipping, and oil and gas). Importantly, coastal wetlands also provide Louisianans a buffer against hurricanes and other storms. Louisiana's wetlands are vital to the

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objected to *Amici* filing this brief, but they have not provided written consent to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part. Likewise, no person or entity, other than *Amici* or their counsel, made a monetary contribution to the preparation or submission of this brief.

state, but they are disappearing at an alarming rate due, in large part, to the types of oil-and-gas activities in which Respondents have historically engaged.

The underlying lawsuit seeks to hold Respondents responsible for the consequences of their commercial activities under Louisiana law. In accepting "arising under" jurisdiction over the flood protection authority's claims, the lower federal courts concluded that the claims necessarily raised substantial and disputed federal issues. The lower courts' reasoning and ultimate dismissal of those claims reveal, however, that the federal courts confronted unsettled questions of state law concerning whether Louisiana's public and private law, independent of any federal duty, imposed liability on Respondents for the damage their activities have caused to the state's wetlands.

The lower courts accepted federal jurisdiction based upon an overly broad application of this Court's holding in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312 (2005). In doing so, the lower federal courts usurped the role of the state courts in deciding and developing Louisiana law to address significant environmental questions. The Fifth Circuit's holding places coastal protection under federal jurisdiction and, thereby, prevents Louisiana and other states from relying upon their own laws to protect their important natural resources. The Court should grant certiorari to review and reverse the lower courts' holdings because they upset the balance of state and federal judicial responsibilities this Court sought to protect in *Grable*.

ARGUMENT

I. LOUISIANA'S COASTAL WETLANDS ARE OF VITAL IMPORTANCE TO THE STATE AND ITS CITIZENS.

The Board of Directors of the Southeast Louisiana Flood Protection Authority—East (the "Authority"), a political subdivision of the State of Louisiana (sometimes the "State"), has been tasked with maintaining a comprehensive levee system that protects millions of people living in southeast Louisiana and their property against floods and hurricanes. *See* LA. REV. STAT. § 38:330.2(G). The Authority's suit alleges that Respondents, oil, gas, and pipeline companies, have severely damaged Louisiana's coastal wetlands by dredging and, thereafter, failing to maintain access and pipeline canals that crisscross Louisiana's coast, permitting saltwater intrusion to erode its wetlands. Respondents' oil and gas activities have taken a great toll on Louisiana's coastal lands by altering wetland hydrology and causing land loss.[2] Indeed, the fact that Respondents' activities have contributed significantly to the land loss suffered by Louisiana's coast seems, at this time, to be beyond dispute. Nevertheless, the Authority's claims against Respondents implicate questions about what coastal wetlands are and why they are so important to the State and its citizens.

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[2] *See generally* Louisiana's Comprehensive Master Plan for a Sustainable Coast (Coastal Prot. & Restoration Auth. of La., June 2, 2017) (hereinafter "Master Plan"), *available at* http://coastal.la.gov/our-plan/2017-coastal-master-plan/; Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3 (1983).

A. What are Coastal Wetlands?

Generally speaking, wetlands constitute "areas where water covers the soil, or is present either at or near the surface of the soil" year round or for periods of time throughout the year. What is a Wetland?, Wetlands Protection and Restoration, U.S. EPA, https://www.epa.gov/wetlands/what-wetland (last visited Aug. 9, 2017). Wetlands in the United States take many forms due to regional and local differences in, for example, soil, topography, climate, hydrology, and water chemistry. Coastal wetlands include "salt marshes, bottomland hardwood swamps, fresh marshes, mangrove swamps, and shrubby depressions . . . , many of which are present in Louisiana." Coastal Wetlands, Wetlands Protection and Restoration, U.S. EPA, http://www.epa.gov/wetlands/coastal-wetlands (last visited Aug. 9, 2017). "Louisiana's coastal plain hosts an extraordinary diversity of coastal habitats, ranging from natural levees and beach ridges to large swaths of forested swamps, to freshwater, intermediate, brackish, and saline marshes." ROBERT R.M. VERCHICK, FACING CATASTROPHE: ENVIRONMENTAL ACTION FOR A POST-KATRINA WORLD 18 (Harvard Univ. Press 2010) (hereinafter "VERCHICK, FACING CATASTROPHE").

