No. 18-389

IN THE
Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,

Petitioner,

v.

BRIAN NEWTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, under the Outer Continental Shelf Lands Act ("OCSLA"), state wage-and-hour law is both "applicable" to workers employed on Outer Continental Shelf structures and "not inconsistent" with existing federal law—and thus properly borrowed as the applicable federal law under 43 U.S.C. § 1333(a)(2)(A).

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.[1] WLF promotes and defends 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 disregarded. *See, e.g., American Economy Ins. Co. v. State of New York, cert. denied*, 138 S. Ct. 2601 (2018); *Deere & Co. v. New Hampshire, cert. denied*, 137 S. Ct. 38 (2016); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). WLF filed briefs in this matter in support of the petition for rehearing *en banc* in the Ninth Circuit and in support of the certiorari petition.

WLF is concerned that the Ninth Circuit's decision has disrupted settled expectations of employers by rejecting the well-accepted judicial understanding of 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 penalties, for having acted in reasonable reliance on that judicial understanding.

WLF agrees with Petitioner Parker Drilling

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[1] Pursuant to Supreme Court Rule 37.6, 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, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

Management Services, Inc. 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). OCSLA does not render that California law "applicable" to the OCS because incorporation of that law into federal law—which exclusively governs structures on the OCS—is unwarranted in the absence of a gap in existing federal law. WLF writes separately to focus primarily on another reason why incorporation is unwarranted: California law is "inconsistent" with existing federal law. The clearest evidence of that inconsistency: as a result of the Ninth Circuit's decision incorporating California wage-and-hour law into federal law, Petitioner faces the threat of massive retroactive liability, despite having complied fully with wage-and-hour standards established by the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 203.

STATEMENT OF THE CASE

Respondent Brian Newton was employed by Parker Drilling for two years on an oil platform on the OCS 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 Ninth Circuit 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." Pet. App-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 California's Private Attorney General Act of 2004 (PAGA).

OCSLA states that fixed structures (such as drilling platforms) attached to the seabed 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 governing wage-and-hour claims (the FLSA) and thus has no need to borrow state wage-and-hour law to fill gaps in federal law—and dismissed the complaint. Pet. App-46 to App-60.

The Ninth Circuit reversed. Pet. App-1 to App-41. 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." *Id.* at App-21. 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)(A) unless it fills "a significant void or gap" in federal law. *Id.* at App-2.

The appeals court recognized that that the FLSA provides a comprehensive federal statutory scheme governing wage-and-hour issues, and that California law "embraces a more protective standard for determining hours worked" than the standard adopted by the FLSA. Pet. App-39. But the court denied that the differing standards rendered California law "inconsistent" with federal law within the meaning of OCSLA. *Ibid*. The Court held that in adopting OCSLA, Congress "provided for the wholesale assimilation of state civil law into federal law" governing the OCS, *id*. at App-32. It stated that California law is not "inconsistent" with the FLSA because the "savings clause in the FLSA reflects Congress's express intent that states should be allowed to adopt more protective standards." *Id.* at App-39 (citing 29 U.S.C. § 218(a).

SUMMARY OF ARGUMENT

In adopting the FLSA, Congress established a comprehensive set of wage-and-hour rules governing employment throughout the United States. It is uncontested that those rules apply to the work performed by Newton for Parker Drilling. The Ninth Circuit held that federal law also applies a second set of wage-and-hour rules to that work: rules established by California and allegedly incorporated into federal law by OCSLA.

That holding is contrary to OCSLA's plain statutory text. OCSLA states that federal law incorporates state laws into the federal law that governs fixed structures on the OCS only "[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 Ninth Circuit conceded that "California embraces a more protective standard for determining hours worked" than do the FLSA and implementing regulations. Pet. App-39. Under that "more protective standard," Newton (were he employed to perform work *in California*) would be entitled to wage payments for sleep and rest time he was required to spend on his employer's premises.

In contrast, the FLSA and implementing regulations make clear that federal wage-and-hour law does *not* require employers to pay employees for sleep and rest hours simply because employees are unable to return home between shifts. Those two standards are "inconsistent" with one another under any commonly understood definition of that word. A standard under which OCS employers would owe millions of dollars more than the wages payable under FLSA standards is "inconsistent" with those standards. As such, § 1333(a)(2)(A) makes clear that OCSLA does not incorporate the California standard into federal law—the only law that is applicable on the OCS.

