No. 18-389

In The
Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,

Petitioner,

v.

BRIAN NEWTON,

Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, under the Outer Continental Shelf Lands Act, 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.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The Chamber's membership includes businesses engaged in commerce in each of the 50 States, including offshore enterprises in States adjacent to the continental shelf. The Chamber therefore has a keen interest in ensuring that those members' long-standing employment arrangements—and other practices—are not thrown into disarray. Businesses faced with unique working conditions have negotiated with employees against the backdrop of the comprehensive Fair Labor Standards Act as the sole regime governing wage and hour rules on the continental shelf. Although compliant with federal law, such arrangements will be abruptly upended by the Ninth Circuit's countertextual and ahistorical interpretation of the Outer Continental Shelf Lands

[1] Counsel of record for all parties consented to the filing of the brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

Act—which engrafts conflicting but non-preempted state laws, contrary to Congress's intent.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the usual sense of the word, the Fair Labor Standards Act ("FLSA") and California wage and hour law are "inconsistent." California's minimum wage is more than $4 higher per hour than federal law and overtime kicks in more quickly and can accrue at higher rates. And, in provisions critical to the unique working arrangements on the remote platforms of the outer continental shelf, the FLSA does not require employers to compensate employees for all hours spent on an employer's premises, including hours spent sleeping, watching television, or engaged in other personal activities. After a 2015 California Supreme Court decision, however, California law requires an employee to be paid for all on-premises time—24 hours a day—if the employee is on "call" in any sense.

These are just a few examples; the FLSA is a "comprehensive legislative scheme," *United States v. Darby*, 312 U.S. 100, 109 (1941), that radically differs from California wage and hour law. And it should be the sole regime on the outer continental shelf. Why? Because Congress, in the Outer Continental Shelf Lands Act ("OCSLA") confirmed that the outer continental shelf is an area of "exclusive Federal jurisdiction." 43 U.S.C. § 1333(a)(1). OCSLA's choice of law provision thus "supplement[s] gaps in the federal law with state law[s] . . . but only to 'the extent that they are applicable and not inconsistent with . . .

other Federal laws.'" *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 357 (1969) (quoting 43 U.S.C. § 1333(a)(2)(A)). Here, there is no gap to fill given the FLSA's comprehensive coverage; and the inconsistency between federal and state laws could not be more glaring. Yet the Ninth Circuit displaced the well-settled FLSA regime with California wage and hour law anyway.

The Ninth Circuit's rationale for its approach was that the FLSA—like many federal laws—has a savings clause permitting States to layer additional requirements on top of federal law within state jurisdiction. But in an area of exclusive federal jurisdiction, there is no state law to "save." So the Ninth Circuit's unmoored reading of "inconsistent" relied on a specialized meaning drawn from federal preemption doctrine that makes no sense for the outer continental shelf. The solicitude for state sovereignty that informs the preemption inquiry—and motivates legislative adoption of a savings clause—has no role to play in deciding which federal standard should govern on federal land: the standard Congress enacted, or a newly-minted rule borrowed from California that wreaks havoc with settled working arrangements.

The text, structure, and history of OCSLA all confirm that Congress intended for its own enactments to govern on the federal enclave of the outer continental shelf. To read OCSLA otherwise, as the Ninth Circuit did, would mean that whenever Congress expressly or implicitly preserved a State's authority to regulate within its own jurisdiction, Congress also granted the State the power to override enacted federal law in an area of exclusive federal

jurisdiction. This would transform a federal choice of law clause for the outer continental shelf into a mechanism whereby inconsistent state laws can displace already-operative federal law. Such a reading effectively undoes Congress's central decision to make the outer continental shelf into an exclusive federal enclave and places the outer continental shelf on the same jurisdictional footing as the territory of California or other state sovereigns, even though there are no state sovereign interests to protect.

The Ninth Circuit's misuse of preemption rules also creates perverse results that threaten to disrupt long-standing business arrangements, not just for employee wages and hours, but also for many other industry practices developed under other comprehensive federal regimes. If longstanding federal regimes can be so easily displaced by facially inconsistent state laws, States with interest in regulating (or discouraging) activities on the outer continental shelf will have every incentive to press the limits of state regulatory authority, even though settled practices are already compliant with operative federal regimes.