The U.S. Environmental Protection Agency has estimated that "[c]oastal wetlands cover about 40 million acres and make up 38 percent of the total wetland acreage in the conterminous United States. 81 percent of coastal wetlands in the conterminous United States are located in the southeast." Coastal Wetlands, Wetlands Protection and Restoration, U.S. EPA, available at www.epa.gov/wetlands/coastal-

wetlands (last visited Aug. 9, 2017). Louisiana is the home to a quarter of all of these coastal wetlands.[3] VERCHICK, FACING CATASTROPHE at 17 & n.15; *see also* Master Plan at 24 (stating that Louisiana's wetlands "account for about half the coastal marsh in the United States"). Louisiana's Coastal Restoration and Protection Authority ("CRPA") has observed, however, that this "complex and fragile ecosystem is disappearing at an alarming rate. Between 1932 and 2010, Louisiana's coast lost more than 1,800 square miles of land." Master Plan at ES-2; *see also* J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 76 (2012) (hereinafter "Byrne, *Cathedral Engulfed*"). The loss of Louisiana's coastal wetlands presents significant issues for the State of Louisiana and its citizens as well as for the nation as a whole.

B. Why Are Louisiana's Coastal Wetlands So Important to the State and Its Citizens?

To understand fully why Louisiana's coastal wetlands are so important to the State and its citizens, it is first necessary to recognize that, in the United States, natural resources are considered to provide "services," that is, benefits or uses. *See Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191, 1220 (D.C. Cir. 1996); *see also* Robert Force, Martin Davies, & Joshua S. Force, *Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil*

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[3] Legal scholars have noted that the coastal wetlands in Louisiana are so vast that if the Florida Everglades were dropped into the Louisiana swamps, they would never be found. VERCHICK, FACING CATASTROPHE at 17-18.

Penalties, and State Remedies in Oil Spill Cases, 85 TUL. L. REV. 889, 912-13 & n.112 (2011). Louisiana's wetlands provide the State and its citizens with an array of services and value, including economic value. Approximately two million people live in coastal Louisiana. Master Plan at 24. The State's coastal wetlands have shaped the way people live in south Louisiana and have helped create and sustain a culture that is important not only to "locals" who live there but also to the many tourists from around the world who visit each year to experience the Cajun and southern Louisiana lifestyles.

Louisiana's wetlands and estuaries support habitats for many species of fish, birds, and other wildlife in addition to people. Countless species of fish as well as shrimp, oysters, crawfish, and alligators live in these waters. The wetlands also provide a habitat for waterfowl and other birds. Master Plan at 24. Abundant plant life and other biota grow in Louisiana's marshes as well.

This wildlife provides aesthetic, recreational, and commercial benefits, i.e., services, to Louisiana. Louisianans experience and enjoy the swamps through "consumptive uses," such as fishing and hunting. Louisiana's natural resources also provide "non-consumptive uses," such as bird watching and boating. *See* Master Plan at 24; VERCHICK, FACING CATASTROPHE at 12-15.

In addition to providing recreational benefits, Louisiana's coastal wetlands also provide commercial and economic services to the State and its citizens. Louisiana's businesses and citizens benefit from the income and jobs that these services generate. Louisiana's commercial fishing industry produces more shrimp, oyster, blue crabs, crawfish, and

alligators than any other state in the country. Louisiana seafood accounts for 25 percent of all of the seafood in the United States. Master Plan at ES-13, 24; VERCHICK, FACING CATASTROPHE at 17. Coastal lands and waters support and protect five of the top twelve ports (by cargo volume) in the United States. *See* Master Plan at ES-2, ES-13, 26; VERCHICK, FACING CATASTROPHE at 18. "The working coast annually sends more than $120 billion in goods to the rest of the United States and exports $36.2 billion internationally. The coast also supports infrastructure that supplies 23% of the nation's waterborne commerce and 29% (by weight) of the continental U.S. commercial fisheries landings." Master Plan at 27 (footnotes omitted). Various aspects of the oil and gas industry are included among the commercial interests that receive support and protection from Louisiana's coastal wetlands. Thus even the very industry at issue in this suit depends upon the natural resources that its activities have imperiled.

