SUPREME COURT OF LOUISIANA

DOCKET NO. 2020-C-685

STATE OF LOUISIANA AND THE VERMILION PARISH SCHOOL BOARD,

Plaintiffs-Respondents

Versus

LOUISIANA LAND AND EXPLORATION COMPANY, ET AL.,

Defendants-Petitioners

On Writ of Certiorari from the May 6, 2020 Decision
of the Third Circuit Court of Appeal, Docket No. CA 19-248,
John D. Saunders, Elizabeth A. Pickett, and Van H. Kyzar, Judges

A CIVIL PROCEEDING

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-PETITIONERS

NOW INTO COURT, through undersigned counsel, comes the Chamber of Commerce of the United States of America (the "Chamber"), which moves this Court for leave to file a brief as *amicus curiae*, pursuant to Rule VII, Section 12 of the Rules of the Supreme Court of Louisiana, in support of Defendants-Petitioners, as follows.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in

matters before Congress, the Executive Branch, and the courts.

As part of this advocacy, the Chamber regularly files briefs as *amicus curiae* urging courts to adopt fair interpretations of laws that advance free enterprise and promote economic growth. The Chamber has participated as *amicus curiae* in cases that have the potential to impact the interpretation and enforcement of contracts, such as this case. *See, e.g.*, *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018); *ACE Secs. Corp. v. DB Structured Prods., Inc.*, 36 N.E.3d 623 (N.Y. 2015).

The Chamber has a substantial, legitimate interest in the principles of contract that courts apply to the freely negotiated contracts of the United States business community. The Third Circuit's decision threatens to undermine the predictability of contracts that is of central concern to businesses, because the decision relied on a statute passed decades after the parties entered into a contract to define the parties' obligations under that contract. Parties to a contract cannot anticipate being bound in their obligations to one another by a statutory standard that has not yet been established at the time of contracting. The rule adopted by the Third Circuit in the decision below would, if allowed to stand and spread throughout the State, introduce uncertainty and instability into the private obligations of the Chamber's many members operating in Louisiana.

The Chamber's brief focuses on narrow, but important issues of contract law that are implicated by the Third Circuit's decision. These issues, and their particular significance to the business community, could otherwise escape the Court's attention. Permitting the Chamber to participate as *amicus curiae* will assist this Court by addressing the far-reaching effects of the Third Circuit's opinion on the predictability of contracts in Louisiana.

The Chamber files its *amicus* brief herewith, conditioned upon this Court's grant of leave. By service of this motion and brief, the Chamber has served notice on all counsel of record.

WHEREFORE, the Chamber of Commerce of the United States of America respectfully requests leave of Court to file the attached brief as *amicus curiae*.

Dated: November 17, 2020

Respectfully submitted,

/s/ *Eric S. Parnes*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the allegations in the foregoing motion are true and correct to the best of my knowledge; and that a copy of the above motion has been served upon the below-listed counsel via next day delivery service, this 17th day of November, 2020, as specified below:

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SUPREME COURT OF LOUISIANA

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A CIVIL PROCEEDING

ORDER

Having considered the foregoing Motion of the Chamber of Commerce of the United States of America for Leave to File Brief as *Amicus Curiae* in Support of Defendants-Petitioners,

IT IS ORDERED that the Chamber of Commerce of the United States of America be and is hereby GRANTED leave to file the attached Brief as *Amicus Curiae*.

THUS DONE AND SIGNED, this ____ day of _____, 2020, in New Orleans, Louisiana.

_____
JUSTICE, LOUISIANA SUPREME COURT

SUPREME COURT OF LOUISIANA

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A CIVIL PROCEEDING

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-PETITIONERS

Respectfully submitted by:

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.[1]

Predictability in the interpretation and enforcement of contractual obligations is of central concern to the business community. Businesses, along with individuals and government entities, depend on contracts to arrange their affairs and inform their decisions regarding their prospective conduct. Contracts can only serve these functions, however, if parties are able to determine their obligations under contracts with certainty and reliably predict how courts will interpret and enforce those obligations.

