No. ____

In the

Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Outer Continental Shelf Lands Act ("OCSLA"), Congress declared federal law to be the exclusive source of law on the Outer Continental Shelf ("OCS"). To fill the gaps in the coverage of federal law, Congress provided that the law of the adjacent state would be borrowed as federal law, to the extent that such state law is "applicable" and "not inconsistent with" existing federal law. Consistent with this Court's decisions, the Fifth Circuit has long held that state law is not borrowed as surrogate federal law under OCSLA unless there is a gap in federal law, as with a garden-variety contract claim. In the decision below, the Ninth Circuit expressly disagreed with the Fifth Circuit and held that state law should be borrowed as federal law governing the OCS whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, regardless of whether there is a gap in federal law. It thus held that California's wage-and-hour laws apply to claims filed by workers on drilling platforms on the OCS, even though the Fair Labor Standards Act already provides a comprehensive set of federal rights and remedies. The result is wholly unanticipated and potentially massive liability for OCS operators that fully complied with the FLSA.

The question presented is:

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

PARTIES TO THE PROCEEDING

Defendant-appellee below, who is the petitioner in this Court, is Parker Drilling Management Services, Ltd.

Plaintiff-appellant below, who is the respondent in this Court, is Brian Newton.

CORPORATE DISCLOSURE STATEMENT

Parker Drilling Management Services, Ltd.'s parent company and sole member is wholly owned by Parker Drilling Company, which is a publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

The federal government has exclusive control and sovereignty over the Outer Continental Shelf ("OCS"). Congress, anticipating extensive mineral-resource development on the OCS, enacted the Outer Continental Shelf Lands Act ("OCSLA") to define a body of law applicable to drilling platforms affixed to the OCS, on which thousands of people live and work for extended periods of time. After considering and rejecting the wholesale application of state law or maritime law, Congress made federal law the exclusive source of law on the OCS. 43 U.S.C. §1333(a)(1). Thus, all law on the OCS is federal law, and no state law applies of its own force. Congress recognized, however, that federal law, because of its interstitial nature, would not address every issue that arose on the OCS. Accordingly, to fill gaps in federal law, Congress declared that the laws of the adjacent state would be borrowed as the applicable federal law governing the OCS to the extent those laws are "applicable" and "not inconsistent with" preexisting federal law. 43 U.S.C. §1333(a)(2)(A).

In a trilogy of cases interpreting OCSLA, this Court recognized that state law never applies of its own force on the OCS but can sometimes serve as surrogate federal law to fill gaps in the coverage of federal law. In the first of these cases, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), this Court explained that "state law [is] used only to supplement federal law," *id.* at 358, and held that state law supplied the federal rule of decision for the plaintiffs' wrongful-death actions only because there was a gap in federal law—in other words, because the

"inapplicability of [federal law] removes any obstacle to the application of state law by incorporation as federal law," *id.* at 366. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), this Court again explained that Congress incorporated state law standards "for filling in the gaps in federal law." *Id.* at 104-05. And in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), this Court reiterated that state law's function under OCSLA is "to fill the substantial 'gaps' in the coverage of federal law." *Id.* at 480. State law supplied the content of federal law in all three cases, but only because there was no other federal law to apply.

Consistent with those cases, the Fifth Circuit held early on that state law is "applicable" as federal law under OCSLA only when it is needed "to fill a significant void or gap" in federal law. *Cont'l Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969). In *Continental Oil*, the Fifth Circuit affirmed dismissal of a lawsuit filed under Louisiana law, explaining that federal law already provided the plaintiffs with a complete set of "substantive rights and remedies" to govern their dispute. *Id.* Because there was "no void" and "no gaps" in the coverage of federal law, the Louisiana statute did not apply as surrogate federal law. *Id.* at 1036, 1040. As a binding decision of the old Fifth Circuit, *Continental Oil* governs the entire Gulf Coast.

In light of *Continental Oil* and this Court's cases, employers and employees have long structured their relationships on the understanding that state wage-and-hour laws do not apply on the OCS because the Fair Labor Standards Act ("FLSA") is a comprehensive federal scheme that leaves no gap for

state law to fill. But after the California Supreme Court issued a worker-friendly decision in *Mendiola v. CPS Security Solutions, Inc.*, 340 P.3d 355 (Cal. 2015), employees on the OCS filed a spate of class-action lawsuits, arguing that California's wage-and-hour laws have applied all along and under California law OCS operators owe compensation not just for hours spent working, but for all time spent on the platform, including time spent sleeping and otherwise not working. District courts uniformly rejected that argument, relying on *Continental Oil*.

In the decision below, the Ninth Circuit disagreed with the Fifth Circuit and every other court to consider the issue, holding that state law extends to the OCS regardless of whether there is a gap in federal law. The Ninth Circuit expressly "reject[ed]" the Fifth Circuit's rule that state law is "applicable" under OCSLA only if needed "to fill a significant void or gap" in federal law. App.2. It instead concluded that state law is "applicable" on the OCS whenever it "pertain[s] to the subject matter at hand." App.21. Applying that expansive standard, the Ninth Circuit held that California's wage-and-hour laws are "applicable" on the OCS because they pertain to respondent's wage-and-hour claims, and are "not inconsistent" with federal law because the FLSA contains a savings clause that would preserve state wage-and-hour laws under preemption principles. App.35-39. In recognition of the circuit split and far-reaching consequences of its decision, the Ninth Circuit stayed the mandate pending a petition for certiorari.

Certiorari is plainly warranted to resolve this acknowledged split of authority. Indeed, the Ninth

Circuit's decision not only opens a split among the circuits with jurisdiction over almost all drilling operations on the OCS, but its interpretation badly misconstrues the text, history, and purpose of OCSLA. As every court to consider the issue has recognized until now, Congress intended for state law to supply the applicable federal rule on the OCS only to fill gaps in federal law. Where, as here, a comprehensive set of federal rights and remedies already governs a dispute, importing different state-law standards turns OCSLA on its head by giving primacy to state law instead of the federal law that Congress deemed exclusive.

