No. 17-____

IN THE

Supreme Court of the United States

LARRY DOIRON, INC., AND ROBERT JACKSON,

Petitioners,

v.

SPECIALTY RENTAL TOOLS & SUPPLY, LLC; OIL STATES ENERGY SERVICES, L.L.C.; AND ZURICH AMERICAN INSURANCE COMPANY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Constitution extends judicial power to "all cases of admiralty and maritime jurisdiction." U.S. Const. art. III, § 2, cl. 1. This Court has held it is paramount that federal maritime law governing the interpretation of contracts shall be uniform throughout the United States of America. *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004); *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (citing *The Lottawanna*, 88 U.S. (21 Wall.) 588, 575 (1875)). Louisiana precludes the enforcement of indemnity agreements in oil-field-related contracts, irrespective of the reference to, or the contemplation, use or necessity of, commercial maritime activity for their performance. La. Rev. Stat. § 9:2780. Disregarding this Court's repeated admonitions that maritime law must be uniform and uniformly applied, the Fifth Circuit has created an exception to maritime law solely to accommodate the local anti-indemnity statute.

The questions presented are:

1. Whether it runs afoul of this Court's consistent, deeply-established, and binding precedents for the court of appeals to decline the uniform application of federal maritime law, including its choice of law rules, in order to give preference to a state's parochial interests;

and

2. Whether a downstream commercial maritime service provider whose services are utilized in the performance of a contract may rely on and enforce that contract under federal maritime law in a federal court sitting in admiralty.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

All parties to the proceeding are named in the caption on the cover. Petitioner Larry Doiron, Inc., is a Louisiana corporation that has no parent corporation and has no publicly-held company owning 10% or more the corporation's stock.

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OPINIONS AND ORDERS BELOW

The *en banc* opinion of the court of appeals (App. 1a) is reported at 879 F.3d 568. The order granting rehearing *en banc* (App. 20a) is reported at 869 F.3d 353. The panel opinion (App. 22a) is reported at 869 F.3d 338. The district court's memorandum ruling (App. 47a) is unofficially reported at 2013 WL 1768017. The order of the district court (App. 64a) is unreported.

JURISDICTION

The admiralty and maritime jurisdiction of the district court is established under 28 U.S.C. § 1333(1). The judgment of the court of appeals sitting *en banc* was entered on January 8, 2018. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the United States Constitution grants to Congress the plenary power to regulate interstate commerce:

> The Congress shall have power ...
>
> * * *
>
> To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes....

U.S. Const. art. I, § 8, cl. 3.

The Admiralty Clause of the United States Constitution establishes the Judiciary's authority over all admiralty and maritime cases:

> The judicial Power shall extend… --to all Cases of admiralty and maritime jurisdiction….

U.S. Const. art. III, § 2, cl. 1.

The Supremacy Clause of the Constitution makes federal law supreme over state law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The admiralty and maritime jurisdiction of the district court is established by statute:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> > (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1333(1).

The Louisiana anti-indemnity act that conflicts with federal maritime law is fully set forth in the Appendix, but in pertinent part provides as follows:

> Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

La. Rev. Stat. § 9:2780.B.

I. STATEMENT

During the performance of a contract on the inland navigable waters of the United States, a longshoreman was injured while utilizing a vessel's crane. The injured party initiated litigation alleging his status as a seaman and/or a longshoreman. The vessel owner initiated in federal court a Vessel Owner Limitation Action under 46 U.S.C. § 30501, *et seq.*, in which all claims by the injured longshoreman were re-asserted, and in which incidental demands were asserted for contractual indemnity and insurance coverage. Jurisdiction of the Limitation Action was predicated on 28 U.S.C. § 1333, as was the vessel owner's third-party demand against its contractual indemnitor.

A. The Contractual Relationship.

Specialty Rental Tools & Supply, LLC ["STS"],[1] respondent, a Delaware corporation with its principal place of business in Texas, executed a Master Service Contract ["MSC"] with Apache Corporation ["Apache"], also a Delaware corporation with its principal place of business in Texas and the owner of the Louisiana-sited production platform. The MSC required STS to defend, release, indemnify and hold harmless certain parties, including Petitioners Larry Doiron, Inc. ["LDI"], a Louisiana corporation, and Robert Jackson ["Jackson"]. STS employed Peter Savoie ["Savoie"], the injured longshoreman. LDI owned the crane barge involved in the incident. Jackson operated the barge at the time of the accident. Zurich American Insurance Company ["Zurich"], respondent, was STS's commercial marine insurer.

Section 12 of the MSC required STS to obtain and maintain insurance for Longshore and Harbor Worker's Compensation Act[2] ["LHWCA"] liability if STS "uses any vessel in connection with its work." Section 12 does not require that STS hire or charter the vessel, but merely that STS use a vessel in the performance of the MSC. STS fulfilled the MSC's insurance obligation by obtaining appropriate maritime insurance from Zurich.

Section 21 of the MSC contained a maritime choice of law provision:

> THIS CONTRACT SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE

---

[1] STS is believed to have been merged into Oil States Energy Services, L.L.C., respondent. Both were parties below.

[2] 33 U.S.C. § 901 *et seq.*

> WITH THE GENERAL MARITIME LAW OF THE UNITED STATES WHENEVER ANY PERFORMANCE IS CONTEMPLATED IN, ON OR ABOVE NAVIGABLE WATERS, WHETHER ONSHORE OR OFFSHORE. IN THE EVENT MARITIME LAW IS HELD INAPPLICABLE, THE LAW OF THE STATE IN WHICH THE WORK IS PERFORMED SHALL APPLY.

(all uppercase in original).

B. The Facts.

The facts triggering STS's indemnity obligations under the MSC were styled by the *en banc* court as follows:

> On October 12, 2005, [Apache] entered into a blanket master services contract ("MSC") with [STS]. The MSC included an indemnity provision running in favor of Apache and its contractors. In early 2011, Apache issued an oral work order directing STS to perform "flow-back" services on a gas well in navigable waters in Louisiana in order to remove obstructions hampering the well's flow. A stationary production platform provided the only access to the gas well. The work order did not require a vessel, and neither Apache nor STS anticipated that a vessel would be necessary to perform the job.
>
> On February 24, 2011, STS dispatched a two-man crew to perform the work required by the work order. After an unsuccessful day of work, the STS crew determined that some heavy equipment was needed to complete the job and that a crane would be required

> to lift the equipment into place. Because the production platform was too small to accommodate a crane, the crew suggested to Apache that it engage a barge equipped with a crane to lift the equipment. Apache agreed and contracted with Plaintiff Larry Doiron, Inc. ("LDI"), to provide a crane barge.
>
> The next day, the LDI crew proceeded to the job site on the crane barge POGO and unloaded the equipment requested by the STS crew. After being unsuccessful, however, the STS crew discovered that it needed yet a different piece of equipment, so, with the aid of the crane, both crews began removing the heavy equipment previously unloaded. During this process, the LDI crane operator struck and injured one of the STS crewmembers, Savoie, with the equipment.

In re Larry Doiron, Inc, 879 F.3d 568, 569-570 (5th Cir. 2018); App. 2a-3a. The tasks being performed, and the utilization of the crane barge, were all accomplished by a verbal work order pursuant to the MSC. *Id.*

C. Proceedings Below.

LDI and Jackson, on the one side, and STS and Zurich on the other, filed cross-motions for summary judgment on STS's and Zurich's obligation to defend and indemnify LDI and Jackson from the claims asserted against them by Savoie. STS and Zurich argued that the controlling precedent in the Fifth Circuit, *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990), weighed against classifying the contract as a maritime contract, and, therefore, that Louisiana state law governed the interpretation and enforceability of the MSC's indemnity provisions. The district

court conducted the *Davis & Sons* analysis and concluded that the MSC was controlled by maritime law and enforced the defense and indemnity provisions. 2013 WL 1768017, at *7 (W.D. La. Apr. 24, 2013); App. 47a.

D. Panel Appeal.

STS and Zurich appealed. Conducting the *Davis & Sons* analysis, the three-judge panel unanimously affirmed. A special concurring opinion was issued raising *sua sponte* a desire to change the rule of law applicable to the case and expressly stating that such action would change the outcome of the case. *In re Larry Doiron, Inc*., 869 F.3d 338, 351 (5th Cir. 2017); App. 38a.

After analogizing the "situs of the controversy" in an Outer Continental Shelf Lands Act[3] case[4] to this inland waters case, the concurring judges proposed the following test:

> So long as a contract's primary purpose is to provide services to promote or assist in oil or gas drilling or production on navigable waters aboard a vessel, it is a maritime contract. Its character as a maritime contract is not defeated simply because the contract calls for incidental or insubstantial work unrelated to the use of a vessel.

Id. at 350; App 45a.

Continuing, the concurrence sought to apply "the test to ... the verbal Apache work order" rather than

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[3] 43 U.S.C. § 1331, *et seq*.

[4] *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009) (*en banc*).

the MSC, and suggested that the verbal work order had "no maritime or 'salty' flavor that would qualify it as a maritime contract." *Id.* at 351; App. 46a. The judges invited the court to sit *en banc* to adopt this new rule of law holding that virtually any contract involving oil and gas extraction, unless primarily performed on a vessel, would not be governed by maritime law, irrespective of locale, involvement of commercial maritime activity, express written contemplation of maritime activity by the parties, or choice of law provisions in written contracts. This proposal would have resulted in otherwise uniform federal maritime law applying to every activity and industry except the oil and gas industry.

E. Rehearing *En Banc*.

The court granted respondents' petition for rehearing *en banc*. *In re: Larry Doiron, Inc.*, 869 F.3d 353 (5th Cir. 2017); App. 20a.

In their supplemental brief, App. 65a, Petitioners argued that contractual choice of law clauses are to be enforced under maritime choice of law rules when a court sits in admiralty, as did the district court in this case. They cautioned against extending OCSLA—by which Congress adopted as federal law "to the extent that they are applicable and not inconsistent with ... Federal laws and regulations" the laws of the adjoining state—to inland waters in contravention of this Court's controlling precedents in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), and *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969). And, finally, the proposed change in the law also would have unduly prejudicial retroactive effect, especially in light of the fact that the suggestion to change the rule of law was first raised in the concurrence and not by any party to this maritime case.

The *en banc* court issued its unanimous opinion and adopted a different test than the proposal in the concurring opinion. The *en banc* opinion found this Court's holding in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004) ["*Kirby*"], supported an oil-and-gas carve out from otherwise uniform federal maritime law. Exchanging the six-prong test of *Davis & Sons* for a conditional two-prong test, the Fifth Circuit made the focus of its new inquiry whether the oil and gas industry was a party to the contract before addressing the maritime service industry's involvement in the performance of the contract:

> First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? The answer to this inquiry will avoid the unnecessary question from *Davis & Sons* as to whether the particular service is inherently maritime. Second, if the answer to the above question is "yes," does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract. If so, the contract is maritime in nature. We find strong support in *Kirby* for this test, particularly the following sentence: "Conceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract." Also, in *Kirby*, the parties obviously expected a vessel to play a major role in transporting the cargo from Australia to Alabama.

Doiron, 879 F.3d 568, 576; App. 15a (footnotes omitted).

The reason for this carve-out was explained by the court:

> The narrow issue presented was whether the MSC was a maritime contract. If so, general maritime law permitted enforcement of the indemnity provision. If not, Louisiana law controlled and the Louisiana Oilfield Indemnity Act ("LOIA") precluded indemnity.

Id. at 570; App. 4a. The court concluded, however, with a discussion of the verbal work order, and not the MSC:

> Applying this new test to this case, the oral work order called for STS to perform down-hole work on a gas well that had access only from a platform. After the STS crew began work down hole, the crew encountered an unexpected problem that required a vessel and a crane to lift the equipment needed to resolve this problem. The use of the vessel to lift the equipment was an insubstantial part of the job and not work the parties expected to be performed. Therefore the contract is nonmaritime and controlled by Louisiana law. The LOIA bars indemnity.

Id. at 577; App. 18a.

The Fifth Circuit failed to respect the district court's status as an admiralty court, or that admiralty jurisdiction was already established under 28 U.S.C. § 1333, irrespective of the contract. The *en banc* court did not apply the admiralty court's choice of law rules, relegating the issue to a one sentence footnote that inappropriately relies on an diversity jurisdiction-based precedent. *Id*. at 571, n. 10. Finally, the court did not consider its activism of adjudicating issues

not raised by the parties until after appeal, or the prejudicial effect of imposing a new rule of law where that issue was not part of the controversy between the parties.

What the Fifth Circuit *en banc* so plainly did was exclude from maritime law oil and gas related contracts so that Louisiana's anti-indemnity statute would bar enforcement of the freely executed commercial contracts.

Except for the Fifth Circuit, every other circuit that has addressed the issue recognizes *Kirby* for what it is: an inquiry into whether the court has admiralty jurisdiction. The court of appeals forced *Kirby*'s jurisdictional analysis into a case where admiralty jurisdiction was otherwise firmly established. The court then ignored its § 1333 admiralty jurisdiction and proceeded as though it were free to apply local choice-of-law rules instead of nationally-uniform admiralty choice-of-law rules.

II. REASONS FOR GRANTING THE PETITION

This Court should grant review for the following reasons.

A. The court of appeals disregarded the jurisdictional nature of this Court's decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), and therefore misapplied it as a controlling precedent. Consequently, it has disregarded the entire canon of maritime law, including admiralty choice-of-law rules and contract interpretation standards.

B. There exists an analytical split among the circuits with regard to the process for classifying contracts as maritime for the purpose of establishing admiralty jurisdiction in the first place. However, the

Fifth Circuit now stands alone in opening the door to invite a patchwork of parochial state interests to impermissibly interject themselves into otherwise nationally uniform maritime law, in a direct affront to this Court's repeated directives.

C. The court of appeals disregarded this Court's controlling precedents in *Offshore Logistics, Inc.*, 477 U.S. 207, and *Rodrigue*, 395 U.S. 352, which cautioned against expanding the impact of the OCSLA's adoption of state law beyond the statute's express and restrictive territorial limits, and *Levinson v. Deupree*, 345 U.S. 648 (1953), which held that a court sitting in admiralty, as distinguished from diversity, is "not, 'in effect, only another court of the State.'" The *en banc* court improvidently incorporated an *Erie*-based analysis[5] to supplant with state choice-of-law rules the otherwise uniform federal maritime choice-of-law rules for federal courts sitting in admiralty. As federal law is supreme, the subordination of federal law to state law was improper.

D. The court of appeals conducted its analysis and fabricated a new substantive rule of law from the perspective of non-mariners only, disregarding the downstream mariner who is called to assist in and effectuate the completion of a contract in navigable waters. This impermissibly disregards commercial maritime actors and insulates the oil and gas industry from the uniform protections and liabilities afforded to

[5] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

mariners throughout the remainder of the United States.

If one thing is made abundantly clear in *Kirby* and its historical roots, it is that uniformity and predictability in marine commerce is of paramount importance. This Court should grant review to overturn the decision below that distorts the uniformity, interpretation and application of federal maritime law into a Balkanized, localized and industry-specific quagmire.

III. ARGUMENT

A. Canon of Admiralty Law.

1. Constitutional Authority.

The Constitution grants power over maritime commerce to the Congress and to the judiciary. Congress can regulate interstate and international commerce over the Nation's commercially navigable waters. U.S. Const. art. I, § 8, cl. 3. The judiciary has the authority to adjudicate all disputes involved in maritime commerce. U.S. Const. art. III, § 2, cl. 1. Due to the power of the Supremacy Clause, U.S. Const. art. VI, cl. 2, no state can impede this national power.

2. Exercise of Article I Statutory Power.

Congress exercised the Nation's supreme authority over its navigable waters at least as far back as 1811 when it enacted a statute declaring, "[t]hat all the navigable rivers and waters in the territories of Orleans and Louisiana shall be and for ever remain public highways." Act of Mar. 3, 1811, c. 46, § 12, 2 Stat. 660, 666 (superceded by U.S. Rev. Stat. 5251, now codified at 33 U.S.C. § 10).

Again, reaching at least into the 19th Century, Congress made it amply clear that the federal government claims the right to, and in fact exercises and maintains control over, all navigable water,

> [i]t shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department.

33 U.S.C. § 1 (derived from Act of Aug. 18, 1894, c. 299 § 4, 28 Stat. 338, 362, which originally applied only to "canals or similar works of navigation").

Seizing upon the new Constitution's grant of authority to the nascent judiciary, Congress enacted the Judiciary Act of 1789, c. 20, § 9, 1 Stat. 73, 76-77, which vested in the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction...." This 1789 congressional grant to the courts of special admiralty and maritime jurisdiction has been carried through to today's 28 U.S.C. § 1333, a jurisdiction distinct and separate from general federal question jurisdiction granted under 28 U.S.C. § 1331.

This Court has "often said" that "'with admiralty jurisdiction ... comes the application of substantive admiralty law.'" *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996), quoting *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986). The nominal exception created

in *Yamaha* is when there is no existing federal admiralty substantive law for state law to supplant, a state's law may sometimes be called on to supplement maritime law.

Maritime law professor Thomas Schoenbaum, cited by the Court in *Kirby*, likewise has described maritime jurisdiction as distinct from federal question jurisdiction, and maritime law as being coextensive with maritime jurisdiction,

> [t]he modern statutory formulation of admiralty jurisdiction, Title 28 U.S.C. Section 1333, which is based upon the grant of admiralty jurisdiction in the Constitution, confers subject matter jurisdiction on the federal district courts. The Supreme Court has held that admiralty claims as such do not arise under the laws of the United States within the meaning of Title 28 U.S.C. Section 1331, and thus are not federal question cases.[6]
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> * * *
>
> With admiralty jurisdiction comes, in general, the applicability of maritime law. This is true even for maritime cases brought under diversity jurisdiction or in state court. Maritime law, then, is generally coextensive with admiralty jurisdiction, although some corners of substantive maritime law are not well-developed. Like admiralty jurisdiction, maritime law deals with various kinds of contracts and torts. To the extent these matters

[6] 1 Thomas Schoenbaum, *Admiralty & Mar. Law* § 3-2 (5th ed.) (footnotes omitted).

> are not covered by statutory law, the general maritime law applies.[7]

When a court is vested with admiralty and maritime jurisdiction, it thereby sits as a special court distinct from a federal-question court or a diversity court. And, as such, it follows the special laws and rules of federal maritime law, and not the local laws or rules.

3. Federal Maritime Common Law.

Unlike in other arenas, maritime law is a "federal corpus of law which is in no sense interstitial."[8] By nature, maritime law is expansive and broadly applied. Repeatedly and consistently, this Court has recognized, extended, reinforced and made clear that the uniformity of the law affecting the nation's commercially navigable waters is of paramount importance.

In 1861, this Court accepted and exercised the Constitution's assignment of authority "in all cases of admiralty and maritime jurisdiction, ... to the Federal Government in general terms...." *The St. Lawrence*, 66 U.S. (1 Black) 522, 526 (1861). In *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875), the Court followed this line of reasoning and held,

> [t]hat we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the

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[7] *Id.* at § 5-1 (footnotes omitted).

[8] David W. Robertson, *Admiralty and Federalism* 140-41 (1970).

> United States shall extend "to all cases of admiralty and maritime jurisdiction."... One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.

Id. at 574-575.

The Court's holding in *The Lottawanna* has been iterated many times by this Court, notably in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 214 (1917) ["*Jensen*"], and *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994), where the Court again held that Article III's grant of admiralty jurisdiction was coextensive with, and operating uniformly throughout the entire nation. *See also Kirby*, 543 U.S. at 28.

B. An Admiralty Court Must Enforce Contracts Under Maritime Law

> Turning to the present case, ... [i]t must be remembered that we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken, and not, as in the case of tort liability or public regulations, obligations imposed simply by virtue of the authority of the State or Federal Government. This fact in itself creates some

> presumption in favor of applying that law tending toward the validation of the alleged contract.

Kossick v. United Fruit Co., 365 U.S. 731, 741 (1961), *citing Pritchard v. Norton*, 106 U.S. 124 (1882).

Federal maritime law mandates that contractual choice of law provisions are to be enforced as agreed by the parties, except in the most extraordinary circumstances. *See Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Fed. Marine Terminals, Inc. v. Worcester Peat Co., Inc.,* 262 F.3d 22, 26 (1st Cir. 2001) ("A court sitting in admiralty jurisdiction applies federal maritime rules"); *State Trading Corp. of India, Ltd.* v. *Assuranceforeningen Skuld*, 921 F.2d 409 (2nd Cir. 1990) (same); *Gibbs ex rel. Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 131-33 (3d Cir. 2002)("because the case sounds in admiralty we apply federal admiralty law, not the law of any state"); *Triton Marine Fuels Ltd., S.A. v. M/V PACIFIC CHUKOTKA*, 575 F.3d 409, 413 (4th Cir. 2009)("In determining the enforceability of the choice-of-law provision in the contract, we look to principles of federal maritime law"); *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236, 242 (5th Cir. 2009)("the court in maritime cases *must* apply general federal maritime choice of law rules" (emphasis in original)); *Nat'l Enterprises, Inc. v. Smith,* 114 F.3d 561, 565 (6th Cir. 1997) ("When a district court exercises its admiralty jurisdiction, that court must apply admiralty law, rather than state law, to the case before it"); *American Home Assur. Co. v. L&L Marine Service, Inc.*, 153 F.3d 616, 618 (8th Cir. 1998); *Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 670-3 (9th Cir. 1997); *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1161-2 (11th Cir. 2009) ("as this case lies in admiralty, federal maritime

conflict of laws control"); *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 766-67 (D.C. Cir. 1992) (contractual choice-of-law provisions are usually honored, even when contained in a contract of adhesion, although such contracts are scrutinized to prevent substantial injustice).

Further, admiralty law favors the enforcement of express contractual indemnity clauses.[9]

1. Supremacy.

Federal maritime law is supreme over and preempts all states' laws as they relate to contracts referencing commercial maritime activity. U.S. Const. art. VI, cl. 2. That federal maritime is supreme over parochial state laws is also manifested in this Court's established precedents. For example, the Court said in *Jensen,*

> [p]lainly, we think, [no state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.

Jensen, 244 U.S. at 215-16.

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[9] *See* 1 Thomas Schoenbaum, *Admiralty & Mar. Law* § 5-21 (5th ed.).

