

No. 10-507 OCT 13 2010

OFFICE OF THE CLERK
In ~~William~~ **William K. Suter, Clerk**
Supreme Court of the United States

PACIFIC OPERATORS OFFSHORE, LLP,
and INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA,

Petitioners,

v.

LUISA L. VALLADOLID,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

HORVITZ & LEVY LLP	THOMAS, QUINN &
PEDER K. BATALDEN	KRIEGER, LLP
*PETER ABRAHAMS	MICHAEL W. THOMAS
15760 Ventura Boulevard,	199 Fremont Street,
18th Floor	20th Floor
Encino, California 91436	San Francisco, California
(818) 995-0800 •	94105
Fax: (818) 995-3157	(415) 546-6100 •
pbalden@horvitzlevy.com	Fax: (415) 358-5868
pabrahams@horvitzlevy.com	mthomas@tqklaw.com

**Counsel of Record*

*Counsel for Petitioners
Pacific Operators Offshore, LLP and
Insurance Company of the State of Pennsylvania*

Blank Page



QUESTION PRESENTED

The Outer Continental Shelf Lands Act, 43 U.S.C., §§ 1331-1356 (OCSLA), governs those who work on oil drilling platforms and other fixed structures beyond state maritime boundaries. Workers are eligible for compensation for “any injury occurring as the result of operations conducted on the outer Continental Shelf.” 43 U.S.C. § 1333(b) (2006). When an outer continental shelf worker is injured *on land*, is he (or his heir):

(1) *always* eligible for compensation, because his employer’s operations on the shelf are the but for cause of his injury (as the Third Circuit holds); or

(2) *never* eligible for compensation, because the Act applies only to injuries occurring on the shelf (as the Fifth Circuit holds);

(3) *sometimes* eligible for compensation, because eligibility for benefits depends on the nature and extent of the factual relationship between the injury and the operations on the shelf (as the Ninth Circuit holds)?

**PARTIES TO THE PROCEEDINGS
AND RULE 29.6 STATEMENT**

All parties are listed in the caption.

Petitioner Pacific Operators Offshore, LLP, is a limited liability corporation wholly-owned by AnAmerica Corporation, a successor to AnAmerica & Drilling Company. Petitioner the Insurance Company of the State of Pennsylvania (ICSOP) is a direct, wholly-owned subsidiary of Chartis U.S., Inc. Chartis U.S., Inc., is a wholly-owned subsidiary of Chartis, Inc. Chartis, Inc., is a wholly-owned subsidiary of American International Group, Inc., which is a publicly held corporation. With the exception of the AIG Credit Facility Trust (a trust established for the sole benefit of the United States Treasury), no parent corporation or publicly held corporation owns 10 percent or more of the stock of American International Group, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	2
INTRODUCTION	2
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT	8
I. THE NINTH CIRCUIT’S DECISION CREATES A THREE-WAY CIRCUIT SPLIT ON THE IMPORTANT QUES- TION OF OIL PLATFORM WORKERS’ ELIGIBILITY FOR OCSLA BENEFITS.....	8
II. THE NINTH CIRCUIT’S INTERPRETA- TION OF OCSLA IS INCONSISTENT WITH CONGRESSIONAL PURPOSE AND THIS COURT’S STATEMENTS	11
CONCLUSION.....	18

TABLE OF CONTENTS – Continued

	Page
APPENDIX	
Opinion.....	App. 1
Decision and Order.....	App. 35
Order Denying the Claimant’s Motion to With- draw or Amend Admissions, Denying the Respondents’ Motion to Strike, and Granting Summary Decision.....	App. 53
Order Denying Petition for Rehearing En Banc.....	App. 94
33 U.S.C. section 903(a).....	App. 96
43 U.S.C. section 1301(a)(b) & (c).....	App. 97
43 U.S.C. section 1312.....	App. 99
43 U.S.C. section 1331(a).....	App. 100
43 U.S.C. section 1332.....	App. 101
43 U.S.C. section 1333.....	App. 102

