No. 15-56352

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN NEWTON, *Plaintiff-Appellant,*

v.

PARKER DRILLING MANAGEMENT SERVICES, INC., *Defendant-Appellee*.

On Appeal from the United States District Court
for the Central District of California
No. 2:15-cv-02517-RGK-AGR

BRIEF OF FREEPORT-MCMORAN OIL & GAS LLC, EXXON MOBIL CORPORATION, AMPLIFY ENERGY CORP., BETA OPERATING COMPANY, LLC (dba BETA OFFSHORE), DCOR, LLC, CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL OCEAN INDUSTRIES ASSOCIATION, OFFSHORE OPERATORS COMMITTEE, AND WESTERN STATES PETROLEUM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* state as follows:

1. **Freeport-McMoRan Oil & Gas LLC** is wholly owned by FCX Oil & Gas Inc., which in turn is wholly owned by **Freeport-McMoRan Inc. (NYSE: FCX)**, a publicly traded company. Freeport-McMoRan Inc. has no parent companies, and no publicly traded company holds 10% or more of its stock.

2. **Beta Operating Company, LLC** is a wholly owned subsidiary of Amplify Energy Operating LLC, which in turn is wholly owned by **Amplify Energy Corp. (AMPY)**, a publicly traded company. Amplify Energy Corp. has no parent companies, and no publicly traded company holds 10% or more of its stock. **Amplify Energy Corp.** is the successor reporting company of Memorial Production Partners LP, the predecessor entity, which was dissolved following the effective date of the Second Amended Joint Plan of Reorganization of Memorial Production Partners LP and its affiliated Debtors, dated April 13, 2017.

3. **DCOR, LLC** ("DCOR") is a privately-held Texas limited liability company that owns operating and leasehold interests in eleven crude oil and natural gas platforms located offshore in southern California in state tide and submerged lands (2) and the Pacific Outer Continental Shelf (9). In July 2017, DCOR was named by Oil and Gas Financial Journal, as the 52nd largest privately-

owned oil and gas exploration and production company in the United States and the second largest privately-owned oil and gas exploration and production company in the State of California. No publicly held corporation owns a 10% or greater interest in DCOR.

4. **Exxon Mobil Corporation (NYSE: XOM)** is a publicly traded company, has no parent companies, and no publicly traded company holds 10% or more of its stock.

5. The **California Independent Petroleum Association** ("CIPA") is a non-profit, non-partisan trade association representing approximately 500 independent crude oil and natural gas producers, royalty owners, and service and supply companies operating in California. CIPA has no parent corporation, and no publicly held company has 10% or greater ownership in CIPA.

6. The **Independent Petroleum Association of America** ("IPAA") is a trade association representing the thousands of independent oil and natural gas production companies, as well as the service and supply industries that support their efforts. IPAA has no parent corporation, and no publicly held company has 10% or greater ownership in IPAA.

7. The **Offshore Operators Committee** ("OOC") is a trade association representing offshore oil and natural gas exploration and production companies who operate on the U.S. federal outer continental shelf, as well as the service and

supply industries that support their efforts. OOC is not a publicly traded company, has no parent companies, and no publicly traded company holds 10% or more of its stock.

8. The **National Association of Manufacturers** ("NAM") is not a publicly traded corporation. It has no parent corporation, and no public corporation owns 10% or more of its stock.

9. The **National Ocean Industries Association** ("NOIA") is a trade association representing more than 250 companies and thousands of individuals actively involved in the development of offshore energy. Members include producers, service companies and related businesses. NOIA promotes fair and open access to the energy resources available on the U.S. outer continental shelf. NIOIA has no parent corporation, and no publicly held company has 10% or greater ownership in NOIA.

10. The **Western States Petroleum Association** ("WSPA") is a nonprofit mutual benefit trade association that represents more than 15 companies engaged in petroleum exploration, production, refining, transportation and marketing in Arizona, California, Nevada, Oregon, and Washington. WSPA has no parent corporation, and no publicly traded company has a 10% or greater ownership interest in WSPA.

11. **The Chamber of Commerce of the United States of America** does not have a parent corporation; nor does any publicly held corporation own 10% or more of its stock.