In *Kirby*, too, the Court cited its historical holdings for finding federal maritime law supreme, and requiring state laws to yield:

> [h]ere, our touchstone is a concern for the uniform meaning of maritime contracts ... ("[I]n several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision" (citing *Kossick*, 365 U.S. 731 at 742; *Pope & Talbot*, 346 U.S. 406, 409 (1953); *Garrett v. Moore–McCormack Co.*, 317 U.S. 239, 248–249 (1942))); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959) ("[S]tate law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope").

Kirby, 543 U.S. 14 at 28.

The modern state of affairs has most concisely been summarized thusly:

> While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them.

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10 (1953). Supplementation by state law may be allowed, but state law is never allowed to supplant federal maritime law. If there is a rule of maritime law, it must be followed.

Applying state law to cases like this one would undermine the supremacy and uniformity of general maritime law.

2. Jurisprudential Preemption.

Admiralty is the only area in which judicial precedent, as a matter of course, is held to preempt contrary state law without any action by Congress. A century ago, this Court held in *Jensen*, that admiralty rules are generally considered a paradigm case of legitimate federal common law.[10] It is often said that "post-*Erie* federal common law is truly federal law in the sense that, by virtue of the Supremacy Clause, it is binding on state courts."[11]

In *Jensen*, this Court held that maritime workers injured on the water could not be covered by a state's workers' compensation scheme. The Court made clear that preemption must be evaluated in terms of the purposes underlying the constitutional grant of admiralty jurisdiction: to provide for "uniformity and consistency on all subjects of a commercial character

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[10] "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.... And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction." *Jensen*, 244 U.S. at 215.

[11] 19 Charles Alan Wright *et al.*, *Federal Common Law*, Fed. Prac. & Proc. Juris. § 4514 at 453 (2d ed. 1996). *See also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 897 (1986) ("Although at one point there was some doubt, it is now established that a federal common law rule, once made, has precisely the same force and effect as any other federal rule. It is binding on state court judges through the supremacy clause.").

affecting the intercourse of the States with each other or with foreign states."[12]

The post-*Jensen* century has brought with it many struggles by the circuit courts and this Court regarding the relationship between supreme federal maritime law and subordinate and preempted state laws. The era has seen efforts to distinguish between "rights and remedies," *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); using state law to fill the "gaps or voids" in federal maritime law, *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); the development and virtual extinction of an ill-begotten "maritime and local" exception, *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 119 (1962); attempts at "balancing and accommodation," *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); and endeavoring to define the "characteristic features" of maritime commerce, *American Dredging Co. v. Miller*, 510 U.S. 443 (1994).

As expressed by Profs. Grant Gilmore and Charles Black, "[t]he concepts that have been fashioned for drawing [the line between state and federal authority] are too vague ... to ensure either predictability or wisdom in the line's actual drawing."[13]

Perhaps more directly, Prof. David Robertson likewise stated that the "theories put forth to organize this body of law fail to accurately describe, much less explain, more than a fraction of the decided cases."[14]

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[12] *Jensen*, 244 U.S. at 215 (quoting *The Lottawanna*, 88 U.S. (21 Wall.) at 575.

[13] Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 1-17, at 49 (2d ed. 1975).

[14] David W. Robertson, *The Applicability of State Law in Maritime Cases after* Yamaha Motor Corp. v. Calhoun, 21 TUL. MAR. L.J. 81, 91-96 (1996) (tabulating fifty-three cases decided by

Prof. Robertson also decries the persistent confusion such that he asserts that "all of the theories various commentators have developed in an effort to synthesize the body of jurisprudence are untenable."[15] This is not because his colleagues are incapable of reasoned analysis, but because, he concludes, the decisions are so conflicting as to require this Court's attention to straighten out the law. While his comments preceded *Kirby*, they remain compelling today.

In this case, there are two contractual provisions that must be enforced under maritime law: choice of maritime law, and indemnity and defense. The application of Louisiana law by the *en banc* court defeated the uniformity and supremacy of maritime law on these two points. By doing so, the court of appeals elevated parochial state interests above uniform national interests.

3. A Maritime Contract: Do We Know It When We See It?

This Court has endeavored on many occasions to provide guidance to the lower courts on what is or is not a maritime contract, that is, what contracts are governed by maritime law. For nearly 150 years, culminating in *Kirby*, the critical question is not where the contract was written, or where it was performed, but whether the contract "has 'reference to maritime service or transaction.'" *Kirby*, 543 U.S. at 24 (quoting *North Pacific S.S. Co. v. Hall Brothers Marine*

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the Court since *Jensen*, and concluding that "none of the traditionally posited patterns is actually reflected in the United States Supreme Court's work").

[15] *Id.* at 95.

Railway & Shipbuilding Co., 249 U.S. 119, 125 (1919) (citing *New England Mutual Marine Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 26 (1870))).

a. The courts of appeals have had a difficult time applying *Kirby*. The sundry tests they have developed follow.

The First Circuit, determining whether it has admiralty jurisdiction, focuses on whether the nature of the transaction was maritime, citing *Kirby*'s "reference to maritime service or maritime transactions." *Puerto Rico Ports Authority v. Umpierre-Solares*, 456 F.3d 220, 225-6 (1st Cir. 2006).

The Second Circuit first focused on *Kirby*'s statement that "the true criterion is whether it has reference to maritime commerce," but then held that the test should be "whether the principal objective of a contract is maritime commerce."

> Because the case law regarding the distinction between maritime and non-maritime contracts was somewhat confused, the Supreme Court clarified, in *Norfolk Southern Railway Company v. James N. Kirby Pty, Ltd.*, 543 U.S. 14 (2004), the appropriate approach for making such a determination.
>
> > To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case. Nor can we simply look to the place of the contract's formation or performance. Instead, the answer depends upon ... the nature and character of the contract, and the true criterion is whether

> it has reference to maritime service or maritime transactions.
>
> *Norfolk S. Ry. Co.*, 543 U.S. at 23–24 (internal quotation marks and citations omitted). In accord with the Supreme Court's ruling in this case, we recently amended our jurisprudence on maritime contracts, recognizing that the proper inquiry is "whether the principal objective of a contract is maritime commerce, rather than ... whether the non-maritime components are properly characterized as more than 'incidental' or 'merely incidental' to the contract." *Folksamerica Reinsurance Co. v. Clean Water of N.Y., Inc.*, 413 F.3d 307, 315 (2d Cir. 2005) (internal quotation marks and citation omitted).

Williamson v. Recovery Ltd. P'ship, 542 F.3d 43, 49 (2d Cir. 2008).

The Sixth Circuit focuses on the importance of the court's maritime jurisdiction.

> Appellants correctly note, however, that *Kirby* addressed the question of subject-matter jurisdiction rather than COGSA's[16] applicability as a matter of law to spatial or temporal realms beyond the plain language of the statute. *Kirby*'s holding of admiralty jurisdiction over a dispute involving the land leg of a multimodal transportation contract does not directly resolve the question of which maritime law applies in the present case. *Kirby* extended only admiralty jurisdiction to the

[16] Carriage of Goods by Sea Act, 46 U.S.C. App § 1301 *et seq.* recodified at 46 U.S.C. § 30701 *et seq.*

> inland leg and not COGSA, itself, as a matter of substantive law.
>
> * * *
>
> *Kirby*'s reasoning affirms the broader principle that courts should evaluate maritime contracts in their entirety rather than treating each of the multiple stages in multimodal transportation as subject to separate legal regimes, which would be an obstacle to uniform and efficient liability rules. The Court explained that the new technology of containerization had popularized "through" bills of lading, by which cargo owners entered into a single contract for multiple stages of transportation across oceans and to inland destinations. By extending admiralty jurisdiction, the Court intended to promote cargo owners' "efficient choice" to arrange for multimodal transport via a single bill of lading.

Royal Ins. Co. of America v. Orient Overseas Container Line Ltd., 525 F.3d 409, 418-19 (6th Cir. 2008).

The Seventh Circuit applies *Kirby* consistent with the court's status as sitting in admiralty.

> Here, we apply federal maritime law because jurisdiction exists under 28 U.S.C. § 1333. *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 24–25 (2004) (finding bills of lading involving overseas shipment of goods to be maritime contracts even where the last leg of the journey was by rail).

Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co., 696 F.3d 647, 651 (7th Cir. 2012).

The Ninth Circuit, declining to find admiralty jurisdiction, found a shore-side umbrella insurance policy to be non-maritime because, citing *Kirby*, the insurer "considered [the maritime employers liability endorsement to be] so insignificant that it did not charge an increased premium when the endorsement was added," and that the insurer itself never imagined that it would be called to cover the asserted maritime-injury claim because the insured "consistently represented that its marine-related risks were insured through others," such as its P&I Underwriters. *Sentry Select Ins. Co. v. Royal Ins. Co. of Am.*, 481 F.3d 1208, 1218-20 (9th Cir. 2007).

The Eleventh Circuit, also addressing the court's admiralty jurisdiction over a contract, defines its post-*Kirby* "task ... to determine whether 'the nature and character of the contract ... has reference to maritime service or maritime transactions.'" *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 636 F.3d 1338, 1340 (11th Cir. 2011), quoting *Kirby*, 543 U.S. at 24.

The notable precept of all of the preceding decisions by every other circuit is that they address (albeit in diverse fashions) the question raised in *Kirby*: was the court possessed of admiralty jurisdiction for the dispute before it.

b. We now come to the Fifth Circuit. The *en banc* court disregarded, indeed fully omitted, the court's established admiralty jurisdiction before addressing (or not addressing) the choice of law rules that apply to a court sitting in admiralty. Under the guise of the jurisdictionally-focused *Kirby* decision, the court fashioned an entirely new, almost anti-*Kirby*, rule for admiralty courts to use. The first question the Fifth

Circuit found that *Kirby* requires it to ask is whether the oil and gas industry is involved:

> First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?

Doiron, 879 F.3d 568, 576.

The *en banc* court then asserted justification of this oil-and-gas centric inquiry with *Kirby*: "We find strong support in *Kirby* for this test, particularly the following sentence: 'Conceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce–and thus it is a maritime contract.'" *Id.* The Fifth Circuit rendered this decision without an inquiry as to whether the application of state law would conflict with federal maritime law or harm the uniformity of maritime law, and ascribed no significance to its admiralty subject matter jurisdiction. Under the approaches taken by the other circuits, the prime consideration is whether the court has admiralty jurisdiction. Then, as compelled by the remainder of the admiralty law canon, maritime law's choice of law rules naturally follow. The Fifth Circuit diverged from the other circuits and this Court, and remained mute on these admiralty-court issues in deference to Louisiana law.

c. Petitioners recognize that this case does not present a classic example of a division in the circuits over a pure question of law. Rather, the courts are divided on their methods of analysis and on the focus of their respective tests when deciding whether they are possessed of admiralty jurisdiction. The Fifth Circuit improvidently mixes *Kirby*'s jurisdictional analysis with an OCSLA or diversity jurisdiction choice

of law analysis, thereby putting it at odds with this Court and with every other circuit that addresses the issue. Unless resolved by this Court, the Fifth Circuit now, and other courts later, will continue adrift and parochial rules will seep into the otherwise watertight hull of maritime law.

Unlike its sister circuits which recognize that *Kirby* affirms the broader principle that courts "should evaluate maritime contracts in their entirety rather than treating each of the multiple stages in multimodal transportation as subject to separate legal regimes, which would be an obstacle to uniform and efficient liability rules," *Royal Ins. Co. of America v. Orient Overseas Container Line Ltd.*, 525 F.3d at 418-19 (6th Cir. 2008) (citing *Kirby*, 543 U.S. at 14), the *en banc* court below addressed only the oral work order, rather than the controlling MSC. It thereby avoided the consequences of the truly objective expression of the parties' wills that maritime commerce was envisioned, expected, and accommodated to the point of requiring marine insurance and adopting federal maritime law as the controlling law.

d. Like this case, *Kirby* involved a one-stop-shopping arrangement. Kirby hired an Australian shipping company to arrange for end-to-end shipping from Australia to Huntsville, Alabama, via the seaport of Savannah, Georgia. *Kirby*, 543 U.S. at 18-19. The shipment was covered by a through-bill of lading that contained a liability limitation under COGSA and a Himalaya clause extending its benefits to inland carriers. *Id.* at 19-20. This Court held that the multimodal through bill of lading was a maritime contract governed by federal law, *id*. at 23-24, and that downstream rail and motor carriers were entitled to

rely upon and enforce its terms. *Id*. at 31-32. In so holding, this Court observed that "it is to Kirby's advantage to arrange for transport from Sydney to Huntsville in one bill of lading, rather than to negotiate a separate contract—and to find an American railroad itself—for the land leg." *Id*. at 26.

The issues presented in this case implicate the very need for certainty and uniformity that this Court has recognized over the centuries and re-affirmed in *Kirby*: mariners must be able to assess and insure against the risks to which they are exposed under MSCs and the derivative written or oral work orders they assist in performing under an MSC's umbrella. The request by the MSC's original parties for LDI to join with them in the performance and completion of the contract is conceptually identical to the downstream parties in *Kirby*. As *Kirby* "downstream contractors," Petitioners should have the right to expect that they are protected by the express terms of the MSC, the performance of which they have joined.

Prior to the *en banc* decision below, the long-settled judicial consensus and the understanding of the maritime and oil and gas industries was that the MSC controlled the contractual relationship between the parties and formed the basis from which subsequent work orders were read. In the opening section of its opinion, the Fifth Circuit correctly states that the blanket MSC and the oral work order must be read together.[17] However, the *en banc* decision does not comport with this basic rule of contract law, whether maritime or terrestial.

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[17] *Doiron*, 879 F.3d at 573; App. 9a (footnotes omitted).

The court of appeals later suggests that the MSC had no bearing on the contractual relationship between Petitioners and respondents because the parties to the MSC were Apache and STS, ignoring the unchallenged-on-appeal third-party beneficiary status of LDI and Jackson to the MSC. Under the MSC, akin to a through-bill of lading, mariners, such as Petitioners, are entitled to enforce its terms and conditions. As with the lower courts in *Kirby*, the court of appeals miscontrued the explicit intent of the parties as expressed in the MSC in order to exclude Petitioners from exercising their indemnity rights under the MSC. And, as in *Kirby*, the court of appeals was thereby "not true to the contract language or the parties' intent."[18] That Petitioners are protected under the MSC is expressed in the original panel opinion, 869 F.3d at 340; App. 23a-24a, and adopted in the *en banc* opinion. *See Doiron*, 879 F.3d at 570 & n.3; App. 2a. The *en banc* court of appeals thereby improperly divided the overall, one-stop umbrella contract (the MSC, with its explicit choice of law provision) into a jigsaw puzzle of independent undertakings.

This Court explained in *Kirby* that even when authority to subcontract "on any terms" *is not* granted, "[w]hen an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed." 543 U.S. at 33. Relying on *Great Northern Railway Co. v. O'Connor,* 232 U.S. 508, 514 (1914), this Court held that a "'carrier ha[s] the right to assume that [the intermediary] could agree upon the terms of the shipment,'" *id.* at 34 (second alteration in original),

[18] *Kirby*, 543 U.S. at 31.

and "could not be expected to know if the [intermediary] had any outstanding, conflicting obligation to another party." *Id.* at 33. Likewise in this case, the hiring of LDI by Apache for STS's use in the completion of the oral work order issued pursuant to the MSC allows LDI to assume that the contractual terms would be enforced as written.

This Court further explained that "[i]n intercontinental ocean shipping, carriers may not know if they are dealing with an intermediary, rather than with a cargo owner," and a rule requiring carriers to "seek out more information before contracting, so as to assure themselves that their contractual liability limitations provide true protection," would be wholly unworkable. *Id.* at 34-35. The necessary "information gathering might be very costly or even impossible," and carriers would want to charge shipping intermediaries higher rates, "interfer[ing] with statutory and decisional law promoting nondiscrimination in common carriage." *Id.* at 35. This Court explained that its holding "produces an equitable result" because the cargo owner could always sue the party with which it initially contracted. *Id.*

Contrary to this Court's modern, practical and forward-looking approach, the Fifth Circuit's new rule flips predictability on its head and effectively precludes downstream mariners from relying on terms negotiated in blanket MSCs unless those terms are somehow included in separate downstream contracts.

The court of appeals conducted a cafeteria-style assemblage of a rule of law by severing the explicit written and objective MSC from the ill-defined oral work order. It thereby converted the authority granted to admiralty courts to interpret maritime contracts into a license for contract reformation incorporating

local state law to defeat the parties' clearly expressed intent and divesting mariners of substantial rights that would be available virtually everywhere else in the Union. Simply put, the court impermissibly elevated parochial state interests above uniform national interests.

IV. CONCLUSION

A commercial mariner summoned to assist in the performance and completion of a contract in the navigable waters of the United States has been barred from exercising its rights under the contract solely because of the involvement of oil and gas production activities and Louisiana's parochial interest in insulating that industry from the effects of freely-entered contracts. The court sitting in admiralty has declined to recognize and enforce the uniform federal admiralty law of the United States and protect the interests of such mariners from local interference with their commercial activities.

The refusal of the admiralty court below to honor the long-standing traditions and deeply-established, expansive application of federal maritime law in favor of state law is inexplicable. A commercial mariner should have, indeed *has*, the right to expect an admiralty court to recognize and enforce its rights of defense and indemnity irrespective of the nature of the business of the party for which it provides its services. It is manifestly unjust to stretch admiralty law landward to a train wreck yet leave a crane bargeman stranded on the waters without the benefits and protections of the law of the sea upon which he risks his life and business in the aid of landlubbers.

This Court, it is most respectfully submitted, should grant this Petition and issue a writ of certiorari to review and then reverse the decision rendered below.

Respectfully submitted,

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April 5, 2018

APPENDIX

APPENDIX A

REVISED January 11, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed January 8, 2018]

No. 16-30217

In Re: In the Matter of the Complaint of Larry Doiron, Incorporated as Owner and Operator of the Barge Pogo and M/V Billy Joe for Exoneration from or Limitation of Liability

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LARRY DOIRON, INCORPORATED,
Plaintiff – Appellee

ROBERT JACKSON,
Intervenor Plaintiff – Appellee

v.

SPECIALTY RENTAL TOOLS & SUPPLY, L.L.P.;
OIL STATES ENERGY SERVICES, L.L.C.;
ZURICH AMERICAN INSURANCE COMPANY,
Defendants – Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

Before STEWART, Chief Judge, and JOLLY*, DAVIS**, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON and COSTA, Circuit Judges.***

W. EUGENE DAVIS, Circuit Judge.

We took this case en banc to consider modifying the criteria set forth in *Davis & Sons, Inc. v. Gulf Oil Corp.* for determining whether a contract for performance of specialty services to facilitate the drilling or production of oil or gas on navigable waters is maritime.[1] After briefing and argument, the Court has decided to adopt a simpler, more straightforward test consistent with the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby* for making this determination.[2]

I. BACKGROUND

On October 12, 2005, Apache Corporation ("Apache") entered into a blanket master services contract ("MSC") with Specialty Rental Tools & Supply, L.L.P. ("STS"). The MSC included an indemnity provision running in favor of Apache and its contractors.[3] In early 2011, Apache issued an oral work order directing STS to

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* Judge Jolly, now a Senior Judge of this court, participated in the consideration of this en banc case.

** Judge Davis, now a Senior Judge of this court, is participating as a member of the original panel.

*** Judges Willett and Ho were not on the court when this case was heard en banc.

[1] *See* 919 F.2d 313 (5th Cir. 1990).

[2] *See* 543 U.S. 14 (2004).

[3] A more exhaustive factual background can be found in the panel opinion. *See In re Larry Doiron, Inc.*, 869 F.3d 338, 340–41 (5th Cir. 2017).

perform "flow-back" services on a gas well in navigable waters in Louisiana in order to remove obstructions hampering the well's flow. A stationary production platform provided the only access to the gas well. The work order did not require a vessel, and neither Apache nor STS anticipated that a vessel would be necessary to perform the job.

On February 24, 2011, STS dispatched a two-man crew to perform the work required by the work order. After an unsuccessful day of work, the STS crew determined that some heavy equipment was needed to complete the job and that a crane would be required to lift the equipment into place. Because the production platform was too small to accommodate a crane, the crew suggested to Apache that it engage a barge equipped with a crane to lift the equipment. Apache agreed and contracted with Plaintiff Larry Doiron, Inc. ("LDI"), to provide a crane barge.

The next day, the LDI crew proceeded to the job site on the crane barge POGO and unloaded the equipment requested by the STS crew. After being unsuccessful, however, the STS crew discovered that it needed yet a different piece of equipment, so, with the aid of the crane, both crews began removing the heavy equipment previously unloaded. During this process, the LDI crane operator struck and injured one of the STS crewmembers, Peter Savoie, with the equipment.

Anticipating a claim from Mr. Savoie, LDI filed a limitation of liability proceeding as owner of the crane barge POGO. Savoie filed a claim in the limitation proceeding. LDI, as Apache's contractor, then filed a third-party complaint against STS, seeking indemnity under the terms of the MSC.

LDI filed a motion for summary judgment seeking a declaration that it was entitled to indemnity from STS

under the MSC. STS filed a cross-motion for summary judgment seeking a determination that it owed no indemnity. The narrow issue presented was whether the MSC was a maritime contract. If so, general maritime law permitted enforcement of the indemnity provision. If not, Louisiana law controlled, and the Louisiana Oilfield Indemnity Act ("LOIA") precluded indemnity.[4] The district court concluded that maritime law applied and awarded LDI indemnity from STS. Our panel affirmed that judgment on appeal. A majority of the active judges then voted to take the case en banc.

II. DISCUSSION

A. Standard of Review

We review de novo a district court's grant of summary judgment.[5] Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[6] A genuine dispute exists if a reasonable jury could find in favor of the nonmoving party.[7] All facts and evidence are viewed in the light most favorable to the nonmovant.[8] We turn first to the existing law on maritime contracts in this circuit.

B. Current Law

The issue in this case is whether the Court should apply maritime law or Louisiana law to determine the

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[4] *See* LA. REV. STAT. § 9:2780(A).

[5] *James v. State Farm Mut. Auto. Ins. Co.*, 743 F.3d 65, 68 (5th Cir. 2014).