The Third Circuit's approach to the contract issues in this case undermines basic tenets of contract law and will thereby reduce the stability and predictability of Louisiana contracts. The court of appeals read the definition of a statutory term adopted by the legislature in 2006 as dispositive of the meaning of an implied obligation in leases executed in 1935 and 1994. The parties to those leases could not have anticipated, and certainly could not have intended, that their agreement would be governed by a statutory standard not in existence when they signed the leases. Allowing the Third Circuit's decision to stand would cast doubt on the ability of businesses, and

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

all other parties that rely on enforcement of contractual obligations, to use contracts to reach a mutual understanding about business obligations and use that understanding to make long-term decisions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The jury in this case found that Union Oil Company of California ("UNOCAL") did not breach its obligations under its leases with the State of Louisiana. Under those leases, UNOCAL had no duty to restore the surface of the areas it worked to their original condition unless UNOCAL acted unreasonably or excessively, which the jury found UNOCAL did not do. The Third Circuit, however, took the dramatic step of overturning this verdict on the ground that it conflicted with the jury's separate finding that UNOCAL was responsible for "environmental damage" as defined by a state statute (Act 312) that Louisiana enacted more than 70 years after the first lease was executed to create special compensation and remediation procedures for cases claiming environmental harm arising out of oil and gas operations. The Third Circuit's decision was erroneous in numerous respects, as petitioners' brief explains in detail. The Chamber submits this brief to draw the Court's attention to one particular aspect of the Third Circuit's decision that has broad implications for every individual and organization that does business in Louisiana.

Act 312 was passed well after the relevant lease agreements here were signed; thus, under longstanding principles of contract law, courts should not incorporate the statute into the parties' agreement or rely on the statute to interpret the agreement. Yet that is exactly what the Third Circuit did. By concluding that the jury's verdict finding no breach of the lease agreements was inconsistent with UNOCAL's admission of liability under Act 312, the Third Circuit effectively modified the terms of the leases, expanding UNOCAL's liability under the leases to encompass any "environmental damage" as defined by the Act. That approach to construing contract terms, if

endorsed by this Court, would undermine the predictability of contracts and the ability of parties to establish and control mutual obligations related to their transactions. Furthermore, in this case, it would lead to a windfall recovery never intended by the parties or by the legislature. To be sure, parties must comply with valid laws whenever those laws are enacted, but changes in the law should not presumptively alter the meaning of contractual undertakings or the availability of contractual remedies between contracting parties.

ARGUMENT

The jury in this case found after trial that UNOCAL was responsible for "environmental damage" under Act 312, but that UNOCAL did not breach its contractual obligations under its mineral leases with the State of Louisiana. The Third Circuit overturned that verdict, concluding that the jury's findings as to UNOCAL's statutory liability were inconsistent with its findings as to the breach of contract claim. *See State v. La. Land & Expl. Co.*, 2019-248, at p. 41 (La. App. 3 Cir. 5/6/20), 298 So. 3d 296, 324–25 ("*LL&E*"). That decision was wrong and should be reversed.

The relevant leases governing UNOCAL's use of the Vermilion Parish land were entered into in 1935 and 1994. Act 312, which was enacted in 2006, establishes a procedure by which a party can make an admission of liability, agree to clean up any environmental damage found on the property, and adopt a remediation plan structured and approved by the Louisiana Department of Natural Resources ("LDNR"). La. R.S. § 30:29(C)(2–3). The Third Circuit concluded that, because UNOCAL made such an admission of statutory liability under Act 312, it must have also violated the leases and was therefore liable for breach of contract. *LL&E*, 2019-248, p. 36.

The decision by the Third Circuit runs contrary to general principles of contract law that emphasize parties' freedom of contract and the need for predictability in contractual relationships. The Third Circuit used a statute passed decades after UNOCAL and the Vermilion Parish School

Board freely entered into a lease to interpret the meaning of terms in that lease, effectively altering the parties' private-law contractual obligations to one another. The Third Circuit then relied on these new purported contractual obligations, to which the parties never agreed, as a vehicle for the extraordinary step of overturning a decision properly committed to the jury. This interpretation of Louisiana contract law threatens to erode the contractual protections that businesses rely upon to engage in efficient, profitable business within the State of Louisiana. In particular, it creates a heightened level of risk for parties engaged in, or considering entering into, long-term business relationships in Louisiana.

A. General Principles of Contract Law Underscore the Importance of Freedom of Contract and Predictability to Promote Business Efficiency.

Contracts are an indispensable tool for individuals, companies, and government entities to cooperate and do business together in an ever-changing world. By entering into a bilateral contract, two parties can make binding commitments to one another and obtain assurance that those commitments will be legally enforced. That assurance allows each party to plan for the future with confidence that the contract will be performed—and that it will be made whole if there is a breach. Contract law's purpose of enabling parties to make voluntary, binding commitments to one another is reflected in two fundamental principles that guide courts' interpretation of contracts: consent and predictability.

