

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   PACIFIC OPERATORS OFFSHORE,                   :

4   LLP, ET AL.,                                   :   No. 10-507

5                           Petitioners                   :

6                   v.   :

7   LUISA L. VALLADOLID, ET AL.                   :

8   - - - - - x

9   Washington, D.C.

10   Tuesday, October 11, 2011

11

12   The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 10:02 a.m.

15 APPEARANCES:

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 10-507, Pacific Operators Offshore v. Valladolid.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

The straightforward question in this case is whether the Outer Continental Shelf Lands Act provides a remedy for a worker injured in a forklift mishap on dry land. The answer is no. A worker injured on dry land from operations on dry land has a remedy in the State workers' compensation law, but not from OCSLA's extension of the Longshore Act to the outer continental shelf. Indeed, both the Benefits Review Board and the Ninth Circuit here held that the accident occurred too far inland for direct coverage under the Longshore Act.

CHIEF JUSTICE ROBERTS: When you say on land, do you -- where do you put the 3-mile State offshore limit? Does that count as land under your view?

MR. CLEMENT: No, it wouldn't count as land,

1 Mr. Chief Justice. If there were platforms on there  
2 that were themselves treated as land, that might be. I  
3 think most of the 3 miles from shore is going to be the  
4 navigable waters, and that might be covered, for  
5 example, directly under the Longshore Act. But as I  
6 say, one of the anomalies here is there was a direct  
7 Longshore Act claim in this case, and the determination  
8 was that the facility here was too far inland for direct  
9 coverage under the Longshore Act.

10 So, therefore, the counterintuitive  
11 proposition on the other side of the table today is that  
12 in extending the Longshore Act to the outer continental  
13 shelf, Congress effectively created a boomerang effect  
14 that caused the Longshore Act to apply further inland  
15 than it otherwise would.

16 JUSTICE KAGAN: Mr. Clement, just to follow  
17 up on the Chief Justice's question, if there's a  
18 helicopter crash in the water, let's say it occurs 2.5  
19 miles from the shore, is that covered? And, similarly,  
20 would it be covered if it occurred 3.5 miles from the  
21 shore?

22 MR. CLEMENT: Well, Justice Kagan, I think  
23 the best answer is both of those crashes would be  
24 covered directly by the Longshore Act because the  
25 Longshore Act by its own terms, not extended by OCSLA,

1 covers the navigable waters, and both of those would be  
2 accidents occurring in the navigable waters. And in the  
3 part of this Court's opinion in the Pacific Operators  
4 case addressing the DOHSA claim, this Court said that a  
5 helicopter effectively, when it's performing this kind  
6 of ferrying function, is a vessel. So, I would think  
7 that the right answer there is not that OCSLA extends  
8 the Longshore Act, but the Longshore Act applies  
9 directly under those circumstances.

10 JUSTICE ALITO: The curious thing about this  
11 case is that the statutory language seems to me to speak  
12 quite clearly to some theory of causation. Any injury  
13 occurring as the result of operations conducted on the  
14 outer continental shelf. That's -- that's causation.  
15 Maybe it's but-for, maybe it's proximate, but it's some  
16 -- some species of causation. And yet, nobody wants  
17 this really to be -- neither you nor your adversary nor  
18 the Government wants this to be a -- to be based on  
19 causation. Everyone wants to smuggle something else  
20 into -- into here -- into this.

21 MR. CLEMENT: Well, Justice Alito, let me  
22 talk first about the causation and then about the  
23 smuggling, if I can. As to the causation, I think there  
24 is both causation in this 1333(b) and a situs  
25 requirement that both sides acknowledge. At a bare

1 minimum, there have to be injuries resulting from  
2 operations conducted on the shelf. And I think that  
3 alone, that causation principle alone, if faithfully  
4 applied, is enough to decide this case in our favor.

5 But let me address the smuggling, because I  
6 do think --

7 JUSTICE SCALIA: Give me an example of a --  
8 of an injury that occurs on the shelf that is not a  
9 consequence of operations conducted. What -- just  
10 beachcombers out there, or what?

11 MR. CLEMENT: Well, I think the best example  
12 would be, Your Honor -- is somebody who's on the shelf  
13 but they're not employed in the relevant production  
14 purposes. And so, you might have an --

15 JUSTICE SCALIA: What are they doing out  
16 there?

17 MR. CLEMENT: Well, you might have an  
18 accountant out there. You might just have some  
19 employees who are out there whale watching or something.

20 JUSTICE GINSBURG: How many accountants go  
21 to platforms?

22 MR. CLEMENT: Well, Justice Ginsburg, I  
23 think it's worth recognizing -- I mean, I don't know how  
24 many go. I doubt very many go. But Congress passed  
25 this statute at a time when they didn't know the full

1 scope of the operations that would take place out on the  
2 shelf. And so, what they're trying to do is they're  
3 trying to -- at the one point, they're trying to limit  
4 it to employees who are engaged in the operations out  
5 there that are designed for the production of the  
6 mineral wealth of the shelf. And so, I think that's  
7 what some of the language is directed at.

8 JUSTICE GINSBURG: But if that -- if that's  
9 what Congress meant, then the emphasis should be on is  
10 this person one who regularly works on the outer  
11 continental shelf. And the -- this worker, we're told,  
12 was on the outer continental shelf 98 percent of the  
13 time.

14 MR. CLEMENT: Sure. And if he was at the --  
15 on the outer continental shelf at the time of this  
16 accident, he probably wouldn't have been injured.

17 But the one thing I think the statute  
18 clearly speaks to is not status, but it speaks to, as  
19 Justice Alito suggested, at a minimum a relationship  
20 between the operations that caused the injury and the  
21 fact that those operations have to be conducted on the  
22 shelf.

23 JUSTICE KENNEDY: But --

24 JUSTICE KAGAN: But Mr. --

25 JUSTICE KENNEDY: But if -- if you had said

1 status or situs, then it seems to me it would have made  
2 more sense, given the language of the statute. We will  
3 all have hypotheticals. We won't have too many, but  
4 it's quite common on oil rigs that the employees bring  
5 some of the equipment back to the land, clean it,  
6 prepare it, and so that they can bring it back to the  
7 next -- the next shift on the rig. And some of this  
8 machinery is complicated. It has springs in it.  
9 Suppose that the worker brings the machine back from the  
10 rig to the land, to the base of operations that's  
11 land-based, and is injured in repairing that machine.  
12 Under your view, no coverage?

13 MR. CLEMENT: No coverage, Your Honor, and I  
14 think that --

15 JUSTICE KENNEDY: I think that's quite  
16 difficult to square with the "as a result" language  
17 because this is a result of the operation. Let's just  
18 say the machine got broken because of the -- of the  
19 operations, and there -- and he's fixing it and he's  
20 injured.

21 MR. CLEMENT: No, I disagree, Your Honor,  
22 respectfully, and I think your way of looking at that  
23 hypothetical doesn't give sufficient import to the  
24 phrase "conducted on the shelf." It's -- what  
25 Respondents want to do is they want you to look at the



1 statute as saying as long as there is an injury that  
2 results from operations that have the purpose of  
3 developing the outer continental shelf, that that's  
4 enough. And if that were enough, I think the answer to  
5 your hypothetical would be that's covered.

6 But the statute very specifically says that  
7 they have to be injuries as a result of operations  
8 conducted on the shelf for the purpose of extracting the  
9 mineral wealth of the shelf.

10 And so, that first "on the shelf" I think  
11 clearly modifies the operations. Only operations  
12 conducted on the shelf are --

13 JUSTICE KENNEDY: Well, the  
14 Government and --

15 MR. CLEMENT: -- covered by the statute.

16 JUSTICE KENNEDY: The Government and the  
17 Ninth Circuit take care of that by saying that the  
18 person has to have -- the injured employee has to have  
19 spent substantial amount of time on the -- on the  
20 offshore operations. So, you could add that.

21 MR. CLEMENT: Well, you can't add that, Your  
22 Honor, because if there's one thing that is absolutely  
23 clear about this statute it's that it doesn't include a  
24 status test that looks for the predominant place you  
25 spend your time. And that's not --

1 JUSTICE GINSBURG: I thought your brief,  
2 your reply brief, said you -- you superimpose a status  
3 test. You have the situs of the injury, and then you  
4 superimpose status. So, your test is not simple state  
5 of -- place of injury.