[6] FED. R. CIV. P. 56(a).

[7] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[8] *James*, 743 F.3d at 68.

validity of the indemnity provisions in the MSC. If Louisiana law applies, the indemnity agreement is void as against public policy.[9] If, on the other hand, the contract is maritime and state law does not apply, then the indemnity obligation is enforceable.[10]

Our cases in this area have long been confusing and difficult to apply. In *Thurmond v. Delta Well Surveyors*, Judge Garwood stated in his concurring opinion that he was "generally in agreement with Judge Wisdom's persuasive opinion, but . . . troubled by the tension, or perhaps outright inconsistency, between many of our opinions in this area."[11] He elaborated that:

> [I]t seems to me that it may be desirable to consider this issue en banc, in order that we may take a more consistent approach to the question of whether and in what circumstances activities in connection with mineral

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[9] *See* LA. REV. STAT. § 9:2780(A).

[10] *See Hoda v. Rowan Cos.*, 419 F.3d 379, 380 (5th Cir. 2005).

LDI also argues that the choice-of-law clause in the MSC, which specifies general maritime law as the applicable law under which to construe the contract, should be enforced even if the contract is nonmaritime in nature.

Our case law makes clear that, if the contract is nonmaritime, Louisiana law will govern its construction even in the face of a choice-of-law clause. This is so because enforcement of the choice-of-law clause would violate Louisiana's public policy and directly contravene LOIA. *See Verdine v. Ensco Offshore Co.*, 255 F.3d 246, 254 (5th Cir. 2001).

[11] 836 F.2d 952, 957 (5th Cir. 1988) (Garwood, J., concurring).

> development in state territorial waters are maritime (or perhaps "maritime and local[.]")][12]

Since 1990, we have followed the multi-factor test set forth in *Davis & Sons, Inc. v. Gulf Oil Corp.* ("*Davis & Sons*") to determine whether a contract is a maritime contract.[13] Judge Rubin, in attempting to summarize and make sense of our case law, set forth numerous guiding principles:

> If . . . the contract consists of two parts, a blanket contract followed by later work orders, the two must be interpreted together in evaluating whether maritime or land law is applicable to the interpretation and enforceability of the contract's provisions. The blanket contract is not of itself complete and calls for no specific work. The actual contract between the parties therefore consists of the blanket agreement as modified by the later work order.[14]

He stated further:

> A contract may either contain both maritime and non-maritime obligations . . . . If separable maritime obligations are imposed . . . , these are maritime obligations that can be separately enforced in admiralty without prejudice to the rest, hence subject to maritime law.[15]

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[12] *See id.* (quoting *Kossick v. United Fruit Co.*, 365 U.S. 731, 738 (1961)).

[13] 919 F.2d at 316.

[14] *Id.* at 315.

[15] *Id.* at 315–16 (internal quotation marks, brackets, and citations omitted).

> Whether the blanket agreement and work orders, read together, do or do not constitute a maritime contract depends, as does the characterization of any other contract, on the nature and character of the contract, rather than on its place of execution or performance. A contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment is subject to maritime law. What constitutes maritime character is not determinable by rubric. The Supreme Court has resorted to the observation that a contract is maritime if it has a genuinely salty flavor.[16]

He concluded his synopsis by distilling these principles into the six-factor test at issue in this appeal:

> Determination of the nature of a contract depends in part on historical treatment in the jurisprudence and in part on a fact-specific inquiry. We consider six factors in characterizing the contract: 1) what does the specific work order in effect at the time of injury provide? 2) what work did the crew assigned under the work order actually do? 3) was the crew assigned to work aboard a vessel in navigable waters? 4) to what extent did the work being done relate to the mission of that vessel? 5) what was the principal work of the injured worker? and 6) what work was the

[16] *Id.* at 316 (internal quotation marks and citations omitted).

> injured worker actually doing at the time of injury?[17]

A number of judges on this Court have since criticized this approach as confusing, particularly the six-factor, fact-intensive test.[18] In *Hoda v. Rowan Cos.*, Judge Jones began the opinion by stating that:

> This appeal requires us to sort once more through the authorities distinguishing maritime and non-maritime contracts in the offshore exploration and production industry. As is typical, the final result turns on a minute parsing of the facts. Whether this is the soundest jurisprudential approach may be doubted, inasmuch as it creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks by companies participating in this industry. Nevertheless, we are bound by the approach this court has followed for more than two decades.[19]

Professor David W. Robertson has also pointed out some of the difficulties with the *Davis & Sons* test:

> The six factors are too pointillistic: they have led Fifth Circuit panels down such odd lines of thought as "whether drilling mud services are more akin to wireline work [which has

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[17] *Id.*

[18] *See, e.g.*, *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1523 n.8 (5th Cir. 1996), (collecting cases expressing frustration with the inconsistent analysis of maritime contracts), *overruled on other grounds by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 788 (5th Cir. 2009) (en banc); *Hoda*, 419 F.3d at 380.

[19] 419 F.3d at 380.

> sometimes been viewed as quintessentially nonmaritime] or to casing services."[20]

For a variety of reasons, most of the prongs of the *Davis & Sons* test are unnecessary and unduly complicate the determination of whether a contract is maritime. Judge Southwick's complex factual explication of the prongs in the panel opinion—which we consider below—demonstrates this point.[21]

The first *Davis & Sons'* prong asks: What does the contract provide?[22] This is clearly an appropriate consideration in any contract case: the language of the contract. In this case, the contract consists of both the blanket MSC and the oral work order, which must be read together.[23]

The second prong asks: What did the crew actually do?[24] Analyzing this prong required the panel to parse the precise facts related to the services performed

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[20] 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, 545 (2007). For a more detailed criticism of the *Davis & Sons* test, see id. at 540–45.

[21] *See generally In re Doiron*, 869 F.3d.

[22] *Davis & Sons*, 919 F.2d at 316.

[23] STS argues that the following provision in the MSC contemplates the use of a vessel: "IF CONTRACTOR [STS] *USES* ANY VESSELS IN CONNECTION WITH ITS WORK FOR COMPANY OR COMPANY GROUP," additional vessel-related insurance is required. (emphasis added).

This insurance provision on its face has no application because STS did not provide or use a vessel—the vessel and crew were provided by LDI. This provision requiring vessel-related insurance applied to contractors such as LDI.

[24] *Davis & Sons*, 919 F.2d at 316.

under the contract and determine whether those services were inherently maritime. Because none of our previous case law had considered the flow-back services at issue here and whether they were inherently maritime, the panel attempted to analogize flow-back services to other services considered in previous opinions.[25] This required the panel to give a detailed description of both this case and the analogous cases, comparing flow-back services to casing, wireline, and welding services.[26] In doing so, the panel added to the many pages dedicated to similar painstaking analyses in the Federal Reporter.[27] The fact is, none of these services are inherently maritime. As discussed below, the focus should be on whether the contract calls for substantial work to be performed from a vessel.

The third and fourth *Davis & Sons* prongs ask: Was the crew assigned to a vessel in navigable waters, and to what extent was the crew's work related to the mission of the vessel?[28] These facts would be relevant if we were required to decide whether the crew

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[25] *See In re Doiron*, 869 F.3d at 343.

[26] *See id.* at 344–46.

[27] *Compare Thurmond*, 836 F.2d at 956 (finding wireline services nonmaritime in nature); *Domingue v. Ocean Drilling & Expl. Co.*, 923 F.2d 393, 398 (5th Cir. 1991) (same), *with Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332 (5th Cir. Unit A Aug. 1981) (finding casing services to be maritime in nature), *and Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1124–25 (5th Cir. 1992) (same); *see also* Kenneth G. Engerrand, *Primer of Remedies on the Outer Continental Shelf*, 4 LOY. MAR. L.J. 19, 61–63 (2005) (noting that historically, some service contracts are considered maritime in nature, including drilling and workover, casing, catering, repair, and well-site supervision, while other services contracts are traditionally nonmaritime in nature, including wireline work, testing and completion operations).

[28] *Davis & Sons*, 919 F.2d at 316.

members were seamen but not relevant to whether the employer of the crewmembers entered into a maritime contract. The fifth prong asks: What was the principal work of the injured worker?[29] Again, this is not relevant to whether the injured worker's *employer* entered into a maritime contract.

The sixth prong asks: What was the injured worker doing when injured?[30] The facts surrounding the accident are relevant to whether the worker was injured in a maritime tort, but they are immaterial in determining whether the worker's employer entered into a maritime contract.

In our panel opinion, after exhaustively analyzing the facts of this case in light of the six-prong test, we limited our holding to the facts of this case and determined that the contract was maritime primarily because a vessel was essential to the completion of the job.[31]

C. *Kirby*

Fortunately, the Supreme Court's opinion in *Norfolk Southern Railway Co. v. Kirby* lights a path to a simpler, more straightforward method for determining whether a contract is maritime and avoids most of the unnecessary analysis required by *Davis & Sons*.[32] In *Kirby*, the Supreme Court considered a claim for money damages for cargo damaged in a train wreck.[33] Under two coextensive bills of lading, the goods were transported from Australia to Huntsville, Alabama:

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[29] *See id.*

[30] *Id.*

[31] *In re Doiron*, 869 F.3d at 345–47.

[32] *See* 543 U.S. at 22–27.

[33] *See id.* at 18.

first by ship from Australia to Savannah, Georgia, and then by rail to Huntsville, Alabama.[34] The question was whether the suit to recover for cargo damaged on the land leg of the trip fell within the Court's admiralty jurisdiction.[35] The Court answered this in the affirmative because both bills of lading were maritime contracts.[36] This was so, the Court reasoned, because the "primary objective" of these bills was "to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States."[37]

In considering whether the bills of lading were maritime contracts, the Court broadly defined what characterized a contract as maritime. The Court observed that:

> [W]e cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case. . . . Nor can we simply look to the place of the contract's formation or performance. Instead, the answer "depends upon . . . the nature and character of the contract," and the true criterion is whether it has "reference to maritime service or maritime transactions."[38]

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[34] *See id.* at 18–21.

[35] *See id.* at 22–24.

[36] *See id.* at 24.

[37] *Id.*

[38] *Id*. (second alteration in original) (quoting *N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125 (1919)); *see also Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 611 (1991) ("[T]he trend in modern admiralty case law . . . is to focus the jurisdictional inquiry upon whether the nature of the transaction was maritime.").

The Court also emphasized that "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce."[39] "The conceptual approach," the Court explained, "vindicates that interest by focusing our inquiry on whether the principal objective of a contract is maritime commerce."[40] The *Kirby* opinion clarified that we should use contract rather than tort principles in determining whether a contract being sued upon is maritime.[41]

The Court in *Kirby* rejected the mixed-contract theory applied in some circuits and which was one of the underpinnings of the *Davis & Sons* panel's rationale in formulating its six-prong test. *Davis & Sons* explained that:

> A contract may either contain both maritime and non-maritime obligations or, as in the Gulf-Davis blanket agreement, contemplate future detailed contracts having different characteristics. If separable maritime obligations are imposed by the supplementary contracts, or work orders, these are "maritime obligations [that] can be separately enforced [in admiralty] without prejudice to the rest," hence subject to maritime law.[42]

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[39] *Kirby*, 543 U.S. at 25 (emphasis removed) (internal quotation marks and citations omitted).

[40] *Id.*

[41] *Id.* at 24. The Court explained that "[g]eography . . . is useful in a conceptual inquiry only in a limited sense: If a bill's *sea* components are insubstantial, then the bill is not a maritime contract." *Id.* at 27.

[42] *See Davis & Sons*, 919 F.2d at 315–16 (footnote omitted).

The *Kirby* court, after disapproving mixed-contract decisions from the Second, Fifth, and Federal Circuit Courts of Appeal,[43] added the following:

> Furthermore, to the extent that these lower court decisions fashion a rule for identifying maritime contracts that depends solely on geography, they are inconsistent with the conceptual approach our precedent requires. Conceptually, so long as a bill of lading requires *substantial* carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some land carriage.[44]

Our cases have long held that the drilling and production of oil and gas on navigable waters from a vessel is commercial maritime activity. For example, in *Theriot v. Bay Drilling Corp.*, we considered a contract for supplying a submersible drilling barge and concluded that the contract was clearly maritime, noting that "[o]il and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce."[45] We recently affirmed this understanding of commercial maritime activity in *In re Deepwater Horizon*, where we concluded that maritime law applied in reference to the oil spill that "occurred while the vessel[, Deepwater Horizon,] was engaged in the

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[43] *See, e.g.*, *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 290 (5th Cir. 1989).

[44] *Kirby*, 543 U.S. at 27 (emphasis added) (internal citation omitted).

[45] 783 F.2d 527, 538–39 (5th Cir. 1986).

maritime activity of conducting offshore drilling operations."[46]

III. CONCLUSION

Based on the principles laid out in *Kirby*, we adopt the following two-pronged test to determine whether a contract in this context is maritime: First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? The answer to this inquiry will avoid the unnecessary question from *Davis & Sons* as to whether the particular service is inherently maritime. Second, if the answer to the above question is "yes," does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?[47] If so, the contract is maritime in

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[46] 745 F.3d 157, 166 (5th Cir. 2014); *see also Boudreaux v. Am. Workover, Inc.*, 664 F.2d 463, 466 (5th Cir. Unit A Dec. 1981) (noting that vessel-related oil and gas drilling and production "is a major industry with peculiar maritime-related problems," and, further, that because it is "an industry that provides approximately 40,000 jobs, and untold millions of dollars in revenues and that takes place primarily upon the navigable waters of the United States," it "bears 'a significant relationship to . . . commerce on navigable waters'") (alteration in original) (footnote and internal citation omitted); *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. Unit A Nov. 1981) ("[O]ffshore drilling the discovery, recovery, and sale of oil and natural gas from the sea bottom is maritime commerce . . . ."); *Corbitt*, 654 F.2d at 332 (finding that a contract requiring the furnishing of a casing crew to a submersible drilling barge was a maritime contract); *Transcon. Gas Pipe Line Corp. v. Mobile Drilling Barge*, 424 F.2d 684, 688–91 (5th Cir. 1970) (finding that a drilling and re-work contract requiring the operation and "survey" of a submersible drilling barge was maritime in nature).

[47] When work is performed in part on a vessel and in part on a platform or on land, we should consider not only time spent on the vessel but also the relative importance and value of the

nature.[48] We find strong support in *Kirby* for this test, particularly in the following sentence: "Conceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract."[49] Also,

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vessel-based work to completing the contract. In *Chandris, Inc. v. Latsis*, in formulating the test for whether a worker's connection to a vessel was substantial enough to qualify him as a seaman under the Jones Act, 46 U.S.C. § 30104, the Supreme Court noted:

> [S]ubstantiality in this context is determined by reference to the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure. Generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act. This figure of course serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases.

515 U.S. 347, 371 (1995). The district courts may develop a similar rule of thumb in evaluating substantiality in this context. However, we leave this for further development below. The calculus would not include transportation to and from the job site.

[48] *See* Robertson, *supra* note 20, at 547–48.

[49] *See Kirby*, 543 U.S. at 27. Six other circuits have applied *Kirby* to determine whether a contract is a maritime one in various circumstances; though none of those decisions addressed a factual situation similar to that in this case, the approaches in those decision are not inconsistent with this test. *See Fireman's Fund Ins. Co. v. Great Am. Ins. Co.*, 822 F.3d 620, 631–36 (2d Cir. 2016) (analyzing whether an insurance contract was maritime); *N.H. Ins. Co. v. Home Sav. & Loan Co.*, 581 F.3d 420, 424–27 (6th Cir. 2009) (same); *Sentry Select Ins. Co. v. Royal Ins. Co.*, 481 F.3d 1208, 1218–20 (9th Cir. 2007) (same); *Flame S.A. v. Freight Bulk Pte. Ltd.*, 762 F.3d 352, 361–63 (4th Cir. 2014) (analyzing whether forward freight agreements were maritime contracts);

in *Kirby*, the parties obviously expected a vessel to play a major role in transporting the cargo from Australia to Alabama.[50]

This test places the focus on the contract and the expectations of the parties. This is the proper approach in a contract case and assists the parties in evaluating their risks, particularly their liability under indemnification clauses in the contract.[51] This test also removes from the calculus those prongs of the *Davis & Sons* test that are irrelevant, such as whether the service work itself is inherently maritime and whether the injury occurred following a maritime tort. Courts need not determine whether this service work has a more or less salty flavor than other service work when neither type is inherently salty.

This does not mean, however, that some of the *Davis & Sons* factors are never relevant. The scope of the contract may be unclear; the extent to which the parties expect vessels to be involved in the work may

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Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel, 636 F.3d 1338, 1340–41 (11th Cir. 2011) (analyzing whether a contract to conduct research pertaining to a shipwrecked vessel was maritime); *Puerto Rico Ports Auth. v. Umpierre-Solares*, 456 F.3d 220, 224–26 (1st Cir. 2006) (analyzing whether a contract to remove a sunken ship from navigable waters was maritime); *see also* ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 1:22 (5th ed. 2017) (discussing *Kirby*'s approach to analyzing maritime contracts).

[50] *See Kirby*, 543 U.S. at 19.

[51] We applied a similar analysis in *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, where we held that the focus of the contract, rather than the situs of the injury, was the relevant consideration for the purposes of evaluating the applicability of an indemnity agreement. *See* 589 F.3d at 786–89; *see also* FORCE & NORRIS, *supra* note 49, § 13:9 (discussing cases applying the rule emanating from *Grand Isle Shipyard*).

also be unclear. In resolving these issues, courts may permit the parties to produce evidence of the work actually performed and the extent of vessel involvement in the job. It is also conceivable, for example, that the seamen status of a crew—which is implicated in two of the *Davis & Sons* factors—could be relevant to whether the vessel involvement was a substantial part of the overall contract. If the contract provided only for work to be done by permanent crewmembers aboard a vessel, the substantial vessel involvement issue would ordinarily be answered. If part of the contract work involves work by crewmembers aboard a vessel and part does not, the work by seamen aboard a vessel would be part of the factual mix that the district court could consider in resolving whether the overall contract involved substantial involvement of a vessel.[52]

Applying this new test to this case, the oral work order called for STS to perform downhole work on a gas well that had access only from a platform. After the STS crew began work down hole, the crew encountered an unexpected problem that required a vessel and a crane to lift equipment needed to resolve this problem. The use of the vessel to lift the equipment was an insubstantial part of the job and not work the parties expected to be performed. Therefore, the contract is nonmaritime and controlled by Louisiana law. The LOIA bars indemnity. Accordingly, we reverse the summary judgment in favor of LDI and grant summary judgment in favor of STS, render

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[52] We deal today only with determining the maritime or nonmaritime nature of contracts involving the exploration, drilling, and production of oil and gas. If an activity in a non-oil and gas sector involves maritime commerce and work from a vessel, we would expect that this test would be helpful in determining whether a contract is maritime.

judgment in favor of STS, and dismiss LDI's third-party complaint against STS.

REVERSED AND RENDERED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed 07/07/2017]

No. 16-30217

In Re: In the Matter of the Complaint of Larry Doiron, Incorporated as Owner and Operator of the Barge Pogo and M/V Billy Joe for Exoneration from or Limitation of Liability

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LARRY DOIRON, INCORPORATED,

Plaintiff – Appellee

ROBERT JACKSON,

Intervenor Plaintiff – Appellee

versus

SPECIALTY RENTAL TOOLS & SUPPLY, L.L.P.; OIL STATES ENERGY SERVICES, L.L.C.; ZURICH AMERICAN INSURANCE COMPANY,

Defendants – Appellants

Appeal from the United States District Court for the Western District of Louisiana, Lafayette

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ON PETITION FOR REHEARING EN BANC

(Opinion February 23, 2017, 5 Cir., 2017, 849 F.3d 602)

Before STEWART, Chief Judge, JOLLY, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON and COSTA, Circuit Judges.

BY THE COURT:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

REVISED March 7, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed February 23, 2017]

No. 16-30217

In Re: In the Matter of the Complaint of
Larry Doiron, Incorporated as Owner and
Operator of the Barge Pogo and M/V Billy Joe
for Exoneration from or Limitation of Liability

LARRY DOIRON, INCORPORATED,

Plaintiff-Appellee

ROBERT JACKSON,

Intervenor Plaintiff-Appellee

v.

SPECIALTY RENTAL TOOLS & SUPPLY, L.L.P.;
OIL STATES ENERGY SERVICES, L.L.C.;
ZURICH AMERICAN INSURANCE COMPANY,

Defendants-Appellants

Appeal from the United States District Court
for the Western District of Louisiana

Before DAVIS, DENNIS, and SOUTHWICK, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

We are yet again required to determine whether a contract is a maritime one. Here, the focus is on a contract to perform flow-back services to improve the performance of an offshore natural-gas well when performance eventually required the use of a crane barge. Plaintiffs Larry Doiron, Inc. and Robert Jackson argue that maritime law applies. Defendants Specialty Rental Tools & Supply, Oil States Energy Services, and Zurich American Insurance Company (collectively, "STS") argue that state law, specifically that of Louisiana, applies. The district court determined the contract was maritime in nature. We conclude the question is close but agree that the specific contract at issue, which was an oral work order in effect at the time of injury, should be considered maritime. AFFIRMED.

FACTUAL AND PROCEDURAL BACKGROUND

On October 12, 2005, Apache Corporation and STS entered into a master services contract ("MSC"). The MSC does not describe individual tasks but operates as a "broadform blanket agreement" that contemplates future tasks to be performed under subsequent work orders to be agreed upon as necessary.[1] The MSC contains an indemnification provision that requires STS to defend and indemnify Apache and its "Company Group" against all claims for property damage or bodily injury. On appeal, the parties do not dispute that Larry Doiron, Inc. ("LDI") and Jackson are part

[1] The MSC provides: Apache "may, from time to time, request Contractor [STS] to perform work or render services hereunder ('Work') including but not limited to the following types of services: Chemicals, Equipment Rental."

of Apache's Company Group and are covered by the terms of the MSC.[2]

In early 2011, Apache hired Specialty Rental Tools & Supply ("STS") to perform flow-back services on its offshore well, located in West Lake Verret in the Atchafalaya Basin. The flow-back process is designed to dislodge solid objects from inside the well to "get it to produce gas again." The work was to be performed on Apache's fixed production platform. The flow-back services were arranged by an oral work order; neither party produced a written agreement for these particular services.

