

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 PARKER DRILLING MANAGEMENT)
4 SERVICES, LTD.,)
5 Petitioner,)
6 v.) No. 18-389
7 BRIAN NEWTON,)
8 Respondent.)

9 - - - - -
10 Washington, D.C.
11 Tuesday, April 16, 2019

12
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:04 a.m.

16
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1 Ninth Circuit effectively treats the Outer
2 Continental Shelf no differently from the
3 mainland, where California is sovereign, and
4 contradicts the most basic --

5 JUSTICE SOTOMAYOR: Not -- not quite.

6 MR. CLEMENT: -- judgments --

7 JUSTICE SOTOMAYOR: Not quite. The
8 Secretary could override the state law, which
9 is not what generally happens in conflict
10 preemption. Federal law -- federal agents have
11 to enforce state law. There are substantial
12 differences built into the Act.

13 What I don't see is a clear statement
14 that says something like you want the word
15 "applicable" to mean, only if there's a gap or
16 a void.

17 MR. CLEMENT: Well, Justice Sotomayor,
18 I think some of the unusual characteristics
19 about state law when it's borrowed and then
20 sort of transformed into federal law on the
21 shelf actually, I think, help provide the
22 context that informs the meaning of the word
23 "applicable."

24 I -- I don't think there's any real
25 doubt here that "applicable" means suitable or

1 appropriate or fit for a purpose. So then the
2 question really becomes when is it appropriate
3 to have state law be transformed into federal
4 law for use on the shelf?

5 And I think --

6 JUSTICE SOTOMAYOR: But tell me why --
7 when it's not inconsistent. Meaning -- and
8 that's my problem. It's suitable only -- and
9 the language says, when it's inconsistent.
10 But, here, federal law clearly states that
11 state law can supplement federal law.

12 So where's the inconsistency?

13 MR. CLEMENT: Well, to -- I want to
14 answer your question, Justice Sotomayor, but I
15 -- first, I do want to point out I view the
16 statute as really having two requirements, that
17 it has to be state law applies to the extent it
18 is applicable and not inconsistent.

19 Now, to talk to the non-inconsistent
20 piece, here, I think the inconsistency is
21 pretty glaring. In fact, the whole reason
22 we're here is because California has a very
23 different rule for addressing sleeping time on
24 the employer's premises than the federal rule.
25 And the federal regulators looked at this and

1 they decided generally we're not going to have
2 sleeping time be treated as work hours, and
3 we're generally going to respect the agreements
4 of the employer and the employee.

5 California looked at that specifically
6 and said: Well, we like that rule for
7 healthcare workers and one or two others, but
8 not for most other workers. We reject the
9 federal analysis.

10 Now, to me, that makes them pretty
11 glaringly inconsistent. Now my friends on the
12 other side, and I take the import of your
13 question, would say: Ah, but there's the
14 savings clause.

15 Well, there's at least three problems
16 I see with the savings clause.

17 The first is the savings clause is not
18 even implicated by its terms unless state law
19 and federal law are inconsistent. If state law
20 and federal law are consistent, you don't need
21 the savings clause. You never get there. They
22 don't -- when the savings clause applies,
23 moreover, it doesn't make federal law and state
24 law consistent. It basically tells the
25 employer which of two inconsistent laws they

1 need to follow, which I think is quite
2 different.

3 The second problem with the savings
4 clause is I think you can't divorce the savings
5 clause from the reason that it's in the FLSA
6 and most statutes, which is to respect the fact
7 that states are, and have been since the
8 framing, the primary regulators of employment
9 relationships and the like.

10 And so, when a state is applying its
11 law in its sovereign territory, I would say
12 it's understandable and laudable that the
13 federal government wants to say: Well, your
14 state law can apply if it's more demanding.
15 But that principle is completely out of place
16 on the Outer Continental Shelf, where all law
17 is federal law.

18 We have a third reason, which I'm
19 happy to get out, which is Congress also knows
20 -- and we have some statutes collected at
21 Footnote 3 of the blue brief -- Congress
22 actually knows how to enact a -- call it a
23 super-savings clause or a savings clause that's
24 specific to federal enclaves. And with respect
25 to certain state laws, state unemployment

1 compensation laws, state workers' comp laws,
2 Congress has said we want the state law to
3 apply even on a federal enclave. But that's
4 not what it did with the Fair Labor Standards
5 Act.

6 JUSTICE KAGAN: Mister --

7 MR. CLEMENT: The Fair Labor Standards
8 -- sorry.

9 JUSTICE KAGAN: Finish your sentence.

10 MR. CLEMENT: The Fair Labor Standards
11 Act is an ordinary savings clause which I think
12 accommodates federalism but wouldn't apply in
13 the -- a federal enclave.

14 JUSTICE KAGAN: After all that, I'm
15 going to take you back to the work -- word
16 "applicable." The language here is clearly not
17 the clearest way of expressing what you want to
18 express, which is that state law applies when
19 there's a gap in federal law. So you rightly
20 say that we look to context as well.

21 And as far as I can see, and tell me
22 if I'm wrong about this, really, your main
23 argument from context is the statement about
24 enclaves, right, that these -- that this should
25 be treated the same way as federal enclaves

1 are, is that correct?

2 MR. CLEMENT: I would really say I
3 have two principal arguments. One of them is
4 the enclave point. But I think even before you
5 get there, I mean, the -- the fact that
6 1333(a)(2) converts the state law into federal
7 law to be applied by federal administrators
8 seems to tell me that something odd is going on
9 here.

10 And then particularly, if you read
11 that in conjunction with 1333(a)(1), which
12 extends the whole body of federal law to the
13 shelf, the way I think about it, just to put it
14 simply, is even apart from federal enclave
15 principles, like why would you create surrogate
16 federal law, which is what 1333(a)(2) does,
17 unless you had a gap in the actual federal law
18 that was extended to the shelf by 1333(a)(1)?

19 JUSTICE KAGAN: Well, possibly because
20 you know that you want this to be administered
21 by federal agents, and if it's going to be
22 administered by federal agents, it should be
23 federal law.

24 So -- and let -- let's just go to the
25 enclaves business --

1 MR. CLEMENT: Sure.

2 JUSTICE KAGAN: -- because I think
3 that that's an important part of your argument,
4 and -- and it's something on which people seem
5 to disagree, and it seems as though it should
6 have a clear answer, but I'm honestly not
7 finding it.

8 So, as I understand Mr. Frederick's
9 position, he says that, apart from the ACA, the
10 crimes act, that -- that, in fact, in federal
11 enclaves, state civil law is applied. Do you
12 think that that's wrong?

13 MR. CLEMENT: We do think that's
14 wrong, and, you know, I think fortunately for
15 me, the federal government agrees with me and
16 has agreed with me in an unbroken chain at
17 least since about 1958, when they put together
18 that exhaustive survey, which the Solicitor
19 General cites, which is roughly contemporaneous
20 with OCSLA, and the Justice Department was up
21 there testifying in front of Congress.

22 So I tend to think that I'm in pretty
23 good company on my understanding of federal
24 enclave law, but I do understand federal
25 enclave law very -- very succinctly as this,

1 which is, when you have a new federal enclave,
2 you don't borrow state law as a general matter
3 and you specifically don't borrow state law
4 when there's federal law on the same matters,
5 which I think is the language right from
6 McGlinn.

7 JUSTICE KAGAN: Even as to preexisting
8 state law?

9 MR. CLEMENT: Even as to preexisting
10 state law. And the reason I think that
11 makes --

12 JUSTICE KAGAN: And do -- how do we
13 know that? Where -- where is that coming from?
14 Do we have cases that say that? Do we -- is
15 there some like federal manual that says that?
16 What -- what's --

17 MR. CLEMENT: So --

18 JUSTICE KAGAN: I feel as though
19 people -- this should be something with an
20 answer, and all we have is sort of assertions
21 on both sides.

