INLAND LITIGATION UNDER THE OUTER CONTINENTAL SHELF LANDS ACT

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INTRODUCTION

For the first 50 years of offshore oil and gas development, coastal states exercised exclusive jurisdiction over their adjacent seabed. But as deposits proved to be significant, the federal-state dispute over control of these "tidelands" became a "question of major importance."[1] In *United States v. California* (1947),[2] the U.S. Supreme Court entered the fray, declaring that "the Federal Government rather than the state has paramount rights" in the tidelands and "full dominion over the resources of the soil under that water area, including oil."[3] This "effectively eviscerated coastal states' claims to ownership of offshore resources."[4]

Congress responded in 1953 by passing a pair of laws to clarify state-federal control of those offshore oil and gas resources.[5] First, Congress granted title to the three-mile coastal belt of submerged lands back to the states under the Submerged Lands Act.[6] Second, with the

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1. W. Page Keeton, *Federal and State Claims to Submerged Lands Under Coastal Waters*, 25 TEX. L. REV. 262, 262 (1947); *see also* William K. Metcalf, *The Tidelands Controversy: A Study in Development of a Political-Legal Problem*, 4 SYRACUSE L. REV. 39, 39 (1952) ("Many domestic, political and legal questions have been brought to the attention of the American public since 1937, but it would be most doubtful whether any single issue of the period has been more hotly debated and contested than the tidelands question."). The term "tidelands" was "used to mean the submerged lands under the marginal sea as well as the lands covered and uncovered by the ebb and flow of the tides." Keeton, *supra*, at 263.

2. United States v. California, 332 U.S. 19 (1947).

3. *Id.* at 38–39. The *California* decision was followed by similar decisions in United States v. Louisiana, 339 U.S. 699 (1950) and United States v. Texas, 339 U.S. 707 (1950).

4. Texas v. Sec'y of Interior, 580 F. Supp. 1197, 1200 (E.D. Tex. 1984).

5. Avrum M. Gross, *The Maritime Boundaries of the States*, 64 MICH. L. REV. 639, 656 (1966).

6. Submerged Lands Act, Pub. L. No. 31, Ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301–15). When defining the boundaries of the lands granted to the states, the Submerged Lands Act uses "geographical miles" as the unit of measure. *See, e.g.*, 43 U.S.C. § 1312 ("The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line[.]"). A "geographical mile" is "the length of 1 minute of arc of the equator, or 6,087.08 feet," which is not the same as but "approximates the length of the nautical mile." NAT'L GEOSPATIAL-INTEL.

Outer Continental Shelf Lands Act (OCSLA),[7] Congress claimed federal control over the remaining "subsoil and seabed" that surrounds the United States.[8]

This federally controlled area—the Outer Continental Shelf[9]—is made up of more than 1.7 billion subsea acres and generally extends seaward up to 200 nautical miles from the U.S. coast.[10] And under OCSLA, Congress expressed the "urgent need" to explore and develop the Outer Continental Shelf's "vast resources," including its oil and gas deposits.[11]

With that development, there has been a long history of litigation arising out of operations on the Outer Continental Shelf. OCSLA

AGENCY, Pub. No. 2, 2 THE AM. PRAC. NAVIGATOR (BOWDITCH) 346 (2019, updated June 2021), https://perma.cc/4XY8-HYCH; *see also id.* at 374, 377 (a "nautical mile" is "usually considered the length of 1 minute of any great circle of the earth," but the standard International Nautical Mile length of 1,852 meters (or 6,076.11549 feet) was adopted by the U.S. Departments of Defense and Commerce in 1954). Sources use "nautical" interchangeably with "geographical" (or "geographic") mile when discussing the relevant boundaries of the submerged lands controlled by the states. *See* United States v. Louisiana, 363 U.S. 1, 9 n.6 (1960) (also using "marine" miles interchangeably); David W. Robertson, *The Outer Continental Shelf Lands Act's Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit's Mistakes*, 38 J. MAR. L. & COM. 487, 492–93 (2007). To complicate matters further, the Submerged Lands Act allows certain states, including Texas and Florida, to claim control out to "three marine leagues into the Gulf of Mexico," which is equivalent to nine nautical miles. 43 U.S.C. § 1311(b); *see* United States v. Louisiana, 363 U.S. at 9 & n.6; United States v. Texas, 339 U.S. at 713 & n.5. A state's "coast line" is "the line of ordinary low water mark along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. § 1301(c).

7. Outer Continental Shelf Lands Act, Pub. L. No. 212, Ch. 345, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1311–56c).

8. 43 U.S.C. §§ 1331, 1332.

9. OCSLA refers to this area as the "outer Continental Shelf," without capitalizing "outer." 43 U.S.C. § 1331. For clarity, this article will generally use "Outer Continental Shelf," but some sources may mirror the statute or use "OCS" as an abbreviation. In any event, the term reflects the political division contemplated by Congress in 1953 and not a specific geological distinction. *See* Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 24–28 (1953). Geologically, the Continental Shelf "begins at the shoreline" and extends until there is a sharp decline to where "the true ocean bottom begins." *Id.* at 24. The portion granted to the states under the Submerged Lands Act could be called the "inner Continental Shelf." OCSLA deals with the remaining, federally controlled portion controlled—the "outer Continental Shelf." *See* H.R. REP. NO. 83-413, at 2 (1953); S. REP. NO. 83-411, pt. 4, at 4 (1953).

10. U.S. Bureau of Ocean Energy Mgmt., 2023–2028 National Outer Continental Shelf Oil and Gas Leasing Proposed Program, Part II, 1-1, 4-1 (July 2022), https://perma.cc/HS5Y-22Y7 [hereinafter *BOEM Proposed Program*]. OCSLA does not expressly define the seaward boundary of the Outer Continental Shelf. 43 U.S.C. § 1331; *see* Christopher, *supra* note 9, at 26 ("Because it would have been difficult to frame a satisfactory definition, the precise seaward limit of the outer Continental Shelf is not defined by the Act."); Michael Atkins, *Overdue for Overhaul: The Outer Continental Shelf Lands Act*, 46 TULANE MARITIME L. J. 481, 486 (2022) ("In the early 1950s, the outer perimeter of the OCS was of little practical importance, as the primitive technology of the day prevented venturing that far from shore to drill."). But Congress assumed "the seaward limit of the Continental Shelf is also the seaward limit of the outer Continental Shelf." Christopher, *supra* note 9, at 26. The general limit of 200 nautical miles was later derived from principles of international law. *See* Restatement (Third) of Foreign Relations Law §§ 511, 515 (Am. L. Inst. 1987); U.N. Convention on the Law of the Sea, art. 76, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397, 428–29 (entered into force Nov. 16, 1994).

11. Outer Continental Shelf Lands Act, Pub. L. No. 212, Ch. 345, 67 Stat. 462, 468 (1953) (codified as amended at 43 U.S.C. §§ 1311–56c); *see also* H.R. REP. NO. 83-413, at 2; S. REP. NO. 83-411, pt. 3, at 2.

broadly grants federal courts original jurisdiction over those disputes.[12] In what is now codified as 43 U.S.C. § 1349(b), OCSLA provides:

> [T]he district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals . . . .[13]

And although federal jurisdiction provided under OCSLA is not exclusive,[14] the jurisdictional grant in § 1349(b) has proven to be "very broad."[15]

For damages cases or those involving injuries caused by a physical act or activity offshore, application of OCSLA's federal jurisdiction provision is straightforward. The Fifth Circuit explained how courts "typically assess jurisdiction" under § 1349(b) using a two-prong test in its *Deepwater Horizon* decision—one of the many cases related to the 2010 Deepwater Horizon oil spill.[16] First, courts consider whether "the activities that caused the injury constituted an 'operation' 'conducted on the outer Continental Shelf' that involved the exploration and production of minerals."[17] Second, courts ask whether "the case 'arises out of, or in connection with' the operation."[18] The Fifth Circuit's test has been widely adopted.[19] But, in applying this test, courts addressing the vast range of commercial disputes related to operations and interests on the Outer Continental Shelf have struggled to apply

12. Laredo Offshore Const., Inc. v. Hunt Oil Co., 754 F.2d 1223, 1228 (5th Cir. 1985).

13. 43 U.S.C. § 1349.

14. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 484 (1981) ("Nothing in the language, structure, legislative history, or underlying policies of OCSLA suggests that Congress intended federal courts to exercise exclusive jurisdiction . . . .").

15. Tenn. Gas Pipeline v. Hous. Cas. Ins. Co., 87 F.3d 150, 154 (5th Cir. 1996).

16. *In re* Deepwater Horizon, 745 F.3d 157, 163 (5th Cir. 2014); *see also id.* at 161 ("The Macondo well, which was being drilled by the mobile offshore drilling rig DEEPWATER HORIZON, experienced a catastrophic blowout and explosion in April 2010 and caused hydrocarbon, mineral, and other contaminant pollution all along the shores and estuaries of the Gulf Coast states, inflicting billions of dollars in property and environmental damage and spawning a litigation frenzy."); Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413, 418 (5th Cir. 2013) (noting that the April 20, 2010 "explosion on *Deepwater Horizon* tragically killed eleven people").

17. *Deepwater Horizon*, 745 F.3d at 163.

18. *Id.*

19. *See, e.g.*, Par. of Plaquemines v. Total Petrochemical & Refin. USA, Inc., 64 F.Supp.3d 872, 893 (E.D. La. 2014) (discussing *Deepwater Horizon*'s "two-prong inquiry"). Other circuits have followed or cited this analysis from *Deepwater Horizon* with approval. *See, e.g.*, Minnesota v. Am. Petroleum Inst., 63 F.4th 703, 712 (8th Cir. 2023) (adopting Fifth Circuit's test); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1272 (10th Cir. 2022) (same); Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178, 220 (4th Cir. 2022) (same).

the *Deepwater Horizon* test and have disagreed over the full scope of federal jurisdiction authorized under OCSLA.[20]

After discussing the relevant background that led to OCSLA's adoption and the broad grant of federal jurisdiction in § 1349, this Article will detail the disparate development of OCSLA jurisprudence and conflicting views among courts regarding the scope of federal jurisdiction under § 1349. I suggest that recent decisions affirming broader jurisdiction under OCSLA in the context of commercial disputes are more faithful to the statute's text, which reflects Congress's intent that federal judicial power extend "to the entire range of legal disputes that it knew would arise relating to resource development on the Outer Continental Shelf."[21]

Beyond elucidating the substantive legal significance of this jurisdictional divide among federal courts, understanding the full reach of OCSLA jurisdiction under § 1349 will empower parties and counsel assessing commercial claims by providing more options to file or remove cases to federal court, should it be their preferred forum.

