No. 10-507

In The 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

REPLY BRIEF FOR PETITIONERS

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1. One of the primary purposes of certiorari jurisdiction is to resolve conflicts among the circuits on issues of federal law. *See*, *e.g., Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 657 (2006). Respondent the Director, Office of Workers' Compensation Programs acknowledges that such a conflict exists here. (*See* Director's Opp'n at 11.) "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." (*Id.*)

In fact, as we explained in our petition, the Court of Appeals' decision here creates a three-way circuit split. The Third Circuit held that an employee injured on land is entitled to benefits if he would not have been injured "but for" his employment on the outer continental shelf. *See Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 809 (3d Cir. 1988). The Fifth Circuit, adopting a situs test, held that a worker is not entitled to benefits unless the injury occurs on the outer continental shelf. *Mills v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 877 F.2d 356 (5th Cir. 1989). The Ninth Circuit – rejecting both the Third Circuit's "but for" test and the Fifth Circuit's situs test – instead requires a claimant to "establish a substantial nexus between the injury and extractive operations on the shelf." *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1139 (9th Cir. 2010).

2. This three-way circuit conflict concerns an important issue to boot. Until it is resolved by this

Court, whether an offshore platform worker injured on land is entitled to OCSLA benefits depends on the circuit in which the claim arises, an intolerable situation. *See Comm'r of Internal Revenue v. Bilder Ex'x*, 369 U.S. 499, 501 (1962) (granting certiorari due to "the need for a uniform rule on the point").

Respondent Valladolid contends the question is not important because it rarely arises. For that proposition, she relies only on the fact that few court of appeals decisions have addressed the question. (*See* Valladolid Opp'n at 14-15.) However, once the Third Circuit in *Curtis* and the Fifth Circuit in *Mills* (in an en banc decision) established the law in their respective circuits, neither court had cause to revisit the question. Both decisions adopted bright line rules that can easily be applied by administrative law judges. Because the law in each circuit is clear, litigants who lose before an administrative tribunal have little incentive to seek review in the Court of Appeals. Consequently, the absence of subsequent circuit court opinions says nothing about the frequency with which OCS workers are injured on land. Valladolid offers no support for her implicit assertion that OCS workers rarely are called upon to also perform work at their employers' onshore facilities.

3. This important issue should be resolved now, not after further proceedings. "[T]he power of this court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency. . . ." *Forsyth v. Hammond*, 166 U.S. 506, 514 (1897). "[W]here . . .

there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status. . . .” Eugene Gressman et al., Supreme Court Practice 281 (9th ed. 2007). Consequently, “[i]n a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment.” 17 Charles A. Wright et al., Federal Practice & Procedure § 4036 (3d ed. 2007).

Despite a three-way circuit conflict on an important question of federal law, the Director and Valladolid urge that certiorari is not warranted because the Ninth Circuit in this case remanded to the agency to determine petitioner’s entitlement to benefits under its “substantial nexus” test. According to the Director, “the case is currently in an interlocutory posture” (Director’s Opp’n at 8), and “[a]llowing 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.” (*Id.* at 12.)

But nothing that the agency might decide on remand will eliminate what even the Director acknowledges is a split between the Third and Ninth Circuits, on the one hand, and the Fifth Circuit on the other. The Director urges that the conflict between the decision below and the Third Circuit’s “but for” test may be “illusory” and that it is “possible that

the Third and Ninth Circuit tests will converge." (Director's Opp'n at 13, n.9.) Even if they do, at best there will still be a two-way circuit split regarding the entitlement of an OCS worker injured on land to OCSLA benefits.

Moreover, the Director's own brief casts doubt on the likelihood the Third and Ninth Circuits' tests will converge. He acknowledges that the Ninth Circuit's "substantial nexus" test, unlike the Third Circuit's test, requires "a fact-based inquiry focused on the particulars of a given injury." (Director's Opp'n at 16.) Therefore, according to the Director, the test lacks "predictability" and, contrary to Congress's intent, "could prove overly inclusive in that it might extend coverage to workers who do not perform any work on the OCS itself." (*Id.* at 15.) Consequently, the Director urges this court to adopt yet a fourth test: an injury is compensable, no matter where it occurs, if there is "a nexus between OCS operations and the employee's 'work performed' generally." (*Id.* at 14.) The additional uncertainty in this already muddled area of the law introduced by yet a fourth test confirms the need for certiorari review now.

And, no matter what happens on remand, this Court will receive another certiorari petition. If Valladolid prevails before the agency, petitioners will file a petition raising the same issue presented by their current petition. If petitioners prevail, Valladolid will undoubtedly seek certiorari and urge this Court to adopt the Third Circuit's test from *Curtis*.

4. Finally, Valladolid appears to contend that even the conflict between the Third Circuit's test in *Curtis* and the Fifth Circuit's test in *Mills* is illusory. She suggests both circuits would hold that an OCS worker travelling to or from OCS platforms is entitled to OCSLA benefits and thus both courts would reach similar results on similar facts. (Valladolid Opp'n at 15-17.) That contention fails. Expressly acknowledging the contrary holding in *Curtis*, the Fifth Circuit in *Mills* rejected an interpretation of 43 U.S.C. § 1333(b) that would extend "LHWCA benefits to oilfield workers injured on land or state territorial waters." *Mills*, 877 F.2d at 361-62.

CONCLUSION

No good reason exists for waiting to grant a writ of certiorari. This case presents an important question that has divided the circuits, and the division would persist no matter how the agency resolved outstanding matters on remand. A worker's eligibility for OCSLA benefits should not depend on the circuit in which his injury occurs.

For the foregoing reasons and the reasons set forth in our petition, the petition for writ of certiorari should be granted.

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