22 MR. CLEMENT: So there's -- there's
23 three places I would look. I would look to
24 McGlinn. I would look to this comprehensive
25 federal survey. I mean, my goodness, it's like

1 200 pages long, and it comes to the same
2 collusion. And then the third place I would
3 look to is the Assimilated Crimes Act, because
4 I don't think the way to understand the
5 Assimilated Crimes Act, which as to criminal
6 law makes this point more specific, as being
7 something unique to criminal law.

8 It's really that the Congress in 1825
9 addressed criminal law because they had a
10 particular problem that they didn't have with
11 civil law, right? Which is the United States
12 v. Hudson case, which says you can't have
13 common law crimes.

14 So Congress was forced to act with
15 respect to criminal law, and when it acted,
16 what I'd say it did with the Assimilated Crimes
17 Act is it reflected the broader principle,
18 which is it didn't say we're going to apply
19 federal criminal law and state -- rather,
20 borrow state criminal law even where we have an
21 on-point federal criminal statute. It said,
22 no, we're going to borrow it to fill the gaps.

23 And if you take a step back, I think
24 that is the basic problem that you have in a
25 newly created federal enclave, which is, you

1 know, the -- it's the same problem Congress had
2 in enacting OCSLA, which is, you -- you've made
3 it a federal enclave, so you're not anxious to
4 have a lot of state law applying there, but,
5 you know, the law, like nature, abhors a
6 vacuum, so you just don't want to have all
7 sorts of, whether it's a cow wandering on to
8 the railroad or whether it's people having a
9 bet and, you know, no contract law, you just
10 don't want there to be a vacuum.

11 So you look --

12 JUSTICE GINSBURG: Are there -- are
13 there federal enclaves inside California?

14 MR. CLEMENT: There are.

15 JUSTICE GINSBURG: And what is the
16 labor law regime there?

17 MR. CLEMENT: The -- the majority view
18 is that the Fair Labor Standard Acts -- Act
19 does not apply to the federal enclaves when
20 they are within a state. My -- my friend has
21 found an unpublished opinion that applies a
22 different rule, but we found something like
23 four or five or six opinions that go the other
24 way.

25 So there is -- I think the majority

1 view is that even on land, the Fair Labor
2 Standards Act doesn't apply on a federal
3 enclave. You have one federal minimum wage.

4 And, again, I think that's -- that
5 that conclusion is probably buttressed by the
6 example of state worker's comp law and state
7 unemployment law, where you have specific
8 federal statutes collected in Footnote 3 in our
9 brief, which make those laws applicable even on
10 a federal enclave.

11 So the law in California is that when
12 Congress is specific that a federal employment
13 statute applies to the enclave, it applies to
14 the enclave, but otherwise, one federal minimum
15 wage law is enough on the federal enclaves.

16 So --

17 JUSTICE GINSBURG: And it would be the
18 state law?

19 MR. CLEMENT: No, no. It would be the
20 federal law. One federal minimum wage is
21 enough on the federal enclaves. It's the one
22 provided by the FLSA.

23 So the higher California minimum wage
24 law does not apply on the federal enclaves. I
25 mean, so I -- I think we have the much better

1 view of the federal enclave law.

2 If you're a little nervous, though,
3 about making a definitive holding about federal
4 enclave law, I suppose you really can get to
5 the same conclusion just based on the structure
6 of 1333 and the fact that (a)(1) extends the
7 whole body of actual federal law to the shelf,
8 and Congress even was clear that that meant the
9 Fair Labor Standards Act, and then, when you
10 get to (a)(2), you don't needlessly take state
11 law and convert it into federal law to be
12 administered by federal officials.

13 JUSTICE GINSBURG: Can we -- can we go
14 back to something --

15 MR. CLEMENT: Sure.

16 JUSTICE GINSBURG: -- Justice
17 Sotomayor suggested, and I wonder if you agree
18 with it, that there's no problem because the
19 Secretary can knock out any state reg -- any
20 state law it doesn't -- doesn't want by
21 regulation.

22 MR. CLEMENT: We -- we don't agree
23 with that, Justice Ginsburg. So I appreciate
24 the opportunity to make that clear.

25 As we read -- the provision that --

1 that I think my friend on the other side is
2 relying on is 1334(a) of OCSLA, and that
3 provision as I read it gives the Secretary of
4 Interior the authority to promulgate
5 regulations addressing leasing or leases on the
6 Outer Continental Shelf.

7 Now I suppose, if I lost this case, I
8 might want to make an ambitious argument that
9 working conditions has something to do with
10 leases on the Outer Continental Shelf, but I
11 don't think that's the better argument, and I
12 don't think it's as simple as the Secretary of
13 the Interior can trump anything he or she
14 wants.

15 I think that the regulatory authority
16 is a little more modest under --

17 CHIEF JUSTICE ROBERTS: Well, but
18 isn't it that --

19 JUSTICE SOTOMAYOR: Is there anything
20 but leasing on the continental shelf?

21 MR. CLEMENT: I'm sorry?

22 JUSTICE SOTOMAYOR: Is there anything
23 but leasing on the continental shelf? Nobody
24 owns those operations. I thought they were
25 fairly heavily regulated by the Secretary

1 generally.

2 MR. CLEMENT: Sure, but -- but the
3 specific term says the leases, not leasing.
4 And, again, you know, I don't want to say that
5 I couldn't make an argument, but I -- I would
6 say based on the plain language of the
7 regulatory authority, I don't think the
8 Secretary of Interior has that authority and I
9 think it would be a little weird, frankly, for
10 the Secretary of Interior to effectively have
11 to take action to vindicate the judgment of the
12 wage-and-hour division regulators, who looked
13 at the specific issue of how to treat sleep
14 time and came to a considered conclusion that
15 sleep time, we don't want to make automatically
16 part of hours worked.

17 JUSTICE SOTOMAYOR: One -- one of the
18 difficulties I have here is, how do you define
19 void or gap? So let's talk about that, because
20 you can always define it broadly or narrowly.

21 If there's a state law that says you
22 can't fire somebody for going to jury service
23 for a state calling, not a federal, is that a
24 void or gap that the federal law doesn't do
25 that?

1 MR. CLEMENT: I -- I -- I would
2 probably say in that situation that there's not
3 a gap in federal law because federal law
4 addresses the general subject of sort of
5 employment discrimination and the like.

6 I -- I actually think that -- I mean,
7 obviously, the jury service example's probably
8 uniquely unlikely to arise directly on the
9 Outer Continental Shelf and it also might be
10 the kind of thing --

11 JUSTICE SOTOMAYOR: Not quite. I
12 mean, people can be called. They're given X
13 number of extensions. And then they're told
14 show up.

15 MR. CLEMENT: Yeah. And so I --

16 JUSTICE SOTOMAYOR: And you go to your
17 employer and you say, out on the shelf: I got
18 to take a week because I've got to go serve.

19 MR. CLEMENT: And -- and -- well, and
20 so there's a --

21 JUSTICE SOTOMAYOR: And to you, that's
22 not -- can you see the other side of that
23 argument?

24 MR. CLEMENT: I -- I can see the other
25 side of that argument and I can also see that

1 that --

2 JUSTICE SOTOMAYOR: So that -- that --
3 that begs the question, which is, I know
4 conflict preemption and I know that some of my
5 colleagues don't like it, but at least there's
6 a well-defined body of law.

7 Under your views, we're back to now
8 defining a different kind of conflict
9 preemption, one that has to do with voids and
10 gaps.

11 MR. CLEMENT: Well, so, Justice
12 Sotomayor, a couple --

13 JUSTICE SOTOMAYOR: So why isn't a
14 statute of limitations or a failure to have one
15 not a void? There is a federal common law. We
16 don't like to use it, but we have a case that
17 said we're going to use Louisiana's statute of
18 limitations. That wasn't a void or gap, even
19 though we had federal law.