In straining to avoid OCSLA's "not inconsistent" mandate, the Ninth Circuit pointed to 29 U.S.C. 218(a) (referred to by the court as the FLSA's "savings clause"), which states that no provision of the FLSA "shall excuse noncompliance with" any state law

"establishing a minimum wage higher than the minimum wage establish by this chapter or a maximum work week lower than the maximum workweek established by this chapter." But by its terms, § 218(a) becomes relevant only after it is determined that an employer is subject to (and noncompliant with) the state law at issue. And by virtue of the inconsistency between the California and FLSA standards governing sleep and rest time, OCSLA dictates that OCS employers are *not* subject to the California standard.

Section 218(a) comes into play only within areas subject to a State's traditional police powers. That provision reflects Congress's determination, based on federalism concerns, that a State is entitled to provide protections to those employed within the State that are greater than the protections otherwise afforded under federal law. But States have never been understood to be authorized to extend their wage-and-hour rules to areas (such as the OCS) outside their geographic borders. Rather, state law extends to areas under the federal government's exclusive control only to the extent that Congress has mandated the incorporation of state law, and § 1333(a)(2)(A)'s "not inconsistent" provision makes clear that Congress has not incorporated California's unique wage-and-hours rules into federal law governing the OCS.

The threat of massive retroactive liability for unpaid wages faced by Parker Drilling and other OCS employers is perhaps the clearest indication that California's wage-and-hour rules are "inconsistent" with OCSLA and other federal laws and thus inapplicable on the OCS. Until California announced

its rules four years ago in *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015), employers and employees negotiated OCS wage agreements with the understanding that sleep and rest time spent on OCS structures was not compensable under applicable federal law. It is highly unlikely that Congress, when it adopted OCSLA, intended to authorized state courts to retroactively impose a contrary regime by announcing new state standards which would immediately be incorporated into federal law.

Such congressional intent is particularly unlikely when, as here, it exposes employers to massive retroactive liability. Indeed, this Court has taken such considerations into account in determining the extent to which state law should be incorporated into the governing federal law. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739-40 (1979) (a "prudent[ial]" consideration in determining whether to incorporate state law is a hesitancy to adopt rules that would "undermine the] stability" of commercial law "essential for reliable evaluation of the risks involved" in structuring financial transactions).

The Ninth Circuit's misinterpretation of OCSLA is also evident from the statute's structure and history. Both of those indicia of congressional intent make clear that Congress intended § 1333(a)(2)(A) to serve a gap-filling function: the statute incorporated state law into federal law to the extent necessary to eliminate gaps that might exist in federal law applicable to structures on the OCS. The statute states that federal law is to apply to the OCS "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. § 1333(a)(1). And it is

uncontested that the federal statute that specifies the criminal law applicable to such federal enclaves, the Assimilative Crimes Act (ACA), 18 U.S.C. § 13a, is intended as a gap-filling statute. *Lewis v. United States*, 523 U.S. 155, 160 (1998) ("The ACA's basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves."). There is no gap in federal law governing wage-and-hour issues arising on the OCS; the FLSA and implementing regulations provide a comprehensive set of rules governing those issues. Accordingly, OCSLA does not incorporate state laws that provide a competing set of rules.

The Ninth Circuit's contrary holding disregards this Court's entire body of OCSLA case law. The Court has repeatedly described § 1333(a)(2)(A) as serving a gap-filling function. *See, e.g., Rodrigue v. Aetna Cas. & Surety Co.*, 395 U.S. 352, 357 (1969) ("Since federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems, [OCSLA] supplemented gaps in the federal law with state law through the 'adoption of State law as the law of the United States.'"). At issue in *Rodrigue* were wrongful-death actions filed by the survivors of individuals killed while working on OCS drilling rigs. The Court stated that if federal law provided a cause of action, it would be "exclusive" and would "oust" any competing state-law cause of action. 395 U.S. at 359. Only after finding that federal law did not provide a cause of action did the Court conclude that OCSLA incorporated Louisiana wrongful-death law as part of federal law. *Id.* at 365-66.