The Ninth Circuit's decision injects uncertainty into what had been a settled area of the law, and it will have serious consequences for companies on the OCS. Those companies and their employees have negotiated mutually beneficial compensation plans that account for the distinct circumstances of offshore work, in good-faith reliance on decades of precedent making clear that the FLSA is the exclusive source of wage-and-hour law on the OCS. If allowed to stand, the Ninth Circuit's decision would require a wholesale restructuring of the way those employees are compensated, would threaten massive retroactive liability, and would allow states seeking to discourage offshore energy development to enact divisive laws that would frustrate Congress' plain intent.

This Court has repeatedly reversed Ninth Circuit decisions imposing FLSA liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018); *Integrity Staffing Sols. v. Busk*, 135 S. Ct.

513 (2014); *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012). The decision below does those earlier Ninth Circuit decisions one better by unsettling expectations and threatening massive liability on employers who have indisputably complied with the FLSA. This Court should grant certiorari to restore uniformity to this important area of the law and correct the Ninth Circuit's deeply flawed interpretation of OCSLA.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 881 F.3d 1078 and reproduced at App.1-41. The district court's order granting judgment on the pleadings is available at 2015 WL 12645746 and reproduced at App.46-60.

JURISDICTION

The Ninth Circuit issued its opinion on February 5, 2018. On April 27, 2018, the Ninth Circuit denied a petition for rehearing en banc, but the panel issued an amended opinion and, on May 16, 2018, stayed its mandate pending certiorari. On July 5, 2018, Justice Kennedy extended the time for filing this petition to August 27, 2018. On August 8, 2018, Chief Justice Roberts extended the time for filing this petition to September 24, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of OCSLA are set forth in the appendix.

STATEMENT OF THE CASE

A. The Outer Continental Shelf Lands Act

The OCS consists of all submerged coastal lands that are within the United States' jurisdiction but outside the territorial jurisdiction of the individual states. *See* App.5; 43 U.S.C. §1331(a). Along the coast, state control over offshore lands extends three nautical miles outward. All submerged lands seaward from there and within the United States' jurisdiction under international law (ordinarily, submerged lands within 200 nautical miles of the shore) constitute the OCS and fall under exclusive federal jurisdiction. *See Amber Res. Co. v. United States*, 538 F.3d 1358, 1362 (Fed. Cir. 2008).

OCSLA grew out of a dispute "between the adjacent States and the Federal Government over territorial jurisdiction and ownership of the OCS and, particularly, the right to lease the submerged lands for oil and gas exploration." *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988). After this Court ruled that the federal government had exclusive jurisdiction over the OCS, *see United States v. California*, 332 U.S. 19, 38-39 (1947), Congress enacted OCSLA and "emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit," *Shell Oil*, 488 U.S. at 27.

OCSLA's primary purpose was to "define a body of law applicable to the seabed, the subsoil, and the fixed structures such as [drilling platforms] on the [OCS]." *Rodrigue*, 395 U.S. at 355. Congress initially considered treating drilling platforms like vessels and applying maritime law, but ultimately concluded "that maritime law was inapposite to these fixed

structures." *Id.* at 363. Congress also rejected the direct application of the law of the adjacent state, deciding against "the notion of supremacy of state law administered by state agencies." *Cont'l Oil*, 417 F.2d at 1036. Congress instead declared the OCS a federal enclave governed exclusively by federal law: "The Constitution and laws … of the United States are extended to the [OCS] … to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. §1333(a)(1); *see Rodrigue*, 395 U.S. at 357 ("[F]ederal law is 'exclusive' in its regulation of this area."). Put succinctly, all law on the OCS is federal law.

At the same time, Congress recognized that "federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems" that could arise on drilling platforms. *Rodrigue*, 395 U.S. at 357. Accordingly, to fill "gaps in the federal law," *id.*, Congress borrowed the laws of the adjacent state as surrogate federal law on the OCS, but only to the extent those laws "are applicable and not inconsistent with this subchapter or with other Federal laws and regulations." 43 U.S.C. §1333(a)(2)(A). To ensure that this limited incorporation of state-law standards as federal law would not erode federal control over the OCS, Congress clarified that OCSLA's choice-of-law provisions "shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the [OCS]." 43 U.S.C. §1333(a)(3). In short, no state law operates of its own force on the OCS, and states have no direct sovereignty over the OCS.

This Court has described the resulting choice-of-law scheme as follows: "All law applicable to the Outer Continental Shelf is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." *Gulf Offshore*, 453 U.S. at 480.

B. The Fair Labor Standards Act

The FLSA is a "comprehensive legislative scheme," *United States v. Darby*, 312 U.S. 100, 109 (1941), that protects "all covered workers from substandard wages and oppressive working hours," *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). Among the topics the FLSA and its implementing regulations address is whether employees must be compensated for time spent on the employer's premises but off-duty, including time spent sleeping. For example, federal regulations provide that "[a]n employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises." 29 C.F.R. §785.23; *see id.* §§785.14-785.22. While there is no "legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time," *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944), courts have developed a substantial body of case law to determine whether such hours are compensable. *See, e.g.*, *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 940-41 (9th Cir. 2004) (holding sleep time non-compensable for employees residing on their employer's premises); *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1247 (5th Cir.

1986) (holding off-duty hours non-compensable for employees residing on employer's barges).

C. Factual & Procedural Background

Respondent Brian Newton worked from January 2013 to January 2015 on Parker's drilling platforms, which are attached to the OCS off the California coast. App.2. As is standard for employees on drilling platforms, Newton worked fourteen-day shifts on the platform. App.3. During each shift, he remained on the platform at all times, spending 12 hours on duty and 12 hours off duty; other crew members maintained the opposite schedule, allowing the rig to operate 24 hours a day. App.3. For working that atypical schedule, Newton, like most employees on drilling rigs, earned "well above the state and federal minimum wage," including "premium rates for overtime hours." App.20.