TABLE OF AUTHORITIES

	Page
CASES	
<i>Curtis v. Schlumberger Offshore Serv., Inc.</i> , 849 F.2d 805 (3d Cir. 1988).....	2, 8, 9
<i>Herb's Welding, Inc. v. Gray</i> , 470 U.S. 414 (1985).....	15, 16, 17
<i>Mills v. Dir., Office of Workers' Comp. Pro- grams, U.S. Dep't of Labor</i> , 877 F.2d 356 (5th Cir. 1989).....	<i>passim</i>
<i>Offshore Logistics, Inc. v. Tallentire</i> , 477 U.S. 207 (1986).....	14, 15, 16, 17
<i>Rodrigue v. Aetna Cas. & Sur. Co.</i> , 395 U.S. 352 (1969).....	11
<i>Valladolid v. Pac. Operations Offshore, LLP</i> , 604 F.3d 1126 (9th Cir. 2010).....	<i>passim</i>
CONSTITUTIONAL AND STATUTORY PROVISIONS	
28 U.S.C. § 1254(1) (2006).....	1
33 U.S.C. §§ 901-950 (2006).....	<i>passim</i>
33 U.S.C. § 903 (2006).....	2
33 U.S.C. § 903(a) (2006).....	4
33 U.S.C. § 921(b)(3) (2006).....	1
33 U.S.C. § 921(c) (2006).....	1
43 U.S.C. §§ 1301, 1312, 1331, 1332, and 1333 (2006).....	2
43 U.S.C. §§ 1301(a)(2), 1312, 1331(a) (2006).....	4

TABLE OF AUTHORITIES – Continued

	Page
43 U.S.C. §§ 1331-1356 (2006)	<i>passim</i>
43 U.S.C. § 1333(a)	14, 17
43 U.S.C. § 1333(a)(1) (2006)	11
43 U.S.C. § 1333(a)(2)(A) (2006)	12, 14
43 U.S.C. § 1333(b) (2006).....	<i>passim</i>
46 U.S.C. §§ 30301-30308 (2006)	14

PETITION FOR A WRIT OF CERTIORARI

Pacific Operators and ICSOP petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

**OPINIONS BELOW**

The unpublished decision of the Administrative Law Judge in the Department of Labor's Office of Workers' Compensation Programs is printed in the appendix (App.) at 53a. The unpublished decision of the Benefits Review Board is reprinted in the appendix at App. 35a. The opinion of the Court of Appeals is reported at 604 F.3d 1126 and is reprinted in the appendix at App. 1a. The unpublished order of the Court of Appeals denying rehearing en banc is reprinted in the appendix at App. 94a.

**JURISDICTION**

The Benefits Review Board had jurisdiction under 33 U.S.C. § 921(b)(3). The Ninth Circuit had jurisdiction to review the decision of the Benefits Review Board under 33 U.S.C. § 921(c). The Ninth Circuit entered judgment on May 13, 2010, App. 1a, and denied petitioners' timely petition for rehearing en banc on July 19, 2010. App. 94a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

The relevant portions of 33 U.S.C. § 903 and 43 U.S.C. §§ 1301, 1312, 1331, 1332, and 1333 are reproduced at App. 96a-106a.



INTRODUCTION

The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356, extends the jurisdiction of the United States to the seabed, subsoil, and fixed structures of the outer continental shelf, an area that lies more than three miles offshore and beyond the territorial jurisdiction of the States. The Act governs the rights and obligations of those who own, operate, and work on offshore oil drilling platforms. The Act creates (and Department of Labor regulations implement) an administrative scheme for compensating injured workers that resembles the workers' compensation schemes developed in most States. Under the Act, a worker is eligible for compensation for "any injury occurring as the result of operations conducted on the outer Continental Shelf." 43 U.S.C. § 1333(b).

