No. 01-1042

In the Supreme Court of the United States

MARGIE A. PICKETT, PETITIONER

v.

PETROLEUM HELICOPTERS, INC., ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 4(b) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1333(b), extends workers' compensation coverage under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, "[w]ith respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf [OCS] 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 such coverage is limited to employees who suffer injury or death on an OCS platform or the waters above the OCS.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 266 F.3d 366. The decisions and orders of the Benefits Review Board (Pet. App. 5a-12a) and the administrative law judge (Pet. App. 13a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2001. A petition for rehearing was denied on October 25, 2001 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on January 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 4(b) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1333(b), provides:

> 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. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section—
>
> (1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;
>
> (2) the term "employer" means an employer any of whose employees are employed in such operations; and
>
> (3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

STATEMENT

Petitioner applied for workers' compensation benefits under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1333(b), on account of the death of her husband, who died in a crash of a helicopter during a test flight. The helicopter was used to ferry workers and

equipment to offshore drilling platforms on the outer continental shelf. An administrative law judge (ALJ) denied petitioner's claim, Pet. App. 13a-25a, and the Department of Labor's Benefits Review Board affirmed, *id.* at 5a-12a. On petition for review, the court of appeals affirmed the denial of benefits, relying on its prior decision in *Mills* v. *Director, OWCP*, 877 F.2d 356, 362 (5th Cir. 1989) (en banc).

1. Congress enacted the Outer Continental Shelf Lands Act, ch. 345, 67 Stat. 462 (43 U.S.C. 1331-1356 (1994 & Supp. V 1999)), and the Submerged Lands Act, ch. 65, 67 Stat. 29 (43 U.S.C. 1301-1315), to address the division of federal and state authority over submerged lands in the wake of this Court's decision in *United States* v. *California*, 332 U.S. 19 (1947). The Submerged Lands Act granted coastal States title to submerged lands seaward of their coastlines to a distance generally of three miles, subject to specific exceptions. See 43 U.S.C. 1301(b), 1311(a). The OCSLA affirmed the United States' paramount authority over submerged lands seaward of the Submerged Lands Act grant, which is denominated the outer continental shelf (OCS). See 43 U.S.C. 1332(1), 1333(a)(1).

The OCSLA created a body of substantive law to govern the federal submerged lands. Among other things, it extended the Constitution and federal statutes to the OCS, 43 U.S.C. 1333(a)(1), (b), (c) and (f); delegated specific authority to various federal agencies, *e.g.*, 43 U.S.C. 1333(d) and (e), 1334; preserved federal admiralty jurisdiction over the high seas above the OCS, 43 U.S.C. 1332(2); and adopted certain laws of the adjacent States to the extent not inconsistent with federal law. 43 U.S.C. 1333(a)(2)(A). In particular, as relevant to this case, it extended federal workers' com-

pensation coverage under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, to employees injured "as the result of operations conducted on the outer Continental Shelf" for the purpose of extracting natural resources. 43 U.S.C. 1333(b). It is the scope of that coverage that is at issue in this case.

2. Petitioner Margie A. Pickett is the widow of a helicopter pilot, Joseph Pickett, who was employed by respondent Petroleum Helicopters, Inc. Pickett's job was to transport workers and equipment between the mainland and offshore drilling platforms on the OCS off the coast of Louisiana. Pet. App. 2a, 15a. On November 19, 1990, at respondent's heliport in Louisiana, Pickett undertook to perform a flight check that was required by regulation after maintenance has been performed. Passengers may not be carried in the helicopter until the flight check has been successfully completed. If the helicopter had performed satisfactorily, Pickett intended to fly the helicopter to the heliport of the Amerada Hess Corporation to pick up personnel and supplies to be transported to offshore platforms on the OCS. *Id.* at 2a & n.1, 15a-16a. Shortly after liftoff on the test flight, however, the helicopter crashed onto the parking lot next to respondent's heliport, killing Pickett. *Id.* at 2a, 17a.