I. CONTROLLING THE CONTINENTAL SHELF

The 1894 discovery of oil in the submerged sands off the Santa Barbara, California, coast is typically identified as the start of offshore oil and gas development in the United States.[22] The "wobbly wooden derricks" which were mounted down on piers that stretched out from the southern California beaches were a far cry from the deep-water platforms of today.[23] But they marked the start of a dispute over control of these resources that would not be resolved for at least another fifty years.

As development increased, coastal states claimed ownership of their adjacent seabed.[24] These states "exercised general police powers" over the "marginal seas" and eventually authorized "the production of oil"

20. *See* Plains Gas Sols., LLC v. Tenn. Gas Pipeline Co., LLC, 46 F.Supp.3d 701, 705 (S.D. Tex. 2014); EPL Oil & Gas, LLC v. Trimont Energy (NOW), LLC, 640 F.Supp.3d 687, 693 (E.D. Tex. 2022).

21. Laredo Offshore Const., Inc. v. Hunt Oil Co., 754 F.2d 1223, 1228 (5th Cir. 1985) (citing Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 357 (1969)).

22. Metcalf, *supra* note 1, at 39; Edward A. Fitzgerald, *The Seaweed Rebellion: Federal-State/Provincial Conflicts Over Offshore Energy Development in the United States, Canada, and Australia*, 7 CONN. J. INT'L L. 255, 256 (1992).

23. Atkins, *supra* note 10, at 486.

24. James W. Corbitt Jr., *The Federal-State Offshore Oil Dispute*, 11 WILLIAM & MARY L. REV. 755, 755 (1970).

offshore.[25] California was the first to issue offshore oil leases in 1921; Texas was next in 1926; and Louisiana followed in 1938.[26] Revenue from the royalties from these leases proved to be valuable to the states, funding state parks and public schools.[27]

Throughout this early period, the federal government largely "recognized state ownership of offshore lands."[28] But as the value of these offshore deposits increased and the federal government realized their significance, control over the land under the nation's coastal waters became a major point of controversy.[29]

A. The Tidelands Controversy

Starting in 1937, the controversy over ownership of the "tidelands" began to simmer in Congress, which continued for the next decade.[30] These legislative efforts focused on the "three-mile marginal belt" of submerged land that the states traditionally claimed.[31] Control of the Outer Continental Shelf was largely ignored.[32]

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25. Robert E. Hardwicke, Carl Illig & C. Perry Patterson, *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398, 400–01 (1948).

26. Edward A. Fitzgerald, *The Tidelands Controversy Revisited*, 2 ENV'T L. 209, 212 (1989).

27. Ernest R. Bartley, *The Tidelands Oil Controversy*, 2 W. POL. Q. 135, 136 (1949).

28. Edward A. Fitzgerald, *The Seaweed Rebellion: Florida's Experience with Offshore Energy Development*, 18 J. LAND USE & ENV'T L. 1, 4 (2002); Bartley, *supra* note 27, at 136–37. Fitzgerald notes that in "over thirty decisions from 1842 through 1935, the Supreme Court held that coastal states owned submerged lands under their navigable waters" and that the U.S. Department of the Interior "recognized coastal state ownership when it refused to issue leases for offshore oil and gas development in the 1930's." Fitzgerald, *supra*, at 4. Bartley adds that he "has not been able to find a single instance, down to the early 1930's, in which an executive officer of the national government ever contested the actions of the states in the three-mile zone." Bartley, *supra* note 27, at 137.

29. Keeton, *supra* note 1, at 262; *see also* Joseph Walter Bingham, *Juridical Status of the Continental Shelf*, 26 S. CAL. L. REV. 4, 4 (1952) (discussing international aspects of the "heighted appreciation of mineral resources" globally).

30. *See* Bartley, *supra* note 27, at 137–41; Metcalf, *supra* note 1, at 43–51. It has been noted that the "tidelands controversy" is a misnomer because "ownership of the tidelands, which is the area between the high and low water marks, was never in question" as the states owned that land. Fitzgerald, *supra* note 22, at 256 (citing Borax Consol. v. City of L.A., 296 U.S. 10, 15 (1935); Weber v. Bd. of Harbor Comm'rs, 85 U.S. 57 (1873)). Rather, "the submerged lands seaward of the low water mark . . . were the focus of the controversy." Fitzgerald, *supra* note 22, at 256; *see also* Comment, *Conflicting State and Federal Claims of Title in Submerged Lands of the Continental Shelf*, 56 YALE L. J. 356, 357 n.10 (1947) ("The terms 'submerged lands' and 'tidelands' are not used with precise meanings in most cases. Generally, the former refers to lands below the line of mean low tide, the latter to lands between mean low tide and mean high tide.").

31. Bartley, *supra* note 27, at 135–36. The three-nautical-mile extension of the country's territorial seas dates back to at least 1793, when then-Secretary of State Thomas Jefferson "would make a tentative claim to the limit in notes sent to England and France." Robert Jay Wilder, *The Three-Mile Territorial Sea: Its Origins and Implications for Contemporary Offshore Federalism*, 32 VA. J. INT'L L. 681, 703, 707–10 (1992). The three-mile belt was incorporated into federal law in 1794. *Id.* at 710 (discussing an Act of 1794 that prohibited "captures made within the waters of the United States or within a marine league of the coasts or shores thereof"). For the next 150 years after its creation, both the states and the federal government assumed that "the states possessed exclusive ownership of resources within this narrow offshore belt." *Id.* at 711.

32. Christopher, *supra* note 9, at 28.

The opening salvo came from Senator Gerald P. Nye of North Dakota, who introduced a bill at the behest of President Roosevelt's Secretary of the Interior Harold Ickes, declaring the three-mile strip "part of the public domain of the United States."[33] Senator Nye quickly substituted his proposal for a resolution expressly asserting that the submerged lands were federal property.[34] But these and similar congressional efforts failed to pass both houses of Congress; an even narrower resolution targeting coastal California oil reserves did not gain the requisite support in the House of Representatives.[35] Then, the Second World War "brought a temporary cessation" to the tidelands controversy.[36]

After the War, the shift toward federal control started to solidify. In 1945, President Truman asserted exclusive federal control over "the natural resources of the subsoil and sea bed of the continental shelf . . . contiguous to the coasts of the United States . . . ."[37] Then, when the federal government pressed the issue before the Supreme Court, the *California* decision in 1947,[38] followed by the *Louisiana* and *Texas* cases in 1950,[39] "established that the 'control and disposition' of the seabed is 'the business of the Federal Government rather than the States.'"[40]

Yet those decisions did not end the controversy. The coastal states pressed their claims in the political arena as the tidelands question became an issue in the 1952 presidential election.[41] During the campaign,

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33. Hardwicke, Illig & Patterson, *supra* note 25, at 401; *see also* S. 2164, 75th Congress, 1st Session; Bartley, *supra* note 27, at 138 (noting that Senate Bill 2164 was "the first time . . . that any declaration or assertion of such right was ever made in the Congress").

34. Bartley, *supra* note 27, at 138 (citing 23 S. J. Res. 208, 75th Congress, 1st Session and Testimony of Senator Nye, *Hearings* on S.J. Res. 208 (1938), 5).

35. *Id.* at 138–39.

36. *Id.* at 139.

37. Exec. Order No. 9633, 10 Fed. Reg. 12,303 (Sept. 28, 1945); *see also* Proclamation 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945) ("Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."). For a contemporary defense of President Truman's exercise of authority over the Continental Shelf from an international law perspective, *see* Bingham, *supra* note 29, at 9–18.

38. United States v. California, 332 U.S. 19, 22 (1947).

39. United States v. Louisiana, 339 U.S. 699, 699 (1950); United States v. Texas, 339 U.S. 707, 707 (1950).

40. Ten Taxpayer Citizens Grp. v. Cape Wind Assoc., LLC, 373 F.3d 183, 188 (1st Cir. 2004) (quoting United States v. Maine, 420 U.S. 515, 522 (1975)); *see also* John Hanna, *The Submerged Land Cases*, 3 STAN. L. REV. 193, 193–94 (1951); Texas v. Sec'y of Interior, 580 F. Supp. 1197, 1200 (E.D. Tex. 1984).

41. Fitzgerald, *supra* note 22, at 259 (explaining that "Republicans favored restoring the coastal states' historic title" whereas "Democrats were split on the issue," and that "Eisenhower's victory, coupled with the election of a Republican Congress, provided the proper climate" for new legislation); Metcalf, *supra* note 1, at 88–89 (discussing "how the various candidates lined up on the topic of submerged lands");

soon-to-be President Eisenhower supported the states' claims to the tidelands.[42] After the election, Congress acted promptly to address the dispute, passing the Submerged Lands Act and OCSLA in 1953.[43]

B. The Submerged Lands Act and OCSLA

Starting with the Submerged Lands Act,[44] Congress abrogated the tidelands cases—the *California*, *Louisiana*, and *Texas* decisions—by granting "title to and ownership of" the tidelands back to the states.[45] In doing so, Congress sought to end the federal-state dispute and cede control within the traditional three-nautical-mile (or three-marine-league) limit to each coastal state.[46] At the same time, Congress asserted federal rights to and control of "the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward" from the area granted to the states in the Submerged Lands Act.[47]

With title to the tidelands somewhat resolved,[48] Congress turned to the development of the "vast mineral resources" on the Outer Continental Shelf.[49] Through OCSLA, Congress declared as "the policy of the United States" that "the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to [the federal government's] jurisdiction, control, and power of disposition."[50] OCSLA

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see also Hanna, *supra* note 40, at 194 (explaining the Court's tideland decisions were "certain to be . . . appealed [to Congress] as a political matter" and the "issue is squarely and solely whether the revenues from these lands are to belong to the country as a whole, or to the respective states").

42. Wilder, *supra* note 31, at 736 & n.347. Adlai Stevenson, the Democratic candidate, opposed the state's claims. *Id.*

43. *Id.* at 738.

44. 43 U.S.C. §§ 1301–15.

45. *Id.* at § 1311(a).

46. *Id.* at § 1301(a); *see also* Fitzgerald, *supra* note 22, at 259 (explaining that "coastal states were awarded an unconditional grant to offshore lands three miles from their coastline," but "[s]tates bordering the Gulf of Mexico could assert an even greater claim of three marine leagues") (citing 43 U.S.C. §§ 1302, 1311, 1312); *see also* Corbitt, *supra* note 24, at 757.

47. 43 U.S.C. § 1302; *see also* Ten Taxpayer Citizens Grp. v. Cape Wind Assoc., LLC, 373 F.3d 183, 188 (1st Cir. 2004) ("A major purpose of the OCSLA was to specify that federal law governs on the 'outer Continental Shelf'—defined as all submerged lands under U.S. sovereign control lying seaward of the three-mile boundary . . . —and on any fixed structures attached to the outer Continental Shelf.") (internal citations omitted).