The Ninth Circuit sought to support its holding

by reference to case law arising under the ACA and 42 U.S.C. § 1988(a), a federal civil rights statute. Pet. App-29 to App-35. The appeals court misconstrued that case law. Indeed, because both the ACA and § 1988(a) are universally understood as authorizing incorporation of state law into federal law solely for the purpose of filling gaps in federal law, those statutes cannot plausibly be understood as support for the Ninth Circuit's contrary interpretation of OCSLA.

ARGUMENT

I. CALIFORNIA WAGE-AND-HOUR LAW IS NOT INCORPORATED INTO FEDERAL LAW BECAUSE IT IS "INCONSISTENT" WITH THE FLSA

The OCS surrounding the United States is within the exclusive control of the United States government. While States may exercise territorial jurisdiction over submerged lands immediately adjacent to their coasts, federal law dating from the 1940s definitively established that submerged lands more than three nautical miles off the coast (the OCS) are (and always have been) within the exclusive jurisdiction of the federal government and subject exclusively to federal law.

Newton does not contend otherwise. He bases his California wage-and-hour claim not on an assertion that California law is directly applicable to the OCS off the coast of California, but on an assertion that Congress incorporated that law into federal law when it adopted OCSLA in 1953. But Congress carefully limited the extent to which it incorporated state law into the federal law governing the OCS. OCSLA

incorporates state laws only "[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). Because California wage-and-hour law is "inconsistent" with federal wage-and-hour law, it is not part of the federal law upon which Newton may rely.

A. California Law Requires Compensation for Sleep and Rest Time that Is Not Compensable Under the FLSA

In adopting the FLSA, Congress established a comprehensive set of wage-and-hour rules governing employment throughout the United States, including on the OCS. Regulations issued by the Department of Labor pursuant to the FLSA are directly applicable to Newton, who generally remained on his OCS rig for 14 days at a time and worked 12-hour shifts each day. Those regulations state that an employee who remains on company premises "for extended periods of time" is "not considered as working" while "engaged in normal private pursuits" such as "eating, sleeping, [and] entertaining." 29 C.F.R. § 785.23. Parker Drilling complied fully with the FLSA; it paid Newton "an hourly rate well above the state and federal minimum wage, and also paid him premium rates for overtime hours." Pet. App-20. It did not pay him for his sleep and rest time.

Before 2015, Parker Drilling seemingly was in full compliance with California wage-and-hour law as well, even if that law had been applicable on the OCS. But in its 2015 *Mendiola* decision, the California Supreme Court announced that California wage-and-

hour law, in sharp contrast to federal law, generally requires that employees be paid for all hours they remain on their work site, even during sleeping and resting time. *Mendiola*, 60 Cal. 4th at 848. The Ninth Circuit fully recognized the contrast between the federal and California wage-and-hour standards, stating that *Mendiola* "establishes that California embraces a more protective standard for determining hours worked" than does federal law. Pet. App-39.

Under any commonly understood definition of the term "inconsistent," the California wage-and-hour standard for sleep and rest time is not consistent with the federal standard. *See, e.g., Webster's New Collegiate Dictionary*, G. & C. Merriam Co. (1981) (defining "consistent" as "marked by harmonious regularity or steady continuity: free from irregularity, variation, or contradiction," and "showing steady conformity to character, profession, belief, or custom"). The two wage-and-hour standards cannot plausibly be deemed "free from irregularity, variation, or contradiction." California's "more protective standard" likely would require Parker Drilling to pay Newton for 24 work hours each day he remained on the OCS; the FLSA clearly does not. A standard under which OCS employers would owe millions of dollars more than the wages payable under FLSA standards is not "marked by harmonious regularity" with the FLSA standards.

The Ninth Circuit sought to apply a far more constricted definition of "inconsistent" even as it recognized that "California embraces a more protective standard for determining hours worked." Pet. App-39. Yet it pointed to no other federal statutes in which Congress has adopted the narrow definition of

"inconsistent" that the appeals court ascribed to § 1333(a)(2)(A).