3. Since Pickett's death, respondent Wausau Insurance Companies has paid petitioner workers' compensation benefits under the Louisiana Workers' Compensation Act. Pet. App. 17a-18a. Petitioner, however, filed a claim for benefits with the United States Department of Labor, Office of Workers' Compensation Programs, under the OCSLA extension of the LHWCA. Petitioner did so because LHWCA benefits are greater than the state benefits.

a. An administrative law judge denied petitioner's claim. Pet. App. 13a-25a. The ALJ considered himself bound by the Fifth Circuit's en banc decision in *Mills* v. *Director, OWCP*, 877 F.2d 356, 362 (1989), which denied OCSLA coverage to a shore-based welder who worked on platforms destined for the OCS. Pet. App. 23a. The *Mills* court established a two-part test, covering "employees who (1) suffer injury or death on an OCS platform or the waters above the OCS; and (2) satisfy the 'but for' status test" described in *Herb's Welding, Inc.* v. *Gray*, 766 F.2d 898, 900 (5th Cir. 1985), *Mills*, 877 F.2d at 362 (*i.e.*, that the injury would not have occurred but for operations on the OCS, *Herb's Welding*, 766 F.2d at 900). Applying that test, the ALJ concluded that he was "compelled to follow the Fifth Circuit's holding, which excludes [Pickett] from coverage as he was over land, albeit rather fortuitously, when the accident occurred." Pet. App. 23a.

b. The Department of Labor's Benefits Review Board affirmed. Pet. App. 5a-12a. Like the ALJ, the Board recognized that this case differs factually from *Mills* because Mills worked only on land in support of OCS operations, whereas Pickett piloted a helicopter to ferry workers to work on the the OCS. *Id.* at 9a. Nevertheless, the Board concluded that "*Mills* forecloses [petitioner's] recovery under the Act" because her husband's "death occurred on land." *Id.* at 11a.

c. On petition for review of the Board's decision, the court of appeals affirmed. Pet. App. 1a-4a. The court acknowledged that *Mills* was "factually distinct" and that its earlier decisions had granted LHWCA benefits to survivors of employees who "died in helicopter crashes on the high seas above the OCS." *Id.* at 3a (discussing *Barger* v. *Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), cert. denied, 461 U.S. 958

(1983), and *Stansbury* v. *Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), cert. denied, 459 U.S. 1089 (1982)). Nonetheless, the court held that "[t]he relevant language in *Mills* is not fact-specific, but categorically requires the injury to occur on the OCS." *Ibid.* It subsequently denied panel rehearing and rehearing en banc. *Id.* at 26a-27a.[1]

ARGUMENT

The Fifth Circuit's decision in this case conflicts with the Third Circuit's decision in *Curtis* v. *Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (1988). After reexamining the legal issue, the Director of the Office of Workers' Compensation Programs has concluded that neither decision correctly articulates the proper test for determining whether the OCSLA applies to the accidents encountered in those cases—the Fifth Circuit's coverage test is too narrow, while the Third Circuit's test is too broad. Nevertheless, the facts of this case are so unusual that it is unlikely to have a significant precedential effect, and it does not present a representative case for this Court to articulate a generally-applicable coverage test for workers' compensation under the OCSLA. In addition, it is possible that the Third Circuit would now adopt either the Fifth Circuit's or the Director's approach if it had occasion to revisit the issue. Finally, the Director has concluded that the result reached by the Fifth Circuit in this case is correct, even though the Director does not agree with the Fifth Circuit's articulated approach in one particu-

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[1] Although nominally a respondent, see *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 519 U.S. 248, 269 (1997), the Director, Office of Workers' Compensation Programs, United States Department of Labor, did not participate in the case below because he considered *Mills* to be controlling in the Fifth Circuit.

lar respect. For these reasons, review of the Fifth Circuit's decision in this case is not warranted.

1. In stating that OCSLA coverage is limited to injuries that occur on or over the OCS, the court of appeals' decision faithfully followed the language of *Mills* v. *Director, OWCP*, 877 F.2d 356 (5th Cir. 1989) (en banc). *Mills* and the decision below, however, conflict with the Third Circuit's decision in *Curtis* v. *Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (1988), which found coverage for an employee who was injured on shore.

