

No. 21-675

In the Supreme Court of the United States

JEFFREY G. CARSWELL, ET AL., PETITIONERS

v.

E. PIHL & SON, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Director of the Office of Workers' Compensation Programs may participate as a party in administrative proceedings under the Defense Base Act, 42 U.S.C. 1651 *et seq.*

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (1st Cir.):

Carswell v. E. Pihl & Sons, No. 19-1630 (May 27, 2021)

United States Court of Appeals (2d Cir.):

Carswell v. E. Pihl & Sons, No. 19-151 (June 18, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 999 F.3d 18. The decisions of the Benefits Review Board of the United States Department of Labor (Pet. App. A35-A51) and the administrative law judge are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2021. A petition for rehearing was denied on August 11, 2021 (Pet. App. A29-A30). The petition for a writ of certiorari was filed on November 2, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. 901 *et seq.*, establishes a workers' compensation scheme for certain maritime workers. See 33 U.S.C. 902(3). The Defense Base Act (Base Act), 42 U.S.C. 1651 *et seq.*, extends that scheme to various classes of workers, including, as relevant here, certain workers employed overseas under government contracts. 42 U.S.C. 1651(a)(4).

The Department of Labor's administrative law judges (ALJs) and Benefits Review Board (Board) adjudicate claims under those schemes. 33 U.S.C. 919(d), 921(b). The worker's private employer typically pays the benefits, but the Director of the Office of Workers' Compensation Programs (OWCP) administers a Special Fund that pays the award if the employer is insolvent or otherwise precluded from paying. 33 U.S.C. 918(b). The Department of Labor's regulations provide that the Director may participate as a party in administrative proceedings. 20 C.F.R. 702.333(b), 801.2(a)(10).

2. In January 1968, a U.S. Air Force bomber carrying nuclear weapons crashed eight miles from Thule Airbase in Greenland, which was then a territory of Denmark. Pet. App. A2-A3. The crash resulted in the release of plutonium and other radioactive materials. *Id.* at A3. The Air Force undertook a comprehensive cleanup. *Ibid.* Petitioners, who were citizens of Denmark and civilian employees of a Danish joint venture, participated in the cleanup. *Id.* at A3-A4, A38.

In 2010, petitioners filed claims for compensation under the Base Act, alleging that they had developed cancer and other medical problems because of exposure to radiation during the cleanup. Pet. App. A4, A6-A8. The joint venture that had employed petitioners had ceased

operations years earlier, so petitioners filed their claims against two of the joint venture's constituent companies. *Id.* at A4, A38 n.2. One of those two companies refused to accept service of process; the other participated in the proceedings, but filed for bankruptcy while the proceedings were ongoing. *Id.* at A4 n.1, A5. The Director joined the proceedings as a party. *Id.* at A5.

The ALJ denied petitioners' claims. Pet. App. A13. The ALJ overruled petitioners' objection to the Directors' participation in the proceedings, observing that the regulations expressly authorized the Director to participate. *Id.* at A5. She also explained that the Director's participation was "especially warranted in this case because [one of the two private companies sued by petitioners] had filed for bankruptcy during the litigation and thus any compensation awarded would potentially be paid from the * * * Special Fund." *Ibid.* On the merits, the ALJ found that petitioners were not entitled to compensation because they had failed to establish a causal connection between their illnesses and exposure to plutonium radiation. *Id.* at A13. She relied on expert evidence indicating that "plutonium radiation does not cause the [specific] illnesses that the Petitioners suffered from." *Id.* at A14.

The Board affirmed. Pet. App. A35-A51. It rejected petitioners' contention that the Director was not a proper party, citing the regulations authorizing the Director to participate in the administrative proceedings. *Id.* at A41 n.7. On the merits, the Board found that substantial evidence supported the ALJ's finding of no causal connection between petitioners' illnesses and exposure to plutonium radiation. *Id.* at A48-A49.

3. Petitioners filed a petition for review in the Second Circuit, but that court transferred the case to the

First Circuit. Pet. App. A33-A34. Petitioners then asked the First Circuit to certify to this Court the question whether judicial review of Base Act claims is properly initiated in the court of appeals or the district court. Pet. Mot. for 28 U.S.C. 1254(2) Certification; see 28 U.S.C. 1254(2) (“Cases in the courts of appeals may be reviewed by the Supreme Court by * * * certification at any time by a court of appeals of any question of law * * * as to which instructions are desired.”); Sup. Ct. R. 19.1 (“A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction.”). The First Circuit denied that motion. Pet. App. A31-A32.