In every instance of which WLF is aware, Congress has intended the ordinary meaning of "inconsistent" when it has used that word in a federal statute. For example, in the Federal Rules of Evidence, Congress has excluded from the definition of hearsay a prior statement that "is inconsistent with the declarant's testimony [at trial] and was given under penalty of perjury." FRE Rule 801(d)(1)(A). Federal courts have repeatedly rejected efforts to narrowly define what constitutes an "inconsistent" prior statement. *See, e.g.*, *United States v. Williams*, 737 F.2d 594, 608 (7th Cir. 1984) ("[W]e do not read the word 'inconsistent' in Rule 801((d)(1)(A) to include only statements diametrically opposed or logically incompatible."); *United States v. Butterworth*, 511 F.3d 71, 75 (1st Cir. 2007) (statement describing an event is inconsistent with later testimony that the witness lacks current memory of the event); *United States v. Truman*, 688 F.3d 129, 142 (2d Cir. 2012) (witness's refusal to answer a question at trial is "inconsistent with his prior testimony" in which he answered the question); *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980) ("[I]nconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position.").

The Ninth Circuit concedes that the California wage-and-hour standard is not the same as the federal wage-and-hour standard and leads to disparate outcomes in this very case. As such, § 1333(a)(2)(A) makes clear that OCSLA does not incorporate the

California standard into federal law—the only law that is applicable on the OCS.

B. California's FLSA-Protected Right to Apply Its Wage-and-Hour Law Within Its Own Borders Is Irrelevant to Whether that Law Is "Inconsistent" with the FLSA

To support its holding that California's "more protective standard" is "not inconsistent" with the federal wage-and-hour standard, the Ninth Circuit pointed to the following provision of the FLSA:

> No provision of this chapter or of any other thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter.

29 U.S.C. § 218(a). According to the Ninth Circuit, this FLSA "savings clause" "explicitly permits more protective state wage and hour laws." Pet. App-36. For that reason, the court "reject[ed] Parker's suggestion that California's minimum wage and overtime laws are antagonistic" to the FLSA "simply because they establish different and more generous benchmarks." Pet. App-36 to App-37.

WLF notes initially that OCSLA refers to "inconsistent" standards, not "antagonistic" ones. More

importantly, the Ninth Circuit argument is unavailing because § 218(a) simply has no application to this case.

Section 218(a) states that compliance with FLSA wage-and-hour standards does not excuse "noncompliance" with a state law establishing a standard more generous to employees. But an employer cannot be deemed "noncomplian[t]" with a state standard that does not apply to the employer. No one argues, for example, that wage-and-hour standards established by New York or New Jersey apply to Parker Drilling, so it is irrelevant whether it complies with those standards. It is similarly irrelevant whether Parker Drilling is "noncomplian[t]" with California wage-and-hour laws for its activities on the OCS (a geographic area over which California exercises no more jurisdiction than do New York and New Jersey), unless it is first determined that OCSLA incorporates those standards into federal law pursuant to 43 U.S.C. § 1333(a)(2)(A). Because (as demonstrated above) incorporation of the "inconsistent" California wage-and-hour standard is not sanctioned by OCSLA, § 218(a) is inapplicable; there is no relevant state law with which Parker Drilling could be in "noncompliance." Parker Drilling does not contend that its compliance with the FLSA standard should excuse it from having to comply with applicable state wage-and-hour law (the contention rejected by § 218(a)); rather, it contends that there is no applicable state law.

Section 218(a) comes into play only within areas subject to a State's traditional police powers. That provision reflects Congress's determination, based on federalism concerns, that a State is entitled to provide

protections to those employed within the State that are greater than the protections otherwise afforded under federal law. Indeed, case law relied on by the court below supports that limited understanding of § 218(a). *See, e.g., Pacific Merchant Shipping Ass'n v. Aubrey*, 918 F.2d 1409, 1421 (9th Cir. 1990) (Congress adopted § 218(a) "to make clear its intent not to disturb the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standards"). That purpose has no relevance to work performed on the OCS, where California never has, and does not now, exercise its police powers.

To underscore the absence of state police powers over the OCS, Congress included the following provision in the OCSLA:

> The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose ...