6 JUSTICE KENNEDY: Yes, I agree. I thought  
7 you had a backup argument --

8 MR. CLEMENT: Well --

9 JUSTICE KENNEDY: -- in your -- in your  
10 reply brief.

11 MR. CLEMENT: Sure. I mean, I have two  
12 arguments, and let me try to address both, which is to  
13 say, on the causation point, if you look at just  
14 causation and you don't have a situs and a status  
15 requirement, then in that scenario, there's no way to  
16 get just a status test. And the only thing I would  
17 implore you to think about in that is not only is it not  
18 in the statute, but there is a statute that has a  
19 status-based remedy that travels with the worker  
20 wherever they go. It's the Jones Act, and it  
21 specifically is written in status terms. And that was a  
22 model that Congress had before it, but it specifically  
23 rejected the admiralty model for dealing with these  
24 structures and adopted the model that has them treated  
25 as --

1 JUSTICE KENNEDY: Would you call status --  
2 if the test is where you spend a substantial amount of  
3 time working, is that what you call status?

4 MR. CLEMENT: That's their status test,  
5 exactly.

6 JUSTICE KENNEDY: You -- but you call that  
7 status?

8 MR. CLEMENT: I call that their pure status  
9 test, which they themselves cite to Chandris, which is a  
10 Jones Act case. That just doesn't work. This was not  
11 the Jones Act.

12 Now, there is a test where we say that the  
13 best reading of the statute is status plus situs. And  
14 if I could try to get this argument out -- it's a little  
15 bit complicated, because I think the defect of this  
16 argument, if it has one, is it doesn't leap out directly  
17 from 1333(b), and you have to read 1333(b) in  
18 conjunction with both the rest of 1333 and in  
19 conjunction with 903(a) of the Longshore Workers' Act.  
20 If you do that, I think you will see there is a situs  
21 requirement and a status requirement.

22 Let me start with the rest of the 1333. If  
23 you think about this statute, the primary engine for  
24 applying Federal law to the shelf is not 1333(b); it's  
25 1333(a). It applies all of Federal law to the shelf.

1           But some statutes, it doesn't work, and the  
2 Longshore Act is one of them. If you apply the  
3 Longshore Act to the shelf without any modifications, it  
4 won't cover the shelf because it by its terms has a  
5 situs requirement that is limited to the navigable  
6 waters and at that point the drydocks.

7           So, Congress has to tailor the longshore  
8 remedy to the reality of the shelf, and it does it in  
9 two ways.

10           One, it has this language that everyone's  
11 focused on that is something of a status requirement in  
12 that it limits the recovery to employees who are engaged  
13 in certain activities. But the rest of the language in  
14 1333(b) is important. It's these definitions (1), (2),  
15 and (3), and they effectively define terms in the  
16 Longshore Act to make them work for purposes of  
17 extending it to the shelf.

18           And the key definition is (3). Three  
19 defines the term "United States" when used in a  
20 geographical sense, and it defines it to include the  
21 shelf, the artificial islands, and the fixed attachments  
22 thereto. Now, that's a puzzle if you look at 1333(b) in  
23 isolation, because it's defining the term "United  
24 States" for geographical purposes, and 1333(b) does not  
25 use the term "United States" for geographical purposes.

1 But another statute does; it's 903. It's the longshore  
2 remedy that's extended.

3 And 903(a) uses the term "United States."

4 And 903(a), if you want to look at, is at page 96 of the  
5 petition appendix. But that's the situs requirement.  
6 The situs requirement of 903(a) unmodified limits  
7 recovery to the navigable waters and drydocks. So, if  
8 you take that definition from (b)(3) and essentially  
9 superimpose it on 903(a), you then get a remedy that has  
10 a situs requirement; there's a recovery, but only if the  
11 injury occurs on the navigable waters, drydocks, the  
12 shelf, artificial islands, and the attachments thereto.

13 So it's -- as I say, it's a complicated  
14 argument, and it doesn't stare you in the face if you  
15 look at 1333(b) --

16 JUSTICE SOTOMAYOR: I'm sorry. How does  
17 that -- how does that provide you situs on the adjacent  
18 waters?

19 MR. CLEMENT: I don't -- with respect,  
20 Justice Sotomayor, I think you get that without OCSLA,  
21 which is to say I think that there's a remedy under the  
22 Longshore Act directly under the adjacent waters because  
23 the adjacent waters are navigable waters.

24 JUSTICE SOTOMAYOR: I see. So, you're  
25 saying you don't even -- you're not going --

1                   MR. CLEMENT: You don't need those, and that  
2 just underscores that Congress in the statute is really  
3 dealing with a very particular problem with the shelf  
4 and the artificial islands and platforms attached to  
5 them.

6                   JUSTICE SOTOMAYOR: So, how do you get to  
7 the water above the shelf?

8                   MR. CLEMENT: Same way, Your Honor, which is  
9 to say they're navigable waters.

10                  JUSTICE SOTOMAYOR: Instead of saying  
11 they're part of the shelf?

12                  MR. CLEMENT: Exactly, and they're not. And  
13 the statute I think couldn't be clearer about that  
14 because 1332 --

15                  JUSTICE SOTOMAYOR: I think the issue that  
16 Justice Kennedy was alluding to was the example the  
17 Ninth Circuit used: A pitcher on the mound throws a  
18 baseball and hits the batter. The situs is not the  
19 mound, but the injury has occurred as a result of  
20 pitching. And so, he's coming up with examples, and I  
21 think that's what the Ninth Circuit was saying when it  
22 was creating the test of a substantial nexus between the  
23 operation and the injury.

24                  MR. CLEMENT: I'm --

25                  JUSTICE SOTOMAYOR: And that's the part of

1 your -- of your definition that gives no credence to  
2 that possibility.

3 MR. CLEMENT: Well -- and I --

4 JUSTICE SOTOMAYOR: You may be arguing that  
5 as a factual matter what this man was doing on land was  
6 not a substantial nexus. That's a different issue than  
7 providing a test that limits injury to an operation  
8 solely on the shelf.

9 MR. CLEMENT: And if I could take that --  
10 there's a couple of pieces to that, Justice Sotomayor.  
11 First of all, I would say that I think that the  
12 hypothetical, let's say, of, you know, a nut or  
13 something coming off the shelf and hitting somebody  
14 somewhere else is -- illustrates the difference between  
15 our primary argument and our backup argument.

16 On our primary argument, somebody who -- if  
17 the nut hits somebody in the navigable waters, they  
18 wouldn't recover from OCSLA; they would recover under  
19 the Longshore Act directly because they were on the  
20 navigable waters.

21 On our backup theory, that it's a tight  
22 proximate cause test, then I would say, yes, that person  
23 can recover under OCSLA, but that's really a fortuitous  
24 set of circumstances precisely because I wouldn't apply  
25 a substantial nexus test, which seems to me just an

1 invitation to kind of play around with --

2 JUSTICE SOTOMAYOR: Well, you're not -- you  
3 don't want a but-for test. Or do you?

4 MR. CLEMENT: Certainly not.

5 JUSTICE SOTOMAYOR: All right. You don't  
6 want a proximate cause test.

7 MR. CLEMENT: Well, I could live with a  
8 proximate cause test as long as it's a proximate cause  
9 test that's tailored to the statute. And what I mean by  
10 that is I think if you look at the statute, you can't  
11 have a proximate cause test that doesn't take geography  
12 into account.

13 And I think -- in particular, I think in a  
14 case like this, you have to ask yourself not just  
15 proximate cause in the abstract, but were there  
16 operations somewhere other than the shelf that were a  
17 more direct proximate cause of the injury? And if  
18 that's the case, then the remedy lies in the law that  
19 applies to those other operations.

20 JUSTICE SOTOMAYOR: Give me your definition  
21 of causation now.

22 MR. CLEMENT: What's that?

23 JUSTICE SOTOMAYOR: This is a new version of  
24 proximate cause, so --

25 MR. CLEMENT: Well, you know, it's -- it's



1 funny because, you know, this Court has on more than one  
2 occasion sort of remarked that "proximate cause" itself  
3 is a weird formulation because "proximate" sounds like  
4 it has a location aspect to it. And we actually think,  
5 for purposes of this statute, that should be right.  
6 It's proximate cause as tailored to this statute and the  
7 policies of this statute, and I think that would want to  
8 really take the geography into account.

9 JUSTICE SCALIA: Mr. Clement, I don't really  
10 understand proximate cause as applied to a -- a statute  
11 that provides for automatic liability rather than  
12 liability for negligence. To say that it's a proximate  
13 cause of a particular act of negligence is one thing,  
14 and we have a whole body of law that gives guidance for  
15 that. But do you know of any other situation where we  
16 talk of proximate cause, something proximately caused by  
17 operations? Not by a particular act of negligence or --  
18 I don't know how to apply proximate cause to an  
19 operation.

