No. 08-212

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Constitution permits Congress to enact legislation for an Article I tribunal that amends applicable law governing the relief available in a pending, non-final action.

RULE 29.6 STATEMENT

Respondent OXY USA Inc. ("OXY") is a wholly-owned indirect subsidiary of Occidental Petroleum Corporation, a publicly held corporation. Occidental Petroleum Corporation has no parent, nor is there any publicly held company that holds a 10% or larger interest in Occidental Petroleum Corporation.

Respondent Union Oil Company of California ("Union Oil") is a wholly-owned indirect subsidiary of Chevron Corporation, which is a publicly held corporation. Chevron Corporation has no parent, nor is there any publicly held company that holds a 10% or larger interest in Chevron Corporation.

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INTRODUCTION

Exxon Mobil Corporation ("Exxon Mobil") in its Petition for a Writ of Certiorari ("Petition") seeks review of an unpublished decision of the United States Court of Appeals for the D.C. Circuit, *Petro Star, Inc. v. FERC,* (Petition Appendix A), which dismissed numerous petitions for review of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Opinion No. 481.[1] In Opinion No. 481,

[1] *Trans Alaska Pipeline System,* Opinion No. 481, 113 FERC ¶ 61,062 (2005), *affirmed and modified in part,* Opinion No. 481-A, 114 FERC ¶ 61,323 (2006), *clarification granted and rehearing denied,* Opinion No. 481-B, 115 FERC ¶ 61,287 (2006).

the FERC resolved an extensive and complex dispute involving the Trans Alaska Pipeline System Quality Bank. The opinion was appealed to the D.C. Circuit by Exxon Mobil, Union Oil, OXY, BP Exploration (Alaska) Inc, Petro Star Inc., Williams Alaska Company, Flint Hills Resources Alaska, LLC, Tesoro Alaska Petroleum Company and the State of Alaska. Exxon Mobil is the only party to seek review of the D.C. Circuit decision.

Exxon Mobil claims that a statute passed by Congress while the Quality Bank case was pending before the FERC constituted legislative interference in the judicial process, violating the Constitution's separation of powers. The statute in question, Section 4412(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, limits refunds, in pending Quality Bank cases, to a period extending back to February 1, 2000, and in future cases to a 15-month period preceding the earliest, first order imposing Quality Bank adjustments in the proceeding. Exxon Mobil states that the statute deprived it of refunds for the period from December 1993, through February 1, 2000, amounting to $150 million. Petition at 5-6. According to Exxon Mobil, Section 4412(b)(1) prescribed a "rule of decision" for a pending case, which this Court declared to be unconstitutional in *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1871). Exxon Mobil is supported by the Washington Legal Foundation ("WLF"), which filed an amicus brief.

Respondents Union Oil Company of California ("Union Oil") and OXY USA Inc. ("OXY") are or were producers of Alaska North Slope crude oil that is of relatively lower value under the Quality Bank

distillation method.[2] They both paid into the Quality Bank during the period in question, and would be subject to any retroactive adjustments ordered by FERC if Exxon Mobil were to obtain the relief it is requesting. Union Oil and OXY therefore have an economic interest in this matter and respectfully request that certiorari be denied.

STATEMENT OF THE CASE

The Statements of the Case set forth in Exxon Mobil's Petition and the *amicus curiae* brief filed by WLF merit comment on three points: the applicability of Section 4412(b)(1) to a single case; the interpretation of Section 4412(b)(2); and the refiners' underpayment of Quality Bank assessments.

First, Exxon Mobil states that Section 4412(b) of Public Law No. 109-59 "creates two rules relating to the Commission's power to order TAPS Quality Bank refunds. The first rule, subsection (b)(1), governs only this proceeding." Petition at 8. WLF echoes this claim. Referring to subsection (b)(1), WLF states:

> It declared that, with respect to the on-going TAPS proceedings and *no other proceedings*, FERC could not order Quality Bank adjustments for any period before February 1, 2000.

WLF Brief at 3 (emphasis in original). The second rule, subsection (b)(2), applies to proceedings commenced after the date of enactment (August 10, 2005).