In January 2015, the California Supreme Court held in *Mendiola* that, unlike the FLSA, California's wage-and-hour laws entitled workers to "compensation for all on-call hours spent at their assigned worksites." 340 P.3d at 357. Barely one month later, Newton filed a putative class action in California state court, alleging that California's wage-and-hour laws required Parker to pay him not only for the 12 hours he actually worked each day on the platform, but also for the 12 hours he spent off-duty, including time spent sleeping. App.3. Parker removed the action to federal court and moved for judgment on the pleadings, arguing that OCSLA does not adopt California's wage-and-hour laws as surrogate federal law because there is no gap in federal law for state law to fill. App.4.

The district court granted Parker's motion. Relying on the Fifth Circuit's *Continental Oil* line of cases, the district court explained that "under OCSLA, federal law governs and state law only applies to the extent it is necessary 'to fill a significant void or gap' in federal law." App.51 (quoting *Cont'l Oil*, 417 F.2d at 1036). Because the FLSA is a comprehensive federal wage-and-hour scheme, the court observed, "there are no significant voids or gaps" in federal law, and therefore "it is not necessary to apply the law of the adjacent state." App.52.

The Ninth Circuit, in a decision by Judge Christen and joined by Judges Paez and Berzon, reversed. Expressly rejecting *Continental Oil*, the court held that "the absence of federal law is not … a prerequisite to adopting state law as surrogate federal law under [OCSLA]." App.2. The court acknowledged that the Fifth Circuit interpreted OCSLA and this Court's cases as "requir[ing] that 'applicable' be read in terms of necessity—necessity to fill a significant void or gap." *Cont'l Oil*, 417 F.2d at 1036. The court likewise acknowledged that every district court in the Ninth Circuit to consider the issue had followed the Fifth Circuit's lead and "concluded that California's wage and hour laws do not extend to OCS platform workers because the FLSA leaves no gap for state law to fill." App.20 n.13. The court nonetheless disagreed with that previously unanimous interpretation: "We … reject the proposition that 'necessity to fill a significant void or gap' is required in order to assimilate 'applicable and not inconsistent' state law into federal law." App.2 (citations omitted). Instead, the court held, state laws are "applicable" under

OCSLA whenever they "pertain[] to the subject matter at hand." App.21.

The court next addressed the meaning of "not inconsistent with." 43 U.S.C. §1333(a)(2)(A). The court held that California's wage-and-hour laws are "not inconsistent with" the FLSA because the FLSA's savings clause "explicitly permits more protective state wage and hour laws." App.36; *see* 29 U.S.C. §218(a). Having concluded that "California's minimum wage and maximum hours worked provisions are applicable and not inconsistent with the FLSA," the court vacated the district court's judgment and remanded for further proceedings. App.39 (citation omitted).

The court denied a petition for *en banc* review, but the panel amended its opinion to direct the district court to consider whether its holding "should be applied retrospectively." App.43. The court granted petitioner's motion to stay the mandate pending the filing of a petition for certiorari. App.44-45.

REASONS FOR GRANTING THE PETITION

This case presents an acknowledged split of authority among the circuits with jurisdiction over almost all OCSLA cases. In a clear departure from Fifth Circuit precedent that is sufficiently longstanding that it also binds the Eleventh Circuit, the Ninth Circuit held that OCSLA adopts state law as surrogate federal law on the OCS even when federal law already provides a comprehensive set of rights and remedies to govern the dispute such that there is no gap in federal law to fill. The court readily acknowledged that its decision conflicts with the Fifth Circuit's *Continental Oil* decision, but it expressly

"reject[ed]" that approach and instead adopted a standard that the Fifth Circuit had expressly rejected fifty years earlier. The Ninth Circuit's suggestion that the Fifth Circuit might no longer adhere to *Continental Oil* is readily disproved, as even the Ninth Circuit itself ultimately seemed to recognize. And *Continental Oil* continues to bind the Eleventh Circuit in all events. Certiorari is thus warranted because the decision below conflicts with "the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a).

A circuit split over the meaning of a federal statute would be undesirable in any circumstance, but the practical realities of the OCS magnify the consequences here. Almost all litigation concerning OCSLA occurs within the confines of the old Fifth and current Ninth Circuits, and companies with operations offshore in both regions may be subject to Ninth and Fifth Circuit precedents simultaneously, making uniformity particularly critical. The decision below also disrupts longstanding relationships among employers and employees on the OCS, who have negotiated mutually beneficial compensation plans in good-faith reliance on the shared understanding that the FLSA was the exclusive source of wage-and-hour law on the OCS. The decision below would require a wholesale reworking of those relationships, and in the meantime threatens massive retroactive liability on companies who fully complied with the FLSA. This Court has not hesitated to intervene in previous cases where the Ninth Circuit exposed employers to massive, unexpected liability for merely following seemingly settled law, and it should do so again here.

Certiorari is all the more critical because the decision below is wrong. The text, history, and purpose of OCSLA's choice-of-law provisions—along with this Court's cases applying them—make clear that state law's only role under OCSLA is to provide a federal rule of decision "to fill federal voids." *Rodrigue*, 395 U.S. at 358. The Ninth Circuit reached a contrary conclusion only by ignoring this Court's cases, employing deeply flawed statutory interpretation, and refusing to engage with the historical evidence, all of which demonstrates that state law becomes "applicable" as federal law only when there is no other federal law to apply. Here, because the FLSA is a comprehensive federal scheme that provides rights and remedies with respect to each of Newton's allegations, there is no gap in the coverage of federal law, and thus no need to adopt state law as surrogate federal law.

Even if state law could be deemed "applicable" under OCSLA without a gap in federal law, the decision below would still be wrong because the state wage-and-hour laws Newton invokes are "inconsistent with" the FLSA for OCSLA purposes. The Ninth Circuit proceeded as if the "inconsistency" inquiry under OCSLA is little different from conflict preemption. But that ignores the most basic aspect of OCSLA—namely, that Congress reaffirmed exclusive federal sovereignty over the OCS and decided to make *all* law applicable on the OCS *federal* law. Thus, no state law applies on the OCS as a result of the state's residual sovereignty. While it makes perfect sense to respect state sovereignty and demand an affirmative conflict between state and federal law before finding conflict preemption, that demanding standard is

wholly misplaced on the OCS, where all law is federal and the only question is whether Congress wanted overlapping and inconsistent federal standards.