20 MR. CLEMENT: Well, Justice Scalia, I would  
21 say two things. One is I do think there's an anomaly  
22 here, but I do think it's -- you know, you're not being  
23 asked to apply proximate cause for purposes of assessing  
24 liability because, as you say, strict liability -- it's  
25 kind of automatic liability.

1           But what I would say is you are being asked,  
2 at least under the backup theory, to apply proximate  
3 cause as a way of determining the geographical scope of  
4 the statute. And that's anomalous, but I don't think  
5 it's so anomalous that you wouldn't do it if you thought  
6 that was the better way to read the statute.

7           That said, I do think that the best way to  
8 read the statute is consistent with all the other  
9 statutes as part of a jurisdictional puzzle. I mean,  
10 all of the areas off of the shelf are governed, with the  
11 exception of seamen under the Jones Act, primarily as a  
12 matter of geography. So --

13           JUSTICE GINSBURG: Mr. Clement, if your  
14 position is right, then we have a worker who most of the  
15 time is doing work on a platform, and he will be covered  
16 or not depending on whether the injury occurred on the  
17 shelf or on the land. So, it's -- the other view is to  
18 say what this person does most of the time is what  
19 counts. Then this worker would always be covered by  
20 OCSLA. And if you take your view, then one will be  
21 covered by OCSLA; another one who is doing the same job  
22 is covered by a State -- a State -- you have a variety  
23 of State workers' compensation laws as opposed to a  
24 uniform law governing workers of this kind.

25           MR. CLEMENT: Well, two responses, Justice

1 Ginsburg: First of all, this Court has already  
2 confronted the objection that, well, if -- under OCSLA  
3 workers would move in and out of coverage, and it  
4 rejected it in the Herb's Welding case. And I don't --  
5 I think it's common ground -- well, maybe not, but it  
6 should be common ground that if you had a worker who was  
7 injured on a State platform, that that would not be  
8 covered by -- a State waters platform, that that would  
9 not be covered by OCSLA.

10 And, again, that was an anomaly that this  
11 Court confronted in Herb's welding and the Court said:  
12 Yes, well, you know, workers are going to move in and  
13 out of coverage, but that's what OCSLA says. That's  
14 what OCSLA does.

15 JUSTICE KENNEDY: That's what brings me --  
16 I'm looking at petition appendix 96, 903(a) that you  
17 referred us to. I wasn't quite sure of your argument  
18 with respect to this statute. This statute is a  
19 situs-based statute.

20 MR. CLEMENT: Yes, and it's the Longshore  
21 Act.

22 JUSTICE KENNEDY: But since Congress didn't  
23 follow this model in the -- in subsection (b) that we're  
24 looking for and used "as a result," why doesn't that  
25 show that Congress meant something different? I didn't

1 hear your argument on that point.

2 MR. CLEMENT: Well, my argument --

3 JUSTICE KENNEDY: I don't see, in other  
4 words, how 903 doesn't hurt you more than it helps you.

5 MR. CLEMENT: It helps me because 1333(b)  
6 doesn't apply a different model. It adopts this model.  
7 It adopts and extends the Longshoreman Act to the shelf.  
8 See, it's a mistake to read 1333 --

9 JUSTICE KENNEDY: But it doesn't; it talks  
10 about where the injury occurs, and that's not what --  
11 and that's not what (b) says.

12 MR. CLEMENT: No, it talks about that as  
13 part of extending the Longshore Workers' Act to the  
14 shelf. It's important that, you know, you can't get --  
15 I mean, 1333(b), like I said, is not a self-contained  
16 offshore workers workers' compensation regime. What it  
17 does is it extends the Longshore Workers' Act to the  
18 shelf, including 903(a).

19 But what I'm saying is Congress recognized  
20 that you couldn't just extend 903(a) and the rest of the  
21 Act to the shelf without modification, because then you  
22 come to this language that says you only get relief if  
23 your injury occurred on the navigable waters or the  
24 drydocks attached thereto. So, Congress in (b)(3)  
25 changes the definition of the United States for

1 geographical purposes in a way that allows you to  
2 superimpose this provision to the shelf, but instead of  
3 reading it to say you only get a recovery if you're  
4 injured on the navigable waters including the drydocks,  
5 you get a recovery if you're injured on the navigable  
6 waters, including the shelf, the drydocks, the  
7 artificial islands, and the fixtures attached thereto.

8 JUSTICE GINSBURG: Mr. Clement, may I go  
9 back to -- you referred to Herb's Welding, but that was  
10 a case -- it was a claim under the Longshore Act, not an  
11 OCSLA claim, and the Court said it was expressing no  
12 opinion on whether 1332(b) covered the injury.

13 MR. CLEMENT: That's right. Herb's Welding  
14 is not a holding, but at the end of that opinion, the  
15 Court confronts this argument that isn't it odd that  
16 somebody would be moving in and out of coverage? And  
17 the Court says that that is a product of OCSLA. And it  
18 doesn't say it's a product of OCSLA generally; it says  
19 particularly that it's a product of OCSLA's extension of  
20 the Longshore Act. And I do think that this objection  
21 about people moving in and out was answered by the Court  
22 in Herb's Welding.

23 I would also say, Justice Ginsburg, the  
24 second point I wanted to make in response to your  
25 earlier question is I understand that it might make

1 policy sense to have coverage that encapsulates an  
2 individual no matter where they work. But the problem  
3 is -- I mean, that's not only a different model; that's  
4 the model that Congress rejected. They thought long and  
5 hard about having an admiralty remedy, and presumably  
6 then the Jones Act would apply, and if you were attached  
7 to a vessel or a platform, then you would have coverage  
8 no matter where you went.

9           But that's not what they did. They  
10 incorporated instead as their model the Longshore Act,  
11 and the Longshore Act always had a situs requirement.  
12 So, when Congress makes a conscious effort to deal with  
13 this unusual geographical problem with -- and solves the  
14 problem with the Longshore Act, which is sitting there  
15 with a situs requirement, and doesn't adopt the Jones  
16 Act, which has a status-only requirement, it seems very,  
17 very peculiar to adopt instead a model that would have a  
18 status-only test.

19           JUSTICE GINSBURG: But Congress also did not  
20 adopt the proposal, the specific proposal to confine  
21 OCSLA to situations in which State workers' compensation  
22 was unavailable.

23           MR. CLEMENT: And I think that's -- they  
24 rejected that with good reason, Your Honor, because you  
25 have to remember that, at this point, they're living

1 with the experience that this Court ultimately resolved.  
2 But they're living in real time with the experience of  
3 people under the Longshore Act, which at that point, did  
4 carve out and limit the remedy, the Federal remedy, only  
5 when a State remedy was unavailable. And they were  
6 watching that play out, and it was a mess. People  
7 didn't know if they should bring a State case or a  
8 Federal case, and at that point they were viewed as  
9 exclusive. So, Congress had ample reasons to reject the  
10 idea that we're going to only give a Federal remedy if a  
11 State remedy is unavailable.

12 JUSTICE SCALIA: What reason did they have  
13 to use the terminology "as a result of" instead of  
14 simply saying that this Act applies only with regard to  
15 injuries on the platform, which is what other statutes  
16 did say? I mean, other statutes had a geographical  
17 requirement. What a strange way to say it, "as a result  
18 of operations."

19 MR. CLEMENT: Well, Justice Scalia, I don't  
20 know which other statutes you're talking about. I mean,  
21 the other statute that most plainly has a situs  
22 requirement is the Longshore Act, and that's precisely  
23 what they extended to the shelf, as I've argued. Beyond  
24 that, it's true that some of the other provisions of  
25 this Act have slightly different wording, but I don't

1 think anything turns on that --

2 JUSTICE KAGAN: But, Mr. Clement, you are  
3 asking us to just ignore six words in this statute,  
4 right? You read the statute as any injury occurring on  
5 the outer continental shelf, when in fact the statute  
6 says "any injury occurring as the result of operations  
7 conducted on the outer continental shelf." And you give  
8 a variety of arguments in your brief about what those  
9 six words are supposed to do. They're supposed to cover  
10 latent injuries. They're supposed to make sure that the  
11 statute only covers things that happen in the scope of  
12 your employment.

13 But your friends come back and say the  
14 statute did all those things anyway. These six words  
15 would serve no function under your theory.

16 MR. CLEMENT: Justice Kagan, first of all,  
17 it's interesting. The only way they can say that those  
18 functions were performed by the statute anyways is to  
19 incorporate provisions of the Longshore Act, because  
20 1333(b) itself doesn't take care of latent injuries or  
21 doesn't take care of, you know, who's in the scope of  
22 their employment. All of that is taken care of in the  
23 Longshore Act, which is why I think the best way to read  
24 this is incorporating the Longshore Act and its situs  
25 requirement.