48. *See* Texas v. Sec'y of Interior, 580 F. Supp. 1197, 1201 (E.D. Tex. 1984) (explaining that OCSLA and the Submerged Lands Act "narrowed, but failed to eliminate, federal-state conflicts concerning ownership of offshore resources," including the "precise location of a state's coastline" and "the seaward limit" of a state's inland waters).

49. S. REP. NO. 83-411, pt. 4, at 4.

50. 43 U.S.C. § 1332(1); *see also* Outer Continental Shelf Lands Act, Pub. L. No. 212, Ch. 345, § 3(a), 67 Stat. 462, 462 (1953) (as originally enacted). As used in OCSLA, "appertain to the United States" means "to belong to" or "to be a part of the United States," mirroring President Truman's 1945 Executive Order and Proclamation. *See supra* note 37 and accompanying text; Christopher, *supra* note 9, at 32–33;

makes the U.S. Constitution, federal laws, and the "civil and political jurisdiction of the United States" fully applicable to the Outer Continental Shelf.[51] And it lays out "detailed provisions for the exercise of exclusive jurisdiction in the area and for the leasing and development of the resources of the seabed."[52] Simply put, OCSLA was "a sweeping assertion of federal supremacy over the submerged lands" on the Outer Continental Shelf.[53]

Expectations for the Outer Continental Shelf were significant.[54] Congress expressly adopted OCSLA "to meet the urgent need" for further exploration and development of the oil and gas deposits on the Outer Continental Shelf.[55] Over the following decades, the development of hydrocarbons offshore increased exponentially. In 2019, production of crude oil reached a "record high 1.9 million barrels per day" and is expected to continue to grow into the next decade.[56]

II. FEDERAL COURT JURISDICTION UNDER OCSLA

It is well-known (or at least often-stated) that federal courts have limited subject-matter jurisdiction.[57] Article III, § 2 of the Constitution lists the categories of cases and controversies "over which federal judicial authority may extend."[58] Lower federal courts are "limited to those subjects encompassed within a statutory grant of jurisdiction."[59]

Appertain, BLACK'S LAW DICTIONARY (4th rev. ed. 1968) ("To belong to; to have relation to; to be appurtenant to").

51. 43 U.S.C. § 1333(a)(1).

52. United States v. Maine, 420 U.S. 515, 526 (1975); *see* 43 U.S.C. §§ 1332–56c.

53. Ten Taxpayer Citizens Grp. v. Cape Wind Assoc., LLC, 373 F.3d 183, 188 (1st Cir. 2004); *see also United States v. Maine*, 420 U.S. at 527 ("Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit when . . . it enacted [OCSLA].").

54. Metcalf, *supra* note 1, at 39 (calling control over the tidelines "the greatest prize that has ever slipped through the fingers" of the states, estimated to be "10,000,000,000 barrels of oil").

55. Outer Continental Shelf Lands Act, Pub. L. No. 212, Ch. 345, § 8, 67 Stat. 462, 468 (1953); *see also* H.R. REP. NO. 83-413, at 2; S. REP. NO. 83-411, pt. 7, at 21. OSCLA was later amended to further emphasize that the Outer Continental Shelf "is a vital national resource reserve" that "should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3).

56. *BOEM Proposed Program, supra* note 10, at Part II, 1-13.

57. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005). The maxim that "federal courts are courts of limited jurisdiction" has been repeated by courts and commentators thousands of times. *See* Zachary D. Clopton, *Catch and Kill Jurisdiction*, 121 MICH. L. REV. 171, 219 & n.210 (2022) (noting that the phrase "appears in more than 10,000 federal cases"); *see also* Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1704 (2020) (emphasizing that federal courts have limited *subject-matter* jurisdiction).

58. Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1746 (2019).

59. *Id.* (citing Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982)); *see* 28 U.S.C. §§ 1330–69.

Thus, before a case can proceed in a U.S. district court, it must have "a statutory basis" for doing so.[60]

OCSLA grants federal courts sweeping jurisdiction over "cases and controversies arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf."[61] OCSLA's broad jurisdictional grant ensures parties a federal forum to litigate the full range of cases involving Outer Continental Shelf operations. Plaintiffs can rely on OCSLA to invoke district court federal question jurisdiction when filing claims.[62] And defendants sued in state court can invoke OCSLA to remove cases to federal court.[63] Thus, understanding OCSLA's full jurisdictional reach—as well as its limits—is important for parties making the strategic decision of whether they should file or remove their cases to federal court.[64]

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60. *Home Depot*, 139 S. Ct. at 1746.

61. 43 U.S.C. § 1349. Other OCSLA provisions use the word "jurisdiction" as a synonym for "sovereignty" as part of Congress's goal of asserting control over the Outer Continental Shelf. Amoco Prod. Co. v. Sea Robin Pipeline Co., 844 F.2d 1202, 1205–06 (5th Cir. 1988). In § 1349, "jurisdiction" means "'the authority by which courts and judicial officers take cognizance of and decide cases.'" *Id.* (quoting BLACK'S LAW DICTIONARY (4th ed. 1951)).

62. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States."). While OCSLA provides an independent basis for jurisdiction, claims for relief under OCSLA are typically understood to require courts to "exercise federal question jurisdiction under 28 U.S.C. § 1331." Broussard v. John E. Graham & Sons, 798 F. Supp. 370, 372 (M.D. La. 1992); *see also* 14A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3671.1 (4th ed. 2002) (footnotes 174 and 175 and accompanying text). But in some circumstances, exercising original jurisdiction under OCSLA is substantively distinct from general federal question jurisdiction. *See In re* Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, 747 F.Supp.2d 704, 707 (E.D. La. 2010). For this reason, OCSLA should not be lumped in with other various jurisdiction-granting provisions of the U.S. Code that are duplicative of the general grant in § 1331. *See* 13D WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 3561, 3585 (3d ed. 1998); Winstead v. J.C. Penney Co., 933 F.2d 576, 580 (7th Cir. 1991) (calling the "numerous special federal jurisdictional statutes" made redundant by the removal of the amount in controversy requirement from § 1331 "beached whales").

63. *See* 28 U.S.C. § 1441(a) (allowing removal for "any civil action . . . of which the district courts of the United States have original jurisdiction"); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483 n.12, 484 (1981). The extensive use of removal by defendants has its share of critics. *See generally* Lonny Hoffman and Erin Horan Mendez, *Wrongful Removals*, 71 FLA. L. REV. 202 (2020); Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 HARV. L. REV. FORUM 87 (2021); Clopton, *supra* note 57, at 195–200. Yet, where a plaintiff has strategically avoided federal court, removal gives defendants an opportunity to litigate federal claims in federal court. *See* 1 MOORE'S MANUAL—FEDERAL PRACTICE AND PROCEDURE § 8.01; *see also* Joan Steinman, *Waiving Removal, Waiving Remand–The Hidden and Unequal Dangers of Participating in Litigation Dangers of Participating in Litigation*, 71 FLA. L. REV. 689, 696 (2019); Clopton & Lahav, *supra*, at 91.

64. *See* Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 55 (2009) ("Forum selection is often the most important strategic decision a party makes in a lawsuit."); Anthony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 168 (2000) (asserting that "litigants can regularly affect the outcome of their dispute by where they file suit and how they cast their claim"); *see also* Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 391 (2006) (arguing that lawyers are "ethically and rationally . . . compelled to seek the most favorable forum to further their clients' interests").

A. Legislative Development of § 1349(b)

Despite being "undeniably broad in scope," the federal jurisdiction that Congress granted under OCSLA received little attention when adopted.[65]

When drafting the provisions that would become OCSLA, the House and Senate had similar but slightly different goals. The House's proposal reflected a straightforward purpose: to "amend the Submerged Lands Act in order that the area in the outer Continental Shelf beyond boundaries of the States may be leased and developed by the Federal Government."[66] In fact, an early version of the bill that would become the Submerged Lands Act included provisions related to the Outer Continental Shelf.[67] But the Outer Continental Shelf provisions were dropped because "no satisfactory legislative solution had then been devised to the complex problems posed by the Shelf."[68] Instead, Congress proceeded with a separate bill for the Outer Continental Shelf.[69] Shortly after the Submerged Lands Act was passed, the House moved quickly to adopt "substantially identical" provisions for its new bill.[70]

The Senate took a more deliberate approach.[71] Beyond setting up a federal leasing program, the Senate paid particular attention to the issue of what law—federal or state—would apply to disputes on the Outer Continental Shelf.[72]

Congress ultimately determined that federal law would apply,[73] but each adjacent state's substantive laws would be deemed to be federal law "[t]o the extent that they are applicable and not inconsistent with"

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65. *See* Christopher, *supra* note 9, at 31–61 (discussing the "[s]ignficant legislative decisions" made in the drafting of OCSLA based in part on "the author's information").

66. H.R. REP. NO. 83-413, at 2 (1953).

67. *Id.* at 1; Christopher, *supra* note 9, at 29–30.

68. H.R. REP. NO. 83-413, at 1. Notably, the Senate failed to include any provision for the development of that Outer Continental Shelf in its version of the Submerged Lands Act.

69. Christopher, *supra* note 9, at 30; J. Skelly Wright, *Jurisdiction in the Tidelands*, 32 TULANE L. REV. 175, 181–83 (1957–1958).

70. Christopher, *supra* note 9, at 31; H.R. REP. NO. 83-413, at 1.

71. S. REP. NO. 83-411, pt. 4, at 2–3.

72. S. REP. NO. 83-411, pt. 4, at 6 ("The primary policy question before the committee in its consideration . . . has been not a question of State versus Federal rights, but whether, and how far, the Federal Government should make use of already existing State laws and State facilities, backed by State experience and knowledge, in providing for administration of the area."); *see also* Christopher, *supra* note 9, at 37–43 (discussing the competing approaches).

73. 43 U.S.C. § 1333(a)(1); *see also* Atkins, *supra* note 10, at 498 & n.139 ("Federal law applies to drilling rigs and other artificial islands as if they were federal enclaves within a landlocked state" such as "federal courthouses, military bases, and national parks.").

federal law.[74] Focused on the "artificial islands" where a range of disputes with workers might arise, Congress expected offshore oil workers to be more "closely tied to the adjacent State, to which they often commute and on which their families live."[75] And because they were "unlike transitory seamen," Congress "deliberately eschewed the application of admiralty principles" under OCSLA.[76]

Distinct from the applicable law that would apply under OCSLA,[77] one matter that got little attention in the drafting was the scope of federal jurisdiction that would be granted under OCSLA.[78] While both the House and the Senate assumed some federal court jurisdiction would apply, the reach of each proposal was different.