Three circuit courts have considered whether a worker injured on land is eligible for compensation under the Act. Each circuit has adopted a different test for resolving that question. The Third Circuit has adopted a "status" test: a worker is eligible for benefits no matter where he is injured, so long as he is involved in operations conducted on the outer continental shelf. *See Curtis v. Schlumberger Offshore*

Serv., Inc., 849 F.2d 805 (3d Cir. 1988) (applying the Act to a rig worker killed in a car accident on a New Jersey freeway while traveling to a helicopter that would have taken him to a rig on the shelf). The Fifth Circuit requires a worker to meet both a “status” test and a “situs” test: a worker is eligible for benefits only if his work is related to development on the outer continental shelf and the injury occurs while working on the shelf. Thus, injuries on land are not compensable. See *Mills v. Director, Office of Workers’ Comp. Programs, U.S. Dep’t of Labor*, 877 F.2d 356 (5th Cir. 1989) (refusing to apply the Act to a welder injured on land while constructing an offshore oil platform). And the Ninth Circuit (in the case below) has adopted a separate and fact-specific test: a worker injured on land is eligible for benefits if there is “a substantial nexus between the injury and extractive operations on the shelf,” meaning that “the work performed directly furthers outer continental shelf operations and is in the regular course of such operations.” *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1139 (9th Cir. 2010), App. 28a.

This disputed legal issue – the proper test of eligibility for OCSLA benefits – is one of nationwide importance because the three circuit courts that have divided on this question cover a majority of the Nation’s coastline and offshore drilling operations. There is no reason to believe that this circuit split will resolve itself. The Third and Fifth Circuits have both followed their standards for more than two decades. Because each of the three circuits has adopted a

fundamentally different test, the split will not be resolved even if one of the circuits were to alter its standard through the en banc process. In sum, a writ of certiorari should be granted here because a worker's eligibility for OCSLA benefits should not depend on the circuit in which his injury occurs.



STATEMENT OF THE CASE

The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, provides benefits to employees engaged in maritime employment who are injured upon navigable waters, including adjoining piers, wharfs, and other structures customarily used in loading, unloading, repairing or building vessels. 33 U.S.C. § 903(a) (2006). Section 4 of OCSLA extends LHWCA benefits to cover the disability or death of non-maritime employees "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." 43 U.S.C. § 1333(b). The outer continental shelf is comprised of "all submerged lands lying seaward and outside of the area of lands beneath navigable waters," that is, submerged lands lying outside the territorial jurisdiction of the states, which generally extends three miles from the coast line. 43 U.S.C. §§ 1301(a)(2), 1312, 1331(a) (2006).

Respondent Luisa Valladolid, the widow of decedent Juan Valladolid, brought this proceeding against Pacific Operators and ICSOP for workers' compensation benefits under the LHWCA and the OCSLA. Pacific's primary business involves oil exploration and extraction. The decedent worked for Pacific as a roustabout, stationed primarily on one of Pacific's two drilling platforms located on the outer continental shelf off the coast of California. He spent approximately 98 percent of his working time on one of the drilling platforms, primarily performing maintenance and repair duties. He also spent time working at Pacific's onshore oil flocculation facility. The facility is separated from the Pacific Ocean by railroad tracks, a highway, and a beach. The facility received crude oil slurry from the offshore platforms via pipeline. Pacific processed the slurry, separating its oil, gas, water, and solid constituents, then routed the oil and gas through pipelines to third parties. The decedent performed maintenance duties at the facility, including painting, sandblasting, weed-pulling, cleaning drain-culverts, and operating a forklift.

Pacific's employees traveled to and from the offshore platforms on a crew boat departing from a pier located approximately three miles from the oil flocculation facility. The boat was also used to ferry equipment and supplies, and to remove scrap metal from the platforms. The scrap metal was ferried to the pier, where it was loaded into trucks and driven to the facility. There it was dumped at various spots on the property. One of the decedent's duties at the

onshore facility was to use a forklift to retrieve the scattered scrap metal and transport it to a central location so that third-party scrap metal vendors could pick the metal up and haul it away. He performed this process roughly once every two years.