1           But, beyond that, I would never ask you to  
2 make six words go away, never. Those words do play a  
3 function, but the function they play is to make it clear  
4 that the injury has to result of operations conducted on  
5 the shelf for certain purposes. And that precludes an  
6 employee accountant who's out on the shelf and injured  
7 by something that has nothing to do with shelf  
8 operations.

9           JUSTICE KAGAN: But this goes back to  
10 Justice Ginsburg's question. She asked you how many  
11 accountants are there on the shelf? One can't really  
12 imagine that Congress is writing this -- this statute,  
13 and drafting those six words in order to make sure that  
14 an accountant who goes out to the outer continental  
15 shelf isn't covered.

16           MR. CLEMENT: Justice Kagan, I would beg to  
17 differ. And I think what you have to understand is, go  
18 back in 1953 and when they're -- I mean, you can say  
19 confidently that there aren't accountants on the shelf  
20 because you have the benefit of 60 -- 60 years of  
21 experience with -- post-1953 with what goes on, on the  
22 shelf. Congress at this point is sort of legislating  
23 for a brave new world, and they don't -- they're trying  
24 to provide for all of the occasions that may come to  
25 pass out on the shelf.

1           There is a great law review article that  
2 actually provides this background, and it's written by,  
3 of all people, Warren Christopher, the Warren  
4 Christopher, and it's in the Stanford Law Review, and it  
5 was written December of 1953, and it's worth a look  
6 because it captures this idea that they're kind of, you  
7 know, legislating for this brave new world out there,  
8 and they don't know who's going to be out there. They  
9 don't know if it's going to be all drill workers or if  
10 there's going to be accountants and clerical workers out  
11 there.

12           And so, I think with that context, it's not  
13 at all odd that they would use those six words to say,  
14 kind of the way that Congress did later in 1972 in  
15 imposing the marine employment test for longshoremen --  
16 it's like, look, we want to provide a longshore remedy,  
17 but not to just anybody, any employee who might happen  
18 to be on the shelf; we want to provide it to those  
19 people who are essentially in the core operations that  
20 are going on, on the shelf.

21           If I could reserve the balance of my time.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 Mr. Clement.

24           Mr. Palmore.

25           ORAL ARGUMENT OF JOSEPH R. PALMORE

1 ON BEHALF OF THE FEDERAL RESPONDENT

2 MR. PALMORE: Thank you, Mr. Chief Justice,  
3 and may it please the Court:

4 I'd like to start off with the exchange that  
5 Justice Kagan had with Mr. Clement about the language  
6 that was used here in 1333(b), and I think the contrast  
7 between the language that Congress used in 1333(b) and  
8 the language it used in other provisions, neighboring  
9 provisions, of 1333 is instructive.

10 And I'd like the point the Court to section  
11 1333(c), which is on page 3a of the appendix to the  
12 Government's brief. This is the provision involving the  
13 National Labor Relations Act. And I think this shows  
14 how Congress went about drafting when it wanted to  
15 specify legal consequences that would flow from an  
16 actual event that took place in a particular place. So,  
17 Congress extends the National Labor Relations Act to  
18 "any unfair labor practice, as defined in such Act,  
19 occurring upon any artificial island...." And then it  
20 lists with particularity the particular situses where  
21 the National Labor Relations Act would apply.

22 If Congress had followed that model in  
23 section 1333(b), it would be a very different statute.  
24 It would have said, as Your Honor pointed out, with  
25 respect to disability or death of an employee resulting

1 from any injury on the outer continental shelf. If  
2 Congress wanted to additionally require -- have some  
3 kind of operations nexus, it could have said occurring  
4 on the outer continental shelf as the result of  
5 operations on the outer continental shelf.

6 Congress didn't do either of those things in  
7 section 1333(b), and we think that contrast is -- is  
8 quite instructive here. It's also not the case --

9 JUSTICE KAGAN: Mr. Palmore --

10 CHIEF JUSTICE ROBERTS: Well, but it's a  
11 little -- it's a little different when you're talking  
12 about a labor practice and an activity that results in  
13 an injury. Labor practice by its terms is going to have  
14 applicability to a particular location. So, you would  
15 expect them to use that type of language. It doesn't  
16 carry the same negative implication you're suggesting  
17 under 1333(b).

18 MR. PALMORE: Well, I think that --  
19 Mr. Chief Justice, that I think there's a contrast  
20 between 1333(b) and 1333(c) in terms of the specificity  
21 with which Congress provided for where a particular  
22 event would happen. There's no question that 1333(b)  
23 has a situs requirement, but it's a situs of operations  
24 requirement.

25 So, when you're talking about a situs of

1 operations, you're talking about a geographic zone where  
2 operations take place. It makes sense that Congress  
3 would have used this phrase "on the outer continental  
4 shelf." Now, the outer continental shelf itself is a  
5 defined term in the statutes. In 1331(a), it applies  
6 only to the subsoil and seabed. It doesn't include  
7 artificial installations put on top. So, we're talking  
8 about a general zone, a general geographic zone where  
9 the operations take place. And then Congress wanted to  
10 provide benefits for injuries that result from those  
11 operations.

12 JUSTICE ALITO: Suppose the facts of this  
13 case were changed a little bit so that the Respondent,  
14 instead of spending 98 percent of his time on an oil rig  
15 doing things that he did there, actually spent only 20  
16 percent of his time there, and he spent 80 percent of  
17 his time on land doing what he was supposed to be doing  
18 at the time of the accident. This particular operation  
19 produced so much scrap metal, he had to spend 80 percent  
20 of his time going around with a forklift gathering it  
21 up. Now, would this case come out the same way then?

22 MR. PALMORE: We don't think so, Your Honor.

23 JUSTICE ALITO: Then how does that -- I  
24 don't see how you get this result out of the statutory  
25 language, because the causal connection between the

1 operations on the shelf and the accident are precisely  
2 the same in the two situations. Whether he spends 98  
3 percent of his time on the rig or 2 percent of his time  
4 on the rig, that makes no difference whatsoever in the  
5 causal relationship.

6 MR. PALMORE: Because we think it's a  
7 mistake in the context of a workers' compensation scheme  
8 to look at this as kind of a snapshot in time. We think  
9 that when you're talking about a workers' compensation  
10 scheme, the kind of causation that is relevant is the  
11 causation caused by the employment relationship itself.  
12 So, if someone's spending, like Mr. Valladolid --  
13 spending 98 percent of his time on the shelf, he's  
14 uniquely exposed to the hazards of work in that  
15 dangerous environment.

16 JUSTICE SCALIA: The trouble with that is  
17 that's not what it says. It says "as a result of  
18 operations."

19 MR. PALMORE: And we think that --

20 JUSTICE SCALIA: And I don't -- you know, I  
21 would think he doesn't even have to be an employee, does  
22 he?

23 MR. PALMORE: He does have to be an  
24 employee. That's a -- only employees are entitled to  
25 benefits. But I think the definition of "employee" or

1 really the related definition of "employer" is  
2 instructive on this question. If you look at the  
3 definition of an employer in 1333(b)(2) -- this is on  
4 page 3a of the Government appendix -- says "the term  
5 'employer' means 'an employer any of whose employees are  
6 employed in such operations.'" It's somewhat of a  
7 circular definition. But there's a focus here on  
8 employees who are engaged in such operations. Those are  
9 employees like --

10 JUSTICE KAGAN: Mr. Palmore, you're asking  
11 us to look at the relationship between the employment  
12 and the shelf activities, and the statute asks us to  
13 look at the relationship between the injury and the  
14 shelf activities. And those may be two different things  
15 and seemingly are two different things in the  
16 hypothetical that Justice Alito gave you.

17 MR. PALMORE: And the Ninth Circuit viewed  
18 -- viewed injury in the way that Your Honor and Justice  
19 Alito are suggesting. And I would -- and that's our  
20 backup position. I think both sides here have backup  
21 positions. I would submit that the backup positions are  
22 where -- -

23 JUSTICE KAGAN: The backup positions may be  
24 better than the primary positions in this case, you  
25 know?

1           MR. PALMORE: I think the backup positions  
2 really also differ with each other only in a matter of  
3 degree, not in --

4           JUSTICE SCALIA: What is the backup position  
5 that's so much better here? What is it?

6           (Laughter.)