In *Mills*, a welder who worked only on land was injured while participating in the building of an oil production platform destined for the OCS. *Mills*, 877 F.2d at 357. Reversing a panel decision, the en banc Fifth Circuit denied coverage. *Id.* at 357-358. The en banc court stated that the "bare language" of Section 4(b) of OCSLA "does not resolve the issue" because the language is "open to interpretation." *Id.* at 359. Nevertheless, the court concluded from the legislative history that "Congress intended to establish a bright-line" test for coverage. *Id.* at 362. It elected to "draw that line" by covering only "employees who (1) suffer injury or death on an OCS platform or the waters above the OCS; and (2) satisfy the 'but-for' status test this court described in *Herb's Welding Inc.* v. *Gray*, 766 F.2d 898, 900 (5th Cir. 1985)." *Mills*, 877 F.2d at 362. The latter prong of the coverage test requires that the employee's "work had furthered the operation of a fixed rig on the shelf and was in the regular course of extractive operations on the shelf," so that the death or injury would not have occurred "but for" those operations. *Herb's Welding*, 766 F.2d at 900.

Curtis, which was decided before the en banc decision in *Mills*, held that the OCSLA covered an

employee injured on shore en route to the OCS. *Curtis*, 849 F.2d at 806. Curtis, who worked regularly on a drilling rig on the OCS off the coast of New Jersey, was injured on the New Jersey Turnpike while driving a company car from his employer's Rhode Island headquarters to meet the helicopter that was to fly him back to the rig. *Ibid.* The Third Circuit held that his injury was covered by the OCSLA. Even though the injury did not occur on or over the OCS, the court read the statutory language to require only that the injured employee "be involved in 'any operations conducted on the [OCS] for the purpose of exploring for, [and] developing * * * the natural resources * * * of the [OCS]," and not to impose a situs-of-injury requirement. *Curtis*, 849 F.2d at 809.[2] It contrasted that language with the narrower language in Section 4(a)(1) of the OCSLA, 43 U.S.C. 1333(a)(1) (1958), which extended other federal substantive law and jurisdiction only to "artificial islands and fixed structures" attached to the Shelf. 849 F.2d at 809. It then discussed a series of pre-*Mills* Fifth Circuit decisions that, although "distinguishable on their facts * * *, support the principle that situs does not control the application of the LHWCA" under the OCSLA. *Id.* at 809-810 & n.9. Like the Fifth Circuit, the Third Circuit adopted a "but for" test to determine "whether Curtis's injury occurred as a result of operations on the [OCS]," and concluded that Curtis met that test. *Id.* at 811.

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[2] *Curtis* actually construed an earlier version of the OCSLA (Section 4(b) and (c) of the OCSLA, 43 U.S.C. 1333(b) and (c) (1958)) than that involved in *Mills* and this case. However, as explained below, pp. 17-18, *infra*, the differences between the two versions are organizational, not substantive.

It is apparent that the Third and Fifth Circuits disagree on whether Section 4(b) of the OCSLA imposes a situs-of-injury requirement and that their disagreement on the applicable coverage test would affect the outcome in this case. Unlike Mills, both Pickett and Curtis were regularly employed in jobs that required them to fly over the high seas above the OCS and to land on offshore drilling platforms in support of operations on the Shelf. Both were also injured on the mainland in transportation that was in some sense related to the OCS, Curtis while driving to the heliport and Pickett at the heliport while conducting an in-air pre-flight test that was required by regulation after mechanical work had been performed on the helicopter, but prior to picking up passengers and supplies for transport to the OCS. Pickett presumably would have been covered by the Third Circuit under the rationale of *Curtis*, as would other employees who are injured or killed on shore or over state waters on the way to or from the OCS.[3]

Nevertheless, the Third Circuit apparently believed that it was following Fifth Circuit case law when it decided *Curtis* shortly before the en banc decision in *Mills*. See *Curtis*, 849 F.2d at 809-811. The earlier Fifth Circuit cases had articulated only the "but for" coverage test, not the two-part *Mills* test (which added a situs-of-injury requirement), although the Fifth Circuit cases had applied the "but-for" test only to injuries that actually occurred on or over the OCS. See *Barger*

[3] Both circuits, however, will cover employees who die in helicopter crashes in the waters over the OCS. See *Barger* v. *Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), cert. denied, 461 U.S. 958 (1983); *Stansbury* v. *Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), cert. denied, 459 U.S. 1089 (1982); Pet. App. 3a-4a (affirming that *Barger* and *Stansbury* survive *Mills*).

