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July 27, 2018

Hon. Blake Hawthorne, Clerk
The Supreme Court of Texas
201 West 14th Street, Rm. 104
Austin, Texas 78701

Via EFile.TXcourts.gov

Re: Amicus Curiae letter brief for No. 16-0505, *Murphy Exploration & Production Co.—USA v. Shirley Adams, et al.*

Dear Mr. Hawthorne:

Amici, National Association of Royalty Owners-Texas, Texas Land and Mineral Owners Association, G. Wade Caldwell, David Drez, James Holmes, Alfred A. Steinle, Walker C. Friedman, Allen D. Cummings, Richard L. Leshin, George Parker Young, Catherine M. Stone, John Petry, Stephen Ahl, Dick Watt, Jim Drought, Calhoun Bobbitt, Joseph Fitzsimons and Robert Park, submit this letter brief and respectfully urge the Court to grant the Respondents' Motion for Rehearing filed on behalf of Shirley Adams, Charlene Burgess, Willie Mae Herbst Jasik, William Albert Herbst, Helen Herbst, and R. May Oil & Gas Company, Ltd., and reconsider the broad ramifications of the Court's decision in this case. Murphy Exploration & Production Company—USA shall be referred to as "Petitioner."

Amici are statewide advocacy organizations and Texas licensed oil and gas attorneys representing numerous land and mineral owners throughout the State of Texas, and have a vested interest in protecting the freedom to contract. Pursuant to

Texas Rule of Appellate Procedure 11, *Amici* certify that no compensation has or will be paid for preparation of this letter.

Amici respectfully submit this letter out of shared concern that the Court's opinion in this case has upended established Texas law by redefining industry definitions and canons of contract construction known and relied upon by all Texas oil and gas attorneys. The Court's ruling not only changes the long established meaning of "offset well", but, far more dangerously, opens the door for the unilateral judicial modification of negotiated oil and gas leases.

Additionally, the Court's ruling does not provide any guidance as to whether the Offset Clause and similar offset clauses will be applied in the same manner as to different well types and formations, and fails to clarify whether the Offset Clause[1] supplants the implied covenant to protect against drainage. And in either case, the Court's ruling will lead to inequitable and unintended results.

1. **The Court's use of the "surrounding circumstances" doctrine effects a policy based contractual modification.**

The foundation of the Court's decision is the presumption that the Offset Clause was "drafted with horizontal shale wells in mind" and the parties "recognize[ed] that there is little to no drainage in the Eagle Ford shale, and therefore no reason to locate the offset well near the lease line."[2] The Court based this presumption upon two sources—an affidavit filed as summary judgment evidence by Petitioner's expert witness John C. McBeath (the "McBeath Affidavit") and a law review article co-authored during the pendency of this suit by Petitioner's trial counsel, Jason Newman (the "Newman Article"). [3]

[1] "Offset Clause" as used herein refers to the offset clause at issue in this case and is defined on page 3 of the Brief of Amicus Curiae Texas Land & Mineral Owners Association In Support of Respondents' Brief on the Merits.
[2] *Murphy Expl. & Prod. Company—USA v. Adams*, 2018 Tex. LEXIS 516 at *5
[3] Jason Newman & Louis E. Layrisson, III, *Offset Clauses in a World Without Drainage*, 9 TEX. J. OIL GAS & ENERGY L. 1 (2013).

For the Court, these presumptions supplied the "context" in which the Leases[4] and the Offset Clause were negotiated.[5] The Court then used this context to interpret the Offset Clause pursuant to the "surrounding circumstances" doctrine, which states that the "facts and circumstances surrounding [a] contract's execution" may "inform [the court's] construction of the [contract]."[6] However, the use of the surrounding circumstances doctrine in this case grossly exceeds the scope and limitations of the doctrine as recently set forth by this Court:

> What "facts and circumstances" may be consulted will naturally vary from case to case, but reasonably well-defined contours can be mined from our jurisprudence. Because objective intent controls the inquiry, only circumstantial evidence that is objective in nature may be consulted . . . In deciding what facts and circumstances are informative rather than transformative, ascertaining objective meaning is the touchstone. A certain degree of latitude is inherent in the inquiry, but absolute limits on the use of surrounding circumstances are abundantly clear. Parties cannot rely on extrinsic evidence to give the contract a meaning different from that which its language imports, add to, alter, or contradict the terms contained within the agreement itself, make the language say what it unambiguously does not say, or show that the parties probably meant, or could have meant, something other than what their agreement stated.[7]