Maybe most importantly, Louisiana's coastal wetlands provide a buffer against hurricanes and other storms. Louisiana's coastal wetlands protect the State against storms and flooding by acting as a giant sponge, "absorbing billions of gallons of rainfall and shielding people and property from storms." VERCHICK, FACING CATASTROPHE at 18; *see also* Master Plan at ES-13, 24. Experts consider the wetlands to be a kind of "horizontal levee" that forms a vital link in the "multiple lines of defense strategy" used in Louisiana and accepted by the U.S. Army Corps of Engineers. Multiple Lines of Defense Strategy, *available at* http://mlods.org (last visited Aug. 15, 2017). The marshes similarly act to purify water by filtering out various pollutants from

incoming water bodies. VERCHICK, FACING CATASTROPHE at 19.

These various services are not merely conceptual or theoretical; they provide real economic value to the State and are used as a way of valuing its natural resources when, for example, natural resources are lost or at risk as is the case with Louisiana's wetlands. In 2010, independent researchers reported that the Mississippi River Delta provided at least $12 billion to $47 billion in benefits to people annually. Master Plan at ES-10. Recreational fishing in Louisiana generates over $3.1 billion annually and supports 34,000 local jobs. *Id.* at 24. The commercial seafood industry creates $2.4 billion in economic benefits and more than 26,300 local jobs each year. *Id.* Louisiana's coastal resources help to produce, in addition, many billions of dollars and thousands of jobs related to the transportation and production of oil, gas, and petrochemicals in the State. *See id.* at 26.

Accordingly,

> a 2015 report prepared by Louisiana State University and The RAND Corporation estimated that direct and indirect impacts of land loss in coastal Louisiana put between $5.8 billion and $7.4 billion in annual output at risk. Similarly, they estimated that increased storm damage could have a total impact on the nation of between $8.7 billion and $51.5 billion, and increased disruption to economic activity leading to $5 billion to $51 billion in total lost output, including indirect and induced effects.

Id. at 27. Given these stakes, many have now come to realize that restoring Louisiana's coastal wetlands and preventing future loss are essential to protecting

the region and ensuring its future. *See* Mark S. Davis, *Coastal Restoration and Protection and the Future of New Orleans*, *in* THE NEW ORLEANS INDEX AT FIVE 176-77, 178 (Brookings 2010); Byrne, *Cathedral Engulfed*, 73 LA. L. REV. at 76.

II. THE LOUISIANA CONSTITUTION REQUIRES THE STATE TO PROTECT THE STATE'S NATURAL RESOURCES, INCLUDING ITS COASTLINE, ON BEHALF OF ITS CITIZENS.

These statistics are not mere numbers; they are reflected in the legal landscape that created the Authority and compels it to act. The Louisiana Constitution declares it to be the express public policy of the State that: "The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy." LA. CONST. art. IX, § 1. In interpreting and enforcing this constitutional policy, the Louisiana Supreme Court has held that "the Natural Resources article of the 1974 Louisiana Constitution imposes a duty of environmental protection on all state agencies and officials, establishes a standard of environmental protection and mandates the legislature to enact laws to implement this policy fully." *Save Ourselves, Inc. v. Louisiana Envt'l Control Comm'n*, 452 So.2d 1152, 1156 (La. 1984).

In accordance with this constitutional mandate, the Louisiana Legislature has declared that the

"maintenance of a healthful and safe environment in Louisiana requires governmental regulations and control over the areas of water quality, air quality, solid and hazardous waste, scenic rivers and streams, and radiation." Louisiana Environmental Quality Act, LA. REV. STAT. § 30:2003(A); *see also Save Ourselves*, 452 So.2d at 1154. Consequently, Louisiana law recognizes a "public trust for the protection, conservation and replenishment of all natural resources of the state . . . ." *Save Ourselves*, 452 So.2d at 1154 (citing Louisiana Constitutions of 1921 and 1974).