The Exxon Mobil statement is correct but potentially misleading; the WLF statement mischaracter-

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[2] OXY divested its North Slope property in an exchange in December of 2000, but remained subject to the retroactive Quality Bank adjustments ordered by Opinion No. 481. Union Oil is still a producer.

izes Section 4412(b)(1). Subsection (b)(1) applies to "proceedings commenced before the date of enactment of this Act."[3] It is not by its terms limited to a single proceeding. It could, at least in theory, have included several proceedings within its scope. The Petition and the WLF Brief, without support from the legislative history, imply that the subsection was drafted *with the specific intent* that it be applied only to one case.

It is not inconceivable that other proceedings could have been encompassed within Section 4412(b)(1). Because the TAPS Carriers file new Quality Bank tariffs every year, and in light of the fact that such filings are subject to protests which take time to resolve, there were several potential proceedings that could have been included within the scope of Section 4412(b)(1).[4]

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[3] The complete text of Section 4412 is attached to the Petition as Appendix F.

[4] Quality Bank tariffs were protested in 2003 when the Naphtha cut valuation was changed, and in 2006 when Opinion No. 481 was implemented. Annual revisions of TAPS transportation rates, as distinguished from Quality Bank rates, have more frequently been protested. E.g., BP Pipelines (Alaska) Inc., Opinion No. 502, 123 FERC ¶61,287 (2008) (describing annual transportation rate filings and protests filed in 2005, 2006, and 2007); ARCO Transportation Alaska, Inc., 68 FERC ¶ 62,105 (1994)(protests leading to suspension of the 1994 transportation tariffs); Amerada Hess Pipeline Corp., 69 FERC ¶ 62,257 (1994) (protests leading to suspension of the TAPS Carriers' 1995 transportation tariffs); Amerada Hess Pipeline Corp., 73 FERC ¶ 61,401 (1995) (protests leading to suspension of the 1996 transportation tariffs); Amerada Hess Pipeline Corp., 77 FERC ¶ 61,343 (1996) (protests leading to suspension of the 1997 transportation tariffs); Phillips Alaska Pipeline Corp., 79 FERC ¶ 61,100 (1997); Amerada Hess Pipeline Corp., 81 FERC ¶ 61,413 (1997).

On February 27, 2003, the TAPS Carriers filed Quality Bank tariff changes affecting the value of the Naphtha cut to take effect on March 1, 2003. The proposed changes, assigned Docket Nos. IS03-137-000 through IS03-144-000, were protested by several parties, and on March 28, 2003, the Commission issued an order accepting the tariff changes, suspending them subject to refund, ordering hearings, and incorporating the issues raised into the hearings then underway in Docket No. OR89-2-000. *BP Pipelines (Alaska) Inc.*, 102 FERC ¶ 61,345 (2003). Had this proceeding not been consolidated with Docket No. OR89-2-000 (the proceeding that produced Opinion No. 481), then there would have been at least one additional Quality Bank proceeding that fell within the class defined by subsection (b)(1).

The TAPS Carriers filed annual Quality Bank tariff adjustments in January of 2003 (Docket Nos. IS03-90-000 through IS03-95-000), January of 2004 (Docket Nos. IS04-149-000 through IS04-153-000), and January of 2005 (Docket Nos. IS05-121-000 through IS05-125-000). (Appendix A hereto). Each of these filings took effect without formal action on FERC's part because none was protested. However, had any one or all of these filings been protested, then they most likely would have remained pending on the date that Section 4412(b) was enacted and would have been among the class of proceedings "commenced before the date of enactment" of Section 4412(b) and subject to the same restrictions on retrospective relief that were applied to Docket No. OR89-2-000.

Second, both Exxon Mobil and WLF assert that under Section 4412(b)(2), which is applicable to all Quality Bank proceedings commenced after the date

of enactment of Public Law No. 109-59, Exxon Mobil would have been entitled to refunds "with no limitation." Petition at 8. *See also* WLF Brief at 3. However, Section 4412(b)(2) has not yet been construed by either the FERC or a court. The interpretation espoused by Exxon Mobil and WLF, while not disputed by Union Oil or OXY, is only one possible interpretation of the statute. An interpretation of Section 4412(b)(2) that would limit refunds under that subsection even more stringently than the limitation under subsection (b)(1) has been espoused by Flint Hills Resources Alaska, LLC in a proceeding now pending before FERC.

Section 4412(b)(2) of Pub. L. No. 109-59 states:

> 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.

The critical words for interpreting the effect of this provision are "the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding." In *BP Pipelines (Alaska) Inc.*, FERC Docket No. OR06-10-000, Flint Hills Resources Alaska, LLC, has argued that the first order imposing Quality Bank adjustments does not occur until the compliance phase of a litigated proceeding, after the entry of the Commission's final order.