The Ninth Circuit's error is evident in its reliance on the FLSA's savings clause, which saves state and local wage laws. Congress' federalism-friendly decision not to displace state and local laws in Fresno says nothing about whether Congress would want to have two federal laws, each prescribing a different minimum wage, governing the exclusive federal enclave that is the OCS. Yet that is the counterintuitive result ushered in by the decision below. Once inconsistency is judged without reference to inapposite preemption-like principles, the inconsistency between the FLSA and a federal wage-and-hour regime borrowed from California is obvious. One federal law tells employers to pay $7.25 per hour; the other federal law tells them to pay $11.00 per hour. One federal law allows them to pay for hours actually worked; the other federal law demands payment for time spent sleeping on the premises. While compliance with both federal laws is possible (by always complying with the more burdensome requirement), no rational Congress—and certainly not the Congress that passed OCSLA with a modest gap-filling mission in mind—would impose such inconsistency.

I. The Ninth Circuit's Decision Openly Conflicts With Fifth Circuit Precedent That Is Also Binding In The Eleventh Circuit.

In a departure from almost fifty years of Fifth Circuit precedent and industry reliance, the Ninth Circuit held that state law can apply on the OCS even

when there are no gaps in the coverage of federal law. The court readily acknowledged that its interpretation of OCSLA conflicted with the Fifth Circuit's, stating that it "reject[ed]" *Continental Oil*'s holding that "'necessity to fill a significant void or gap' is required in order to assimilate 'applicable and not inconsistent' state law into federal law." App.2 (quoting *Cont'l Oil*, 417 F.2d at 1036, and 43 U.S.C. §1333(a)(2)(A)). And because *Continental Oil* predated the division of the Fifth Circuit, *Continental Oil* is binding precedent in the Eleventh Circuit and governs the entire Gulf Coast. This Court's review is needed to resolve this circuit split among the circuits with jurisdiction over virtually all drilling operations on the OCS.

A. In *Continental Oil*, the Fifth Circuit held that state law is not "applicable" as surrogate federal law unless it is needed to fill a gap in the coverage of federal law. The dispute in *Continental Oil* arose from a collision between a ship and a drilling platform affixed to the OCS. 417 F.2d at 1031. The owner of the drilling platform sued the shipowner's insurer, attempting to invoke a Louisiana statute that allowed direct actions against an insurer without first obtaining a judgment against the insured. *Id.* at 1031-32. The district court dismissed the lawsuit and the Fifth Circuit affirmed, holding that state law is "applicable" under OCSLA only when it is needed "to fill a significant void or gap" in federal law. *Id.* at 1036. Because federal law already provided "substantive rights and remedies" for injuries arising from the collision, "[t]here is no void, there are no gaps." *Id.* Accordingly, the Louisiana statute did not apply. *Id.* at 1040.

In reaching that conclusion, the Fifth Circuit relied extensively on *Rodrigue*, 395 U.S. 352; *see infra*. The "recurring theme" of *Rodrigue*, according to the Fifth Circuit, was that Congress' "deliberate choice of federal law … requires that 'applicable' be read in terms of necessity—necessity to fill a significant void or gap." *Cont'l Oil*, 417 F.2d at 1036. The Fifth Circuit highlighted *Rodrigue*'s repeated references to OCSLA's use of state law to "supplement[] gaps" or to "fill federal voids." *Id.* at 1036; *see, e.g.*, *Rodrigue*, 395 U.S. at 358 ("This language makes it clear that state law could be used to fill federal voids.").

The *Continental Oil* court expressly rejected the plaintiff's argument that "the term 'applicable'" means only that the relevant state law is "applicable to the subject matter in question." 417 F.2d at 1035. That overly broad interpretation, the court explained, "imputes to Congress the purpose generally to export the whole body of adjacent [state] law onto the" OCS. *Id.* at 1035. Such a result "is hardly in keeping with" Congress' "reject[ion]" in OCSLA of "the notion of supremacy of state law administered by state agencies." *Id.* at 1036.

The Fifth Circuit has continued to apply the *Continental Oil* test in cases presenting choice-of-law questions on the OCS. In *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973), for example, it held that a Louisiana statute did not apply to a lawsuit between two employees on an offshore drilling rig. The court reaffirmed that state law was not "applicable" under OCSLA unless it was "necessary to fill some gap in federal law," which was not the case because the Longshore and Harbor Workers' Compensation Act

provided a federal remedy and thus left "no gap—not even a tiny one." *Id.* at 589. Likewise, in *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985), a Louisiana retaliatory discharge statute did not apply on the OCS because "Congress provided a specific statutory provision (33 U.S.C. §948a) to address retaliatory discharges." *Id.* at 509; *see also Bartholomew v. CNG Producing Co.*, 862 F.2d 555, 557 (5th Cir. 1989) (holding that state law does not apply to apportionment of attorney's fees because "there is applicable federal law").

Before the Ninth Circuit's decision in this case, several district courts within the Ninth Circuit had followed *Continental Oil* in holding that state law is applicable as surrogate federal law on the OCS only when it is needed "to fill gaps in federal law." *Williams v. Brinderson Constructors Inc.*, 2015 WL 4747892, at *4 (C.D. Cal. Aug. 11, 2015); *see* App.20 n.13 (collecting cases). Not one district court held otherwise.

B. In this case, the Ninth Circuit expressly disagreed with the Fifth Circuit's *Continental Oil* line of cases, stating: "[W]e are not convinced that state law applies as surrogate federal law on the OCS only if 'necess[ary],' *Cont'l Oil*, 417 F.2d at 1036, in the sense that there is no existing federal law on the subject." App.26. The court explicitly "reject[ed]" the Fifth Circuit's rule that state law is "applicable" under OCSLA only if it is necessary "to fill a significant void or gap." App.2. Then, exacerbating the conflict, it adopted a standard that the Fifth Circuit had specifically rejected in *Continental Oil*. Whereas the Fifth Circuit declined to read the term "applicable" as

meaning "applicable to the subject matter in question," *Cont'l Oil*, 417 F.2d at 1035, the Ninth Circuit embraced exactly that standard, holding that state laws are "applicable" whenever they "pertain[] to the subject matter at hand." App.21. Applying that expansive standard, the panel held that California's wage-and-hour laws are "applicable" on the OCS because they pertain to the subject matter of Newton's claim. App.35-39.