v. *Petroleum Helicopters, Inc.*, 692 F.2d 337, 340 (5th Cir. 1982), cert. denied, 461 U.S. 958 (1983); *Stansbury* v. *Sikorski Aircraft*, 681 F.2d 948, 950-951 & n.2 (5th Cir.) ("OCSLA has no situs requirement"), cert. denied, 459 U.S. 1089 (1982). Because the Third Circuit, when it decided *Curtis*, had no way of anticipating the Fifth Circuit's subsequent change of direction, and because it has had no occasion to address the issue since then, it is at least possible that the conflict in the circuits will be resolved without the intervention of this Court.

2. On the merits, neither the Fifth nor the Third Circuit has yet adopted an OCSLA coverage test that satisfactorily reflects the language, structure, purpose, and history of the statute, as well as the practicalities of OCS operations. The Fifth Circuit test is too narrow because it reads into Section 4(b) of the Act a restrictive situs-of-injury requirement the statutory text does not contain. Section 4(b) of the OCSLA provides LHWCA coverage for "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). It does not say that it covers "any injury occurring on [or over] the [OCS] as a result of operations" for one of the stated purposes, as it would if it mandated the Fifth Circuit's reading. See *Mills*, 877 F.2d at 362-363 & n.1 (Duhe, J., dissenting). "Certainly, Congress knows how to include a situs requirement in a statute when it intends that such a requirement should exist," particularly when an express situs requirement is contained in the LHWCA itself, the statute whose provisions Congress extended in the OCSLA. *Id.* at 363 (Duhe, J., dissenting); see 33 U.S.C. 903(a) (LHWCA applies to an "injury occurring upon the

navigable waters of the United States" and specified adjoining areas).

The Fifth Circuit's approach also disregards textual differences among the subsections of Section 4 of the OCSLA itself, and the maxim that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 432 (1987). For instance, Section 4(a)(1) of the OCSLA provides, in pertinent part:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the [OCS] and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State.

43 U.S.C. 1333(a)(1). By its terms, this jurisdictional provision extends to the OCS itself and to installations actually attached to the subsoil and seabed of the OCS (as well as to pipelines for transporting OCS resources). It does not extend to the waters above the OCS, which remain subject to federal maritime law. See 43 U.S.C. 1332(2) (preserving "the character of the waters above

the [OCS] as high seas").[4] Other subsections also contain explicit situs language. See 43 U.S.C. 1333(c), (d), (e) and (f). To give meaning to the textual difference between Section 4(b) and the other coverage provisions of Section 4, 43 U.S.C. 1333, therefore, an appropriate test would cover at least some injuries that occur outside the geographical limits of the OCS—but only if they "occur[ ] as the result of operations conducted on" the OCS for the specified purposes. 43 U.S.C. 1333(b).[5]

The Third Circuit's test, in contrast, is too broad because, in finding no situs requirement at all, it gives no effect to the statutory phrase "on the [OCS]." See 43 U.S.C. 1333(b). It thus leaves open the possibility of covering purely shore-based employees whose work is merely related to OCS operations, such as Mills, as well

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[4] In that regard, we note that the Fifth Circuit's coverage test extends to injuries occurring over the OCS, not just injuries on OCS platforms attached to the seabed. But there is no textual basis in Section 4(b) for selecting that particular line of demarcation, and there is no logical reason why a helicopter crash into the high seas above the OCS is any more or less the "result of operations conducted on the [OCS]" than a helicopter crash on any other segment of the journey between an OCS platform and the coast, such as a crash on the beach or into state waters.

