CA No. 15-56352

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
Case No. 15-cv-02517
(Honorable R. Gary Klausner)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING *EN BANC*

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a public interest law firm and policy center headquartered in Washington, D.C., with supporters in all 50 States, including many in the State of California.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts to support continuity in legal doctrines and to ensure that settled expectations of parties are not lightly disrupted. *See, e.g., American Economy Ins. Co. v. State of New York, cert. petition filed*, No. 17-1179 (U.S., Feb. 22, 2018); *Deere & Co. v. New Hampshire, cert. denied*, 137 S. Ct. 38 (2016).

WLF is concerned that the panel decision has disrupted settled expectations of employers by rejecting a well-accepted judicial understanding regarding the meaning of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-13356b. The decision exposes those employers to massive retroactive liability for damages and

[1] Pursuant to Fed. R. App. P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

penalties for having acted in reasonable reliance on that judicial understanding. WLF submits that the Ninth Circuit should not adopt a statutory interpretation that departs so sharply from the interpretation of other courts (including the Fifth Circuit) and that imposes retroactive liability on numerous unsuspecting employers, without at least subjecting the panel's decision to *en banc* review.

WLF agrees with Defendant-Appellee Parker Drilling Management Services, Inc. (Parker Drilling) that OCSLA does not incorporate California labor law into the federal law that governs wage-and-hour issues arising from employment on oil platforms located on the Outer Continental Shelf (OCS). WLF writes separately to focus on the sharp conflict between the decision below and the decisions of other federal courts, and on the extreme hardship (in the form of massive retroactive liability) likely to be faced by employers if the panel decision remains in place.

STATEMENT OF THE CASE

Plaintiff-Appellant Brian Newton was employed by Parker Drilling for two years on an oil platform off the California coast, where his typical work day lasted 12 hours. The inaccessibility of the oil platform made it difficult for Newton to return to his home in California during his off hours, and thus he generally remained on the site for 14 days at a time. During Newton's 12 "off" hours, Parker Drilling provided Newton with food, lodging, and recreational facilities on the oil platform at no cost.

As the panel recognized, Parker Drilling paid Newton "an hourly rate well above the state and federal minimum wage, and also paid him premium rates for overtime hours." Op. 20.

A month after Newton ceased working on the oil platform, he filed a putative class action alleging that Parker Drilling failed to pay him and similarly situated employees in accordance with California labor law. His principal claim is that California law required that he be paid for all hours that he was on the oil platform, even during sleep and rest time. He seeks to recover back pay plus civil penalties under the Private Attorney General Act of 2004 (PAGA).

OCSLA states that "fixed structures" (such as oil platforms) located on the OCS are deemed federal enclaves that are subject to federal law. 43 U.S.C. § 1333(a)(1). It further states that the laws of adjacent States "are declared to be the law of the United States" for those fixed structures, "[t]o the extent that they are applicable and not inconsistent with [OCSLA] or with other Federal laws." 43 U.S.C. § 1333(a)(2)(A). The district court held that California wage-and-hour laws were not "applicable"—because federal law already incorporates a comprehensive statutory scheme (the Fair Labor Standards Act) governing wage-and-hour claims and thus has no need to borrow state wage-and-hour law to fill in gaps in federal law—and dismissed the complaint. Op. 6.

This Court reversed. It held that state law is "applicable" to a controversy arising on an OCS oil platform whenever (as here) the law is "relevant" to the controversy, and it rejected "the notion that state laws have to fill a gap in federal law to qualify as surrogate federal law." Op. 21, 22. In doing so, it explicitly disagreed with the Fifth Circuit's holding in *Continental Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969), that state law cannot qualify as "applicable" under § 1333(a)(2) unless it fills "a significant void or gap" in federal law. Op. 4. Although recognizing that the FLSA provides a comprehensive federal statutory scheme governing wage-and-hour issues, the panel held that also applying California law to Newton's claims was not "inconsistent with federal law" because the FLSA merely provides a statutory floor "under which wage protections cannot drop" and that the FLSA permits States to impose a higher level of wage protections. Op. 35.