20 MR. CLEMENT: Well, specifically, in
21 that case, you were -- you were looking at the
22 question of whether you should borrow a statute
23 of limitations from federal common law. And it
24 seemed clear to this Court from the legislative
25 history that federal common law was not what

1 Congress wanted you to use for gap.

2 JUSTICE SOTOMAYOR: How about the high
3 seas, Death on the High Seas Act? That was
4 federal law.

5 MR. CLEMENT: That -- that's right.
6 And -- and this --

7 JUSTICE SOTOMAYOR: And we still
8 borrowed state law.

9 MR. CLEMENT: Exactly. Because this
10 Court found a gap, and I actually think that
11 Rodrigue, which is the case where you look to
12 state law borrowed through the lands act as
13 opposed --

14 JUSTICE SOTOMAYOR: But we had federal
15 law that answered --

16 MR. CLEMENT: -- to the Death on the
17 High Seas Act --

18 JUSTICE SOTOMAYOR: -- but we had
19 federal law that answered the question.

20 MR. CLEMENT: Exactly. But it didn't
21 answer the question on the platforms. It only
22 answered the question on the seas. And this
23 Court said -- and this was, you know, as I
24 understand it, basically its holding, that, you
25 know, since there was sort of no federal law

1 that directly applied, there was a gap, and you
2 borrowed state law.

3 And I would only add before I sit down
4 that the Fifth Circuit, and really every court
5 that's wrestled with this question until the
6 Ninth Circuit in the decision below, has been
7 applying this Court's cases, which they
8 understood as applying this gap-filling
9 analysis, and none of them have had a real
10 problem with that.

11 And, certainly, I don't think any of
12 them would identify a gap here, where the Fair
13 Labor Standards Act comprehensively addresses
14 issues of overtime and the like.

15 JUSTICE KAGAN: Just on that, Mr.
16 Clement, and I apologize, but I think people
17 are a little bit overreading the Fifth Circuit
18 decision or let me just put out the possibility
19 that that's true.

20 The Fifth Circuit decision, when it
21 talks about these gaps, is really saying that
22 there's a federal remedial scheme that covers a
23 problem and so that there's no need to look for
24 remedies anyplace else.

25 And that's a very different kind of

1 situation than the one we have here, isn't it?

2 MR. CLEMENT: No, I -- I think this is
3 exactly the same situation, which is you do
4 have a federal remedial regime that provides a
5 remedy for overwork, and you don't need to look
6 to state law to borrow a different regime that
7 you would then make a second and duplicative
8 and I think inconsistent federal minimum wage
9 statute.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 MR. CLEMENT: Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Michel.

14 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL
15 FOR THE UNITED STATES, AS AMICUS CURIAE,
16 IN SUPPORT OF THE PETITIONER

17 MR. MICHEL: Mr. Chief Justice, and
18 may it please the Court:

19 More than 70 years ago, in United
20 States versus California, this Court clarified
21 the federal government's paramount sovereignty
22 over the continental shelf. Congress
23 reinforced that interest throughout OCSLA,
24 including its choice of law provision.

25 Now, unlike a typical choice of law

1 provision, Section 1333 of OCSLA does not
2 direct a choice between two bodies of law.
3 Instead, it creates one body of law, a body of
4 federal law, and it adopts state law as "the
5 law of the United States" to the the extent it
6 is applicable and not inconsistent with other
7 federal law.

8 Now, as this Court and virtually every
9 other court has recognized for 50 years, those
10 words refer to gap-filling in federal law.
11 Respondent's position, by contrast, would
12 essentially replicate the position on mainland
13 California on the Outer Continental Shelf, with
14 the small exception that federal officials
15 would enforce the law, which we think is
16 inconsistent with the text, the purpose, and
17 the history of -- of OCSLA.

18 CHIEF JUSTICE ROBERTS: How would
19 federal officials enforce the state law? Are
20 there sort of administrative responsibilities
21 with respect to the state employment law that
22 the federal officials would have to undertake
23 or --

24 MR. MICHEL: That -- that is -- it's a
25 -- that is a big concern that -- that -- that

1 we have. You know, I think, if you look at
2 this case in particular, it's actually state
3 administrative law that's being construed by
4 the California Supreme Court against Wage Order
5 16 that the Mendiola case is construing.

6 So you do have federal officials sort
7 of trying to interpret the -- the -- the work
8 of state administrators, which is difficult.

9 CHIEF JUSTICE ROBERTS: But, I mean, I
10 -- are they filling out forms or are they
11 enforcing? I mean, I don't quite know what
12 you're talking about when you say federal
13 officials will have to administer.

14 I mean, it -- are they just simply
15 checking to make sure that they're being paid
16 whatever it is, \$12 or --

17 MR. MICHEL: I see, yeah. I mean, it
18 varies, obviously, depending on the regulation.
19 With something like this, you know, presumably,
20 it's the -- it would be the Wage-and-Hour
21 Division of the Labor Department that ensures
22 compliance with minimum wage laws in the same
23 way that it does on the mainland, although, of
24 course, it would have to adopt all of this
25 state law where we already have a federal law.

1 And as we reproduce in the appendix to our
2 brief, you know, federal law, including Labor
3 Department regulations, address a lot of these
4 issues already.

5 And I do think, you know, if you sort
6 of picture page -- at page 8a of our -- our
7 brief, for example, we have the statute on the
8 minimum wage, which at the bottom says it's
9 \$7.25 an hour.

10 Given this unique choice of law
11 provision, what we're -- what Respondent is
12 essentially saying is that you should adopt
13 another sub-provision that has a different
14 federal minimum wage. And I -- I do think it's
15 just a very odd concept and one that has no
16 support in -- in the statute's history to say
17 we're going to have two federal minimum wages,
18 where federal law has already answered this
19 question.

20 JUSTICE BREYER: The -- what -- one --
21 two questions, but one is minor. And if you
22 don't know, just say.

23 What percentage, rough guess, of Outer
24 Continental Shelf activity takes place in the
25 Fifth Circuit? Is it more like -- that's one

1 question. And do you want -- if you have a
2 quick answer, I have another question.

3 MR. MICHEL: I have a pretty quick
4 answer. I think it's about 97 percent.

5 JUSTICE BREYER: Ninety-seven percent,
6 okay. Now my second question is this, that --
7 that has federal enclaves in mind. There are
8 dozens and dozens of federal regulatory
9 programs. They have to do with, you know,
10 safety, OSHA, NHTSA, drugs, you name it. And
11 in those thousands and thousands of federal
12 regulations, there's quite a lot of room for
13 state activity, even in tort law. We've had
14 cases like that, the FDA.

15 What's been the practice? That is to
16 say, there is room in the sense that federal
17 law does not preempt the state law, but it does
18 lay down rules that generally apply. All
19 right. In federal enclaves in general, can you
20 shed any light on whether, with those thousands
21 of other statutes and regulations, there has
22 been a practice of just limiting it to
23 preemption, otherwise state law applies, or a
24 practice of looking for a gap?

25 MR. MICHEL: So I -- I think, to

1 start, there is a default federal enclave rule.
2 And I -- and I -- my friend is correct that you
3 can customize enclaves in different ways. But
4 the basic rule is pretty straightforward. On
5 the criminal side, since 1825, it's been the
6 Assimilated Crimes Act.

7 JUSTICE BREYER: Yeah, yeah, but I'm
8 thinking of civil and I'm thinking of
9 regulatory.

10 MR. MICHEL: And -- and on the civil
11 side, the -- the law, at least since 1885 in
12 this Court's decision in *McGlinn*, is that
13 federal law is exclusive in the enclave, with
14 the exception of preexisting state law that is
15 not in conflict with and not inconsistent with
16 federal law.