April 2, 2018

/s/ Jeremy C. Marwell
Jeremy C. Marwell

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae include companies with oil and gas operations on the Outer Continental Shelf ("OCS") or in the offshore industry, and trade associations whose members operate in, serve, or have other interests in that industry. A list of proposed *amici*, with descriptions, is attached as Appendix A. Several *amici* are defendants in pending litigation in this Circuit, in which OCS platform workers assert wage and hour claims under California law; those claims were dismissed on similar grounds as the district court gave in this case. Because those cases will be affected by the disposition of this case, *amici* have a direct and substantial interest in this case.

Collectively, *amici* participate regularly in legislative, regulatory, and judicial proceedings that may affect their (or their members') interests. *Amici* have an interest in ensuring a stable and predictable legal framework governing the offshore industry, including the question presented here—*i.e.*, the circumstances in which state wage and hour laws might apply to operations on the OCS.

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[1] All parties have consented to the filing of this brief. Fed. R. App. P. 29(b)(1); 9th Cir. R. 29-2(a). Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* hereby certify that this brief was authored solely by *amici* and their counsel, and that no person other than amici and their members contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The petition compellingly demonstrates why rehearing en banc is warranted. *Amici* offer four additional reasons why the Court should rehear the case en banc.

First, in interpreting the Outer Continental Shelf Lands Act ("OCSLA"), the panel here expressly rejected a rule that is settled Fifth Circuit law. The panel created a square conflict between the two federal courts of appeals with territorial jurisdiction over *virtually all* U.S. oil and gas operations on the OCS. This conflict undermines predictability and uniformity for those—like many *amici* and their members—with operations in both the Gulf of Mexico and offshore West Coast.

Second, by rejecting the Fifth Circuit's standard, which has provided the choice-of-law framework on the OCS for almost fifty years, the panel potentially inflicted on OCS employers hundreds of millions of dollars of retroactive damages, fines, and penalties—all of which vastly exceeds the already generous wages and benefits employees enjoy under longstanding arrangements tailored to the unique circumstances of living and working offshore.

Third, the panel's opinion effectively accords state law supremacy over federal law in an area under the federal government's exclusive jurisdiction and control, contrary to Congress's intent and longstanding Supreme Court precedent. Highlighting the conflict, this decision elevates a state law requiring employees to

be paid for non-working and even sleeping hours, over federal regulations expressly providing the opposite.

Fourth, because some states have different policy preferences than the federal government regarding OCS activity, this decision invites states to act strategically and to promulgate laws intended to increase the difficulty and cost of OCS operations that the federal government seeks to encourage.

BACKGROUND

When businesses decide whether and how to operate on the OCS, including developing labor and employment policies and making a variety of other practical and economic decisions, a key threshold question is whether federal or state law applies. The Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.*, defines the body of law applicable to the OCS and the structures fixed thereon, including drilling and production platforms. *See Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969).

Through OCSLA, "Congress extended the jurisdiction of the United States and its laws to the [OCS]." *Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374, 1384 n.6 (9th Cir. 1989). The OCS, and the platforms attached to it, are "subject to the exclusive jurisdiction and control of the Federal Government." *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 27 (1988). Recognizing that federal law might not address the full range of potential legal

issues arising on the OCS, however, Congress included a choice-of-law provision that courts have long understood to "supplement[] gaps in the federal law with state law." *Rodrigue*, 395 U.S. at 357. It states in relevant part:

> To the extent that they are *applicable and not inconsistent* with this subchapter or with other Federal laws and regulations . . . now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon . . . .

43 U.S.C. § 1333(a)(2)(A) (emphasis added). Under this provision, "[a]ll law applicable to the [OCS] 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 Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480-81 (1981) (citations omitted).

Contrary to long-settled precedent and widely held industry expectations, the panel here held that workers employed on platforms fixed on the OCS may bring claims under state wage and hour laws. Op. 3-4. The panel expressly "reject[ed] the proposition"—settled law in the U.S. Court of Appeals for the Fifth Circuit—that state law applies on the OCS *only* if "necess[ary] to fill a significant void or gap" in federal law. Op. 4 (citing *Cont'l Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969)). The decision will have far-reaching practical and financial consequences not only for employers operating on the OCS,

but also for thousands of employees working there pursuant to generous contractual and other arrangements predicated on the legal framework the panel has now discarded.