While it openly acknowledged its disagreement with *Continental Oil*, the Ninth Circuit tried to soften that blow by suggesting that the Fifth Circuit might have moved away from *Continental Oil*. In particular, the Ninth Circuit stated that it was "unclear" whether a test set forth in *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990) ("*PLT*"), "has superseded the *Continental Oil* test in the Fifth Circuit." App.19. That suggestion is simply wrong. The Fifth Circuit's *PLT* decision was written by the same judge as *Continental Oil* and contains not a whiff of disapproval of that jurist's earlier decision—and under the Fifth Circuit's rule of orderliness, *see Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008), even a panel less sensitive to consistency with its earlier work product could not have "superseded" *Continental Oil*. Moreover, nothing in *PLT* could affect *Continental Oil*'s status as binding law in the Eleventh Circuit.

In reality, and as the Ninth Circuit ultimately recognized, "the *Continental Oil* test" is "a precursor to the *PLT* test"; the latter test addresses the subsequent determination of what type of law fills the gap once the logically anterior determination that

"there is a significant gap or void in federal law" has already been made. App.19. The dispute in *PLT* was a standard contract dispute; the absence of an on-point federal statute went without saying. *See* 895 F.2d at 1046. The only question was whether the gap in federal law should be filled by state law or, instead, by general maritime law. The Fifth Circuit created the so-called "*PLT* test" to answer that question, holding that maritime law would fill the gap if it would "apply of its own force" in the absence of OCSLA; otherwise, state law would supply the federal rule of decision if it was "not inconsistent with" federal law. *Id.* at 1047. Thus, *PLT* only confirms the Fifth Circuit's view that Congress intended for state law to apply only "to fill in the gaps in the federal law." *Id.* at 1052; *see also In re Deepwater Horizon*, 745 F.3d 157, 166 & n.10 (5th Cir. 2014) (calling the *PLT* test a "misfit" in light of federal statutes already "regulating water pollution and oil pollution").[1]

In sum, the decision below expressly rejects longstanding Fifth Circuit precedent, which also governs the Eleventh Circuit, holding that state law is "applicable" as surrogate federal law under OCSLA only if state law is "necess[ary] to fill a significant void or gap" in the coverage of federal law. *Cont'l Oil*, 417 F.2d at 1036. Instead, in the Ninth Circuit, state law is "applicable" under OCSLA whenever it "pertain[s] to the subject matter at hand," App.21, even when it

[1] In every case in which the Fifth Circuit has applied the *PLT* test, the only potentially applicable sources of law were general maritime law and state law—*i.e.*, there was an unquestioned gap in federal law. *See, e.g.*, *ACE Am. Ins. Co. v. M-I, L.L.C.*, 699 F.3d 826, 832 (5th Cir. 2012) (contract dispute).

is not needed to fill a gap in federal law. The Ninth Circuit's explicit departure from the Fifth Circuit's longstanding view—and its adoption of the very standard that the Fifth Circuit has rejected—creates a circuit split that clearly warrants this Court's review.

II. The Ninth Circuit's Decision Creates An Intolerable Split, Undermines Reliance Interests, And Invites Strategic Behavior By States.

A circuit split over the meaning of a federal statute would be undesirable in any circumstance, but the practical realities of the OCS and oil and gas operations there exacerbate the consequences and underscore the need for certiorari here. The Fifth, Eleventh, and Ninth Circuits have jurisdiction over virtually all existing operations on the OCS in the United States—*i.e.*, off the Gulf Coast and the Pacific Coast (including Alaska). As a result, almost all litigation concerning OCSLA occurs in these circuits, rendering the split here both unlikely to benefit from further percolation and particularly intolerable. Making matters worse, for companies with operations offshore in both regions, enterprise-wide policies and employer-employee relationships may be subject to Ninth and Fifth Circuit precedent simultaneously, making uniformity regarding OCSLA's choice-of-law rules particularly important.

Certiorari is also critical because the Ninth Circuit's decision disrupts longstanding employer-employee relationships. Employers and employees on the OCS, often through collective bargaining, have implemented mutually beneficial compensation and

benefit systems based around the shared understanding that the FLSA is the exclusive source of wage-and-hour law on the OCS. For example, many employers and employees have agreed to exclude sleep time from hours worked, as expressly permitted by federal law. *See* 29 C.F.R. §785.22. Under California law, however, such agreements are ineffective in all but a few select industries. *See Mendiola*, 340 P.3d at 365-66. The Ninth Circuit's holding would thus force employers and employees into compensation plans that differ from agreements they voluntarily negotiated, which—unlike California's wage-and-hour laws—were specifically tailored to the distinctive circumstances of work on offshore drilling platforms.

This Court has not looked favorably on analogous attempts by plaintiffs to use novel theories of wage-and-hour liability to upset long-settled industry practices. In the FLSA context, for example, the Court has explained that it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 567 U.S. at 158. Newton and the class he represents do not seek to impose liability under the FLSA, but the effect on settled expectations and industries practices is the same. In fact, this lawsuit is even more problematic, as it threatens massive liability against employers who undisputedly *complied with* the FLSA on platforms governed exclusively by federal law. Those employers, who relied for fifty years on the unquestioned proposition that the FLSA is the exclusive source of wage-and-hour law on the OCS, have now been blindsided by the Ninth Circuit's

holding that state wage-and-hour standards also apply as overlapping federal law and have done so all along. This Court has repeatedly intervened to address (and ultimately reject) similar efforts by the Ninth Circuit to expose settled industry practices to massive, unexpected liability, *see Encino Motorcars,* 138 S. Ct. 1134; *Integrity Staffing*, 135 S. Ct. 513; *Christopher*, 567 U.S. at 142, and should do so again here.