17 JUSTICE KAGAN: So I understand you
18 and Mr. Clement to have a little bit of a gap
19 there, because I understood Mr. Clement --

20 (Laughter.)

21 JUSTICE KAGAN: I understood
22 Mr. Clement to say that even as to preexisting
23 state law, that that did not apply of its own
24 force as the default rule. And you're saying
25 preexisting civil, state law, does apply. Is

1 that correct?

2 MR. MICHEL: I -- I think that's --
3 that's the rule of McGlinn. In an onshore
4 enclave, of course, you know, the Court, as Mr.
5 Clement suggested, doesn't need to confront
6 that here because the one thing we know about
7 the Outer Continental Shelf is that there was
8 no preexisting state law. There was no --

9 JUSTICE BREYER: Yeah, but we do have
10 to confront it, I think, because, after all, it
11 -- there is a lot of preexisting state law in
12 respect to many federal enclaves.

13 And so, if the rule was no gap is
14 necessary, all we look to see is preemption,
15 then there was a vast amount of non-preempted
16 state law that federal enclaves had to accept
17 as theirs, namely, all preexisting.

18 And so why would there be a different
19 rule where the statute is different and the
20 words don't require a gap -- they might -- why
21 would you want to have, though, a different
22 rule for a subsequent state law? I mean, of
23 course, if it's preempted, it's out. But, I
24 mean, non-preempted.

25 MR. MICHEL: Right. So, to be clear,

1 the preemption has never been the law on -- on
2 federal enclaves. This preexisting -- the
3 preexisting law rule is borrowed from an
4 international law rule, as the Court explains
5 in McGlinn. There's some hint at this in Chief
6 Justice Marshall's opinion in the Canter case,
7 that American territorial courts had applied a
8 similar rule to the former territory when --
9 when the United States was there.

10 But the basic federal enclave rule
11 does not accommodate preemption. I think a --
12 an illustrative example are the two cases the
13 Court issued on the same day in 1943, one in
14 the Pacific Dairy case and the other in the
15 Penn Dairy case. And the Pacific Dairy case
16 was at Moffett Field in --

17 JUSTICE BREYER: My question is not
18 about preemption. My question is about
19 non-preempted state law. And to be very simple
20 about it, my question is, if all non-preempted
21 state law that was preexisting applied to
22 federal enclaves, what practical reason would
23 there be for having a different rule where the
24 state law was passed subsequent to the
25 territory becoming a federal enclave?

1 MR. MICHEL: Yeah, I -- I think it
2 goes to -- to the core nature of a federal
3 enclave, Justice Breyer. When -- when the
4 United States takes exclusive jurisdiction,
5 that's the word that the -- that the
6 Constitution uses, it displaces federal -- it
7 displaces state authority.

8 The -- the preexisting rule is really
9 sort of an emergency measure to, as the Court
10 said in one of its cases, make sure that
11 there's not an area that has an absolute law.

12 JUSTICE SOTOMAYOR: Could you address
13 the -- the Secretary of the Interior's -- the
14 extent of the power as you see it? Do you
15 agree with Mr. Waxman that it's limited to just
16 leasing or leases, or do you think it's a
17 broader power?

18 MR. MICHEL: I think it's a little
19 broader, but I'm relying on the same provision
20 that my friend did, which is 1334(a). It's the
21 next provision in the statute, and it provides
22 regulatory authority over leasing, and it goes
23 on to say also for -- to provide for the
24 prevention of waste and conservation of natural
25 resources and the protective -- protection of

1 correlative rights.

2 So that -- that we do think is broad
3 authority, but I -- I do think it would be hard
4 to get to wage-and-hour law from there. It is
5 -- it is not -- although there was some
6 versions of the statute that initially gave the
7 Interior secretary sort of general preemptive
8 authority over the entire OCS, that's not the
9 statute that Congress ultimately adopted, and
10 so we don't think -- although, of course, we
11 don't think you need to get to the Interior
12 secretary's authority here, but we don't think
13 the Interior secretary could preempt a
14 wage-and-hour law at the end of the day. As my
15 friend suggested, that -- it would be within
16 the Labor Department; it wouldn't be within the
17 Interior secretary's authority under -- under
18 OCSLA or under its organic statutes.

19 JUSTICE KAGAN: Mr. Michel, if -- if
20 you are right, what work is the word
21 "inconsistent" doing? In other words, how can
22 a state law be inconsistent with federal law if
23 there's a total void in federal law?

24 MR. MICHEL: So I -- I agree with you
25 that, you know, the -- the -- the two words

1 shed a lot of light on each other, and -- and
2 there may not be a huge gap, so to speak,
3 between them, but I do think there are some
4 examples.

5 We cite some in our briefs. Another
6 example that I think has come up in this
7 Court's enclave cases is the general principle
8 that when the federal government takes an
9 enclave, state law, whatever else it does,
10 cannot interfere with the federal government's
11 use of the enclave for the purpose of the
12 enclave.

13 So, even if there was some gap in
14 federal law and the state came along with a law
15 that would, say, make it impossible or, not
16 even that bad, interfere with the government's
17 use of an enclave for a military base or a
18 national park or something like that, even in
19 the absence of federal -- of a -- of an
20 on-point federal law, that -- it would still be
21 inconsistent.

22 JUSTICE KAGAN: I guess I'm having a
23 little bit of a hard time -- sorry.

24 CHIEF JUSTICE ROBERTS: Go ahead.

25 JUSTICE KAGAN: Well, just

1 understanding that example and the ones in your
2 brief. Are you saying that even if it's
3 inconsistent with a federal law, it can be
4 inconsistent with sort of broad-scale federal
5 policy and that that's what the statute is
6 looking towards?

7 MR. MICHEL: I think it's both.
8 Federal law is the most obvious example, but
9 the cases have also referred to federal policy.
10 So inconsistency with either, we think, would
11 be a reason not to assimilate the statute.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Frederick.

15 ORAL ARGUMENT OF DAVID C. FREDERICK
16 ON BEHALF OF THE RESPONDENT

17 MR. FREDERICK: Thank you, Mr. Chief
18 Justice, and may it please the Court:

19 Our position is that the plain
20 language of OCSLA and the Fair Labor Standards
21 Act control this case and that the Ninth
22 Circuit was correct in determining that the
23 California Labor Code provisions at issue here
24 are both applicable and not inconsistent with
25 federal law.

1 OCSLA, therefore, incorporates them as
2 federal law. I'd like to --

3 JUSTICE GINSBURG: How -- how close
4 does your position come to the one thing we
5 know Congress rejected; that is, direct
6 application of state law? Instead, state law
7 is incorporated as federal law. It's
8 administered by federal officials.

9 MR. FREDERICK: Yes. We -- we do know
10 that OCSLA, however, was a compromise, and the
11 compromise was between having state control
12 over the law of the Outer Continental Shelf and
13 federal law, but federal law did not encompass
14 all of the legal relationships and matters that
15 concern human endeavors.

16 And that's why what Congress did was
17 to incorporate state law as federal law, with
18 federal law having supremacy and the Secretary
19 having the authority to issue the appropriate
20 regulations.

21 And if I could just start there, the
22 first sentence of Section 1334(a), in answer to
23 your question, Justice Sotomayor, reads as
24 follows: "The Secretary shall ... prescribe
25 such rules and regulations as may be necessary

1 to carry out such provisions."

2 I'm astonished that the other side
3 thinks that that language isn't broad enough to
4 displace any state rule that gets in the way of
5 what the federal government deems to be
6 necessary.

7 We know through practice that the EPA
8 is regulating Outer Continental Shelf air
9 emissions that are proscribed by California,
10 and it is doing so pursuant to a memorandum of
11 understanding.