Between May 5, 2004 and June 5, 2004, Pacific assigned decedent to work at the onshore facility assisting in an ongoing project painting a water tank. He performed that work most of the day on June 2, 2004. At 4:00 p.m. that day, the decedent's supervisor directed him to take a forklift to the rear yard of the facility and move some scrap metal. One hour and 15 minutes later, the supervisor found the decedent next to a tree roughly 10 feet from a service road in the facility, with the forklift resting on his abdomen and chest. He was pronounced dead at the scene. The decedent had not moved any of the scrap metal he had been directed to move.

The accident report stated that the decedent apparently had stood on the top of one of the raised tines of the forklift to cut fruit hanging from a tree that was out of reach of a person on the ground. The forklift apparently moved forward while the decedent was attempting to harvest the fruit, which caused him to lose his balance, fall in front of the forklift, and sustain fatal injuries when it rolled over him.

Respondent received death benefits under California's workers' compensation scheme. She also filed a claim for benefits under the LHWCA and under OCSLA's extension to outer continental shelf workers.

An administrative law judge in the Department of Labor's Office of Workers' Compensation Programs denied respondent's OCSLA claim on the ground the death had not occurred on the outer continental shelf, and denied the LHWCA claim on the grounds the decedent was not engaged in maritime employment and was not injured on a maritime situs. App. 81a, 93a. The Benefits Review Board upheld the administrative law judge's decision. App. 42a-43a, 51a-52a.

On respondent's petition for review, the United States Court of Appeals for the Ninth Circuit upheld the Board's finding that the facility was not a maritime situs, meaning she had no direct right to LHWCA benefits. *Valladolid v. Pac. Operations Offshore LLP*, 604 F.3d 1126, 1141 (9th Cir. 2010), App. 32a. However, the court rejected the Board's situs-of-injury test for determining the applicability of OCSLA's extension of the LHWCA. *Id.* at 1137-38, App. 23a-24a. The Ninth Circuit formulated a new and different test: "An injury is 'the result of' outer continental shelf operations if there is a substantial nexus between the injury and the operations." *Id.* at 1142, App. 34a. "To meet the standard, the claimant must show that the work performed directly furthers outer continental shelf operations and is in the regular course of such operations." *Id.* at 1139, App. 28a. The Ninth Circuit remanded for further agency proceedings involving the new test. *Id.* at 1142, App. 34a.



REASONS FOR GRANTING THE WRIT**I. THE NINTH CIRCUIT'S DECISION CREATES A THREE-WAY CIRCUIT SPLIT ON THE IMPORTANT QUESTION OF OIL PLATFORM WORKERS' ELIGIBILITY FOR OCSLA BENEFITS.**

Three Courts of Appeals have considered whether a worker injured on land is eligible for LHWCA benefits, as extended by section 4 of OCSLA, 43 U.S.C. § 1333(b). One court adopted a status test – the employee's work must further mineral extraction from the outer continental shelf. Another court required an employee to satisfy both a status and a situs test – the employee's work must be related to development on the outer continental shelf and he must have suffered injury or death from an occurrence on the shelf. And a third court rejected both the status and situs tests in favor of a fact-intensive inquiry into the nature and extent of the employee's work.