43 U.S.C. § 1333(a)(3). Applying to the OCS a state wage-and-hour standard that is "inconsistent" with the standard adopted under federal law contravenes the express provisions of OCSLA. Nothing in the FLSA (which was adopted several decades before OCSLA) suggests that Congress adopted § 218(a) for the purpose of overriding OCSLA and applying two divergent wage-and-hour standards to an area solely within the jurisdiction of the federal government.

C. Congress Is Highly Unlikely to Have Intended a Statutory Scheme that Exposes Employers to Massive Retroactive Liability

Prior to the decision below, a body of federal case law had uniformly rejected incorporation of state law in OCSLA cases in which federal law (in this case, the FLSA) provides a comprehensive set of rules. *See, e.g., Continental Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030 (5th Cir. 1969). Not surprisingly, oil companies responded to that case law by adopting OCS employment practices that complied with federal wage-and-hour standards. Yet unless the decision below is overturned, they face massive retroactive liability under state wage-and-hour standards that prior federal-court OCSLA decisions had deemed inapplicable to the OCS.[2]

The threat of massive liability is a strong indication that California's wage-and-hour rules are "inconsistent" with federal law and thus inapplicable on the OCS. When OCSLA was adopted in 1953, the FLSA had already put into place a comprehensive federal regulatory scheme governing wage-and-hour issues. It is highly unlikely that when it adopted OCSLA, Congress intended to permit States at their option to impose competing sets of wage-and-hour standards on an area (the OCS) over which they

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[2] Indeed, the Ninth Circuit conceded that, prior to its decision, *every* federal district court in California (including the district court in this case) had relied on *Continental Oil* to reject efforts to apply California wage-and-hour law to the OCS. Pet. App-20 n.13.

exercise no jurisdiction—and thereby expose employers to retroactive liability for failing to anticipate the State's move. It is far more likely that Congress limited state-law incorporation to law "not inconsistent" with federal law precisely because it sought to prevent liability-inducing changes in OCS regulation of the sort initiated by *Mendiola* and the decision below.[3] Indeed, Congress had no need to "borrow" state law at all when, as with wage-and-hour standards, a comprehensive body of federal law already existed; doing so merely invites the confusion and legal instability that frequently arises whenever entities are subject to two non-identical regulatory schemes.

The liability risks created by the decision below are not limited to back-pay awards covering sleep and rest time. As Parker Drilling notes, the California minimum hourly wage is significantly higher than the federal minimum wage. Although Parker Drilling's OCS employees are all paid in excess of the California minimum wage, the decision below may pose

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[3] As Petitioner notes, the decision below enables a State bent on discouraging off-shore oil-and-gas development to undermine development by imposing new regulations and creating the potential for massive civil liability. This Court has cautioned that "it is the duty of the federal courts to assure that the importation of state law [into federal law] will not frustrate or interfere with the implementation of national policies." *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 161 (1983) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977)). Congress adopted OCSLA because it determined that the Outer Continental Shelf should be subject to *exclusive* federal control and that it should be up to the federal government to determine the extent to which natural resources under the OCS should be exploited.

retroactive liability concerns for other OCS employers who, in good-faith reliance on prior case law, have paid hourly wages that comply with federal law but not state law. Other risks include liability under California workers' compensation law. The universal understanding of OCS employers is that they are not subject to workers' compensation laws. But the decision below calls that understanding into doubt.[4]

When determining the extent to which state law should be incorporated into federal law, the Court has been mindful of the need to avoid such instability. For example, in *Kimbell Foods,* the Court faced the need to establish a federal rule governing federal-government lien priority. The Government sought creation of a federal common-law rule that would grant its liens securing loan guarantees priority over all private liens. The Court rejected that approach (at least with respect to non-tax liens) and instead directed lower courts to

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[4] The Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, provides a right of action (against an employer) for employees injured while engaged in maritime employment. Although employees working on OCS drilling platforms are not engaged in "maritime employment" (33 U.S.C. § 902(3)), Congress expanded the LHWCA to expressly cover OCS drilling-platform employees when it adopted OCSLA. 43 U.S.C. § 1333(b). Because injured OCS employees may seek compensation under the LHWCA, there is no need to incorporate additional state-law remedies (*e.g.*, workers' compensation) into the federal law governing the OCS. However, OCSLA includes a "savings clause" similar to 29 U.S.C. § 218(a). *See* 43 U.S.C. § 1333(f) (the creation of a LHWCA remedy for OCS employees is "not intended" to bar otherwise applicable rights). The decision below may open the door to claims that California workers' compensation law is available to OCS employees, based on claims that it is both "applicable" and "not inconsistent" with federal law.