12 There are memorandum of understanding
13 between the Secretary of Interior and the Coast
14 Guard and the EPA and the National Park Service
15 and the National Oceanic and Atmospheric
16 Administration that concern the
17 interrelationships of how law enforcement
18 occurs with state law as the substance of what
19 is being enforced.

20 That happens every day in the National
21 Park Service, where national park rangers are
22 enforcing hunting and fishing rules that are
23 prescribed by states.

24 CHIEF JUSTICE ROBERTS: Which -- which
25 federal agency has Congress given preemptive

1 authority with respect to the Outer Continental
2 Shelf?

3 MR. FREDERICK: The Interior
4 Department.

5 CHIEF JUSTICE ROBERTS: So, even on a
6 question of labor law, the Interior Department
7 could issue regulations that of their own force
8 would preempt the California rules?

9 MR. FREDERICK: Yes, yes. And that's
10 what 1334(a) stands for. And it is why in the
11 way this is implemented the Interior Department
12 has these memorandum of understanding with
13 states and with other federal agencies in order
14 to determine which laws are going to be
15 applicable.

16 Now, notably, this gap-filling notion
17 on the other side is expressly written into two
18 statutes that we cite in our brief: the
19 Assimilative Crimes Act and the Civil Rights
20 Attorney's Fees Awards Act.

21 But Congress didn't choose to use
22 those words in the OCSLA. Instead, what
23 Congress did was to say that applicable and not
24 inconsistent state law were not --

25 JUSTICE KAVANAUGH: How -- how is a --

1 CHIEF JUSTICE ROBERTS: On the
2 consistence -- on the consistency point, I
3 understand what -- I understand it to be our
4 basic rule in preemption analysis that
5 something like this would generally not be
6 inconsistent. If the federal minimum wage is 7
7 and the California is 12, you can comply with
8 both by paying 12.

9 But, here, what's distinctive is that
10 it's not a disagreement between federal and
11 state law. This is -- both are federal law
12 under operation of OCSLA.

13 So, if you ask the question, what is
14 the federal minimum wage, it is inconsistent,
15 because, in one case, you would say: Well,
16 it's \$7 under the federal FLSA, but it's also
17 -- but it's \$12 under the federal law that's
18 incorporated from California.

19 So doesn't that make a difference in
20 how you apply the inconsistency point?

21 MR. FREDERICK: No. You --

22 CHIEF JUSTICE ROBERTS: I thought you
23 might say that.

24 (Laughter.)

25 MR. FREDERICK: Well, and let me refer

1 you to one of your cases, Your Honor. It's the
2 Powell case, and in that case, the Court had
3 before it an application of the Fair Labor
4 Standards Act minimum wage and a minimum wage
5 that was set higher by virtue of another
6 federal statute that applied to certain federal
7 operations.

8 And this Court held in Powell that the
9 higher standard applied, and it did so by
10 looking at the plain language of the savings
11 clause.

12 And if I can refer you to page 9(a) --

13 CHIEF JUSTICE ROBERTS: But was that a
14 consistency analysis that -- of the sort that
15 you would apply in -- it couldn't have been
16 under the normal preemption cases, because it's
17 two different sources of federal law, whether
18 -- rather than federal or state.

19 MR. FREDERICK: No, but let me refer
20 you to the savings clause plain language,
21 because, again, I think that the statute
22 operates in our favor. At 9(a) of the gray
23 brief, the government has set forth the
24 language, and let me read it: "No provision of
25 this chapter or any order thereunder shall

1 excuse non-compliance with any federal or state
2 law or municipal ordinance establishing a
3 minimum wage higher than the minimum wage
4 established under this chapter or maximum work
5 week."

6 And so the way the savings clause
7 works in the federal, comparing federal law, if
8 there's a higher federal law, the savings
9 clause says apply the higher federal law. If
10 there's a higher municipal ordinance or a
11 higher state law, you apply the higher one.
12 That's what the savings clause provides.

13 And what the other side wants to do is
14 to take one part of the Fair Labor Standards
15 Act, the part that says \$7.25 an hour, and
16 ignore the words that come right before that,
17 which read "not less than."

18 And so --

19 JUSTICE ALITO: But how does that
20 apply to this particular case?

21 MR. FREDERICK: It applies to this
22 particular case because California has issued
23 wage orders that provide for more generous
24 minimum wage per hour standards, as well as
25 definition of what a work week is and the per

1 hour --

2 JUSTICE ALITO: Well, I thought the
3 dispute was about the definition of a work
4 week.

5 MR. FREDERICK: It is in part a
6 dispute about the definition of a work week and
7 in part a definition of whether or not certain
8 things that are done within that work week,
9 time spent, for instance, meal allowances, how
10 sleep time is calculated, et cetera, are within
11 the word -- within the limit.

12 And so, to that extent, Your Honor,
13 what we have in the Fair Labor Standards Act
14 are some provisions that do speak to the
15 question with the savings clause and some that
16 do not speak at all. For instance, the Labor
17 Department doesn't speak to issues of mealtime
18 allowances and how pay stubs are to be done to
19 inform workers.

20 And what the Department of Labor has
21 said in its regulatory guidance -- and we set
22 this out, I think it's at page 8 of our brief
23 -- is that where there is silence in the FLSA,
24 a higher or more generous standard by the state
25 shall prevail.

1 And our position is that what Congress
2 intended in OCSLA to do was to incorporate
3 those as applicable and not inconsistent --

4 JUSTICE KAVANAUGH: If your --

5 MR. FREDERICK: -- with the standards.

6 JUSTICE GINSBURG: Mr. Frederick, on
7 the savings clause, I thought the savings
8 clause was meant to allow a state to apply its
9 own more protective regime in a domain over
10 which the state is sovereign, but a state is
11 not sovereign over the Intercontinental Shelf.

12 MR. FREDERICK: That's correct, but
13 what -- in -- in the same way, Your Honor, that
14 in Powell, this Court determined that one
15 federal statute provided for a higher minimum
16 wage than what the FLSA did, we're not arguing
17 which sovereign gets to determine the rules.

18 What we're saying is the content of
19 those rules varies depending on the source.
20 And, here, the source -- just because the
21 source of that happens to be California law
22 doesn't affect things.

23 You asked earlier about enclaves in
24 California, And let me give you a different
25 answer than the one my colleagues on the other

1 side gave.

2 There is a district court decision
3 called Korndobler which we cite in our brief
4 and we discuss. That's a case in which the
5 district court was looking at whether the Fair
6 Labor Standards Act provisions for minimum wage
7 predated the creation of Sequoia National Park.

8 And the Court did a very extensive
9 analysis to determine that, in fact,
10 California, as of 1913, had established a
11 minimum wage rule. And it applied this Court's
12 decisions -- and I'll talk about those in just
13 a second -- to say that, in fact, the
14 preexisting state law of minimum wage was
15 bought into the Sequoia National Park when
16 Congress created that as a federal enclave.

17 And so I do think that the other side
18 is not consistent with each other as to what
19 the standards are. And let me talk about this
20 --

21 CHIEF JUSTICE ROBERTS: That just --
22 that's an awful lot of weight to place on one
23 unpublished district court decision.

24 MR. FREDERICK: Well, it was
25 answering -- and the reason why the three cases

1 that he cites are not apposite is because there
2 the state law came into existence after the
3 creation of the federal enclave. So the only
4 case that's on point agrees with us.

5 And let me talk about the two cases
6 from this Court that actually give the
7 standards. Justice Kagan, you were talking and
8 asking about the standards. And there are two
9 of them.

10 One of them is called James Stewart,
11 and the other is called Paul. In the James
12 Stewart case, what this Court did was it took a
13 personal injury that occurred in a federal
14 enclave in New York where, because there were
15 no -- because there -- it adopted the general
16 enclave principles, it incorporated state
17 standards with respect to what steel beams
18 needed to be used in construction.