On February 24, 2011, STS sent its employees Peter Savoie and Matt Delahoussaye to perform the flow-back operation. After being unsuccessful that day, Savoie informed Brandon LePretre, Apache's representative, that STS would need additional equipment to perform the operation, including a flow-back iron, a hydraulic choke manifold, and a hydraulic gate valve. In Savoie's estimation, STS would also need a crane barge because the additional equipment was too heavy for the workers to remove from the wellhead. LePretre contacted VAS Gauging, Inc., which arranged for LDI to provide the crane barge POGO[3] for use at the

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[2] Before the district court, STS argued that VAS Gauging, Inc. – and not Apache – contacted LDI to procure the crane barge. As such, it argues, LDI was not in contractual privity with Apache, so "STS would not owe LDI and Mr. Jackson defense and indemnity even if the general maritime law is held to apply to the MSC." Neither party briefed this issue on appeal, so we need not address it here. *See United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001).

[3] We have previously recognized that a barge is a vessel if it is "equipped for use in navigable waters, ha[s] traveled a considerable distance through such waters to its present site and was, at the time of the accident, located in a navigable canal." *Producers*

Apache well. Robert Jackson was the crane operator. LePretre testified that he knew LDI owned the barge and that it was used at the well site with Apache's consent.

On the second day of the flow-back operation, Savoie and Delahoussaye were again unsuccessful, even with use of the crane. Savoie informed LePretre that he needed a coiled tubing unit, so they terminated the operation until one could be obtained. Savoie began "rigging down" and directed Jackson to lower the crane. Instead, Savoie reported the crane came toward him and "knocked [him] off balance." He clutched the crane to avoid falling backward but eventually lost his grip, which caused him to fall approximately eight feet onto the deck of the barge. His accident resulted in "a crush type injury to the right lower extremity."

Later that year, LDI made a formal demand that STS defend and indemnify LDI against any claims Savoie may bring. STS rejected the demand. LDI then filed a Vessel Owner Limitation Action for exoneration from liability on the basis of admiralty jurisdiction under 46 U.S.C. §§ 30501–30512. Savoie answered the complaint, alleging he was injured by LDI's negligence and through no fault of his own. LDI then filed a third-party complaint against STS and its affiliates. Jackson intervened in the Vessel Owner Limitation Action, seeking protection under the MSC and the insurance policy issued by Zurich. STS ultimately settled with Savoie, and the district court severed the indemnity claims from the personal-injury case.

Drilling Co. v. Gray, 361 F.2d 432, 437 (5th Cir. 1966). Neither party disputes that the POGO qualifies as a vessel, so we do not engage in any analysis of the barge's classification.

LDI and Jackson filed a motion for summary judgment to "enforce their contractual right to defense and indemnity." LDI and Jackson argued the MSC obligated STS to indemnify LDI and Jackson against Savoie's claims. In response, STS filed a cross-motion for summary judgment, arguing that the MSC "must be construed under Louisiana law and that the indemnity provision contained therein is void and unenforceable under the Louisiana Oilfield Indemnity Act." The district court granted the motion submitted by LDI and Jackson and denied the cross-motion submitted by STS.

Thereafter, the parties filed a joint motion to dismiss the claims not resolved by summary judgment and for entry of final judgment on the others. The parties reserved the right to appeal "the limited issue of whether Defendants were contractually obligated to defend and indemnify Plaintiffs . . . ." The court granted the motion and entered final judgment on March 10, 2016. STS filed a timely notice of appeal.

DISCUSSION

We review *de novo* the district court's grant of summary judgment. *James v. State Farm Mut. Auto. Ins. Co.*, 743 F.3d 65, 68 (5th Cir. 2014). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute exists if a reasonable jury could find in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All facts and evidence are viewed in the light most favorable to the non-movant. *James*, 743 F.3d at 68.

The issue here is whether maritime or state law should be applied to determine the validity of the MSC's indemnity clause. The MSC contains a choice-of-law provision:

> This contract shall be construed and enforced in accordance with the general maritime law of the United States whenever any performance is contemplated in, on or above navigable waters, whether onshore or offshore. In the event that maritime law is held inapplicable, the law of the state in which the work is performed shall apply.

The district court correctly analyzed the conflict as being one between Louisiana state law and general maritime principles. The Louisiana Oilfield Indemnity Act provides that indemnity clauses in "agreements pertaining to wells for oil, gas, or water" are void as violations of public policy. LA. REV. STAT. § 9:2780. Maritime law "does not bar enforcement of [those] provisions." *Hoda v. Rowan Cos.,* 419 F.3d 379, 380 (5th Cir. 2005). There are, though, no "clean lines between maritime and nonmaritime contracts." *See Norfolk S. Ry. Co. v. Kirby*, 125 S. Ct. 385, 393 (2004).

We articulated the legal framework for deciding cases like this in *Davis & Sons, Inc. v. Gulf Oil Corp*., 919 F.2d 313 (5th Cir. 1990). Distinguishing between maritime and non-maritime contracts "turns on a minute parsing of the facts," but we are bound by the *Davis* approach – however inexact it may be. *Hoda*, 419 F.3d at 380–81. In *Davis*, the parties entered a Master Service Agreement under which Gulf Oil would issue work orders directing Davis to perform specific tasks related to its natural-gas and crude-oil wells. *Davis*, 919 F.2d at 314. The agreement con-

tained an indemnity clause requiring Davis to indemnify Gulf Oil against any claims that may arise out of their relationship. *Id.* Under the work order at issue, Davis supplied land-based barges to perform routine maintenance on the wells. *Id.* The work platforms around the wells did not provide adequate workspace, so most of the work was done on the barge itself. *Id.*

On the day of the accident in *Davis*, the barge employee supervising the operation drowned. *Id*. His representatives sued both Davis and Gulf Oil, and the parties settled. *Id.* at 315. Davis sought a declaratory judgment that Louisiana law governed the contract and that the indemnity provision was therefore void. *Id.* Gulf Oil argued that maritime law applied to validate the indemnity provision. *Id.* The district court applied Louisiana law. *Id.*

On appeal, we held that when a contract involves two parts – "a blanket contract followed by later work orders" – the two must be interpreted together to determine whether maritime or state law applies. *Id.* We then articulated a two-part analysis. *Id.* at 316. First, we determine the nature of the contract by reference to its historical treatment. *Id*. If the historical treatment is unclear, we must consider six factors:

> 1) [W]hat does the specific work order in effect at the time of injury provide? 2) [W]hat work did the crew assigned under the work order actually do? 3) [W]as the crew assigned to work aboard a vessel in navigable waters[?] 4) [T]o what extent did the work being done relate to the mission of that vessel? 5) [W]hat was the principal work of the injured worker? and 6) [W]hat work was the injured worker actually doing at the time of injury?

Id.; *see also Hoda*, 419 F.3d at 381. In *Davis*, the work being performed was not historically maritime in nature. *Davis*, 919 F.2d at 316. Nonetheless, an analysis of the factors revealed "[t]he work done by the crew of Barge 11171 was inextricably intertwined with maritime activities since it required the use of a vessel and its crew." *Id*. at 317.

Applying *Davis*, we find no clarity to the historical treatment of contracts like this because this court has not previously considered flow-back operations. We have found contracts for the provision of wireline services to be non-maritime. *See, e.g.*, *Domingue v. Ocean Drilling & Expl. Co.*, 923 F.2d 393, 397–98 (5th Cir. 1991); *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 956 (5th Cir. 1988). Wireline services include providing maintenance for partially drilled oil and gas wells and gathering "geophysical data relevant to production." *Domingue*, 923 F.2d at 394 n.3. On the other hand, contracts for casing services are maritime in nature. *See, e.g.*, *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 500 (5th Cir. 2002), *overruled on other grounds by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 787 (5th Cir. 2009) (en banc); *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1123–24 (5th Cir. 1992). Casing is "the welding together and hammering of pipe into the subsurface of the earth to create a permanent construction." *Campbell*, 979 F.2d at 1118 n.2. One distinction between the two is that wireline services often do not require the use of a vessel; casing services do. *Compare Thurmond*, 836 F.2d at 956, *with Campbell*, 979 F.2d at 1123. Whether that distinction was sufficient to cause the different outcomes is unclear.

We now examine flow-back operations to see if they are comparable either to wireline operations or to

casing services. When providing flow-back services, employees use whatever equipment is necessary to clear the well for the resumption of production. The services themselves may be performed exclusively on the well platform or may, as here, require a vessel to be alongside the well. The district court was likely correct that "flow back services have little to do with traditional maritime activity or commerce." Even if flow-back services in the main are not maritime, this is not a sufficient answer under *Davis*. Because the historical treatment is unclear, we cannot rely on a generic view of the work; instead, we must consider the circumstances surrounding the injury. *See Devon Louisiana Corp. v. Petra Consultants, Inc.*, 247 F. App'x 539, 544 (5th Cir. 2007) (unpublished).

Under *Davis*. no single factor is dispositive. We find that four of the six factors – one, two, four, and six – indicate this contract is maritime in nature. The first factor concerns the specific work order in effect at the time of the injury. *Davis*, 919 F.2d at 316. Neither party can produce a written document to establish what the parties contemplated when this particular agreement arose. The MSC references vessels by requiring insurance coverage when the "contractor uses any vessels in connection with its work for Company or Company Group." While this factor concerns the specific work order and not the MSC, the language of the MSC indicates the parties at least contemplated the use of a vessel during the operations for which Apache would employ STS. Imposing a maritime obligation would not cause unfair surprise.

The second factor examines the work the crew assigned under the work order actually performed. *Id*. The STS crew performed a flow-back operation, which is not primarily maritime. In fact, however, Savoie and

Delahoussaye relied on the crane barge to execute the flow-back operation, and Savoie was injured as a result of its use. The district court noted that the operation "could not have been completed without the use of a crane barge . . . ." We agree. STS claims the barge was ancillary to the flow-back operation, but the presence of the barge was a necessary predicate to Savoie's using the hydraulic gate valve.

The fourth factor concerns the extent to which the work being done related to the mission of the vessel. *Id*. The barge was sent to Apache's well site to serve STS in the execution of its flow-back job. STS notes that the barge was forced to move away from the well during the flow-back process to avoid safety concerns raised by having an ignition source near a gas well. Despite its physical location at the time of the operation, though, the barge was still tasked with assisting STS in its execution of the flow-back operation.

The sixth factor concerns what the injured worker was doing at the time of his injury. *Id*. Savoie, at the time of injury, was preparing to disconnect the hydraulic gate valve from the crane. During "rigging down," Savoie clutched the crane itself and fell onto the deck of the barge when he lost his grip. Thus, Savoie was injured by equipment affixed to the vessel itself.

Only the third and fifth factors militate against applying maritime law. The third factor concerns whether the crew was assigned to work aboard a vessel in navigable waters. *Id*. Neither Savoie nor Delahoussaye was assigned to work aboard the crane barge. Still, Savoie made use of the barge by loading and unloading equipment from its deck, conducting

safety meetings on board the vessel,[4] and using the crane to install large equipment on the platform. The fifth factor concerns the principal work of the injured person. *Id*. At the time of his injury, Savoie was principally employed to perform the flow-back operation at issue; he was not commissioned to be a seaman. Yet Savoie need not be a sailor to give this work order a "peculiarly salty flavor." *See Thurmond*, 836 F.2d at 953, 956.

Some of the cases that have applied *Davis* assist us in our analysis. The gravamen of our inquiry is not whether the contract required use of a vessel but whether the *execution* of the contract required a vessel. *Demette*, 280 F.3d at 500–01. STS correctly notes that "incidental or preparatory use of a vessel" is not sufficient to render a contract maritime in nature. On the other hand, when the work is "inextricably intertwined with maritime activities," the contract will be maritime. *Davis*, 919 F.2d at 317.

We find useful similarities between this case and *Campbell*, where a worker performing casing services was injured when transferring from one vessel to another. *See Campbell*, 979 F.2d at 1122–23. First, neither this operation nor the operation in *Campbell* was intrinsically maritime; both may have been performed on a fixed surface instead of a vessel. Second, a vessel at some point became necessary to execute the operations in both cases. Also, both Savoie and the injured worker in *Campbell* suffered their injuries

[4] STS states neither Savoie nor Delahoussaye boarded the barge. Delahoussaye testified that no one from STS went onto the barge "during the actual flow back services" but made no representations as to whether he had boarded the barge at other times. The district court found that STS personnel had, at minimum, conducted safety meetings alongside the barge's crew.

while transferring to a vessel that had been used during the operation. Finally, and most importantly, the vessel's equipment was used to accomplish the relevant task both here and in *Campbell*. Given the similarities, Savoie's work, like the work in *Campbell*, was "inextricably intertwined with maritime activities . . . ." *See id.* at 1123 (quoting *Davis*, 919 F.2d at 317).

We also find similarities between this case and *Hoda*, where a worker was injured while working aboard a vessel. *See Hoda*, 419 F.3d at 380. His primary job under that work order was to tighten the nuts on a blow-out preventer on the wellhead. *Id*. at 381. The operation was performed using a crane aboard the vessel because there was no well platform. *Id*. In this case, Apache had a fixed well platform from which the flow-back operation could have been executed. Regardless, the existence of the fixed platform is immaterial because the use of a vessel eventually became necessary to manipulate the heavy equipment used during the operation. Like the injured worker in *Hoda*, Savoie would "have had nothing to do" had LDI not provided the crane barge. *See id*. Savoie's work depended on the barge's direct involvement, which strongly indicates a maritime contract. *See id.* at 383

Devon, an unpublished case from this court, is also analogous. There, the worker was injured aboard a vessel during inclement weather. *Devon*, 247 F. App'x at 541–42. At the time of his injury, he was working to repair an offshore well, and the operation required use of welding equipment. *Id*. Prior to the operation, the workers failed to secure a "hot work" permit, which precluded performance of welding operations on the well platform. *Id*. at 541. Thus, the welding equipment remained on the vessel, and the procedures were performed on the vessel itself. *Id*. On appeal, we decided

the contract was maritime in nature because the work at issue required the vessel's direct involvement. *Id*. at 544–45. We noted that, but for the employees' failure to secure a permit, the work could have been performed on a fixed platform. *Id*. at 545. It was fair to say, then, that the operation in fact required a vessel. *Id*. This case is similar. Although Apache had a fixed production platform from which the work could have been done, Savoie relied on the crane barge to perform the job when he realized he could not manipulate the heavy equipment alone. This should thus be seen as a maritime operation.

STS relies on *Thurmond* and *Domingue* to support its position. In *Thurmond*, decided before *Davis*, Gulf Oil contracted with P & S Well Services for a barge bearing equipment for the performance of wireline services. *Thurmond*, 836 F.2d at 953. Thurmond, a member of the barge's crew, was injured when he "stepped off the barge and on the wellhead[.]" *Id*. We held the contract to be nonmaritime, noting that Thurmond was "not engaged in the performance of a maritime obligation" at the time of his injury. *Id*. at 955. We also found significant that the parties' contract did not address the use of a vessel. *Id*. In *Domingue*, also concerning wireline services, the injured worker tripped over a piece of equipment the vessel's crew had placed on the well platform. *Domingue*, 923 F.2d at 394. We held that the vessel was "incidental . . . [to] the execution of [the] particular service contract." *Id*. at 397.

Thurmond and *Domingue* have been distinguished by this court under circumstances similar to this case. *See, e.g.*, *Campbell*, 979 F.2d at 1122; *Davis*, 919 F.2d at 316. Neither wireline nor flow-back services are themselves maritime activities. The flow-back services

in this case, though, could not have been completed without a vessel that was more than ancillary to the operation. Also, Savoie was not injured as a result of the flow-back operation but because of Jackson's operation of the crane, which was affixed to the vessel. Both workers in *Thurmond* and *Domingue* were on the well platform at the time of injury, but Savoie clutched the crane and fell onto the deck of the barge.

Further, unlike the contract in *Thurmond*, the MSC contemplated the use of a vessel, showing that both Apache and STS recognized a vessel could be necessary to the performance of its future work orders. The contract does not mention the crane barge specifically, but the MSC was a blanket agreement that did not create present obligations. Instead, it required STS to accommodate Apache's work orders at unspecified future dates. In addition, "the *Davis* factors must be applied to the facts as they actually occurred" and not "as the parties intended them" to occur. *See Devon*, 247 F. App'x at 545. Even if the parties did not expect a vessel would be used during the flow-back operation, one was.

STS also relies on one of our recent nonprecedential decisions, *Riverside Construction Company, Inc. v. Entergy Mississippi, Inc.*, 626 F. App'x 443 (5th Cir. 2015). We analyzed a repair contract for Entergy's Dolphin Fender System located on a fuel dock in the Mississippi River. *Id*. at 444. Entergy removed the suit to federal court, arguing the contract was maritime because it "contemplated that [the] work would be performed from a floating barge . . . ." *Id*. at 445. We found that federal law did not apply and that removal was improper because the barge, which remained tethered to a bank during the operation, was merely used as a platform from which the work could be

done – making it "auxiliary to the actual purpose of the contract[.]" *Id*. at 446.

Riverside is not factually analogous. No evidence exists to suggest the barge in this case remained tethered to a bank during the operation. Instead, it was close enough to the well platform – "located on navigable waters in West Lake Verret" – to permit the crane to access the wellhead.

STS also argues there is no basis for applying federal law to claims arising in Louisiana territorial waters, especially considering that state law applies to claims arising on the Outer Continental Shelf. The Outer Continental Shelf Lands Act extends the law of the adjacent state to the "subsoil and seabed" off its coast. 43 U.S.C. § 1333(a)(1). The adjacent state's law, though, is incorporated into federal law and "does not supplant admiralty and maritime law." ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 3:15 (2016). Accordingly, once we determine the contract is maritime, state law is irrelevant even on the Outer Continental Shelf. The policy of applying the law of the situs may seem appealing, but doing so would disrupt the "twin aims of maritime law": "achieving uniformity in the exercise of admiralty jurisdiction and providing special solicitude to seamen." *Miles v. Melrose*, 882 F.2d 976, 987 (5th Cir. 1989).

Finally, STS argues that "LDI's maritime tort is irrelevant to STS's contract." STS implies that Savoie's injury as a result of the barge is maritime, while the contract governing Apache's relationship with STS is not. In support, it notes that the personal injury lawsuit has been severed from this action, leaving us no tort issues to decide. As a result, it argues that LDI and Jackson are "attempt[ing] to cloud the nature

and character of the [MSC] by emphasizing LDI's own maritime tort against Mr. Savoie." Peeling the maritime tort away from an ostensibly non-maritime contract is imaginative enough, but it is inconsistent with our prior treatment of analogous situations. The fact that Savoie brought an action in tort has no effect on our interpretation of the choice-of-law provision or our analysis of the relevant facts. The tort suit also has no bearing on the application of the indemnity provision, which is the direct subject of this appeal. In fact, the tort suit only bears passing relevance because LDI and Jackson would not be seeking indemnification otherwise. We recognize the basic distinction between tort and contract claims, but that distinction is immaterial here because our outcome holds regardless of the doctrinal lens through which the facts are viewed.

Our holding is confined to the facts before us. *See Hoda*, 419 F.3d at 383.

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We conclude that the oral work order is the relevant contract and that it is a maritime contract. The district court did not err by determining maritime law applies. AFFIRMED.

W. EUGENE DAVIS, Circuit Judge, joined by LESLIE H. SOUTHWICK, Circuit Judge, specially concurring:

I concur in Judge Southwick's careful opinion which faithfully follows our precedent in *Davis & Sons*[1] and its progeny. I write separately to urge the court to take this case en banc and simplify the test for determining whether a contract is a maritime contract.

The multi-factor test in *Davis & Sons*, as set out in the majority opinion,[2] has been criticized by a number of judges of this court: in *Hoda v. Rowan Cos.*,[3] Judge Jones began the opinion by stating:

> This appeal requires us to sort once more through the authorities distinguishing maritime and non-maritime contracts in the offshore exploration and production industry. As is typical, the final result turns on a minute parsing of the facts. Whether this is the soundest jurisprudential approach may

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[1] *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990).

[2] The six factors are:

> (1) [W]hat does the specific work order in effect at the time of the injury provide? (2) [W]hat work did the crew assigned under the work order actually do? (3) [W]as the crew assigned to work aboard a vessel in navigable waters? (4) [T]o what extent did the work being done relate to the mission of that vessel? (5) [W]hat was the principal work of the injured worker? and (6)[W]hat work was the injured worker actually doing at the time of injury?

Id. at 316.

[3] 419 F.3d 379 (5th Cir. 2005) (concerning an indemnity claim on a contract to install a blowout preventer from a jack-up drilling rig).

> be doubted, inasmuch as it creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks by companies participating in this industry. Nevertheless, we are bound by the approach this court has followed for more than two decades.

In *Thurmond*,[4] Judge Garwood concurred in the opinion holding that a contract to provide wireline services that required use of a vessel was not a maritime contract. In his concurring opinion, however, he stated, "I am generally in agreement with Judge Wisdom's persuasive opinion, but am troubled by the tension, or perhaps outright inconsistency, between many of our opinions in this area."[5] And later,

> However, it seems to me that it may be desirable to consider this issue en banc, in order that we may take a more consistent approach to the question of whether and in what circumstances activities in connection with mineral development in state territorial waters are maritime (or perhaps "maritime and local").[6]

Professor David W. Robertson, in his article, pointed out some of the flaws in the *Davis & Sons* test:[7]

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[4] *Thurmond v. Delta Well Surveyors*, 836 F.2d 952 (5th Cir. 1988).

[5] *Id.* at 957 (Garwood, J., concurring).

[6] *Id.* (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 738 (1960)).

[7] For a more detailed criticism of the *Davis & Sons* test, *see* 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, 540-45 (2007).

