No. 18-389

IN THE
Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,

Petitioner,

v.

BRIAN NEWTON,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, under the Outer Continental Shelf Lands Act ("OCSLA"), state law is borrowed as the applicable federal law only when there is a gap in the coverage of federal law, as the Fifth Circuit has held, or whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, as the Ninth Circuit held below.

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts to support continuity in legal doctrines and to ensure that settled expectations of parties are not lightly disregarded. *See, e.g., American Economy Ins. Co. v. State of New York, cert. denied*, 138 S. Ct. 2601 (2018); *Deere & Co. v. New Hampshire, cert. denied*, 137 S. Ct. 38 (2016). WLF filed a brief in this matter when it was before the Ninth Circuit, in support of the petition for rehearing *en banc*.

WLF is concerned that the Ninth Circuit's decision has disrupted settled expectations of employers by rejecting the well-accepted judicial understanding of the meaning of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-13356b. The decision exposes those employers to massive retroactive liability for damages and penalties, for having acted in reasonable reliance on that judicial understanding.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days prior to filing this brief, WLF notified counsel for Respondent of its intent to file. All parties have consented to the filing.

WLF agrees with Petitioner Parker Drilling Management Services, Inc. that OCSLA does not incorporate California labor law into the federal law that governs wage-and-hour issues arising from employment on oil platforms located on the Outer Continental Shelf (OCS). WLF writes separately to focus on the sharp conflict between the decision below and decisions of the Fifth Circuit, and on the extreme hardship (in the form of massive retroactive liability) to which employers will be exposed if the decision below remains in place. Review is warranted both to resolve that conflict and because companies reasonably relied on an interpretation of OCSLA that had been unanimously accepted by the federal courts until the Ninth Circuit issued its conflicting decision earlier this year.

STATEMENT OF THE CASE

Respondent Brian Newton was employed by Parker Drilling for two years on an oil platform off the California coast, where his typical work day lasted 12 hours. The inaccessibility of the oil platform made it difficult for Newton to return to his home in California during his off hours, and thus he generally remained on the site for 14 days at a time. During Newton's 12 "off" hours, Parker Drilling provided Newton with food, lodging, and recreational facilities on the oil platform at no cost. As the Ninth Circuit recognized, Parker Drilling paid Newton "an hourly rate well above the state and federal minimum wage, and also paid him premium rates for overtime hours." Pet. App-20.

A month after Newton ceased working on the oil platform, he filed a putative class action alleging that

Parker Drilling failed to pay him and similarly situated employees in accordance with California labor law. His principal claim is that California law required that he be paid for all hours that he was on the oil platform, even during sleep and rest time. He seeks to recover back pay plus civil penalties under California's Private Attorney General Act of 2004 (PAGA).

OCSLA states that fixed structures (such as drilling platforms) attached to the seabed on the OCS are deemed federal enclaves that are subject to federal law. 43 U.S.C. § 1333(a)(1). It further states that the laws of adjacent States "are declared to be the law of the United States" for those fixed structures, "[t]o the extent that they are applicable and not inconsistent with [OCSLA] or with other Federal laws." 43 U.S.C. § 1333(a)(2)(A). The district court held that California wage-and-hour laws were not "applicable"—because federal law already incorporates a comprehensive statutory scheme governing wage-and-hour claims (the Fair Labor Standards Act) and thus has no need to borrow state wage-and-hour law to fill gaps in federal law—and dismissed the complaint. Pet. App-46 to App-60.

The Ninth Circuit reversed. Pet. App-1 to App-41. It held that state law is "applicable" to a controversy arising on an OCS oil platform whenever (as here) the law is "relevant" to the controversy, and it rejected "the notion that state laws have to fill a gap in federal law to qualify as surrogate federal law." *Id.* at App-21. In doing so, it explicitly disagreed with the Fifth Circuit's holding in *Continental Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969), that state law cannot qualify as "applicable"

under § 1333(a)(2) unless it fills "a significant void or gap" in federal law. *Id.* at App-2. Although recognizing that the FLSA provides a comprehensive federal statutory scheme governing wage-and-hour issues, the court held that applying California law to Newton's claims was not "inconsistent with federal law" because the FLSA merely provides a statutory floor "under which wage protections cannot drop" and that the FLSA permits States to impose a higher level of wage protections. *Id*. at App-36.