ARGUMENT

I. Preemption Analysis Has No Role To Play In Choosing Whether To Apply Enacted Federal Law Or Borrowed State Law In An Area Of Exclusive Federal Jurisdiction.

The "purpose of the [OCSLA] was to define a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the outer Continental Shelf." *Rodrigue*, 395 U.S. at 355. Rejecting the application of

both maritime law and adjacent state law, Congress made "federal law . . . 'exclusive' in its regulation of this area." *Id.* at 357, 358–59, 361–62; 43 U.S.C. § 1333(a)(1) ("The Constitution and laws . . . of the United States are hereby extended to the [outer continental shelf] . . . to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State[.]"). Because interstitial federal law "might be inadequate to cope with the full range of potential legal problems," however, Congress adopted a choice of law rule to "supplement[] gaps in the federal law with state law," not by applying state law directly, but by "adopt[ing] [it] only as surrogate federal law." *Rodrigue*, 395 U.S. at 357. And even then, state law may be borrowed "only when not inconsistent with applicable federal law." *Id.* at 355–56.

Under OCSLA, California wage and hour law cannot be borrowed as "surrogate federal law" because it fails to meet the criteria of being "applicable and not inconsistent with . . . Federal laws." 43 U.S.C. § 1333(a)(2)(A). The FLSA leaves no void to be filled, making borrowed state law inapplicable, and California law's divergence from the FLSA makes it inconsistent.

The Ninth Circuit made two wrong turns on the way to holding otherwise. First, it bypassed the requirement of a federal-law gap by failing to recognize the limiting function of "applicable," in context, as meaning "suitable." Only some state laws are suitable to be applied on the outer continental shelf—those that fill gaps by addressing subjects not already covered by federal law. *See Gulf Offshore Co.*

v. Mobil Oil Corp., 453 U.S. 473, 480 (1981) (under OCSLA, state law is used "to fill the substantial 'gaps' in the coverage of federal law"). In other words, where there is already-applicable federal law, then state law is not "applicable" under OCSLA. *See* Pet. Br. 33–38.

Otherwise, under the Ninth Circuit's broad reading—where "applicable" means pertinent to the matter at hand, Pet. App. 21—any and every state law used to challenge activities on the outer continental shelf would be "applicable," because, of course, the only laws that ever apply to a lawsuit are ones that pertain to the subject matter at hand. Such a wooden reading of a single word in isolation—which deprives it of any practical meaning—cannot and should not displace the statutory context and purpose of this federal choice of law provision. It "is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (quoting *Deal v. United States,* 508 U.S. 129, 132 (1993)). The purpose and structure of OCSLA, as well as its ample legislative history, all demonstrate that the Ninth Circuit's interpretation of "applicable" makes no sense. *See* Pet. Br. 19–25.

Second, the court of appeals errantly transplanted a preemption analysis meant to protect state sovereign interests into the federal terrain of submerged seabeds and offshore structures. The court interpreted OCSLA's provision borrowing "not inconsistent" state laws to mean that borrowing was allowed so long as state law would not be preempted

by federal law within state territory. This error sustained the court's holding that California wage and hour law is somehow "not inconsistent with" the FLSA simply because the FLSA's savings clause "explicitly permits more protective state wage and hour laws." Pet. App. 36; *see* 29 U.S.C. § 218(a).

The plain meaning of "inconsistent" refutes the Ninth Circuit's approach. And importing federalism concerns where they do not belong circumvents Congress's central objective of making the outer continental shelf subject exclusively to federal law. So even if "applicable" could be read as broadly as the Ninth Circuit would have it, OCSLA's inconsistency criterion would still rule out the borrowing of California wage and hour law.

Our federalist system "adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 567 U.S. 387, 398 (2012). Preemption doctrine, implementing the Supremacy Clause, addresses the "possibility that laws can be in conflict or at cross-purposes" when there are two sovereigns. *Id.* at 399.