ARGUMENT

I. The Panel Rejected The Settled Understanding That OCSLA Fills Gaps Left By Federal Law

Half a century ago, the Fifth Circuit articulated a clear and easily implemented standard for when state law applies as surrogate federal law under § 1333(a)(2)(A). That standard comports with OCSLA's language and purpose, Supreme Court precedent, longstanding industry practice, employee expectations and common sense. The panel here, however, rejected the Fifth Circuit's understanding, creating a square circuit split and introducing perplexing and destabilizing uncertainty into OCSLA's governing legal framework.

As the panel acknowledged, any understanding of OCSLA must begin with *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969). *Rodrigue* conducted an exhaustive analysis of OCSLA, including § 1333(a)(2)(A). After considering the statute's text, legislative history, and purpose, the Court concluded that OCSLA "makes it clear that federal law, supplemented by state law of the adjacent State, is to be applied to . . . artificial islands [affixed on the OCS] as though they were federal enclaves in an upland State." *Id.* at 355.

Turning first to the statutory text, the Court held that "[i]t is evident . . . that federal law is 'exclusive' in its regulation of [the OCS]," and that state law is adopted as surrogate federal law only when necessary to "supplement[] gaps in the federal law." *Id.* at 357. Legislative history, the Court concluded, also "makes it clear that state law could be used to fill federal voids" but that ultimately "federal law should prevail." *See id.* at 357-59. Importantly, however, "for federal law to oust adopted state law[,] federal law must first apply." *Id.* at 359. On the facts there, the Court determined that federal law did not apply, *see id.* at 359-66, thus "remov[ing] any obstacle to the application of state law by incorporation as federal law through the [OCSLA]," *see id.* at 355, 366. In other words, because federal law did not apply *at all*, "a substantial 'gap' in federal law" existed, to be "filled with the applicable body of state law." *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 101 (1971) (discussing *Rodrigue*, 395 U.S. 352).

Shortly thereafter, the Fifth Circuit addressed the question presented here: whether state law is "applicable and not inconsistent" under § 1333(a)(2)(A) when existing federal law provides a comprehensive governing scheme. Applying "the recurring theme of *Rodrigue*," the Fifth Circuit concluded that "the deliberate choice of federal law, federally administered, requires that 'applicable' [in § 1333(a)(2)(A)] be read in terms of necessity—necessity to fill a significant void or gap" in federal law. *See Cont'l Oil*, 417 F.2d at 1033-37. Otherwise put, when

federal law provides both a right and a remedy, the application of state law is neither "needed [n]or permitted" under OCSLA. *Id.* at 1035-36.

Since 1969, the Fifth Circuit has consistently held that "OCSLA adopts the law of the adjacent state . . . as surrogate federal law" only "[w]hen there are 'gaps in the federal law[.]'" *Tetra Techs., Inc. v. Cont'l Ins. Co.*, 814 F.3d 733, 738 (5th Cir. 2016) (quoting *Rodrigue*, 395 U.S. at 357); *see also, e.g., Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co.*, 448 F.3d 760, 772 (5th Cir. 2006) ("OCSLA extends federal law to the [OCS] and borrows adjacent state law as a gap-filler."). The Supreme Court also has reaffirmed *Rodrigue*'s central premise—namely, that the laws of the adjacent States apply under OCSLA only when necessary "to fill the substantial 'gaps' in the coverage of federal law." *Gulf Offshore*, 453 U.S. at 480-81; *see also Maryland v. Louisiana*, 451 U.S. 725, 752 n.26 (1981); *Chevron Oil*, 404 U.S. at 103-05.

Despite this well-settled precedent, the panel here expressly rejected the Fifth Circuit's approach, *see* Op. 4, 27, departing from Supreme Court precedent such as *Rodrigue*, *Gulf Offshore*, and *Chevron Oil*, and creating a circuit split. *Continental Oil* remains binding law in the Fifth Circuit. *See* Pet. for Reh'g En Banc at 13-14. Notably, the very case the panel cited as creating uncertainty, *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990), acknowledged the central holding of both *Rodrigue* and *Continental Oil*, by

emphasizing that Congress intended for "the OCS [to] be treated as an area of exclusive federal jurisdiction within the state where state law will apply *to fill in the gaps in the federal law*." *Id.* at 1052 (emphasis added). The *PLT* court did not focus on whether a gap existed, because there was no federal law to apply. *See, e.g.*, *id.* at 1047 ("*Rodrigue* made clear that 'for federal law to oust adopted state law, federal law must first apply.'" (quoting *Rodrigue*, 395 U.S. at 359)). The conflict with the Fifth Circuit strongly supports en banc review. *See* 9th Cir. R. 35-1; Fed. R. App. P. 35(b)(1)(B); *see also Groves v. Ring Screw Works*, 498 U.S. 168, 172 n.8 (1990) (en banc rehearing for "a square conflict in the Circuits").

