JAN 14 2011

No. 10-507

In the Supreme Court of the United States

PACIFIC OPERATORS OFFSHORE, LLP, ET AL., PETITIONERS

v.

LUISA L. VALLADOLID, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN FRANK JAMES
Associate Solicitor

MARK A. REINHALTER
Counsel

SEAN G. BAJKOWSKI
Counsel

RITA A. ROPPOLO
Attorney
Department of Labor
Washington, D.C. 20210

Blank Page

QUESTION PRESENTED

Section 4(b) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1333(b), extends workers' compensation coverage under the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. 901 *et seq.*, "with respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources * * * of the outer Continental Shelf." The question presented is whether the OCSLA extends Longshore Act coverage only to workers injured on the outer Continental Shelf itself.

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

Blank Page

In the Supreme Court of the United States

No. 10-507

PACIFIC OPERATORS OFFSHORE, LLP,
ET AL., PETITIONERS

v.

LUISA L. VALLADOLID, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 604 F.3d 1126. The decision and order of the Benefits Review Board of the United States Department of Labor (Pet. App. 35-52) is reported at 42 Ben. Rev. Bd. Serv. (MB) 67. The decision and order of the administrative law judge (Pet. App. 53-93) is reported at 41 Ben. Rev. Bd. Serv. (MB) 795.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 2010. A petition for rehearing en banc was denied on July 19, 2010 (Pet. App. 94-95). The petition for a writ of certiorari was filed on October 13, 2010. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331-1356a, and the Submerged Lands Act, 43 U.S.C. 1301-1315, were enacted in 1953 to provide "for the orderly development of offshore resources" in the wake of a series of decisions of this Court clarifying the federal government's paramount authority over the seabed, including those portions formerly claimed by certain coastal States. *United States* v. *Maine*, 420 U.S. 515, 527 (1975). In general, the Submerged Lands Act extended the boundaries of coastal States to include the seabed within three miles of their coasts. 43 U.S.C. 1301, 1311(a), 1312. The OCSLA affirmed the federal government's primary authority over the seabed beyond that area, which it denominated the "outer Continental Shelf" (OCS). 43 U.S.C. 1331(a), 1332(1).

The OCSLA also created a body of substantive law to govern the OCS. It did so in several ways: by extending federal law and jurisdiction to the OCS, 43 U.S.C. 1333(a)(1), (b), (c) and (f); by delegating specific authority to the Coast Guard, the Army, and the Department of the Interior, *e.g.*, 43 U.S.C. 1333(d) and (e), 1334; by preserving federal admiralty jurisdiction on the high seas above the OCS, 43 U.S.C. 1332(2); and by adopting the civil and criminal laws of the adjacent states to the extent those laws are not inconsistent with federal law. 43 U.S.C. 1333(a)(2)(A).

One of the federal statutes specifically extended by the OCSLA is the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act), 33 U.S.C. 901 *et seq.* The Longshore Act provides federal workers' compensation coverage for employees disabled

or killed in the course of maritime employment (a "status" requirement) on the navigable waters of the United States or in certain adjoining areas (a "situs-of-injury" requirement). 33 U.S.C. 903. Congress has extended this workers' compensation regime to cover several other categories of workers, including those injured while working for nonappropriated fund instrumentalities, 5 U.S.C. 8171(a), and federal contractors overseas, 42 U.S.C. 1651(a)(4). Its extension to OCS workers was effected by Section 4 of the original OCSLA statute, which provided, in pertinent part:

> (b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf * * * .
>
> (c) With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b), compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

OCSLA, ch. 345, § 4(b) and (c), 67 Stat. 463.

In 1978, the OCSLA was amended for various reasons unrelated to workers' compensation. Among the changes, Subsection (c) of Section 4 became Subsection (b), and was modified to change the description of covered injuries from those "occurring as a result of operations described in subsection (b)," to actually incorporat-

ing a description of those "operations" from former Subsection (b):

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act.