Louisiana law defines the natural resources of the State to include "all land, fish, shellfish, fowl, wildlife, biota, vegetation, air, water, groundwater supplies, and other similar resources owned, managed, held in trust, regulated, or otherwise controlled by the state." LA. REV. STAT. § 30:2454(17). The State owns such public things, including "running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore," LA. CIV. CODE art. 450. The State holds these natural resources in trust for the people of the State of Louisiana so "that they may enjoy and use [the resources] free from obstruction or interference." *Save Ourselves*, 452 So.2 at 1154 (citing *Illinois Cent. R. Co. v. Illinois*, 145 U.S. 387 (1892)).

The Louisiana Supreme Court has found, in particular, that the protection of Louisiana's disappearing coastal lands falls precisely within the State's public trust responsibility:

> The public resource at issue is our very coastline, the loss of which is occurring at an alarming rate. The risks involved are not just environmental, but involve the health,

> safety, and welfare of our people, as coastal erosion removes an important barrier between large populations and ever-threatening hurricanes and storms. Left unchecked, it will result in the loss of the very land on which Louisianans reside and work, not to mention the loss of businesses that rely on the coastal region as a transportation infrastructure vital to the region's industry and commerce. The State simply cannot allow erosion to continue.

Avenal v. State of La., 886 So.3d 1085, 1101-02 (La. 2004).[4]

III. THE FIFTH CIRCUIT'S HOLDING UPSETS THE PROPER BALANCE BETWEEN FEDERAL AND STATE JUDICIAL RESPONSIBILITIES IN ENVIRONMENTAL SUITS.

The Fifth Circuit's holding below departs from established "arising under" jurisdiction jurisprudence from this Court and others. In *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312 (2005), this Court recognized that only a small category of cases asserting state-law claims satisfied the test for "arising under" jurisdiction by "implicat[ing] significant federal issues." *See also Devon Energy Prod. Co. v. Mosaic Potash Carlsad, Inc.*, 693 F.3d 1195 (10th Cir. 2012). Not only does *Grable* limit federal "arising under"

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[4] *Avenal* expands "the resources to which [the public trust doctrine] applies, as well as the pubic uses and values it protects" beyond that recognized by many other states. Byrne, *Cathedral Engulfed*, 73 LA. L. REV. at 100.

jurisdiction to state-law claims that unavoidably raise a substantial and disputed federal issues, it goes further, permitting such jurisdiction *only* where the claim's resolution would not disturb the careful balance between state and federal judicial responsibilities. 545 U.S. at 312. The Fifth Circuit's holding upsets the proper balance of judicial responsibilities in environmental suits by usurping the state courts' role in developing state law to address new and important environmental claims.

A. The Lower Federal Courts Deprived the Louisiana State Courts of the Ability to Address Unresolved Questions of State Law.

In this case, the Authority did not plead any federal-law claims. Indeed, the lower courts acknowledged that the Authority had alleged only state-law claims for negligence, strict liability, natural servitude of drain, public and private nuisance, and breach of contract. *See, e.g.*, Pet'rs' App. A, 5a-6a. The Authority premised these state-law claims, not surprisingly, on Louisiana law. While it is true that the Authority's petition referred to three federal statutes to illustrate the range of standards governing Respondents' activities, the Authority's negligence, strict liability, and nuisance claims rested solely upon Louisiana, not federal statutory, concepts of duty.[5] *See Grable*, 545 U.S. at 318 (recognizing that

[5] The mere reference to federal standards, including federal environmental statutes, does not suffice to justify federal "arising under" jurisdiction. *See Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 912 (7th Cir. 2007) ("That some standards of care used in tort litigation come from federal law does not make

federal statutes and regulations may provide the basis for state-law claims). The natural servitude of drain claim presented purely Louisiana-law issues without any reference to federal standards.