> In summary, given that quality bank adjustments at issue here must be fixed in numerical form by the compliance filing before they can be

> imposed, it follows that the first order imposing such adjustments, within the meaning of Section 4412, will not occur until Commission approval of the compliance filing. Consequently, the 15-month period under Section 4412 will not be calculable until the date of that future order approving the compliance filing, as that would be "the earliest date of the first order" imposing such adjustment in this proceeding.

Protest of Flint Hills Resources Alaska LLC to Compliance Filing of The TAPS Carriers, filed April 17, 2008. (Appendix B hereto). Exxon Mobil maintains here, as Union Oil has in Docket No. OR06-10-000, that the "first order imposing Quality Bank adjustments" is the order at the start of a proceeding that accepts proposed changes and implements ("imposes") them subject to potential modification and refund after hearings. Petition at 8. This interpretation of Section 4412 (b)(2) makes retroactive relief available to a date that precedes by over a year the filing by the Carriers of proposed Quality Bank changes. If this interpretation were applied to Docket No. OR89-2-000, it would indeed, as Exxon Mobil has argued, provide retrospective relief back to December of 1993. Petition at 14. But FERC has not yet issued an order in Docket No. OR06-10-000 to resolve the competing interpretations of Section 4412 (b)(2).

Third, it is somewhat misleading to state that the Alaskan refiners "were found to have dramatically underpaid the Quality Bank for the oil they removed from the common stream." Petition at 6. The Initial Decision made no finding respecting whether the refiners had underpaid the Quality Bank. The Initial Decision did, however, dramatically lower the value

of the Resid cut. Because the refiners return the Resid cut to TAPS, the Quality Bank methodology had allowed them a credit for the returned Resid. The Initial Decision's reducing the value of Resid indicated that the refiners had received too much credit over the time period that the distillation methodology had been in place.[5]

The distinction is important only because, as phrased by WLF, it would appear that the refiners had done something wrong because they had "significantly underpaid the Quality Bank." WLF Brief at 2. In fact, the refiners, and also Union Oil and OXY, paid into the Quality Bank the assessments established by the published TAPS tariffs. They legally could pay nothing more and nothing less. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-578 (1981).

REASONS FOR DENYING THE PETITION

The Petition does not raise an issue worthy of this Court's review. The Court of Appeals properly concluded that Section 4412(b)(1) was not unconstitutional and appropriately dismissed Exxon Mobil's appeal. Supreme Court review is unwarranted because Congress, by enacting Section 4412(b)(1), did nothing more than amend existing law governing the relief available from an Article I tribunal.

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[5] Union Oil and OXY produced oil shipped on TAPS that had relatively more of the Resid cut than the TAPS common stream. They paid into the Quality Bank during the period in question, but would be required to pay in more if the lower Resid value were applied retroactively as Exxon Mobil has requested.

I. THE DECISION BELOW IS CONSISTENT WITH PRECEDENTS OF THIS COURT

A. Section 4412(b)(1) Is Consistent with *Klein.*

Exxon Mobil and WLF argue that Section 4412(b)(1) runs afoul of the separation of powers principles proclaimed in *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1871). According to Exxon Mobil, *Klein* held that Congress is forbidden from "passing laws that dictate the results in pending cases." Petition at 11-12. Exxon Mobil admits that subsequent decisions have recognized Congress' power to amend applicable law, and that Congress may intervene to change results in pending cases, but only by prescribing rules of general applicability rather than dictating the outcome of a single case. Petition at 13. Exxon Mobil and WLF insist that *Klein's* proscriptions apply, regardless of whether the case at issue arose in an Article III court or an Article I tribunal. Petition at 12; WLF Brief at 19-20.

Klein has very little in common with the present case. Unlike Section 4412(b), the statute in *Klein* directly infringed Article III of the Constitution. The statute in *Klein* circumscribed the Supreme Court's appellate review authority; it did not merely enact a standard for decision by a lower Article I tribunal. Furthermore, in *Klein*, the Court of Claims had rendered a final judgment, which was then pending on appeal to the Supreme Court when the statute was enacted. Here, by contrast, FERC had not yet issued its opinion, but rather had before it for review an initial decision of an Administrative Law Judge. Finally, in *Klein*, the statute at issue interfered with not only the Supreme Court's Article III jurisdiction, but also the Executive Branch's exclusive power under

Article II, Section 2, to grant pardons. In light of these critical differences, *Klein* easily is distinguishable.