Although highly critical of the Fifth Circuit's *Continental Oil* decision, the Ninth Circuit noted Newton's assertion that the Fifth Circuit no longer adheres to that decision. The court identified what it termed a "more recent line of [Fifth Circuit] cases"—beginning with *Union Texas Petroleum Corp. v. PLT Engineering, Inc.* ["*PLT*"], 895 F.2d 1043 (5th Cir. 1990)—which, according to Newton, adopted an entirely new test for determining when OCSLA incorporates state law as surrogate federal law. Pet. App-18. Labeling this allegedly new test the "*PLT* test," the Ninth Circuit stated:

> It remains unclear whether the *PLT* test has superseded the *Continental Oil* test in the Fifth Circuit, or whether the Fifth Circuit views the *Continental Oil* test as a precursor to the *PLT* test, such that the *PLT* conditions come into play only if there is a significant gap or void in federal law.

Id. at App-19. The court did not attempt to resolve that issue; it simply concluded that *Continental Oil*

incorrectly interpreted OCSLA. It severely criticized the conclusion of *Continental Oil* (and its extensive progeny) that state law is not "applicable" under OCSLA unless its adoption as surrogate federal law is necessary to fill a "significant void or gap" in federal law. *Id*. at App-23.

SUMMARY OF ARGUMENT

WLF agrees with Parker Drilling that review is warranted because the Ninth Circuit's decision is incorrect. This Court's OCSLA decisions conclusively demonstrate that state law is not "applicable" to OCSLA cases unless there exists a "significant void or gap" in federal law that can be filled by incorporating the state law. WLF writes separately to focus on two other reasons why review is warranted.

First, the conflict between the decision below and decisions of the Fifth Circuit is irreconcilable. Indeed, the Ninth Circuit expressly rejected the interpretation of OCSLA espoused by the Fifth Circuit in *Continental Oil*—an interpretation that had been adopted by *every* federal court to address the issue prior to the Ninth Circuit's ruling. The conflict is outcome-determinative; had the Ninth Circuit followed *Continental Oil*, it would have affirmed the dismissal of Newton's lawsuit.

Newton argued below—and can be expected to reassert in this Court—that no conflict exists because (he contends) the Fifth Circuit has abandoned *Continental Oil* and has replaced it with a new test—the "*PLT* test"—that supposedly is consistent with the Ninth Circuit's ruling. That argument is

without merit and is based on a misunderstanding of Fifth Circuit case law.

The Fifth Circuit has never backed away from its adherence to *Continental Oil*. The "*PLT* test" cited by Newton is merely a special application of the test developed in *Continental Oil*, applicable to cases in which the party opposing incorporation of state law points to federal maritime law as the comprehensive federal scheme whose existence renders unnecessary any need to incorporate state law.

Thus, for example, the Fifth Circuit held in *Tetra Technologies, Inc. v. Continental Ins. Co.*, 814 F.3d 733 (5th Cir. 2016)—one of the court decisions that, according to the court below, adopted "the *PLT* test"—that Louisiana law governing indemnification agreements would *not* be incorporated into a contract dispute arising under OCSLA if the district court found (on remand) that federal maritime law was applicable to the case, because that body of federal law provides a comprehensive scheme governing maritime contract disputes. 814 F.3d at 740-42. But *Tetra Technologies* certainly did not suggest, in conflict with *Continental Oil*, that the requisite "significant void or gap" in federal law exists whenever federal maritime law is inapplicable to a dispute governed by OCSLA. To the contrary, it stated that OCSLA incorporates state law when there are "gaps in the federal law," without suggesting that federal maritime law is the only federal law that can obviate the need to resort to gap-filling state law. *Id.* at 738.

