No. 22-40158

In the United States Court of Appeals for the Fifth Circuit

BG GULF COAST LNG, L.L.C.; PHILLIPS 66 COMPANY,
Plaintiffs-Appellants,

v.

SABINE-NECHES NAVIGATION DISTRICT OF JEFFERSON COUNTY, TEXAS,
Defendant-Appellee.

On Appeal from Civil Action No. 1:21-cv-00470 in the
United States District Court for the Eastern District of Texas

BRIEF OF AMICI CURIAE THE AMERICAN PETROLEUM INSTITUTE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE CHAMBER OF SHIPPING OF AMERICA IN SUPPORT OF PETITION FOR REHEARING EN BANC

John Wagner
Grace D. Soderberg
AMERICAN PETROLEUM INSTITUTE
200 Massachusetts Ave., NW
Washington, DC 20001

Andrew R. Varcoe
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H St., NW
Washington, DC 20062

(Additional counsel listed on inside cover)

Kyle D. Hawkins
Counsel of Record
Leah F. Bower
LEHOTSKY KELLER LLP
919 Congress Ave., Suite 1100
Austin, TX 78701
(512) 693-8350
kyle@lehotskykeller.com

Steven P. Lehotsky
LEHOTSKY KELLER LLP
200 Massachusetts Ave., NW
Washington, DC 20001

Counsel for Amici Curiae

Kathy Metcalf
CHAMBER OF SHIPPING OF AMERICA
1730 Rhode Island Ave., NW,
Suite 506
Washington, DC 20036

CERTIFICATE OF INTERESTED PERSONS

No. 22-40158

BG Gulf Coast LNG L.L.C.,
Plaintiffs-Respondents,
v.
Sabine-Neches Navigation District of Jefferson County, Texas,
Defendant-Appellee.

The undersigned counsel of record certifies that, in addition to the persons and entities listed in Petitioners' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification.

Amici Curiae:

American Petroleum Institute. The American Petroleum Institute ("API") has no parent corporation. No publicly held company has any ownership interest in API.

The Chamber of Commerce of the United States of America. The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Chamber of Shipping of America. The Chamber of Shipping of America ("CSA") is a non-profit, tax-exempt trade association. CSA has no parent corporation. No publicly held company has any ownership interest in CSA.

Counsel for Amici Curiae:

John Wagner
Grace D. Soderberg
AMERICAN PETROLEUM INSTITUTE
200 Massachusetts Ave., NW
Washington, DC 20001

Andrew R. Varcoe
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H St., NW
Washington, DC 20062

Kathy Metcalf
CHAMBER OF SHIPPING OF AMERICA
1730 Rhode Island Ave., NW,
Suite 506
Washington, DC 20036

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Counsel of Record
Leah F. Bower
LEHOTSKY KELLER LLP
919 Congress Ave., Suite 1100
Austin, TX 78701
(512) 693-8350
kyle@lehotskykeller.com

Steven P. Lehotsky
LEHOTSKY KELLER LLP
200 Massachusetts Ave., NW
Washington, DC 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes, and Rules

Other Authorities

INTEREST OF AMICI CURIAE

The American Petroleum Institute ("API") is a national trade association representing all segments of America's oil and natural gas industry. API's nearly 600 members support more than 11.3 million jobs and produce, process, and distribute most of our nation's energy. API works to support a strong, viable American oil and natural gas industry and therefore has a keen interest in the rigorous and consistent application of statutes that directly affect its members' abilities to contribute to the Texas and national economies through the import and export of oil and natural gas.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber of Shipping of America ("CSA") represents multiple U.S.-based companies that own, operate, or charter oceangoing vessels engaged in both the domestic and international trades and companies that maintain a commercial interest in the operation of such vessels. CSA provides the voice of the U.S. maritime industry in promoting sound public policy through legislative and regulatory initiatives. CSA supports a viable domes-

tic maritime industry and promotes open international trade in shipping services. CSA thus has a strong interest in cases that impose significant burdens on the shipping industry and on trade.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The natural gas and oil industry is critical to the American economy, contributing an estimated $1.7 trillion in 2019, and accounting for nearly 8% of the national GDP. *See* PricewaterhouseCoopers, *Impacts of the Oil and Natural Gas Industry on the US Economy in 2019*, prepared for API (July 2021), tinyurl.com/yc897skw. The industry relies heavily on our nation's ports and waterways to export roughly 8.5 million barrels per day of petroleum, and to import nearly as much. U.S. Energy Information Administration, *Oil Imports and Exports* (Apr. 21, 2022), tinyurl.com/y98v5mdc.