[5] Respondent Petroleum Helicopters, Inc. (PHI) accordingly errs by relying (Br. in Opp. 7-12) on decisions of this Court construing Section 4(a) of the OCSLA, 43 U.S.C. 1333(a), as limited to events occurring on the seabed, subsoil, and fixed structures attached to the OCS. See *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986); *Rodrigue* v. *Aetna Cas. & Surety Co.*, 395 U.S. 352 (1969). As explained above, Section 4(a) is worded more narrowly than Section 4(b). Thus, the proper inference is that Congress intended to make LHWCA coverage apply more broadly to OCS workers than the provisions of state and federal law incorporated by Section 4(a), and not that the scope of the different subsections is identical, as respondent PHI contends.

as OCS employees like Curtis himself whose injuries are caused by entirely land-based risks (such as driving an automobile). The Third Circuit would be correct, of course, if the Act covered "any injury occurring as a result of operations conducted for the purpose of" exploiting OCS resources, without the limiting phrase "conducted on the [OCS]." But it does not. Thus, neither the Third Circuit nor the Fifth Circuit approach succeeds in giving meaning to all the words of Section 4(b) of the OCSLA. See, *e.g.*, *TRW, Inc.* v. *Andrews*, 122 S. Ct. 441, 449 (2001).[6]

The definitions in Section 4(b) of the OCSLA (which replace definitions of the same terms in the LHWCA itself, 33 U.S.C. 902) offer some help in ascertaining which employees Congress meant to cover. While Section 4(b)(1) identifies only "employee[s]" that are excluded from coverage (seamen and government employees), Section 4(b)(2) defines a covered "employer" as "an employer any of whose employees are employed in such operations." 43 U.S.C. 1333(b)(1) and (2). The term "such operations" must refer back to "operations conducted *on* the [OCS]" for the specified purposes. 43 U.S.C. 1333(b) (emphasis added). It is thus reasonable to infer that a covered "employee" must himself be employed in operations "conducted on the [OCS]" at least part of the time, a reading that excludes purely shore-based workers.

While this Court has never construed Section 4(b) of the OSCLA, it has suggested in dictum that the provision contains both status and situs requirements. See

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[6] The test enunciated by the Third Circuit in *Curtis* is consistent with the position taken by the Director, OWCP, in that case and in *Mills*. Upon further consideration, the Director has revised his previous view of the appropriate construction of Section 4(b).

Offshore Logistics, Inc. v. *Tallentire*, 477 U.S. 207, 219 n.2 (1986) (noting that Section 4(b) "superimposes a status requirement on the otherwise determinative OCSLA situs requirement"); *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 427 (1985) (OCSLA "draws a clear geographic boundary that will predictably result in workers moving in and out of coverage."). But those decisions—like the Act itself—do not spell out the content of the situs requirement or the location of the geographic boundary, and the Court expressly disavowed construing Section 4(b) in each case. See *Tallentire*, 477 U.S. at 219 n.2; *Herb's Welding*, 470 U.S. at 427-428.

The legislative history of Section 4(b), while far from conclusive, suggests that the drafters intended to fill gaps in state workers' compensation coverage by creating a uniform federal compensation scheme for offshore workers, but does not suggest that Congress meant to extend that coverage broadly to shore-based employees or injuries. When the OCSLA was enacted in 1953, the LHWCA covered only injuries upon actual navigable waters, not injuries upon adjacent structures such as wharves and piers. See *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 214-220 (1969).[7] The Jones Act, 46 U.S.C. App. 688 (enacted in 1915), provided tort

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[7] In 1972 Congress amended the LHWCA to extend coverage to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." See 33 U.S.C. 903(a). Where coverage had previously stopped "at the water's edge," in 1972 "Congress moved the line" landward, *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 259, 260 (1977), because it "was especially concerned that some workers might walk in and walk out of coverage." *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 83 n.18 (1979).

remedies to seamen, and the Death on the High Seas Act, 46 U.S.C. App. 761 *et seq.* (enacted in 1920), extended admiralty tort remedies to wrongful death cases. State workers' compensation provided the only coverage for workers killed or injured on land. Some States also covered workers based in the State but injured elsewhere, including seamen and offshore oil workers, but such coverage was not uniform. See *Outer Continental Shelf: Hearings Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 22, 545 (1953) (*Hearings*). The Senate Committee that drafted the OCSLA concluded, among other things, that Congress could not require States to extend state workers' compensation coverage offshore, *Hearings* 25 (Sens. Barrett, Cordon, and Daniel), and had been advised that decisions of this Court raised questions about the constitutionality of such extensions by the States. See *Hearings* 30-31 (discussing *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205 (1917)). As a result, the drafters plainly wanted to fill gaps in workers' compensation coverage for offshore workers.