Finally, the Ninth Circuit's decision invites strategic behavior by States that are hostile to offshore drilling. Because state laws presumptively apply on the OCS under the decision below, States may attempt to enact targeted laws that increase the difficulty and cost of OCS operations, deterring activity the federal government seeks to encourage. That is plainly inconsistent with Congress' basic judgment in OCSLA to make the OCS an enclave of exclusive federal jurisdiction where only federal law governs. Along the same lines, the decision below encourages opportunistic plaintiffs to file copycat suits addressed to the OCS every time California broadens its wage-and-hour protections. This Court should grant certiorari to restore uniformity to this important area of the law and arrest the far-reaching consequences of the decision below.

III. The Ninth Circuit's Decision Is Incorrect.

Certiorari is all the more critical because the Ninth Circuit's decision is wrong. By holding that state law can apply on the OCS even absent a gap in federal law, the Ninth Circuit misinterpreted OCSLA and this Court's precedent, both of which make clear that state law's only role is "to fill federal voids."

Rodrigue, 395 U.S. at 358. Moreover, by holding that California's wage-and-hour laws are "not inconsistent" with the FLSA because of the FLSA's savings clause, the Ninth Circuit failed to recognize that OCSLA incorporates state law *as federal law*, making preemption principles and the FLSA's savings clause's carve-out for state law entirely inapt.

A. State Law Is Applicable Under OCSLA Only When There Are Gaps in the Coverage of Federal Law Necessary For State Law to Fill.

1. Congress enacted OCSLA in the wake of a protracted dispute between the federal government and the States over sovereignty and ownership of coastal submerged lands. After this Court held that all submerged lands belong exclusively to the federal government, *United States v. California*, 332 U.S. at 38-39, Congress crafted a compromise to quell the "deep political and emotional currents centered around the clash between national sovereignty and states' rights," *Cont'l Oil*, 417 F.2d at 1036: It ceded all federal interest in submerged lands within three miles of the coast, 43 U.S.C. §§1301-1315, but affirmed its absolute sovereignty and control over the OCS. *Gulf Offshore*, 453 U.S. at 479 n.7.

Having ceded control over submerged lands within the three-mile belt, Congress had no interest in allowing States to assert any sovereignty or direct legislative control over the OCS. Accordingly, it made federal law the exclusive source of law: "The Constitution and laws … of the United States are extended to the subsoil and seabed of the [OCS] … to the same extent as if the [OCS] were an area of

exclusive Federal jurisdiction located within a State." 43 U.S.C. §1333(a)(1); *see Rodrigue*, 395 U.S. at 357 ("[F]ederal law is 'exclusive' in its regulation of this area.").

Congress recognized, of course, that "because of its interstitial nature, federal law would not provide a sufficiently detailed legal framework to govern life on the miraculous structures which will rise from the sea bed of the [OCS]." *Shell Oil*, 488 U.S. at 27. But the substantial gaps in the coverage of federal law neither deterred Congress from making federal law exclusive nor led Congress to adopt proposals that would have treated the OCS as if it were part of the adjacent state. *See Rodrigue*, 395 U.S. at 358-59. And, critically, under OCSLA, state law *never* applies on the OCS of its own force—*i.e.,* there is no state law applicable *qua* state law on the OCS. Instead, Congress borrowed state standards as federal law only to "fill federal voids," adopting state law as surrogate federal law to "supplement[] gaps in the federal law." *Id.* at 357-58; *see* 43 U.S.C. §1333(a)(2)(A) ("To the extent that they are applicable and not inconsistent with [federal law], the civil and criminal laws of each adjacent State … are declared to be the law of the United States.").

This Court has repeatedly recognized the limited, gap-filling role of state law under OCSLA. This Court first addressed OCSLA's choice-of-law provisions in *Rodrigue*. The question there was whether Louisiana state law or the federal Death On The High Seas Act ("DOHSA") applied to wrongful-death actions filed by survivors of workers who died on drilling rigs. 395 U.S. at 352-53. This Court traced OCSLA's history, recounting that Congress rejected both the wholesale

application of maritime law and the wholesale application of state law and instead made federal law exclusive. *Id.* at 355-58. In describing state law's limited role, this Court repeatedly emphasized that state law applied only "to fill federal voids." *Id.* at 358; *see id.* at 357 ("[T]he Act supplemented gaps in the federal law with state law."); *id.* at 362 ("[T]he whole body of Federal law was made applicable to the area as well as state law where necessary." (alterations omitted)).

In light of state law's limited, gap-filling role, the *Rodrigue* Court reasoned that if the incidents at issue were within DOHSA's scope, then DOHSA would apply and provide "the exclusive remedy for these deaths." *Id.* at 353, 359. The Court determined, however, that the incidents did not occur on the "high seas" and therefore were outside DOHSA's scope. *Id.* at 359-60, 366. Because of the absence of applicable federal law, this Court held that OCSLA permitted the adoption of state law as surrogate federal law. *Id.* at 366. The "recurring theme" of *Rodrigue*, as the Fifth Circuit noted, is that state law does not apply on the OCS unless it is "necess[ary] to fill a significant void or gap" in federal law. *Cont'l Oil*, 417 F.2d at 1036.

This Court's subsequent OCSLA cases are much the same. In *Huson*, 404 U.S. 97, this Court held that courts cannot fill the gaps in federal law by creating federal common law: "Congress made clear provision for filling in the gaps in federal law; it did not intend that federal courts fill in those gaps themselves by creating new federal common law." *Id.* at 104-05. That holding is necessarily premised on the idea that state law (and not federal common law) serves a

purely gap-filling role. Likewise, in *Gulf Offshore*, this Court reiterated that state law's role under OCSLA is "to fill the substantial 'gaps' in the coverage of federal law." 453 U.S. at 480; *see Maryland v. Louisiana*, 451 U.S. 725, 752 n.26 (1981) ("[OCSLA] borrows 'applicable and not inconsistent' state laws for certain purposes, such as were necessary to fill gaps in federal laws.").