> The "historical treatment" reference does no more than remind courts and counsel to look for close analogies in the jurisprudence. This is what courts must always do when there is no clear governing general rule or principle. The six factors are too pointillistic: they have led Fifth Circuit panels down such odd lines of thought as "whether drilling mud services are more akin to wireline work [which has sometimes been viewed as quintessentially nonmaritime] or to casing services [which can be maritime if done on a vessel-type drilling rig.]"[8]

One problem with the multi-factor test in *Davis & Sons* is the lack of guidance about what weight to give each factor. A number of our cases seem to give the most weight to the *Davis & Sons* prong that requires examination of the precise work to be performed, e.g., wireline service, welding, casing service, or drilling. Most of our cases hold that a contract to provide any of these services on a vessel on navigable waters is a maritime contract, but panels have held that contracts to provide wireline services are non-maritime in nature whether the contractor contemplates that the services are to be performed from a vessel or not.[9] On the other hand, we have held that contracts to perform

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[8] *Id.* at 545 (alteration in Robertson).

[9] *See Hollier v. Union Tex. Petroleum Corp.*, 972 F.2d 662, 665 (5th Cir. 1992) (holding that a contract for well testing on fixed platforms on the OCS is non-maritime); *Domingue v. Ocean Drilling & Expl. Co.*, 923 F.2d 393, 397-98 (5th Cir. 1991) (holding that a contract to provide wireline services to a jack-up rig operating on the OCS off the coast of Louisiana is non-maritime); *Thurmond*, 836 F.2d at 956-57 (holding that a contract to provide wireline services to a fixed platform in Louisiana state waters is non-maritime).

casing services are maritime because of the nature of casing work.[10]

A 2004 Supreme Court case, *Norfolk Southern Railway Co. v. Kirby*,[11] supports my view that the en banc court should abandon the *Davis & Sons* test. In *Kirby*, the Court was called upon to determine whether a bill of lading for a shipment of goods by sea from Australia to Charleston, South Carolina, then by rail to Huntsville, Alabama was a maritime contract.[12] The goods were damaged in a train wreck during the land leg of the trip and the question was whether the suit to recover damages for property that was damaged on this leg of the trip fell within admiralty jurisdiction.[13] The Court concluded that both the land and water portions of the bills of lading constituted maritime contracts because their primary objective was to accomplish the transportation of goods by sea from Australia to the eastern coast of the United

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[10] *See Demette v. Falcon Drilling Co.*, 280 F.3d 492, 501 (5th Cir. 2002) (finding that because casing work "is an integral part of drilling," which is a "the primary purpose of the vessel" a contract for casing services is maritime); *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1121 (5th Cir. 1992) (holding that a contract to provide casing services is maritime); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332 (5th Cir. 1981) (finding that circuit precedent compels the conclusion that a contract for casing services is maritime); *see also* Kenneth G. Engerrand, *Primer of Remedies on the Outer Continental Shelf*, 4 LOY. MAR. L.J. 19, 61-63 (2005) (noting that historically, some services contracts are considered maritime in nature, including drilling and workover, casing, catering, repair, and well-site supervision, while other services contracts are traditionally non-maritime in nature, including wireline work, testing and completion operations).

[11] 543 U.S. 14 (2004).

[12] *Id.* at 18-19.

[13] *Id.* at 21-22.

States.[14] Although the facts of this case are not closely analogous to those in today's case, the Court provided important guidance to assist us in determining whether a contract is a maritime contract:

> To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case. . . . Nor can we simply look to the place of the contract's formation or performance. Instead, the answer "depends upon . . . the nature and character of the contract," and the true criterion is whether it has "reference to maritime service or maritime transactions."[15]

And further "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce."[16]

Thus, in determining whether a contract being sued upon is a maritime contract, we should use contract principles rather than tort principles: We look to "the nature and character of the contract," "whether it has

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[14] *Id.* at 24.

[15] *Id.* (second alteration in original) (quoting *N. Pac. S.S. Co v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125 (1919) (citing *Ins. Co v. Dunham*, 78 U.S. 1, 16 (1870))); *see also Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 611 (1991) ("[T]he trend in modern admiralty case law . . . is to focus the jurisdictional inquiry upon whether the nature of the transaction was maritime.").

[16] *Id.* at 25 (emphasis removed) (internal quotation marks omitted) (quoting *Exxon*, 500 U.S. at 608 (quoting *Sisson v. Ruby*, 497 U.S. 358, 367 (1990), in turn quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982))).

'reference to maritime service or maritime transaction.'"[17] The Court called for a conceptual approach to the inquiry and the focus of the inquiry is the protection of maritime commerce.[18]

The six-prong test in *Davis & Sons* for determining whether the contract being sued upon is a maritime contract includes two prongs that are appropriate in a contract case: (1) what does the work order provide and (2) was the work to be performed on navigable water. The remaining factors are more appropriate in analyzing whether maritime tort jurisdiction can be exercised. In *Grand Isle Shipyard*, the en banc court encountered a similar question.[19]

In that case, another action to recover indemnity under a contract, we were faced with identifying the "situs of the controversy" under the Outer Continental Shelf Lands Act ("OCSLA").[20] If the situs was the Outer Continental Shelf ("OCS"), state law (Louisiana) applied and the indemnity agreement was unenforceable because of the Louisiana Oilfield Indemnity Act.[21] We overruled a number of our cases applying tort principles that held that the situs of the controversy for purposes of the OCSLA was the place of injury.[22] In

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[17] *Id.* at 24-25.

[18] *Id.* at 25.

[19] *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009) (en banc).

[20] *Id.* at 781.

[21] *Id.*

[22] *Id.* at 787-88 (overruling *Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531, 546 (5th Cir. 2002); *Demette*, 280 F.3d at 500; *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1527 (5th Cir. 1996); *Smith v. Penrod Drilling Corp.*, 960 F.2d 456, 459 (5th Cir. 1992); and *Hollier*, 972 F.2d at 664).

Grand Isle Shipyard, the injury occurred on a vessel and the appellant argued that this was the situs of the controversy.[23] We disagreed and concluded that we should apply contract principles and determine where the majority of the work was to be performed under the contract.[24] Because most of the work contemplated under the contract was on stationary platforms on the OCS, we concluded that this location was the focus of the contract and the situs of the controversy.[25] This resulted in the application of state law as required under OCSLA.[26]

The same reasoning applies here. This is a suit on a contract for indemnity. We look to the blanket contract and the verbal work order for the nature and character of the contract; that is, what was the work STS was engaged to do on the well in West Lake Verret in the state of Louisiana. The answer is clear: they were engaged to work downhole from a stationary platform to dislodge downhole obstructions and get the gas well back on production. The contract did not call for any work on a vessel.

As it turned out, an unexpected problem developed that required a vessel equipped with a crane to complete the job. Apache engaged another party, LDI, to provide the vessel and crew for this work.

Considering all of the above, what is an appropriate test for determining whether a contract to provide oilfield services is maritime or non-maritime? Based

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[23] *Id.* at 781-82.

[24] *Id.* at 787.

[25] *Id.* at 787-88; *see also* ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 13:9 (2016) (discussing cases applying the rule emanating from *Grand Isle Shipyard*).

[26] *Id.* at 789.

on the Supreme Court's opinion in *Kirby*, our opinion in *Grand Isle Shipyard,* and the weight of our decisions in this area, I would substitute the following test for determining whether a contract for services to facilitate the drilling or production of oil and gas on state waters or the OCS is a maritime contract.

So long as a contract's primary purpose is to provide services to promote or assist in oil or gas drilling or production on navigable waters aboard a vessel, it is a maritime contract. Its character as a maritime contract is not defeated simply because the contract calls for incidental or insubstantial work unrelated to the use of a vessel.[27]

Under this test, a contract or work order to provide specialized services to promote the drilling and production of an oil or gas well from a vessel should be considered a maritime contract. If such a contract also provides for work on land or platforms that is incidental to the work on vessels or insubstantial in relation to the vessel-related work, this does not defeat the character of the contract as a maritime contract. Under this test and consistent with most of our cases, specialized services to promote drilling or production of oil or gas to be performed solely from a stationary platform should not be considered a maritime contract.

Our cases have consistently held that oil and gas drilling on navigable waters from a vessel is considered maritime commerce.[28] It follows that other services performed on a vessel in navigable waters to

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[27] Professor Robertson recommends a similar test, *see* Robertson, *supra* note 7 at 548.

[28] *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538-39 (5th Cir. 1986) ("Oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce."); *Pippen v. Shell Oil*

facilitate the drilling and production of oil and gas constitutes maritime commerce. Determining whether the contract is maritime should not depend on the nature of the particular oilfield services contracted for.

Applying this test to today's case, the verbal Apache work order called for STS to perform downhole work from a stationary platform to clear an obstruction in a gas well and get it back on production. This downhole work on a stationary platform has no maritime or "salty" flavor that would qualify it as a maritime contract.

The fact that during the course of performing the work from the platform, a problem was encountered that required Apache to engage a vessel with a crane to assist in the job, does not alter the nature of Apache's contract with STS even though the STS crew performed incidental work to assist in connecting the vessel's crane to a load to be lifted.

CONCLUSION

It is time to abandon the *Davis & Sons* test for determining whether or not a contract is a maritime contract. The test relies more on tort principles than contract principles to decide a contract case. It is too flexible to allow parties or their attorneys to predict whether a court will decide if a contract is maritime or non-maritime or for judges to decide the cases consistently. The Supreme Court's decision in *Kirby* reinforces this conclusion. Just as important, the above test will allow all parties to the contract to more accurately allocate risks and determine their insurance needs more reliably.

Co., 661 F.2d 378, 384 (5th Cir. 1981) ("[O]ffshore drilling the discovery, recovery, and sale of oil and natural gas from the sea bottom is maritime commerce . . . .").

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

[Filed 04/24/13]

CIVIL ACTION NO. 11-1510

IN THE MATTER OF LARRY DOIRON, INC. AS OWNER AND OPERATOR OF THE BARGE POGO and THE M/V BILLY JOE

JUDGE DOHERTY
MAGISTRATE JUDGE HILL

MEMORANDUM RULING

Currently pending before the Court are: (1) a motion for summary judgment filed by Complainant-in-Limitation/Third-Party Plaintiff Larry Doiron, Inc. and Intervenor Robert Jackson (collectively referred to as "LDI") [Doc. 58]; and (2) a motion for summary judgment filed by Third-Party Defendants Specialty Rental Tools & Supply, L.L.C., Oil States Energy Services, L.L.C. and Zurich American Insurance Company (collectively referred to as "STS") [Doc. 63]. By way of their motion, LDI and Mr. Jackson seek a judgment "to enforce their contractual right to defense and indemnity," arguing "the Master Service Contract that is the subject of this motion obligates Specialty Rental Tools & Supply, LLP, and its successor, Oil States Energy Services, L.L.C., to defend, indemnify and hold harmless LDI and Jackson from and against

the claims asserted by all claimants in the present litigation and to reimburse LDI and Jackson for all attorney's fees and costs incurred by LDI and Jackson to date." [Doc. 58, p.1] By way of its cross-motion, STS seeks a judgment dismissing the claims of LDI and Jackson, arguing "the Master Service Contract at issue must be construed under Louisiana law," and therefore "the indemnity provision contained therein is void and unenforceable under the Louisiana Oilfield Indemnity Act." [Doc. 63, p.1]

I. Background

On August 19, 2011, Larry Doiron, Inc. filed a complaint for "exoneration from or limitation of liability." [Doc. 1] On September 30, 2011, Peter Savoie filed a claim for injuries against LDI. [Doc. 6] Mr. Savoie asserts he was injured on February 25, 2011, while working on a fixed production platform owned by Apache Corporation and located on navigable waters in West Lake Verret in the Afachalaya Basin. [Doc. 6, pp. 10-11] Mr. Savoie was employed by STS as a Field Supervisor III. Apache hired STS to perform a "flow back" job[1] on its platform.

On February 24, 2011, STS sent two of its employees (Mr. Savoie and Mathew Delahoussaye) to perform flow back services on Apache's production platform. The flow back attempt on that day was unsuccessful. Mr. Savoie advised Brandon LePretre (Apache's Company Man) "that the flow back efforts on the well had been unsuccessful and they needed larger equipment, including a three inch flow back iron, a hydraulic choke manifold and a hydraulic gate valve to proceed with the flow back job." [Doc. 58-1, p.4] Mr. Savoie

[1] According to the parties, a "flow back" job is an operation designed to clean up a well and increase production.

additionally advised Mr. LePretre that "a crane barge was needed to proceed with the flow back job."[2] [Id. at 4-5] Mr. LePetre testified Mr. Savoie advised him a crane barge was necessary, because the new equipment they were bringing out to perform the flow back services was too heavy for the workers to remove from the wellhead.[3] [Doc. 58-8, pp. 25-26, 32-33] Thereafter, Mr. LePretre contacted VAS Gauging, Inc. (an Apache contractor) and arranged for VAS to provide a crane barge to assist STS in the flow back job. VAS then contacted LDI and had LDI provide the crane barge POGO[4] for use at Apache's platform. The POGO was on location on the second day of the job. Mr. LePretre testified he was aware VAS intended to obtain a crane barge from LDI, and that the crane barge was at the worksite with the consent of Apache. [Doc. 58-8, pp. 31-32]

Despite the use of larger equipment on the second day, the flow back operations were still unsuccessful, and Mr. Savoie advised Mr. LePretre a coiled tubing unit would be necessary. The flow back job was then terminated, and Mr. Savoie and Mr. Delahoussaye began to disassemble and remove the flow back equipment. According to Mr. Savoie's testimony, after disconnecting some of the bolts that were holding the gate valve in place on the well head, he directed LDI's crane operator, Robert Jackson, to use the crane to place a "bind" on the gate valve so that he could

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[2] According to STS, "The only equipment that STS brought on location for the flow back services that [first] day was a dual choke, a manifold and some flow iron (pipe)." [Doc. 63-2, p.6]

[3] According to LDI, the hydraulic valve weighed approximately 500 pounds. [Doc. 58-1, p.2]

[4] The POGO is a self-propelled construction barge owned and operated by LDI. [Doc. 1, p.1]

remove the last bolt. Mr. Savoie had trouble removing the gate valve, but it eventually "popped out." [Doc. 69-2, p.139] When it finally popped out, "it canted even more, causing [the] chicksan to swing into the grease zerk where it was lodged." [Id.] Mr. Savoie then gave the crane operator the "all stop" signal. [Id. at 139; *see also* Doc. 69, p.7] Mr. Savoie then removed the chiksan from the grease zerk with his right hand and gave the crane operator the signal to boom down. [Doc. 69-2, p. 143] According to Mr. Savoie, rather than booming down, "All of a sudden the load come [sic] toward me very fast. When it did that, it knocked me off balance, I was going back, so I grabbed the chicksan [sic] to hold on. At that point, it's either, you know, fall backwards and break my neck or hold on for life." [Id. at 143-44] Mr. Savoie testified as he held the chiksan, the crane operator continued to boom up. "Then when I tell him to stop - - He wanted to put me down on the platform. I said, 'No, put me down on the barge.' So he started to come down. It just took him a long time to get me down. I couldn't hold on anymore. I slipped and was kind of grabbing for a grasp and I fell." [Id. at 144] Mr. Savoie asserts he fell approximately eight feet, onto the deck of the POGO, resulting in "a crush type injury to the right lower extremity."[5] [Doc. 6, pp. 11, 14]

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[5] More specifically, plaintiff alleges the incident caused:

> (1) an avulsion fracture of the distal lateral femoral condyle in the area of the fibular collateral ligament, (2) a comminuted fracture of the proximal diaphysis of the fibula, with displaced bony fragments, (3) crush type fractures of the medial and lateral tibial plateaus, with displaced bony fragments, and (4) severe edema of the right knee, along its anterior and posterior aspect, together with fluid within the supra patellar bursa sac; it was further determined that he also

On August 16, 2012, LDI made formal demand upon STS to defend, indemnify and hold LDI harmless against the claims asserted against LDI by Mr. Savoie. On September 24, 2012, STS rejected LDI's demand. LDI and STS have now filed the pending motions for summary judgment, thus necessitating this Court's interpretation of the nature of the Apache Master Service Contract, and potentially the scope of the defense and indemnity provision at issue therein.

All parties agree, at the time of Mr. Savoie's accident, STS was engaged by Apache to perform a flow back job at Apache's production platform, pursuant to a Master Service Contract, executed on October 12, 2005. [Docs. 58-2, ¶ 3; 63-7, ¶ 3] The MSC requires STS to defend and indemnify Apache, as well as Apache's contractors, subcontractors and invitees, from claims asserted by STS employees for bodily injury arising out of the work. Specifically, the contract provides as follows:

> Contractor hereby agrees to defend, release, indemnify, and hold harmless Company Group[6], from all losses, costs, expenses, and causes of action (including attorney's fees and court costs) for loss or for damage to property and for injuries to persons and death arising out of, incident to, or in connection with, the

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> suffered injury to his lower back, with concomitant low back pain and left lower extremity pain.

[Doc. 6, p.14]

[6] The MSA defines "Company Group" as follows: "As used herein, the term 'Company Group' shall mean each of Company, its parent, subsidiary and affiliated companies, and their officers, subcontractors (other than Contractor), and each of their respective successors, spouses, relatives, dependents, heirs and estates." [Doc. 58-3, p.1]

> work or any and all operation under this contract and which are asserted by or arise in favor of contractor, its parent, subsidiary and affiliated companies, and their officers, directors, employees[,] in-house legal counsel, agents representatives [sic], invitees, co-lessees, co-owners, partners, joint venturers, contractors and subcontractors . . ., whether or not such losses, costs, expenses, injuries, death, or causes of action are caused or contributed to by the negligence, omission, strict liability, or conractual [sib] liability, or fault of any member of company group and whether or not caused by a pre-existing condition.

[Doc. 58-3, p.1 (capitalization omitted)]

II. Analysis

By way of its motion, LDI argues the MSC is a maritime contract, because: the flow back job could not have been completed without the use of the POGO's crane, thus making the crane barge's role in the flow back operation an integral and necessary element of the operation; and, at the time of plaintiff's accident, the crew was utilizing the POGO's crane to lift the hydraulic valve and move it from Apache's platform to the equipment barge. Contrarily, STS argues the MSC is not a maritime contract, because: the MSC did not call for or require the use of a vessel[7]; the crane was

[7] Of note, STS does not explain how the equipment required to perform the flow back operations could have been utilized without the use of the crane barge POGO. Furthermore, the Fifth Circuit has found contracts which did not require the use of vessels for their execution to be maritime contracts, where a vessel ultimately became necessary in order to complete the work. *See e.g. Hoda v. Rowan Companies, Inc.,* 419 F.3d 379, 381 (5th Cir. 2005); *Devon Louisiana Corp. v. Petra Consultants, Inc.,*

required only for "rigging up" and "rigging down," and not for the actual flow back services[8]; the crane barge was not permitted to be on location during the actual flow back operations, and thus, the flow back operations were conducted without the use of a vessel[9]; plaintiff's alleged injuries occurred after the flow back operation was completed, during the rigging down process[10]; STS had "nothing to do" with the selection of

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247 Fed.Appx. 539, *5 (5th Cir. 2007). The Court additionally notes, "'Even a contract for offshore drilling services that does not mention any vessel is maritime if its execution requires the use of a vessel.'" *Hoda* at 383 (quoting *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 500-501 (5th Cir. 2002)). While it is true the MSC makes no explicit reference to a vessel, it does contain a choice of law provision which provides: "This contract shall be construed and enforced in accordance with the general maritime law of the United States whenever any performance is contemplated in, on or above navigable waters, whether onshore or offshore. In the event that maritime law is held inapplicable, the law of the state in which the work is performed shall apply." [Doc. 58-3, p.2 (capitalization omitted)] Additionally, the contract requires STS to obtain certain types of marine insurance, "if contractor uses any vessels in connection with its work for company. . . ." [Id. at p.4 (capitalization omitted)]

[8] More specifically, STS argues the crane "was needed for lifting a hydraulic gate valve onto the wellhead before flow back services began and for removing the valve once the flowback services were complete. Lifting equipment on and off a wellhead is referred to [sic] 'rigging up' and 'rigging down.' Mr. Delahoussaye testified that rigging up is not part of flow back services." [Doc. 63-2, p.6]

[9] The Court notes the testimony cited in support of this statement is that neither the tug nor the crane barge could be near the platform during flow back operations, because the crew was concerned about "ignition sources" in light of the fact they would be "flowing back gas." [Doc. 63-3, p. 36]

[10] STS concedes the POGO's crane was involved in plaintiff's accident, as the crew was in the process of rigging down at that time, but asserts this use of the crane "was only incidental to the

LDI and had no obligation to charter a crane barge under the MSC[11]; plaintiff was not assigned to any vessel and never operated the crane; and finally, aside from rigging up and rigging down, all flow back operations were conducted either on the platform, or the adjacent equipment barge.

To determine whether a contract is a maritime or non-maritime contract, a court must first undertake an examination of the "historical treatment in the jurisprudence" of the type of work at issue – in this case, flow back services. Where, as here, the historical treatment is not sufficiently established, the Court should then engage in a "fact-specific inquiry" by applying the six factor test set forth in *Davis and Sons, Inc. v. Gulf Oil Corp.,* 919 F.2d 313, 316 (5th Cir. 1990); *see also Hoda v. Rowan Companies, Inc.,* 419 F.3d 379, 381 (5th Cir. 2005). The six factors are:

> 1) what does the specific work order in effect at the time of injury provide? 2) what work did the crew assigned under the work order actually do? 3) was the crew assigned to work aboard a vessel in navigable waters? 4) to what extent did the work being done relate to the mission of that vessel? 5) what was the principal work of the injured worker? and 6) what work was the injured worker actually doing at the time of injury?

Davis at 316; *see also Hoda*, 419 F.3d at 381 (5th Cir. 2005).

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principal work being performed — the flow back services." [Doc. 63-2, p.10]

[11] This is a distinction without a legal difference, as the MSC requires STS to defend and indemnify *Apache's* subcontractors and invitees - not STS's subcontractors and invitees.

A. Historical Treatment

As stated above, the Court's first task is to investigate the historical treatment of the type of work at issue. Here, all parties agree Apache retained STS to perform flow back services on Apache's well located on a platform, in order to increase the well's productivity. Neither this Court, nor the parties, have found any jurisprudence addressing the historical treatment of flow back services, or whether contracts for such services, when performed on a platform in navigable waters but with the use of a crane located on a vessel, constitute maritime contracts. Accordingly, this factor is inconclusive. Nevertheless, it appears self-evident that flow back services have little to do with traditional maritime activity or commerce, but rather, are services peculiar to the oil and gas industry, whether those services are conducted on or offshore.