The legislative history also demonstrates that the drafters chose to adopt uniform federal workers' compensation coverage under the OCSLA, and not coverage that would vary depending on state law.[8] Before extending LHWCA coverage in the OCSLA, Congress had considered other approaches to providing workers' compensation coverage for offshore workers. For instance, early House bills proposed applying the

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[8] That choice is also evident in the contrast between the text of Section 4(b), which extends federal LHWCA coverage without mentioning state law, and Section 4(a)(2)(A), which extends the civil laws of adjacent States to the OCS when federal law does not apply.

workers' compensation laws (and other police powers) of the adjacent States to OCS operations, an approach later rejected. See, *e.g.*, H.R. Rep. No. 215, 83d Cong., 1st Sess. 7-8 (1953); *id.* at 23; H.R. Rep. No. 695, 82d Cong., 1st Sess. 13 (1951). The principal Senate bill, as introduced, incorporated the LHWCA in terms similar to those later enacted, but only "if recovery for such disability or death * * * is not provided by State law." S. 1901, 83d Cong., 1st Sess. § 4(c) (1953), *reprinted in Hearings* 2. S. 1901, as reported, removed that condition, explaining:

> It was deemed inadvisable to have the Federal Longshoremen's and Harbor Workers' Compensation Act apply only if there is no applicable State law. By this amendment, *all workers on the outer shelf* not already protected under laws respecting seamen are protected by the [LHWCA].

S. Rep. No. 411, 83d Cong., 1st Sess. 16, 23 (1953) (emphasis added).[9]

As to the geographic scope of OCSLA coverage, the language emphasized above suggests that the drafters were primarily concerned about workers *on* (or perhaps over) the OCS—not those working in adjoining States —and expected all such offshore workers to be pro-

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[9] Additionally, the members of the Senate Committee that removed the exclusion for workers covered by state law knew that LHWCA compensation levels would generally be more favorable to workers. *Hearings* 31-32, 512. In fact, testimony presented to the Committee by an industry representative indicates that the offshore oil industry was willing to pay higher premiums for federal compensation coverage to obtain uniformity and certainty, rather than to continue a situation in which "operators now cover workmen under both State and Federal compensation laws." *Id.* at 512.

tected either by the LHWCA or by the remedies available to seamen (even if they also happened to be eligible for state workers' compensation in a particular State). The Conference Report makes a similar (although less specific) geographic reference:

> Provision is made for the jurisdiction in the United States district court for cases and controversies arising *on the outer Continental Shelf* and certain Federal laws are made applicable *to the area* such as the Longshoremen's and Harbor Workers' Act.

H.R. Conf. Rep. No. 1031, 83d Cong., 1st Sess. 12 (1953) (emphasis added).

As a consequence of Congress's deliberations, Section 4 of the 1953 Act 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. * * *

§ 4(b) and (c), 67 Stat. 463 (emphasis added to show language later combined to form text of current Section 4(b), 43 U.S.C. 1333(b)).

The OCSLA was amended in 1978 for various reasons unrelated to workers' compensation. As pertinent here, it deleted former subsection 4(b), which provided jurisdiction for certain cases and controversies, and incorporated its provisions into a new Section 23, 43 U.S.C. 1349. See Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 203(h), 92 Stat. 636; H.R. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 81 (1978). As a result, Congress adopted a "conforming change to section 4(c) of the 1953 OCS Act," by moving language previously in Section 4(b) into Section 4(c) (and renumbering it as Section 4(b)). *Ibid.* As the conference report explained:

> This amendment involves no change in existing law. It was not the intent of the managers to alter in any way the existing coverage of the Longshoremen's Act, nor of other remedies that may be available for injury or death.

H.R. Conf. Rep. No. 1474, *supra*, at 81.