First, it is a bedrock principle of contract law that the formation of a contract requires the consent of both parties. *See, e.g.*, Restatement (Second) of Contracts § 17(1) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange."). The fact that both parties have voluntarily consented to the exchange of promises embodied in a contract is what justifies the legal system in enforcing the terms of that otherwise private agreement by giving it the "effect of law for the parties." *See Clovelly Oil Co. v. Midstates Petroleum Co.*,

2012-2055, p.5 (La. 3/19/13), 112 So. 3d 187, 192 (quotation marks omitted); *see also, e.g.*, Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269, 300 (1986) (arguing that "legal enforcement [of a contract] is morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights"). Consent of the parties is thus at the heart of contract formation, and parties have broad leeway in negotiating the terms to which they agree to be bound under a contract. *See* La. Civ. Code Ann arts. 1927, 1971; *see also La. Smoked Prods., Inc. v. Savoie's Sausage & Food Prods., Inc.*, 1996-1716, p.14 (La. 7/1/97) 696 So. 2d 1373, 1380.

Because the legitimacy of contract law depends upon contracting parties' voluntary consent, courts in Louisiana (and elsewhere) limit their review "strictly to the ascertainment of the limits of the rights and obligations of the contracting parties *as they have defined them for themselves*." *Salles v. Stafford, Derbes & Roy*, 173 La. 361, 366, 137 So. 62, 64 (1931) (emphasis added); *see also Clovelly Oil Co.*, 112 So. 3d at 196 ("A court is not authorized to alter or make new contracts for the parties. A court's role is only to interpret the contract."). These rights and obligations are construed "as the parties must be supposed to have understood them at the time of [the contract's] execution." *Salles*, 137 So. at 64; *see also La. Smoked Prods.*, 696 So. 2d at 1378. A contract may be modified after its formation, but any such modification requires a new "meeting of the minds" manifested by the mutual consent of the contracting parties. *See Taita Chem. Co. v. Westlake Styrene Corp.*, 246 F.3d 377, 387 (5th Cir. 2001) (citing La. Civ. Code Ann. art. 1927). In short, contracting parties are bound by, and *only* to the extent of, the obligations they have voluntarily consented to assume based upon their mutual understanding of the terms of the contract.

Second, and relatedly, contract law recognizes that the utility of contracts depends on their

predictability. "Predictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Contracts allow individuals and businesses to maintain stable and predictable commercial relationships, enabling them to plan for the future. *See* 5 La. Civ. L. Treatise, Law of Obligations § 1.7 (2d ed.) ("It is of the essence of an obligation that the creditor or obligee is assured that his expectation will be fulfilled through means other than the debtor's mere willingness to perform."); Howard O. Hunter, Modern Law of Contracts § 1:1 (2020) ("Contracts provide a means to assure stability and predictability in both personal and commercial relationships."). When rights and obligations under contracts are consistent and predictable, parties are able to assess future risks accurately and negotiate for protections that provide them with effective protection against those potential risks. *See* Williston on Contracts § 1:1 (4th ed. 2020) (noting that "a contract enables parties to project exchange into the future and to tailor their affairs according to their individual needs and interests"); Hunter, *supra*, § 17:1 (explaining that "[w]hen two parties negotiate a contract, one of their greatest interests is to allocate risks rationally," and "[p]redictability is an important factor in risk allocation"). That facilitates economic activity by encouraging parties to make investments in new business and personal ventures.

In view of the importance of predictability in contractual relations, contract law recognizes that the judicial role in enforcing contracts is to "protect the expectations of the contracting parties." Williston, *supra*, § 1:1; 5 La. Civ. L. Treatise, Law of Obligations § 12:101 (2d ed.) ("[W]here a contract is concerned, interpretation thereof is the determination of the common intent of the parties."). An effective contract-law regime should give parties confidence at the time that they sign a contract that the provisions for which they have bargained will be enforced and that they will receive the benefits of those bargains. Accordingly, courts hold it a "fundamental and

cardinal rule" of contract interpretation "that the intention of the parties is to be ascertained as of the time when they executed the contract, and effect is to be given to that intention if it can be done consistently with legal principles." *See* Williston, *supra*, § 30:2.