Nonetheless, the lower courts accepted removal under federal "arising under" jurisdiction, suggesting that they understood the case to present significant federal issues. In analyzing the Authority's case (and ultimately dismissing it), however, the lower courts had to confront an unsettled question of state law, that is, whether Louisiana's public and private law—independent of a federally imposed obligation—could ever be understood to impose liability for damage caused by an oil and gas company to thousands of acres of wetlands. Without referring to any state case law directly on point, the lower courts essentially made an "*Erie* guess" that the answer was "no."

As the Fifth Circuit's opinion reveals, little, if any, state jurisprudence supports the federal courts' reading of state law. In holding that the Authority's negligence and nuisance claims justified federal jurisdiction, the Fifth Circuit concluded, without citation, that Respondents did not owe a duty to the Authority, an arm of the State authorized to protect a portion of its levee system, under Louisiana law. *See, e.g.*, Pet'rs' App. A, 9a, 11a. The Fifth Circuit's reasoning did not consider the potential state-law duties Respondents owed to a political subdivision of

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the tort claim one 'arising under' federal law."); *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 154 (4th Cir. 1994) (finding "Plaintiffs' reference to federal environmental statutes in their state common law negligence action cannot support federal subject matter jurisdiction"); *Giles v. Chicago Drum, Inc.*, 631 F. Supp. 2d 981, 983-84 (N.D. Ill. 2009) (applying *Mulcahey* post-*Grable*).

the State or what rights the Authority had in enforcing the State's public trust obligation.

The Fifth Circuit's discussion of Louisiana administrative law best underscores this failing. The court observed that "[n]o Louisiana court has used this or any related provision [of Louisiana regulatory law] as the basis for the tort liability that the Board would need to establish . . . ." *Id.*, 11a. The court of appeals asserted further that the "Louisiana Supreme Court has explicitly rejected the prospect that a statutory obligation of 'reasonably prudent conduct' could require oil and gas lessees to restore the surface of dredged land." *Id.* The appeals court contradicted itself, however, by noting that such a claim *could* be asserted with "proof that the lessee has exercised his rights under the lease unreasonably or excessively." *Id.*, 11a n.16 (citing *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 893 So.2d 789, 801 (La. 2005)). The court failed, moreover, to consider whether the Louisiana courts would recognize a duty to the State, exercising its public trust rights, to restore damaged land.[6]

The court of appeals' affirmance of the dismissal of the Authority's state-law claims confirms not only that those claims rest on state law but also that, here, the state law remains largely unresolved. The Fifth Circuit's refusal to recognize a duty of care was, in fact, based largely on *other federal opinions* applying state law. *See id.*, 19a-20a. While *Terrebonne Parish School Board v. Columbia Gulf Transmission Co.* did not find that the contracts at issue imposed a duty on the defendant oil and gas companies for coastline damage, it nonetheless acknowledged that state-law

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[6] The Fifth Circuit's removal analysis did not address the natural servitude of drain claim at all.

liability might exist under other provisions of state law. 290 F.3d 308, 325-26 (5th Cir. 2002) (holding that Louisiana's civil code might impose a duty even though the servitude agreements at issue did not impose a duty). Similarly, in *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 767, 695 (E.D. La. 2006), the district court expressly held open the possibility that state-law liability might exist under different circumstances.

Further, throughout its review of the district court's holdings, the Fifth Circuit considered only whether Louisiana courts had previously held that oil and gas companies owed a duty to *private parties* to restore land damaged by their activities. *See, e.g.*, Pet'rs' App. A, 23a ("there is little evidence that any of the cited provisions create private liability"). The lower courts did not consider whether Louisiana law would recognize a duty, under the applicable regulations, *to the Authority*, a political subdivision of the State created with the express legislative purpose of protecting the area within its jurisdiction from overflow from the coastal wetlands in which Respondents operate. The federal courts also had little or no guidance from the state courts on this question. By taking jurisdiction over the Authority's claims, the lower federal courts deprived the state courts of the opportunity to decide these important state-law questions as a matter of first impression. In this way, the federal courts have essentially occupied this area of state coastal protection, ensuring that suits raising similar questions of state law will forever be resolved by federal courts so long as a defendant seeks removal.