7           MR. PALMORE: Well, I don't -- to be clear,  
8 we don't think it's better. We think that the category  
9 of off-shelf injuries that should be covered are those  
10 that are suffered by workers who spend a substantial  
11 amount of time on the shelf. The backup position is  
12 the -- in our view, is the Ninth Circuit position, which  
13 is the substantial connection between the injury and  
14 operations on the shelf. It doesn't strike me as that  
15 different from Mr. Clement's backup position.

16           JUSTICE ALITO: Well, the trouble is that I  
17 have no idea what that means. Now, they have the  
18 example of an accountant on land who spends all of his  
19 time doing accounting work for the -- for the oil rig.  
20 Why isn't there a substantial connection there? Were it  
21 not for the operations on the oil rig, this guy would be  
22 out of work or he'd be doing something completely  
23 different. I don't understand that.

24           MR. PALMORE: Well, that's the -- that would  
25 be an expansive but-for test of the kind that at least



1 some language in the Third Circuit's opinion in Curtis  
2 would support. We think that that sweeps too broadly.  
3 We think a proximate cause, however, sweeps too  
4 narrowly, and Justice Scalia's exchange with Mr. Clement  
5 highlighted this. Proximate cause is a --

6 JUSTICE SOTOMAYOR: A substantial nexus is  
7 just right?

8 MR. PALMORE: We think substantial --  
9 substantial nexus, substantial connection. We think,  
10 though, that it would be a mistake to look at only the  
11 snapshot in time. And there is some language in the  
12 Ninth Circuit decision which -- which might suggest  
13 that. We think --

14 JUSTICE SOTOMAYOR: Do you accept your  
15 adversary's position that whatever causal -- you have  
16 to, given your status test. Where are you drawing your  
17 status test from? Meaning, obviously it's not from the  
18 language.

19 MR. PALMORE: Well, I think I would submit  
20 that it is from the language, Justice Sotomayor, because  
21 we think that the language has to be understood in the  
22 context of workers' compensation. This is not a  
23 tort-based fault regime. This is a workers'  
24 compensation scheme. Workers' compensation schemes are  
25 based on the relationship between employer and employee,

1 and they cover injuries that arise out of and in the  
2 course of employment. So, the kind of causation that  
3 matters in a workers' compensation scheme is the -- is  
4 the causation that flows from the worker relationship  
5 itself, the workplace relationship itself.

6 JUSTICE SOTOMAYOR: You're not -- I would  
7 have just thought you would have taken it out of (b)  
8 subdivision (2), the term "employer," almost the  
9 obverse, means an employer -- means an employer any of  
10 whose employees are employed in such operations.

11 MR. PALMORE: Thank you, Justice Sotomayor.  
12 I think that is the second point. I think that textual  
13 provision provides support for the fact that Congress  
14 was particularly focused on those employees who were  
15 uniquely exposed to the hazards of work on the shelf.

16 CHIEF JUSTICE ROBERTS: What if -- but what  
17 if that exposure is not pertinent to what they're doing?  
18 Let's take the same individual, 98 percent of the time  
19 on the rig and 2 percent on land. An emergency comes  
20 up. They need a new part, and they say: Here, go --  
21 you know, go drive to Reno where they have a new part  
22 and bring it back. And he skids off the road and is  
23 injured. Is he really covered by the Offshore Act?

24 MR. PALMORE: We think he is because that is  
25 a worker who is uniquely exposed to those hazards

1 offshore, and he shouldn't --

2 CHIEF JUSTICE ROBERTS: Well, so, he's  
3 subject -- he's injured by, you know, a hazard on the  
4 road to Reno. He's -- I don't know how many miles that  
5 is from the offshore, and yet he's still covered by the  
6 Offshore Act?

7 MR. PALMORE: Yes, Your Honor, because we  
8 think that the -- that -- and here the contrast with the  
9 underlying Longshore Act is important, and Justice  
10 Kennedy's questions of Justice -- of Mr. Clement  
11 highlighted this, because it's quite an unusual thing  
12 for a workers' compensation statute to have a  
13 situs-of-injury requirement. The Longshore Act is the  
14 sole example of which I'm aware, and it has it for  
15 historical reasons based on this Court's decision in  
16 Jensen.

17 And it has a provision that's quoted on page  
18 19 of the Government brief, that provides coverage for  
19 disability or death, but only if the disability or death  
20 result from an injury occurring upon the navigable  
21 waters. That was clearly in front of Congress at the  
22 time that it adopted OCSLA, because it was incorporating  
23 that statute and applying it in the outer continental  
24 shelf context. And it's quite telling that Congress did  
25 not use that but-only-if formulation.

1 JUSTICE SCALIA: Yes, but --but Mr. Clement  
2 says that -- and we can argue about whether the language  
3 does it or not, but the system he comes up with, he  
4 says, creates a very sensible division. You're either  
5 under the Longshore Act or you're under this Act. And  
6 -- whereas, in your situation, you can be under both,  
7 can't you?

8 MR. PALMORE: Yes, in some situations.

9 JUSTICE SCALIA: Well, why does that make  
10 any sense?

11 MR. PALMORE: Because the kind of certainty  
12 -- we think our test is actually much easier to  
13 administer and provides greater predictability in this  
14 sense --

15 JUSTICE SCALIA: Which one prevails when  
16 they both apply? Are there any differences between the  
17 two?

18 MR. PALMORE: Well, there's -- Congress  
19 contemplated, expressly contemplated, that there would  
20 be overlapping coverage and adopted a provision in  
21 903(e) of the Longshore Act to provide for offsetting  
22 payments when there is overlap. So, overlap is a fact  
23 of life in this area.

24 JUSTICE BREYER: I think the question is, is  
25 there any difference between the two?

1 MR. PALMORE: Well, in this case the Federal  
2 benefits were more generous than the State benefits.

3 JUSTICE BREYER: Well, why wouldn't they  
4 have been -- I mean, as I understand it, if a person of  
5 a certain set -- and it's the same set in both,  
6 virtually, the same set of people -- where they're  
7 injured on navigable waters or piers and docks and so  
8 forth, it's the Longshore Act. And if you're on the  
9 platform, it's this Act, so far. And the benefits are  
10 the same.

11 MR. PALMORE: Correct.

12 JUSTICE BREYER: Okay. So, the only thing  
13 that extending this does, I think he says, is imagine a  
14 person who worked on a platform goes to get some  
15 platform bits repaired miles from the sea. Now, that  
16 person would not be covered by Longshore Act, would he?

17 MR. PALMORE: Would not.

18 JUSTICE BREYER: No. And he would be  
19 covered by this, if they're right, but not if Clement is  
20 right.

21 MR. PALMORE: Correct.

22 JUSTICE BREYER: Okay. So, he's saying what  
23 point was there for Congress to do that?

24 MR. PALMORE: Because we thought that  
25 Congress intended this to function in the way that other

1 workers' compensation schemes function, both at the time  
2 that OCSLA was adopted and today, which is that the  
3 coverage provides comprehensive benefits from the start  
4 of the workday to the end of the workday.

5 JUSTICE BREYER: Let me give you an example.  
6 It might help. A longshoreman is working on a dock.  
7 Someone tells him: There is a winch here that's broken;  
8 take it to the plant to have it repaired, which is  
9 100 miles inland. He does it, and he's hurt at the  
10 plant. He is not covered, correct?

11 MR. PALMORE: Under the Longshore Act?

12 JUSTICE BREYER: Correct. Yes, that's  
13 right. So, he's not covered.

14 MR. PALMORE: Correct.

15 JUSTICE BREYER: But if the same thing  
16 happens on the platform, under your theory he is  
17 covered. Now, your opponent is asking a reasonable  
18 question. That seems to be about the only difference  
19 that he can think of, whether it's the one Act or the  
20 other, and why would Congress have done that? That's  
21 his question, and I'd like to hear the answer.

22 MR. PALMORE: Because in that situation,  
23 Justice Breyer, the Longshore Act's strict  
24 situs-of-injury requirement is the exception, not the  
25 rule. That is unusual and really unprecedented in

1 imposing a situs-of-injury requirement in the context of  
2 a workers' compensation scheme. At the time of OCSLA --  
3 at the time OCSLA was adopted in 1953, States had nearly  
4 uniformly moved away from the tort theory of workers'  
5 compensation coverage that would apply benefits --

6 JUSTICE BREYER: So, your answer is  
7 basically there are many statutes like this, they all  
8 have some kind of OCSLA-type requirement, it's the  
9 Longshore Act that was rather stingy, and we don't know  
10 why.

11 MR. PALMORE: No, we do know why.

12 JUSTICE BREYER: Why?

13 MR. PALMORE: It was stingy for historical  
14 reasons --

15 JUSTICE BREYER: Because of the workmen's  
16 compensation?

17 MR. PALMORE: It was based on this Court's  
18 decision in Jensen, and there's a whole long and  
19 tortured history there, and that explains why Congress  
20 did that.