43 U.S.C. 1333(b); see H.R. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 81 (1978) ("This amendment involves no change in existing law. It was not the intent * * * to alter in any way the existing coverage of the [LHWCA]."); *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 809 (3d Cir. 1988) ("[T]he 1978 amendment combining (b) and (c) was not meant to change the meaning of the law.").

2. Luisa A. Valladolid (respondent) is the widow of Juan Valladolid (Valladolid or decedent), who was employed as a roustabout by petitioner, an oil exploration and extraction company. Pet. App. 57. The decedent spent approximately 98% of his time working on one of petitioner's oil platforms, which was located on the OCS more than three miles from the California coast. *Id.* at 3. He spent the remainder of his working time on land at his employer's crude oil plant, called "La Conchita," in Ventura, California. *Ibid.*; see *id.* at 57. The decedent's death occurred in 2004, during working hours at the La Conchita plant. His assigned duty at the time was to use a forklift to clean up scrap metal debris that

had been delivered to the plant from the OCS platforms. *Id.* at 57-58. He died after being crushed by the forklift while harvesting plantains growing near one of the plant's service roads. *Id.* at 58.[1]

3. Following her husband's death, respondent received death benefits under California's workers' compensation program. Pet. App. 54. She also filed a claim for Longshore Act benefits with the United States Department of Labor, Office of Workers' Compensation Programs (OWCP), asserting that her husband was covered by the Longshore Act, both directly and as extended by the OCSLA. *Ibid.*[2] After the parties failed to resolve the claim voluntarily, it was referred to an administrative law judge (ALJ) for a formal hearing pursuant to 33 U.S.C. 919(c) and (d).

a. The ALJ granted petitioner's motion for summary judgment. Pet. App. 53-93. The ALJ held that Valladolid had status under the OCSLA "because of his duties on [the employer's offshore] platform," but denied benefits because Valladolid's injury did not occur on an OCSLA-covered situs. *Id.* at 87-88, 93. The ALJ recognized that the Ninth Circuit had not directly ad-

[1] Valladolid's foraging activities at the time of his death were not part of his assigned duties. The Longshore Act (either directly or by extension through the OCSLA) covers only injuries "arising out of and in the course of employment." 33 U.S.C. 902(2). This issue was not addressed by the court of appeals or during the administrative proceedings because petitioner was awarded summary judgment on other grounds.

[2] Petitioner paid respondent $807.69 per week for 52 weeks pursuant to the California Workers' Compensation Act. Pet. App. 54 n.2. Under the Longshore Act, a surviving spouse is generally entitled to 50% of the decedent's average weekly wage until death or remarriage. 33 U.S.C. 909(b). If respondent is ultimately successful in obtaining Longshore Act benefits, petitioner will be entitled to offset any payments made to respondent under California law. 33 U.S.C. 903(e).

dressed the issue and that the Third Circuit had ruled in *Curtis* that Section 1333(b) has no situs requirement, 849 F.2d at 809. The ALJ, however, accepted the contrary view articulated by the Fifth Circuit in *Mills* v. *Director, OWCP*, 877 F.2d 356 (1989) (en banc), which had found a situs requirement in that provision. Relying on *Mills*, the ALJ denied the claim because Valladolid's injury did not take place "on the subsoil and seabed of the outer continental shelf, or the artificial islands and structures erected thereon." Pet. App. 92.[3]

b. The Department of Labor's Benefits Review Board (Board) affirmed. Pet. App. 35-52. The Board agreed with the ALJ's legal conclusion that Section 1333(b) contains a situs-of-injury requirement, finding the Fifth Circuit's *Mills* decision to be more consistent with the OCSLA's legislative history than the Third Circuit's view. Pet. App. 51.[4]

c. The court of appeals reversed in part, ruling that the OCSLA does not have a situs-of-injury requirement. Pet. App. 18.[5] In analyzing the situs issue, the court of

[3] The ALJ also rejected respondent's assertion that her husband was directly covered by the Longshore Act, giving two independent reasons for doing so. First, Valladolid did not have "status" as a maritime employee under 33 U.S.C. 902(3), because "[w]hatever loading and unloading the Decedent did was incidental to his primary role as a roustabout on the offshore platforms and the La Conchita site." Pet. App. 79. Second, the injury did not occur on a LHWCA-covered "situs" because the La Conchita facility was not "upon the navigable waters of the United States" or an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." *Id.* at 82 (quoting 33 U.S.C. 903(a)).