The critical corollary of the rule that a court (where possible) should give effect to the parties' intentions at the time they signed a contract is that a court should *not* permit one party to extract more from its counterparty than it is entitled to expect, or impose liability on the counterparty for which the contract does not provide. Granting one party a windfall after the fact imposes substantial costs on the counterparty—costs that the counterparty could not have predicted at the time of the formation of the contract. If entering into contracts entailed a risk of this kind of unexpected liability, parties would be reluctant to agree to contracts, and business activity would be substantially chilled.

B. Interpreting Contract Terms to Incorporate Future Legislative or Regulatory Enactments Threatens the Predictability of Contracts.

In line with the foregoing principles, courts interpreting a contractual term generally hold that statutes enacted or modified after the contract's execution have no impact on the rights of the parties under the contract. Williston, *supra*, § 30:23 ("[A]s a rule of construction, changes in the law subsequent to the execution of a contract are not deemed to become part of agreement unless its language clearly indicates such to have been [the] intention of [the] parties.") (collecting cases). This rule helps to ensure that the parties are not held to obligations that they could not have consented to, by limiting the universe of applicable law to the law that was in existence at the time of the contract and thus presumably known to the parties when they entered into the agreement. Williston, *supra*, § 30:19 (explaining that there is a presumption of incorporation of "valid applicable laws existing at the time of the making of a contract"). "Whereas the law in effect at the time of execution sheds light on the parties['] intent, subsequent changes in the law that are

not anticipated in the contract" do not, and thus "generally have no bearing on the terms of their agreement." *Fla. E. Coast Ry. Co. v. CSX Transp., Inc.*, 42 F.3d 1125, 1130 (7th Cir. 1994); *see also, e.g., Alvin Ltd. v. U.S. Postal Serv.*, 816 F. 2d 1562, 1565 (Fed. Cir. 1987) (holding that a change in law did not affect the terms of a preexisting contract because there was "no evidence of contemporaneous recognition" that a change in law was a possibility).

The rule against incorporating changes in the law that postdate the execution of a contract also encourages predictability in contracting. As the United States Supreme Court has explained, new legislation "'ought not to change the character of past transactions carried on upon the faith of the then existing law.'" *E. Enters. v. Apfel*, 524 U.S. 498, 533 (1998) (plurality opinion) (holding that employer was not responsible for later-enacted statute requiring retirement payments) (quoting H. Broom, Legal Maxims 24 (8th ed. 1911)). Applying new laws to add new obligations to a preexisting contract "'can deprive citizens of legitimate expectations and upset settled transactions.'" *Id.* (quoting *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)).

The danger in interpreting contract terms in light of later-enacted legislation lies in the inherent uncertainty it creates. As discussed above, one of the primary purposes of a contract is to provide predictability and certainty to a particular set of bilateral commitments. If contractual commitments could be revisited and altered based on future legislation, the predictability that contracts provide would be considerably eroded. Courts in other states have thus consistently declined to interpret contracts on the basis of changes in the law, reasoning that doing so would modify contracts without the parties' consent "and would promote uncertainty in commercial transactions." *See, e.g., Swenson v. File*, 475 P.2d 852, 856 (Cal. 1970) (holding that non-compete covenant should be interpreted consistently with law at time of signing); *Peterson v. D.C. Lottery & Charitable Games Control Bd.*, 673 A.2d 664, 667 (D.C. 1996) (declining to interpret language

on lottery ticket to include later enacted assignment regulations).

In *EEJ Inc., North American Land Dev. v. H.G. Angle Co. Inc.*, the Second Circuit Court of Appeal came to the same conclusion. 618 So. 2d 566, 567 (La. App. 2 Cir. 1993) (*rehearing denied* 618 So. 2d 566 (La. 1993), *writ denied* 626 So. 2d 1176 (La. 1993), *and reconsideration of writ decision denied* 629 So. 2d 1150 (La. 1993)) (holding that liens could not be interpreted to include later-enacted procedural requirement). *EEJ* concerned the enforceability of three liens for labor and materials filed against a property by subcontractors who had worked on a construction project there. A day before the liens were filed, a legislative amendment went into effect requiring a lienor to provide ten days' written notice to a property owner before filing a lien. But the Second Circuit held that the liens were nonetheless enforceable. It explained that "laws existing at the time of [a contract's] confection are incorporated into and form part of the contract as though expressly written therein," and "[i]n the instant case, the law existing at the time of the confection of the contracts in question did not contain a provision requiring written notice prior to the filing of a lien." *Id.* at 567. Thus, the subcontractors had "met all of the legal requirements which were in effect at the time of the [formation] of their respective contracts" and were entitled to enforce their liens. *Id.* As the court recognized, parties must be able to enter contracts with certainty that their contractual obligations will not change, so that they can structure their behavior based on the requirements of the contract at the time of signing.