Second, review is warranted because the decision below threatens massive retroactive liability

for employers who adopted wage-and-hour practices in good-faith reliance on a body of federal case law that had uniformly found state law inapplicable to OCSLA cases in which federal law (in this case, the FLSA) provides a comprehensive set of rules. Moreover, to avoid future liability, employers will likely be forced to significantly restructure their employment practices—a restructuring that may be unsatisfactory to employers and employees alike. Such uncertainty cannot be what Congress had in mind when it adopted OCSLA and declared that fixed structures on the OCS would be governed solely by federal law.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Congress has decreed that the seabed and subsoil of the OCS—as well as structures "permanently or temporarily attached to the seabed" on the OCS—are subject solely to the federal law of the United States. 43 U.S.C. § 1333(a)(1). Yet the two federal appeals courts in which virtually all cases governed by OCSLA arise—the Fifth and Ninth Circuits—have adopted sharply conflicting understandings of how to go about determining the content of that federal law.[2] As this case illustrates, the conflicting interpretation is likely to result in

[2] As Parker Drilling notes, the Eleventh Circuit has adopted as binding precedent decisions issued by the "old" Fifth Circuit before the Eleventh Circuit split off in 1981. Because many of the relevant Fifth Circuit decisions (including *Continental Oil*) pre-date 1981, the decision below also creates a direct conflict with the Eleventh Circuit, within which some cases involving Gulf of Mexico drilling platforms arise.

conflicting decisions in a large number of cases. Review is urgently needed to resolve that conflict.

When it adopted OCSLA in 1953, Congress recognized that existing federal law "might be inadequate to cope with the full range of potential legal problems" likely to arise on the OCS. *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 356 (1969). To address that problem, OCSLA "supplemented gaps in the federal law" by adopting (as federal law) the laws of adjacent States. *Ibid.* Such state laws are incorporated into federal law "[t]o the extent that they are applicable and not inconsistent with [OCSLA] or other Federal laws." 43 U.S.C. § 1333(a)(2). WLF agrees with Parker Drilling that the decision below misinterprets the word "applicable." *Rodrigue* indicates that state law is "applicable" only "where necessary" to fill a gap in federal law, 395 U.S. at 363, and that federal statutory law "would be exclusive if it applied." *Id.* at 359.[3] Contrary to the Ninth Circuit, a state wage-and-hour law is not automatically rendered "applicable" to a claim governed by OCSLA simply because the plaintiff has

[3] WLF further agrees with Parker Drilling that California wage-and-hour law is "inconsistent" with the FLSA and its implementing regulations. *Compare, e.g., Mendiola v. CPS Sec. Sols., Inc.*, 60 Cal. 4th 833, 836 (2015) (California wage-and-hour laws entitled security guards to "compensation for all on-call hours spent at their assigned worksites") *with* 29 C.F.R. § 785.23 (under FLSA, "[a]n employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises."). The Fifth Circuit did not reach the "inconsistent with" issue in *Continental Oil*, having found that the Louisiana law was not "applicable" (within the meaning of OCSLA) to the issue in dispute.

raised a wage-and-hour claim.

WLF writes separately to point out two other reasons why review is warranted: (1) the conflict between the Fifth and Ninth Circuit decisions is irreconcilable and can only be resolved by this Court; and (2) the decision below threatens to disrupt operations of oil and gas companies and expose them to massive liability for having reasonably relied on prior court decisions interpreting the OCSLA.

I. THE DECISION BELOW IRRECONCILABLY CONFLICTS WITH DECISIONS FROM THE FIFTH CIRCUIT

A. The Ninth Circuit Expressly Rejected Fifth and Eleventh Circuit Case Law Interpreting OCSLA

The decision below held that California wage-and-hour law should be incorporated into federal law governing structures affixed to the OCS off the coast of California, even though there is no "gap" in federal wage-and-hour law—the FLSA provides a comprehensive set of federal rules governing wage payments. That holding irreconcilably conflicts with controlling Fifth and Eleventh Circuit case law, which holds that state law is not "applicable" on the OCS unless its incorporation into federal law is necessary to fill a gap in federal law. Review is warranted to resolve that conflict.