The legislative history thus has its own ambiguities. The 1953 Senate Report's reference to "workers on the outer shelf" and the Conference Report's reference to extending the LHWCA "to the area" of the OCS lend some support to the Fifth Circuit's view that Congress intended to cover only injuries occurring on or over the OCS. Covering "workers on the outer shelf," however, does not necessarily limit coverage to injuries actually occurring there if employees who work on the OCS are injured elsewhere in the course of their employment; 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. Cf. *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 360 (1995) (Jones Act test for "seamen"). Nor does the deletion of the

provision that would have extended LHWCA coverage only in the absence of applicable state coverage give rise to any unambiguous inference about congressional intent. Congress might have intended to permit OCSLA coverage for some injuries on land or state waters, or might only have meant to assure uniform offshore coverage even for employees connected to States that provide their own offshore workers' compensation coverage.[10]

In the view of the Director of OWCP, the most appropriate test that can be derived from the text and purpose of Section 4(b), and the structure and history of the OCSLA in general, covers employees who work on the OCS in covered operations and are injured on, over,

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[10] Petitioner makes the additional argument (Pet. 10) that the OCSLA's definition of "development"—which includes "platform construction, and operation of all onshore support facilities," 43 U.S.C. 1331(*l*)—precludes imposition of any situs requirement for workers' compensation coverage under the Act. But Section 4(b) of OCSLA does not use the term "development"; instead, it refers to "operations conducted on the [OCS] for the purpose of * * * developing" natural resources. In fact, the word "developing" is also used in Section 4(a)(1) of the OCSLA, in conjunction with an express situs requirement. Thus, the word "developing" does not necessarily eliminate situs considerations. In addition, the legislative history of the definition of "development," added in 1978, makes clear that it was added to the Act for a purpose unrelated to LHWCA coverage—namely, "to identify the point, after exploration and before development, beyond which activity cannot proceed without an approved development and production plan, as described in [43 U.S.C. 1351]." See *Mills*, 877 F.2d at 360 (quoting from H.R. Rep. No. 590, 95th Cong., 1st Sess. 126 (1977)). Thus, while the definition suggests a broad concept of OCS "operations," it was not intended to alter or clarify the scope of LHWCA coverage under the OCSLA. It therefore sheds no light on the intent of Congress in enacting the LHWCA coverage provisions in 1953.

or en route to or from the OCS by air or sea. That test would contain both a status and a situs component. The status component covers employees involved in covered OCS operations at the time of injury; it is thus the equivalent of the "but for" test adopted by both the Third and Fifth Circuits. See *Curtis*, 849 F.2d at 811; *Herb's Welding Inc.* v. *Gray*, 766 F.2d 898, 900 (5th Cir. 1985). It differs, however, from the pure status test proposed by petitioner, which would create a class of "Offshore Lands Workers," analogous to Jones Act seamen, who work regularly on the OCS but carry their status with them elsewhere. Compare Pet. 11 (discussing *Chandris, Inc.* v. *Latsis*, *supra*), with PHI Br. in Opp. 12-13 (arguing that petitioner's seaman analogy is inappropriate because of differences in the text and purpose of the Jones Act, 46 U.S.C. App. 688, and Section 4(b) of the OCSLA).

The situs component of the government's proposed test would cover injuries that occur on, over, or en route to or from the OCS by air or sea. It would include injuries from the point of departure to, and return from, the OCS by helicopter or boat trip, including those portions that occur over state waters or dry land. It draws a geographical boundary at the point of embarkation for the OCS (*i.e.*, the heliport or boat dock), and so would not cover Curtis's injury while driving to the heliport or Mills' injury while welding a platform under construction at a mainland facility.

The government's proposed test has the practical advantages of a bright-line rule, while avoiding the unfairness and arbitrariness of covering employees only for part of a journey to or from the OCS, when the same transportation purpose and similar hazards are present throughout that journey. It also provides a clear line for limiting OCSLA coverage on the landward side of

the employee's departure point for the OCS, where the work-related activity may have other purposes, the typical hazards are quite different, and Congress knew that state workers' compensation coverage always applied and thus would not have perceived a need to fill any gap. In this case, for example, the flight test apparently was required by governing regulations because mechanical work had just been performed on the helicopter, without regard to whether the helicopter was then going to travel to the OCS or elsewhere; the risks attendant to the test flight accordingly were not related to operations on the OCS but rather to maintenance of helicopters; and Pickett's injury was and is covered by Louisiana's workers' compensation law.

