No. 21-675

In the
Supreme Court of the United States

JEFFREY G. CARSWELL, HEINZ ERIKSEN, AND SVENNING TEVEDE JUHL, REPRESENTATIVE OF BENT HANSEN (DECEASED),
Petitioners,

v.

E. PIHL & SON, TOPSEO-JENSEN & SCHROEDER LTD. (DANISH CONSTRUCTION COMPANY), DIRECTOR OWCP,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONERS

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Director Lacks a Justiciable Interest for Standing in ALJ Proceedings to "Protect "the Fund.

The Special Fund suffers no direct "concrete" injury in ALJ proceedings for a justiciable interest to arise under Federal law giving the Director standing as a party-defendant therein.

Any possible injury will only arise subsequently if a wage- loss order is made which the employer cannot pay or reimburse the Fund for a disbursement under Sec. 918(b).

Since the LHWCA does not otherwise confer standing on a Director as a party, (See "*Harcum*"126, below, pp. 3-5), Federal law justiciability for standing must be shown from some direct "concrete" injury to the Fund which can be adjudicated on and decided in ALJ proceedings.

As this Court stated in *Sierra Club v. Morton*, 405 U.S. 727, 732, such standing requires that:

> "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." citing *Baker v. Carr* 369 U.S. 186, 204.

But the LHWCA does not authorize an ALJ to consider or decide the issue of damage to the Fund as

a factor in determining a worker's wage-loss claim. It is clearly not a justiciable dispute in that forum.[1]

Nor can be known during ALJ proceedings whether the Fund will subsequently suffer any actual harm for a justiciable interest to arise, even if the employer becomes bankrupt.[2]

As this Court held in *US v Richardson*, 418 U.S. 166,177:

> "While we can hardly dispute that this respondent has a genuine interest in the use of funds, and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury."

Whether or not an employer will actually be indebted later to the Fund for non-payment or non-reimbursement, is impossible for a Director to know or allege in ALJ hearings.

Depending how events develop after ALJ hearings, the Fund might or might not suffer particular "concrete" damage. But this is too speculative and unknown for a justiciable dispute to arise for standing

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[1] Claimants as "plaintiffs" have no right to seek Fund distribution as part of their wage-loss claims in ALJ proceedings. Sec 918(a) limits workers' recovery of a subsequent award from a defaulting employer, by filing a post-hearing "supplementary order" of the Director, (not of the ALJ), in the District court.

[2] Wages may be a privileged debt in bankruptcy under a DBA employer's national law and payable in full before ordinary creditors by Art. 11 Protection of Wages Convention 1949.

under Federal law, allowing a Director to contest claims as a party-defendant in ALJ proceedings.

At best, the Director, as Fund-representative, is merely an "interested" party or "observer" in ALJ proceedings, not a party-litigant. As such he has no rights under Federal law to present defenses, adduce evidence, cross-examine witnesses or appeal an ALJ decision. *Green, et al. v. Bogue*, 158 U.S. 478, 503, also followed by Cardozo J. in *Knickerbocker Trust Co. v. T.W.P. & M. Railway Co.*, 139 App. Div. 305 (NY) at 308.[3]

The Director's sharp litigation tactics as a party-litigant in opposition, (Pet, 18-20), warrant vacature of the ALJ's order and remand for wage loss assessments to protect the integrity of the LHWCA's government-administered processes, as in *Berger v. US*, 295 U.S. 78, 88.

"Harcum" and the Director's Standing.

In *Director OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995), *"Harcum"*, this Court considered the 4th Circuit's finding, raised *sua sponte,* in *"Harcum",* 8 F.3d 175, 181 (1993) that a Director has standing to appeal BRB decisions in the Federal court based on an interest to protect the fiscal

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[3] Conceivably, a Director could seek protection against possible Fund harm following an employer's bankruptcy during ALJ hearings, by requiring security from its trustees on the analogy of the *cautio damni infecti.* (See use of such cautionary security in *Borey v. National Fire Insurance*, 934 F.2d 30.) This might partly explain the Director's bizarre $200 million claim against Pihl's estate.

integrity of the special fund. This Court reversed, finding that "With regard to claims that proceed to ALJ hearings, the [LHWCA] Act does not by its terms make the Director a party to the proceedings, or grant her authority to prosecute appeals to the Board, or thence to the federal courts of appeals". (*ibid* 126).

The Director argued alternatively before this Court that since 30 U.S.C. § 932(k) of the Black Lung Benefits Act, (BLBA), made her a party in claim proceedings under that Act, she must also be a party in LHWCA claim proceedings. Her suggestion being that Congress by some oversight forgot to include the Director as a party in the latter's worker's claim proceedings.

This Court summarily dismissed this argument stating that "the normal conclusion one would derive from putting these statutes side by side is this: When, in a legislative scheme of this sort, Congress wants the Secretary to have standing, it says so." (*ibid* 135) In determining the Director's BRB review standing in "*Harcum*", this Court interpreted the Congressional intent as excluding the Director as a party-litigant from all LHWCA proceedings, unlike BLBA claims.