Practical realities of OCS oil and gas operations and OCSLA litigation exacerbate the consequences of the circuit split. The Ninth and Fifth Circuits collectively have jurisdiction over virtually all existing operations on the OCS in the United States—*i.e.*, the Pacific Coast (including Alaska) and the Gulf Coast. The majority of America's coastal waters currently open to offshore oil and gas drilling are located off the coasts of States within the Fifth Circuit's jurisdiction.[2] To the extent drilling occurs elsewhere, it is located almost exclusively offshore of

[2] *See, e.g.*, Bureau of Ocean Energy Mgmt., *Gulf of Mexico OCS Region*, https://www.boem.gov/Gulf-of-Mexico-Region/ (areas off the coasts of Texas, Louisiana, Mississippi, and Alabama "generat[e] about 97% of all OCS oil and gas production").

States within the jurisdiction of the Ninth Circuit.[3] As a result, the vast majority of litigation concerning OCSLA occurs in these two circuits. Indeed, numerous district court decisions hold that California wage and hour laws do not apply on the OCS because the Fair Labor Standards Act ("FLSA") has no "gaps" necessitating resort to state law.[4] Moreover, for companies with operations offshore in both regions, enterprise-wide policies and employer-employee relationships may be subject to Ninth and Fifth Circuit jurisdiction simultaneously. Uniformity regarding OCSLA's choice-of-law rules is critical.

By rejecting the Fifth Circuit's standard, the panel decision could significantly disrupt oil and gas operations on the OCS. Employers and employees associated with drilling and production platforms have structured employment relationships in reliance on the long-settled legal framework created by *Rodrigue* and *Continental Oil*. *See infra* Section II. Following the panel's decision here, operations along the Pacific Coast are governed by different choice-of-law rules

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[3] *See, e.g.*, 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* (Jan. 2018), https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/.

[4] *See, e.g.*, *Garcia v. Freeport-McMoRan Oil & Gas LLC*, No. 16-cv-4320 (C.D. Cal. Sept. 16, 2016); *Jefferson v. Beta Operating Co.*, No. 15-cv-4966 (C.D. Cal. Nov. 3, 2015); *Espinoza v. Beta Operating Co.*, No. 15-cv-4659 (C.D. Cal. Oct. 29, 2015); *Reyna v. Venoco, Inc.*, No. 15-cv-4525 (C.D. Cal. Oct. 23, 2015); *Williams v. Brinderson Constructors, Inc.*, No. 15-cv-2474, 2015 WL 4747892 (C.D. Cal. Aug. 11, 2015).

than those in the Gulf, undermining expectations and disrupting contractual and other arrangements.

Even within the Ninth Circuit, OCS operations now face dramatically different legal rules, depending on their location. Four States within the Ninth Circuit's jurisdiction—California, Oregon, Washington, and Alaska—are included in the existing OCS oil and gas regime,[5] and significant differences exist in their laws. For example, state courts have reached diametrically opposite views regarding 29 C.F.R. § 785.23—a U.S. Department of Labor regulation addressing compensation for employees who reside on their employers' premises "for extended periods of time." That regulation states that employees are "not considered as working all the time [they are] on the premises," and gives effect to "any reasonable agreement of the parties" concerning wages for overtime work. *See id.*; *accord Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 940-41 (9th Cir. 2004). State courts have adopted drastically different views of § 785.23. *Compare Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal. 4th 833, 842-43 (Cal. 2015) (rejecting an employer's reliance on § 785.23 and holding that on-call hours, including "sleep time," represented "hours worked" for overtime purposes), *with*

[5] *See* Bureau of Ocean Energy Mgmt., *Pacific OCS Region*, https://www.boem.gov/Pacific-Region/; Bureau of Ocean Energy Mgmt., *Alaska OCS Region*, https://www.boem.gov/Alaska-Region/.