One such crucial channel of interstate and foreign commerce is the Sabine-Neches Waterway, which links Texas ports to the Gulf of Mexico. The Sabine-Neches Waterway is the top bulk liquid cargo waterway for shipping crude oil, liquefied natural gas, and liquified petroleum gas. *See* Texas Ports Association, Sabine Neches Navigation District (2022), tinyurl.com/3tm2n4mt. It is currently the top U.S. crude oil importer and is poised to become the largest U.S. exporter of liquefied natural gas. *Id*.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

Despite energy shippers' critical role in the national economic engine, Appellee Sabine Neches Navigation District has asserted sweeping powers to impose on them the enormous cost of improving the Waterway. The District has set its fees for oil and natural gas cargo at a rate *ten times* that of other freight, ignoring Congress's directive to apportion fees in a "fair and equitable" manner. 33 U.S.C. § 2236(a)(4). And it has levied those fees on vessel and cargo owners able to use the Waterway in its current, unimproved form, disregarding this Court's longstanding recognition that the Water Resources Development Act of 1986 ("WRDA") "forbids fees to finance harbor improvements until after the project is complete" to "ensure[] that the fees [are] paid by ships that benefit directly from improvements." *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal District*, 874 F.2d 1018, 1026 (5th Cir. 1989).

Yet the panel decision allowed the District to proceed anyway. As the Petition demonstrates, that decision not only conflicts with *Plaquemines* and the WRDA, it implicates constitutional limits on a nonfederal entity's ability to impose burdens on commerce and maritime trade under the Tonnage Clause, the Import-Export Clause, and the Commerce Clause of the Constitution. *See* Petition for Rehearing En Banc, No. 22-40158, at iii, vi, 4-5; *see also Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 4, 6-8 (2009).

More, the panel opinion portends far-reaching consequences for the energy industry and, indeed, for any industry that relies on ports and waterways—and, it follows, for the Texas and national economies. Amici estimate

that the District's fee structure could result in nearly $50 million in fees for oil and gas shippers over a single year, and as much as $1.3 billion over the 27-year timeframe set by the District's ordinance. Perhaps even more concerning, however, the panel decision opens the door to billions of dollars in user fees for any *future* navigation improvement project undertaken by a nonfederal district.

The conflict between *Plaquemines* and the panel decision in this case is stark and serious. Fixing such conflicts in the law of this Circuit is particularly important to maritime commerce in the United States. Given the importance of nonfederal ports and waterways to national and global energy markets and to U.S. commerce more generally, coupled with the staggering costs that the panel decision threatens for both the oil and natural gas industry and shipping and commercial interests nationwide, this case presents an issue of exceptional importance. *See* Fed. R. App. P. 35(a)(2). The Court should grant rehearing en banc.

ARGUMENT

I. The panel decision disrupts well-settled expectations about constitutional protections for free trade and conflicts with *Plaquemines*.

The panel decision disturbs the private sector's long-settled understanding that nonfederal interests may finance port and harbor improvements, such as "new deeper channels," only by levying fees on vessels that directly

benefit from those improvements. *See Plaquemines*, 874 F.2d at 1025. This understanding is grounded in centuries-old prohibitions (not waivable "without the consent of Congress," U.S. Const. art. I, § 10, cl. 2; *id.* cl. 3) on import-export taxes under the Import-Export Clause, *see id*. cl. 2, and on "all taxes and duties regardless of their name or form . . . which operate to impose a charge for the privilege of entering, trading in, or lying in a port" under its neighbor, the Tonnage Clause. *Clyde Mallory Lines v. Ala.*, 296 U.S. 261, 265-66 (1935) (discussing U.S. Const. art. I, § 10, cl. 3).