incorporate into federal law the lien-priority law of the forum state. *Kimbell Foods*, 440 U.S. at 739-40. The Court explained that it was adopting this "prudential course" in order to avoid the upheaval potentially caused by "altering settled commercial practices":

> In structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved. Cf. *National Bank v. Whitney*, 103 U.S. 99 (1881). However, subjecting federal contractual liens to the doctrines developed in the tax lien area could undermine that stability. Creditors who justifiably rely on state law to obtain superior liens would have their expectations thwarted whenever a federal contractual security interest suddenly appeared and took precedence.

Ibid.

The Court should be similarly reluctant in this case to fashion a federal law that undermines the reasonable expectations of OCS employers and exposes them to massive liability. Until *Mendiola*, none of the States adjacent to offshore drilling platforms had adopted wage-and-hour standards governing sleep and rest time that differed from FLSA standards, and that continues to be true for each of the States other than California. *See, e.g.*, Alaska Stat. Ann. § 23.20.095 (West) & 8 AAC 15.105(a)-(b) (Alaska law); *Louisiana Hours Worked*, Employment Law Handbook, available at https://www.employmentlawhandbook.com/wage-

a n d - h o u r - l a w s / s t a t e - w a g e - a n d - h o u r - laws/louisiana/hours-worked (Louisiana law); *Hours Worked for Non-Exempt Employees*, Texas Workforce Comm'n, available at https://twc.texas.gov/news/efte/hours_worked_nx_ees.html (Texas law). Parker Drilling acted in reasonable reliance on that regulatory history in negotiating employment relationships, and no one contests that at all times it has complied with the FLSA. Yet if the decision below is upheld, Parker Drilling's reasonable expectations will have been thwarted, and it will face massive liability claims. WLF respectfully submits that the possibility of retroactive liability could not exist if California's wage-and-hour standard were "not inconsistent" with the FLSA.

II. OCSLA DOES NOT INCORPORATE STATE LAW INTO FEDERAL LAW WHERE, AS HERE, THERE ARE NO GAPS IN FEDERAL LAW

The Ninth Circuit's misinterpretation of OCSLA is also evident from the statute's structure and history. As Parker Drilling's brief explains in detail, numerous provisions included in OCSLA make clear that Congress intended § 1333(a)(2)(A) to serve only a gap-filling function; that is, the statute incorporates state law into federal law to the extent necessary to eliminate gaps that might exist in federal law applicable to structures on the OCS.

Rather than repeating that explanation here, WLF focuses on just one of those provisions. Section 1333(a)(1) states that federal law is to apply to the OCS "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State."

Federal law has long provided that areas of exclusive federal jurisdiction located within a State (generally referred to as "federal enclaves") are subject solely to federal law but that the law of the surrounding State should be incorporated into federal law where necessary to eliminate gaps in the law.[5] So by specifying that the OCS should be treated akin to federal enclaves, OCSLA makes clear that state law should be applied to the OCS only for gap-filling purposes. That rationale precludes incorporation of California wage-and-hours standards into federal law, because there are no gaps in the FLSA's comprehensive wage-and-hours standard.

OCSLA's legislative history confirms the gap-filling function that Congress intended for § 1333(a)(2)(A). *Rodrigue* summarizes that legislative history, including: (1) a Senate committee report stating that OCSLA adopts state law as federal law, to be used "when Federal statutes or regulations ... are inapplicable"; and (2) opponents of OCSLA, who "realized full well that state law was being used only to supplement federal law," introduced an ultimately unsuccessful amendment to make state law fully applicable on the OCS. 395 U.S. at 358-59 (citing S. Rep. 411 (1953); and 99 Cong. Rec. 7232-36).