Although highly critical of the Fifth Circuit's *Continental Oil* decision, the panel expressed some doubts regarding whether the Fifth Circuit still adhered to that decision. The panel identified what it termed a "more recent line of [Fifth Circuit] cases"—beginning with *Union Texas Petroleum Corp. v. PLT Engineering, Inc.* ["*PLT*"], 895 F.2d 1043 (5th Cir. 1990)—which the panel interpreted as adopting an entirely new test for determining when OCSLA incorporates state law as surrogate

federal law. Op. 18-19. It labeled this supposed new test the "*PLT* test" and stated:

> It remains unclear whether the *PLT* test has superseded the *Continental Oil* test in the Fifth Circuit, or whether the Fifth Circuit views the *Continental Oil* test as a precursor to the *PLT* test, such that the *PLT* conditions come into play only if there is a significant gap or void in federal law.

Op. 19-20. Without further comment on the continued viability of *Continental Oil* within the Fifth Circuit, the panel proceeded to severely criticize the reasoning employed by that decision (and its extensive progeny) in concluding that state law is not "applicable" under OCSLA unless its adoption as surrogate federal law is necessary to fill a "significant void or gap" in federal law. Op. 23.

SUMMARY OF ARGUMENT

WLF agrees with Parker Drilling that rehearing is warranted because the panel misconstrued OCSLA: the statute's language, statutory history, and construction by the U.S. Supreme Court all support Parker Drilling's contention that state law is not "applicable" to OCSLA cases unless there exists a "significant void or gap" in federal law that can be filled by incorporating the state law. WLF writes separately to focus on two other reasons why rehearing is warranted.

First, rehearing is warranted because the panel's decision creates a sharp conflict with the Fifth Circuit. This Court has repeatedly stated that it declines to create circuit splits except for *compelling* reasons, yet the panel made little or no effort

to explain why it felt "compelled" to reject the Fifth Circuit's decades-long interpretation of OCSLA.

The panel explicitly acknowledged that its interpretation of OCSLA differed sharply from the interpretation adopted by the Fifth Circuit's *Continental Oil* decision. It then sought to downplay the importance of that conflict by suggesting that perhaps the Fifth Circuit backed away from *Continental Oil* in recent years and developed a new test—the "PLT test"—for determining when state law is incorporated into federal law for purposes of deciding cases governed by OCSLA. That suggestion is based on a misreading of Fifth Circuit case law. That court has never backed away from its adherence to *Continental Oil*. The "*PLT* test" cited by the panel is merely a special application of the test developed in *Continental Oil*, applicable to cases in which the party opposing incorporation of state law points to federal maritime law as the comprehensive federal scheme whose existence renders unnecessary any need to incorporate state law.

Thus, for example, the Fifth Circuit held in *Tetra Technologies, Inc. v. Continental Ins. Co.* , 814 F.3d 733 (2016)—one of the court decisions that, according to the panel, adopted "the *PLT* test"—that Louisiana law governing indemnification agreements would *not* be incorporated into a contract dispute arising under OCSLA if the district court found (on remand) that federal maritime law was applicable to the

case, because that body of federal law provides a comprehensive scheme governing maritime contract disputes. 814 F.3d at 740-42. But *Tetra Technologies* certainly did not suggest, in conflict with *Continental Oil*, that the requisite "significant void or gap" in federal law exists whenever federal maritime law is inapplicable to a dispute governed by OCSLA. To the contrary, it stated that OCSLA incorporates state law when there are "gaps in the federal law," without suggesting that federal maritime law is the only federal law that can obviate the need to resort to gap-filling state law. *Id.* at 738.

Second, review is warranted because the decision below threatens to impose massive retroactive liability on employers who adopted wage-and-hour practices in good-faith reliance on a body of federal case law that had uniformly found state law inapplicable in OCSLA cases in which a federal statute (in this case, the FLSA) provides a comprehensive set of rules. The retroactive nature of Parker Drilling's potential liability does not, of course, preclude the Ninth Circuit from adhering to the panel's construction of OCSLA if it determines that the panel's construction accurately reflects congressional intent. However, construing statutes in a manner that gives rise to retroactive liability is disfavored under the law and should only be undertaken when courts are absolutely convinced of the correctness of their construction.

At the very least, the Court should grant rehearing *en banc* to consider whether the panel's decision should be applied prospectively only. That is, the unanticipated construction of OCSLA—incorporating California wage-and-hour law into federal law for the benefit of individuals employed to work on oil platforms on the OCS—would not apply to work performed before 2018. The Court has recognized the appropriateness in civil cases of applying new rules only prospectively when parties have reasonably relied on a previous rule overturned by court decision. *See, e.g.*, *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (*en banc*).