The United States Supreme Court has pointed to similar policy concerns in the context of legislative retroactivity, explaining that retroactive laws present "problems of unfairness." *Romein*, 503 U.S. at 191. Indeed, the Court has noted that the "largest category of cases in which [it] ha[s] applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime

importance." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 271 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.").

These principles are not altered when the government is a party to the contract. On the contrary, it is particularly important to prevent legislative modification of existing contract rights when one of the counterparties is the state, because in that scenario, the state has a strong incentive to secure itself a windfall by unfairly changing the terms of its bargain. That is why, for example, legislation affecting a state's own contractual obligations is subject to less deferential analysis under the Contract Clause than legislation affecting only private contracts. *Cf. Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983) (noting that under the Contract Clause, a stricter standard of review applies to legislation affecting a state's own contracts because "'the State's self-interest is at stake'") (quoting *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977)). A similarly skeptical approach is warranted here: When one of the parties to a contract is a state entity, a court interpreting the contract should be especially careful not to rely on subsequent law to read in extracontractual obligations on the state's counterparty.[2]

C. The Decision Below Upset the Parties' Expectations and Impermissibly Modified Their Agreement.

The Third Circuit's decision reached the very kind of unfair and unpredictable result that courts have cautioned against and contract law forbids. The Third Circuit held that the jury's

[2] To the extent the Third Circuit's opinion could be read to suggest that the legislature actually altered the terms of the mineral leases, such reasoning would also place Act 312 at odds with the Contract Clause. *See* U.S. Const. art. I, § 10, cl. 1; *U.S. Tr. Co. of New York*, 431 U.S. at 17 ("It long has been established that the Contract Clause limits the power of the states to modify their own contracts as well as to regulate those between private parties."); *see also* Appl. for Writ of Cert. by Union Oil Co. of Cal., et al., 2020-685, pp. 14–16 (La. 6/5/20). To avoid that constitutional difficulty, the Court should hold that the Act was not incorporated into and did not modify the terms of either lease.

verdict was inconsistent because the jury found that UNOCAL was liable for environmental damage for purposes of the remedial framework of Act 312 but had not breached the 1935 mineral lease or the 1994 surface lease. *LL&E*, 2019-248, pp. 37–41. In so holding, the court effectively broadened UNOCAL's obligation under the leases, by reading a requirement not to cause any "environmental damage" under Act 312 into the terms of the leases—notwithstanding the fact that the leases predate Act 312 by more than 70 years in the case of the mineral lease and more than a decade in the case of the surface lease. The parties could not have contemplated that outcome when they entered into the leases.

This Court has repeatedly held that "in the absence of an express lease provision," a mineral lessee does not have "an implied [contractual] duty to restore the surface to its original, pre-lease condition" unless the "lessee has exercised his rights under the lease unreasonably or excessively." *Terrebonne Parish School Bd. v. Castex Energy, Inc.*, 2004-0968, p. 17 (La. 1/19/05), 893 So. 2d 789, 801; *accord State v. La. Land & Explor. Co.*, 2012-0884, p. 27–28 (La. 1/30/13), 110 So. 3d 1038, 1057–58; *see also Moore v. Denbury Onshore, LLC*, 159 F. Supp. 3d 714, 721 (W.D. La. 2016) (affirming that Act 312 does not preclude damages for "unreasonable or excessive" actions). An inquiry into whether a lessee has acted "unreasonably or excessively" and the extent to which the lessee is required to correct the damage must be made on a "case by case" basis and with reference to "the character of the specific rights granted in the lease." *La. Land & Explor. Co.*, 2012-0884, p. 27–28 (citing *Marin v. Exxon Mobil Corp.*, 2009-2368, p. 37–38 (La. 10/19/10), 48 So. 3d 234, 259–60). This is a question for the trier of fact.

Here, however, the Third Circuit obviated any case-specific analysis of whether UNOCAL acted unreasonably or excessively under its leases. The court of appeals held that UNOCAL's admission that it was responsible for "environmental damage" under Act 312 was enough, without

more, to necessitate a finding of "unreasonable or excessive" conduct that breached the leases. In essence, the court of appeals replaced the conduct-based standard for lessee liability with a different, lower standard that the parties could never have contemplated at the time of their agreement.