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[5] For example, the Assimilative Crimes Act is the federal law that governs the incorporation of state criminal law into the federal law applicable to federal enclaves. The ACA provides that state law is to be incorporated solely for the purpose of filling gaps in federal law. *Lewis*, 523 U.S. 155, 160 (1998) ("The ACA's basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves.").

A. The Decision Below Disregards This Court's OCSLA Case Law

The Ninth Circuit's rejection of a gap-filling interpretation of OCSLA disregards *Rodrigue* and the Court's entire body of OCSLA case law. *Rodrigue* repeatedly describes OCSLA as a statute intended to fill gaps in federal law. Indeed, the Fifth Circuit observed that limiting application of state law to instances in which its application is "necess[ary] to fill a significant void or gap" is "the recurring theme of *Rodrigue*." *Continental Oil*, 417 F.2d at 1036. *See also Rodrigue*, 395 U.S. at 362 (stating that "the whole body of Federal law was made applicable to the [OCS] (as well as state law *where necessary*)") (emphasis added).

At issue in *Rodrigue* were wrongful-death actions filed by the survivors of individuals killed while working on OCS drilling rigs. The plaintiffs filed claims under Louisiana tort law, but the defendants argued that OCSLA did not incorporate Louisiana tort law because the plaintiffs had an adequate remedy under the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.* Crucially, the Court agreed fully with the defendants' gap filling premise; it stated that: (1) the DOHSA remedy "would be exclusive if it applied"; and (2) "for federal law to oust adopted state law federal law must first apply." *Id.* at 359. The Court ultimately permitted the plaintiffs to proceed with their state-law tort claims, but only after concluding that DOHSA did not provide a remedy. *Id.*

at 359-66.[6]

In light of *Rodrigue*'s ultimate holding that the plaintiffs' state-law claims were incorporated into federal law by OCSLA, the Court's statements regarding gap-filling (that the state-law claims were actionable *only* because the plaintiff lacked a federal cause of action under DOHSA) were arguably dicta. But those statements were central to the Court's rationale, so the Ninth Circuit was unwarranted in asserting that *Rodrigue* established nothing more than that "absent a maritime nexus, federal admiralty law does not extend to the OCS." Pet. App-27.

The Court's gap-filling view of OCSLA carried over to its later OCSLA decisions. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court described its *Rodrigue* decision as follows:

> In *Rodrigue*, we clarified the scope of application of federal law and state law under § 1331(a)(1) and § 1333(a)(2). By rejecting the view that comprehensive admiralty law remedies apply under § 1333(a)(1), we recognized that there exists a substantial "gap" in federal law. Thus, state law remedies are not "inconsistent" with applicable federal law.

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[6] The Court held that Congress determined that admiralty law should *not* apply on OCS structures and that DOHSA may only be invoked in an admiralty action. *Ibid.* The Court noted that admiralty law usually applies to claims involving vessels and that Congress did not wish to classify structures on the OCS as vessels. *Id.* at 360-62.

> Accordingly, we held that, in order to provide a remedy for wrongful death, the "gap" must be filled with the applicable body of state law under § 1333(a)(2).

404 U.S. at 101. The clear implication of *Huson*: where (as in Newton's case) there is no gap in federal law, state law is not incorporated into federal law by OCSLA. The Court later reinforced its point by stating, "Congress [in OCSLA] specified that a comprehensive body of state law should be adopted by the federal courts in the absence of existing federal law. ... Thus, Congress made clear provision *for filling in the gaps* in federal law." *Id.* at 104 (emphasis added).

Similarly, in a later OCSLA decision, the Court observed, "All law applicable to the Outer Continental Shelf is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480 (1981) (quoting 43 U.S.C. § 1333(a)(2)). The Ninth Circuit is correct that neither *Rodrigue* nor *Huson* nor *Gulf Offshore* addressed the precise question presented here: does OCSLA incorporate state law when a comprehensive federal regulatory scheme addresses the very same subject matter and thus there are no gaps in federal law? But the tenor of those decisions—including repeated statements that state law is incorporated only if there is a gap in federal law—strongly supports Parker Drilling.