The First Circuit then denied petitioners’ petition for review. Pet. App. A1-A28. The court began by noting that it could properly adjudicate the petition. *Id.* at A15 n.10. It cited circuit precedent establishing that the court of appeals, not the district court, is the proper forum for initial judicial review of agency decisions under the Base Act. *Ibid.* (citing *Truczinskas v. Director, OWCP*, 699 F.3d 672, 674-676 (1st Cir. 2012)).

The First Circuit rejected petitioners’ argument that the Director lacked the authority to participate in the administrative proceedings. Pet. App. A16-A21. The court observed that Congress had authorized the Secretary of Labor to make such regulations “as may be necessary in the administration” of the workers’ compensation scheme. *Id.* at A17 (quoting 33 U.S.C. 939(a)). The court noted that the regulations expressly authorized the Director to participate as a party in administrative proceedings. *Ibid.*; see 20 C.F.R. 702.333(b), 801.2(a)(10).

The First Circuit also sustained the agency’s merits decision. Pet. App. A21-A28. The court found

substantial evidence to support the ALJ's finding of no causal connection between petitioners' illnesses and exposure to plutonium radiation. *Id.* at A25.

ARGUMENT

Petitioners contend (Pet. 21-31) that the Director lacked the authority to participate in the administrative proceedings below. The court of appeals' rejection of that contention was correct and does not conflict with any decision of this Court or any other court of appeals.

Petitioners separately identify (Pet. 31-36) a circuit conflict about whether judicial review of decisions under the Base Act is properly initiated in the courts of appeals or in the district courts. But this case would be a poor vehicle for resolving that conflict. The petition for a writ of certiorari should be denied.

1. Petitioners contend (Pet. 21-31) that the Director lacked the authority to participate in the administrative proceedings below. That contention is incorrect.

Congress has authorized the Secretary of Labor to make such regulations "as may be necessary in the administration" of the Longshore Act. 33 U.S.C. 939(a). Even apart from that express authorization, this Court ordinarily presumes that "the formulation of procedures [i]s basically to be left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978). The Secretary, exercising his authority under the statute to make regulations and his authority under general principles of administrative law to prescribe agency procedures, has adopted a regulation providing that "[t]he Solicitor of Labor or his designee may appear and participate in any formal hearing * * * on behalf of the Director as

an interested party.” 20 C.F.R. 702.333(b); see 20 C.F.R. 801.2(a)(10) (authorizing participation in Board proceedings); 20 C.F.R. 701.101(a) and 802.101(b)(2) (making the foregoing regulations applicable to Base Act claims). As the court of appeals held, the regulation expressly authorizes the Director to participate in administrative proceedings under the Base Act. Pet. App. A18.

The Director’s participation was “especially warranted in this case.” Pet. App. A5. The joint venture that had employed petitioners during the cleanup had ceased operations; one of the two constituent companies that petitioners had sued had refused to accept service of process; and the other company had filed for bankruptcy during the proceedings. *Id.* at A4 n.1, A5. “[A]ny compensation awarded would potentially be paid from the * * * Special Fund,” and the Director, as the administrator of the Special Fund, “ha[d] an obligation to protect [it] from unjustified claims.” *Id.* at A5, A19 (citations omitted).

Contrary to petitioners suggestion (Pet. 21-23), the court of appeals’ decision does not conflict with this Court’s decision in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995). That case involved the Director’s right to file a petition for review in the court of appeals, rather than his right to participate in the agency’s own proceedings. Congress had provided that only an “adversely affected or aggrieved” party could file a petition for review. 33 U.S.C. 921(c). The Court held that the Director was not adversely affected or aggrieved by, and thus could not seek judicial review of, Board decisions that, in the Director’s view, denied claimants compensation to which they were entitled. *Newport News*, 514 U.S. at 125-136.

But that holding concerns only the Director's authority to initiate judicial review of Board decisions denying compensation, not his authority to participate in administrative proceedings. And the Court noted in a later case that "the Director has * * * been authorized by [regulations] to appear before the relevant adjudicative branches of the Department of Labor," without suggesting that the regulations in any way conflicted with its earlier decision. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 519 U.S. 248, 263 (1997).

Petitioners do not contend that the court of appeals' decision on the question presented conflicts with any decision of any other court of appeals. Further review is therefore unwarranted.

2. Petitioners also discuss (Pet. 31-36) a circuit conflict over whether judicial review of Board decisions under the Base Act is properly initiated in the courts of appeals or in the district courts. This case, however, would be a poor vehicle for resolving that conflict.