19 There, the worker was injured because
20 of a violation of the state standard. And what
21 this Court held was that that state standard
22 had been incorporated into the federal enclave
23 law and, therefore, was the law of the United
24 States, I think was the phrase this Court used.

25 So it was incorporated federal law,

1 even though the source of the standard and the
2 substance of the standard derived from state
3 law. And that all happened prior to -- as the
4 federal enclave was being created.

5 Similarly, in this Court's decision in
6 Paul versus United States, which was an early
7 '60s decision, there, the Court applied exactly
8 the same notion, which is that preexisting
9 state law came into the law of the enclave and
10 it was incorporated federal law to be applied
11 as federal law.

12 JUSTICE GORSUCH: Mr. Frederick, can I
13 take you back to a -- a question I think
14 Justice Alito was pursuing a moment ago? And I
15 understand one of the important parts of your
16 case is the definition of the workweek and
17 whether stand-by hours should be incorporated.
18 California's treatment of them is subject to
19 the minimum wage requirement.

20 But the savings -- the savings clause,
21 at least as I understand it, and you can
22 correct me if I'm wrong, while it preserves the
23 ability of states to raise the minimum wage, it
24 doesn't allow them to define the workweek
25 differently than federal law does.

1 So how do we deal with that? Why
2 isn't your client's claim at least inconsistent
3 with federal law to that extent?

4 MR. FREDERICK: Well, what the -- as
5 the Seventh Circuit has held in terms of
6 determining what is a minimum wage, you have to
7 look at both the pay rate and what you're
8 multiplying that pay rate by, which is what
9 constitutes a working hour.

10 And a working hour is what we're
11 dealing with when we deal with situations like
12 is the worker under the control of the
13 employer, subject to the employer's call-back
14 or emergency call, et cetera? And so the issue
15 about the workweek constitutes how you define
16 what is a working hour.

17 JUSTICE GORSUCH: Do you agree that
18 federal law and state law differ in how they
19 define that?

20 MR. FREDERICK: I -- they do differ,
21 except insofar as what the Labor Department has
22 determined is not a difference in workweek.
23 Just so we're clear about that, the 40 hours
24 applies and the federal standard applies.

25 JUSTICE GORSUCH: Right. But how

1 we --

2 MR. FREDERICK: But what constitutes a
3 compensable hour?

4 JUSTICE GORSUCH: Yeah.

5 MR. FREDERICK: And it's that hour and
6 what the Department of Labor's regulations say
7 is that there is a multi-factor test for
8 determining when a worker is under the control
9 of the employer.

10 JUSTICE GORSUCH: I -- I understand
11 that.

12 MR. FREDERICK: Yes.

13 JUSTICE GORSUCH: But I guess my
14 question is still don't -- federal -- federal
15 law and its definition is different than --

16 MR. FREDERICK: I don't --

17 JUSTICE GORSUCH: -- state law? Is
18 that -- is that not right?

19 MR. FREDERICK: I -- well, I would say
20 two things about it, Justice Gorsuch. One is
21 that the Labor Department's regulations give
22 room for states to define what is a compensable
23 hour. We're not talking about any difference
24 in 40. We -- we all agree 40 is the --

25 JUSTICE GORSUCH: I -- we're on the

1 same page, right?

2 MR. FREDERICK: Yeah, yeah.

3 JUSTICE GORSUCH: We are.

4 MR. FREDERICK: Yeah, but -- but the
5 issue is what constitutes a compensable hour.
6 That actually is a fact question.

7 JUSTICE GORSUCH: I -- I understand
8 that, but we have a federal law standard and we
9 have a state law standard and they're
10 different, arguably.

11 MR. FREDERICK: Yes.

12 JUSTICE GORSUCH: And the savings
13 clause doesn't speak to this particular issue,
14 right? It speaks to what you multiply that by,
15 \$12 or 7, whatever.

16 MR. FREDERICK: Right.

17 JUSTICE GORSUCH: It doesn't deal with
18 this issue. So the savings clause can't help
19 you with respect to this issue, it seems to me.

20 MR. FREDERICK: It --

21 JUSTICE GORSUCH: What -- what do we
22 do about that?

23 MR. FREDERICK: Well, what the Labor
24 Department has done is issued regulations and
25 guidance where there is silence in the FLSA,

1 and what it is says where there's silence, you
2 incorporate or you deal with the state law and
3 how the state law applies.

4 JUSTICE SOTOMAYOR: Mr. Frederick, I
5 have --

6 MR. FREDERICK: And we've got those
7 regulations in our brief.

8 JUSTICE SOTOMAYOR: -- I have poor
9 memory on this issue, but didn't the court
10 below remand to see whether there were actual
11 inconsistencies with certain of your claims?

12 MR. FREDERICK: Yes.

13 JUSTICE SOTOMAYOR: Number one, which
14 were they? And, secondly, how do you deal with
15 Mr. Clement's point that your view basically
16 makes this identical to normal state conflict
17 preemption? What differences do you see in the
18 two?

19 MR. FREDERICK: Okay. Let me take the
20 first one first.

21 JUSTICE SOTOMAYOR: Why would your
22 reading still result in a difference between
23 normal -- the normal conflict preemption
24 situation?

25 MR. FREDERICK: Well, let me start

1 with the second one first then. In this
2 Court's decision in Guerra, the Court construed
3 the words "not inconsistent with" and it said
4 that they had the same content as normal
5 conflict preemption. Is there a difference
6 that would make it akin to conflict preemption?
7 And that was a statutory interpretation case.

8 Our position is that the most coherent
9 way to understand the words "not inconsistent
10 with" is to apply the same standards that you
11 have in the preemption canon, where you look at
12 is it impossible to comply? Does it stand as
13 an obstacle? And -- and the like.

14 JUSTICE ALITO: But that means that
15 California then extends 200 miles out to sea.

16 MR. FREDERICK: So --

17 JUSTICE ALITO: And Congress could
18 have just said that and said California extends
19 200 miles out to sea; however, within this part
20 of California, federal officials will enforce
21 the law.

22 MR. FREDERICK: So, remember, Justice
23 Alito, that our client's shift begins and ends
24 in California onshore in the uplands. The
25 first two to three hours of every one of his

1 shifts is exclusively within California, when
2 he gets briefed for safety, when he gets the
3 bus down to the port to take the -- the vessel
4 out to the lake, and --

5 JUSTICE KAVANAUGH: But I -- I don't
6 think --

7 MR. FREDERICK: -- and so --

8 JUSTICE KAVANAUGH: -- respectfully,
9 that's responsive to the question, which is, if
10 -- if your position were correct, then ordinary
11 preemption principles would apply and this -- a
12 lot of this language would seem pointless.

13 MR. FREDERICK: Well, let me try to
14 wrap it together in this way, Justice
15 Kavanaugh, which is that if you're looking at
16 the substance of the law, looking at whether
17 there's conflict and inconsistency, the
18 preemption cases give you an intellectual way
19 to understand the substance of that.

20 I'm not here to argue that California
21 controls the outcome. The federal government
22 does. And the Secretary has the authority to
23 issue regulations if the Secretary perceives
24 there to be a difference that would matter in
25 the context of the Outer Continental Shelf.

1 JUSTICE KAGAN: Is -- is that what you
2 think the principal difference is? Because I
3 have the same concern here. This is an awful
4 lot of stuff to go through if all that Congress
5 wanted to do was to essentially set up the
6 regime that applies everywhere else, and
7 especially in light of the fact that Congress
8 seemed to have rejected a -- a draft statute
9 that said exactly that.

10 So -- so -- so what is the difference
11 as you see it between this statute and -- and
12 one that would just say, you know, here on the
13 Outer Continental Shelf, just as in California,
14 preemption principles apply?