Air Logistics of Alaska, Inc. v. Throop, 181 P.3d 1084, 1092-94 (Alaska 2008) (existence of agreement pursuant to § 785.23 is persuasive evidence on the question of compensable hours; not requiring sleep and recreation time to be compensated as overtime work).

To be sure, Congress recognized in OCSLA that in some circumstances, an interest in "national uniformity" would give way to other considerations, such as the need to fill gaps in federal law. *See* Op. 37 (quoting *Gulf Offshore*, 453 U.S. at 487; *Chevron Oil*, 404 U.S. at 104); *see also Rodrigue*, 395 U.S. at 355, 361-66; Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN L. REV. 23, 40-41 (1953).[6] "This concern manifested itself primarily in the incorporation of the law of adjacent States *to fill gaps in federal law*." *Gulf Offshore*, 453 U.S. at 479 n.7 (emphasis added) (citing *Rodrigue*, 395 U.S. at 365). En banc review is essential to ensure uniformity and predictability in the choice-of-law framework, which in turn determines what substantive law applies, in a manner consistent with OCSLA's text and intent.[7]

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[6] Congress decided against simply applying maritime law, given the gaps that existed in that framework. For example, the "so-called social laws," including "fair-labor-standard laws," would not apply under maritime law. *Rodrigue*, 395 U.S. at 361-62. Congress also recognized that some OCS workers might have "close[] tie[s]" with adjacent states. *Id.* at 355.

[7] The possibility of expanded OCS operations under current U.S. policy will only heighten the need for uniformity and consistency in the governing legal framework. *See supra* n.3.

II. The Panel Opinion Disrupts Existing Employer-Employee Relationships Formed In Reliance On Longstanding Interpretations Of OCSLA

For decades, employers and employees on drilling and production platforms on the OCS have implemented compensation and benefit structures under a shared understanding of substantive background law. Whether by arms-length negotiated contracts or other arrangements, these policies have been tailored to the offshore industry, recognizing (among other things) that workers sometimes temporarily reside on premises. The terms of these arrangements generally are more favorable—including with respect to wages, overtime, and other benefits—than those seen in non-OCS industries typically covered by state wage and hour laws. By rejecting long-settled precedent and potentially imposing massive retroactive liability on employers who reasonably relied on those arrangements, the panel undermined the stability of those relationships, with tremendous practical and financial consequences.

Oil and gas operations on the OCS present unique circumstances that bring both opportunities and challenges. Drilling platforms affixed to the OCS operate 24 hours a day and are often in remote locations miles off the coast. While some employees may have the option to return home each night, in other instances, it may not be practical for employees to commute, for instance due to travel logistics or if employees do not reside near enough to allow commuting. Employees often work agreed-upon shifts, or "hitches," in which the employees work, eat, sleep,

and live on the platforms for a specified number of days. *See* Op. 4 (14-day work shifts, followed by 14 days at home not working); *Meadows v. Latshaw Drilling Co.*, 866 F.3d 307, 309 (5th Cir. 2017).

But in exchange for the particular circumstances of work on OCS drilling platforms, employees are rewarded with above-market salaries, generous benefits, and abundant time off.[8] Long before the decision at issue here, OCS employees received hourly rates "well above the state and federal minimum wage," and "premium rates for overtime hours." Op. 20. In fact, the federal government recently estimated that oil and gas workers earn more than 150% of the average hourly wage of other employees.[9] Moreover, during the non-working (*e.g.*, sleeping and recreation) hours within a hitch that form the basis for this lawsuit, employees are free to use their time as they see fit. The platforms are equipped with various amenities for employees to use free of charge, including cable,

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[8] *See, e.g.*, International Association of Drilling Contractors, *Life on a Drilling Rig*, http://drillingmatters.iadc.org/life-on-a-drilling-rig/.