Reflecting its narrower focus, the House proposal would have "merely" provided for federal court jurisdiction over proceedings involving a federal lease or the right granted under federal leases for the use of the Outer Continental Shelf.[79] Section 13 of the House bill, titled "Actions Involving Outer Continental Shelf," provided:

> Any court proceeding involving a lease or rights under a lease of a portion of the outer continental shelf may be instituted in the United States district court for the district in which any defendant may be found or for the district in which the leased property, or some part thereof, is located; or, if no part of the leased property

74. 43 U.S.C. § 1333(a)(2)(A); Wright, *supra* note 69, at 182–83. In 2019, the Court emphasized that "all law on the OCS is federal law." Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881, 1886 (2019). While some assert as shorthand that under OCSLA, "the law of the adjacent state applies," it is more accurate to say OCSLA "deems the adjacent State's law to be federal law." *Parker Drilling*, 139 S. Ct. at 1886; *accord* Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 355–56 (1969) ("law was to be federal law of the United States, applying state law only as federal law and then only when not inconsistent with applicable federal law"). When OCSLA was adopted, it was predicted that "state laws [which] 'are applicable and not inconsistent' with federal laws and regulations will be open to constant interpretation and controversy." Christopher, *supra* note 9, at 42. Indeed, the Supreme Court most recently addressed this issue in 2019. *Parker Drilling*, 139 S. Ct. at 1889 (explaining that "state laws can be 'applicable and not inconsistent' with federal law . . . only if federal law does not address the relevant issue").

75. *Rodrigue*, 395 U.S. at 355.

76. *Id.*

77. The jurisdiction granted to federal courts under OCSLA is distinct and independent from the provisions selecting the applicable law. *See* Kenneth G. Engerrand, *Primer of Remedies on the Outer Continental Shelf*, 4 LOYOLA MARITIME L. J. 19, 25 (2005) (noting that "courts have struggled with the relationship between jurisdictional issues and choice of applicable law"); Barker v. Hercules Offshore, Inc., 713 F.3d 208, 220 (5th Cir. 2013). Thus, even if a court has jurisdiction pursuant to OCSLA, the court must "turn to the OCSLA choice of law provision to ascertain whether state, federal, or maritime law applies to a particular case." Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211, 215 (5th Cir. 2016) (citation omitted).

78. Christopher, *supra* note 9, at 41.

79. H.R. REP. NO. 83-413, at 6.

> is within any district, for the district nearest to the property involved.[80]

As the Senate was proceeding more comprehensively, its proposal took a broader approach, extending federal court jurisdiction to all disputes "arising out of operations" on the Outer Continental Shelf.[81] Section 4(b) of the Senate bill stated:

> [T]he United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district nearest the place where the cause of action-arose.[82]

When the two chambers came together, the Conference Committee recommended adopting the Senate's version of the bill with some minor amendments. As a result, the final language adopted by Congress largely mirrored the Senate's proposal.[83] Section 4(b) of OCSLA provides:

> The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be

80. H.R. REP. NO. 83-413, at 11.

81. S. REP. NO. 83-411, pt. 6, at 11; Christopher, *supra* note 9, at 40.

82. S. REP. NO. 83-411, pt. 7, at 16 (emphasis and footnotes omitted).

83. H.R. REP. No. 83-1031, at 2 (1953) (Conf. Rep.); Christopher, *supra* note 9, at 41; Wright, *supra* note 69, at 181–82.

> found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.[84]

Despite the expanded reach, § 4(b) warranted little comment.[85] And through the amendments to OCSLA,[86] the broad grant of federal court jurisdiction over cases with a connection with "operations" on the Outer Continental Shelf has remained in place.

B. The Fifth Circuit's "But-For" Test

Courts have long recognized that the "reach of OCSLA is broad."[87] Like the law established under OCSLA, Congress intended that the district court's original jurisdiction would extend to "the full range of potential legal problems that might arise in connection with operations on the Outer Continental Shelf."[88] But courts have also recognized that there must be some limit to cases that OCSLA can reach.[89]

When determining whether jurisdiction is appropriate under OCSLA, the Fifth Circuit's *Deepwater Horizon* opinion is generally considered the leading precedent.[90] There, the Fifth Circuit outlined a

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84. Outer Continental Shelf Lands Act, Pub. L. No. 212, Ch. 345, § 4(b), 67 Stat. 462, 463 (1953) (as originally enacted); *see also* Wright, *supra* note 69, at 182 ("The effect of the Outer Continental Shelf Act is that, for jurisdictional purposes, the area of the shelf seaward from the three-mile line or other recognized historical state boundary shall be under the exclusive control of the United States, much in the manner of a post office or fort or other place under exclusive federal jurisdiction, but the civil and criminal laws of the adjacent state, where not in conflict with federal law, are to be applied by the federal district courts to controversies 'arising out of or in connection with' any mineral operations on the shelf.").

85. H.R. Rep. No. 83-1031, at 12 (statement of House managers simply stated that "Provision is made for the jurisdiction in the United States district court for cases and controversies arising on the outer Continental Shelf"). The only remarks on § 4(b) that were apparently notable at the time did not involve the scope of federal court jurisdiction—rather, at least one senator questioned whether the fixing venue provision might violate the Sixth Amendment. Christopher, *supra* note 9, at 41–42 n.96. But at least one senator in the minority expressed general concerns about civil actions proceeding in federal court. S. REP. NO. 83-411 at 66 (minority report).

86. OCSLA's jurisdictional provisions were originally codified at 43 U.S.C. § 1333(b), but Congress made minor amendments and recodified the provisions in 1978. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 479 n.5 (1981) (citing Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95–372, Title II, § 208(b), 92 Stat. 657); H.R. REP. NO. 95-590 at 162 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1568; H.R. REP. NO. 95-1474 at 114 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1674, 1713. In 1984, as part of a broader set of "improvements" to the federal courts, Congress made another minor change that did not affect § 1349(b). Act of Nov. 8, 1984, Pub. L. No. 98–620, Title IV, § 402(44), 98 Stat. 3335 (repealing former subsection (d)).

87. Recar v. CNG Producing Co., 853 F.2d 367, 369 (5th Cir. 1988).

88. Laredo Offshore Const., Inc. v. Hunt Oil Co., 754 F.2d 1223, 1228 (5th Cir. 1985) (citing Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 352 (1969)); *see also* Tenn. Gas Pipeline v. Hous. Cas. Ins. Co., 87 F.3d 150, 156 (5th Cir. 1996) ("Congress arguably intended to vest the federal courts with the power to hear any case involving the OCS . . . .").

89. *In re* Deepwater Horizon, 745 F.3d 157, 163 (5th Cir. 2014) ("'Mere connection' to activities on the OCS . . . is insufficient . . . ."); City of Hoboken v. Chevron Corp., 45 F.4th 699, 710 (3d Cir. 2022) ("[H]owever broad, the statute must stop somewhere."); Plains Gas Sols., LLC v. Tenn. Gas Pipeline Co., LLC, 46 F.Supp.3d 701, 705 (S.D. Tex. 2014).

90. *See Deepwater Horizon*, 745 F.3d at 163.

two-step inquiry, explaining that "[c]ourts typically assess jurisdiction under [§ 1349] in terms of whether (1) the activities that caused the injury constituted an 'operation' 'conducted on the outer Continental Shelf' that involved the exploration and production of minerals, and (2) the case 'arises out of, or in connection with' the operation."[91]

Deepwater Horizon's two-part test—sometimes called the "but-for test"[92]—has been followed in numerous cases and expressly adopted by at least three other circuit courts.[93] But the specific formulation of the *Deepwater Horizon* test deserves some scrutiny.[94]

For the first step, rather than determining whether the underlying activity in the case involves an "operation" on the Outer Continental Shelf, *Deepwater Horizon* has been read to require determination of a "threshold question" of what "activities" "caused the injury."[95] And only after the injury-causing activity has been identified, the "next question" that courts address (still within step one) "is whether these activities constitute an operation" on the Outer Continental Shelf.[96] However, that "threshold question" departs from OCSLA because there is no textual requirement that an Outer Continental Shelf "operation" cause the injury at issue.[97] Rather, OCSLA only requires "that

91. *Id.* at 163; *see also* Par. of Plaquemines v. Total Petrochemical & Refin. USA, Inc., 64 F.Supp.3d 872, 893 (E.D. La. 2014) (discussing *Deepwater Horizon*'s "two-prong inquiry"); Jonathan D. Baughman & Marcus V. Eason, *Discussion of Selected Federal Court Jurisdiction Issues in Oil and Gas Disputes*, 64 ANN. INST. ON MINERAL L. 234, 249 (2018).

92. *E.g.*, Sam v. Laborde Marine, L.L.C., No. H-19-4041, 2020 WL 59633, at *2 (S.D. Tex. Jan. 6, 2020); Ronquille v. Aminoil Inc., No. 14-164, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014).

93. Minnesota v. Am. Petroleum Inst., 63 F.4th 703, 712 (8th Cir. 2023) (adopting Fifth Circuit's test); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1272 (10th Cir. 2022) (same); Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178, 220 (4th Cir. 2022) (same); *see also, e.g.*, District of Columbia v. Exxon Mobil Corp., 640 F.Supp.3d 95, 108 (D.D.C. Nov. 12, 2022). *But see* County of San Mateo v. Chevron Corp., 32 F.4th 733, 754 & n.11 (9th Cir. 2022) (questioning part of the Fifth Circuit's test); City of Hoboken v. Chevron Corp., 45 F.4th 699, 709 (3d Cir. 2022) (same). Two circuit courts have declined to decide whether to follow the Fifth Circuit's test. *See* Rhode Island v. Shell Oil Prods. Co., L.L.C., 35 F.4th 44, 59 (1st Cir. 2022) (declining to "wrestle the but-for-causation issue to the ground" in finding no jurisdiction); State by Tong v. Exxon Mobil Corp., 83 F.4th 122, 146 (2d Cir. 2023) (same).

94. The formulation in *Deepwater Horizon* appears to be derived from the district court's decision below addressing the State of Louisiana's motion for remand. *See In re* Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, 747 F.Supp.2d 704, 708 (E.D. La. 2010).

95. Bd. of Comm'rs of the Se. La. Flood Prot. Auth'y v. Tenn. Gas Pipeline Co., LLC, 29 F.Supp.3d 808, 835 (E.D. La. 2014).