In *Devon Louisiana Corporation v. Petra Consultants, Inc.*, the Fifth Circuit undertook an examination of whether a contract to repair a fixed platform was a maritime contract. 247 Fed.Appx. 539 (5th Cir. 2007). Because the Court had not previously considered that question, it found the first prong of the *Davis* analysis *(i.e.* an examination of the "historical treatment") to be "inconclusive." *Id.* at 544; *see also Hoda* at 381 ("in some circumstances, though not here, the historical treatment is clear enough to make the second part of the test 'unimportant.'"). In conducting its analysis, the *Devon* Court provided the following overview of the pertinent jurisprudence:

> We . . . held in *Domingue . . . ,* that where a contract is only incidentally related to a vessel's mission, it is not maritime. *Domingue* involved a contract for wireline services on an offshore well. The work order required the

crew to use a jack-up drilling rig. Although a jack-up rig has been classified as a vessel for maritime law purposes, **in *Domingue* the use of a vessel was purely incidental to the execution of the contract, and nothing about the contract required that the contractor use a vessel instead of a mere work platform.**

In contrast, the work in *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1123 (5th Cir.1992), **required the use of a vessel as such. *Campbell* involved casing work that required the use of a vessel such as a jack-up rig, along with its derrick and draw works, because there was no fixed platform or derrick at the work site.** Similarly, in *Davis* we noted that the "particular nature of the terrain and production equipment required" the use of a vessel. *Davis* involved a work crew that traveled from one offshore job site to another and made various repairs to the offshore facilities and thus required a vessel "that could function as a mobile work platform."[12]

In *Hoda,* . . . we addressed an analogous situation in which the crew's "exact work did not require the use of [a] vessel," **but the work "could not be performed without the [vessel's] direct involvement." *Hoda* involved the torquing up and down of the bolts on blowout preventer stacks, a task that by itself did not require the use**

[12] *See also Davis* at 317 (mission of "mobile maintenance vessel" was "inextricably intertwined with maritime activities'").

> **of the vessel or its crew but that would have been irrelevant and impossible if the vessel's crew had not used the vessel's rig to set the stacks and bolts in place.**

Devon at 544-45 (citations and footnotes omitted) (emphasis added).

The *Devon* court ultimately determined the contract before it was a maritime contract, reasoning:

> **Although the "exact work" on the punch list did not require the use of a vessel *per se,*** the failure of the parties to obtain a hot work permit meant that the welding work, which was a prerequisite for completing some of the tasks on the punch list, **had to be completed on a vessel, not the fixed platform**. . . . The contract here required that the parties provide a vessel *per se,* because **only a vessel working alongside the already existing fixed platform could provide a suitable place to perform the hot work.** As was the case in *Davis, Campbell,* and *Hoda,* the instant contract required that a vessel be provided.
>
> It is undisputed that the hot work could have been completed on the oil and gas platform if the appropriate permit had been obtained. The inability to perform the hot work on the vessel was not caused by any physical or technical limitations but by the legal limitations resulting from the absence of a permit. That is, however, a distinction without a legal difference. *Hoda, Davis,* and *Campbell* do not require that the need for a

> vessel be caused by physical or technical limitations. **There is no practical difference between having to use a vessel because of physical realities and having to use one because of legal restrictions. A vessel is required in both situations.**
>
> **The jurisprudence therefore indicates that where the use of a vessel as such is required for completion of the contract, maritime law appropriately governs.**

Id. at 545 (emphasis added).

B. *Davis* Factors

As noted, after examining the historical treatment in the jurisprudence, the court is to apply the six factor test set forth in *Davis and Sons.*

1. What does the specific work order in effect at the time of injury provide?

According to counsel for STS, "STS was not performing under a specific work order on the day of Mr. Savoie's alleged injury."[13] [Doc. 63-2, p.10] However, all parties agree that Apache hired STS to perform flow back services on its well. As is commonplace in the oil and gas industry, the MSC does not describe the work to be performed by the agreement, as it

[13] The only support counsel for STS has provided for this statement is the deposition testimony of Mr. Delahoussaye, the STS employee working under Mr. Savoie on the day of the accident. Counsel has not shown Mr. Delahoussaye is the proper person to testify as to such matters, such that this Court can indeed conclude there were no specific work orders (written or verbal) for the flow back job on the day in question. Presumably there exists, at the very least, a verbal work order, or STS would have no reason to be on Apache's platform.

is simply a broadform blanket agreement which contemplates future specific work orders covering the specific work to be done.[14] *Domingue v. Ocean Drilling and Exploration Co.,* 923 F.2d 393, 394 (5th Cir. 1991).

2. What work did the crew assigned under the work order actually do?

All parties to this motion agree STS was performing flow back services on Apache's well *on a fixed platform,* in order to clean out the well and make it more productive. According to LDI, such work included: selecting the equipment necessary for the job, off loading the equipment from the barge, attaching a sling to the hydraulic valve, assembling the equipment on the well head, stabbing the hydraulic valve, turning on the pump and monitoring the fluids, serving as the signal man for the crane operator, disassembling the equipment and loading it back onto the barge, and conducting safety meetings (which included the crew of the crane barge). [Dots. 69, p.12; 69-2, pp.83, 85; 103]

3. Was the crew assigned to work aboard a vessel in navigable waters?

The STS crew was not assigned to work aboard a vessel in navigable waters. [Doc. 63-1, no. 34; LR 56.2] However, all parties appear to agree that STS

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[14] As stated in the MSC:

> a) Company may, from time to time, request Contractor to perform work or render services hereunder ("Work") including but not limited to the following types of services: Chemicals, Equipment Rental.
>
> b) Upon acceptance of a job order or other request to perform work . . . .

[Doc. 58-3, p.1, ¶ 2]

employees performed some of their work from an equipment barge.[15]

4. To what extent did the work being done relate to the mission of that vessel?

According to STS, the flow back services did not relate to the mission of any vessel. According to LDI, "The POGO' s mission was to provide the crane services needed by the STS crew to complete the flow back job." [Doc. 69, p.11] LDI further asserts Mr. Savoie was in charge of "when, where and how the STS crew used the crane in connection with the flow back job. . . ." [Id.]

5. What was the principal work of the injured worker?

Mr. Savoie's principal work was to provide flow back services to Apache's well.

6. What work was the injured worker actually doing at the time of injury?

At the time of his injury, Mr. Savoie was in the process of disconnecting the hydraulic gate valve, so

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[15] According to STS, "the barge was used for deck space for the flow back equipment." [Doc. 632, p.4] STS implies the equipment barge was used merely as a work platform. [Doc. 71-1, p.4 ("[T]his Court has held, and LDI states in its opposition, that a contract is not necessarily, not maritime when a vessel is being used only as a mere work platform."] According to LDI, "Throughout the process of preparing for the flow back job, the STS employees were regularly aboard the equipment barge and also used that barge for their safety meetings. Irrespective of the degree of their connection with the crane barge [POGO], their connection to the equipment barge was far more than an [sic] incidental." [Doc. 69, p.12]

that it could be lifted and loaded onto the equipment barge and taken back to STS.

C. Finding as to nature of the contract

While it is, decidedly, a close question, the Court concludes, after a review of the historical treatment, applicable jurisprudence, and evidence submitted, that the contract between Apache and STS is a maritime contract. The job for which STS was retained – flow back services - as a practical matter was proven to be one that could not have been completed without the use of a crane barge, as evidenced by the earlier unsuccessful attempts. As there was no crane on the platform with which to place the hydraulic valve onto the well head and remove it therefrom after completion of the work and as the vessel was ordered after unsuccessful attempts to perform the task, the vessel was necessary in order to perform the task at hand. As in *Hoda*, while STS's "exact work did not require the use of the vessel, her personnel or equipment," STS would have had nothing to do had LDI personnel not used the POGO's equipment to set the hydraulic gate valve in place. *Hoda* at 381 ("Greene's exact work did not require the use of the vessel, her personnel or equipment, but Greene's would have had nothing to do had Rowan personnel not used the rig's equipment to set the blow-out preventers in place, align them, place the bolts on them, and place the nuts on the bolts for tightening (or performed the same functions in reverse order."); *see also Devon* at *5 (although the work did not require a vessel *per se,* and could have been completed on the platform had the appropriate work permits been obtained, the failure to obtain a hot work permit meant the welding work had to be completed on a vessel, thus rendering the contract a maritime contract). Here, the work was attempted without the

involvement of the vessel and was unsuccessful without the vessel. Accordingly, the Court finds, as did *Hoda,* STS' s services were "inextricably intertwined" with the successful attempt at completion of the activity on the POGO, and all were dependent on LDI's placement of STS's equipment on which STS's employees worked, and could not be performed without the POGO's direct involvement. *Hoda* at 383 ("Greene's services were 'inextricably intertwined' with the activity on the rig, were dependent on Rowan's placement of the equipment on which Greene's employees worked, and could not be performed without the rig's direct involvement.")

Finally, to the extent STS argues LDI was neither an invitee nor a subcontractor of Apache, such that the indemnity provision would be inapplicable, STS has failed to carry its burden, both in law and in fact.[16]

III. Conclusion

In light of foregoing, the motion for summary judgment [Doc. 58] submitted by LDI and Robert Jackson is hereby GRANTED. Accordingly, STS must

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[16] The entirety of STS's argument on this issue is as follows:

> LDI was engaged to provide its services by VAS, not Apache. Therefore, there was no contractual privity between LDI and VAS. As such, LDI cannot be an invitee of Apache. Further, the corporate representative of LDI testified that LDI was acting as VAS' subcontractor, not Apache's. Therefore, STS would not owe LDI and Mr. Jackson defense and indemnity even if the general maritime law is held to apply to the MSC.

[Doc. 63-2, p.13] Clearly, LDI was the invitee of Apache, and LDI was at the worksite with Apache's consent. *See* Doc. 58-8, pp. 31-32; *Blanks v. Murco Drilling Corp.,* 766 F.2d 891, 894 (5th Cir. 1985). Accordingly, LDI falls within the protections of the indemnity provision of the MSC.

defend, indemnify and hold harmless LDI and Jackson from and against the claims asserted by Peter Savoie in the present litigation, and STS must reimburse LDI and Jackson for all attorney's fees and costs incurred by LDI and Jackson in connection therewith to date. The motion for summary judgment [Doc. 63] submitted by STS is DENIED.

THUS DONE AND SIGNED in Chambers Lafayette, Louisiana, this 24 day of April, 2013.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 11-1510

IN THE MATTER OF LARRY DOIRON, INC. AS OWNER AND OPERATOR OF THE BARGE POGO AND THE M/V BILLY JOE

JUDGE DOHERTY
MAGISTRATE JUDGE HILL

ORDER

Considering the foregoing Memorandum Ruling, the motion for summary judgment [Doc. 58] submitted by Larry Doiron, Inc. ("LDI") and Robert Jackson is hereby GRANTED. Accordingly, Specialty Rental Tools & Supply, LLC, Oil States Energy Services, LLC and Zurich American Insurance Company (collectively, "STS") must defend, indemnify and hold harmless LDI and Robert Jackson from and against the claims asserted by Peter Savoie in the present litigation, and STS must reimburse LDI and Jackson for all attorney's fees and costs incurred by LDI and Jackson in connection therewith to date.

The motion for summary judgment [Doc. 63] submitted by STS is DENIED.

THUS DONE AND SIGNED in Lafayette, Louisiana, this 24 day of April, 2013.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-30217

In re: In the Matter of the Complaint of Larry Doiron, Incorporated as Owner and Operator of the Barge Pogo and M/V Billy Joe for Exoneration from or Limitation of Liability

---

LARRY DOIRON, INCORPORATED,

Plaintiff – Appellee

v.

SPECIALTY RENTAL TOOLS & SUPPLY, L.L.P.;
OIL STATES ENERGY SERVICES, L.L.C.;
ZURICH AMERICAN INSURANCE COMPANY,

Defendants – Appellants

Appeal from the United States District Court
for the Western District of Louisiana Civil Action
No. 15-cv-00593 The Honorable Rebecca Doherty,
United States District Judge

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Case No. 16-30217

In re: In the Matter of the Complaint of Larry Doiron, Incorporated as Owner and Operator of the Barge Pogo and M/V Billy Joe for Exoneration from or Limitation of Liability

Larry Doiron, Incorporated

v.

Specialty Rental Tools & Supply, L.L.P.; Oil States Energy Services, L.L.C.; Zurich American Insurance Company

I CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1 The Parties

1.1 Larry Doiron, Incorporated	Plaintiff-appellee
1.2 Robert Jackson	Plaintiff-in-Intervention-appellee
1.3 Specialty Rentpal Tools & Supply, L.L.P.	Defendant-appellant
1.4 Oil States Energy Services, L.L.C.	Defendant-appellant
1.5 Zurich American Insurance Company	Defendant-appellant

2 Counsel for the Parties

2.1	Alan D. Ezkovich Kristin M. Lausten Ezkovich & Co., LLC	Counsel for Larry Doiron, Incorporated, Plaintiff-appellee, and Robert Jackson, Plaintiff-in-Intervention-appellee
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3 Other interested parties

3.1	RLI Insurance Company	Insurer of Larry Doiron, Inc.

/s/ Alan D. Ezkovich
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Robert Jackson, Plaintiff-in-Intervention-appellee

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IV STATEMENT OF THE ISSUES PRESENTED FOR REVIEW (SUPPLEMENTAL)

In response to the Court's request for supplemental briefs, Larry Doiron, Inc. ["LDI"] and Robert Jackson ["Jackson"] present the following supplemental issues for review.

1. Specialty Rental Tools & Supply, LLP ["STS"] and Apache Corp. ["Apache"] entered into a clear and unambiguous written contract under which they agreed that performance of the contract would require the involvement of maritime commerce, and that the contract would be governed by maritime law. With the district court sitting in admiralty, maritime choice of law rules control the determination of whether the choice of law provision is enforceable. Maritime choice of law, which historically seeks nationwide uniformity, mandates the enforcement of the parties' agreement to be bound by maritime law. The issue presented for review is whether the unambiguous agreement of the parties should be enforced under the maritime law of the United States.

2. In *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 125 S. Ct. 385 (2004), the United States Supreme Court declared as its "touchstone ... a concern for the uniform meaning of maritime contracts." With that in mind, interpretation of a contract should be controlled by federal maritime law irrespective of the place of its execution or performance. The issue presented for review is whether the unambiguous language of a written contract controlled by federal maritime law should be interpreted any differently when performance is in the navigable waters of the United States

located in Louisiana as opposed to elsewhere in the country.

3. After the panel unanimously affirmed the district court's judgment finding the contract in question to be a maritime contract, Judge Eugene Davis wrote in a specially concurring opinion,

> I concur in Judge Southwick's careful opinion which faithfully follows our precedent in *Davis & Sons*[1] and its progeny. I write separately to urge the court to take this case en banc and simplify the test for determining whether a contract is a maritime contract.

In re: Larry Doiron, Inc., 849 F.3d 602, 610-11 (5th Cir. 2/23/17), Davis, J., specially concurring (footnote omitted). Relying in part on the Supreme Court's opinion in *Kirby*, Judge Davis proposed a rule that, while perhaps simpler than *Davis & Sons*, nonetheless requires an inquiry and balancing of the subjective intent of the parties beyond that stated in their explicit, objective and written contract. It is respectfully suggested that an even simpler rule, which is in full compliance with *Kirby*, would be to apply the expressed and objective intent of the parties with respect to a contract's maritime nature. The issue thus presented for review en banc is whether this court should fashion a rule that goes beyond the four corners of the parties' contract in an effort to exclude the contract from enforcement under the nationwide and uniform general maritime law of the United States.

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[1] *Davis & Sons, Inc. v. Gulf Oil Corp*., 919 F.2d 313 (5th Cir. 1990).

4. The parties to this appeal entered into their contract with the understanding and knowledge that *Davis & Sons* would control the interpretation of their contract. The parties to this appeal never challenged the efficacy of *Davis & Sons*, nor did they raise the issue of whether *Davis & Sons* ran afoul of the Supreme Court's decision in *Kirby*. The first time the issue was ever raised was after the appeal was briefed, argued, and decided, when it was mentioned in the special concurring opinion attached to the unanimous panel decision. Changing the rule of law applicable to the dispute before it, when the parties did not raise the issue, contravenes this Court's requirement that only those issues properly raised in the district court and preserved on appeal by the parties may be considered. *United States v. Brace*, 145 F.3d 247, 255-56 (5th Cir. 1998) (en banc).

   Changing the law after the appeal was argued and the judgment was affirmed is not only unfair, but would also result in the ex post facto application of a new rule of law that adversely affects private contractual rights. The Supreme Court has held that "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively," it should not be applied retroactively. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). In this case, the parties to this litigation did not raise the issue addressed in the special concurring opinion and there is prospect of a substantial inequitable result that the Court may change the existing rule of law to the detriment of the contracting parties. The issue presented is whether, if the Court elects en banc to adopt a new rule of law that would reverse the judgment below, the

decision should apply only to those cases that are decided hereafter.

V STATEMENT OF THE CASE (SUPPLEMENTAL)

The parties to this case operated under this Court's long-standing holding in *Davis & Sons*. In point of fact, it was STS and its insurer, Zurich American Insurance Company ["Zurich"] that directly requested the district court to apply the *Davis & Sons* standard, and criticized LDI and Jackson for not citing it. ROA.162 ("They [LDI and Jackson] very curiously make absolutely no mention of *Davis & Sons, Inc. v. Gulf Oil Corporation*, 919 F.2d 313 (5th Cir. 1990), the seminal Fifth Circuit case by which this Court must be guided in determining whether the MSC is maritime."). No party to this litigation challenged the efficacy of *Davis & Sons*, or ever suggested that it in any way ran afoul of the Supreme Court's holding in *Kirby*.

With the issue of streamlining or replacing *Davis & Sons* first being raised in the special concurring opinion in this appeal, appellees, in this Supplemental Brief, re-focus on the facts and proceedings below that may be pertinent to the Court's consideration en banc, and endeavor to avoid duplication of the presentation in their Principal Brief.

A FACTUAL STATEMENT (SUPPLEMENTAL)

The Master Service Contract ["MSC"] between STS and Apache objectively contemplated the active engagement of maritime commerce. The MSC contains multiple provisions relating to the use of vessels, and

requirements for marine insurance coverage, including *inter alia* LHWCA[2] (with an OCSLA[3] extension) liability insurance, members and masters of crews of vessels coverage, and hull and machinery coverage. ROA.97. The MSC also contains a provision that requires STS to indemnify and defend Apache and other defined parties, including (by that definition) LDI and Jackson, if one of STS's employees is injured and sues. ROA.94. STS is also required to have Apache listed as an additional insured for "all obligations undertaken and liabilities assumed by [STS] under the [MSC]," and requires STS to procure maritime-related insurance.

Oil and gas operations occur in a variety of situations. Explicitly and objectively recognizing that the services STS would perform for Apache would be in, on or above the navigable waters of the United States, the MSC contained a clearly-worded choice of law clause provision:

> THIS CONTRACT SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE GENERAL MARITIME LAW OF THE UNITED STATES WHENEVER ANY PERFORMANCE IS CONTEMPLATED IN, ON OR ABOVE NAVIGABLE WATERS, WHETHER ONSHORE OR OFFSHORE. IN THE EVENT MARITIME LAW IS HELD INAPPLICABLE, THE LAW OF THE STATE IN WHICH THE WORK IS PERFORMED SHALL APPLY.

ROA.95 (all uppercase in original).

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[2] Longshore and Harbor Workers Act, 33 U.S.C. § 901, *et seq.*

[3] Outer Continental Shelf Land Act, 43 U.S.C. § 1331, *et seq.*

The inclusion of this language in the MSC explicitly and objectively indicates that the parties intended and expected that general maritime law would apply whenever a question arose regarding the rights and responsibilities of the parties.

A key undisputed material fact of this case is that there was no way for STS to perform its flow back operations without the utilization of a maritime commercial vessel. Memorandum Ruling, p.5 at n.7. ROA.314. It is this necessary involvement of mariners and their vessels that allowed STS to perform its contractual obligations; absent the presence of LDI's Crane Barge POGO and Mr. Jackson, her operator, STS would have had no work to perform. This inextricable integration of maritime commerce into STS's performance was explicitly and objectively contemplated by STS in its MSC with Apache. STS may subjectively have wanted to side-step the use of maritime commerce in order to avoid the effect of its express, objective obligation to have maritime law apply and to indemnify others—such as LDI and Jackson—but it was unable to avoid integrating maritime commerce into its operations. Instead, STS called upon Apache to summon a maritime vessel for STS's use in, on, or above navigable waters.

Mr. Savoie (STS's representative on the scene and the injured worker in this case) not only had to use a vessel (not the POGO) to get to his jobsite, but he also requested that Apache provide it with the floating barge-based crane so he could complete STS's job. Apache abided STS's request and retained LDI to provide a vessel, her rigging and her crew for STS's use in the performance of STS's MSC-controlled verbal work order. LDI deployed its vessel, Crane Barge POGO, and her operator, Robert Jackson, and allowed

Mr. Savoie to "run the show" and direct Mr. Jackson's positioning and operation of the vessel's crane. Deposition of P. Savoie, ROA.228:11-229:5; *see also* Memorandum Ruling, ROA.320.

B SUMMARY OF PROCEEDINGS BELOW (SUPPLEMENTAL)

This federal admiralty litigation commenced when LDI filed a Vessel Owner Limitation Action pursuant to 46 U.S.C. § 30501, *et seq*. Mr. Savoie answered the complaint in the Vessel Owner Limitation Action and asserted his claim for bodily injuries against several parties, including LDI and its operator, Mr. Jackson. Mr. Savoie based his claim on maritime law and the fact that he was injured aboard the vessel POGO, specifically alleging that

> the place of the injuries suffered by Savoie; that is, where the impact of the negligent acts and omissions were appreciated by Savoie, happened on the deck of the BARGE POGO, which was then located on a navigable waterway—Lake Verret; that this incident had the potential to disrupt, and in fact, did disrupt maritime commerce, and the general character of the activity given rise to Savoie's injuries had a substantial relationship to traditional maritime activity.