REASONS FOR GRANTING THE PETITION

I. THE PANEL DECISION CREATES A SHARP CIRCUIT SPLIT, AN ACT THAT THIS COURT UNDERTAKES ONLY FOR "COMPELLING REASONS"

Rehearing is warranted because the panel's decision creates a sharp conflict with numerous decisions from the Fifth Circuit, the only other federal appeals court in which OCSLA decisions are likely to arise. While acknowledging its disagreement with *Continental Oil*, one of the Fifth Circuit's principal OCSLA decisions, the panel stated that perhaps the Fifth Circuit had backed away from *Continental Oil.* That statement was based on the panel's misinterpretation of later decisions from the Fifth Circuit; that court has never retreated from *Continental Oil.*

This Court has repeatedly stated that it will not create a circuit split unless

"there is a compelling reason to do so." *S&H Packing & Sales Co. v. Tanimura Distributing, Inc.*, 883 F.3d 797, 812 n.11 (9th Cir. 2018); *Kelton Arms Condominium Owners Assoc., Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003). The panel has created a circuit split by disagreeing with a decision to which the Fifth Circuit has adhered for nearly half a century, yet it made no effort to articulate a "compelling reason" for doing so.[2] The panel provided several reasons why it disagreed with the Fifth Circuit's interpretation of the word "applicable" as used in 43 U.S.C. § 1333(a)(2)(A), but doubts about another circuit's well-considered interpretation of a federal statutes hardly qualifies as a "compelling" reason to create a circuit split.[3]

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[2] That the panel articulated a OCSLA standard that conflicts with *Continental Oil*'s interpretation of § 1333(a)(2)(A) is not open to serious question. The panel expressly rejected *Continental Oil*'s significant-void-or-gap-in-federal-law standard for accepting state law as federal law in OCSLA cases. *See, e.g.*, Op. 23 (stating that Fifth Circuit erred by reading "applicable" "in terms of necessity—necessity to fill a significant void or gap").

[3] Indeed, as the panel recognized, the Fifth Circuit derived its definition of "applicable" state law directly from language in Supreme Court decisions construing OCSLA. *See Rodrigue v. Aetna Cas. & Surety Co.*, 395 U.S. 352, 358 (1969) (stating that OCSLA provides that "state law could be used to fill federal voids"); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 103 (1971) (stating that the application of state law in OCSLA cases is "subject to the absence of inconsistent and applicable federal law"). Any argument that the panel had "compelling reasons" to create a circuit split is also undercut by the fact that for 50 years Congress has not chosen to amend OCSLA in response to *Continental Oil*. Even if one accepts that such inaction does not constitute congressional endorsement of the Fifth Circuit's construction of OCSLA, it at least

The panel's suggestion that perhaps the Fifth Circuit has *sub silentio* overturned *Continental Oil*, Op. 19-20, is based on a misreading of subsequent Fifth Circuit case law. The panel asserted that "a more recent line of [Fifth Circuit] cases" adopted a new test, the "*PLT* test," for determining when OCSLA incorporates state law as surrogate federal law. Op. 18-19. But there is nothing novel about the "*PLT* test"; it is simply the Fifth Circuit's effort to apply the test developed in *Continental Oil* to cases in which the party opposing incorporation of state law urges the applicability of federal maritime law.

The first decision in this line of cases, *PLT*, involved a contractual dispute between a marine construction company and several of its subcontractors regarding who was entitled to payments from an oil company that had hired the construction company to build a gas pipeline connecting an OCS oil platform to a larger pipeline. *PLT*, 895 F.2d 1043. A key issue in the case was whether OCSLA authorized the subcontractors to invoke a Louisiana statute that permitted subcontractors to assert liens on pipelines they helped to build. The Fifth Circuit identified three conditions as "significant" in determining whether state law could permissibly be adopted as surrogate federal law in such disputes:

(1) The controversy must arise on a situs covered by OCSLA (*i.e.*, the

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suggests the absence of a "compelling" reason to challenge that construction.

> subsoil, seabed, or artificial structures permanently or temporarily attached thereto); (2) Federal maritime law must not apply of its own force; (3) The state law must not be inconsistent with Federal law.

Id. at 1047. The only one of the "significant" factors disputed by the parties was the second: whether federal maritime law applied to the contractual dispute. The court ultimately determined that federal maritime law did not apply because the subject matter of the contractual dispute did not bear a "significant relationship to traditional maritime activities," *id.* at 1048, and thus that the subcontractors were permitted to invoke Louisiana's lien law.