The Base Act provides that, "[e]xcept as herein modified, the provisions of the [Longshore Act], as amended * * * , shall apply" to workers covered by the Base Act. 42 U.S.C. 1651(a). When the Base Act was adopted in 1941, the Longshore Act provided for initial judicial review of agency decisions in district court. 33 U.S.C. 921 (1940). The Base Act's judicial-proceedings provision, in turn, provided that "[j]udicial proceedings provided under [33 U.S.C. 921] * * * shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial

district nearest the base at which the injury or death occurs.” 42 U.S.C. 1653(b).

In 1972, Congress amended the Longshore Act to provide for judicial review “in the United States court of appeals for the circuit in which the injury occurred.” 33 U.S.C. 921(c) (Supp. II 1972). But Congress neglected to amend the Base Act’s judicial-proceedings provision, which continues to refer to the institution of review in “district court.” 42 U.S.C. 1653(b).

The Director has long argued that, as a result of the amendment to the Longshore Act, judicial review of an Board decision under the Base Act is properly initiated in the court of appeals. See, *e.g.*, *Pearce v. Director, OWCP*, 603 F.2d 763, 765 (9th Cir. 1979). The Base Act incorporates the Longshore Act “as amended.” 42 U.S.C. 1651(a). That language indicates that the Base Act incorporates, not just the version of the Longshore Act in effect at the time of the Base Act’s adoption, but later amendments as well—including, as relevant here, the later amendment providing for initial judicial review in the courts of appeals rather than the district courts. And to the extent the later amendment conflicts with the Base Act’s judicial-proceedings provision, the amendment controls. See *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) (“[W]here provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.”).

The judicial-review issue has generated a 4-4 circuit conflict. The First, Second, Seventh, and Ninth Circuits have held that judicial review of Board decisions under the Base Act is properly initiated in the courts of appeals. See *Truczinskas v. Director, OWCP*, 699 F.3d 672, 674-676 (1st Cir. 2012); *Service Employees*

International, Inc. v. Director, OWCP, 595 F.3d 447, 451-455 (2d Cir. 2010); *Pearce v. Director, OWCP*, 647 F.2d 716, 721 (7th Cir. 1981); *Pearce*, 603 F.2d at 765-771 (9th Cir.). The Fourth, Fifth, Sixth, and Eleventh Circuits, in contrast, have held that judicial review is properly initiated in the district courts. See *Lee v. Boeing Co.*, 123 F.3d 801, 804-806 (4th Cir. 1997); *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1115-1116 (5th Cir.), cert. denied, 502 U.S. 906 (1991); *Home Indemnity Co. v. Stillwell*, 597 F.2d 87, 89-90 (6th Cir.), cert. denied, 444 U.S. 869 (1979); *ITT Base Services v. Hickson*, 155 F.3d 1272, 1274-1275 (11th Cir. 1998).^{*} Accordingly, in the notice of appeal rights that the Board issues to claimants, the Board states that petitions for review should be filed in the courts of appeals, but notes that “the Fourth, Fifth, Sixth, and Eleventh Circuits have held that decisions must initially be appealed to the United States District Court.” Pet. App. A53.

This case, however, would be a poor vehicle for resolving that circuit conflict. It is unclear whether the certiorari petition properly presents the question of the appropriate forum for judicial review. The question presented reads: “If the First Circuit had jurisdiction to review Petitioners’ wage-loss claims, did its finding that a US Labor Director could oppose their claims to protect a privately-financed Fund, violate Congress’s intention for Directors to exercise only administrative support functions in cases under the Longshore and Harbor Workers Compensation Act?” Pet. i. That

^{*} The D.C. Circuit stated in *Hice v. Director, OWCP*, 156 F.3d 214 (1998), that it was “inclined to agree” that judicial review is properly initiated in the district courts, but ultimately found it unnecessary to decide the issue. *Id.* at 218.

question is ambiguous as to whether petitioners seek certiorari only on the question of the Director's participation, or whether they also seek certiorari on the question whether judicial review was properly initiated in the court of appeals. And under this Court's ordinary practice, "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a); see *Yee v. City of Escondido*, 503 U.S. 519, 535-538 (1992).

In addition, it is unclear what position petitioners take on the judicial-review issue. Petitioners discuss (Pet. 31-36) the circuit conflict over that question, and suggested below that judicial review is properly initiated in district court (Pet. App. 15 n.10), but in this Court they never develop an argument that the First Circuit's answer to that question was wrong.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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