Savoie's First Supplemental and Amending Answer and Exceptions, Claim, and Third Party Demand, Section entitled "Savoie's Claim for Injuries and Damage," ¶ VII, Vessel Owner's Limitation Action, Doc. 68 (referenced at ROA.28), and Savoie's Answer and Exceptions, Claim, and Third Party Demand, Section entitled "Savoie's Claim for Injuries and

Damage," ¶ VII, Vessel Owner's Limitation Action, Doc. 6 (referenced at ROA.22).

LDI then filed a third-party complaint against STS, Oil States Energy Services, LLC ["OSES"], and Zurich, with admiralty jurisdiction established under 28 U.S.C. § 1333. ROA.37 at ROA.39. [Collectively, STS, OSES and Zurich are referred to as "STS/Zurich."]

Both the district court (at the behest of STS/Zurich) and the three-judge panel on appeal correctly and unanimously concluded that the STS-Apache contract was governed by maritime law. In reaching this conclusion, both courts relied on the standards set forth by the U.S. Supreme Court in *Kossick v. United Fruit Co.,* 365 U.S. 731 (1961), as applied by this Court in *Davis & Sons, Inc. v. Gulf Oil Corp*., 919 F.2d 313 (5th Cir. 1990), and its long-established progeny, such as *Hoda v. Rowan Companies, Inc.*, 419 F.3d 379 (5th Cir. 2005); *Devon Louisiana Corp. v. Petra Consultants, Inc.*, 247 Fed. Appx. 539 (5th Cir. 2007); and *Demette v. Falcon Drilling Co., Inc.,* 280 F.3d 492, (5th Cir. 2002).

In a special concurring opinion, Judge Davis, joined by Judge Southwick, suggested that this Court decide en banc whether and/or how to streamline the *Davis & Sons* multi-pronged test for determining when a contract is a "maritime" contract. By order filed July 7, 2017, the Court granted STS/Zurich's petition for rehearing en banc with oral argument.

VI SUMMARY OF THE ARGUMENT

A MARITIME CHOICE OF LAW RULES APPLY AND MANDATE THE ENFORCEMENT OF THE CONTRACT'S SELECTION OF GENERAL MARITIME LAW AS GOVERNING THE CONTRACT

When a district court sits in admiralty, it must apply maritime choice of law rules. Maritime choice of law rules require the nationwide, uniform recognition and enforcement of contract choice of law elections. In this case, the court sat in admiralty, the parties freely agreed that maritime law would apply, and so, under general maritime law, that is the law that should apply to this dispute.

B UNDER *DAVIS & SONS*, THE CONTRACT IS A MARITIME CONTRACT

As fully argued in Appellees's principal brief, and as found by the district court and the original panel on appeal, the Master Service Contract at issue here is a maritime contract.

C *KIRBY* REQUIRES THAT ANY ALTERNATIVE TO *DAVIS & SONS* MUST BE A NATIONALLY UNIFORM AND EXPANSIVE APPLICATION OF MARITIME LAW

Maritime law is to be uniform throughout the United States. Maritime law should, whenever possible, be applied expansively, especially when the court's constitutionally-granted admiralty jurisdiction is invoked. Parochial state law must yield to the needs of uniform federal maritime law.

D OCSLA IS A SPECIAL STATUTORY CARVE-OUT THAT CANNOT BE APPLIED TO INLAND WATERWAYS

Most of the cases cited by the appellants and the amici curiae rely on OCSLA, and impermissibly attempt to expand its reach to inland waters. Such an effort violates the Supreme Court's mandate in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 217-18 (1986), to restrict OCSLA to its narrowly-drawn limit.

E ANY CHANGE IN THE RULE OF LAW THAT WOULD REVERSE THE DISTRICT COURT'S JUDGMENT SHOULD NOT APPLY TO THE PARTIES IN THIS CASE

Whenever there is a judicial change in a rule of law, it should not apply to the case before the court when it causes in a change the outcome of the case. In that instance, the new rule of law should apply prospectively only.

VII ARGUMENT

A STANDARD OF REVIEW

This Court reviews de novo final judgments rendered on motion for summary judgment. *Health Care Service Corp. v. Methodist Hospitals of Dallas*, 814 F.3d 242, 247 (5th Cir. 2016). In admiralty cases, such as this, the Court reviews legal conclusions de novo. *Theriot v. U.S.*, 245 F.3d 388, 394 (5th Cir. 1998).

B CHOICE OF LAW

1 *Federal Courts Sitting in Admiralty Apply Federal General Maritime Choice-of-Law Rules*

The jurisdiction of the district court was established pursuant to the court's admiralty jurisdiction. 28

U.S.C. § 1333. This admiralty case began as a vessel owner's limitation action under 46 U.S.C. § 30501, *et seq*. The district court's admiralty jurisdiction also "extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land." 46 U.S.C. § 30101(a). In this case, Mr. Savoie lost his grip after dangling from the end of the Crane Barge POGO's crane and he fell onto the vessel, and that injury was alleged to have been caused by the vessel while upon navigable waters. The district court therefore was a court properly sitting in admiralty.

2 *Courts Sitting in Admiralty Apply General Maritime Law*

Federal courts sit in admiralty by specific grant of authority in the United States Constitution, U.S. Const. Art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity,...; [and] –to all Cases of admiralty and maritime Jurisdiction..."), and by virtue of 28 U.S.C. § 1333 and 46 U.S.C. § 30101(a). Admiralty jurisdiction is discrete and separate from state-law-based and federal-statute-based cases:

> The modern statutory formulation of admiralty jurisdiction, Title 28 U.S.C. Section 1333, which is based upon the grant of admiralty jurisdiction in the Constitution, confers subject matter jurisdiction on the federal district courts. The Supreme Court has held that admiralty claims as such do not arise under the laws of the United States within the meaning of Title 28 U.S.C. Section 1331, and thus are not federal question cases.

1 Thomas Schoenbaum, Admiralty & Mar. Law § 3-2 (5th ed.) (internal citations omitted). Continuing, Prof. Schoenbaum writes,

> With admiralty jurisdiction comes, in general, the applicability of maritime law. This is true even for maritime cases brought under diversity jurisdiction or in state court. *Maritime law, then, is generally coextensive with admiralty jurisdiction*, although some corners of substantive maritime law are not well-developed. Like admiralty jurisdiction, maritime law deals with various kinds of contracts and torts. *To the extent these matters are not covered by statutory law, the general maritime law applies*.

1 Thomas Schoenbaum, Admiralty & Mar. Law § 5-1 (5th ed.) (emphasis added).

3 *Courts Vested with Admiralty Jurisdiction Apply Maritime Choice of Law Rules*

Federal courts sitting in admiralty "must apply general federal maritime choice-of-law rules." *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236, 241 (5th Cir. 2009), *quoting Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 890 (5th Cir. 1991).

4 *OCSLA Does Not Apply, so Admiralty Choice-of-Law Rules Govern*

The Outer Continental Shelf Land Act, 43 U.S.C. § 1331, *et seq.* ["OCSLA"], has a specific provision in it that provides for the application of the neighboring state's law as a surrogate for federal maritime law when, as held by this Court, the contract is sited on the outer continental shelf, and federal maritime law "of its own force" does not apply. *Grand Isle Shipyard,*

Inc. v. Seacor Marine, LLC, 589 F.3d 778, 793 (5th Cir. 2009) (en banc), *citing Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990), *in turn citing Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 355-56, 89 S. Ct. 1835, 1837-38 (1969). STS/Zurich have cited many cases that rely on an OCSLA analysis. OCSLA, though, does not apply to this inland navigable waters case; federal general maritime law does.

The OCSLA analysis, creating a specific statutory exception to the general rules of maritime law, cannot have its exception extended to apply when a court sitting in admiralty faces non-outer continental shelf issues. The Supreme Court has recognized this extra-ordinary statutory carve-out and held that OCSLA "supersede[s] the normal choice-of-law rules that the forum would apply." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 482 n.8, 101 S. Ct. 2870, 2877 n.8 (1981); *see also In re Deepwater Horizon*, 745 F.3d 157, 166 (5th Cir. 2014); *Texaco Exploration & Production, Inc. v. AmClyde Engineered Products, Inc.*, 448 F.3d 760, 772 (5th Cir. 2006)("These [OCSLA] statutory choice of law rules are not subject to exception by the parties' agreement").

The Supreme Court also has cautioned that OCSLA should not be extended beyond its explicit remit:

> The intent behind OCSLA was to treat the artificial structures covered by the Act as upland islands or as federal enclaves within a landlocked State, and not as vessels, for purposes of defining the applicable law because maritime law was deemed inapposite to these fixed structures. *See Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 361-366, 89 S. Ct. 1835, 1840-1842, 23 L.

Ed. 2d 360 (1969). This Court endorsed the congressional assumption that admiralty law generally would not apply to the lands and structures covered by OCSLA in *Rodrigue*, noting that accidents on the artificial islands covered by OCSLA "had no more connection with the ordinary stuff of admiralty than do accidents on piers." *Id.*, at 360, 89 S. Ct., at 1839-1840. *See also Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 422, 105 S. Ct. 1421, 1426, 84 L. Ed. 2d 406 (1985). Thus, in *Rodrigue*, the Court held that an admiralty action under DOHSA does not apply to accidents ***"actually occurring" on these artificial islands***, and that DOHSA therefore does not preclude the application of state law as adopted federal law through OCSLA to wrongful death actions arising from accidents *on* ***offshore platforms***. *Rodrigue v. Aetna Casualty Co.*, *supra*, 395 U.S., at 366, 89 S. Ct., at 1842.

* * *

The extension of OCSLA far beyond its intended locale to the accident in this case simply cannot be reconciled with either the narrowly circumscribed area defined by the statute or the statutory prescription that the Act not be construed to affect the high seas which cover the Continental Shelf. Nor can the extension of OCSLA to this case be reconciled with the operative assumption underlying the statute: that admiralty jurisdiction generally should not be extended to accidents in areas covered by OCSLA.

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 217-18 (1986)(emphasis added), *quoted in Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 958 n.2 (5th Cir. 1988) (Garwood, J. concurring)("We have also recognized, at least for purposes of admiralty actions, that the uniform 'common law' of admiralty displaces state wrongful death statutes in territorial waters. *Matter of S/S Helena*, 529 F.2d 744 (5th Cir. 1976). *Cf. Kossick*; *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550 (1959)").

Attending to the Supreme Court's holdings in *Gulf Offshore*, *supra*, and *Offshore Logistics*, *supra*, and this Court's holding in *In re Deepwater Horizon*, *supra*, the normal choice-of-law rules of a federal district court sitting in admiralty for non-outer-continental-shelf cases necessarily apply, and any discussions of OCSLA-based legal analyses is misplaced in this case.

5 *Maritime Choice of Law Rules Enforce Contractual Choice of Law Agreements*

Federal maritime law provides that, when the parties to a contract have elected to have maritime law govern their contract, courts sitting in admiralty apply federal maritime law and must not consider any extrinsic evidence on the parties' intent absent ambiguity in the contract. *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332-33 (5th Cir. 1981), *citing Hicks v. Ocean Drilling and Exploration Co.*, 512 F.2d 817, 825 (5th Cir. 1975).

Contracts are presumptively the law between the parties. *See*, *e.g.*, *Adams v. Unione Mediterranea di Sicurta*, 364 F.3d 646, 655 (5th Cir. 2004). When the parties contractually agree that maritime law controls the obligations arising from the contracts to which

they have entered, that choice of law will be enforced absent a showing that there is no reasonable possibility of maritime commerce being affected in the performance of the contract. Only if the choice of law is determined to bear absolutely no possible connection with maritime commerce will it be considered by this Court to be a ruse and unenforceable under the OCSLA-controlled cases of *Hollier v. Union Texas Petroleum Corp.*, 972 F.2d 662 (5th Cir. 1992), and *Matte v. Zapata Offshore Co.*, 784 F.2d 628 (5th Cir. 1986). This is so because OCSLA explicitly incorporates state law as a surrogate for general maritime law, and, therefore, mandates the use of such state's choice of law provisions.

6 ***Uniformity of Interpretation and Application of Contracts is Paramount***

Of critical note is the Supreme Court's admonition in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 125 S. Ct. 385 (2004), that its "touchstone ... [is] a concern for the uniform meaning of maritime contracts." This philosophy can be found in repeated expressions throughout the nation's maritime law opinions. *See*, *e.g.*, *American Dredging Co. v. Miller*, 510 U.S. 443, 451, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994) (quoting *The Lottawanna*, 21 Wall. 558, 575, 22 L. Ed. 654 (1875)). *See also Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996) ("[I]n several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision" (citing *Kossick, supra*, at 742, 81 S. Ct. 886; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410, 74 S. Ct. 202 (1953); *Garrett v. Moore–McCormack Co.*, 317 U.S. 239, 248–9, 63 S. Ct. 246, 87 L. Ed. 239 (1942))); *Romero v. International Terminal Operating Co.*, 358

U.S. 354, 373, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959) ("[S]tate law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] ... [b]ut this limitation still leaves the States a wide scope").

That touchstone expresses an overarching concern by the Supreme Court that the interpretation of contracts controlled by federal maritime law should be identical irrespective of the places of their execution or performance. A mariner haling from Alabama should have the expectation of having the same rights and obligations in the navigable waters of the United States situated in or near Louisiana as he would have in Alabama, New York, Illinois, or any other locale:

> The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the states may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme.

State of Washington v. W.C. Dawson & Co., 264 U.S. 219, 228 (1924). Simply put, allowing parochial state interests to trump uniform national law would be anathema to *Kirby* and its long line of predecessors.

The MSC explicitly and objectively imposes general maritime law for any interpretation or enforcement of contractual disputes. The record on appeal is devoid of any evidence that STS never reasonably contemplated that it would never work in, on, or above the navigable waters of the United States or that its performance

would never involve maritime commerce. Indeed, STS/Zurich acknowledge that the MSC "contemplated the possibility of Apache calling on STS to provide a vessel...." Appellants' Supplemental Br. 8 (emphasis omitted). As an undisputed fact, STS's contractual performance necessitated the use of a vessel. When the parties explicitly undertake covenants that contemplate the use of maritime commerce, the focus of attention is and properly should be on the actual use of a maritime vessel to perform maritime services in the performance of the contract to determine whether that maritime involvement comes to pass and thereby activates or triggers the contractual choice of maritime law.

7 ***The MSC's Choice of Law Provision Should be Enforced***

The Court should recognize and enforce the explicit, objective and clear agreement of the parties to have maritime law control any disputes arising out of the MSC and any work orders (whether verbal or written) issued pursuant to the MSC. This is true because of an admiralty court's obligation to apply maritime choice of law rules to the cases before it, and because maritime choice of law rules requiring the recognition and enforcement of contractual choice of law elections by the parties. In this case, the parties freely elected to have maritime law control their contractual relationship. Consequently, the Court should enforce the MSC's choice of general maritime law as controlling this dispute.

8 ***Maritime Law Enforces Contractual Indemnity Provisions***

Contractual indemnity agreements are enforceable under federal general maritime law. *Hoda v. Rowan*

Enterprises, Inc., 419 F.3d 379 (5th Cir. 2005). The contractual indemnity agreement in the STS-Apache MSC is therefore enforceable.

9 *Conclusion as to Enforceability of the MSC's Indemnity Provision Under General Maritime Law*

The district court sat as a court in admiralty. As an admiralty court, it is obliged to apply federal maritime choice of law rules. Federal choice of law rules recognize and enforce contractual choice of law clauses. The contractual choice of law clause in the MSC, to which STS explicitly and objectively agreed, mandates the application of maritime law to any disputes arising out of the contract. It is respectfully submitted that the Court should apply the parties' objective agreement to have maritime law govern their disputes, and, upon doing so, recognize and enforce the parties' indemnity and insurance agreements and affirm the district court's judgment on appeal.

C UNDER *DAVIS & SONS*, THE CONTRACT IS A MARITIME CONTRACT

As set forth in LDI's and Jackson's principal brief, and as held by the unanimous panel, the application of *Davis & Sons* to the undisputed facts of this case mandates that the MSC and its subordinate verbal work order constituted a maritime contract, and, therefore, is controlled by maritime law of its own force and without regard to the choice of law provision in the MSC. Because maritime law governs the contract under *Davis & Sons*, the court should again recognize and enforce the indemnity and insurance provisions of the MSC and affirm the judgment of the district court.

D THE CRUX OF THE REASON FOR REHEARING EN BANC: WHAT TO DO WITH *DAVIS & SONS*?

Judge Davis's special concurring opinion in this case raises the question of whether the *Davis & Sons* test should be simplified and whether the Supreme Court's opinion in *Kirby* suggests or requires focusing on different aspects of a contract's nature when discerning whether it is a "maritime" contract. While federal admiralty choice of law rules and the choice of law provisions in the MSC should resolve that question in this case in favor of affirming the district court's judgment, LDI and Jackson understand the Court's broader concerns and will address them here.

The starting point of the analysis should be to determine what the underlying "problem" with the *Davis & Sons* test is. The *Davis & Sons* test was developed to address a specific problem that is somewhat unique to two of the states within the Fifth Circuit's jurisdiction: Texas and Louisiana. More specifically the *Davis & Sons* test concerns water-based oil and gas operations that, were such operations on land, would be subject to those states' oilfield anti-indemnity acts. La. Rev. Stat. 9:2780; Tex. Civ. Prac. & Rem. Code §§ 127.001-.008; *see generally* 1 Thomas Schoenbaum, Admiralty & Maritime Law § 5-21. The cases cited by the amici curiae relate to these anti-indemnity laws in two of the fifty states of the United States of America. While other unusual circumstances certainly arise, for example the train wreck in *Kirby*, they are exceedingly rare in this Circuit.

A line should be easy to draw between land-law and sea-law: when acting or performing a contract in, on or above the navigable waters of the United States, maritime law should govern. The courts have thus far

declined to make such a clear distinction. *See*, *e.g.*, *Davis & Sons*, *supra*, 919 F.2d at 315 ("[f]or those looking for a bright line delineating the boundary between maritime and non-maritime contracts, our previous cases offer little assistance"). The "problem" this particular Court faces arises with the legal fiction that creates so-called artificial islands built by the oil and gas interests in Neptune's historic domain that co-mingle "traditional" oil and gas operations with "traditional" maritime activities, and with the efforts by this Court to balance those competing interests.

The narrowly-drawn legal fiction of the artificial island (a concept that is established in statutory law for the outer continental shelf,[4] but only by judicial decree for near-shore or inland waters), may clarify the status of work performed solely ***on a fixed platform***, but does not eradicate the rule of maritime law over sea-borne activity. That fiction should be as narrowly applied as possible, and not be allowed to expand infinitely like an oily sheen upon the water. *See Offshore Logistics, Inc. v. Tallentire*, *supra*, 477 U.S. at 217-18.

That maritime law should govern all disputes involving the sea, save those carved out by Act of Congress, is manifest in light of the interplay between traditional maritime law and admiralty jurisdiction. *See*, *e.g.*, *Jambon & Associates, L.L.C. v. Seamar Divers, Inc.*, 2009 WL 2175980 (E.D. La. July 20, 2009), (Barbier, J.) (a plaintiff's assertion of jurisdiction solely under diversity jurisdiction "does not withstand scrutiny, and evidences a fundamental misunderstanding of the interplay between jurisdiction and choice of law"). The requirement that substantive

[4] *See* OCSLA, 43 U.S.C. § 1331, *et seq.*

maritime law govern seaborne claims, whether they be tort or contract and regardless of the forum in which they are brought, is central to the overarching goal of uniformity that undergirds the entire system of maritime law. *See*, *e.g.*, *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 28 (2004)*; Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373, 79 S. Ct. 468 (1959) (superseded by statute on other grounds) ("[s]tate law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system"). The Supreme Court has long affirmed the constitutional and historic basis for this principle of uniformity:

> [T]he Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.

The Lotowanna, 88 U.S. 558 (21 Wall.), 575 (1874); *see also Kirby*, *supra*, 543 U.S. at 395; *Chelentis v. Luckenbach S.S. Co. Inc.*, 247 U.S. 372, 382, 38 S. Ct. 501 (1918), *quoting The Lotowanna*, *supra*.

The favor shown to general maritime law in preference to any state's laws has been expressed in many contexts. For example, the Supreme Court has specifically held—albeit in a tort context—that a party cannot elect for application of state law, even when the claims are asserted solely under a federal court's diversity jurisdiction, when the underlying rights at

issue arise under the general maritime law. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410, 74 S. Ct. 202 (1953).

Largely beyond cavil, the expressed policy of the Supreme Court has consistently been to expansively and generally apply maritime law whenever it is even remotely possible to do so, and to restrict any limitations on the general maritime law. Congress, too, has expressed its desire to have general maritime law apply as broadly and liberally as possible, as so clearly stated in the Admiralty Extension Act, 46 U.S.C. § 30101(a), quoted *supra* at p.12. To use the legal fiction of an artificial island situated in the navigable waters of the United States as an excuse to constrict the application of maritime law would contravene Congress's expressed will in the Admiralty Extension Act, and in the long historical chain of Supreme Court decisions, culminating in the *Kirby* decision cited by STS/Zurich and in the special concurring opinion.

In opposition to this analysis, STS/Zurich argue that the performance of the work with the use of a vessel was an unanticipated or incidental circumstance which should not weigh in favor of the application of maritime law. STS claims it subjectively envisioned that all of the work under the verbal work order was going to be done on the fixed platform to which STS was dispatched. While STS/Zurich style this subjectively-based "anticipation that a vessel would not be used" test as a *Kirby*-compliant, "focus of the contract" test, Appellants' Supplemental Br. 28, this approach yet again requires courts to inquire into and discern the accuracy of the subjective intent of the parties with respect to particular tasks or un-recorded work orders. It also allows a party to declare "I did not

think I would use a vessel" to get around the fact that the party actually needed and actually used a vessel. Again, this pits the subjective hope against the objective reality. Reality should govern.

LDI and Mr. Jackson respectfully suggest that the better rule would be to remove the subjectivity and discernment and, whenever possible, apply the objective expression of the parties' intent: the written choice of law provision or other parts of the contract that weigh on the topic.