In arriving at its interpretation of the word "applicable" in 43 U.S.C. § 1333(a)(2), the "old" Fifth Circuit relied heavily on this Court's *Rodrigue* decision.

Continental Oil, 417 F.2d at 1036. The appeals court explained:

> [OCSLA's] deliberate choice of federal law, federally administered, requires that "applicable" be read in terms of necessity—necessity to fill a significant void or gap. This is the recurring theme of *Rodrigue*. Thus, early in the opinion the Court states since "Federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems, [OCSLA] supplemented gaps in the federal law with state law 'through the adoption of State law as the law of the United States.'" ... Mr. Justice White summed it up for the Court emphatically, "This language [from a congressional report] makes it clear that state law could be used to fill federal voids."

Ibid (quoting *Rodrigue*, 395 U.S. at 357, 358).

At issue in *Continental Oil* was whether a Louisiana direct-action statute (which permitted an injured party to sue a tortfeasor's liability insurer directly) should apply to damage claims arising from a collision between a ship and a drilling platform affixed to the OCS. The Fifth Circuit concluded that maritime law provided "a fully effective right and remedy" to the plaintiff—maritime law applies to claims for damages caused by a sea-going vessel. *Id.* at 1035. Given the absence of any "gap" in federal law, the court held that Louisiana law was not "applicable" to the controversy,

within the meaning of § 1333(a)(2).

Continental Oil's continued viability has never been questioned in subsequent Fifth and Eleventh Circuit decisions. Just two years ago, the Fifth Circuit reiterated *Continental Oil*'s central holding, stating that OCSLA adopts state law as "surrogate federal law" "[w]hen there are 'gaps in the federal law.'" *Tetra Technologies*, 814 F.3d at 738 (quoting *Rodrigue*, 395 U.S. at 356).

In holding that California wage-and-hour law applied to Newton's claims arising from his employment on a drilling platform, the Ninth Circuit acknowledged that its interpretation of OCSLA directly conflicted with *Continental Oil*. The court stated:

> We hold that the absence of federal law is not, as the district court concluded, a prerequisite to adopting state law as surrogate federal law under [OCSLA]. We thus *reject* the proposition that "necessity to fill a significant void or gap," *Continental Oil* [417 F.2d at 1036] is required in order to assimilate "applicable and not inconsistent," 43 U.S.C. § 1333(a)(2)(A), state law into federal law governing drilling platforms affixed to the [OCS].

Pet. App-2 (emphasis added).

The Ninth Circuit criticized *Continental Oil* for having "navigated OCSLA's choppy waters by taking legislative history as its lodestar," *id.* at App-22, then

ultimately concluded that "the legislative history is at best muddled." *Id.* at App-25. It expressly disagreed with the Fifth Circuit's conclusion, articulated in *Continental Oil* (and later in *Nations v. Morris*, 483 F.2d 577, 585 (5th Cir. 1973)) that "necessity to fill a significant void or gap" was the "recurring theme of *Rodrigue*." *Id.* at App-27 (quoting *Continental Oil*, 417 F.3d at 1036).

Moreover, the Ninth Circuit implicitly acknowledged that its conflicting interpretation of OCSLA was outcome-determinative. It recognized that Newton's claims were governed by OCSLA. It further recognized that the FLSA provides a comprehensive set of federal rules governing wage-and-hour issues—and thus that there was no significant void or gap in federal law requiring supplementation by California law. Pet. App-35 to App-36. The Fifth Circuit would have held (applying *Continental Oil* to the facts of this case) that California law was not "applicable" and thus would have affirmed the dismissal of Newton's California-law claims. In contrast, the Ninth Circuit held that Newton's wage-and-hour claims (and related claims) were "'applicable and not inconsistent,' 43 U.S.C. § 1333(a)(2)(A), with the FLSA," and it vacated the order dismissing those claims. *Id.* at App-39. Review is warranted in light of the acknowledged and outcome-determinative conflict between the decision below and the case law of the Fifth and Eleventh Circuits.