B. The Authority's Reference to Federal Statutes Does Not Support "Arising Under" Jurisdiction.

The Fifth Circuit's analysis of the three federal statutes cited in the petition—Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-388; Rivers and Harbors Act ("RHA"), 33 U.S.C. §§ 401-67; and Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451-66—provides an equally infirm foundation for establishing jurisdiction under *Grable*. In *Grable*, the Court sought to clarify its prior holding in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986). The Court observed that the lack of a federal right of action alone would not preclude "arising under" jurisdiction. *Grable* held, however, that that factor combined with the additional factors of an absence of federal preemption, an adherence to legislative intent, and the potential for shifting traditional state cases into federal court, resulting in an "increased volume of federal litigation," would prevent federal jurisdiction. *Grable*, 545 U.S. at 319.

These statutes represent precisely the types of statutes that this Court and lower federal courts have held do not support federal "arising under" jurisdiction following *Grable*. The CWA, RHA, and CZMA do not create private rights of action.[7] *See Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 573-74 (6th Cir. 2007) (holding that absence of a right of

[7] The lack of a private right of action does not mean that state actors cannot rely upon the standards set forth in these statutes to prove liability under state law. Similarly, although the CWA does not grant states the right to recover environmental restoration and replacement costs, it does empower the United States to recover such costs from responsible parties to reimburse the states. *See* 33 U.S.C. § 1321(f)(4).

action provides a starting point under *Grable*). These statutes also do not preempt state-law remedies. Indeed, each statute is subject to a savings clause, permitting injured parties to enforce their state-law rights. *See* 16 U.S.C. § 1456(e) (CZMA); 33 U.S.C. § 1416(g) (RHA); 33 U.S.C. §§ 1331(o), 1365(e) (CWA); *see also Cooper v. International Paper Co.*, 912 F. Supp. 2d 1307, 1310 (S.D. Ala. 2012) ("[T]he presence of savings clauses in many of the cited federal statutes further supports allowing the purely state-law claims to proceed in state court."). Respondents' argument that these provisions only preserve *existing* state-law claims merely begs the question. *See* Pet'rs' App. A., 15a. The lower courts' holdings have prevented the state courts from deciding whether Louisiana law recognizes the Authority's claims or not.

Congress's inclusion of savings clauses in the CWA, RHA, and CZMA provides some evidence that it did not intend to vest federal courts with jurisdiction to decide the merits of the Authority's state-law claims. Other provisions in these statutes confirm that state-law claims premised on or referencing standards of conduct created by those statutes do not support "arising under" jurisdiction. For instance, Congress enacted the CWA to create a comprehensive federal regulatory program to prevent and reduce water pollution. *See* 33 U.S.C. § 1252. Nevertheless, in doing so, Congress did not intend to eliminate the states' historical authority to address pollution and the preservation of natural resources. Accordingly, the CWA expressly states that: "It is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* . . . to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." *Id.* § 1251(b) (emphasis

added). The RHA provides that the federal government may "cooperate with any State in the preparation of a comprehensive State or regional plan for the conservation of coastal resources located within the boundaries of the State." *Id.* § 426g-1.

The CZMA similarly provides that:

> The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

16 U.S.C. § 1451(i).

These statutory provisions express Congress's intent not to vest authority solely in the federal government but, instead, to "divide[ ] responsibility for [these] complex regulatory schemes between states and the federal government." *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 281 (5th Cir. 2010). The CWA and CZMA, in particular, reflect this concept of "cooperative federalism." *See New York v. United States*, 505 U.S. 144 (1992) (recognizing that CWA employs scheme of cooperative federalism); *Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782, 793 (4th Cir. 1988) (holding that CZMA "was designed to encourage states to develop land-use planning programs that will preserve, protect, and restore the

environment of their coastal zones"). As the Fifth Circuit observed, in a prior case:

> Such a scheme necessarily implies that states may reach differing conclusions on specific issues relating to the implementation of the Act. Far from being a bug, a patchwork of state-by-state implementation rules is a *feature* of this system of cooperative federalism. In implementing such a system, Congress has explicitly rejected the "advantages thought to be inherent in a federal forum," such as uniform application of federal law.