This Court's cases thus all reflect that Congress borrowed state law standards as surrogate federal law not out of any respect for state sovereignty. To the contrary, Congress expressly rejected claims of state sovereignty over the OCS and reaffirmed its status as an exclusive federal enclave where all law is federal law. It follows ineluctably from that most basic congressional decision that state standards of conduct are borrowed out of necessity, not out of respect for state sovereignty and not where other federal law already applies and governs the conduct at issue. In short, this Court's repeated recognition that state law on the OCS is limited to a gap-filling role reflects not just the text of OCSLA but Congress' most fundamental judgment in enacting that statute.

2. The Ninth Circuit overlooked all of this in declaring that state law can apply on the OCS even without a gap in federal law. Its analysis was wrong at every turn.

Beginning with the text, the Ninth Circuit settled on its definition of "applicable" only by employing a flawed brand of textualism that defies this Court's precedents. "Statutory language cannot be construed in a vacuum." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). Rather, "the words of a statute must be read

in their context and with a view to their place in the overall statutory scheme." *Id.* This Court's decision in *Ransom v. FIA Card Services*, 562 U.S. 61 (2011), which interpreted the word "applicable" in the phrase "applicable monthly expense amount," demonstrates how the analysis should proceed. The Court began by citing dictionaries that defined "applicable" as "appropriate, relevant, suitable, or fit." *Id.* at 69-70. But instead of stopping there and adopting a broad definition of "applicable," the Court considered how those definitions made the most sense in light of the statute's "text, context, and purpose." *Id.* at 80; *see id.* at 69-74. The Court concluded from its extensive contextual analysis that Congress must have used the word "applicable" as a limiting term—*i.e.*, to "filter[] out debtors for whom a deduction is not at all suitable." *Id.* at 74.

Here, in contrast, the Ninth Circuit simply went with the first dictionary definition it found. *See* App.21. Instead of assessing which dictionary definitions made the most sense in light of OCSLA's broader context, the Ninth Circuit merely declared that "applicable" must mean "pertain[ing] to the subject matter at hand." *Id.* That short-circuited analysis failed to read the words of the statute "in their context and with a view to their place in the overall statutory scheme." *Sturgeon*, 136 S. Ct. at 1070. Had the Ninth Circuit conducted the proper analysis, it would have concluded, like *Ransom*, that the word "applicable" serves a limiting function, narrowing the universe of state laws that may be considered for adoption as surrogate federal law—*i.e.*, that state law becomes "applicable" only when the

absence of federal law makes resort to state law "suitable" or "appropriate."

No other interpretation of "applicable" makes sense of Congress' deliberate judgment to reject state law as the default body of law governing the OCS. If "applicable" means that state law applies whenever it pertains to activities on the OCS without regard to the existence of any gap in federal law, then Congress achieved indirectly through a subsidiary provision the precise result it directly rejected in OCSLA's principal provisions. That simultaneously violates the elephants-in-mouseholes canon, *see Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001), and the direction that courts are to make "sense, not nonsense" out of federal statutes, *W.V. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991). The far better interpretation is that state law is "applicable" only when there is no applicable federal law governing the subject, leaving a gap to be filled.

The Ninth Circuit's definition renders the word "applicable" superfluous. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) ("[W]e must give effect to every word of a statute wherever possible"). If all Congress meant was that state law must "pertain to the subject matter at hand," it could have omitted the word "applicable" altogether and achieved the same result; the only laws that *ever* apply to a lawsuit are ones that pertain to the subject matter at hand.[2] Thus, as the Fifth Circuit

[2] Tellingly, after embracing its definition of "applicable," the Ninth Circuit never analyzed whether California's wage-and-hour laws were "applicable" under that definition—presumably because the laws a plaintiff invokes are invariably "pertinent to the subject matter" of his lawsuit.

put it in *Continental Oil*, the Ninth Circuit's approach places "100% Emphasis" on the phrase "not inconsistent with" and leaves no role for "applicable." 417 F.2d at 1035. In contrast, interpreting the statute to adopt state law only when needed to fill a gap in federal law "ensures that the term 'applicable' carries meaning, as each word in a statute should." *Ransom*, 562 U.S. at 70.

The decision below also fails to account for OCSLA's historical context, which (as outlined above) makes crystal clear that state law standards play only a limited, gap-filling role as borrowed federal standards. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979) ("[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed."). Except for a passing acknowledgement that "Congress was solicitous to retain and … assert[] the federal government's civil and political jurisdiction over the OCS," App.22-23, the Ninth Circuit breezed right past the historical circumstances surrounding OCSLA's passage, including the very ones on which this Court relied in *Rodrigue*, 395 U.S. at 355-59, and *Gulf Offshore*, 453 U.S. at 478-83.

The Ninth Circuit largely ignored the historical materials this Court invoked in *Rodrigue*. The Senate Report explains that under OCSLA, the body of law applicable on the OCS consists of: (a) federal constitutional and statutory law; (b) federal regulations; and "(c) *in the absence of such applicable Federal law or adequate Secretarial regulation*, the civil and criminal laws of the State adjacent to the [OCS]." S. Rep. No. 83-411, at 2 (1953) (emphasis

added). And on the Senate floor, advocates and opponents of the bill both recognized that state law's only role was to fill gaps. *See* 99 Cong. Rec. 7164 (1953) (Sen. Anderson: "[W]here there is a void, the State law may be applicable."); 99 Cong. Rec. 7257 (1953) (Sen. Long: "[W]hen the Federal law is silent, the State law will apply.").

The Ninth Circuit studiously avoided all of this, instead marshaling irrelevant snippets of legislative history—and even those cherry-picked statements provide little support. The Ninth Circuit quoted a statement by Senator Cordon that, according to the court, "emphasized the importance of … state law." App.24. In reality, the quoted passage does not extol the importance of state law vis-à-vis federal law, but rather explains why the committee chose state law instead of maritime law to serve as "housekeeping law for the [OCS]" when there is a gap in federal law. 99 Cong. Rec. 6963 (1953).