B. Contrary to Respondent's Contention, the Fifth Circuit Has Not Abandoned *Continental Oil*

Newton argued below—and can be expected to

reassert in this Court—that no conflict exists because (he contends) the Fifth Circuit has abandoned *Continental Oil* and has replaced it with a new test—the "*PLT* test"—that supposedly is consistent with the Ninth Circuit's ruling. That argument is without merit and is based on a misunderstanding of Fifth Circuit case law.

The Fifth Circuit has never backed away from its adherence to *Continental Oil*. The "*PLT* test" cited by Newton is merely a special application of the test developed in *Continental Oil*, applicable to cases in which the party opposing incorporation of state law points to federal maritime law as the comprehensive federal scheme whose existence renders unnecessary any need to incorporate state law.

The *PLT* test derives its name from a 1990 Fifth Circuit decision, *Union Texas Petroleum Corp. v. PLT Engineering, Inc.* ["*PLT*"], 895 F.2d 1043 (5th Cir. 1990). The lawsuit involved claims by subcontractors on an OCS pipeline contract that they were not fully paid for their work. Union Texas Petroleum (UTP), the oil company that contracted for construction of the pipeline, filed an interpleader action that asked a federal district court to determine how undisbursed contract funds should be distributed. The subcontractors counterclaimed, asserting the right to file liens under the Louisiana Oil Well Lien Act (LOWLA). The issue before the Fifth Circuit was whether OCSLA applied and, if so, whether OCSLA incorporated LOWLA into federal law as "applicable" state law. UTP opposed incorporation of LOWLA into federal law, asserting that state law was not "applicable" because federal maritime/ admiralty law

was applicable and provided a sufficiently comprehensive body of law to resolve the dispute.

To determine whether LOWLA applied (thereby permitting the subcontractors to file liens on the pipeline), the Fifth Circuit announced a three-part test (later dubbed "the *PLT* test"):

> [F]or adjacent state law to apply as surrogate federal law under OCSLA, three conditions are significant. (1) The controversy must arise on a situs covered by OCSLA (*i.e.* the subsoil, seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law.

PLT, 895 F.2d at 1047. The court concluded that all three conditions were met and thus that the Louisiana lien statute, LOWLA, could properly be applied as surrogate federal law. *Id*. at 1047-50. The Fifth Circuit has adhered to its "*PLT* test" in a number of later decisions in which the party objecting to the application of state law under OCSLA argued that federal maritime law applied and thereby rendered state law "inapplicable" under § 1333(a)(2).[4]

Contrary to Newton's contention, the *PLT* test is

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[4] *See, e.g., Hodgen v. Forest Oil Co.*, 87 F.3d 1512, 1526 (5th Cir. 1996); *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 783 (5th Cir. 2009) (*en banc*); *Tetra Technologies*, 814 F.3d at 738.

fully consistent with *Continental Oil*. In every reported decision in which the Fifth Circuit has cited the *PLT* test, the party opposing incorporation of state law cited federal maritime law as the body of federal law that obviated the need to incorporate state law into federal law. Under those circumstances, the second part of the three-part *PLT* test (does federal maritime law "apply of its own force?") is simply the Fifth Circuit's way of asking whether a significant void or gap exists in federal law. If federal maritime law applies to an OCSLA case, there is no gap in federal law and thus (under *Continental Oil*) state law is not "applicable" within the meaning of § 1333(a)(2). Contrary to Newton's contention, adoption of the *PLT* test does not signify Fifth Circuit abandonment of *Continental Oil*'s interpretation of the word "applicable."