[4] The Board also accepted, as supported by the record, the ALJ's finding that the La Conchita facility was not a maritime situs covered directly by the Longshore Act. Pet. App. 42-43.

[5] Although the Director of the OWCP, who administers the OCSLA, was formally a respondent before the court of appeals, 20 C.F.R.

appeals found no controlling authority, and little guidance, in decisions by this Court and the Ninth Circuit. It therefore turned to the plain language of Section 1333(b), finding it to be "unambiguous in not including a situs-of-injury requirement." *Ibid.* The court explained that the absence of any explicit situs requirement in Section 1333(b) and the presence of explicit situs requirements in Section 1333's other subsections "reflects an intent not to limit [Section 1333(b)] in the same manner." *Id.* at 17.

The court of appeals held that Section 1333(b) extends Longshore Act coverage to workers injured on land where there is "a substantial nexus between the injury and extractive operations on the shelf." Pet. App. 28. Because the ALJ and the Board had denied the OCSLA claim based on the fact that Valladolid's death did not take place on the OCS, the court remanded the case to the Board to apply its test and determine in the first instance whether respondent was entitled to benefits. *Id.* at 30.[6]

ARGUMENT

The court of appeals correctly concluded that the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, does not contain a situs-of-injury requirement and properly reversed the decision of the Benefit Review Board (Board), which had denied respondent's OCSLA claim solely because her husband's injury did

802.410(b); *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 519 U.S. 248, 269 (1997), he did not participate below.

[6] The court of appeals affirmed the Board's denial of respondent's direct Longshore Act claim, agreeing that the La Conchita facility was not a maritime situs as defined by 33 U.S.C. 903(a). Pet. App. 33-34. That claim is not at issue here.

not occur on the Outer Continental Shelf (OCS). This conclusion is consistent with a decision of the Third Circuit but inconsistent with the Fifth Circuit's interpretation of the statute. Further review of this issue is not warranted, however, because the case is currently in an interlocutory posture, and it is possible that respondent will be denied benefits under the standard adopted by the court of appeals. The difference in approach between the court of appeals here and the Fifth Circuit thus may not make a difference in this case. Moreover, the court of appeals made clear that it adopted a highly general standard for determining which injuries taking place outside the OCS would be covered by the statute and that the standard was subject to refinement in future cases. Review of that standard now would be premature.

1. The OCSLA extends Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act) coverage to "any injury occurring as the result of operations conducted on the [OCS] for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources * * * of the [OCS.]" 43 U.S.C. 1333(b). There is no dispute that workers injured on the OCS, or structures attached to it, are covered by the Longshore Act through Section 1333(b). The disagreement focuses on whether, and under what circumstances, Section 1333(b) extends the Longshore Act to workers injured outside that geographic situs.

a. The Third Circuit ruled that the OCSLA does not have a situs-of-injury requirement in *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 811 (1988). Curtis was employed to gather data at offshore oil wells and evaluate offshore drilling sites. *Id.* at 806 n.2. He was seriously injured in an automobile accident while

driving a company car to meet a helicopter that was to fly him to an OCS platform off the New Jersey coast. The Board denied benefits on the ground that Curtis "was not at the time of the accident subject to the unique working conditions and hazards associated with the exploration and development of the Shelf." *Id.* at 808-809 (citation omitted).