Despite the limitations set forth by this Court in *URI, Inc.*, the Court's ruling assumes that Respondents were aware of the assertions contained within the McBeath Affidavit and the Newman Article in 2009 without any supporting evidence in the record.[8] And more troubling, the Court then *removes* the term

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[4] As defined on page 3, Brief of Amicus Curiae Texas Land & Mineral Owners Association In Support of Respondents' Brief on the Merits.
[5] *Murphy Expl. & Prod. Company—USA v. Adams*, 2018 Tex. LEXIS 516 at *15—16.
[6] *Id.* at *7.
[7] *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 767—768 (Tex. 2018) (internal citations omitted).
[8] As the dissent correctly points out, *there is no evidence in the record whatsoever* showing that the original parties to the Leases had any knowledge as to the drainage characteristics of *any* formation, let alone that there was "little to no drainage" in the Eagle Ford shale. "[T]he Court's entire discussion is neither linked to language of the Leases, nor any evidence in this record . . . ." *Murphy Expl. & Prod. Company-USA v. Adams*, 2018 Tex. LEXIS 516, *29-30.

"offset well" from the Offset Clause and *replaces* it with the term "offset".[9] The Court states that "offset", as used in the Leases, means a well that "serves to counterbalance or to compensate for" a triggering well on adjacent property. To reach this conclusion, the Court uses one of the several definitions of the *noun* "offset" given in Merriam Webster's dictionary.

However, the Leases do not use the term "offset" as a noun. The Leases use the compound noun "offset well" made up of the *adjective* "offset" and the noun "well".[10] The compound noun "offset well" is defined in the Merriam-Webster Dictionary as "an oil well drilled opposite another oil well on an adjoining property."[11] This is not mere semantics. If the Court is going to ignore the industry accepted meaning of an unambiguous term and use a common dictionary definition, it cannot substitute an entirely different word and grammatical form. The omission and addition of terms is strictly prohibited by the surrounding circumstances doctrine.[12]

Amici are concerned that the Court's ruling has used the surrounding circumstances doctrine as a pretext for a policy-based balancing of correlative rights.[13] While the balancing of efficient oil and gas development against private property rights may be a legitimate policy goal of this Court in cases regarding

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[9] *See Murphy Expl. & Prod. Company—USA v. Adams*, 2018 Tex. LEXIS 516, *16. "While the leases do not provide a formal definition of the term 'offset well', the phrase is nevertheless internally defined by the leases' description of where and to what depth the offset well must be drilled. And these requirements qualify such a well as one that 'serves to counterbalance or to compensate for a triggering well on the adjacent property." *Id*. (citing *Offset*, WEBSTER'S THIRD INT'L DICTIONARY 1567 (2002)).

[10] Compound nouns "often have a meaning that is different, or more specific, than the two separate words." *Compound Nouns*, available at https://www.ef.edu/english-resources/english-grammar/compound-nouns/

[11] *See* Offset Well Definition, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/offset%20well.

[12] *URI, Inc. v. Kleberg Cty*., 543 S.W.3d 755, 767—768 (Tex. 2018).

[13] The Newman Article, quoted extensively by the majority, emphasizes the "balance" struck by Texas courts between "efficient development" and the "lessor's rights" and counsels the courts to "decline to apply . . . 'deemed drainage' provisions[s] . . . [to] signal an approach committed to restoring [such] balance." Jason Newman & Louis E. Layrisson, III, *Offset Clauses in a World Without Drainage*, 9 TEX. J. OIL GAS & ENERGY L. 1 (2013).

certain common law remedies[14], private contracts are another matter.[15] Texas courts have consistently refused to modify the plain language of oil and gas leases, even when the results are arguably inconsistent with efficient, economic development.[16] Texas courts have recognized that parties to private contracts are masters of their own agreements, and it is not for any court to decide what the parties *should* have negotiated.[17]

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[14] *See, e.g.*, *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 50 (Tex. 2017) ("whether the small amount of minerals lost. . . will support a trespass action must, in the end, be answered by balancing the interests involved . . . [W]e have no doubt that individual interests in the oil and gas lost through being brought to the surface as part of drilling a well are outweighed by the interest of the industry as a whole and society in maximizing oil and gas recovery"); *Railroad Commission of Texas v. Manziel*, 361 S.W.2d 560, 568-69 (Tex. 1962) ("technical rules of trespass have no place in the consideration of the validity of the orders of the Commission").