In *Curtis v. Schlumberger Offshore Ser., Inc.*, 849 F.2d 805, 809 (3d Cir. 1988) (citation omitted), the Third Circuit adopted the status test. It held that an oil rig worker injured in a car accident on a New Jersey freeway while traveling to a helicopter that would have taken him to an offshore rig was entitled to LHWCA benefits. As interpreted by the Third Circuit, "[t]he only criterion [under OCSLA] . . . for securing LHWCA benefits is for injured employees to be involved in 'any operations conducted on the outer Continental Shelf for the purpose of exploring for,

[and] developing . . . the natural resources . . . of the outer Continental Shelf.’ There [is] . . . no limitation . . . to ‘artificial islands and fixed structures’ . . .”; *Id.* at 810 n.9 (“[s]itus does not control the application of the LHWCA”). Thus, the Third Circuit has adopted a “but for” test: the employee’s injury on the freeway occurred as a result of operations on the outer continental shelf because “[b]ut for’ his traveling to the [offshore rig] for the purpose of conducting ‘operations’ within § 1333(b), [he] would not have sustained injuries in the automobile accident.” *Id.* at 811.

The Fifth Circuit took a different approach in *Mills v. Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor*, 877 F.2d 356 (5th Cir. 1989), holding that an employee must satisfy both a status and a situs test to be eligible for benefits under the LHWCA as extended by OCSLA: “We interpret § 1333(b) to require that covered operations be (1) related to OCS development; and (2) conducted on the OCS. Given the second requirement, activity conducted off the OCS, even though related to OCS mineral extraction, does not satisfy § 1333(b).” *Id.* at 359. Accordingly, the Fifth Circuit in *Mills* held that a welder injured during the onshore construction of a platform designed for the outer continental shelf was not eligible for LHWCA benefits.

In this case, the Ninth Circuit disagreed with both the Third and Fifth Circuits. Rejecting the Fifth Circuit’s holding in *Mills*, it held that “a situs-of-injury test is unambiguously absent from § 1333(b).” *Valladolid*, 604 F.3d at 1135, App. 19a. However,

refusing to follow the Third Circuit, the Ninth Circuit did not “find that Congress intended to enact a simple ‘but for’ test in covering injuries that occur ‘as the result of’ outer continental shelf operations. Injuries with a tenuous connection to the outer continental shelf are not covered.” *Id.* at 1139, App. 27a.

Instead, the Ninth Circuit adopted the following test:

[T]he claimant must establish a substantial nexus between the injury and extractive operations on the shelf. To meet the standard, the 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 the 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.

Id., App. 28a.

Although the facts in this case are undisputed (the decedent suffered fatal injuries while attempting to harvest fruit at Pacific’s onshore facility), the Ninth Circuit declined to decide whether they satisfied its “substantial nexus” test. Instead, it remanded

the case for further consideration by the agency. *Id.* at 1142, App. 34a.

These three circuit courts are hopelessly divided, and their territories include a majority of the Nation's coastline, giving rise to the vast majority of OCSLA claims. The purely legal question of whether outer continental shelf workers injured on land are eligible for OCSLA benefits therefore deserves this Court's review.

II. THE NINTH CIRCUIT'S INTERPRETATION OF OCSLA IS INCONSISTENT WITH CONGRESSIONAL PURPOSE AND THIS COURT'S STATEMENTS.

The Ninth Circuit's decision in this case disregarded Congress' purpose in enacting OCSLA. Before the enactment of OCSLA in 1953, the outer continental shelf was "an area of intense activity that lacked an established legal system because it lies beyond state boundaries." *Mills*, 877 F.2d at 358. Consequently, "to define a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the outer Continental Shelf," *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969), Congress extended "[t]he Constitution and laws and civil and political jurisdiction of the United States" to those locales "to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state. . . ." 43 U.S.C. § 1333(a)(1) (2006). In the event no federal law existed on a

particular issue, Congress borrowed the adjacent state's law as surrogate federal law. 43 U.S.C. § 1333(a)(2)(A) (2006).

“One obvious void in the law governing the OCS was the lack of a workers' compensation scheme for thousands of workers employed in the dangerous oilfield extraction industry. Congress filled that void in § 1333(b) when it adopted the LHWCA's benefits provision to cover non-seamen employed in the oil patch on the OCS.” *Mills*, 877 F.2d at 358.