21 But when Congress took the unusual step of  
22 imposing a situs-of-injury requirement in the context of  
23 a workers' compensation scheme, it did so in express  
24 terms with this "but-only-if" phrase.

25 JUSTICE SOTOMAYOR: Would the -- would

1 worker who went to the factory be covered by State  
2 workmen's comp?

3 MR. PALMORE: Yes, just like the worker on a  
4 fixed platform on the outer Continental Shelf would also  
5 be covered by State workers' comp. Private Respondent  
6 cites the Bobbitt case from California that says  
7 California workers' comp doesn't have a location  
8 requirement --

9 CHIEF JUSTICE ROBERTS: I'm sorry; I don't  
10 understand the answer. So, he's covered by both?

11 MR. PALMORE: Yes.

12 CHIEF JUSTICE ROBERTS: Oh.

13 MR. PALMORE: Overlap -- a certain degree of  
14 overlap is a fact of life in this area. Section 903(e)  
15 accounts for that by allowing for offsetting payment, so  
16 there's never going to be double recovery. And 903(e)  
17 really just endorsed a historical practice of offsetting  
18 payments that was discussed by this Court in the Calbeck  
19 case. So that there has always been some degree of  
20 overlapping coverage.

21 At the time of -- OCSLA was adopted in  
22 1953 -- this Court in Davis had recognized that even  
23 under the Longshore Act itself there was a twilight zone  
24 of overlapping coverage. So --

25 JUSTICE SCALIA: When you're covered by both



1 the Longshore Act and State workmens' comp, can you  
2 proceed under either one?

3 MR. PALMORE: You -- you might be able to  
4 proceed under either one if you're covered under either  
5 one, but what is quite, Justice Scalia, is you can't  
6 collect --

7 JUSTICE SCALIA: You can't get --

8 MR. PALMORE: -- under either one, or if you  
9 do, you -- there are going to be contingent offsets.

10 JUSTICE SCALIA: But you think you can  
11 proceed under the State law if you choose.

12 MR. PALMORE: Yes, Your Honor.

13 JUSTICE KENNEDY: Does -- do we owe -- do  
14 the courts give some deference to the director's  
15 position?

16 MR. PALMORE: May I answer, Mr. Chief  
17 Justice?

18 CHIEF JUSTICE ROBERTS: Please.

19 MR. PALMORE: Yes. In this Court's decision  
20 in Rambo, the Court said that the director's  
21 interpretation of the statute is entitled to Skidmore  
22 deference.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Frederick.

25 ORAL ARGUMENT OF DAVID C. FREDERICK

1 ON BEHALF OF THE PRIVATE RESPONDENT

2 MR. FREDERICK: Thank you,

3 Mr. Chief Justice, and may it please the Court:

4 I'd like to shift some focus to what would  
5 have happened if Mr. Valladolid had worked on a floating  
6 platform instead of a fixed, because the law is clear  
7 that if the platform was floating, he would be a Jones  
8 Act seaman, and under this Court's cases, if he were  
9 injured on land, he would have a Jones Act remedy. So,  
10 the only anomaly here is that he happened to be working  
11 on a fixed platform 98 percent of the time. And the  
12 question is whether the permissive workers' compensation  
13 benefits provided under OCSLA carry with him when he  
14 happens to be injured on land as a result of the shelf  
15 operations.

16 JUSTICE SCALIA: I don't think that's an  
17 anomaly. I mean, you know, if it's a floating platform,  
18 it's a vessel. The difference between a vessel and a  
19 dock. Is it an anomaly that you're covered under the  
20 Longshore Act if you're injured on a dock, which is  
21 fixed, but you are not -- you're covered under the Jones  
22 Act instead if you're on a vessel, which is not fixed?

23 MR. FREDERICK: Your question, Justice  
24 Scalia --

25 JUSTICE SCALIA: That doesn't seem to me

1 like an anomaly at all.

2 MR. FREDERICK: Well, let me answer your  
3 question this way, Justice Scalia.

4 JUSTICE SCALIA: How many floating platforms  
5 are there, anyway?

6 MR. FREDERICK: There are a number of  
7 floating platforms in the Gulf of Mexico. They're  
8 operating on the outer continental shelf as well as on  
9 the Western Pacific --

10 JUSTICE SCALIA: And they're covered by the  
11 Jones Act?

12 MR. FREDERICK: Yes. That's correct.

13 JUSTICE SCALIA: They should be; they're  
14 vessels.

15 MR. FREDERICK: But the point is that they  
16 get a Jones Act remedy if they happen to be injured on  
17 land. So, Mr. Chief Justice, under your hypothetical,  
18 if the Jones Act seaman is driving to Reno and there's  
19 an accident, he's covered under the Jones Act and gets  
20 to have a Jones Act remedy, notwithstanding that the  
21 injury has nothing to do with his service on the vessel  
22 itself.

23 JUSTICE SCALIA: You're -- you are not  
24 proposing to eliminate that anomaly?

25 MR. FREDERICK: No, what I'm saying is that

1 the --

2 JUSTICE SCALIA: You're saying wherever you  
3 are injured, so long as you're on a platform,  
4 you're covered. I don't think so.

5 MR. FREDERICK: If the work is substantially  
6 related and the causal connection goes to the employment  
7 relationship, to the operations, the worker is covered  
8 under OCSLA.

9 JUSTICE SCALIA: So, you still have an  
10 anomaly.

11 MR. FREDERICK: There is --

12 JUSTICE SCALIA: Sometimes it will be  
13 covered; sometimes it won't be covered.

14 MR. FREDERICK: It is, to be sure, a more  
15 comfortable fit to the actual language of the statute  
16 than imposing and superimposing a situs-of-injury  
17 requirement, which is nowhere to be found in section  
18 1333(b).

19 JUSTICE GINSBURG: Is there any injury on  
20 land in the course of employment that would not be  
21 covered by OCSLA where we have a worker of this kind  
22 that -- who spends 98 percent of his time on the outer  
23 continental shelf -- the injury, however, is on land?  
24 Is there any case where such a worker who predominantly  
25 works on the outer continental shelf would not be

1 covered by OCSLA in your view?

2 MR. FREDERICK: Well, if the work is arising  
3 out of the course and scope of employment, which is the  
4 natural way that these workers' compensation regimes  
5 work, and it is related to the shelf operations, our  
6 submission is, yes, he is covered under OCSLA.

7 JUSTICE GINSBURG: So, then what you're  
8 really saying is -- it's not your test, but really the  
9 Government's saying we look to see, is this person  
10 dominantly working on the outer continental shelf?

11 MR. FREDERICK: That -- that's correct,  
12 Justice Ginsburg. It's the easiest to administer test,  
13 too, because the way workers' compensation insurance  
14 works, the employer will -- based on the payroll of the  
15 workers who are out on the shelf and its overall  
16 payroll, will pay workers' compensation premiums, and  
17 under the Department of Labor regulations, it will add  
18 an endorsement for those workers whose status it  
19 controls, would be covered under OCSLA and thereby get  
20 the higher Federal benefit.

21 JUSTICE SCALIA: So, if you work only 20  
22 percent of your time for this -- this drilling company  
23 on -- on the -- on the platform, but it so happens that  
24 you are injured on the platform, you know, a bolt comes  
25 off and strikes you, you're not covered?

1           MR. FREDERICK: Well, our submission would  
2 be he would be covered because he's directly injured as  
3 a result of the operations on the shelf. It's a  
4 two-factor --

5           JUSTICE SCALIA: Well, then -- then you're  
6 not applying the -- the employment test. I mean, you  
7 either are or you are not.

8           MR. FREDERICK: Well, that person is going  
9 to be covered under our submission because it's a  
10 two-part inquiry. You look at the nature of the  
11 relationship, and you look at the nature of how the  
12 injury came about. And under those circumstances we  
13 agree with the Government, that if somebody is -- if an  
14 employee is out on the platform and is injured as a  
15 result of operations, that person is covered.

16           JUSTICE SCALIA: Heads, I win; tails, you  
17 lose, right? We -- we have a situs-of-the-injury test  
18 when you have less than your -- a majority of your work  
19 on the platform, but we don't have a situs test when the  
20 majority is on the platform.