15 MR. FREDERICK: Well, number one, who
16 decides? That's a big difference in terms of
17 what regulatory power is given to displace a
18 state standard.

19 Number two, you have a decision, and
20 you talk about the compromise, but let me give
21 you the other part of the compromise, which was
22 that it was advocated to have federal admiralty
23 law apply to the Outer Continental Shelf, and
24 the Court -- Congress said no. And where they
25 came in the middle was to create OCSLA, where

1 they incorporated these state standards, as
2 federal law, to be implemented in that manner.

3 But please keep in mind that the
4 development of the Outer Continental Shelf
5 encompasses relationships with the state. And
6 that's why this Court in *Huson* said that the
7 special relationship between the adjacent state
8 to the oil rig is important.

9 Why? Because that's where the worker
10 is coming from. That's where his lawyer can be
11 expected to understand what the applicable
12 standards are. That's why, if something
13 happens to him, he's going to know where to
14 look for a legal redress. And there are many
15 oil rigs within the three-mile limit.

16 And as this Court held in *Valladolid*,
17 there is overlapping coverage between state
18 workers' compensation and the Longshore/Harbor
19 Workers' Compensation Act, and it discussed a
20 case called *Herb's Welding*, which says that
21 within the three-mile limit, state law controls
22 completely.

23 And so what we're talking about is a
24 very fluid situation, if you will, between
25 workers who might go to a rig within the

1 three-mile limit and be governed exclusively by
2 state law, one shift, come back onshore, then
3 go back out to a shift that would be on the
4 Outer Continental Shelf.

5 And the question is, what legal regime
6 is going to cover those people? And it's quite
7 -- quite sensible why Congress would have said,
8 substantively, we think that the state law
9 ought to apply, but, to the extent that the
10 Secretary of Interior perceives there to be
11 inconsistencies with the federal standard,
12 we're going to give the Secretary the
13 authority, regulatory authority, to displace
14 that standard.

15 JUSTICE BREYER: That makes sense. A
16 difficult argument, both sides, and what's
17 gnawing at me is the word "applicable" and the
18 Fifth Circuit has for 50 years interpreted it
19 to require a gap. And you heard the answer
20 they gave to the question I asked, which was
21 that 97 percent of those involved in this are
22 in the Fifth Circuit.

23 So I'm slightly worried.

24 MR. FREDERICK: Yes.

25 JUSTICE BREYER: I don't know if it's

1 determinative, but I'm slightly worried about
2 overturning a set of court of appeals decisions
3 under which industry and labor and everyone
4 have worked, 97 percent of them, for 50 years.

5 MR. FREDERICK: Let me --

6 JUSTICE BREYER: All right. Now
7 what --

8 MR. FREDERICK: Yeah --

9 JUSTICE BREYER: I do want to hear
10 what you have to say.

11 MR. FREDERICK: I -- I do, and I have
12 a number of things to say, Justice Breyer, and
13 I appreciate you raising this so that I can
14 address them orally.

15 First, the Fifth Circuit decided that
16 gap standard in a case called Continental Oil,
17 which was a classic maritime law case. There,
18 the vessel went and it collided into the
19 offshore rig. And the court was faced with the
20 question, what law applies?

21 And what the Court said was maritime
22 law applies, because there's no gap there. You
23 know what happens with a marine casualty
24 situation. The admiralty law will govern that
25 situation.

1 The same judge, Judge John R. Brown,
2 who is one of the most distinguished admiralty
3 law judges ever to serve in this Court, decided
4 a case about 20 years -- or not in this Court,
5 in the courts, 20 years later decided a case
6 called PLT.

7 Now, if you want to look at what
8 reliance interests are, you should look at that
9 case, not the Continental Oil case, because, in
10 PLT, Judge Brown's decision for the Fifth
11 Circuit did not use gap-filling. Rather, he
12 used a standard that is very much like what the
13 Ninth Circuit did in this case.

14 Moreover, the standards that you would
15 be worried about applying here are not likely
16 to arise in the Fifth Circuit cases because
17 state law has already made an affirmative
18 determination not to apply their state laws to
19 the Outer Continental Shelf.

20 Both Louisiana and Texas have, by
21 statute, determined that their worker's
22 compensation is not going to apply to the Outer
23 Continental Shelf. And their state labor laws
24 will not apply to the Outer Continental Shelf.

25 So to the extent that you perceive

1 there to be a problem that would be unique in
2 correcting the law in the Fifth Circuit, I
3 don't think you have to have a similar type of
4 worry as the kind of case that we have here,
5 because neither Texas nor Louisiana have
6 comparable state laws that seek to go above the
7 federal floor in the FLSA.

8 Now, the word "applicable," I do think
9 it has meaning. And the other side fluctuates
10 between it being surplusage or irrelevant or
11 whatever, but I do want to point out that it's
12 not just applicable state law that the federal
13 -- that the Secretary is administering, it's
14 also applicable federal law.

15 So if the word "applicable" really
16 does mean gap-filling, you strain to wonder how
17 is it that the Secretary is supposed to
18 determine what applicable law is if you give it
19 an authoritative construction that the word
20 "applicable" means gap-filling because then you
21 have a complete contradiction and you have read
22 the statute in a -- a very bizarre way, because
23 ordinarily what the Secretary is doing is
24 reading the word "applicable" federal law to
25 decide, does the Clean Air Act apply.

1 JUSTICE KAVANAUGH: Why -- why doesn't
2 "not inconsistent with," suggest gap-filling in
3 this context, in this statute?

4 MR. FREDERICK: Well, for the reason
5 that this Court in Powell played why and also
6 why this Court in Guerra explained why. Not
7 inconsistent with in its ordinary parlance
8 would mean not incompatible with.

9 And incompatible is a word that is
10 stronger than simply the creation of a void or
11 a gap. You would look at whether there is a
12 conflict or inconsistency.

13 So if you are looking at the words --

14 JUSTICE KAVANAUGH: Well, I would say
15 in ordinary parlance, two different
16 requirements are not consistent with one
17 another.

18 MR. FREDERICK: Well, you look at
19 whether or not the two requirements that may be
20 different can be accommodated to each other.
21 And that's why in --

22 JUSTICE KAVANAUGH: That sounds like
23 impossibility.

24 MR. FREDERICK: No, in -- in Guerra,
25 the Court looked at the application of

1 California's standards regarding pregnancy
2 relief and discrimination and the federal
3 standard for pregnancy and it determined that
4 they were different, but the fact that the
5 California standard was more protective meant
6 that it was not inconsistent with what the
7 federal law was.

8 And so, for that reason, I think that
9 case is the most closely on point to the actual
10 words that we have to work with here. And so,
11 rather than sort of conjure up some concepts
12 that are not appropriate, as the other side is
13 trying to weave, I think if you just read the
14 statutes here, the statutes by their plain
15 language give you the answer. We know --

16 JUSTICE ALITO: Well, if I think that
17 not inconsistent is -- is consistent -- is --
18 can be interpreted either the way you interpret
19 it or the way Mr. Clement interprets it, where
20 do I go from there?

21 MR. FREDERICK: Well, Mr. Clement
22 doesn't give a definition in his opening brief.

23 JUSTICE ALITO: All right. Well, let
24 me amend --

25 MR. FREDERICK: In his open -- in his

1 closing brief --

2 JUSTICE ALITO: Then I'll amend the
3 question. So, if I think that "not
4 inconsistent" can mean in conflict with,
5 irreconcilable, but also simply different in an
6 important way, where do I go from there?

7 MR. FREDERICK: Well, I think then you
8 look at the source of the law that's supposedly
9 different. And, here, where I think that the
10 statute is best understood is that the word
11 "applicable" focuses on the state law and the
12 phrase "not inconsistent with" focuses on the
13 federal law. And if --

14 JUSTICE ALITO: I don't know what you
15 can get out of applicable. Is it -- can -- can
16 you conceive a situation in which somebody is
17 directed to apply law that is inapplicable?