Given this backdrop of mutual respect between dual sovereigns, although Congress may expressly or implicitly preempt state laws, *id.*, Congress may also do the opposite. For example, some federal regulatory schemes are based on a "cooperative federalism" model. *See New York v. United States*, 505 U.S. 144, 167–68 (1992) (listing an array of federal statutes deploying a cooperative federalist approach).

Congress also may enact savings clauses that preserve some of a State's pre-existing regulatory authority over an area that is also subject to federal control. *See, e.g.*, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002) (describing a "saving clause [that] reclaims a substantial amount of ground" for state regulation); *United States v. Locke*, 529 U.S. 89, 105 (2000) (describing savings clause purpose "to preserve [certain] state laws").

But in an area of exclusive federal jurisdiction where only federal law applies, savings clauses meant to preserve state authority have no role to play. Such is the case under OCSLA, where there are not two sovereigns who need to be accommodated on the outer continental shelf—there is only one: the federal government. 43 U.S.C. § 1333(a)(1); *Rodrigue*, 395 U.S. at 357. Even before the passage of OCSLA, this Court recognized that the protection and control of the outer continental shelf was solely a function of federal sovereignty, where the "national interest is unencumbered." *United States v. California*, 332 U.S. 19, 34–35 (1947).

In short, because States have no sovereign control over the outer continental shelf, and have never had any, there is no residual state authority for Congress to preserve via a savings clause. In transposing Congress's decision under the FLSA to preserve state authority regarding wage standards within state jurisdiction, 29 U.S.C. § 218(a), into an area of exclusive federal jurisdiction, the Ninth Circuit injected federalism considerations into a context where they are fundamentally misplaced.

OCSLA's choice of law rule—meant to provide parameters for when state law can be borrowed for use as federal law—is far from the clear statement that would be necessary to allow inconsistent state law to supplant long-established federal law in an area of exclusive federal jurisdiction. Jurisprudence governing the applicability of state law in federal enclaves is instructive. Far from favoring the displacement of established federal law by state law of more recent vintage, the presumption runs the other way. *See* Pet. Br. 20–21. Courts presume that ordinary congressional authorization of state regulation does *not* authorize regulation of a federal enclave unless Congress's purpose to do so is manifest. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) ("[T]he activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation.").

There is no such manifest intent in the FLSA's savings clause or anywhere else in the FLSA. The savings clause provides that "No provision of this Act . . . shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a [higher] minimum wage . . . or a [lower] maximum workweek . . . ." 29 U.S.C. § 218(a). As there never has been any "State law or municipal ordinance" governing the outer continental shelf, the savings clause does not indicate any congressional intent to permit States to regulate there, much less with the requisite specificity. *Compare Goodyear Atomic Corp.*, 486 U.S. at 181–82 (finding statute authorized state worker's compensation regulation in federal enclaves

where it provided that States possess authority over federal lands and facilities "to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be").

Nor does the savings clause magically eliminate the facial inconsistency between the FLSA and California wage and hour law. Indeed, the savings clause presupposes that there is an inconsistency; it exists to tell employers how to resolve that inconsistency, by requiring them to comply with the most demanding standard. Such a requirement displaces federal law entirely where, as here, California law effectively rewrites most FLSA provisions.

Far from resolving conflicts, such misapplication of a savings clause creates them. Businesses on the outer continental shelf will be governed by (at least) two overlapping and inconsistent federal standards. And, because an employer would necessarily have to resolve the conflicts by complying with the most demanding standard, the upshot would be the displacement of a federal standard enacted by Congress with a borrowed federal standard adopted in Sacramento, and the transfer of authority from the

federal government to a State determined to impose its own standards.[2]

That was plainly not the result that Congress intended when it established federal law as exclusive on the outer continental shelf, 43 U.S.C. § 1333(a)(1), and barred the borrowing of "inconsistent" state law, *id.* § 1333(a)(2)(A). Reading "not inconsistent with" to mean "not preempted by" effectively undoes the central premise of OCSLA. The outer continental shelf ends up on precisely the same footing as Los Angeles: state law governs unless preempted by federal law—no matter how widely it diverges from enacted federal standards—except that it is deemed "federal law" and is enforced exclusively by federal regulators. *See id.* § 1333(a)(2)(A) (providing that borrowed state laws

[2] Under the Ninth Circuit's preemption analysis, each State adjacent to the outer continental shelf could impose its own (differing) wage and hour standards simply because, on the mainland, such standards would be protected under the FLSA's savings clause. States could thus override long-established federal law on federal land, and employers operating in compliance with established federal law would no longer be able to implement uniform procedures across all of their outer continental shelf operations.