Klein reviewed a statute enacted in 1870 that instructed the Supreme Court to rule a certain way in exercising its appellate review of a Court of Claims decision. During the Civil War, the federal government had come into possession of property abandoned by civilians in the rebellious states, including certain bales of cotton which had been sold and the proceeds deposited in the Treasury. A statute authorized the Court of Claims to return the property or its proceeds to the original owner if that owner could prove his loyalty. The heirs of the owner of the cotton filed such a claim, and presented a presidential pardon as proof of loyalty. The Court of Claims entered judgment in favor of the claimant, and an appeal to the Supreme Court was taken. Pending the appeal, Congress attached a proviso to an appropriation which required that, in any Court of Claims suit, a pardon introduced in evidence as proof of loyalty shall instead be considered proof of disloyalty. Congress provided that, if judgment has already been entered, the Supreme Court on appeal shall retain jurisdiction only for the purpose of determining whether a loyalty ruling was based on a pardon, and, upon determining that issue, shall thereafter dismiss the case.

The Supreme Court ruled that the 1870 statute was unconstitutional. It proclaimed that Congress had by statute prescribed "a rule for the decision" of a pending case, *id.* at 146. In so ruling, it is clear that the Court was primarily concerned with Congress' dictating directly to the Supreme Court how to decide a particular case:

> But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty.

Id. at 145. Respecting the effect of the statute, the Court stated:

> The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction. It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way?

Id. at 146. The Court went on to declare this a violation of the Constitution.

> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power. It is of vital importance that these powers be kept distinct.

Id. at 147. The Court was equally succinct in stating that Congress had infringed upon the Executive Branch as well by revoking presidential pardons.

> The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive. It is the intention of the Constitution that each of the great coordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit.

Id. at 147.

In rejecting an argument by the government that Congress by statute had merely retracted the "favor" of allowing claims against the Executive Branch, the Court replied that Congress had undertaken to interfere with the Judicial Branch, and made clear its belief that the Court of Claims was at that time considered an Article III court. *Id.* at 144-145.[6] Regardless of whether the Court of Claims is an Article III or Article I court, however, it is clear that *Klein's* primary concern was that the 1870 statute

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[6] WLF incorrectly asserts that the Court of Claims' status was clearly understood in the 19th Century to be an Article I court. WLF Brief at 20. Its status was not clear. In *Ex Parte Bakelite Corporation*, 279 U.S. 438, 454-455 (1929), the Supreme Court stated that the Court of Claims is a legislative (Article I) court, and asserted that *Klein* recognized it as such. *See also, Williams v. United States*, 289 U.S. 553, 568 (1933) (affirming *Bakelite* and distinguishing *Klein* and other decisions to the extent they ruled otherwise). Congress in 1953 passed legislation declaring that the Court of Claims is an Article III court, and the Supreme Court in *Glidden v. Zdanok*, 370 U.S. 530, 585-589 (1962), accepted this declaration, distinguishing *Bakelite* and *Williams*. *See also, United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 n. 25 (1980) ("at least since 1953, the Court of Claims has been an Art. III court").

directly infringed the Supreme Court's jurisdiction, thereby violating the separation of powers doctrine. *Id.* at 145-146.

Unlike the statute in *Klein*, Section 4412(b)(1) does not create a rule for decision by an Article III court. Instead, it provides a standard for relief available from an administrative agency which is not an Article III court but instead is an Article I or legislative court. Moreover, the statute does not reverse pardons, reopen judgments, or otherwise dictate a specific result. By merely limiting the type of relief available from the agency, it does not usurp the decision-making function of the FERC, or otherwise impose a "rule of decision" for a specific case. It merely amends applicable law.

Cases that have construed *Klein* indicate that Section 4412(b)(1) does not run afoul of the "rule of decision" holding in *Klein*. In *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995), the Supreme Court held on separation of powers grounds that Section 27A of the Securities Exchange Act, 15 U.S.C. §78aa-1, was unconstitutional. Section 27A was passed in 1991 to reverse the Supreme Court's *Lampf* opinion,[7] which had established a uniform, national statute of limitations for litigation under §10(b) and Rule 10b-5. Section 27A required courts to reopen final judgments decided on the basis of *Lampf* and to allow those cases to proceed if they met the state limitations law in effect before *Lampf*.