Key to understanding *PLT* is understanding the significance of whether federal maritime law applies to a controversy arising "on a situs covered by OCSLA." Federal maritime law, when applicable to a dispute, provides an elaborate set of rules governing resolution of the dispute. Thus, when federal maritime law applies—as it does when a contractual dispute "bears the type of significant relationship to traditional maritime activities necessary to invoke admiralty jurisdiction," *id.*[4]—there are no gaps in federal law and thus no need to adopt state law to fill those gaps. Under those circumstances, *Continental Oil* dictates that state law is not "applicable" to the

[4] Traditionally, federal maritime law applies broadly to virtually any "contract relating to ... commerce or navigation on navigable waters, or to transportation by sea or to maritime employment." *Id.* at 1048 n.8. But in adopting OCSLA, Congress decided that federal maritime law would not apply to a situs covered by OCSLA, except as noted above. *Id.* at 1048.

dispute and thus is not incorporated into federal law.

PLT never suggested that federal maritime law was the only body of federal law whose existence would obviate the need to incorporate state law into federal law, and the party that opposed application of Louisiana's lien law relied solely on the alleged applicability of federal maritime as the basis for its opposition. Indeed, the Fifth Circuit stressed that the three factors it cited were merely "significant," *id.* at 1047, not that state law should be incorporated into federal law under OCSLA whenever those three factors are satisfied.[5]

Several subsequent Fifth Circuit decisions cited the "*PLT* test" and repeated the three "significant" factors listed in *PLT*. *See, e.g., Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009). In none of those cases did the party opposing application of state law cite any body of federal law other than federal maritime law as the basis for its opposition. Indeed, in *Tetra Technologies*, the most recent Fifth Circuit decision (2016) to reference the three "significant" conditions cited by *PLT*, the Court explicitly stated that OCSLA only incorporates state law when

[5] Significantly, Judge John Brown wrote the opinions for the Fifth Circuit in both *Continental Oil* and *PLT*. Had Judge Brown intended *PLT* to overrule his prior decision in *Continental Oil*, it is likely that he would have expressed that intent in the latter decision. The failure of *PLT* to include any reference to *Continental Oil* is a strong indication that Judge Brown saw nothing inconsistent between the earlier decision and the "*PLT* test."

there are "gaps in the federal law." 814 F.3d at 738. Moreover, the Fifth Circuit has cited its *Continental Oil* decision on numerous occasions during the past half century, including in decisions issued in the years following its *PLT* decision.

In sum, the panel decision conflicts sharply with the Fifth Circuit's *Continental Oil* decision, and no decisions that the Fifth Circuit has issued since *Continental Oil* have undermined its validity. Rehearing is warranted to determine whether there are "compelling reasons" justifying the creation of that conflict.

II. THE EXTRAORDINARY RETROACTIVE LIABILITY CREATED BY THE PANEL DECISION WARRANTS *EN BANC* REVIEW

The panel's decision exposes companies whose employees work at a situs covered by OCSLA to massive retroactive liability. In reasonable reliance on a uniform body of OCSLA case law issued prior to the panel decision, oil platform employers generally paid their employees substantial premiums over applicable minimum wages for hours actually worked, but they did not separately compensate employees for sleep and rest time while on the oil platform. Rehearing is warranted because the panel adopted a novel statutory construction that upended those reasonable expectations.

As the panel recognized, federal wage-and-hour law—the FLSA and its accompanying regulations, 29 C.F.R. § 785.23—does not require employers to pay

employees for sleep and rest hours simply because employees are unable to return home between shifts. In sharp contrast, California wage-and-hour law generally requires employees to be paid for those hours. *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833, 842 (2015). Because of the panel's novel ruling that California wage-and-hour law is "applicable" to OCSLA cases, employers now face massive retroactive liability for back pay and fines.