"shall be administered and enforced by the appropriate officers and courts of the United States").[3]

That is exclusive federal jurisdiction in name only, and it is little different from the proposals to adopt state law as OCLSA's governing standard that Congress rejected, because there, too, state law would have been subject to ordinary preemption. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) ("Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").

Nothing in the text of OCSLA commands this topsy-turvy result. The ordinary meaning of "inconsistent" easily rules out the borrowing of California wage and hour law in lieu of the FLSA. The differences between the two laws are legion, and outcome-dispositive. *See infra* pp. 15-18. As even the Ninth Circuit acknowledged, "California's minimum wage and overtime laws . . . establish different and more generous benchmarks than the . . . FLSA's statutory and regulatory scheme." Pet. App. 36–37.

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[3] As Petitioner argues (Br. 19), most "borrowed" state law will be interstitial common law, such as contract law governing simple contract disputes. The provision for federal administrators to apply state law comes into play primarily where Congress has made explicit that state regulations should apply in the outer continental shelf, such as for workers' compensation. *See Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 218 (2012) (holding the "workers' compensation scheme incorporated by the OCSLA explicitly anticipates that injured employees might be eligible for both state and federal benefits").

Had Congress wanted to invoke the test the Ninth Circuit applied, it could have authorized borrowing of state laws to "the extent that they are applicable and not [preempted by] this Act or . . . other Federal laws." 43 U.S.C. § 1333(a)(2)(A).[4] But Congress chose "not inconsistent with" instead. It would turn principles of federalism—and of statutory construction—upside down to give the phrase anything other than its plain meaning.

The structure of OCSLA's choice of law provisions reinforces that this choice was intentional. Congress provided that borrowed state law was to be administered by federal regulators, *id.*, an odd choice if it was contemplating the borrowing of all state law that was not preempted—i.e., the same scope of state regulatory authority that applies in Fresno. And it expressly provided that the borrowing of state law "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]." *Id.* § 1333(a)(3). This prohibition on a State's assertion of jurisdiction would ring hollow if the State's authority was effectively the same on the outer continental shelf as within its territory.

For those circumstances where there is no governing federal law, Congress recognized that workers' relationships with adjacent States, *Rodrigue*, 395 U.S. at 365, made it sensible to borrow interstitial standards from state law rather than have courts

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[4] Congress knows how to express this precisely and use the phrase "not preempted" when it wants to. *E.g.*, 42 U.S.C. § 18012; 49 U.S.C. § 31151(e)(2)(A).

invent new federal common law. *See Cont'l Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969). But nothing in OCSLA's text, history, or purpose indicates that Congress wanted to displace comprehensive existing, enacted federal standards with competing standards borrowed from state law.

II. Applying State Law On The Outer Continental Shelf Because It Is Not Preempted Within State Territory Leads To Perverse Results And Disrupts Settled Expectations.

The California wage and hour law that would supplant the FLSA as surrogate federal law if the Ninth Circuit's preemption test were imported into OCSLA is vastly different from the FLSA. Complying would not be a simple matter of updating a wage number or two; rather, it would require a wholesale restructuring of employment relationships on the outer continental shelf. The resulting disuniformity across different parts of the outer continental shelf would be far greater than Congress contemplated and made worse by the outlier nature of California's wage and hour law. And, under the logic of the ruling below, the potential for unintended and unwelcome state regulatory intrusion into the outer continental shelf is not readily confined to the wage and hour realm. Any non-preemptive federal law, no matter how comprehensive, would be a candidate for replacement by borrowed state laws under the Ninth Circuit's approach.