[15] *See Phillips v. Union Bankers Ins. Co.*, 812 S.W.2d 616, 619 (Tex. App.—Dallas 1991, no writ) ("[T]his Court has no authority to revise a contract while professing to construe it. We cannot rewrite an unambiguous contract to conform with one party's assertions regarding public policy."); *see also General Am. Indem. v. Pepper*, 339 S.W.2d 660, 661 (Tex. 1960) ("Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves.").

[16] *Jones v. Killingsworth*, 403 S.W.2d 325 (Tex. 1965) (finding that the lessee breached the pooling clause even though the lessee was acting in good faith, was authorized to pool, and had a valid permit from the Railroad Commission); *Texas Oil & Gas Corp. v. Vela*, 429 S.W.2d 866, 871 (Tex. 1968) (refusing to grant relief due to changing market realities, noting the royalty obligation "may prove financially burdensome to a lessee who has made a long-term contract without protecting itself against increases in market price"); *Browning Oil Co. v. Luecke*, 38 S.W.3d 625, 641-42 (Tex. 2000) (upholding an onerous pooling provision, stating "If . . . drilling a horizontal well on an eighty acre unit was economically impractical, they could have attempted to expand their pooling authority . . . [f]ailing that, they could have exercised the option of not drilling a well . . . [w]hat they could not do was [breach the lease]"); *ConocoPhillips Co. v. Vaquillas Unproven Minerals, Ltd.*, 2015 Tex. App. LEXIS 8194 (Tex. App.—San Antonio Aug. 5, 2015, pet. granted, judgm't vacated w.r.m.) (mem. op) ("ConocoPhillips further argues that the trial court's construction of the retained acreage clause would adversely affect the provision in the lease allowing for pooling. This argument, however, only establishes that parties must be careful in drafting oil and gas leases to avoid conflicts."); *Endeavor Energy Res., L.P. v. Discovery Operating, Inc.*, 2018 Tex. LEXIS 316 (Tex., Apr. 13, 2018) (enforcing a retained acreage clause despite resulting in economic loss, stating "Lessees who agree to leases like those at issue here must meet 'the condition which they imposed upon themselves . . . . they have only themselves to blame.").

[17] *Thedford Crossing, L.P. v. Tyler Rose Nursery, Inc.*, 306 S.W.3d 860, 867 ("We cannot change the contract simply because we or one of the parties comes to dislike its provisions or thinks that something else is needed in it.").

Additionally, this Court's policy-based decision ignores the purpose of private contracts. While the Court's ruling states that there is an "absence of a *significant* possibility that drainage was in fact occurring"[18], the Lucas Well *may actually be draining* oil and gas from the Respondents' property. There is no evidence in the record either way, and for good reason.[19] The Offset Clause in the Leases is a negotiated hedge, a method of avoiding debates about geology, formation characteristics, or whether any individual well is draining Respondents' tract. Private parties regularly use contracts to allocate risk and provide for protection from even unlikely scenarios in a variety of situations.[20] The mere fact that drainage is *possible*, no matter how remote, supplies more than enough justification for Respondents' inclusion and interpretation of the Offset Clause, if justification is needed for the enforcement of freely negotiated contractual terms.

The Court's reliance on the surrounding circumstances doctrine is troublesome to *Amici* because it casts uncertainty upon almost every term and provision in every oil and gas lease. Attorneys will no longer be able to reasonably advise their clients as to the legal effect of long-understood terms and provisions when each term and provision can be transformed based on whatever future "context" is expedient to the operator. This Court should grant Respondents' motion for rehearing in order to reaffirm the limitations imposed by this Court's previous rulings on the surrounding circumstances doctrine.

2. The Court's opinion leads to inequitable and unintended results.

While the Court purports to limit its holding to "unconventional production in tight shale formations", the Court bases its decision not only on the "context" of the Eagle Ford shale, but also on the unambiguous language contained within the

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[18] *Murphy Expl. & Prod. Company-USA v. Adams*, 2018 Tex. LEXIS 516 at *15.