Moreover, compensating injuries and deaths of workers that occur during a trip to or from operations on the OCS (over land, state waters or the high seas) is more central to the purposes of the OCSLA than compensating injuries on the mainland before or after such a trip. As a result, the Director's test would cover more injuries than the Fifth Circuit test, but not more workers; it would simply cover them for a somewhat larger portion of their working hours; and it would reduce (but not entirely eliminate) the likelihood that workers would regularly move in and out of OCSLA coverage. Finally, as discussed at pp. 10-19, *supra*, the Director's test is the most faithful to the text, legislative history, and purposes of Section 4(b).

3. Under the test just described, this case was correctly decided. Petitioner's husband was injured during a flight check following maintenance of the helicopter, rather during the actual trip to the OCS. See Pet. App. 16a. He therefore would not fall within the OCSLA's coverage. Although the Fifth Circuit did not articulate the test for coverage that the Director now

believes is appropriate, it reached the correct result under the facts of this case.

The formulation used in the court of appeals' decision, if strictly adhered to by the Fifth Circuit in the future, would lead to the persistence of a an OCSLA coverage test that, in the Director's view, is too restrictive in the narrow respect discussed above concerning certain segments of direct transportation to and from the OCS. The Fifth Circuit, however, has not to date addressed a case involving transportation by helicopter or boat to or from a work site on the OCS in which the injury occurs over land or state waters before reaching, or after leaving, the OCS. It may be that, if it considered the issue in a case in which the Director had taken the position in the administrative proceedings that the OCSLA covers such an injury, the Fifth Circuit would defer to and sustain that interpretation. See *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997) (discussing deference to the Director).

The articulation of the test by the Fifth Circuit also is inconsistent, in principle, with that of the Third Circuit. See *Curtis*, *supra*. It is possible, however, that the Third Circuit would eventually fall in line with the *Mills* test, if and when similar cases arise in that circuit. In the alternative, the Third Circuit might adopt the Director's proposed test. In either event, the issue is not yet ripe for this Court's determination.

Furthermore, the facts in this case—like those in *Curtis*—are atypical, because they involve an injury on shore that occurred shortly before, rather than during, a trip to the OCS. Every worker on an OCS oil rig travels back and forth to his or her place of employment by air or water and could be injured at any point during those travels. Such trips pose risks (such as drowning) that were foreseeable by the OCSLA's drafters and are

generally different in kind from those typically encountered on a highway, in a shipyard, or at a heliport. The specific risk in this case – arising from a pilot's post-maintenance flight check of a helicopter – is more peripheral to the concerns of the Act (and also presumably rarer) than the risk of accidents en route to or from the OCS, which would be covered under the Director's proposed test.

Aside from the particular facts of this case, the general question of OCSLA coverage potentially affects a significant number of OCS workers within the jurisdiction of the Fifth Circuit, but currently affects relatively few elsewhere. Some 4200 OCSLA injuries and deaths have been reported since 1997 to the Labor Department, and all but 123 of them were reported to district offices within the jurisdiction of the Fifth Circuit. In addition, the Minerals Management Service of the Department of the Interior reports that some 35,400 persons currently work offshore in the Gulf region, where the vast majority of current offshore oil and gas operations take place. See U.S. Dep't of Interior, Minerals Management Service, *OCS Activities Report, October 2000-May 2001*, at 53-71 (2001) (visited Apr. 11, 2002) (discussing activities by region) <www.gomr.mms.gov/homepg/offshore/safety/overview.html>. As explained above, however, the Director believes that the Fifth Circuit is largely correct in its approach to the situs issue, with the exception of a case (which has not yet been addressed by the Fifth Circuit) in which the injury occurs in the course of transportation by helicopter or boat to or from a work site on the OCS but before the helicopter reached, or after it has left, the OCS. There is accordingly no basic misconception by the Fifth Circuit that warrants review by this Court.

While only a few of the numerous OCS workers in the Fifth Circuit are likely to be helicopter pilots who perform flight checks, all of them travel back and forth to the OCS and thus could be killed or injured during any segment of such journeys. Therefore, while we do not think it necessary for the Court to review this case, it may wish to consider the coverage question in a future case, if the Fifth Circuit addresses a case involving actual transportation to or from the OCS or if the Third Circuit adheres to the *Curtis* formulation notwithstanding the intervening Fifth Circuit decision in *Mills* and the Director's new position. At the present time, however, review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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