In holding that Section 27A was unconstitutional, the Court actually distinguished *Klein*: "Whatever the precise scope of *Klein*, however, later decisions

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[7] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

have made clear that its prohibition does not take hold when Congress "amend[s] applicable law." *Plaut* at 218. The Court went on to explain that Section 27A amended applicable law, but it nevertheless "offends a postulate of Article III just as deeply rooted in our law." *Id.* The Constitution requires that Article III courts actually decide cases that come before them and that retroactively reopening final judgments violates this principle. The Court was careful to confine its holding to statutes that reopen final judgments, distinguishing situations in which Congress changes the law while cases are still pending, or while there is still a right of appeal to a higher court. *Id.* at 226-227. With respect to legislation that affected final judgments of non-Article III courts, the court ruled that "These cases distinguish themselves." *Id.* at 232. The Court acknowledged that Congress could avoid constitutional problems by including prospectivity and general applicability in its statutes, but stated that even a retroactive statute that "singles out" a small class or an individual may not necessarily be unconstitutional. *Id.* at 238-239.

The present case is a far cry from *Plaut*. Here, there was no final judgment when Congress amended the applicable law, and the FERC is not an Article III court. Furthermore, the mere fact that Section 4412(b)(1) applies to a small class, or even a single case, does not per force render the statute unconstitutional.

Congress' ability to amend applicable law is rather broad. In *Pope v. United States,* 323 U.S. 1 (1944), the Court of Claims rejected a claim by a government contractor for over-runs and excavation allowances under a tunneling contract with the government. After final judgment was entered, Congress passed a

special act requiring that the Court of Claims render judgment at contract rates for certain work under the Pope contract for which the government received the use and benefit. The work defined in the statute was the same work that the Court of Claims had rejected. The Court of Claims refused to apply the statute, holding that it violated *Klein*, but the Supreme Court reversed. It held that the special act did not require that the prior judgment be set aside, but rather created a new obligation, and that requiring the Court of Claims to enter judgment on this new obligation was not unconstitutional. *See also Pennsylvania v. Wheeling and Belmont Bridge Co.,* 59 U.S. (18 How.) 421 (1856) (statute overruling court decision declaring a bridge to be an obstruction of navigation held not to violate the Constitution's separation of powers).

In *Robertson v. Seattle Audubon Society,* 503 U.S. 429 (1992), the Court again refused to apply *Klein.* The statute at issue there addressed two district court decisions, which enjoined timber harvests that threatened the endangered spotted owl in thirteen federal forests in Oregon. In response to the two decisions, Congress enacted Section 318(b)(6)(A) of the 1990 Department of Interior and Related Agencies Appropriations Act, which stated that management of the forests in compliance with other provisions of Section 318 would satisfy the legal requirements that were the bases for the injunctions issued in the two cases. In rejecting arguments by the Audubon Society that the statute violated *Klein,* the Court ruled that Section 318(b)(6)(A) merely amended applicable law and did not direct a decision in a pending case. *Id.* at 441.

> We conclude that subsection 318(b)(6)(A) compelled changes in the law, not findings or results

> under old law. . . Moreover, we find nothing in subsection 318(b)(6)(A) that purported to direct any particular findings of fact or applications of law, old or new, to fact.

Id. at 438.

Seattle Audubon explains why the *Plaut* Court qualified its reference to *Klein* with the phrase "whatever the precise scope of *Klein.*" *Pope* and *Seattle Audubon* taken together have pared the "rule of decision" language in *Klein* very narrowly. In light of *Pope* and *Seattle Audubon*, it is clear that *Klein* does not apply to Section 4412(b)(1). Section 4412(b)(1) does not compel findings or results under old law, nor does it direct any particular findings of fact or applications of law to fact. It simply limits the extent of retroactive relief available in pending cases.