A. Importing California's Outlier Wage and Hour Law Would Require Major Restructuring of Employment Relationships.

California law is inconsistent with the FLSA (and most other States' laws) on every major topic covered by a wage and hour law: wages, hours, overtime, and employee status. Substituting California law for federal law results in the wholesale jettisoning of long-settled and uniform federal wage and hour law with a dramatically different regulatory scheme. That will not do. Even in *United States v. Reed*, 734 F.3d 881 (9th Cir. 2013), a case interpreting the Assimilative Crimes Act relied upon below, Pet. App. 29–30, the court recognized that a "state statute will not be assimilated" as a crime applicable in federal enclaves if "it would effectively rewrite an offense definition that Congress carefully considered." *Reed*, 734 F.3d at 888. But rewriting Congress's carefully considered standards is exactly what the Ninth Circuit did here.

Key to this dispute, California rules for counting hours worked are different from the FLSA. Under federal law, employers and employees can make reasonable agreements regarding what on-premises hours are considered compensable, and not all of an employee's time engaged in private pursuits on an employer's premises, like sleeping or watching television, is considered work time. 29 C.F.R. § 785.23. In California, however, as of 2015 at least, personnel residing on an employer's premises must be paid for all hours on call, including those "engaged in personal activities, including sleeping, showering, eating, reading, watching television, and browsing the

Internet." *Mendiola v. CPS Sec. Sols., Inc.*, 340 P.3d 355, 361 (Cal. 2015). And that is just the beginning of the differences.

The minimum wage itself is also different. *Compare* 29 U.S.C. § 206(a)(1)(C) ($7.25), *with* Cal. Lab. Code § 1182.12(b)(1)(C) ($12 for larger employers).[5] The way that overtime is calculated likewise differs. *Compare* 29 U.S.C. § 207(a)(1) (overtime at 40 hours per week), *with* Cal. Lab. Code § 510(a) (overtime after eight hours a day and on seventh consecutive day of work).[6] California's hours-per-day and days-per-week overtime tests are outlier provisions shared in some form by only two to three other States and Puerto Rico, *see* U.S. Dep't of Labor,

[5] Given the unique working conditions and related compensation structures for most workers on the outer continental shelf—now put at risk by the Ninth Circuit's decision—the majority of such workers have historically made far more than minimum wage. *See* Pet. App. 20 (noting Respondent was paid "well above the state and federal minimum wage").

[6] Certain workers covered by collective bargaining agreements are exempt from these rules. Cal. Lab. Code §§ 510(a)(2), 514.

Minimum Wage Laws in the States.[7] Only one other State with outer continental shelf operations (Alaska) shares an hours-per-day test, and even then it is not the same as California's. *See* Alaska Stat. § 23.10.060(a) (overtime based on hours per day but not consecutive days of work). Such hours-per-day tests have obvious disruptive implications for work that, per necessity, is often structured into tightly grouped days of 12-hour shifts, Pet. Br. 9–10, magnifying the upheaval created by the disuniformity between different parts of the outer continental shelf under the Ninth Circuit's approach.

Making things more complicated still, overtime exemptions are not the same between the FLSA and California wage and hour law. *E.g.*, c*ompare* 29 C.F.R. § 541.200(a) (2015) (exempting administrative employees whose primary duty "includes" qualifying exercise of discretion if the employee's salary exceeds $455 per week), *with* Cal. Lab. Code § 515(e), Cal. Code Regs. tit. 8, § 11040 (requiring salary of more than $880 per week and "more than one-half of the employee's worktime" to be comprised of qualifying tasks to be exempt as an administrative employee).

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[7] *Available at* https://www.dol.gov/whd/minwage/america.htm. Alaska, Colorado, Nevada, and Puerto Rico share some variation on the hours-per-day test. *Id.* Kentucky and Connecticut have some variation on the rule requiring overtime for the seventh straight day of work, at least in certain industries. *Id.* No State other than California has both an hours-per-day and a days-per-week test, and no State requires double time for hours exceeding eight on the seventh day of work, as California does. Combined with a rule requiring 24-hour-a-day compensation, these differences have a huge potential impact for unique offshore working conditions.