No such void existed when outer continental shelf workers were injured on land. Like the decedent in this case, those workers were covered by the applicable state workers' compensation scheme. As the Fifth Circuit in *Mills* correctly observed, “Congress intended to regulate the OCS, not those areas that already were governed by state law.” *Id.* at 359. There was no “legislative history suggesting that Congress intended to single out OCSLA's workers' compensation scheme for different treatment.” *Id.* The Ninth Circuit's decision anticipates that some outer continental shelf workers injured on land will be eligible for OCSLA benefits (and even some workers who never set foot on the outer continental shelf, so long as their work “directly furthers outer continental shelf development”), and to that extent the decision runs afoul of Congress' intentions.

The Ninth Circuit's decision also has important insurance consequences that are inconsistent with Congress' intentions. If, as the Ninth Circuit held

here, workers injured on land are entitled to both state workers' compensation benefits and OCSLA benefits so long as their work "directly furthers outer continental shelf operations," *Valladolid*, 604 F.3d at 1139, App. 28a, then employers must purchase insurance covering their liability to land based workers (like the welder in *Mills*) under both the state and federal compensation acts. As the Fifth Circuit explained, however, there is "no evidence indicating that Congress intended to create such a cumbersome and uncertain compensation scheme or that it intended to intrude in a significant way on established state workers' compensation programs." *Mills*, 877 F.2d at 362.

The Ninth Circuit believed its decision was compelled by what it characterized as OCSLA's plain language, asserting that "a situs-of-injury test is unambiguously absent from § 1333(b)." *Valladolid*, 604 F.3d at 1135, App. 19a. The language of § 1333(b) is anything but plain, however. Interpreting the same language, the Fifth Circuit showed that eligibility for benefits rests on an injury occurring on the shelf: although the phrase "[injured] as the result of operations conducted on the outer Continental Shelf for the purpose of . . . developing . . . the natural resources . . . of the [OCS]' [in §1333(b)] is open to interpretation," given the congressional purpose underlying OCSLA, "under [a] . . . plausible reading of 43 U.S.C. § 1333(b), coverage requires that the relevant 'operations' out of which the injury arises occur on the OCS." *Mills*, 877 F.2d at 359.

Moreover, even if the Ninth Circuit's interpretation of 43 U.S.C. § 1333(b) were correct, there was no reason for it to infer meaning from the absence of a situs requirement. As two decisions of this Court confirm, a situs requirement already appears in § 1333(a), which limits OCSLA's coverage "to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed. . . ."; it was unnecessary for Congress to repeat that requirement in 43 U.S.C. § 1333(b).

In one of those decisions, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), two offshore drilling platform workers were killed when the helicopter carrying them from the platform to the shore crashed 30 miles off the Louisiana coast. Their widows brought actions against the owner and operator of the helicopter. They claimed they were not limited to awards of pecuniary damages provided by the Death on the High Seas Act, 46 U.S.C. §§ 30301-30308, but were also entitled to nonpecuniary damages under the Louisiana wrongful death statute, which applied either of its own force, or as surrogate federal law under OCSLA. *See* 43 U.S.C. § 1333(a)(2)(A) (2006). This Court held that because the helicopter crash did not occur in the area covered by OCSLA, but rather on the high seas, the maritime remedy for wrongful death under the Death on the High Seas Act controlled:

We do not interpret § 4 of OCSLA, 43 U.S.C., § 1333 to require or permit us to extend the

coverage of the statute to the platform workers in this case who were killed miles away from the platform and on the high seas simply because they were platform workers. Congress determined that the general scope of OCSLA's coverage, like the operation of DOHSA's remedies, would be determined principally by locale, not by the status of the individual injured or killed. Because the fatalities underlying this suit did not arise from an accident in the area covered by OCSLA but rather occurred on the high seas, DOHSA plainly was intended to control.