Any lingering doubt that *Klein* should not be narrowly construed was dispelled by *Miller v. French*, 530 U.S. 327 (2000). There the Supreme Court expressly distinguished *Klein* and upheld a statute that suspended injunctions issued by Article III courts, a legislative action far more intrusive on the judicial function than Section 4412(b)(1).[8] The Court held:

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[8] The statute at issue is described as follows: "The Prison Litigation Reform Act of 1995 (PLRA) establishes standards for the entry and termination of prospective relief in civil actions challenging prison conditions. §§ 801-810, 110 Stat. 1321-66 to 1321-77. If prospective relief under an existing injunction does not satisfy these standards, a defendant or intervenor is entitled to 'immediate termination' of that relief. 18 U.S.C. § 3626(b)(2) (1994 ed., Supp. IV). And under the PLRA's 'automatic stay' provision, a motion to terminate prospective relief 'shall operate as a stay' of that relief during the period beginning 30 days after the filing of the motion (extendable to up to 90 days for 'good cause') and ending when the court rules on the motion. §§ 3626(e)(2), (3)." 530 U.S.at 331.

> In contrast to due process, which principally serves to protect the personal rights of litigants to a full and fair hearing, separation of powers principles are primarily addressed to the structural concerns of protecting the role of the independent Judiciary within the constitutional design. In this action, we have no occasion to decide whether there could be a time constraint on judicial action that was so severe that it implicated these structural separation of powers concerns. The PLRA does not deprive courts of their adjudicatory role, but merely provides a new legal standard for relief and encourages courts to apply that standard promptly.

Id. at 350. Section 4412(b)(1) similarly provides a new legal standard for relief. It clearly does not violate *Klein*.

Nor does the decision below "eviscerate *Klein*," a claim Exxon Mobil supports with a citation to Justice Powell's concurring opinion in *Immigration and Naturalization Service v. Chada,* 462 U.S. 919, 966 (1983). Petition at 18. WLF similarly cites Justice Powell's concerns. WLF Brief at 12. *Chada* is completely inapposite. It held unconstitutional a statute that permitted a single chamber of Congress to override via legislative veto a determination made by the Executive Branch pursuant to delegated authority. The principle enforced in striking down the statute was the Constitution's requirements in Article I that the Legislative Branch act bicamerally with the participation of the President. *Id.* at 951, 957-958. In the instant case, Section 4412(b)(1) complied with all of the legislative restraints on abuse of legislative power built into Article I that were the focus of Justice Powell's remarks. Moreover, Justice Powell was

addressing a legislative veto of a decision by the Immigration and Naturalization Service to allow Mr. Chada permanent residency, an action with far more immediate and specific consequences than the legislative action at issue here.

Not only does section 4412(b)(1) not violate *Klein*, neither is the statute an unconstitutional bill of attainder, as Exxon Mobil seems to imply by its citation of *United States v. Brown*, 381 U.S. 437 (1965). Petition at 11, 13. "Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *Id.* at 448-449 (quoting *United States v. Lovett*, 328 U.S. 303, 315-316 (1946). *Brown* held that Section 504 of the Labor-Management Reporting and Disclosure Act, which singled out union officials for punishment due to their membership in the Communist Party, was a constitutionally proscribed bill of attainder. Section 4412(b)(1) by contrast does not identify Exxon Mobil, or any class to which Exxon Mobil belongs, so as to inflict punishment on it without a trial.

B. Section 4412(b)(1) Amends Applicable Law on Refunds

Both Exxon Mobil and WLF admit that *Klein* does not prevent Congress from enacting rules of general applicability. Petition at 12-13; WLF Brief at 9, 11-12. However, they claim that, in Section 4412(b)(1), Congress did not merely amend existing law with a rule of general applicability. But contrary to Exxon Mobil and WLF's assertion, this *is* a case "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." Petition at 14.

In adopting Section 4412(b), Congress provided two rules to govern retrospective relief, one that applies to all cases that were commenced prior to the effective date of the legislation, and a different rule that applies to all cases commenced after the effective date of the legislation. While the distinction between pending cases and future cases created two different classes, the rules for each class are stated in terms of general applicability. There is no clue on the face of the statute itself that only a single case is subject to the rule for pending cases.

Exxon Mobil argues the contrary, that Section 4412(b)(1) "does not amend applicable law; instead, it impermissibly directs results in a single pending adjudication under old law." Petition at 14. WLF picks up the refrain, arguing "there is no credible argument that when it prescribed a rule of decision in *this* case, Congress also changed the underlying generally applicable law." WLF Brief at 10. However, there *is* a credible argument that Congress prescribed a rule of general applicability when it enacted Section 4412(b)(1). Simply stating that the statute does not amend applicable law, but instead directs results in a single case, does not make it so.

The language of Section 4412(b)(1) is couched in terms of general applicability:

> In 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.