The Third Circuit reversed, concluding that the plain language of Section 1333(b) "did not place any nexus, situs or geographic restrictions on claims for injuries in connection with outer continental shelf operations." *Curtis*, 849 F.2d at 809. It contrasted Section 1333(b) with Section 1333(a)(1), which imposes a clear situs requirement in extending federal substantive law and jurisdiction only to the OCS itself and "artificial islands and fixed structures which may be erected thereon." *Ibid.* (quoting 43 U.S.C. 1333(a)(1) (1958)). Turning to the meaning of Section 1333(b)'s reference to "any injury occurring as the result of operations conducted on the [OCS]," the Third Circuit concluded that the provision extends Longshore Act coverage to injuries that would not have occurred "but for" operations on the OCS. *Id.* at 809-811. It therefore found that Curtis was entitled to Longshore Act benefits. *Id.* at 811.

b. The Fifth Circuit has taken a contrary view, concluding that the OCSLA extends the Longshore Act only "to employees who (1) suffer injury or death on an OCS platform or the waters above the OCS; and (2) satisfy [a] 'but for' status test." *Mills* v. *Director, OWCP*, 877 F.2d 356, 362 (1989) (en banc). Mills was injured on land while constructing an oil platform destined for the OCS. *Id.* at 357. A Fifth Circuit panel had ruled that Mills was entitled to Longshore Act benefits, finding that his injury had been proximately caused by operations on the

OCS and that Section 1333(b) did not impose any situs-of-injury requirement. *Id.* at 357-358.

The *Mills* majority began its analysis with the acknowledgment that the text of Section 1333(b) "is open to interpretation." 877 F.2d at 359. Observing that each of Section 1333's other five subsections contains an explicit situs requirement, the court discerned a congressional intent "to regulate the OCS, not those areas that already were governed by state law." *Ibid.*

The *Mills* dissent rejected the majority's fundamental premise, concluding that Section 1333(b) "is not ambiguous in its lack of a situs requirement." 877 F.2d at 362. According to the dissent, the explicit situs requirements contained in Section 1333's other subsections, and in the Longshore Act itself, demonstrate that "Congress knows how to include a situs requirement in a statute when it intends that such a requirement should exist." *Id.* at 363.

c. The court of appeals below agreed with the Third Circuit and the *Mills* dissent that Section 1333(b) does not contain a situs-of-injury requirement. Pet. App. 1-34. The court of appeals began its analysis by considering this Court's statement in *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986), that Section 1333(b) "superimposes a status requirement on the [OCSLA's] otherwise determinative * * * situs requirement." Pet. App. 8-9 (quoting *Tallentire*, 477 U.S. at 219 n.2). The court described the remark as "textbook dictum" because—as the *Tallentire* Court itself explained—Section 1333(b) had "no bearing on th[at] case." *Id.* at 9. In the court of appeals' view, this remark was not entitled to the deference often accorded the Supreme Court's considered dicta because "[t]here is no analysis or reasoning behind the Court's statement that a situs

requirement applies to § 1333(b)," which "strip[s] the dictum of any predictive or persuasive value." *Id.* at 10.[7]

In the absence of controlling authority, the court of appeals treated the issue as "a straightforward question of statutory construction." Pet. App. 13. The court reasoned that the plain text of Section 1333(b) extended the Longshore Act to some injuries suffered outside the OCS because "the results of an operation may regularly extend beyond its immediate physical location." *Id.* at 16. The court of appeals rejected the *Mills* court's argument that the explicit situs requirements in Section 1333(b)'s other subsections reveal an overarching congressional intent to apply the OCSLA only where necessary to fill gaps in state law. *Id.* at 16-17. Instead, the court reasoned that these provisions demonstrate that "Congress had the ability to craft a situs-of-injury requirement," but chose not to do so in Section 1333(b), concluding that the provision "is unambiguous in not including a situs-of-injury requirement." *Id.* at 17-18.

2. There is a conflict between the Ninth and Third Circuits, on the one hand, and the Fifth Circuit, on the other, on the question of whether the OCSLA extends the Longshore Act only to injuries incurred within the geographic situs of the OCS.[8] Review of the issue is nevertheless unwarranted because this case is in an inter-

[7] The court of appeals also observed that the Court's comment in *Tallentire* may not have referred to a situs-of-injury requirement at all, but rather to the "situs-of-operations" requirement clearly evident in Section 1333(b). Pet. App. 10.