The Fifth Circuit's frequent invocation of the *PLT* test is a reflection of the fact that parties opposing incorporation of state law into federal law in OCSLA cases most frequently cite the applicability of maritime law as the basis of their opposition. When a party in a OCSLA case points to a different body of federal law as the basis for its anti-incorporation argument, the Fifth Circuit does not apply its *PLT* test (which asks whether federal maritime law "appl[ies] of its own force"). For example, *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985), affirmed dismissal of a retaliatory discharge claim filed under Louisiana law by an individual who was employed on an OCS drilling platform off the coast of Louisiana. Citing *Continental Oil*, the court determined that Louisiana law was not "applicable" within the meaning of § 1333(a)(2) because federal law provides a non-maritime remedy for

retaliatory discharge of drilling-platform workers (33 U.S.C. § 948a) and thus incorporation of state law was not necessary to fill a significant void or gap in federal law. 776 F.2d at 509.[5]

Moreover, even as interpreted by Newton, the *PLT* test conflicts sharply with the decision below. Under the *PLT* test, state law is not incorporated into federal law under OCSLA—even with respect to controversies arising on a situs covered by

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[5] The Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, provides a right of action (against an employer) for employees injured while engaged in maritime employment. Although employees working on OCS drilling platforms are not engaged in "maritime employment" (33 U.S.C. § 902(3), Congress expanded the LHWCA to expressly cover OCS drilling-platform employees when it adopted OCSLA. 43 U.S.C. § 1333(b); *see Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 417-18 (1985). *LeSassier* cited the right of action made available by § 1333(b) as its basis for concluding that Louisiana's retaliatory discharge statute should not be incorporated into federal law. *LeSassier* dismissed the plaintiffs' retaliatory-discharge claim despite the existence of a savings clause in OCSLA. *See* 43 U.S.C. § 1333(f) (the creation of a LHWCA remedy for OCS employees is "not intended" to bar otherwise applicable rights). That result conflicts sharply with the decision below, which cited a similar savings clause in the FLSA as the Ninth Circuit's basis for concluding that application of California wage-and-hour law is "not inconsistent" with federal wage-and-hour law. Pet. App-39.

The LHWCA right of action is limited to claims against employers. Federal law does not (of its own force) create personal-injury rights of action by OCS drilling-platform employees against other types of defendants (*e.g.*, the platform owner). That "gap" in federal law explains *Rodrigue*, in which this Court held that OCS drilling-platform employees could rely on state law to assert personal-injury claims against non-employer defendants. Pet. App-14 n.9 (citing *Rodrigue*, 395 U.S. at 354).

OCSLA—when federal maritime law applies to the controversy (*e.g.*, as in *Continental Oil*, when a vessel collides with a drilling platform). In sharp contrast, the decision below would incorporate all relevant state law, provided only that the state law is "not inconsistent" with maritime law or some other federal law.

No Fifth Circuit decision has ever stated that the court has abandoned *Continental Oil*'s interpretation of § 1333(a)(2). Any assertion that *PLT* overturned *Continental Oil sub silentio* is implausible, both because a Fifth Circuit panel lacks authority to overrule a prior panel decision on its own and because the same federal judge (John R. Brown) wrote both decisions. If Judge Brown had intended to overturn his prior interpretation of § 1332(a)(2), one would reasonably expect that he would have openly expressed that intention.[6]

Perhaps most importantly, the Fifth Circuit has continued to employ its "significant void or gap" language in OCSLA cases in which it applies its *PLT* test. *See, e.g., Tetra Technologies*, 814 F.3d at 738 (stating that OCSLA authorizes incorporation of the law of the adjacent State as surrogate federal law "[w]hen there are 'gaps in the federal law.'") (quoting

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[6] Nor is it plausible to conclude that Judge Brown authored an opinion that inadvertently conflicted with his prior opinion in *Continental Oil*. Judge Brown was widely regarded as one of the nation's leading authorities on maritime law. Indeed, this Court referred to him as "our leading admiralty authority." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 115 (1971) (Douglas, J., concurring in the judgment).

Rodrigue, 395 U.S. at 356).