[9] 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* (Jan. 2018), https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/. A study examining the economic impacts of energy activity in Louisiana estimated that the average wage earned by employees in the oil and gas extraction area were 180% higher than the average employee. Eric N. Smith, *Louisiana – The Status of the State: A Report on the Impact of Energy Activity on the State's Economy*, GREATER NEW ORLEANS, INC. (2014), http://www.noia.org/wp-content/uploads/2014/04/Future_of_Energy_FINAL-GNO-INc.pdf.

internet access, and fitness and recreation facilities, allowing employees to engage cost-free in many of the same personal-time activities they enjoy on land. Employees live and eat rent-free during shifts, with employers providing lodging and bathing facilities, meal and cleaning services at no cost to employees. And when the hitch is completed, the employee returns home to spend an equivalent number of days off.

Employers and employees in this industry have abided by these wage and benefit policies based on a shared understanding of the governing legal framework, *see supra* Section I, and the industry's practical and financial realities. By altering the background legal framework, the panel disrupted those relationships. Virtually overnight, employers became subject to state laws ill-tailored to the OCS's unique working environment, inflicting potentially hundreds of millions of dollars of retroactive liability. Employees, already generously compensated under existing arrangements, will receive a windfall of backpay for time for which they had already been compensated, plus interest and penalties. Going forward, employers may not be in a position to offer equivalently generous compensation and benefits, if employment relationships are subject to state-law overtime and other requirements enacted without regard for the unique circumstances of OCS work. The decision not only inflicts significant retroactive liability, it will disrupt employer-employee relationships going forward. All sides would benefit from

having a uniform choice-of-law regime governing the OCS. Otherwise, workers will face a different legal regime depending on whether they are working in the Gulf or off the Pacific Coast—and which neighboring state is closest to that location— in a given month. Increasing the cost of OCS operations could also shorten the economic life of some offshore facilities, to the detriment of not only employees, but also the federal government, which receives royalty payments for production, and ultimately taxpayers.

III. The Panel Decision Elevates State Law To Supremacy Over Federal Law, Conflicting With Congressional Intent And Inviting Strategic Behavior By States

The panel opinion also effectively gives state law supremacy over federal law, contrary to OCSLA's text and intent. "[B]y passing the [OCSLA], Congress 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 (citations and internal quotation marks omitted). OCSLA, in other words, "affirm[ed] the Federal Government's authority and control" over the OCS and the artificial structures affixed there. *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 212 (2012). And because "the OCS [is] subject to the exclusive jurisdiction and control of the Federal Government," *Shell Oil*, 488 U.S. at 27, "federal law should prevail" over state law. *Rodrigue*, 395 U.S. at 358.

OCSLA's limited adoption of state law does not alter these principles. Congress included OCSLA's savings clause because federal law, standing alone, could not always address the broad range of legal problems relating to oil and gas development on the OCS. *Shell Oil*, 488 U.S. at 27-28; *Rodrigue*, 395 U.S. at 357; *see also* Op. 10. Yet, as *Rodrigue* makes clear, when a federal statutory scheme *does* apply, such as the FLSA here, resort to state law under § 1333(a)(2)(A) is unnecessary. *See Rodrigue*, 395 U.S. at 355-59; *see also Gulf Offshore*, 453 U.S. at 480-81; *Cont'l Oil*, 417 F.2d at 1036.

The panel decision effectively "accord[s] state law supremacy over federal law" and "cede[s] the United States' jurisdiction over the OCS to state agencies." Op. 23. In the panel's view, even when a comprehensive federal scheme governs claims arising on the OCS, state law will control so long as it "pertain[s] to the subject matter at hand," Op. 20-27, and is not "inconsistent with" existing federal law (under the panel's diluted reading of "inconsistent," *see* Op. 27-39). The panel decision "accords initially a superiority to adjacent state law," because "the question of federal law comes into play only after this process excludes state law."[10] *Cont'l Oil*, 417 F.2d at 1035-36; *cf. Rodrigue*, 395 U.S. at 359 (state law

[10] The panel also effectively read "applicable" out of the statute, "put[ting] almost 100% Emphasis on the not inconsistent with federal laws element of [§ 1333(a)(2)(A)]," *Cont'l Oil*, 417 F.2d at 1035 (internal quotation marks and alterations omitted), an approach the Fifth Circuit has long disfavored.

applies under OCSLA only if federal law does not "first apply"). While Congress expressly rejected "the notion of supremacy of state law administered by state agencies," *Cont'l Oil*, 417 F.2d at 1036 (citing *Rodrigue*, 395 U.S. at 358-59), the panel's reasoning adopts such an approach.