[8] Petitioner alleges that the court of appeals' ruling also conflicts with this Court's decisions in *Tallentire* and *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414 (1985). Pet. 15-17. There is no such conflict. As the court of appeals accurately explained, the isolated comments in those decisions on which petitioner relies were dicta; Section 1333(b) was not at issue in those cases. Pet. App. 9-11 & n.2.

locutory posture. The court of appeals remanded the case to the Board for a determination whether respondent was entitled to benefits under the court of appeals' test. Pet. App. 30. Upon remand, petitioner will have an opportunity to argue to the ALJ, the Board, and, if necessary, the court of appeals that there was no "substantial nexus between [Valladolid's] injury and extractive operations on the shelf." *Id.* at 28.

If petitioner prevails on that contention, resolution of the question presented will have no effect on the outcome of this case. If petitioner does not prevail before the agency, the case may come before the Court in a posture better suited for review. See, *e.g.*, *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals.") (citation omitted). Allowing the agency and the court of appeals an opportunity to apply the newly announced "substantial nexus" test may clarify the test's contours and provide a more concrete dispute to review.

In sum, this case presents no exceptional circumstances justifying a departure from the Court's typical practice of denying a writ of certiorari to review an interlocutory decision. See, *e.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); see generally Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280-281 (9th ed. 2007).

3. In the view of the Director of the OWCP (Director), the court of appeals correctly concluded that Sec-

tion 1333(b) does not contain a situs-of-injury requirement. There is no such limitation in the text of that provision. In light of the explicit situs requirements contained in Section 1333(a), (c), (d) and (e), the absence of such a requirement in Section 1333(b) is best understood to mean that Congress did not intend to limit OCSLA's extension of the Longshore Act to injuries suffered on the OCS itself. See pp. 10-11, *supra*.

How to nonetheless identify an "injury occurring as the result of operations conducted on the [OCS]," and thereby determine what categories of workers injured outside the OCS are brought within the Longshore Act's coverage by virtue of Section 1333(b), is a more difficult question. Having rejected a situs-of-injury test, the court of appeals declined to adopt the Third Circuit's *Curtis* test "to the extent that it requires only a 'but for' test of causation," because, in the court of appeals' view, "[i]njuries with a tenuous connection to the [OCS] are not covered." Pet. App. 28.[9] Instead, the court of ap-

[9] Petitioner alleges a conflict between the decision below and the Third Circuit's decision in *Curtis*. Pet. 9-10. While the court of appeals did decline to adopt the Third Circuit's "but for" test, Pet. App. 27-28, any conflict between the circuits' approaches may be illusory. There is no reason to assume that the Ninth Circuit would deny coverage on the facts presented in *Curtis*. Nor is it clear that the Third Circuit would take its "but for" language literally by awarding Longshore Act benefits to a worker with only a tenuous connection to OCS operations; Curtis himself appears to have spent a considerable portion of his working time on an OCS drilling rig. *Curtis*, 849 F.2d at 806. Moreover, both courts relied on a line of pre-*Mills* Fifth Circuit cases beginning with *Nations* v. *Morris*, 483 F.2d 577, cert. denied, 414 U.S. 1071 (1973), in developing their respective tests. See *Curtis*, 849 F.2d at 809, 811; Pet. App. 28. It is thus possible that the Third and Ninth Circuit tests will converge.

peals required a "substantial nexus between the injury" and OCS operations. *Ibid.* To meet that standard:

> [T]he claimant must show that the work performed directly furthers outer continental shelf operations and is in the regular course of such operations. An injury sustained during employment on the outer continental shelf itself would, by definition, meet this standard. However, an accountant's workplace injury would not be covered even if related to outer continental shelf operations, while a roustabout's injury in a helicopter en route to the outer continental shelf likely would be. We leave more precise line-drawing to the specific factual circumstances of later cases.

Ibid.