96. *Id.*

97. EPL Oil & Gas, LLC v. Trimont Energy (NOW), LLC, 640 F.Supp.3d 687, 693 (E.D. Tex. 2022). In *Deepwater Horizon*, the Fifth Circuit also confirmed that the text of § 1349 "precludes an artificial limit based on situs." *In re* Deepwater Horizon, 745 F.3d 157, 164 (5th Cir. 2014). In an earlier unpublished decision, the court asserted that OCSLA's coverage must be "determined principally by locale." Golden v. Omni Energy Servs. Corp., 242 Fed. Appx. 965, 967 (5th Cir. 2007) (holding that offshore worker's claims for injuries from a helicopter crash on land while traveling to the offshore platform was not within OCSLA's jurisdiction). *Golden* was subsequently criticized for departing from § 1349's text by improperly adopting a situs requirement. *See* David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 33 TULANE

the case arise out of or in connection with an 'operation.'"[98]

In the context of a personal-injury matter, the operation and the activity that caused the injury may be the same, making the typical *Deepwater Horizon* analysis at step one straightforward. For example, when an offshore worker is injured while performing maintenance on a drilling platform, these issues likely overlap.[99] The same is not always true for commercial claims where the specific contractual breach at issue may not constitute an operation, but the underlying activity the contract relates to involves operations on the Outer Continental Shelf.[100]

Turning to the second step, *Deepwater Horizon* adheres to earlier precedent in assessing whether the dispute would have arisen "but for" the operation on the Outer Continental Shelf.[101] But even this widely accepted causal analysis has been questioned recently by other courts. In *City of Hoboken v. Chevron Corp.*, the Third Circuit explained that the Fifth Circuit's reading of § 1349's "arising out of or in connection with" language was "too cramped."[102] The court reasoned that § 1349's use of both "arising out of" and "in connection with" required a broader application of OSCLA jurisdiction to more cases than those with just a causal connection.[103] In other words, the Fifth Circuit's broad but-for test did not reach far enough.

MARITIME L. J. 381, 464 (2009) (lamenting the "unsatisfactory state of the Fifth Circuit's OCSLA jurisprudence"); Phillips v. BP PLC, No. 4:10CV259-RH/WCS, 2010 WL 3257740, at *6 (N.D. Fla. July 30, 2010), *report and recommendation adopted*, No. 4:10CV259-RH/WCS, 2010 WL 3257737 (N.D. Fla. Aug. 17, 2010) ("*Golden* is probably wrongly decided as it conflates the substantive law issue of § 1331(1) with the subject matter jurisdictional issue of § 1349(b)(1)."). Thus, requirements that an "incident in suit occur on the OCS" to support OCSLA jurisdiction are not supported by § 1349's text. Robertson & Sturley, *supra*, at 494.

98. *EPL Oil & Gas*, 640 F.Supp.3d at 692 (citing 43 U.S.C. § 1349(b)(1)).

99. Recar v. CNG Producing Co., 853 F.2d 367, 368 (5th Cir. 1988).

100. *See, e.g.*, EP Operating Ltd. P'ship v. Placid Oil Co., 26 F.3d 563, 569–70 (5th Cir. 1994); Amoco Prod. Co. v. Sea Robin Pipeline Co., 844 F.2d 1202, 1203 (5th Cir. 1988); United Offshore Co. v. S. Deepwater Pipeline Co., 899 F.2d 405, 407 (5th Cir. 1990); *see also* Brooklyn Union Expl. Co., Inc. v. Tejas Power Corp., 930 F.Supp. 289, 290 n.3 (S.D. Tex. 1996) ("Prior applications of section 1349(b)(1) by the Fifth Circuit to disputes not of a contractual nature are not particularly useful for determining jurisdiction in the instant case . . . ."). *But see* Plains Gas Sols., LLC v. Tenn. Gas Pipeline Co., LLC, 46 F.Supp.3d 701, 704 (S.D. Tex. 2014) (explaining that "the Court is unpersuaded that there is a difference between federal court jurisdiction over tort claims and contract claims under the OCSLA" because § 1349 "does not create a higher jurisdictional standard for certain types of claims" and the Fifth Circuit has "applied its interpretation of the OCSLA's broad jurisdictional grant to contract claims and tort claims alike"). There may also be cases involving personal injury claims where the worker was not injured offshore, but the work arose out of an operation on the Outer Continental Shelf. *See, e.g.*, Ronquille v. Aminoil Inc., No. 14-164, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014) ("[A]lthough Plaintiff was not physically employed on the OCS itself, his work on and in support of the OCS structures and materials coming into the Venice land base provides a sufficient connection to the operations on the OCS.").

101. *Deepwater Horizon*, 745 F.3d at 163 (collecting cases).

102. City of Hoboken v. Chevron Corp., 45 F.4th 699, 709–10 (3d Cir. 2022).

103. *Id.*; *see also* County of San Mateo v. Chevron Corp., 32 F.4th 733, 754 (9th Cir. 2022); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings . . . ."). The Third Circuit followed the U.S. Supreme

Moreover, the provenance of the but-for test raises its own questions. Specifically, the Fifth Circuit first adopted the but-for test in the context of a separate OCSLA provision requiring compensation for an injury that was "the result of operations conducted on the outer Continental Shelf."[104] And then, three years later, the court applied the same test to § 1349 "without addressing the differences between the text of those provisions."[105]

Thus, while *Deepwater Horizon* offers the general test for how courts "typically" assess OCSLA jurisdiction, there is some confusion among the courts about the textual underpinnings for each step as compared to the straightforward text of § 1349.

C. Textual Test for OCSLA Jurisdiction

Rather than parse the *Deepwater Horizon* decision as if it were a statute,[106] OCSLA's text provides a more direct roadmap for determining the proper scope of the court's subject-matter jurisdiction. And, as courts often instruct, statutory interpretation "begins with the text."[107]

Looking to the text, the test for jurisdiction under § 1349 can still be summarized in two steps.

First, the court should determine whether "the underlying activity" in this case constitutes an "operation" conducted on the Outer Continental Shelf.[108] "Operation" is a broad term that is, for better or worse, not defined in the statute. Yet the term "does not stand alone."[109] Section 1349 refers to "operations" as involving the "exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf."[110] And each of those terms—

Court's analysis in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), which addressed the reach of the Court's test for specific personal jurisdiction. 141 S. Ct. at 1026 (holding that the requirement that a suit "arise out of or relate to the defendant's contacts with the forum" asks about causation in the first part, but also "contemplates that some relationships will support jurisdiction without a causal showing").

104. 43 U.S.C. § 1333(b); Herb's Welding v. Gray, 766 F.2d 898, 900 (5th Cir. 1985).

105. *County of San Mateo v. Chevron Corp.*, 32 F.4th at 754 n.11 (citing Recar v. CNG Producing Co., 853 F.2d 367, 369 (5th Cir. 1988)); *compare* 43 U.S.C. § 1333(b) (stating "disability or death of an employee resulting from any injury occurring *as the result of operations* conducted on the outer Continental Shelf") (emphasis added) *with* 43 U.S.C. § 1349(b) (stating "cases and controversies *arising out of, or in connection with* . . . any operation conducted on the outer Continental Shelf") (emphasis added).

106. Mays v. Chevron Pipe Line Co., 968 F.3d 442, 448 (5th Cir. 2020) (citing Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979)).

107. Ross v. Blake, 578 U.S. 632, 638 (2016); Bartenwerfer v. Buckley, 598 U.S. 69, 74 (2023) ("[W]e start where we always do: with the text of the statute.") (quoting Van Buren v. United States, 141 S.Ct. 1648, 1654 (2021)).

108. EP Operating Ltd. P'ship v. Placid Oil Co., 26 F.3d 563, 569 (5th Cir. 1994).

109. Amoco Prod. Co. v. Sea Robin Pipeline Co., 844 F.2d 1202, 1207 (5th Cir. 1988).

110. 43 U.S.C. § 1349(b)(1).

"exploration,"[111] "development,"[112] and "production"[113]—is defined by OSCLA to broadly cover the full range of activity on the Outer Continental Shelf.[114] Thus, "operations" should be read to be as equally broad.[115]

Second, with the relevant operation identified, the court next should determine whether the cause of action at issue (e.g., property damage, personal injuries, or contractual disputes) either "arises out of" or is "in connection with" the operation.[116] Although these phrases are expansive, both are understood to have discernable, established meanings.[117] Courts have defined "arising out of" to mean "originating from, having its origin in, growing out of or flowing from, or in short, incident to, or having connection with."[118] And in general, the most natural reading of "arising out of" implies a causal relationship.[119] "[I]n connection with," on the other hand, "contemplates that some

111. *Id.* at § 1331(k) ("The term 'exploration' means the process of searching for minerals, including (1) geophysical surveys where magnetic, gravity, seismic, or other systems are used to detect or imply the presence of such minerals, and (2) any drilling, whether on or off known geological structures, including the drilling of a well in which a discovery of oil or natural gas in paying quantities is made and the drilling of any additional delineation well after such discovery which is needed to delineate any reservoir and to enable the lessee to determine whether to proceed with development and production.").

112. 43 U.S.C. § 1331(l) ("The term 'development' means those activities which take place following discovery of minerals in paying quantities, including geophysical activity, drilling, platform construction, and operation of all onshore support facilities, and which are for the purpose of ultimately producing the minerals discovered."); *see also* Dominion Expl. & Prod., Inc. v. Ameron Int'l Corp., No. 07-3888, 2007 WL 4233562, at *2 (E.D. La. Nov. 27, 2007) (citing Huffco Petroleum Corp. v. Transcon. Gas Pipe Line Corp., 681 F.Supp. 400, 401 (S.D. Tex. 1988) ("The definition of 'development' reflects Congress's intent to involve itself, as well as the federal courts, in the process of removing minerals of quantity from the seabed after discovery.")).

113. 43 U.S.C. § 1331(m) ("The term 'production' means those activities which take place after the successful completion of any means for the removal of minerals including such removal, field operations, transfer of mineral to shore, operation monitoring, maintenance and work-over drilling."). "Production" also includes the "absence or cessation of production." Baughman & Eason, *supra* note 91, at 252 (citing *Sea Robin*, 844 F.2d at 1208).

114. EP Operating Ltd. P'ship v. Placid Oil Co., 26 F.3d 563, 568 (5th Cir. 1994).

115. Vincent J. Foley, *Defining "Operation" for Jurisdiction Pursuant to the Outer Continental Lands Act: EP Operating Ltd. Partnership v. Placid Oil Co.*, 19 TULANE MARITIME L. J. 165, 173 (1994); *see* EPL Oil & Gas, LLC v. Trimont Energy (NOW), LLC, 640 F.Supp.3d 687, 692–93 (E.D. Tex. 2022) ("Operation may include the subsequent cessation, suspension or reduction of production on the OCS because such conduct would have an immediate bearing on the production of the OCS well.") (internal quotation marks, brackets, and citations omitted).

116. 43 U.S.C. § 1349(b)(1).

117. City of Hoboken v. Chevron Corp., 45 F.4th 699, 710 (3d Cir. 2022); *EPL Oil & Gas*, 640 F.Supp.3d at 691. *But see* County of San Mateo v. Chevron Corp., 32 F.4th 733, 751 (9th Cir. 2022) (asserting that "both terms are broad and indeterminate, and do not incorporate any principle that would limit federal jurisdiction").

118. *EPL Oil & Gas*, 640 F.Supp.3d at 692 (quoting Hamilton v. United Healthcare of La., 310 F.3d 385, 392 (5th Cir. 2002) (citing Red Ball Motor Freight, Inc. v. Emps. Mut. Liab. Ins. Co. of Wisc., 189 F.2d 374, 378 (5th Cir. 1951))).