And any regulatory ambiguities must be resolved according to different interpretive rules. In California, wage and hour laws must be "construed so as to promote employee protection." *Mendiola*, 340 P.3d at 359. While under the FLSA, provisions are to interpreted according to a "fair reading," without an interpretive presumption in either direction. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

Finally, California not only regulates hours, wages, and overtime differently than the FLSA—it also regulates who counts as an employee in a completely different way. Under the FLSA, employee status (versus classification as an independent contractor) depends upon the "economic reality" of whether the worker is dependent upon the hiring business or in business for himself, as determined by multiple factors. *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304–05 (4th Cir. 2006) (citing *United States v. Silk*, 331 U.S. 704 (1947)).

Under California law, however, a newly minted test for employee status for wage and hour purposes—which starts from a mistaken presumption that all workers are employees—may sweep in many more workers who, under long-settled federal law, otherwise would qualify as independent contractors. *See Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 34–35 (Cal. 2018) (rejecting the "federal economic reality" test). Like many aspects of California wage and hour law, this approach is an outlier, and is applied in only one other State (and in no other States with outer continental shelf

operations). *Id.* at 34 n.23 (noting that California was adopting a test applied only in Massachusetts).

This divergence causes trouble for employers and employees alike. Given the major differences between the FLSA and California law, employers and employees have negotiated compensation arrangements for decades in reliance on a shared understanding that state law was "inconsistent" with the FLSA's comprehensive scheme, and therefore did not apply on the outer continental shelf. Such arrangements, often the product of collective bargaining, have typically included unique (and often highly remunerative) compensation structures well-suited to off-shore work, such as the 14-days-on, 14-days-off schedule that Respondent worked, and a shift system that provided for employees' sleeping time to be excluded from compensation. *See* Pet. Br. 9–10; U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program* 8-4 (Jan. 2018) (estimating that oil and gas workers earn more than 150% of the average hourly wage of other employees).[8]

Upending that settled understanding would expose employers on the outer continental shelf to the risk of substantial retroactive liability for California law violations—despite uncontested compliance with the FLSA. It would also limit the ability of employers and employees to negotiate mutually beneficial arrangements going forward, especially because

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[8] *Available at* https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/.

company-wide arrangements would be thrown into disarray as employers were subjected to different rules for different parts of their offshore operations. If upheld, the decision below would force major changes to critical industry staffing and compensation practices, driven by a jurisdiction with no sovereign authority to impose its own rules on an area of exclusive federal jurisdiction. This is contrary to Congress's intent in OCSLA to use federal law, not state law, on the outer continental shelf.

B. The Potential Disruptive Consequences of the Ninth Circuit's Upside-Down Preemption Analysis Extend Far Beyond Wage and Hour Law.

The upheaval engendered by permitting state laws that are not preempted to displace established federal enactments on the outer continental shelf cannot necessarily be cabined to wage and hour laws, or even employer-employee relationships.

As previously noted, a host of environmental and land use statutes contain savings clauses, and many apply some degree of cooperative federalism. If the Ninth Circuit's upside-down approach here were affirmed, such clauses might produce an onslaught of inconsistent state regulatory intrusions on the outer continental shelf or yield a host of litigation demanding compliance with state law, including state common law that imposes duties that conflict with comprehensive federal regulatory schemes. And even if courts ultimately choose to deny the application of overlapping and inconsistent state law, it could still

take years of costly litigation to reach a result that should have been obvious from the start. By reversing the ruling below, the Court can avoid this morass of potential problems.

The danger is magnified, moreover, because States opposed to development of the outer continental shelf could attempt to enact targeted laws that make offshore operations more difficult or economically infeasible—precisely the sort of state interference Congress sought to avoid when making explicit that the outer continental shelf was an area of exclusive federal jurisdiction. *See* Pet. Br. 48–49.

It is one thing for Congress to contemplate and promote cooperation between state and federal law to pursue common objectives within state territory, where state jurisdiction is unquestioned and state sovereignty concerns are paramount. It is quite another to allow States to second guess or supplant otherwise comprehensive federal schemes where they have no authority to regulate. If such turmoil is to be created on the outer continental shelf, Congress must clearly demand it. It has not done so here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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