In sum, the Fifth Circuit has not retreated from its interpretation of 33 U.S.C. § 1333(a)(2), first announced in *Continental Oil*. Because the Ninth Circuit has adopted a sharply conflicting interpretation of that statute, review of the decision below is warranted to resolve the conflict.

II. THE DECISION BELOW DISRUPTS EMPLOYMENT PRACTICES ADOPTED IN REASONABLE RELIANCE ON CASE LAW INTERPRETING OCSLA

Review is also warranted because the decision below threatens massive retroactive liability for employers who adopted wage-and-hour practices in good-faith reliance on settled OCS law. A body of federal case law had uniformly found state law inapplicable to OCSLA cases in which federal law (in this case, the FLSA) provides a comprehensive set of rules. Not surprisingly, oil companies responded to that case law by adopting OCS employment practices that complied with federal wage-and-hour standards. Yet unless the decision below is overturned, they face claims under state wage-and-hour standards that prior federal-court OCSLA decisions had deemed inapplicable to the OCS.[7]

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[7] Indeed, the Ninth Circuit conceded that, prior to its decision, every federal district court in California (including the district court in this case) had relied on *Continental Oil* to reject efforts to apply California wage-and-hour law to the OCS. Pet. App-20 n.13 (citing *Williams v. Brinderson Constructors, Inc.*, 2015 WL 4747892 (C.D. Cal. Aug. 11, 2015); *Reyna v. Venoco, Inc.*, No.

As the Ninth Circuit recognized, federal wage-and-hour law—the FLSA and its accompanying regulations, 29 C.F.R. § 785.23—does not require employers to pay employees for sleep and rest hours simply because employees are unable to return home between shifts. In sharp contrast, California wage-and-hour law generally requires employees to be paid for those hours. *Mendiola*, 60 Cal. 4th at 842. Because of the Ninth Circuit's novel ruling that California wage-and-hour law is "applicable" to OCSLA cases, employers now face claims for fines and massive back-pay awards.

Moreover, to avoid future liability, employers will likely be forced by the decision below to significantly restructure their employment practices (certainly in the OCS adjacent to California and perhaps elsewhere as well)—a restructuring that may be unsatisfactory to employers and employees alike. In light of the hardships faced by OCS employees (who generally remain on-site for 14 or more days at a time), their negotiated employment contracts generally include premium hourly compensation (for their 12-hour-per-day on-duty time) and extended time off between their 14-day shifts. If employers will now be required to compensate employees for the entire time they remain on a drilling platform, employers are likely to be forced to alter their employment practices considerably (*e.g.,* reducing hourly wage rates and requiring employees to devote more time to more

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CV 15-4525 (C.D. Cal. Oct. 23, 2015); *Espinosa v. Beta Operating Co.*, No. CV 15-04659 (C.D. Cal. Oct. 29, 2015); *Jefferson v. Beta Operating Co.*, No. CV 15-04966; and *Garcia v. Freeport-McMoRan Oil & Gas LLC*, No. CV 16-4320 (C.D. Cal. Sept. 16, 2016)).

frequent trips to and from the mainland). Review is warranted to determine whether such disruption of employment relationships is consistent with Congress's mandate that drilling platforms should be governed solely by federal law.

This Court has cautioned that "it is the duty of the federal courts to assure that the importation of state law [into federal law] will not frustrate or interfere with the implementation of national policies." *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 161 (1983) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977)). Congress adopted OCSLA because it determined that the Outer Continental Shelf should be subject to *exclusive* federal control and that it should be up to the federal government to determine the extent to which natural resources under the OCS should be exploited. The federal government has authorized the current, moderate level of off-shore development. The decision below threatens to disrupt that authorized development activity, and invites States that may be unhappy with current development levels to construe their laws in a manner that causes further disruption. By reviewing the decision below, the Court can determine whether Congress intended (when it adopted OCSLA) to incorporate into federal law a substantial body of state law that threatens such major disruptions of well-accepted practices.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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