18 MR. FREDERICK: Well, the -- the best
19 example that I could give, California in its
20 public resources code has quite extensive rules
21 concerning drilling and mining on land.

22 And one could well conclude that the
23 word "applicable" could be used to say those
24 standards don't apply to the marine environment
25 of drilling offshore. And so that would be an

1 area of law that, if you looked at it, you
2 might say those mining and drilling
3 requirements would seem to be applicable.

4 And then, if you thought a little
5 harder about it and said: You know, actually,
6 it's quite a different environment and quite a
7 different situation, you might say that, in
8 fact, they are not applicable.

9 And I think that the -- the way you
10 would judge the interplay of those standards
11 through the "non-inconsistent with" is that if
12 you then go to the text of the Fair Labor
13 Standards Act and when it invites higher
14 standards to be created by not just other state
15 statutes or federal statutes but municipal
16 ordinances, you are seeing Congress's pointer
17 that we're not going to view these labor
18 standards as something that's going to create
19 the sort of conflicts or differences that would
20 give rise, Justice Alito --

21 JUSTICE KAVANAUGH: But, if -- if
22 there are --

23 MR. FREDERICK: -- to the concern that
24 you're expressing.

25 JUSTICE KAVANAUGH: -- to pick up on

1 Justice Alito's question, if there are two
2 different ways one could imagine interpreting
3 "not inconsistent with," why isn't the better
4 answer to look at the overall context here,
5 which, as Justice Kagan said, the overall
6 context is a clear preference, a clear
7 congressional choice to make federal law the
8 primary, and so that you would choose the
9 interpretation of "not inconsistent with" that
10 says different from?

11 So what -- what's your response to
12 that?

13 MR. FREDERICK: Well, I think that
14 this Court's cases have said otherwise, in both
15 Powell and Guerra. I think the statute says
16 otherwise.

17 And I think that, ultimately, the
18 trump card here is 1334(a), which says that the
19 Secretary shall have the power to prescribe
20 regulations. The fact that the Secretary here
21 has chosen not to issue rules that would
22 displace California's more-generous-to-worker
23 provisions, I think, is indicative.

24 JUSTICE KAVANAUGH: And you think the
25 Secretary clearly has that authority under that

1 language?

2 MR. FREDERICK: That's -- under a
3 plain reading of the statute, Justice
4 Kavanaugh, the Secretary does have that. And
5 that's why I was quite surprised to hear the
6 other side disclaim a regulatory authority that
7 is written in such plain English.

8 I would like to point out one other
9 thing, which is that because, in the state's
10 territorial limits we know that state law is
11 going to apply, what the other side's provision
12 does is to create a condition for the kind of
13 labor disharmony that Congress surely was
14 trying to legislate against.

15 That labor disharmony would arise
16 whenever a crew is assigned to an onshore or
17 within state territorial waters rig, as opposed
18 to one that goes out on the Outer Continental
19 Shelf, because the worker who's assigned
20 in-state knows he is going to get the benefit
21 of the California State rules and he's going to
22 get the benefit of state worker's compensation,
23 whereas the worker who's assigned to a crew to
24 go with the Outer Continental Shelf under their
25 version is going to be given lower protections

1 and lower wages.

2 And so, because Congress in what --

3 JUSTICE SOTOMAYOR: Do you know what
4 happens now with worker's comp?

5 MR. FREDERICK: Yes.

6 JUSTICE SOTOMAYOR: What -- what
7 happens on the Outer Shelf with worker's comp?
8 Because there's no FLSA rules related to that.

9 MR. FREDERICK: Yes.

10 JUSTICE SOTOMAYOR: So how does it
11 happen?

12 MR. FREDERICK: In Valladolid, what
13 this Court considered was the overlap between
14 state worker's comp and the Longshore Harbor
15 Workers' Compensation Act as it was
16 incorporated.

17 The solicitor general at the oral
18 argument -- and I invite you to look at the
19 transcript -- said: Both state worker's
20 compensation law and Longshore Harbor apply and
21 the worker can get the benefit of whichever one
22 is more generous. And that's why there is an
23 offset provision in 903(e) of the Longshore
24 Harbor Workers' Compensation Act.

25 Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Clement, you have three minutes
4 remaining.

5 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
6 ON BEHALF OF THE PETITIONER

7 MR. CLEMENT: Thank you, Mr. Chief
8 Justice. Just a few points in -- in rebuttal.

9 First of all, my friend wants to draw
10 something from the fact there are no on-point
11 regulations here addressing this by the
12 Secretary of the Interior.

13 Well, the obvious two reasons why
14 there are no regulations is that the United
15 States Government agrees with us on the
16 interpretation of the statute, and agrees with
17 us and is doubtful on its authority to
18 promulgate those regulations.

19 As to the specific issue of workmen's
20 comp, the reason that that can be -- state law
21 can apply is because that's one of the places
22 where Congress has said specifically that state
23 law can apply even on a federal enclave. And
24 that's 40 U.S.C. 3172. That's the kind of
25 super --

1 JUSTICE SOTOMAYOR: It begs the
2 question, why is that a gap?

3 MR. CLEMENT: Well, they're --
4 they're --

5 JUSTICE SOTOMAYOR: I -- I --

6 MR. CLEMENT: No, they -- I think that
7 that --

8 JUSTICE SOTOMAYOR: You get paid for
9 working. You don't get paid for not working.
10 So if the federal law doesn't pay you for work
11 -- not working, except under the long --
12 longshoreman's act, why would state law apply?

13 MR. CLEMENT: Because there's a
14 specific federal statute that operates as a
15 super-savings clause specific to federal
16 enclaves, and that's what's missing in the
17 FLSA.

18 A few other points just to make. My
19 friend wants to say that you should interpret
20 OCSLA differently from the Assimilated Crimes
21 Act. It seems to me the much better course is
22 to say that OCSLA is trying to get at the same
23 thing and is trying to do gap-filling.

24 If you don't adopt that rule, then
25 you're going to be saying that there's a

1 greater role for state law, criminal law, on
2 the Outer Continental Shelf than on any other
3 federal enclave. And keep in mind that OCSLA
4 joins civil and criminal law at the hip. So
5 the same regime on the Outer Continental Shelf
6 applies to criminal law and civil law. And I
7 suggest the way harmonize all of those federal
8 statutes is to require gap-filling in every
9 instance.

10 Also in thinking about this case, do
11 keep in mind that the Outer Continental Shelf
12 is a super federal enclave in the sense that no
13 other state was previously sovereign. So you
14 don't have the issues where you have to go back
15 to 1913 and look at what the conditions a state
16 might have put on the grant of land to the
17 federal government. None of that applies on
18 the Outer Continental Shelf.

19 My friend relies on Powell and Guerra
20 as his two most apposite cases. So Powell is
21 an apposite -- inapposite because there, you
22 have two separate congressional provisions,
23 both of which go through bicameralism and
24 presentment. And, of course, this Court is
25 going to try to do anything it can to reconcile

1 two federal statutes.

2 You don't have that situation here.
3 The second body of inconsistent law was the
4 product of a Sacramento labor commission. It
5 doesn't -- you don't apply that the same way.

6 Guerra is equally inapposite because
7 Guerra is just a plain old preemption case.
8 And the problem my friend on the other side has
9 -- has, as the Court has pointed out, is you
10 just can't read the Outer Continental Shelf
11 Lands Act and conclude that the Court -- that
12 Congress wanted these preemption principles to
13 work the same way onshore as in the Outer
14 Continental Shelf. It's a federal enclave; all
15 the law is federal law.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 11:06 a.m., the case
20 was submitted.)

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