477 U.S. at 219-20.

In a footnote, this Court in *Offshore Logistics* added:

Only one provision of OCSLA superimposes a status requirement on the otherwise determinative OCSLA situs requirement; § 1333(b) makes compensation for the death or injury of an "employee" resulting from certain operations on the Outer Continental Shelf payable under the Longshoreman's and Harbor Workers' Compensation Act. We note that because this case does not involve a suit by an injured employee against his employer pursuant to § 1333(b), this provision has no bearing on this case.

477 U.S. at 220 n.2.

In *Offshore Logistics*, this Court referred to its discussion in *Herb's Welding, Inc. v. Gray*, 470 U.S.

414 (1985), regarding the “status and situs requirements of the Longshoremen’s and Harbor Workers’ Compensation Act as applied to platform workers making claims against their employers. . . .” *Offshore Logistics*, 477 U.S. at 220. In *Herb’s Welding*, a welder who spent roughly three-fourths of his working time on oil drilling platforms in state waters and the rest on platforms on the outer continental shelf claimed a direct right to LHWCA benefits after he was injured on a platform in state waters. This Court held that he did not have a direct right to LHWCA benefits because he was not engaged in maritime employment. It declined to decide whether the welder was entitled to benefits under OCSLA because the issue had not been fully briefed in or discussed by the Court of Appeals. *Herb’s Welding*, 470 U.S. at 426 n.12, & 427. Nonetheless, the Court made clear that entitlement to benefits under that Act depended on situs as well as status. Noting “the explicit geographical limitation to the Lands Act’s incorporation of the LHWCA,” it commented that “Gray would indeed have been covered for a significant portion of his work-time, but because of the Lands Act, not because he fell within the terms of the LHWCA. . . . [T]hat statute draws a clear geographical boundary that will predictably result in workers moving in and out of coverage.” *Id.* at 427.

The Ninth Circuit here dismissed this Court’s statements in *Offshore Logistics* and *Herb’s Welding* as dicta. *Valladolid*, 604 F.3d at 1131-32 & n.2, App. 9a-11a & n.2. But as the Fifth Circuit in *Mills*

correctly found, those statements firmly acknowledge “the geographic boundaries to OCSLA’s coverage. . . .” *Mills*, 877 F.2d at 361. They make clear that when a worker seeks benefits under OCSLA, § 1333(b) does not replace the Act’s situs requirement with a status requirement. Rather, it “superimposes,” i.e., adds, a status requirement to “the otherwise determinative OCSLA situs requirement” found in § 1333(a). *Offshore Logistics*, 477 U.S. at 220 n.2. Consequently, a worker will “mov[e] in and out of coverage,” *Herb’s Welding*, 470 U.S. at 427, depending on where he is working. As the Fifth Circuit stated in *Mills*, “[w]e cannot accept the Director’s explanation that the Court meant to ‘replace’ situs with status when it used ‘superimposes.’ The Court could not have made it clearer that a worker must demonstrate status and situs to recover LHWCA benefits under § 1333(b).” *Mills*, 877 F.2d at 361.

In sum, the Ninth Circuit’s justifications for its decision can be reconciled with neither Congressional intent nor this Court’s statements in prior cases involving the OCSLA. And as we have explained, the Ninth Circuit’s decision deepens an existing circuit split on a threshold issue of benefits eligibility and formulates a test that provides no meaningful guidance to administrative law judges and the Benefits Review Board. The current three-way split among the circuits regarding the interpretation of 43 U.S.C. § 1333(b) and the import of this Court’s statements in *Offshore Logistics* and *Herb’s Welding* means that a worker’s entitlement to OCSLA benefits for an injury

on land depends on the circuit in which the claim arises, an intolerable situation. Only a decision by this Court can bring clarity and consistency to this area of the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HORVITZ & LEVY LLP
PEDER K. BATALDEN
*PETER ABRAHAMS

THOMAS, QUINN & KRIEGER, LLP
MICHAEL W. THOMAS

*Counsel for Petitioners
Pacific Operators Offshore, LLP
and Insurance Company of
the State of Pennsylvania*

**Counsel of Record*