21           MR. FREDERICK: I would submit that the  
22 incongruity --

23           JUSTICE SCALIA: How do you get that out of  
24 this statute?

25           MR. FREDERICK: It's even greater under

1 their hypothetical with the helicopter worker, because  
2 they want to get the person who's riding in the  
3 helicopter out to the shelf covered under the Longshore  
4 Act, and yet that flies directly in the face of this  
5 Court's holding in Herb's Welding, that when he's on the  
6 fixed platform, he doesn't get longshore benefits. And  
7 so, here under their hypothetical --

8 JUSTICE SCALIA: Was it the Longshore Act?  
9 I thought -- I thought it was the Jones Act that they  
10 were covered in the helicopter.

11 MR. FREDERICK: No. Under his submission --  
12 his submission is that when they fly out in a helicopter  
13 and they crash in the water, they get longshore  
14 benefits. But if they actually made it to the platform,  
15 under this Court's holding in Herb's Welding they would  
16 not get longshore benefits --

17 CHIEF JUSTICE ROBERTS: Well, I mean, both  
18 positions --

19 MR. FREDERICK: -- if they were in State  
20 territorial waters.

21 CHIEF JUSTICE ROBERTS: Both positions, Mr.  
22 Frederick, are vulnerable to particular hypotheticals.  
23 You have imprecision on what it means to spend most of  
24 your time on the -- on the shelf, and they have their  
25 own problems. And what do you do with somebody who's --

1 3 months he's on the shelf, and then 3 months he's back  
2 -- back on land 3 months? Does it depend when the  
3 injury occurs, whether it's when he's on the land part  
4 of his job or on the shelf part?

5 MR. FREDERICK: The way this Court handled  
6 that under in seaman context under Chandris was to look  
7 at the totality of the circumstances of the worker's  
8 employment, and that seems to be --

9 CHIEF JUSTICE ROBERTS: Well, that's -- I've  
10 given you all the totality. He's working for 3 months,  
11 and then he's -- you know, it's seasonal or something,  
12 and 3 months he's on -- on the land. That is the  
13 totality of the circumstances.

14 MR. FREDERICK: He would be covered.

15 CHIEF JUSTICE ROBERTS: Why?

16 MR. FREDERICK: Because he's the kind of  
17 person that Congress wanted to provide coverage to under  
18 Federal worker -- remind -- remember, in 1950 --

19 CHIEF JUSTICE ROBERTS: Where -- how do you  
20 know it's the kind of person? I thought your line was  
21 whether or not he spends most of his time on the shelf  
22 or most of his time somewhere else.

23 MR. FREDERICK: Our test actually is  
24 substantial work. We don't disagree with the  
25 Government's adoption of a Chandris 30 percent line.



1 That seems appropriate in light of the fact that many of  
2 these workers come on for 2 weeks, are off for 2 weeks.  
3 They're working 12-hour shifts while they're out on the  
4 rig. It seems appropriate that the coverage should go  
5 with them when they are --

6 CHIEF JUSTICE ROBERTS: Thirty percent is  
7 the line?

8 MR. FREDERICK: That's what the Government  
9 -- I have no brief to defend, Mr. Chief Justice, in  
10 terms of where that line is, because my -- my client's  
11 husband --

12 CHIEF JUSTICE ROBERTS: Well, I know, but  
13 we'd like to have a test that we apply to your  
14 situation, and it's nice to know -- maybe 30 percent, I  
15 guess, is as good as any.

16 MR. FREDERICK: The point that Congress was  
17 trying to get at -- and these are platforms that were  
18 covered by State workers' compensation in 1953 -- was to  
19 extend the more generous Federal benefits to encourage  
20 an industry that was a nascent industry to develop the  
21 resources of the outer continental shelf, to provide  
22 uniformity, to provide benefits to the workers who were  
23 exposed to the perils that were out on the platform.  
24 And so, it makes sense, we submit, that when those  
25 workers who are -- who are subjected to those

1 circumstances have the same Federal benefits. And there  
2 are substantial benefits.

3 My client, for instance, got a one-time  
4 lump-sum payment of \$42,000 for the death of her  
5 husband, as opposed to the Federal benefits that would  
6 be approximately \$466 per week during the remainder of  
7 her period as a widow. And the State benefits would be  
8 credited against any Federal benefits that she would be  
9 getting in the future. But it's -- it is a substantial  
10 dimension to the life of a worker out on the shelf.

11 JUSTICE KAGAN: So, suppose, Mr. Frederick,  
12 that we find that we can't find your status test in the  
13 language of the statute and that what this statute seems  
14 to give us is, instead, a causal test and that the cause  
15 is whether operations on the outer continental shelf  
16 caused the injury in question. So, what's your best  
17 argument for how operations on the shelf caused the  
18 injury in this case?

19 MR. FREDERICK: The scrap metal that Mr.  
20 Valladolid was charged with moving at the time of his  
21 the death was very likely the same scrap metal that he  
22 personally had taken off the shelf, or someone in his  
23 position would have taken off the shelf. And to Justice  
24 Kennedy's point, the equipment is heavy, dangerous,  
25 difficult equipment. Just the fact that it is moved off

1 the shelf for a cleaning, scrap, for removal, et cetera,  
2 is an immaterial difference.

3 In their reply brief, they concede that an  
4 oil spill worker who's cleaning up this oil spill from  
5 an offshore event is going to be covered under a -- what  
6 they call a proximate cause standard -- under any kind  
7 of substantial connection proximate cause. Proximate  
8 cause is a legal policy that determines how you want to  
9 limit the scope of the injuries that would be covered.

10 In a workers' compensation scheme,  
11 Justice Scalia, you were completely right it makes no  
12 sense. And so, if you adopt some kind of substantial  
13 connection, it has to be very loosely related. As the  
14 Court in the FELA context last term held in CSX v.  
15 McBride, where you have a negligence standard, it makes  
16 even more sense to have a very relaxed standard of  
17 causation under workers' compensation.

18 JUSTICE SCALIA: I assume that the Act would  
19 also apply under your analysis to a -- an independent  
20 contractor, a trucker, who carries this heavy -- this  
21 heavy steel to the place where this worker worked on it,  
22 right?

23 MR. FREDERICK: I don't think so.

24 JUSTICE SCALIA: Well --

25 MR. FREDERICK: You have to be an employee.

1 JUSTICE SCALIA: -- but he would not have  
2 been carrying the steel had it not been for the -- for  
3 the operations on the shelf.

4 MR. FREDERICK: It has to be an employee.  
5 If -- if your hypothetical is the independent contractor  
6 on land, it has to be an employee in order to be  
7 covered. And that person doesn't qualify, which creates  
8 another set of --

9 JUSTICE SCALIA: I see. I see.

10 MR. FREDERICK: -- difficult lines to draw  
11 under the Longshore Act, where you also have to be an  
12 employee, and independent contractors are not covered --

13 JUSTICE SCALIA: He would be covered if --  
14 if -- he were employed by the -- by the firm that  
15 operates the platform, right?

16 MR. FREDERICK: If you could give me the  
17 rest of the facts of your hypothetical, Justice Scalia.

18 JUSTICE SCALIA: Well -- it's just the guy  
19 that drives the truck that takes the steel to the place  
20 where your client worked on it.

21 MR. FREDERICK: Not covered, because that  
22 person is not directly substantially working on shelf  
23 operations --

24 CHIEF JUSTICE ROBERTS: Unless he spent 30  
25 percent of his time on the shelf. Then he's covered.

1 MR. FREDERICK: Yes. Because those  
2 workers -- those workers -- I think it's hard to imagine  
3 the kinds of --

4 JUSTICE KENNEDY: Is it 30 percent of his  
5 time over his career or that month or in a year?

6 MR. FREDERICK: This Court's articulation of  
7 that standard, Justice Kennedy, in the Chandris test has  
8 been the subject of litigation in the lower courts, and  
9 my understanding is that the courts have kind of worked  
10 out the various factors and standards that go into the  
11 nature of the employment standard --

12 JUSTICE GINSBURG: You -- you're talking  
13 about the Chandris standard that the seaman's  
14 relationship to the vessel must be substantial in nature  
15 and duration --

16 MR. FREDERICK: Correct.

17 JUSTICE GINSBURG: And that's a kind of a  
18 vague -- what's substantial? It's the same problem we  
19 have here. What is the --

20 MR. FREDERICK: That's correct. And the  
21 nature -- you know, if I could -- I'm sorry, did you  
22 want --

23 JUSTICE GINSBURG: Yes. So, how have courts  
24 worked this out? What is a substantial relation to the  
25 vessel?

1           MR. FREDERICK:  As I understand the case  
2  law, Justice Ginsburg, there are a range of factors that  
3  go into the nature of the sea workers' relationship to  
4  the vessel, and they go to -- they go to duration, they  
5  go to the performance of duties in the completion of the  
6  mission of the vessel and the like.  And there are a  
7  range of standards.  Obviously, the facts of each crew  
8  member is difficult to unpack in a hypothetical at this  
9  time.