The practical effects are real. The panel decision invites States to control operations on the OCS, an area within the federal government's exclusive jurisdiction. 43 U.S.C. § 1333(a)(1); *Rodrigue*, 395 U.S. at 356-57. For instance, state law now may effectively control over 29 C.F.R. § 785.23. The panel decision eliminates the contractual freedom guaranteed by § 785.23 and overrules that provision by treating non-working (and even sleeping) hours as "working"—and more broadly inviting workers (and plaintiff's lawyers) to retroactively claim a host of extra-contractual rights based in state employment or other laws.

The conflict is particularly stark, where (as here) a federal scheme excludes non-working hours from the overtime calculation, *see* § 785.23, but state law compels the opposite approach. The panel decision ignores that conflict, and departs from decisions holding that California state wage-and-hour laws could not apply in other federal enclaves, because they conflict with the FLSA. *E.g.*, *Mersnick v. USProtect Corp.*, No. 06-cv-3993, 2006 WL 3734396, *7-8 (N.D. Cal. Dec. 18, 2006) (so holding); *cf. Rodrigue*, 395 U.S. at 355 (fixtures on OCS treated as "federal enclaves in an upland State").

Given that some states have different policy preferences than the federal government regarding OCS activity, this decision opens the door to strategic behavior, inviting the promulgation of facially neutral but practically targeted state laws that increase the difficulty and cost of OCS operations, deterring or prohibiting activity the federal government seeks to encourage. The concern is not theoretical. *E.g.*, Andre Stepankowsky, *West Coast states push back on drilling proposal*, THE DAILY NEWS (Jan. 5, 2018), http://tdn.com/news/west-coast-states-push-back-on-drilling-proposal/article_3e7f59bb-d76c-53df-8490-211e0bc1a7d9.html (quoting joint statement by Governors of California, Washington, and Oregon opposing federal proposal to expand OCS oil and gas operations).

In short, the panel decision transforms OCSLA, a statute "Congress intended to provide for the orderly development of offshore resources," *Shell Oil*, 488 U.S. at 27 (citation and internal quotation marks omitted), into a regime of jurisdictional chaos, inviting States to assert ever-increasing authority over commercial activities in an area of primary federal jurisdiction and control. En banc review is urgently warranted.

CONCLUSION

The Court should grant the petition for rehearing en banc.

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Respectfully submitted,

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APPENDIX A:
LIST AND IDENTITIES OF *AMICI CURIAE*

1. **Freeport-McMoRan Oil & Gas LLC** ("Freeport") acquires, explores, develops, and produces oil and gas properties on the Outer Continental Shelf ("OCS") offshore California and in the Gulf of Mexico. Freeport is a defendant in pending litigation in this Circuit, in which OCS platform workers assert wage and hour claims under California law. The district court dismissed all claims against Freeport on essentially the same grounds as the district court did in this case. *See* Order, *Garcia v. Freeport-McMoran Oil & Gas LLC*, No. 16-cv-4320 (C.D. Cal. Sept. 16, 2016), ECF No. 20. Plaintiffs' appeal to the Ninth Circuit is currently held in abeyance pending the disposition of the above-captioned case. Freeport thus has a direct and substantial interest in the panel decision here.

2. **Amplify Energy Corp.** ("Amplify"), in part through its subsidiary **Beta Operating Company, LLC** ("Beta"), is engaged in the acquisition, development, exploitation and production of oil and natural gas properties. Amplify, through Beta, is engaged in oil production activities and operates three drilling and production platforms on the OCS off the coast of California, on which it employs approximately 60 workers. Amplify and/or Beta is a defendant in pending litigation in the Ninth Circuit, in which OCS platform workers assert wage and hour and Private Attorneys General Act claims under California law. The

district courts dismissed all claims against Amplify and Beta on essentially the same grounds as the district court did in this case. *See* C.D. CA Case No. 2:15-cv-04659-RGK-AS, Dkt. No. 20; C.D. CA Case No. 2:15-cv-04966-SJO-PLA, Dkt. No. 31. Plaintiffs' appeals to the Ninth Circuit are currently "deferred pending issuance of the mandate in [the above-captioned case], or until further order of the court." *See* Ninth Circuit Case No. 15-56819, Dkt. No. 43; Ninth Circuit Case No. 15-56856, Dkt. No. 41. Amplify thus has a direct and substantial interest in the panel decision here.