B. The Decision Below Misconstrues Case Law Governing Federal Enclaves and Federal Civil Rights Law

The Ninth Circuit sought to support its holding by reference to case law arising under the ACA and 42 U.S.C. § 1988(a), a federal civil rights statute. Pet. App-29 to App-35. The appeals court misconstrued that case law. Indeed, because both the ACA and § 1988(a) are universally understood as authorizing incorporation of state law into federal law solely for the purpose of filling gaps in federal law, those statutes cannot plausibly be understood as support for the Ninth Circuit's contrary interpretation of OCSLA.

The Ninth Circuit's reliance on *Lewis* was particularly misplaced. *Lewis* addressed the circumstances under which the ACA mandates that state law should be incorporated into the federal law that governs federal enclaves. The defendant was charged with murdering her child on a federal enclave. Prosecutors sought to incorporate Louisiana law, which would have allowed them to charge the defendant with murdering a child under 12 (classified as first-degree murder by Louisiana). The Court *rejected* that incorporation effort, with the result that the defendant could only be charged with second-degree murder under existing federal law. *Lewis*, 523 U.S. at 172. The Court explained that there was "no gap for Louisiana's statute to fill" because federal law already criminalize "all variants of murder." *Id.* at 169. Congress had simply decided that the type of murder with which the defendant was charged should not be classified as first-degree murder (and thus could not be

punishable by death). *Id.* at 170.

WLF recognizes that while OCSLA and the ACA have many similarities–both involve incorporation of state law into federal law, and Congress explicitly modeled OCSLA after statutes (such as the ACA) that govern federal enclaves located within a State—differences in the statutes make it difficult to draw relevant conclusions about OCSLA from ACA case law. But to the extent that *Lewis* has any relevance here, it supports Parker Drilling, not (as the Ninth Circuit insisted) Newton. *Lewis* demonstrates that, in general, federal law does not incorporate state law unless the state law is needed to fill a gap in federal law.

The Ninth Circuit drew from *Lewis* the proposition that charging a defendant with a state crime is not automatically precluded simply because the defendant's conduct violated *some* federal crime, no matter how minor. Pet. App-30. But that proposition provides the Ninth Circuit with very little traction. As an example of a situation in which prosecutors could turn to gap-filling state law despite the availability of a federal crime, *Lewis* posited a situation in which there was no federal law against murder but the defendant could be charged under federal law with simple assault. 523 U.S. at 161. One could plausibly argue, based on *Lewis*, that OCSLA's gap-filling limitations should not prevent invocation of state law in OCS cases where the only federal remedy is grossly inadequate. But that argument is irrelevant here, where federal law provides comprehensive standards governing wage-and-hour issues.

The Ninth Circuit's reliance on case law

interpreting 42 U.S.C. § 1988(a) is equally implausible. That statute provides in pertinent part:

> [I]n all cases where [laws enacted for the protection of civil rights] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is *not inconsistent* with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of the cause.

(Emphasis added.)

Far from supporting the Ninth Circuit, § 1988(a) case law cited by the appeals court interprets the statute precisely in the manner that Parker Drilling urges for OCSLA—state law is incorporated into federal law under § 1988(a) only if: (1) incorporation is necessary to fill a gap in federal law; *and* (2) the state law is not inconsistent with federal law. *See, e.g., Burnett v. Grattan*, 468 U.S. 42 (1984); *Robertson v. Wegmann*, 436 U.S. 584 (1978). In both cases, all parties agreed that a gap existed in federal law, and the only issue before the Court was whether the gap-

filling state law was inconsistent with federal law.[7] Unlike here, in neither case could the party opposing incorporation point to a written federal standard with which the state law was arguably inconsistent. As a result, the Court's inconsistency analysis included an examination of policies underlying federal civil rights laws. *See, e.g., Burnett*, 468 U.S. 52-55. The Ninth Circuit cited *Burnett* in support of its contention that whether California wage-and-hour standards are "inconsistent" with federal wage-and-hour standards should include an examination of Congress's objectives. Pet. App-35. But *Burnett* includes no suggestion that where, as here (and unlike in *Burnett*), the inconsistency between a federal regulation (29 C.F.R. § 785.23) and state law is readily apparent, a court is permitted to rely on policy considerations as a basis for ignoring the inconsistency.

[7] Indeed, in *Burnett* no party objected to importation of state law; the only issue before the court was which of two state limitations statutes should be imported into federal law.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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