Nowhere does the statute identify or refer to Docket No. OR89-2-000, the proceeding that produced Opinion

No. 481. It does not "direct any particular findings of fact or applications of law, old or new, to fact." *Seattle Audubon* at 438. Under the standards recognized in *Seattle Audubon* and *Miller v. French,* the statute clearly amends applicable law.

Nowhere does the statute by its terms indicate that it is limited to a single case. By its terms, it applies to all Quality Bank cases that were pending in August, 2005, a class that in actuality included only one case—Docket No. OR89-2-000—but that also could have included other cases, had any of the annual filings in January 2003, 2004, or 2005 been protested, or had the March 2003 Naphtha change not already been consolidated with Docket OR89-2-000.

Even the fact that only one Quality Bank case was pending before FERC when the statute was enacted does not prove that the statute was not a rule of general applicability. The statute at issue in *Pope* applied to a single case, and yet the Supreme Court held that it did not violate the rule adopted in *Klein*. The same can be said for *Seattle Audubon*: a pair of cases was the subject of that statute, yet the Court still found that Congress had changed applicable law and not violated *Klein*. And, as admitted by the Petition at 16, and the WLF Brief at 15, Congress may always legislate regarding a legitimate class of one. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 472 (1977).

In fact, Exxon Mobil's complaint is similar to the complaint lodged by Former President Nixon: "In essence, he argues that *Brown* establishes that the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality."

433 U.S. at 469-470. The Supreme Court rejected this argument:

> His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals.

Id. at 470-471 (citations and footnotes omitted). Similarly, the argument here that Section 4412(b)(1) is unconstitutional because it impacts a single case and treats pending litigants differently than future litigants must be rejected.

II. THE D.C. CIRCUIT'S RULING DOES NOT CREATE A CONFLICT WITH OTHER CIRCUITS

In rejecting Exxon Mobil's constitutional challenge to Section 4412(b)(1), the D.C. Circuit relied principally on *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001). *See Petro Star, Inc. v. FERC,* Petition App. A. ("As to petitioners' separation of powers argument, any claim that Congress' decision here unconstitutionally exercised judicial power is foreclosed by our decision in *National*

Coalition to Save Our Mall v. Norton, 269 F.3d 1092 (D.C. Cir. 2001).") Exxon Mobil contends that the D.C. Circuit's reading of *Klein* in *Petro Star* and *National Coalition* conflicts with decisions of the Seventh, Ninth, Fourth, and Tenth Circuits. Petition at 19-20. However, the cases cited by Exxon Mobil all involved statutes that the courts *upheld*, and therefore there is no conflict between these cases and *National Coalition*.

In *National Coalition,* the D.C. Circuit refused to declare unconstitutional a statute that exempted from judicial review the decision undertaken by several agencies to construct the World War II Memorial on the Mall. The Coalition, like Exxon Mobil here, complained that the case-specific nature of the statute singling out one proceeding that was pending when Congress acted violated the "rule of decision" holding of *Klein.* After reviewing *Klein* and the Supreme Court decisions construing it, the Court rejected this challenge:

> In view of *Plaut, Miller v. French* and *Wheeling Bridge*, we see no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit.

269 F.3d at 1097.

Exxon Mobil claims that *Lindh v. Murphy,* 96 F.3d 856 (7th Cir. 1996), *rev'd on other grounds,* 521 U.S. 320 (1997), is inconsistent with *Petro Star* and *National Coalition.* It is not. In the first place, the issues in *Lindh* were very different. *Lindh* concerned a murder conviction appealed to the state's highest court, which Lindh challenged in an independent habeas corpus suit in federal court. The federal action was dismissed, Lindh appealed to the Seventh Circuit, and while the appeal was pending, Congress

passed a statute, 28 U.S.C. § 2254(d), governing the effect to be given in habeas proceedings to findings of fact in state courts. The Seventh Circuit applied the new law and denied Lindh's appeal. Hence, based on the holding of the case, it is entirely consistent with the action taken in *Petro Star*.

Secondly, in rejecting various constitutional challenges made by Lindh, what the Seventh Circuit said about *Klein* is not inconsistent with the result reached in the present case:

> Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck, but it may prescribe maximum damages for categories of cases, or provide that victims of torts by federal employees cannot receive punitive damages.