These prohibitions do not preclude fees "for services rendered to and enjoyed by vessels," which "are constitutional because they facilitate rather than impede commerce" and represent "demands for reasonable compensation." *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 805 F.3d 98, 107 (3d Cir. 2015) (discussing *Packet Co. v. Keokuk*, 95 U.S. 80, 85 (1877) and *Clyde Mallory Lines*, 296 U.S. at 265-66); *accord Plaquemines*, 874 F.2d at 1027 ("If ships receive a service they pay for, fees charged by a nonfederal port authority are constitutional."); *see also Polar Tankers, Inc.*, 557 U.S. at 10 (local ordinance, which "applie[d] almost exclusively to oil tankers," imposed tax based "on a factor related to tonnage" and "not for services provided to the vessel," and thus was unconstitutional under Tonnage Clause).

The important distinction between taxes (which burden commerce) and fees for services rendered (which facilitate it) is evident in the text of the WRDA, 33 U.S.C. § 2201, *et seq*. Consistent with constitutional limits on state and local burdens on free trade, the WRDA provides nonfederal ports with

limited, narrowly crafted authority to levy fees in connection with completed harbor improvements. *See* 33 U.S.C. § 2236(a) ("Consent of Congress") (expressly authorizing "port or harbor dues" – "[s]ubject to" specified "conditions" – "under clauses 2 and 3 of section 10, and under clause 3 of section 8, of Article 1 of the Constitution").

In *Plaquemines*, this Court acknowledged Congress's "belief," manifest in the text of the WRDA, that fees levied under that Act were "not for the purpose of raising revenue" but solely to "repay costs related directly to the servicing of commerce" and "offset services rendered to vessels." 874 F.2d at 1026 (discussing 33 U.S.C. § 2236(a)). To that end, the *Plaquemines* Court explained that § 2236(a)(1) of the WRDA "forbids fees to finance harbor improvements until after the project is complete," thus "prevent[ing] nonfederal ports from fraudulently charging for projects that are mere speculation or that suffer from undue delays while under construction" and, most importantly, "ensur[ing] that the fees will be paid by ships that benefit directly from improvements." *Id*. at 1026.

The District should have heeded *Plaquemines* and its interpretation of the WRDA—but instead it imposed broad user fees, including on ships that may *not* benefit directly from completed improvements. The panel decision nevertheless blessed the District's approach by dismissing *Plaquemines*'s important limits as "dicta" that "concerned an entirely different provision of the Act." Op. at 10. Because *Plaquemines* focused on subsection (a)(2) of the

WRDA rather than (a)(1), the panel concluded, any statements in *Plaquemines* are "peripheral" to Petitioners' appeal. *Id*.

That is the core of the panel's error. Simply put, because subsection (a)(2) expressly references subsection (a)(1), *Plaquemines*'s construction of (a)(2) *necessarily* construed (a)(1) as well. Specifically, subsection (a)(2) provides that "[p]ort or harbor dues may not be levied for the purposes *described in paragraph (1)(B)* of this subsection after the dues cease to be levied for the purposes *described in paragraph (1)(A)* of this subsection." 33 U.S.C. § 2236(a)(2) (emphasis added). Thus, to evaluate the propriety of fees levied under (a)(2), the *Plaquemines* Court necessarily had to first define the scope of the two paragraphs found in subsection (a)(1).

Subsection (a)(1) permits fees in only narrow and carefully prescribed circumstances. Specifically, it provides that fees "may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project) . . . and for the following purposes":

- (1)(A)(i): "to finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor" under certain provisions of the Act,
- (1)(A)(ii): "to finance the cost of construction and operation and maintenance of a navigation project for a harbor," under certain other provisions of the Act, or
- (1)(B): to "provide emergency response services in the harbor[.]"