Even assuming arguendo there was testimony regarding the parties' narrow intentions at the time of entering into the verbal work order, and ignoring for the sake of argument the objective and explicit expression of their intent when the controlling MSC was signed, STS/Zurich's approach invites the Court to supplant the objective six-factor test prescribed in *Davis & Sons* with a factual inquiry into the parties' subjective intentions when entering into a verbal work order. That inquiry into subjective intent with respect to unwritten work orders not only requires discarding the objective intent expressed in the written MSC, but also makes virtually every such case immune to summary judgments and requiring of findings of fact after trial.

Moving a step further into the case before the Court, even if an inquiry into the parties' subjective intentions becomes relevant under *Davis & Sons* or its replacement test issued in this appeal, the inability of STS to perform the requested work without the aide of a vessel, its request for a vessel, and its actual use of the vessel to complete the requested work on the platform are significantly more reliable indicia of the parties' intentions than the self-serving arguments of STS/Zurich regarding a verbal work order. It is

respectfully suggested that the Court not ignore the very real, non-fictional operations at sea and the very real, non-fictional integration of maritime vessels and their rigging and crews in favor of the fictional world of artificial islands and subjective intentions. The only way to make water-based operations governed by state law instead of maritime law is to perpetuate and ill-advisedly extend the legal fictions already created.

Grafting onto the *Davis* analysis—or any replacement test—for determining whether a contract is maritime or not, an overarching inquiry into the parties' subjective intentions would defeat the purpose of objective criteria, would render the test more difficult to apply, and would foster the very uncertainty, unpredictability and vexatious litigation that the Court likely seeks to avoid.

If the parties' *objective intent* is the controlling consideration in this choice of law dispute, then the inquiry is simple: the parties agreed that maritime law would apply and that agreement is enforceable.

If the parties' subjective expectations control, the objective written contract becomes largely irrelevant, and the district courts will need to delve into and discern the subjective facts, circumstances and truthful or non-truthful testimony of the parties.

The Court should therefore reject STS/Zurich's proposed test.

E ***KIRBY*** SUPPORTS THE UNIFORM, NATIONWIDE, AND EXPANSIVE APPLICATION OF GENERAL MARITIME LAW

The *Kirby* court did not change the law or establish a new test, but merely reapplied its existing jurisprudence:

Applying the two-step analysis from *Kossick*, we find that federal law governs this contract dispute. Our cases do not draw clean lines between maritime and nonmaritime contracts. We have recognized that "[t]he boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw." 365 U.S., at 735, 81 S. Ct. 886. To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case. *Cf.* Admiralty Extension Act, 46 U.S.C. App. § 740 ("The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury ... caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land"); 1 R. Force & M. Norris, The Law of Seamen § 1:15 (5th ed. 2003). Nor can we simply look to the place of the contract's formation or performance. Instead, the answer "depends upon ... the nature and character of the contract," and the true criterion is whether it has "reference to maritime service or maritime transactions." *North Pacific S.S. Co. v. Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U.S. 119, 125, 39 S. Ct. 221, 63 L. Ed. 510 (1919) (citing *Insurance Co. v. Dunham*, 11 Wall. 1, 26, 20 L. Ed. 90 (1871)). *See also Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 611, 111 S. Ct. 2071, 114 L. Ed. 2d 649 (1991) ("[T]he trend in modern admiralty case law ... is to focus the jurisdictional inquiry upon

whether the nature of the transaction was maritime").

* * *

We have reiterated that the "'fundamental interest giving rise to maritime jurisdiction is "the protection of maritime *commerce*."'" *Exxon*, *supra*, at 608, 111 S. Ct. 2071 (emphasis added) (quoting *Sisson v. Ruby*, 497 U.S. 358, 367, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990), in turn quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982)). The conceptual approach vindicates that interest by focusing our inquiry on whether the principal objective of a contract is maritime commerce. While it may once have seemed natural to think that only contracts embodying commercial obligations between the "tackles" (*i.e.*, from port to port) have maritime objectives, the shore is now an artificial place to draw a line. Maritime commerce has evolved along with the nature of transportation and is often inseparable from some land-based obligations. The international transportation industry "clearly has moved into a new era—the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water, and land." 1 Schoenbaum 589 (4th ed. 2004). The cause is technological change: Because goods can now be packaged in standardized containers, cargo can move easily from one mode of transport to another. *Ibid. See also NLRB v. Longshoremen*, 447 U.S. 490, 494, 100 S. Ct. 2305, 65 L. Ed. 2d 289 (1980)

> ("'[C]ontainerization may be said to constitute the single most important innovation in ocean transport since the steamship displaced the schooner'"; G. Muller, Intermodal Freight Transportation 15–24 (3d ed.1995).

Kirby, 543 U.S. at 23-25.

The elements of the Supreme Court's decision are that maritime contracts are more broadly defined than the mere involvement of a vessel and more encompassing than the place of a contract's formation or performance. "[T]he true criterion is whether it "has '***reference to maritime service or maritime transactions***.'" *Kirby*, 543 U.S. at 24 (emphasis added).

This analysis thus brings the Court back to the discussion on choice of law, and whether the contract, the MSC in this case, has reference to maritime services or transactions. The answer can be objectively and expressly found in the terms of the contract, its selection of maritime law, and its requirement that STS provide a variety of maritime insurance coverages. STS/Zurich acknowledge the involvement of maritime vessels as a "possibility," that is, that the contract has objective reference to maritime services or transactions. No inference is required.

The *Kirby* court continued by studiously explaining that maritime commerce is not limited to the space "between the tackles," but extends landward. Indeed, the Court recognized that the land-leg part of the journey at issue in that case was not merely "incidental," but "essential to contracting the contract's purpose." *Id.*, 543 U.S. at 26-27. Absent the train, the delivery would have prematurely terminated. This is precisely the same as STS's use of the vessel POGO; absent the POGO, STS's work would have prematurely stopped.

The Supreme Court's earlier decision in *Kossick*, *supra*, also considered the issue of whether contracts should be characterized as maritime. The Court there instructed that "[t]he only question is whether the transaction relates to ships and vessels, masters and mariners, as the agents of commerce." *Kossick*, 365 U.S. at 736. That the MSC relates to vessels is manifest; a vessel was used by STS to perform its MSC obligations.

Since the Supreme Court's decision in *Kirby*, the Fifth Circuit has been presented with similar situations to *Davis & Sons* where the work performed pursuant to the blanket contract and subsequent work order was inextricably intertwined with maritime activities and transactions. This Court has not found a conflict between *Davis & Sons* and *Kirby*. *See*, e.g., *Hoda v. Rowen Companies, Inc.*, 419 F.3d 379 (5th Cir. 2005); *Devon Louisiana Corp. v. Petra Consultants, Inc.*, 247 Fed. Appx. 539 (5th Cir. 2007).

The requested flow-back services and the rigging work of Mr. Savoie were intrinsically connected to the vessel's presence at the Apache platform. The work actually performed during STS's performance did not merely "touch incidentally" on the use of a vessel. The work was specifically focused on the vessel's use to accomplish the flow-back services. It is beyond dispute that the work performed required the use of, and actually involved the use of, a vessel—the Crane Barge POGO—and that STS could not have met its contractual obligation to Apache without the use of the vessel. This undisputed factual issue was key to the disposition of the case in the district court and before the panel on appeal.

Interpreting the STS-Apache MSC and verbal work order together, the contract's subject matter covers,

contemplates and includes provisions for actual maritime activities and commerce. The total STS-Apache contract is a maritime contract from its moment of signing until the final performance of the work at hand.

F THE AMICI CURIAE FALL INTO THE OCSLA TRAP

The amici curiae filed a brief in support of changing the *Davis & Sons* test. Their proposed test, which calls for a complete carve-out of the oil and gas industry from the ambit of maritime law,[5] is grossly overbroad, and is supported in large measure by OCSLA-controlled cases. For example, they cite, among others, *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985); *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (5th Cir. 1985);[6] *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990);[7] and *Texaco Exploration & Production, Inc. v. AmClyde Engineered Products, Inc.*, 448 F.3d 760 (5th Cir. 2006), all of which involved the specific application of OCSLA.

OCSLA, of course, creates a statutory carve-out that is applicable only within the limited terms of its expressed scope. In the context of this case, OCSLA applies to artificial islands on the outer continental shelf. It does not apply anywhere else, and it is unseemly to ask a court to usurp the role of Congress

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[5] In their conclusion, the amici curiae "respectfully submit that this Court should overrule *Davis* and the cases that suggest that oil and gas development is maritime commerce." Amici Curiae Br. of Liberty Mutual Insurance Co., Liberty International Underwriters, and Crescent Energy Services, LLC, p.25.

[6] Amici Br., *passim*.

[7] Amici Br. 11.

by extending a statutory mandate beyond that expressed by Congress, or expanding it beyond the precise limit of, in this case, the artificial island. Just as the amici curiae suggest that applying Longshore and Harbor Worker Act cases would be inappropriate, *see* Amici Br. 17, so too is applying OCSLA case law to inland waters. *Offshore Logistics, Inc.*, *supra*, 477 U.S. at 217-18.

While the amici curiae posit that oil and gas operations are not traditional maritime activities, likewise artificial islands on the outer continental shelf are not traditional in any field. They are legal fictions created solely by Act of Congress to have certain legal characteristics, and those fictions should not be interpreted to apply where Congress did not decree them to apply, nor should they override the ancient uninterrupted expansive application of maritime law, culminating in *Kirby* and as clearly expressed in the Admiralty Extension Act.

Kirby, of course, dealt with transportation from one point to another, the first leg of which was by sea, and the second leg of which was by rail on land. It was a train wreck that gave rise to the litigation, yet the Supreme Court held that maritime law continued landward all the way across the country. The fundamental policy of the Court was to ensure uniformity of maritime law across the country, and to apply it to the fullest extent possible, rather than as narrowly as possible, an approach proffered by the amici curiae.

Perhaps more to the point, the Supreme Court has recognized that the performance of repair or maintenance activity on land from a barge on the water is in fact "traditional maritime activity":

> the "activity giving rise to the incident" in this suit, *Sisson* [*v. Ruby*, 497 U.S. 358, 364, 110 S. Ct. 2892 (1990)],... at 364, 110 S. Ct., at 2897, should be characterized as repair or maintenance work on a navigable waterway performed from a vessel. Described in this way, there is no question that the activity is substantially related to traditional maritime activity, for barges and similar vessels have traditionally been engaged in repair work similar to what Great Lakes contracted to perform here. *See*, *e.g.*, *Shea v. Rev–Lyn Contracting Co.*, 868 F.2d 515, 518 (CA1 1989) (bridge repair by crane-carrying barge); *Nelson v. United States*, 639 F.2d 469, 472 (CA9 1980) (Kennedy, J.) (repair of wave suppressor from a barge); *In re New York Dock Co.*, 61 F.2d 777 (CA2 1932) (pile driving from crane-carrying barge in connection with the building of a dock); *In re P. Sanford Ross, Inc.*, 196 F. 921, 923–924 (EDNY 1912) (pile driving from crane-carrying barge close to water's edge), rev'd on other grounds, 204 F. 248 (CA2 1913); *cf. In re The V–14813*, 65 F.2d 789, 790 (CA5 1933) ("There are many cases holding that a dredge, or a barge with a pile driver, employed on navigable waters, is subject to maritime jurisdiction ... § 7.54"); *Lawrence v. Flatboat*, 84 F. 200 (SD Ala.1897) (pile driving from crane-carrying barge in connection with the erection of bulkheads), aff'd *sub nom. Southern Log Cart & Supply Co. v. Lawrence*, 86 F. 907 (CA5 1898).

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 540 (1995).

To suggest that the work performed by the Crane Barge POGO in connection with STS's performance of its contract with Apache is not traditional maritime commerce is, simply, wrong. What the POGO did is exactly what vessels traditionally have done: perform services from the sea that affects or assists operations on the land (whether real or artificial).

The notable distinction of the cases cited by the amici curiae is that the cases where the Court found the contracts to be non-maritime were those that were more akin to water taxi services than to maritime commercial involvement in the actual performance of the contract. *See*, *e.g.*, *Thurmond v. Delta Well Surveyors*, 836 F.2d 952 (5th Cir. 1988), discussed at Amici Br. 11. In *Thurmond*, the vessel had nothing to do with the accident: "Roosevelt Thurmond stepped off the barge and on the wellhead to open the valve. When he did the stem and seat of a motor valve popped off the wellhead and struck his chin." Being hit on the chin on an island by a piece of the island has no relationship whatsoever to the water taxi that brought him there. This is a far cry from using the crane barge, directing the operation of a barge's crane, becoming airborne on the end of the crane line, and being swung over and dropped onto the deck of the barge by the operator of the crane barge, as happened here.

Here, the vessel was commercially integrated into STS's contractual performance, and in no way merely present at the wrong place at the wrong time. Unlike the vessel in *Thurmond* that just happened to be present, the Crane Barge POGO was being used as an active tool in STS's operations.

The Court should not expand the reach of OCSLA, transplant OCSLA's analysis beyond where Congress

mandated, or ignore the knowing and anticipated integration of maritime commerce into STS's contractual performance.

G EVEN IF THIS COURT DECIDES THE CONTRACT IS NON-MARITIME UNDER A NEW TEST, OR THAT MARITIME LAW AS AGREED BY THE PARTIES DOES NOT APPLY, APPLICATION OF ANY SUCH TEST SHOULD NOT APPLY TO THE PARTIES TO THIS CASE IF IT WOULD RESULT IN A REVERSAL OF THE DISTRICT COURT'S JUDGMENT

This Court and the district court properly addressed the *Davis & Sons* criteria in light of the broad blanket MSC read together with the work orders, the actual events and the work performed with the use of the Crane Barge POGO. This Court, sitting en banc should decline the request of STS/Zurich to re-examine the panel's application of *Davis & Sons*, or to re-evaluate the choice of law criteria through the prism of STS's subjective expectations. The methodology urged by STS—an unequivocal renunciation of the choice of law provisions in a blanket master services contract entered into between sophisticated parties in exchange for a selective review of a single verbal work order to determine the nature and character of the blanket master services contract—would eviscerate the long standing principles of contract law and destroy the certainty and predictability that *Davis & Sons* has provided to the maritime industry.

This Court should also reject STS/Zurich's invitations to revisit the undisputed facts presented in the parties' motions for summary judgment by raising for the first time issues and questions of law in their petition for rehearing en banc.

As this Court en banc has explained, it only reviews those issues presented to it in a timely and proper fashion:

> It goes without saying that we are a court of review, not of original error. Restated, we review only those issues presented to us; we do not craft new issues or otherwise search for them in the record.... It is for the parties, those who have a stake in the litigation, to decide which issues they want to pursue, at trial and on appeal. Diverse reasons underlie the choices the parties make. Likewise, other obvious factors come into play, such as judicial efficiency and economy, fairness to the courts and the parties, and the public interest in litigation coming to an end after the parties have had their fair day in court.

United States v. Brace, 145 F.3d 247, 255-56 (5th Cir. 1998) (en banc); *see also Blumberg v. HCA Mgmt. Co.,* 848 F.2d 642, 646 (5th Cir.1988) ("[W]e have repeatedly held that we will not consider alleged errors raised only [in the reply brief]"); *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 751 n.31 (5th Cir. 2009) (en banc), Elrod, J., dissenting.

Understanding that the Court nonetheless may consider changing the rule of law expressed in *Davis & Sons*, any new rule that would result in a different outcome should not apply to the parties in this case. In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), the Supreme Court outlined a test for whether non-criminal judicial opinions should be applied retroactively when they effect a sea-change in the outcome relative to existing law:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, *see e.g.*, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, *supra*, 392 U.S., at 496, 88 S. Ct., at 2233, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, *see*, *e.g.*, *Allen v. State Board of Elections*, *supra*, 393 U.S., at 572, 89 S. Ct., at 835. Second, it has been stressed that 'we must *** weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter v. Walker*, *supra*, 381 U.S., at 629, 85 S. Ct., at 1738. Finally, we have weighed the inequity imposed by retroactive application, for '(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' *Cipriano v. City of Houma*, *supra*, 395 U.S., at 706, 89 S. Ct., at 1900.

Chevron Oil Co. v. Huson, 404 U.S. 97, 106-7 (1971).

Under that standard, there is little question but that this Court is sitting en banc specifically to modify *Davis & Sons* or establish a new rule of law; that *Davis & Sons* has become a well-entrenched and well- and frequently-applied rule of law; and, if the Court adopts either the proposed new test as set forth in the special

concurring opinion, that proposed by STS/Zurich, or that proposed by the amici curiae, it would result in a complete reversal of the nature of the analysis and reverse the outcome of this case relative to existing controlling law. It would be wholly unjust to impose such an outcome on parties that did not raise, much less preserve for appeal, the issue at any time before STS/Zurich petitioned for rehearing en banc.

Notable, too, is the Supreme Court's holding that there needs to be an expression by the court that it applies prospectively only unless it declares otherwise. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 96-97,`. Ct. 2870 (1993). In light of the fact that the parties to this litigation did not raise in the district court or on panel appeal the issue addressed in the special concurring opinion, and the prospect of a substantial inequitable result that would effectively reverse the existing rule of law to the detriment of the contracting parties, it is respectfully submitted that any decision that establishes a new legal standard that would end in a reversal of the judgment below should apply only to those cases that are decided hereafter, and the Court should so declare.

VIII PROPOSED NEW TEST

Any new test to replace *Davis & Sons* should have clearly-drawn lines and start with the assumption that maritime law applies, with the burden on the party seeking to disregard federal maritime law. LDI and Jackson respectfully suggest the following:

> When working in, on, or above the navigable waters of the United States, a contract is presumed to be maritime. Unless it can be shown that the totality of the contract's performance was upon a fixed platform

> and performed without any involvement of maritime commerce, the contract is maritime. If the performance of the contract is in fact accomplished without the involvement of any maritime commerce, other than as a water-taxi to bring workers to the fixed platform, then and only then will it not be considered maritime in nature.

IX CONCLUSION AND PRAYER FOR RELIEF

Fixed platforms sit with the patient consent of the sea, but when the sea and her seamen are summoned to assist the stranded landlubbers, Oceanus's laws—both physical and civil—must be respected. While on the precarious platforms, humans can live with the legal fiction that they are on land, but when they cross the edge of their phantasmagorical islands, it is into the briny deep that they fall and summon all able mariners for help.

Should the Court decide to modify or replace the *Davis & Sons* test, it is respectfully submitted that the test should strongly respect the need for national, unified maritime law without regard to parochial state interests, apply choice of law clauses when interpreting contracts whenever the court sits in admiralty, and recognize that the legal fiction of an artificial island should not be allowed to spread and further dilute the law of the sea.

Finally, irrespective of whatever changes the Court applies to the *Davis & Sons* test, any such change that would result in a different outcome than that of the district court or the panel should not apply to the parties to this appeal, but only to those case hereafter adjudicated.

The district court's judgment is without error and should be affirmed.

X SIGNATURE OF COUNSEL

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XI CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that the above and foregoing **Appellees' Supplemental Brief** has been served on the following counsel by electronic transmission, this 6th day of September, 2017:

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XII CERTIFICATE OF COMPLIANCE LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,848 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 5th Cir. Local Rule 32.2.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14-point Times New Roman font.

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APPENDIX G

§2780. Certain indemnification agreements invalid

A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

C. The term "agreement," as it pertains to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, as used in this Section, means any agreement or understanding,

written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.

D.(1) The provisions of this Section do not affect the validity of any insurance contract, except as otherwise provided in this Section, or any benefit conferred by the worker's compensation laws of this state, and do not deprive a full owner or usufructuary of a surface estate of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals on the owner's land.

(2) Any language in this Section to the contrary notwithstanding, nothing in this Section shall affect the validity of an operating agreement or farmout agreement, as defined herein, to the extent that the operating agreement or farmout agreement purports to provide for defense or indemnity as defined in Subsection B of this Section. This exception shall not

extend to any party who physically performs any activities pursuant to any agreement as defined in Subsection C of this Section. For purposes of this Subsection, operating agreement and farmout agreement shall be defined as follows:

(a) "Operating agreement" means any agreement entered into by or among the owners of mineral rights for the joint exploration, development, operation, or production of minerals.

(b) "Farmout agreement" means any agreement in which the holder of the operating rights to explore for and produce minerals, the "assignor", agrees that it will, upon completion of the conditions of the agreement, assign to another, the "assignee", all or a portion of a mineral lease or of the operating rights.

E. This Section shall have no application to public utilities, the forestry industry, or the sulphur industry, so long as the work being performed is not any of the operations, services, or activities listed in Subsection C above, except to the extent those operations, services, or activities are utilized in the sulphur industry.

F. The provisions of this Section do not apply to loss or liability for damages, or any other expenses, arising out of or resulting from:

(1) Bodily injury or death to persons arising out of or resulting from radioactivity; or

(2) Bodily injury or death to persons arising out of or resulting from the retainment of oil spills and clean-up and removal of structural waste subsequent to a wild well, failure of incidental piping or valves and separators between the well head and the pipelines or

failure of pipelines, so as to protect the safety of the general public and the environment; or

(3) Bodily injury or death arising out of or resulting from performance of services to control a wild well so as to protect the safety of the general public or to prevent depletion of vital natural resources.

The term "wild well," as used in this Section, means any well from which the escape of salt water, oil, or gas is unintended and cannot be controlled by the equipment used in normal drilling practices.

G. Any provision in any agreement arising out of the operations, services, or activities listed in Subsection C of this Section of the Louisiana Revised Statutes of 1950 which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the provisions of this Section, shall be null and void and of no force and effect.

H. The provisions of this Act do not deprive a person who has transferred land, with a reservation of mineral rights, of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals in connection with the reserved mineral rights; provided such person does not retain a working interest or an overriding royalty interest convertible to a working interest in any production obtained through activities described in Subsection C of this Section.

I. This Act shall apply to certain provisions contained in, collateral to or affecting agreements in connection with the activities listed in Subsection C which are designed to provide indemnity to the indemnitee for all work performed between the indemnitor

and the indemnitee in the future. This specifically includes what is commonly referred to in the oil industry as master or general service agreements or blanket contracts in whatever form and by whatever name. The provisions of this Act shall not apply to a contract providing indemnity to the indemnitee when such contract was executed before the effective date of this Act and which contract governs a specific terminable performance of a specific job or activity listed in Subsection C.