Id. at 872 (citations omitted). In Section 4412(b)(1), Congress did not say that Exxon Mobil cannot be awarded an additional $150 million in refunds. Instead, as the Seventh Circuit indicated it can, Congress established a maximum amount of refunds, limiting them to a five-and-one-half-year retrospective period (February 1, 2000 through October 31, 2005).

Crater v. Galaxa, 491 F.3d 1119 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2961 (2008), which Exxon Mobil cites as an example of a conflict with the D.C. Circuit, also involved a state court criminal conviction and the same statute modifying habeas corpus relief in a collateral federal proceeding. In rejecting the claim that 28 U.S.C. § 2254(d) violates *Klein*, the Ninth Circuit held:

> Section 2254(d)(1) does not instruct courts to discern or to deny a constitutional violation. In-

> stead, it simply sets additional standards for granting relief in cases where a petitioner has already received an adjudication of his federal claims by another court of competent jurisdiction. The Constitution does not forbid Congress from establishing such standards, as the Fourth Circuit has eloquently explained.

Id. at 1127.

The Fourth Circuit opinion referred to by the Seventh Circuit, *Green v. French*, 143 F.3d 865 (4th Cir. 1998), *abrogated on other grounds by Williams v. Taylor*, 529 U.S. 362 (2000), is also cited by Exxon Mobil as a decision that conflicts with *National Coalition*. *Green v. French* rejected the argument that 28 U.S.C. 2254(d) violates the constitutional separation of powers doctrine, stating:

> In amending section 2254(d)(1), Congress has simply adopted a choice of law rule that prospectively governs classes of habeas cases; it has not subjected final judgments to revision, nor has it dictated the judiciary's interpretation of governing law and mandated a particular result in any pending case. And amended section 2254(d) does not limit any inferior federal court's independent interpretive authority to determine the meaning of federal law in any Article III case or controversy.

Id. at 874-875.

The final case cited by Exxon Mobil as being in conflict with *National Coalition* is also not in conflict. *Shawnee Tribe v. United States*, 423 F.3d 1204 (10th Cir. 2005), rejected a constitutional challenge to Pub. L. No. 108-375, § 2841, a statute that rendered moot a pending lawsuit seeking a transfer of federal prop-

erty to the tribe. The court stated: "Although *Klein* might be read broadly, it has been significantly limited by subsequent Supreme Court decisions." *Id.* at 1217 (citing *Plaut* and *Seattle Audubon*). In applying these decisions to the case before it, the court held:

> In this case, § 2841 simply provides a supervening way to dispose of the particular Sunflower Property. As long as the Secretary of the Army exercises that authority to dispose of the property, we hold that any claim under § 523 is moot. However, § 2841 itself purports neither to compel a particular decision in the case before us nor to decide how the law applies to our specific facts. That function is left to us as a court. Therefore, we conclude that § 2841 is a constitutional exercise of Congress's power to amend existing law and make it applicable to the property which is the subject of this pending case.

Id. at 1218.

Exxon Mobil seems to concede that these decisions may not be in conflict with *National Coalition*, Petition at 22, but requests certiorari nevertheless to quell what Exxon Mobil terms "a raging dispute" over the meaning of *Klein*. In addition to several periodicals, Exxon Mobil cites a Supreme Court case in which *Klein* is mentioned in a passing reference but is not part of the Court's holding. *Guiterrez de Martinez v. Lamagno,* 515 U.S. 417, 430 (1995). The debate over *Klein* appears to focus on whether, in light of *Seattle Audubon*, *Klein* has any vitality beyond its specific facts.[9] Whatever the merits of this

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[9] Notwithstanding the academic interest in Klein, the commentators do not appear to suggest an interpretation that would make Klein applicable to the facts of this case. *See, e.g.*, L.G.

dispute, the present case does not present a clear conflict among the circuits with respect to the proper interpretation of *Klein*. To the contrary, in the examples cited by Exxon Mobil, *Klein* has been applied in a consistent manner, not only in the case at bar but in the decisions of other circuits.

CONCLUSION

Union Oil Company of California and OXY U.S.A. Inc. respectfully request that the Court deny the petition for a writ of certiorari. The D.C. Circuit's decision in *Petro Star v. FERC* is consistent with precedent of this Court and it does not conflict with the law applied in other circuits.

Respectfully submitted,

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Sager, *Klein's First Principle: A Proposed Solution*, 86 Geo. L. J. 2525, 2579 (1998) ("This is how we should understand the first principle of U.S. v. Klein: The judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequences for our political community.")