Plaquemines carefully analyzed this provision in light of the structure of the WRDA, properly construing it to "forbid[] fees to finance harbor improvements until after the project is complete." 874 F.2d at 1026. The Court then relied on its explanation of subsection (a)(1) to conclude that, under subsection (a)(2), fees for emergency services must therefore be limited "to the time the ships are also paying for the improvement itself" so that "the ships that directly benefit from the completed project pay not only for the cost of building the project but also for the ancillary cost of emergency services while it is under construction." *Id*. at 1026.

Plaquemines thus read (a)(2) and (a)(1) together to sensibly conclude that any fees levied in connection with harbor improvements were intended as reimbursement rather than revenue, highlighting Congress's belief that such fees would "be paid by ships that benefit directly from improvements." *Id*.[2]

The panel was wrong to dismiss that careful analysis as mere dicta. *Plaquemines*'s analysis of § 2236(a)(1) could not "have been deleted without seriously impairing the analytical foundations of" the Court's holding and thus, is not dicta. *United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014).

[2] The congressional record accords with the text of the WRDA and *Plaquemines*. *See, e.g.*, 132 Cong. Rec. H11,563 (daily ed. Oct. 17, 1986) ("It is our intent that the direct beneficiaries pay port or harbor duties."); *id*. at H11,549 (recognizing "the need of ports to recoup reasonable costs from beneficiaries for navigation improvements and services rendered, but at the same time establish[ing] an important direct beneficiary principle").

Rather, the discussion in *Plaquemines* reflects a reasoned "explication of the governing rule of law"—the WRDA and its limitations on harbor improvement fees—"necessary to the result" reached. *Id*.

The panel's decision confers on nonfederal districts unprecedented power to impose fees on waterway users untethered to any direct benefit the user may enjoy. That holding is not only at odds with *Plaquemines*, it wrongly impinges upon the Constitution's express protections for interstate and foreign commerce. *See* Pet. for Reh'g. En Banc at 4-5. The en banc Court should intervene to restore *Plaquemines* to its rightful status as the law of this Circuit and reestablish the narrow and specific circumstances under which a nonfederal district is permitted to burden maritime commerce.

II. The panel decision has significant financial consequences for not only the energy industry but the Texas and national economies.

The panel decision's departure from *Plaquemines* and Congress's pronouncements is reason enough to grant rehearing en banc. *See* Fed. R. App. P. 35(a)(1). But en banc review is especially warranted in light of the serious economic impacts from the District's action alone and, more broadly, from the panel's decision. Indeed, if the decision is permitted to stand, it portends serious harms to the energy industry at a critical juncture in the nation's economic wellbeing. It also threatens similarly weighty harms to trade more broadly, encouraging nonfederal interests to bankroll future projects at the

expense of private industries, unfettered by Congress's carefully crafted limits.

The panel decision bodes ill for the energy industry—an industry whose impact is felt across the American economy. As of 2019, the 11.3 million jobs supported by the natural gas and oil industry represented 5.6% of total employment. *See* PricewaterhouseCoopers, *Natural Gas and Oil: Essential Contributors to American Recovery* (July 2021), tinyurl.com/58m8te59. The industry contributed an estimated $1.7 trillion to the U.S. economy, which represents 7.9% of the gross domestic product. *Id*. Texas in particular benefits greatly from the natural gas and oil industry, which accounts for a sound 13.9% of employment, supports 2,508,870 jobs, and produces 21.8% of the state's total labor income. *Id*. And the industry contributed $411.5 billion to Texas's gross domestic product in 2019—more than 22% of the state total. *Id*.

These enormous economic benefits will be stymied if ports and waterways are permitted to levy fees in the expansive manner deployed by the District here. As noted above, Amici estimate that, in light of the nearly 140 million tons of oil and gas products loaded and unloaded in the Sabine-Neches Waterway in 2019, industry-wide fees could climb as high as $1.3 billion over the 27 years permitted by the District's ordinance.[3] *See* U.S. Army

[3] The ordinance imposing fees will expire on January 1, 2049, or upon final payment of all construction and construction financing costs associated with the Project, whichever occurs first. Op. at 5.

Corp. of Engineers, Waterborne Commerce Statistics Center, *2019 Sabine-Neches Waterway*, tinyurl.com/bdc7xusd (cataloguing commodities shipped to and received at the Waterway in CY2019).