[19] As the dissent acknowledged, by tying the offset obligation to a specified distance but without a requirement that the well be actually draining the property, the Herbsts "avoided . . . having to shoulder the burden of proving the lessee breached the 'substantial drainage' element of the implied covenant to protect the lease in the event a controversy such as this arose." *Murphy Expl. & Prod. Co.-USA v. Adams*, 2018 Tex. LEXIS 516 at *49.

[20] *See, e.g., TEX Olmos, LLC v. ConocoPhillips Co.*, 2018 Tex. App. LEXIS 3909 at *14 ("[A] promisor can protect himself against foreseeable events by means of an express provision in the agreement.").

four corners of the Offset Clause.[21] The Court's ruling thus leads to uncertainty as to whether the Offset Clause functions differently as applied to different well types and formations. If an "offset well", as the Court opines, is simply a well drilled with "due diligence" to a "depth adequate to test the same formation" as the adjacent well "and no more", then it would seem the Court's reasoning must be applied to all well types and all formations, including vertical wells drilled in conventional formations.[22] This will lead to several inequitable and unintended results depending upon whether the Offset Clause is an express drainage protection clause—another question which the Court did not explicitly answer.

If the Offset Clause is an express drainage protection clause, it supplants the implied covenant to protect against drainage.[23] In such case, the majority opinion will deprive landowners with similar offset clauses of all drainage protection. If the implied covenant is supplanted, the express offset clause is the only drainage protection the landowner will have. But under the majority's ruling, even if the landowner could prove actual drainage is occurring from an adjacent well (regardless of the well type or formation), the lessee would only be obligated to drill a well "with due diligence" to a "depth adequate to test the same formation", whether or not such well was actually protecting the leasehold from drainage. It is difficult to see how this would "counterbalance" or "compensate" the aggrieved landowner when oil and gas is being drained from their property with no available remedy.[24]

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[21] "While the leases do not provide a formal definition of the term 'offset well', the phrase is nevertheless internally defined by the leases' description of where and to what depth the offset well must be drilled." *Murphy Expl. & Prod. Co.—USA v. Adams*, 2018 Tex. LEXIS 516 at *16.

[22] *Id.* at n. 10.

[23] *Middle States Petroleum Corp. v. Messenger*, 368 S.W.2d 645 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.) ("The duty of the lessee to prevent drainage ordinarily requires him, in the absence of contrary agreement, to drill necessary offset wells, but where there is an express provision covering the subject, the court will not imply inconsistent obligations").

[24] A full waiver of drainage protection is disfavored by the courts. *See Shell Oil Co. v. Stansbury*, 401 S.W.2d 623, 630 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.) ("A lessor and lessee may contract so that lessee is never under obligation to drill an offset well. To so contract, however, the language must be very clear.").

If the Offset Clause is not an express drainage protection clause, then the implied covenant is still operative.[25] In this case, if the landowner could prove substantial drainage from an adjacent vertical or horizontal well, the lessee would have to drill two wells; one under the implied covenant and one under the Offset Clause. This would also mean that Respondents could still bring an action against Petitioner based on the implied covenant to protect against drainage. This Court should grant Respondent's motion for rehearing in order to clarify its ruling and foreclose such inequitable and absurd results.

For the foregoing reasons, *Amici* respectfully submits that the Court should grant Respondents' motion for rehearing.

Respectfully submitted,

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[25] *Texas Co. v. Ramsower*, 7 S.W.2d 872 (Tex. Comm. App. 1928), *aff'd on rehearing* 10 S.W.2d 537 (Tex. Comm. App. 1928) (ruling that delay rental clause refers to an initial exploratory or development well to be drilled at the will of the lessee and does not relate to the subject matter of the drainage covenant; the two covenants include different subjects).

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief contains 3,019 words, excluding the portions of the brief exempted by Rule 9.4(i)(1). I further certify that this document was produced using Microsoft Word 2010 and complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e).

By: */s/ Robert M. Park*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27 day of July, 2018, a true and correct copy of this letter brief was electronically filed with the Supreme Court of Texas and served through the court-approved electronic filing and service system on all counsel of record in this case.

By: */s/ Robert M. Park*
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