That decision cannot be squared with the basic principles of contract law discussed in this brief. UNOCAL has been operating for decades with the understanding that it would be liable for breach of contract only if it acted "unreasonably and excessively." The Third Circuit's decision removes from the lease agreement the need to provide proof of unreasonable or excessive behavior and instead substitutes a different standard based on legislation that did not exist at the time the parties entered the lease agreement and that turns on the meaning of a different term.

Relying on a subsequently enacted statute to alter the meaning of a contractual agreement would be problematic under any circumstances, but it raises even greater concern where, as here, the subsequently-enacted legislation states that it should not be construed to "create any cause of action or to impose additional implied obligations under the mineral code or arising out of a mineral lease." La. R.S. § 30:29(H)(2). The quoted language makes clear that Act 312 merely creates a new "*procedure* for judicial resolution of claims for environmental damage"—without altering the substantive obligations of mineral lessees. *See M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007-2371, p. 29 (La. 7/1/08), 998 So. 2d 16, 35–36 (emphasis added) (quotation marks omitted) (holding that Act 312 is procedural and does not change substantive rights). However, the Third Circuit applied the Act to do exactly what it purports not to do, by relying on the Act to impose new substantive contractual obligations on UNOCAL.

The Third Circuit's reliance on Act 312 to expand UNOCAL's contractual liability also undermines the purpose for which the legislature enacted Act 312. Prior to 2006, this Court held

that damages for environmental harm in breach of a mineral lease need not be "tethered" to the value of the property—and that a landowner who collected such damages "could not be required by the defendant or the State of Louisiana to actually remediate the damages on which the landowner's recovery was based." Loulan Pitre, Jr., *"Legacy Litigation" and Act 312 of 2006*, 20 Tul. Envtl. L.J. 347, 348 (2007) (discussing *Corbello v. Iowa Prod.*, 2002-0826 (La. 2/25/03), 850 So. 2d 686). The result was "a perception that contaminated property was the equivalent of a winning lottery ticket for the landowner." *Id.*

The Louisiana legislature enacted Act 312 to ensure that amounts necessary to remediate environmental damage to regulatory standards are actually used for such remediation, by creating a procedure in which a lessee found responsible for "environmental damage" can be ordered to remediate the property according to whatever remediation plan LDNR finds most feasible. Pitre, Jr., *supra*, 348; *see also Moore*, 159 F. Supp. 3d at 717 ("The Legislature passed Act 312 primarily in an effort to ensure that contaminated oil and gas exploration sites were remediated to the extent necessary to protect the public interest."). In other words, Act 312 is intended to protect the public interest in remediation, rather than to create new private-law liability for additional sums.

Act 312 does envision that in certain circumstances, a lessee may be liable to a landowner for contractual damages beyond "[t]he cost of funding the feasible plan" ordered by LDNR. La. R.S. § 30:29(M)(1)(a). But such contractual liability applies "*only* if required by an express contractual provision providing for remediation . . . to some other specific remediation standard" (*id.* § 30:29(M)(1)(b) (emphasis added)), and the extra liability is treated as separate from the costs for environmental damage that the Act requires be deposited with the court for remediation purposes. *See Moore*, 159 F. Supp. 3d at 721 (clarifying that remediation for breach of an express contractual provision is provided directly to landowners, as compared with remediation for liability

under the Act, which is placed in the court's registry). By leveraging Act 312 to expand UNOCAL's contractual liability in the absence of any "express contractual provision" imposing such liability, the Third Circuit undermined the remedial purposes of the statute and created a strong disincentive for lessees to voluntarily admit environmental damage and participate in the Act's remedial scheme.

If the Court allows the decision of the Third Circuit to stand, the potential ramifications to commercial interests in Louisiana are significant. The predictability of contracts in Louisiana will be called into doubt. Legislation (such as Act 312) that is intended to protect the public interest may be misapplied to provide windfall damages awards based on legal standards that contracting parties never contemplated and never intended to incorporate into their agreement. The Court should reject that outcome.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court reverse the Third Circuit's decision.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the allegations in the foregoing *amicus curiae* brief are true and correct to the best of my knowledge; and that a copy of the above *amicus curiae* brief has been served upon the below-listed counsel via next day delivery service, this 17th day of November, 2020, as specified below:

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