Budget Prepay, 605 F.3d at 281 (citations omitted). The Fifth Circuit's holding ignores this important legislative intent.

Indeed, the role Congress envisioned for states with respect to state waters and lands under each of these statutes weighs heavily against the lower courts' exercise of "arising under" jurisdiction. The states have historically exercised broad powers to protect their natural resources. In Louisiana, as discussed above, the public trust doctrine is enshrined in the State's Constitution. The Authority has a "special responsibility" to protect, preserve, and restore the natural resources under its control damaged by the Respondents' activities. *Gunn v. Minton*, 568 U.S. 251, 264 (2013); *see also supra* note 4. The Fifth Circuit's opinion ignores the State's and the Authority's special responsibility for Louisiana's natural resources and, therefore, departs from this Court's holdings in *Grable* and *Gunn*.

As a result, the lower courts' rulings will upend the balance between state and federal judicial responsibilities. In *Grable*, this Court concluded that

"[a] general rule of exercising federal jurisdiction over state [tort] claims resting on federal . . . statutory violations would thus . . . herald [ ] a potentially enormous shift of traditionally state cases into federal courts." 545 U.S. at 319; *see also Hampton v. R.J. Corman R.R. Switching Co.*, 683 F.3d 708, 712 (6th Cir. 2012) (rejecting removal of state-law negligence claim on the sole basis that violation of federal statute created presumption of negligence under state law so as not to flout congressional intent and shift traditional state cases to federal courts). The Fifth Circuit's holding subjects future state-law claims for environmental damage premised on actions regulated by the CWA, RHA, and CZMA to federal jurisdiction. Whether or not the actual number of cases proves to be "overwhelming" or "uncomfortably burdensome" is largely irrelevant because each statute demonstrates that Congress did not intend "to open the federal court door quite so wide." *Mikulski*, 501 F.3d at 574.

In fact, there is little or no benefit to providing a federal forum for this case. The lower courts' resolution of the Louisiana state-law questions in this case will have no real precedential effect in other cases. Even if the Fifth Circuit's holding has provided a basis for federal jurisdiction, future courts will have to address claims under other states' laws independently, thereby negating any potential benefit of a federal forum. *See Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 701 (2006); *Morgan County War Mem'l Hosp. ex rel. Bd. of Directors of War Mem'l Hosp. v. Baker*, 314 F. App'x 429, 536 (4th Cir. 2008).

Moreover, in finding "arising under" jurisdiction, the lower courts have usurped the authority of Louisiana state courts to decide state law. In this

case, the lower federal courts addressed important issues of Louisiana tort law despite the fact that the Louisiana state courts had provided little, if any, guidance on those state-law questions. The Louisiana state courts should have been permitted to consider these undecided questions, especially given the public trust implications of the Authority's claims. *See Hofbauer v. Northwestern Nat'l Bank of Rochester, Minn.,* 700 F.2d 1197 (8th Cir. 1983) ("Even though the [plaintiffs] cannot assert a private cause of action arising under federal law, the federal statutes may create a standard of conduct which, if broken, would give rise to an action for common-law negligence. That is a question of Minnesota law best left to the courts of that State.").

Louisiana's coastal restoration plan assumes, in fact, that the State can use its laws and resources to implement restoration. If the State is not permitted to use its own laws to protect its citizens and, when appropriate, recoup damages, then its plan will surely fail. The State and its political subdivisions need an effective mechanism to hold companies that have privatized their gain and socialized (that is, externalized) their costs accountable. That mechanism is state law, and state courts are the ones best suited to examine the borderlands of their law.

Importantly, the jurisdictional precedent set by the Fifth Circuit's holding does not apply only to Louisiana and cases involving its coastal wetlands. Other states also rely on their laws to offer protection for important resources. If the Fifth Circuit's decision stands, the court's holding will impact not just Louisiana but the ability of other states to interpret their own laws to protect important resources within their borders. Consequently, this aspect of the case presents questions important across the country.

Amici urge the Court to grant certiorari to reverse the lower courts' holdings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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