119. *City of Hoboken v. Chevron Corp.*, 45 F.4th at 710 (citing Ford Motor Co. v. Montana Eighth Judicial District Court, 141 S. Ct. 1017, 1026 (2021)).

relationships will support jurisdiction without a causal showing," including other logical, sequential, and similarly loose connections.[120]

In sum, the text reveals that OCSLA's jurisdictional reach is "undeniably broad."[121] Section 1349's scope also reflects Congress's intent that the "judicial power of the United States to be extended to the entire range of legal disputes that it knew would arise relating to resource development on the Outer Continental Shelf."[122] And it should be no surprise that OCSLA jurisdiction has extended far inland to cover the variety of commercial disputes that have some connection to an operation on the Outer Continental Shelf.

D. OCSLA's Jurisdictional Limits

Although OCSLA's text confirms that Congress intended § 1349 to vest federal courts with the power to hear any case involving the Outer

120. *Id.* ("Legos, puzzle pieces, and train cars connect, though they do not cause one another. And as statisticians stress, a correlation or connection does not imply causation."); *EPL Oil & Gas*, 640 F.Supp.3d at 692 ("'Connection' generally means a 'relationship or association in thought (as of cause and effect, local sequence, mutual dependence or involvement)[;]' '[t]he condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like[;]' or a 'relation between things one of which is bound up with, or involved in, another.'") (quoting United States v. Am. Com. Lines, L.L.C., 875 F.3d 170, 175 (5th Cir. 2017)); *see also* BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 457 (3d ed. 2009) ("in connection with is almost always a vague, loose connective"); United States v. Loney, 219 F.3d 281, 284 (3d Cir. 2000) (collecting usage examples that "underscore that the phrase 'in connection with' is used to capture a very wide variety of different relationships"); United States v. Wyatt, 102 F.3d 241, 247 (7th Cir. 1996) (finding that "the meaning of the phrase 'in connection with' should be construed expansively"); Khimmat v. Weltman, Weinberg & Reis Co., LPA, 585 F. Supp. 3d 707, 712 (E.D. Pa. 2022) (explaining that terms like "regarding" and "with respect to" "imply a direct link," whereas "'in connection with' means a looser relationship"); Tarrant County v. Bonner, 574 S.W.3d 893, 898 (Tex. 2019) (explaining that "'in connection with' does not imply a material or significant connection although context may indicate otherwise" and that it may be "error to construe the phrase as requiring more than a tangential, tenuous, or remote relationship between the connected items") (citations omitted).

The Supreme Court has explained that the statutory phrase "in connection with" warrants a "broad interpretation." Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 85 (2006) (interpreting 15 U.S.C. § 78bb(f)(1)(A)). But because "in connection with" is "essentially indeterminate," the Court has also held that the phrase "provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions." Maracich v. Spears, 570 U.S. 48, 60 (2013) (internal marks omitted); *see also* Chadbourne & Parke LLP v. Troice, 571 U.S. 377, 397–98 (2014) (Thomas, J., concurring). The Court has also interpreted OCSLA's provision extending federal workers' compensation for injuries "occurring as the result of" operations on the Outer Continental Shelf—§ 1333(b)—to be limited to those workers who can establish a "substantial nexus" between their injury and operations on the Outer Continental Shelf. Pac. Operators Offshore, LLP v. Valladolid, 565 U.S. 207, 210, 221 (2012) (rejecting the Third Circuit's "but for" test for § 1333(b) because it could extend coverage "to all employees of a business engaged in extracting natural resources from the OCS, no matter where those employees work or what they are doing at the time of injury").

121. EP Operating Ltd. P'ship v. Placid Oil Co., 26 F.3d 563, 569 (5th Cir. 1994).

122. *Id.* (finding that "the most consistent reading of the statute instructs that the jurisdictional grant of section 1349 should be read co-extensively with the substantive reach of section 1333"); Laredo Offshore Const., Inc. v. Hunt Oil Co., 754 F.2d 1223, 1228 (5th Cir. 1985); *see also* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56–57 (2012) ("[W]ords are given meaning by their context, and context includes the purpose of the text.").

Continental Shelf,[123] courts have reflexively searched for limits on OCSLA's reach to prevent it from sweeping up routine state-law claims.[124]

One area of litigation that has recently tested the outer bounds of OCSLA jurisdiction has involved a series of cases filed by states and municipalities asserting state tort law claims against oil and gas producers related to climate change.[125] Nearly all these cases were filed in state court, but defendants quickly removed them to federal court, asserting various jurisdictional grounds, including OCSLA.[126] Yet, in essentially every case, the courts have ultimately declined to exercise jurisdiction.[127] While not the main focus of this article, these climate change cases are instructive as to the outer bounds the courts have set for jurisdiction under OCSLA.

For example, in *City of Hoboken v. Chevron Corp.*, Delaware and Hoboken sued several oil companies under state law claiming they "worsened climate change" by "producing, marketing, and selling fossil fuels."[128] The companies removed the case to federal court, citing, among other grounds, § 1349 because "the suits related to producing oil on the Outer Continental Shelf."[129] In fact, about one-third of the oil produced in the United States and used to produce fuels comes from

123. Tenn. Gas Pipeline v. Hous. Cas. Ins. Co., 87 F.3d 150, 156 (5th Cir. 1996).

124. *City of Hoboken v. Chevron Corp.*, 45 F.4th at 710 ("[H]owever broad, the statute must stop somewhere.") (citation omitted); Plains Gas Sols., LLC v. Tenn. Gas Pipeline Co., LLC, 46 F.Supp.3d 701, 705 (S.D. Tex. 2014) (recognizing that OCSLA jurisdiction is "not limitless"); City & County of Honolulu v. Sunoco LP, 39 F.4th 1101, 1113 (9th Cir. 2022) ("A statute about OCS fossil fuel should not let oil and gas companies remove nearly every suit, no matter how remote the tie to the OCS."); *see also* Brooklyn Union Expl. Co., Inc. v. Tejas Power Corp., 930 F.Supp. 289, 291 (S.D. Tex. 1996) (limiting jurisdiction under § 1349 in contractual disputes to "application of the principles established" in *Laredo* and *Sea Robin*).

125. *See* Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1406–09 (2020); Katarina Resar Krasulova, *The Unlikely Renaissance of Federal Common Law in the Second Wave of Climate Change Litigation*, 13 ARIZ. J. ENV'T L. & POL'Y 72, 88–91 (2022); *Recent Developments in Texas and United States Energy Law*, 17 TEX. J. OIL, GAS, & ENERGY L. 87, 116 (2022); M. Logan Campbell, *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.: A Future for Climate Change Litigation?*, 47 HARV. ENV'T L. REV. 605 (2023). While the individual claims in each case vary, these actions generally seek damages under state law-related "alleged misrepresentations about the effects fossil fuels have had on the environment." Minnesota v. Am. Petroleum Inst., 63 F.4th 703, 707 (8th Cir. 2023); Krasulova, *supra*, at 88.

126. *See* Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178, 196 (4th Cir. 2022) ("Chevron asserted eight different grounds for removal under statutory grants of federal jurisdiction and various legal theories . . . ."); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1248–49 (10th Cir. 2022) (defendants asserted seven different grounds for removal, including that "original federal jurisdiction exists under the OCSLA"); Sokol, *supra* note 125, at 1409 ("In all of those cases, the defendants have also filed notices of removal to federal court on the ground that federal common law preemption of the state claims provides federal courts with subject matter jurisdiction under the federal-question statute.").

127. *Am. Petroleum*, 63 F.4th at 708 (collecting cases).

128. *City of Hoboken v. Chevron Corp.*, 45 F.4th at 706.

129. *Id.*

the Outer Continental Shelf.[130] But the Third Circuit found that OCSLA did not provide jurisdiction because the production on the Outer Continental Shelf was "too many steps removed from the burning of fuels that causes climate change."[131]

While the court understood § 1349 to be extremely broad and rejected limiting jurisdiction to cases where oil production is a but-for cause, it also stressed federalism concerns as a basis to find some "limiting principle."[132] Because the court viewed OCSLA as "focuse[d] on the oil drilling on the Shelf itself not oil consumption hundreds or thousands of miles away,"[133] it determined that the claims targeted emissions that were "too far away from Shelf oil production."[134]

The rejection of OCSLA jurisdiction in these climate change actions reflects the general reluctance to expand OCSLA's reach too far inland—too far removed from physical operations on the Outer Continental Shelf.[135] In *City of Hoboken v. Chevron Corp.*, the Third Circuit framed the relevant jurisdictional question as asking: "[D]o the lawsuits here target actions on or closely connected to the Shelf?"[136] And in *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, the Tenth Circuit was even more direct: "[J]urisdiction under OCSLA makes little sense for injuries in a landlocked state that are alleged to be caused by conduct that is not specifically related to the [Outer Continental Shelf]."[137]

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130. *Id.* at 709; *see also* State by Tong v. Exxon Mobil Corp., 83 F.4th 122, 145–46 (2d Cir. 2023) (discussing Exxon's assertion that it "engages in significant operations on the outer continental shelf," where it has produced "690 million barrels of oil and 1.034 trillion cubic feet of natural gas in 2019 alone").

131. *City of Hoboken v. Chevron Corp.*, 45 F.4th at 706. The court recognized that plaintiffs took issue with "the oil companies' entire business, from production through sale," but the complained of emissions come from burning and not extracting oil and gas. *Id.* at 712. Thus, the court found that the actions related to "what oil companies did with their oil after it hit the mainland: sell it for people to burn" and not the production on the Outer Continental Shelf. *Id.*; *see also State by Tong v. Exxon Mobil Corp.*, 83 F.4th at 147 (holding that state's claims "ultimately concern neither extracting oil and gas nor burning them, but [the company] talking about what happens to the environment when they are burned") (internal marks, citations, and emphasis omitted).

132. *City of Hoboken v. Chevron Corp.*, 45 F.4th at 710–11; *see* 13 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3522 (4th ed. 2022).

133. *City of Hoboken v. Chevron Corp.*, 45 F.4th at 711.

134. *Id.*

135. *See, e.g.*, Dominion Expl. & Prod., Inc. v. Ameron Int'l Corp., No. 07-3888, 2007 WL 4233562, at *3 (E.D. La. Nov. 27, 2007) (no OCSLA jurisdiction over contract dispute for nonpayment for work painting an "offshore spar floating production facility" to be placed in production on the Outer Continental Shelf because "[t]he spar was on land when it was painted and the contract allegedly breached"); ANR Pipeline Co. v. Conoco, Inc., 646 F.Supp. 439, 444 (W.D. Mich. 1986) (explaining that § 1349 "is relevant only to those direct and indirect controversies surrounding the direct exploration, development or production of minerals of the subsoil and seabed of the OCS") (emphasis omitted).