Because the oil and gas industry is a critical player in our nation's post-pandemic economic recovery, industry-wide fees of this magnitude could have devastating and cascading effects on other businesses and consumers. Indeed, while fuel prices are increasingly volatile—with record-breaking leaps in 2022, including the largest month-over-month gain on record—the impacts of increasing energy costs and prices extend far beyond the price at the pump. *See* U.S. DOT, Bureau of Transportation Statistics (Aug. 8, 2022), tinyurl.com/42abstbw; CNBC Markets, *Rising fuel costs are a massive problem* (May 19, 2022), tinyurl.com/22mue7fm. Higher costs for oil and natural gas echo throughout the economy in countless ways. Agricultural and food supply chains, for one, rely on energy products for planting, fertilizing, and harvesting, as well as for shipping and delivery. *See* U.S. Chamber of Commerce, *Energy and Inflation: 5 Things You Need to Know Now* (June 27, 2022), tinyurl.com/y5jfwshc. Likewise, electricity markets and the price of manufactured goods are strongly influenced by the costs of energy. *Id*.

More worrisome still, this case represents only the tip of the iceberg. The panel decision opens the door to nonfederal interests to levy user fees on vessel and cargo owners for every future navigation improvement project, regardless of whether those owners derive any direct benefit from the pro-

ject. This broad license for nonfederal entities exposes business owners nationwide to billions of dollars in potential fees,[4] hindering rather than facilitating trade in a manner inconsistent with longstanding constitutional and statutory protections. *See* Pet. For Rhg. En Banc at iii, 4-5.[5]

CONCLUSION

This Court should grant the Petition for Rehearing En Banc.

[4] And these costs are not limited to large corporations. Trade is especially important to small and medium-sized businesses, which account for about one-third of U.S. merchandise exports. *See* U.S. Chamber of Commerce, *We Can't Stand Still: The Benefits of Trade for America* (Oct. 7, 2022), tinyurl.com/y53n6mrd.

[5] Current market conditions render these concerns particularly potent. Inflation is the highest it's been in 40 years, with an 8.2% increase in the Consumer Price Index in the 12 months prior to September 2022. *See* U.S. Bureau of Labor Statistics, *Consumer Price Index*, https://www.bls.gov/cpi/. And "[p]andemic disruptions combined with high demand for imported goods has led to unprecedented costs for shipping goods by sea." *See* Federal Reserve Bank of St. Louis, *Economic Synopsis, Inflation and Shipping Costs* (Mar. 18, 2022), tinyurl.com/ycksh v8a.

Dated: October 14, 2022

Respectfully submitted,

/s/ Kyle D. Hawkins

Kyle D. Hawkins
Counsel of Record
Leah F. Bower
LEHOTSKY KELLER LLP
919 Congress Ave., Suite 1100
Austin, TX 78701
(512) 693-8350
kyle@lehotskykeller.com

Steven P. Lehotsky
LEHOTSKY KELLER LLP
200 Massachusetts Ave., NW
Washington, DC 20001

John Wagner
Grace D. Soderberg
AMERICAN PETROLEUM INSTITUTE
200 Massachusetts Ave., NW
Washington, DC 20001

Andrew R. Varcoe
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H St., NW
Washington, DC 20062

Kathy Metcalf
CHAMBER OF SHIPPING OF AMERICA
1730 Rhode Island Ave., NW
Suite 506
Washington, DC 20036

CERTIFICATE OF SERVICE

On October 14, 2022, this brief was served via CM/ECF on all registered counsel and via email to all counsel listed in the Petition's service list and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses. No paper copies were filed in accordance with the COVID-19 changes ordered in General Docket No. 2020-3.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 5(c)(1) and 29(a)(5) because it contains 2,580 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

/s/ Kyle D. Hawkins
Kyle D. Hawkins

CERTIFICATE OF CONFERENCE

As stated in amici's motion for leave to file this brief, counsel for amici conferred with counsel for Petitioners and Respondent. Petitioners consent to the filing of this brief and Respondent does not oppose the filing.

/s/ Kyle D. Hawkins
Kyle D. Hawkins