3. **DCOR, LLC** ("DCOR") employs over 252 personnel, approximately half of whom work on one or more of its nine federal offshore California OCS platforms. It is essential to DCOR's long-term growth, productivity, financial planning and stability to know with certainty which labor and employment practices apply to its offshore California OCS employees. DCOR also seeks to have uniform labor and employment practices apply for both Gulf of Mexico and offshore California operations on the OCS.

4. **Exxon Mobil Corporation** ("ExxonMobil") is an oil and gas company that operates and employs individuals to work on oil platforms attached to the OCS and located off the California coast, as well as in the Gulf of Mexico. ExxonMobil thus has operations in both the Fifth and Ninth Circuits, and depends on national uniformity in the interpretation of wage and hour law as it applies on

the OCS. Because ExxonMobil has operated oil platforms on the OCS for many years, it also relies on longstanding interpretations of the Outer Continental Shelf Lands Act ("OCSLA") in establishing relationships with its employees. ExxonMobil is also currently a Defendant in the Western Division of the Central District of California in the matter of G*abriel Guimary v. Exxon Mobil Corporation*, No. 2:18-cv-02430-SVW-JC (removed to the Central District on March 2, 2018), which alleges similar claims to those in the instant matter. For these reasons, ExxonMobil has a substantial interest in the outcome of this litigation and the application of wage and hour laws on the OCS.

5. **The California Independent Petroleum Association** ("CIPA") is a non-profit, non-partisan trade association representing approximately 500 independent crude oil and natural gas producers, royalty owners, and service and supply companies operating in California. CIPA's members account for approximately 70% of California's total oil production and 90% of California's natural gas production. CIPA members are involved in all aspects of oil and gas exploration, and production, including the drilling and operation of wells on the OCS. CIPA educates the public and elected officials regarding a number of aspects of the oil and gas industry and frequently weighs in on legislative and regulatory issues affecting its members, as well as participates as an amicus in cases affecting its members' interests.

6. **The Chamber of Commerce of the United States of America** ("Chamber") is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. An important function of the Chamber is to represent the interests of its members by participating as amicus curiae in cases involving issues of national concern to American business, such as this one. The Chamber's members operate in nearly every industry and business sector in the United States.

7. **The Independent Petroleum Association of America** ("IPAA") represents the thousands of independent oil and natural gas exploration and production companies, as well as the service and supply industries that support their efforts. Independent producers drill about 95 percent of American oil and natural gas wells, produce about 54 percent of American oil, and more than 85 percent of American natural gas.

8. **The National Association of Manufacturers** ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and

accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

9. **The National Ocean Industries Association** ("NOIA") is a national trade association representing hundreds of corporate and individually owned businesses, comprised of thousands of workers who engage in the exploration and production of oil and natural gas in the OCS. As a trade association, NOIA frequently participates in legislative, regulatory, and judicial proceedings that may affect its members' interests. NOIA and its members have an interest in ensuring a stable and predictable legal framework governing the offshore industry, including circumstances in which state wage and hour laws might apply to operations on the OCS.

10. The **Offshore Operators Committee** ("OOC") is a national trade association representing offshore oil and natural gas exploration and production companies who operate on the U.S. federal outer continental shelf, as well as the service and supply industries that support their efforts. OOC regularly participates in government related efforts that may affect its members' interests. OOC and its members have an interest in ensuring a stable and predictable legal framework governing the offshore industry.

11. **Western States Petroleum Association** ("WSPA") is a nonprofit mutual benefit trade association founded in 1907 that represents more than 15 companies that account for the bulk of petroleum exploration, production, refining, transportation and marketing in the five western states of Arizona, California, Nevada, Oregon, and Washington. WSPA is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially, economically and environmentally responsible. Toward that end, WSPA works to disseminate accurate information on industry issues and to provide a forum for the exchange of ideas on petroleum matters.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the format/length limitations of 9th Cir. R. 29-2(c)(2) because it contains 4,193 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: April 2, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Brief of Amici Curiae Freeport-McMoRan Oil & Gas LLC et al.* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 2, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: April 2, 2018

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