The panel conceded that its construction of § 1333(a)(2)(A) conflicted sharply not only with *Continental Oil* but also with other federal-court decisions. Indeed, it conceded that *every* California federal district court that had previously addressed the § 1333(a)(2)(A) issue in the context of wage-and-hour claims had concluded that California wage-and-hour law is not applicable to oil platform workers. Op. 20-21 n.13 (citing *Williams v. Brinderson Constructors, Inc.*, No. CV 15-2474-MWF (AGRx), 2015 WL 4747892 (C.D. Cal. Aug. 11, 2015); *Reyna v. Venoco, Inc.*, No. CV 15-4525-PA (RAOx) (C.D. Cal. Oct. 23, 2015); *Espinoza v. Beta Operating Co.*, No. CV 15-04659-RGK (Asx) (C.D. Cal. Oct. 29, 2015); *Jefferson v. Beta Operating Co.*, No. CV 15-04966-SJO (PLAx) (C.D. Cal. Nov. 3, 2015); *Garcia v. Freeport-McMoRan Oil & Gas LLC*, No. CV 16-4320-R (C.D. Cal. Sept. 16, 2016)). In light of that uniform case law, there can be no serious question that employers acted reasonably in not paying oil-platform employees for sleep and rest hours and instead

seeking to attract employees by offering higher hourly wages and premium overtime rates.

The Supreme Court has repeatedly held that the law disfavors construing statutes in a manner that imposes retroactive liability on those who acted in reasonable reliance on prior law:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal. In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994). This Court has on a number of occasions declined to interpret federal statutes as having retroactive application when doing so would impose unfair civil penalties on individuals who had reasonably relied on previous understandings of the applicable law. *See, e.g., Tyson v. Holder*, 670 F.3d 1015 (9th Cir. 2012); *Sacks v. SEC*, 648 F.3d 945 (9th Cir. 2011); *Carmins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007). Rehearing is warranted to determine whether the panel's interpretation of § 1333(a)(2)(A) is consistent with the presumption against interpreting statutes as imposing retroactive liability in a manner

that upsets reasonable expectations.

The panel might respond that its decision does not "retroactively" impose liability under a new law but merely adopts the construction of OCSLA that Congress always intended when it enacted the statute decades ago. But that response fails to account for the fact that its construction of OCSLA had been universally rejected by other federal courts for more than 50 years. The result was that employers came to reasonably rely on that case law in ordering their affairs.[6] The concerns that animated *Landgraf*—that "settled expectations should not be lightly disrupted" and that commercial and artistic endeavors are "fostered by a rule of law that gives people confidence about the legal consequences of their actions," 511 U.S. at 265-66—are fully applicable here and warrant consideration by the *en banc* court.

At the very least, the Court should grant rehearing *en banc* to consider whether the panel's decision should be applied prospectively only. That is, the unanticipated construction of OCSLA—incorporating California wage-and-hour law into federal law for the benefit of individuals employed to work on oil platforms on the

[6] Moreover, the many oil-platform employers with unionized workforces have entered into collective bargaining agreements with their employees that cover the very wage-and-hour issues raised by Newton's claims. It would be extremely unfair if such employers, having negotiated labor contracts under which they agreed to pay (and did pay) higher hourly wages in return for an agreement that sleep and rest time would not be included within hours worked, were now to face retroactive liability for unpaid sleep and rest time.

OCS—would not apply to work performed before 2018.

Indeed, in *Chevron Oil*, one of the OCSLA decisions cited by the panel, the U.S. Supreme Court determined that it would apply its interpretation of OCSLA prospectively only, because it was concerned that retroactive application would unfairly upset reasonable expectations. 404 U.S. at 105-08. Construing § 1333(a)(2), the Court held that a Louisiana statute of limitations was incorporated into federal law by OCSLA and rendered the plaintiff's personal injury claim untimely. Because the plaintiff had acted in reasonable reliance on prior OCSLA case law regarding the timeliness of filings, the Court determined that its construction of § 1333(a)(2) should be applied prospectively only and thus that the plaintiff could proceed with his claim. *Id.* at 107. The Court stated, "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights." *Ibid.*

This Court recently relied on *Chevron Oil* in recognizing the appropriateness in civil cases of applying new rules only prospectively when parties have reasonably relied on a previous rule overturned by court decision. *Nunez-Reyes v. Holder*, 646 F.3d at 692-94. Rehearing is warranted to consider whether the panel's novel interpretation of OCSLA, even if determined to be a proper construction of the statute, should similarly be limited to prospective application only—in order to avoid

upsetting the reasonable reliance interests of employers.

CONCLUSION

WLF requests that the Court grant the petition for rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rules 29-2 and 32-1, I hereby certify:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 29-2(c)(2) because: this brief contains 4,197 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) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionately spaced typeface using WordPerfect X5 Times New Roman.

/s/ Richard A. Samp
Richard A. Samp
Attorney for Washington Legal Foundation

Dated: April 2, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of April, 2018, I electronically filed the foregoing brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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