136. *City of Hoboken v. Chevron Corp.*, 45 F.4th at 712.

137. Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1274 (10th Cir. 2022). The Ninth Circuit has adopted a seemingly narrower approach for tort claims: "we read

These specific geographic concerns should be irrelevant under the text of § 1349. Instead, the focus of the jurisdictional analysis should be whether the claims asserted have some substantive connection to an operation on the Outer Continental Shelf, even if the injuries are felt far from shore, including in "landlocked states."

III. COMMERCIAL DISPUTES UNDER OSCLA

Like the concerns raised in the climate change cases, the Fifth Circuit has similarly rejected any universal application of OSCLA jurisdiction.[138] And the *Deepwater Horizon* two-step inquiry has been viewed as a way to "cabin" the grant of federal jurisdiction under § 1349.[139] But including the extra-textual determination of whether the "activities that cause the injury" were an operation on the Outer Continental Shelf has resulted in a division among the courts applying the *Deepwater Horizon* test for jurisdiction. Specifically, courts assessing the vast range of commercial disputes related to operations or interests on the Outer Continental Shelf have disagreed over the full scope of federal jurisdiction authorized under OCSLA.[140]

A. Breach of Contract Claims

At first there was uncertainty about whether OSCLA could extend jurisdiction to contractual claims, even where the provisions at issue

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the phrase 'aris[e] out of, or in connection with' in § 1349(b)(1) as granting federal courts jurisdiction over tort claims only when those claims arise from actions or injuries occurring on the outer Continental Shelf." County of San Mateo v. Chevron Corp., 32 F.4th 733, 753 (9th Cir. 2022); City & County of Honolulu v. Sunoco LP, 39 F.4th 1101, 1112 (9th Cir. 2022) ("A test requiring only some connection between a tort and OCS activities has no limiting principle."). In *City of Oakland v. BP P.L.C.*, U.S. District Judge William Alsup questioned the correctness of these decisions but directed the removing defendants to "address their arguments to [the Ninth Circuit]." No. C 17-06011 WHA, 2022 WL 14151421, at *3 (N.D. Cal. Oct. 24, 2022) (noting that plaintiffs' allegations "emphasize production of fossil fuels as a basis for the theory of liability" and that "[a] substantial portion of defendants' production of fossil fuels arises out of extraction that takes place on the outer Continental Shelf" and explaining that if the court was "writing on a clean slate, these allegations in the complaints would seem to sustain removal jurisdiction, given their sustained emphasis and attacks on production and sale of fossil fuels and given the central role of the outer Continental Shelf in America's oil production"); *see also* City of Oakland v. BP PLC, No. 22-16810, 2023 WL 8179286, at *3 n.2 (9th Cir. Nov. 27, 2023) (rejecting OCSLA jurisdiction because the court was bound by its earlier decision in *City & County of Honolulu v. Sunoco LP*).

138. *In re* Deepwater Horizon, 745 F.3d 157, 163 (5th Cir. 2014) ("[O]ne can hypothesize a 'mere connection' between the cause of action and the OCS operation too remote to establish federal jurisdiction . . . .").

139. Plains Gas Sols., LLC v. Tenn. Gas Pipeline Co., LLC, 46 F.Supp.3d 701, 705 (S.D. Tex. 2014).

140. *Compare id.* ("In order for this Court to have jurisdiction, the activities that caused the alleged injuries must constitute 'some physical act' 'conducted on the outer Continental Shelf.'") *with* EPL Oil & Gas, LLC v. Trimont Energy (NOW), LLC, 640 F.Supp.3d 687, 693 (E.D. Tex. 2022) ("[N]othing in the text of § 1349 requires that an OCS 'operation' cause the injury—only that the case arise out of or in connection with an 'operation.'").

related directly to the construction of a platform to be affixed on the Outer Continental Shelf.[141] In *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, the Fifth Circuit recognized that OCSLA extended jurisdiction to the full range of disputes, including contractual commercial disputes that were "intimately connected with an operation on the Outer Continental Shelf which involved the exploration, development, or production of subsurface resources."[142]

Then, in a series of cases following *Laredo*, the Fifth Circuit found federal jurisdiction under § 1349 in a broader range of contractual disputes involving the purchase of mineral resources produced on the Outer Continental Shelf,[143] the control of an entity that operated a gas pipeline delivering gas from the Outer Continental Shelf,[144] and even an action to partition property after operations had ended when the wells on the Outer Continental Shelf stopped producing.[145]

In *Sea Robin*—the first of these cases after *Laredo*—the Fifth Circuit elaborated on the full reach of § 1349 as intended by Congress. The court explained that a "primary reason" for OCSLA was to ensure "the efficient exploitation of the minerals of the OCS, owned exclusively by the United States since the declaration of supremacy in the [Submerged Lands Act]."[146] Based on that purpose, the court

141. *See* Laredo Offshore Const., Inc. v. Hunt Oil Co., 754 F.2d 1223, 1227 (5th Cir. 1985) ("Laredo . . . asserts that, in enacting the OCSLA and its subsequent amendments, Congress did not intend to vest district courts with the jurisdiction to resolve under the Act contractual controversies such as the one at bar.").

142. *Id.* at 1229 (collecting cases where the court applied OCSLA "often without question, to resolve contractual disputes"). Some courts have offered a narrower reading of *Laredo*, asserting that the Fifth Circuit was "careful to limit the scope of its holding by emphasizing that the actual controversy directly pertained to development/production on the OCS." Brooklyn Union Expl. Co., Inc. v. Tejas Power Corp., 930 F.Supp. 289, 290 (S.D. Tex. 1996) (citing *Laredo*, 754 F.2d at 1225 ("We hold that, insofar as the alleged breach of contract relates directly to platform construction, the controversy is on 'arising out of, or in connection with' an operation conducted on the Outer Continental Shelf involving the development of mineral resources and therefore is encompassed within the district court's grant of original jurisdiction.")).

143. Amoco Prod. Co. v. Sea Robin Pipeline Co., 844 F.2d 1202, 1210 (5th Cir. 1988); *see also* Fluor Ocean Servs., Inc. v. Rucker Co., 341 F.Supp. 757, 759 (E.D. La. 1972) (applying the § 1349(b) predecessor, § 1333(b), and finding jurisdiction for a contract dispute regarding the dismantling of an offshore rig); Superior Oil Co. v. Transco Energy Co., 616 F.Supp. 98, 100–01 (W.D. La. 1985) ("This Court has little difficulty in concluding that a contract for the sale of natural gas produced on the OCS arises out of and is connected with the 'exploration, development, or production of the minerals' of the Outer Continental Shelf.").

144. *See* United Offshore Co. v. S. Deepwater Pipeline Co., 899 F.2d 405, 407 (5th Cir. 1990) (recognizing that the contractual dispute was "one step removed from the actual transfer of minerals to shore since it involves a contractual dispute over the control of an entity which operates a gas pipeline").

145. *See* EP Operating Ltd. P'ship v. Placid Oil Co., 26 F.3d 563, 570 (5th Cir. 1994) (finding OCSLA jurisdiction because resolution of ownership rights in offshore facilities "would affect the efficient exploitation of resources from the OCS and/or threaten the total recovery of federally-owned resources").

146. *Sea Robin*, 844 F.2d at 1210. The court also explained that several "operating considerations unique to oil and gas wells" informed its understanding of Congress's intent. *Id.* at 1209–10 (taking judicial notice that oil and gas wells "are not like mines for solid minerals, where one can mine as fast or

concluded that Congress intended "any dispute that alters the progress of production activities on the OCS threatens to impair the total recovery of the federally-owned minerals from the reservoir or reservoirs underlying the OCS" to fall within § 1349.[147]

The Fifth Circuit subsequently reaffirmed this view in *United Offshore* and *EP Operating*.[148] In each of these cases, there was not a traditional injury-causing activity on the Outer Continental Shelf. Still, jurisdiction was proper because each dispute had some connection or arose out of past, ongoing, or future production of oil and gas on the Outer Continental Shelf.[149] And the fact that the alleged contractual breaches occurred onshore—as well as the intended performance in some cases—confirms OCSLA's extended reach to support federal jurisdiction.

B. Split of Authority Addressing Commercial Disputes

Despite earlier precedents extending OSCLA jurisdiction to commercial disputes involving Outer Continental Shelf operations to varying degrees, a split of authority has emerged following the Fifth Circuit's *Deepwater Horizon* decision.

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slowly as one cares or even interrupt mining operations entirely for relatively long periods and be secure in the knowledge that whatever mineral wealth is there to be had will eventually be procured" and that "[c]hanges in the rate of oil or gas flow and/or interruptions in that flow not only cause a change in the actual 'production' of the well involved for the duration of the change or the interruption, but may also decrease or affect the potential 'production' that is or could ultimately be recovered from the well or the particular reservoir"). These conditions were most relevant to the take-or-pay dispute in *Sea Robin* because the exercise of these contractual rights "necessarily and physically ha[d] an immediate bearing on the production of the particular well, certainly in the sense of the volume of gas actually produced." *Id.* at 1210.

147. *Id.*

148. *EP Operating*, 26 F.3d at 570 (because resolution of the ownership rights over dormant offshore wells would "facilitate the reuse, sale or salvage" of the wells, a partition action sufficiently affected "the efficient exploitation of resources from the OCS and/or threaten[ed] the total recovery of federally-owned resources"); *United Offshore*, 899 F.2d at 407 (dispute over control of gas pipeline had a "similar nexus with production" as the dispute in *Sea Robin*).

149. The scope of the connection between the contractual dispute and production on the Outer Continental Shelf has been viewed differently by commentators and courts. *See, e.g.*, Foley, *supra* note 115 (describing the progression of decisions within the Fifth Circuit: "*Fluor* allowed indirect disputes; *Laredo* included contracts for construction; *Sea Robin* concerned indirect contracts; and [*United Offshore*] applied to disputes that are one step removed from operations.") (citations omitted); Minnesota v. Am. Petroleum Inst., 63 F.4th 703, 713 (8th Cir. 2023) (asserting that "[t]he Fifth Circuit has found federal jurisdiction under § 1349 only in cases involving close connections to fossil fuel operations on the outer continental shelf" including cases with "a direct physical connection to an OCS operation (collision, death, personal injury, loss of wildlife, toxic exposure) or a contract or property dispute directly related to an OCS operation"); City of Hoboken v. Chevron Corp., 45 F.4th 699, 712 (3d Cir. 2022) (describing precedents as "fall[ing] into four buckets" that "target activity on the Shelf or pipelines connected to it," including (1) "[d]isputes about who may operate on the Shelf;" (2) "[c]ases about transporting oil or gas from the Shelf;" (3) "[d]isputes over first-order contracts to buy oil or gas produced on the Shelf;" and (4) "tort suits about accidents on the Shelf").