3. Because state law does not apply on the OCS absent a gap in federal law, California's wage-and-hour law does not apply in this case. The FLSA is "a comprehensive legislative scheme." *Darby*, 312 U.S. at 109. The FLSA indisputably applies on the OCS and its protections are broad, shielding "all covered workers from substandard wages and oppressive working hours, labor conditions that are detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." *Barrentine*, 450 U.S. at 739. Because the FLSA applies to the OCS and comprehensively addresses wage-and-hour issues, there is "no gap" in the coverage of federal law—"not even a tiny one."

Nations, 483 F.2d at 589. The application and comprehensiveness of the FLSA is sufficient to make state labor law inapplicable under OCSLA as a general matter.

Examining Newton's specific claims reinforces that there is no gap for California's wage-and-hour law to fill vis-à-vis the FLSA. Newton's first and sixth claims allege minimum-wage and overtime violations. App.3. The FLSA addresses those issues by "establish[ing] federal minimum-wage, maximum-hour, and overtime guarantees." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013). Newton's second claim alleges pay stub violations, App.3, which the FLSA addresses by, *inter alia*, requiring employers to keep records of hours worked and wages paid, 29 U.S.C. §211(c). Newton's fifth claim complains of the failure to provide valid meal periods, App.3, which the FLSA addresses by requiring employers to compensate employees for any meal period that is not "bona fide," 29 C.F.R. §785.19. Newton's third claim, for unfair competition, App.3, is based on the same predicate acts as his wage and meal-period claims. Newton's fourth claim alleges failure to timely pay final wages, App.3, which the FLSA addresses by imposing penalties on employers who fail to pay terminated employees on the next regularly scheduled payday, 29 U.S.C. §216(b); App.58.[3]

In short, whether examined generally or in light of the specific state-law claims alleged in this case, the

[3] Because substantive state law does not reach the OCS, Newton's seventh claim, for civil penalties under California's private-attorney-general statute, also fails.

FLSA is fully applicable to the OCS and to Newton's claims and leaves no gaps for state law to fill. Thus, California's wage-and-hour law is not "applicable" as surrogate federal law. Just as DOHSA's application to the OCS would have rendered state law inapplicable in *Rodrigue*, 395 U.S. at 359, and just as the Longshore and Harbor Workers' Compensation Act's application to the OCS rendered state law inapplicable in *Nations*, 483 F.2d at 589, the FLSA's application to the OCS renders state law inapplicable here. As a result, the FLSA is plaintiffs' "exclusive remedy," *Rodrigue*, 395 U.S. at 359, and the decision below should be reversed.

B. California's Wage-and-Hour Laws Are Inconsistent With the FLSA for OCSLA Purposes.

Even if, contrary to OCSLA and this Court's cases, state law could be deemed "applicable" as surrogate federal law despite the absence of a gap in federal law, the decision below would still be wrong because California wage-and-hour laws are "inconsistent with" the FLSA for OCSLA purposes. 43 U.S.C. §1333(a)(2)(A). As described above, each of the state-law provisions that Newton invokes has an FLSA counterpart that regulates the same topic in a different way. Indeed, if the FLSA were consistent with state law on these issues, Newton presumably would have filed his claims under the FLSA instead of swimming upstream against the then-settled law established in *Continental Oil*.

The Ninth Circuit openly acknowledged that "California's minimum wage and overtime laws … establish different and more generous

benchmarks than the … FLSA's statutory and regulatory scheme." App.36-37. It held, however, that the differences between the two statutory schemes did not make them "inconsistent" for OCSLA purposes. App.35-36. In the court's view, California's wage-and-hour laws are consistent with the FLSA because the FLSA allows states to enact higher minimum-wage requirements and lower maximum workweek requirements. App.36; *see* 29 U.S.C. §218(a). In other words, the court held that California's wage-and-hour standards are "not inconsistent with" the very different rules under the FLSA because the latter does not preempt the former.

That conclusion reflects a fundamental misunderstanding of OCSLA's "not inconsistent with" standard. While the FLSA does not preempt state and local laws where they apply of their own force based on an exercise of the residual sovereignty of the states, that is irrelevant under OCSLA because state law *never* applies of its own force under OCSLA. When OCSLA borrows state law standards, it adopts them "as the law of the United States." *Rodrigue*, 395 U.S. at 356. Thus, whether the FLSA would preempt state law is not just irrelevant, but a fundamentally wrong question to ask. When Congress includes a savings clause in a statute like the FLSA, it does so out of the federalism-friendly impulse not to displace the residual sovereignty of the states. But such impulses are fundamentally misplaced on the OCS, where Congress has already made a deliberate judgment to reaffirm exclusive federal sovereignty and make all applicable law federal law. Put differently, Congress' decision in the FLSA to "save" the applicability of California law to Fresno says nothing about Congress'

very different decision in OCSLA to make federal law exclusive on the OCS.

Once it is clear that preemption principles are inapposite and the question under OCSLA is whether two *federal* regulatory regimes are consistent, the Ninth Circuit's error comes into sharp relief. If California's wage-and-hour law were incorporated into federal law, federal law would be riddled with contradictions; federal law would simultaneously require and not require employers to pay employees for their off-duty time on the platform, and simultaneously impose a minimum wage of $7.25 per hour and $11.00 per hour. While it would not be impossible to comply with both *federal* regimes, to say the two regimes are consistent would be to distort meaning and disregard Congress' evident intent in enacting OCSLA.

Finally, the Ninth Circuit's decision establishes the exact choice-of-law regime that Congress rejected. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) ("Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."). In the Ninth Circuit's view, state law controls on the OCS whenever it is not preempted. But that is exactly how the law applies within the borders of States: state law presumptively applies unless preempted by federal law. And Congress expressly repudiated proposals that would have treated the OCS as if it were part of the adjacent state. *See* p.7, *supra*. The Ninth Circuit's decision is thus contrary to the distinctive regime that Congress established for the OCS, underscoring the need for this Court's review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

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