10           CHIEF JUSTICE ROBERTS:  Well, that's a real  
11  -- obviously, it's a real mishmash, and maybe that's  
12  what we're -- we're stuck with.  How does this work as a  
13  practical matter?  I assume the -- the companies get  
14  insurance to cover their risks here.

15           MR. FREDERICK:  Correct.

16           CHIEF JUSTICE ROBERTS:  Who decides -- I  
17  mean, the insurance company will underwrite how many  
18  people spend what percentage of time where?

19           MR. FREDERICK:  And as a practical matter,  
20  Mr. Chief Justice -- and I don't represent the insurance  
21  company here -- but the way I understand that it works  
22  is that, on an annual or a periodic basis, the company  
23  and the insurance company get together through some  
24  auditing process where there's verification of the  
25  workers who are OCSLA workers and thereby get the

1 longshore benefits, and the company and the insurance  
2 company work that out to determine either numbers or  
3 particular individuals or the like.

4           And so, here what we're talking about is a  
5 situation where the employer is not liable for the  
6 damage. It's an insured risk, and --

7           CHIEF JUSTICE ROBERTS: No -- well, they  
8 have to pay higher insurance rates. To say they're not  
9 liable for it I think is a real --

10           MR. FREDERICK: It's a different form of  
11 liability, and it's one that based on the way workers'  
12 compensation traditionally is developed -- and I would  
13 direct the Court to the opening chapters of Larson's  
14 monumental treatise on workers' compensation, where he  
15 basically says if this is a social compact in which the  
16 employer doesn't have to face liability for personal  
17 injuries in tort but gets insurance, and the premiums  
18 are then passed on to the consuming public of that  
19 particular entity's goods.

20           JUSTICE BREYER: Does it carry over who's an  
21 employee from the Longshoreman Act? Which defines an  
22 employee as a maritime worker, and then defines that and  
23 has exceptions and so forth, and this has a couple more.  
24 That's who the employee is; is that right?

25           MR. FREDERICK: Well, under this statute,

1 no; (b)(2), as Justice Sotomayor referenced, it is -- it  
2 is an employer, some of whose employees are engaged in,  
3 quote, "such operations." And Mr. Valladolid was  
4 exactly the kind of person who was engaged in such  
5 operations.

6 So, our submission, Justice Breyer, is that  
7 that is the kind of person that Congress contemplated  
8 when it was focusing on the work force that would be  
9 engaged in development of the outer continental shelf.

10 If the Court has --

11 CHIEF JUSTICE ROBERTS: Well, but you -- I  
12 don't mean to get back to it all the time, but it's not  
13 -- you have to say that Congress contemplated the person  
14 who spent 30 percent of his time on the outer  
15 continental shelf. In terms of us coming up with a  
16 test. Maybe your client is an easy case, where it's 98  
17 percent. But the test you want us to adopt covers the  
18 person who spends 70 percent of his time on land.

19 MR. FREDERICK: Mr. Chief Justice, if I  
20 could put it this way, the pushback for the but-for test  
21 in its broadest sense is that there isn't a natural kind  
22 of a way of confining some restriction to it. And so,  
23 if you look at the statute in terms of what it naturally  
24 must have meant by Congress, there is a natural limit,  
25 and it is not just complete but-for causation, but there



1 are an effort -- there is an effort to try to restrict  
2 the scope of the compensation.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Mr. Clement, you have 4 minutes remaining.

6 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

7 ON BEHALF OF THE PETITIONERS

8 MR. CLEMENT: Thank you, Mr. Chief Justice.

9 A few points in rebuttal. First of all,  
10 Justice Kennedy, you asked about deference, and I think  
11 before you give any deference to the Government's  
12 position, you should look at the other Government's  
13 position, which is to say the position that the  
14 Government took in its brief to this Court in *Pickett v.*  
15 *Petroleum Helicopters* in 2002.

16 They have a completely different position  
17 now, and they've never explained the difference other  
18 than to say what they thought was plausible then they  
19 now find persuasive now. That's not enough for  
20 deference. And in that brief, they took a position very  
21 similar to ours. There has to be status plus situs,  
22 albeit a slightly different situs, but otherwise it's on  
23 all fours with our position.

24 Second of all, the Government comes up here  
25 and says that the longshore remedy is an outlier among

1 workers' compensation remedies because it's the only one  
2 with a situs. Well, the problem with that is of all the  
3 workers' compensation provisions that Congress could  
4 have extended to the outer continental shelf, it picked  
5 the Longshore Act with that situs requirement.

6           And the Government also says, well, you  
7 know, the reason that the Longshore Act had a situs  
8 requirement was because of Jensen, and this Court's  
9 decision in Jensen created a problem about whether State  
10 workers' comp law could go to the navigable waters.

11           Well, that's the exact same backdrop against  
12 which Congress is passing OCSLA. It doesn't know that  
13 State workers' compensation law can go to the outer  
14 continental shelf. Jensen is still good law. Jensen  
15 tells Congress that it can't extend -- States can't  
16 extend their laws to the navigable waters. What  
17 makes --

18           JUSTICE GINSBURG: But why -- why doesn't  
19 Congress know? Because I think States overwhelmingly  
20 would include outer continental shelf workers in their  
21 compensation scheme.

22           MR. CLEMENT: Oh, no, Justice Ginsburg.  
23 What States overwhelming did is say a worker could be  
24 covered in a different State. But covering them on the  
25 outer continental shelf was not something that was well

1 established.

2           And, indeed, Congress specifically heard  
3 testimony that questioned the ability of either States  
4 to get their workers' comp law there directly and also  
5 heard that there might be constitutional problems,  
6 because of the Knickerbocker Ice case, of Congress  
7 extending the State law there. So, that's why they  
8 settled on this remedy of taking this Longshore Act that  
9 solved the Jensen problem on the navigable waters and  
10 solved the same problem for the outer continental shelf.

11           JUSTICE GINSBURG: It would make sense to  
12 use the Longshore Act because they wanted to have the  
13 same level of compensation.

14           MR. CLEMENT: As other alternatives like the  
15 Jones Act?

16           JUSTICE GINSBURG: No. No, no. They wanted  
17 the OCSLA worker to have the same benefits as the  
18 longshore worker.

19           MR. CLEMENT: Sure, when they were on the  
20 shelf. But they were solving the exact same kind of  
21 jurisdictional problem they solved with the Longshore  
22 Act with the shelf -- with the statute.

23           Justice Sotomayor, I don't think you can  
24 read too much into (b)(2). All (b)(2) is doing is  
25 modifying the same definition for the longshores.

1 You're an employer if you employ a longshoreman or a  
2 longshore worker. So, they're just updating this for  
3 purposes of extending a longshore remedy to the shelf;  
4 (b)(3) does the same thing, and it modifies the situs  
5 and creates a situs that makes sense for the shelf: the  
6 navigable waters, drydocks, the shelf, artificial  
7 islands, and everything attached thereto.

8 Mr. Chief Justice, you talked about the  
9 imprecision of their test. It's worse than that. It's  
10 imprecision without any text. At least in the Jones  
11 Act, you have the seamen and you have some other textual  
12 clues as to where you draw these limits. Here there's  
13 nothing in the statute that in any way suggests a  
14 status-based test. So, you would be completely  
15 unmoored, if you will.

16 The last point I would make is this: The  
17 answer to the causation test is really -- the kind of  
18 the lie to the other side's position is what they say  
19 when they're dealing with somebody who's not a 98  
20 percenter but is a 2 percenter. When that person goes  
21 out on the shelf, when are they covered? Well, when the  
22 injuries operating on the shelf cause them a direct  
23 injury on the shelf. At that point, even the Government  
24 resorts to a situs-based test.

25 Well, here's the problem: That status-based

1 test, it's in the Jones Act; it's not in OCSLA. And  
2 even when you recognize that and you look at what's left  
3 of the case, what's left of the case is either our  
4 approach that essentially incorporates the Longshore Act  
5 through (b)(3) or a tight nexus test that would require  
6 a geographical focus and give -- give force to the words  
7 "conducted on the shelf."

8 This person was injured by operations for  
9 the purpose of exploring the shelf at some level, but he  
10 sure wasn't injured by operations conducted on the shelf  
11 for those purposes. He was injured by operations on dry  
12 land. And under those circumstances, the remedy lies  
13 with the State workers' comp law, not with OCSLA.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 The case is submitted.

16 (Whereupon, at 11:04 a.m. the case in the  
17 above-entitled matter was submitted.)

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19  
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25

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