On one side, district courts have strictly applied *Deepwater Horizon*'s two-step analysis, in particular the added requirement that the "activities that caused the injury" be the relevant "operation" required under OCSLA.[150] For example, in *Plains Gas Solutions v. Tennessee Gas Pipeline Co.*, the court explained that it "must determine the connection between a case and an operation *only after* it has established that *the activities that caused the injury constituted an operation* on the OCS."[151] And because an operation must be some physical act on the Outer Continental Shelf, the court held that for an injury to fall within OCSLA's jurisdictional grant, the injury "must be in connection with a physical act on the OCS that involved the exploration, development, or production of minerals."[152] Thus, even though the allegations involved breach of a processing contract and access to a pipeline for gas from offshore leases, the court stretched out the connection to the Outer Continental Shelf by focusing on whether the breaches themselves were "operations" rather than focusing on the contract's connection to the production of the gas. And, as a result, the court determined that the injuries did not involve physical operations on the Outer Continental Shelf.[153]

Courts applying a similar analysis have also rejected OCSLA in line with *Plains Gas*.[154] And the *Plains Gas* decision has been cited approvingly outside the Fifth Circuit to support limiting the reach of § 1349.[155]

On the other side of this divide are two more recent cases that looked to the subject matter of the contracts to determine whether they arose out of or were entered in connection with an operation on the Outer Continental Shelf. In *EPS Logistics Co. v. Cox Operating*, the district court found that OCSLA authorized jurisdiction over a contractual dispute dealing with open invoices for lease operating services provided

150. *In re* Deepwater Horizon, 745 F.3d 157, 163 (5th Cir. 2014).

151. Plains Gas Sols., LLC v. Tenn. Gas Pipeline Co., LLC, 46 F.Supp.3d 701, 705 (S.D. Tex. 2014) (emphasis in original).

152. *Id.*

153. *Id.*

154. *See, e.g.*, Targa Midstream Servs. LLC v. Crosstex Processing Servs. LLC, No. H-14-2256, 2014 WL 12672258, at *1 (S.D. Tex. Nov. 25, 2014) (breach of contract relating to an onshore facility processing a large portion of gas produced from leases on the Outer Continental Shelf); Bd. of Comm'rs of the Se. La. Flood Prot. Auth'y v. Tenn. Gas Pipeline Co., LLC, 29 F.Supp.3d 808, 835 (E.D. La. 2014) (finding no jurisdiction under § 1349 because "all of the activities causing Plaintiffs' injuries occurred on Louisiana's coastal lands or within Louisiana's territorial waters"); Enven Energy Ventures, LLC v. Gemini Ins. Co., No. 6:17-CV-01573, 2018 WL 3203605, at *4 (W.D. La. June 8, 2018), *report and recommendation adopted*, No. 6:17-CV-01573, 2018 WL 3203464 (W.D. La. June 28, 2018) (finding no jurisdiction under § 1349 in a "free-standing" insurance coverage claim where the insurer's "decision not to defend or indemnify . . . did not constitute an operation conducted on the Outer Continental Shelf").

155. *Plains Gas*, 46 F.Supp.3d at 705.

by Cox.[156] While Cox had conducted some operations on the Outer Continental Shelf, the court emphasized that OCSLA contains "no situs requirement" and that § 1349's jurisdictional grant covers both cases "arising geographically" on the Outer Continental Shelf as well as those "arising 'in connection with' operations" on the Outer Continental Shelf.[157]

In *EPL Oil & Gas, LLC v. Trimont Energy (Now) LLC*, the district court extended that analysis and found that OSCLA jurisdiction applied to a contractual dispute over bonding requirements for certain leased assets acquired in a transaction, a portion of which were located on the Outer Continental Shelf.[158] The court "easily conclude[d]" that the case arose out of an operation on the Outer Continental Shelf because the bonds at issue were required to protect interest-holders from liability relating to the decommissioning and abandonment of the offshore wells.[159] The court emphasized that the "abandonment or decommissioning of wells on the OCS is an 'operation' under OCSLA" and that the bond requirement "would not exist" but-for that operation.[160] That said, the alleged failure to acquire the bonds was not itself an operation—nor did it need to be to meet the text of § 1349. In other words, because the court did not have to find that "the activity that caused the injury"—the act or failure to acquire bonds—was itself an operation on the Outer Continental Shelf, jurisdiction extended to the dispute.[161]

The two sides of this split reflect competing interests driving the courts' decisions. In *Plains Gas*, the court properly raised the potential "universal application" of § 1349 as a concern.[162] But the desire to "[cabin] federal court jurisdiction" does not support the application of an extra-textual requirement to artificially limit OCSLA jurisdiction and deny to parties the federal forum provided by Congress to litigate

156. EPS Logistics Co. v. Cox Operating, L.L.C., No. 6:21-CV-01003, 2021 WL 2698209, at *1–3 (W.D. La. June 30, 2021).

157. *Id.* at *3 (explaining that absent Cox's operations on the Outer Continental Shelf operations, "Cox would not have entered into a contract with EPS, and the dispute regarding the payment of EPS's invoices would not have arisen").

158. EPL Oil & Gas, LLC v. Trimont Energy (NOW), LLC, 640 F.Supp.3d 687, 694 (E.D. Tex. 2022).

159. *Id.*

160. *Id.*

161. *Id.*; *see also* Cox Operating, L.L.C. v. Expeditors & Prod. Servs. Co., No. 21-728, 2021 WL 2853060, at *3 (E.D. La. July 8, 2021) (reaching a similar result when "the underlying activity" in a contractual dispute "constitute[d] an operation conducted on the OCS").

162. Plains Gas Sols., LLC v. Tenn. Gas Pipeline Co., LLC, 46 F.Supp.3d 701, 705 (S.D. Tex. 2014).

their full range of disputes involving Outer Continental Shelf operations.[163]

Although courts may continue to struggle to define which cases or controversies are too remote or too far removed from an Outer Continental Shelf operation to establish federal jurisdiction,[164] any requirement that the operation cause the injury at issue is rightly rejected as contrary to the text of § 1349. In this way, the courts' decisions in *EPS Logistics* and *EPL Oil & Gas* are better attuned to the broad grant of federal jurisdiction reflected in § 1349. And both cases appropriately decline to overextend *Deepwater Horizon*'s typical two-part inquiry, keeping the federal courthouse doors open to those commercial cases arising out of or connected to operations on the Outer Continental Shelf.[165]

CONCLUSION

The present divide among the district courts addressing OCSLA jurisdiction as to commercial contractual disputes reveals that the strict adherence to *Deepwater Horizon*'s general description of how courts "typically assess jurisdiction" as the required analysis in all cases has resulted in confusion and has unnecessarily narrowed § 1349's reach in a way that runs contrary to Congress's stated intent. What's more, a close review of the decisions shows a creeping situs requirement limiting federal jurisdiction under OCSLA to only those activities that physically occur on the Outer Continental Shelf.

163. *Id.* Notably, two-years before deciding *Plains Gas*, U.S. District Judge Keith P. Ellison adopted a broader test for jurisdiction under § 1349: "[T]he Court has jurisdiction if Plaintiff's claims 'aris[e] out of, or in connection with' an operation conducted on the OCS 'involv[ing] exploration, development, or production" of subsurface minerals.'" *In re* BP p.l.c. Sec. Litig., No. 4:12-CV-1836, 2012 WL 4739673, at *4 (S.D. Tex. Oct. 1, 2012) (finding that BP's allegedly false statements made to regulators regarding "the amount of oil gushing from the Macondo well after the Deepwater Horizon explosion" were in connection with an operation on the Outer Continental Shelf and claims that these statements artificially inflated BP's stock fell "fall comfortably within the statutory language of section 1349(b)(1)"). The change in the court's analysis from this test to the test applied in *Plains Gas* is the direct result of the Fifth Circuit's recitation of the two-part test in *Deepwater Horizon*. *See Plains Gas*, 46 F.Supp.3d at 705 (Under [*Deepwater Horizon*'s two-step] inquiry, a court must determine the connection between a case and an operation only after it has established that the activities that caused the injury constituted an operation on the OCS.") (citing *In re* Deepwater Horizon, 745 F.3d 157, 163 (5th Cir. 2014)).

164. *See* County of San Mateo v. Chevron Corp., 32 F.4th 733, 754 (9th Cir. 2022); *Deepwater Horizon*, 745 F.3d at 163; *see also* State by Tong v. Exxon Mobil Corp., 83 F.4th 122, 146–47 (2d Cir. 2023) (explaining that five circuit courts have found that § 1349 does not reach the state-law tort claims in the recent climate change cases).

165. *See* EPS Logistics Co. v. Cox Operating, L.L.C., No. 6:21-CV-01003, 2021 WL 2698209, at *3 (W.D. La. June 30, 2021) (recognizing that "OCSLA's jurisdictional grant covers not only cases arising geographically on the OCS but also those arising 'in connection with' operations thereon").

But that is not what § 1349 provides, and, as the court in *EPL Oil & Gas* explained, *Deepwater Horizon* did not overrule or even cast doubt on the several contractual cases upholding OCSLA jurisdiction.[166] Because the text of § 1349 only requires that the case arise out of or in connection with an operation on the Outer Continental Shelf, courts should not be compelled to address a purported "threshold question" of what "activities" "caused the injury."[167] Therefore, when assessing whether a case may proceed in federal court, it should not matter if the case involves a dispute between two companies located in the same inland city, such as Detroit, Michigan, over a contract for oil and natural gas produced in the Gulf of Mexico.[168] As this hypothetical case arises out of or is in connection with an operation on the Outer Continental Shelf—namely, the production of oil and natural gas in the Gulf of Mexico—that case should proceed in federal court.

166. EPL Oil & Gas, LLC v. Trimont Energy (NOW), LLC, 640 F.Supp.3d 687, 692 (E.D. Tex. 2022) (citing Amoco Prod. Co. v. Sea Robin Pipeline Co., 844 F.2d 1202, 1204 (5th Cir. 1988); and United Offshore Co. v. S. Deepwater Pipeline Co., 899 F.2d 405, 407 (5th Cir. 1990)); *see also Expeditors*, 2021 WL 2853060, at *2–4 (upholding OCSLA jurisdiction in breach of contract dispute relating to liens filed against property on the OCS).

167. Bd. of Comm'rs of the Se. La. Flood Prot. Auth'y v. Tenn. Gas Pipeline Co., LLC, 29 F.Supp.3d 808, 835 (E.D. La. 2014). Even though "some of the dredging and pipelines may have facilitated oil and gas activities on the OCS," the court considered that connection too "attenuated." *Id.* at 836–37 (distinguishing *Sea Robin* and *EP Operating*).

168. *See* ANR Pipeline Co. v. Conoco, Inc., 646 F.Supp. 439, 440 (W.D. Mich. 1986).