The Director agrees with the court of appeals that a mechanical "but for" test is insufficient. If taken literally, such a test could extend coverage to workers and injuries with little substantial connection to the OCS itself. It is difficult in the abstract to evaluate the court of appeals' alternative test, *i.e.*, that "the claimant must show that the work performed directly furthers outer continental shelf operations and is in the regular course of such operations." Pet. App. 28. That standard has not been applied in this case or any other. Indeed, the court expressly "le[ft] more precise line-drawing to the specific factual circumstances of later cases." *Ibid.*

It is not clear, for example, whether the court's standard would require a strict nexus between OCS operations and the particular task a worker was performing at the moment of injury, or instead a nexus between OCS operations and the employee's "work performed" generally. Pet. App. 28. The Director believes the later

approach is the more workable one, as land-based workers who perform both OCS-related and non-OCS-related tasks would not oscillate between Longshore Act and state workers' compensation coverage throughout the workday. In addition, the court of appeals' standard, depending on how it is applied, could prove overly inclusive in that it might extend coverage to workers who do not perform any work on the OCS itself. While Congress's decision not to include a situs-of-injury requirement in Section 1333(b) reflects an intent to extend Longshore Act coverage to some injuries occurring outside the OCS, it is undeniable that the OCSLA's primary focus is the OCS itself. Covering injuries to entirely land-based workers would be in tension with that intent.

The Director believes that Section 1333(b) is best interpreted as creating a class of OCS workers who retain their Longshore Act coverage when they perform OCS-related work on land.[10] Those are the workers who, in the court of appeals' terminology, have a "substantial nexus" with operations on the OCS. Pet. App. 28. Interpreting Section 1333(b) as a status test primar-

[10] In *Curtis* and *Mills*, the Director argued that Section 1333(b) does not contain a situs-of-injury requirement and extends Longshore Act coverage to all workers satisfying a "but for" status test. *Curtis*, 849 F.3d at 807 n.4; *Mills*, 877 F.2d at 360 n.7. In a later case, however, the Director expressed the view that the most appropriate test that could be derived from Section 1333(b) would extend the Longshore Act only to workers who (1) are injured on, over, or en route to or from the OCS by air or sea, and (2) satisfy a "but for" status test. Gov't Br. in Opp. at 19-20, *Pickett* v. *Petroleum Helicopters, Inc.*, 535 U.S. 1080 (2002) (No. 01-1042). He added that "it is also plausible that Congress intended to create a class of 'OCS workers' who would retain LHWCA coverage wherever their work activities took them." *Id.* at 18. After further consideration, the Director believes that this latter view is not only plausible, but the best interpretation of Section 1333(b).

ily focused on OCS workers would safeguard against the possibility of employees' moving in and out of coverage during the workday. It would also provide maximum protection to true OCS workers while denying OCSLA coverage to employees who never work on the OCS. Finally, this test would also offer more predictability than a fact-based inquiry focused on the particulars of a given injury.

The Director's proposed test would be analogous to the test developed in *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 368 (1995), which extended Jones Act coverage to workers with a "connection to a vessel * * * that is substantial in terms of both its duration and its nature." Employees who satisfy this status test would be covered by the Longshore Act, as extended by the OCSLA, even when they performed work on land. Other workers would be covered only if injured on the OCS itself. While borrowing the *Chandris* test would certainly not end disputes about OCSLA coverage, it would likely result in a coverage framework that is both relatively predictable and in keeping with the OCSLA's purpose.

4. The Director's interpretation of the statute, rather than the Board's, is entitled to deference. See *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) ("[T]he Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts."); *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997) ("[T]he Director's reasonable interpretation of the Act brings at least some added persuasive force to our conclusion."). Because the Director did not participate in this litigation before the court of appeals, the court did not have the benefit of his views. As the court of appeals refines its "substantial

nexus" test (whether in this case or another), it may take into account the Director's considered views on the question. Such a decision would provide a better vehicle than this one for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN FRANK JAMES
Associate Solicitor

MARK A. REINHALTER
Counsel

SEAN G. BAJKOWSKI
Counsel

RITA A. ROPPOLO
Attorney
Department of Labor

JANUARY 2011

Blank Page