The weakness of the employer's counter-argument, (Op. Br. 11-13) is revealed by its reliance on pre-1995 circuit decisions contrary to "*Harcum*"', made 13 years before this Court's ruling: namely in *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 483 (D.C. Cir. 1982) and *Director OWCP v. Newport News Shipbuilding & Dry Dock Co.* 676 F.2d 110, 113-4, "*Langley*" (4th Cir. 1982).

Similarly, its argument, (Op. Br. 13-14) that the Director has standing as a petitioner to review a BRB decision, relies on a footnote in a 1979 DC case, *Director OWCP v. National Van Lines*, 613 F.2d 972, 977, fn. 6, made 16 years before "*Harcum*", and did not concern a LHWCA claim.

Conflict with Federal Code of Regulations.

This Court in "*Harcum*", 132, found the Director was not an aggrieved party for judicial review standing under Sec 921(c). But 20 CFR 802.201(a)(1) states the opposite; the Director is a "party adversely affected" in judicial review proceedings.

"*Harcum*" did not involve the Special Fund. The Court queried, 128 Fn.3, but left undecided, whether the Director might be aggrieved as the manager of the privately-financed Fund which this Petition involves.

Since 20 CFR 802.201(a)(1) considers the Director, "adversely affected" as the Fund's representative, this matter now requires the Court's resolution of whether the Director's agency may now be a "person" for such review purposes.

"*Harcum*" 126, found Congress did not intend the Director to be a party to any LHWCA adjudicative proceedings, unlike the BLBA. But 20 CFR 702.333(b) gives the Director "interested" party-standing, though LHWCA Sec. 940(f) excludes him from proceedings in which he has an interest.

This also requires the Court's resolution. If, (as in petitioners' cases), a Director has party-litigant standing in ALJ hearings to oppose workers' claims, he

can also challenge BRB decisions on review as a party-petitioner, contrary to "*Harcum*", or appear as a party-respondent, contrary to *Ingalls Shipbuilding Co. v. Director OWCP*, 519 U.S. 248, 265 where the Court previously found he only has FRAP Rule 15(a) standing as an agency-representative.[4]

While deference is normally accorded to the executive's construction of a Congressional scheme, (Br. Op. 21) this Court has also recognized that the Department of Labor will simply ignore judicial interpretations of such schemes, which it is "dissatisfied" with. *Potomac Electric Power Co. v. Director OWCP*, 449 U.S. 268, 278-279.

Certiorari is warranted to resolve these current conflicts.

Conflict over Defense Base Act Review Jurisdiction

Dual or Single Reviews

Depending on the location of the overseas defense base, a DBA claimant may currently have single or dual reviews.[5] The 5th and 6th circuits provide both

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[4] Br. Op. 11, misstates *Ingalls*, 263, which did not find that a Director "can appear as a litigant" in LHWCA proceedings. *Ingalls* 263, was merely referring to 20 CFR 702.333(b). The *Ingalls'* decision was not based on the Director as a "litigant", but only as a BRB review representative under FRAP 15(a); *Ingalls* 265. This finding may be consistent with the Director's "representative" standing in 20 CFR 802.410(b).

[5] The 3rd, 8th and 10th circuits, unlike other circuits, have no District Director's office in their areas, which apparently precludes

district and circuit court reviews in claims from former West Germany and Guantanamo Bay bases. *AFIAI CIGA Worldwide v. Felkner*, 930 F.2d 1111, 1116 (5th Cir.); *Home Indemnity Co. v. Stillwell*, 597 F.2d 87, 90 (6th Cir.).

The 1st and 2nd circuits provide only one circuit court review for Saigon and Iraq base claims. *Air America Inc. v. Director OWCP*, 597 F.2d 773, 776 (1st Cir.), *Service Employees International v. Director OWCP*, 595 F.3d 447, 454 (2d Cir., Cabranes J. dissenting, 458).

This Court in *Elgin v. Department of Treasury*, 567 U.S. 1, 15 stressed the need in such cases for clear guidance on the proper forum for reviewing administrative decisions. (Cited by Ginsberg J. with approval in *Perry v. Merit Systems Protection Board*, 1375 Sup. Ct. 1975 (2017), in determining whether district or circuit courts have review jurisdiction in serious adverse employment determinations against Federal employees.

Both the 2nd and 1st circuits denied Petitioners' 28 U.S.C. § 1254 (2) certification requests for guidance from this Court on the proper review forum. (Pet. A-34, A-31).

DBA claim- filing under LHWCA 913(a) and also review under DBA 1653 (b), though the 3rd circuit appears to review LHWCA claims for injuries arising in its area under LHWCA 921(c). See *infra* Fn. 8 and "*Santoro*" LHWCA case in *Director OWCP v. Greenwich Collieries*, 512 U.S. 267, 270.

Conflicting Jurisprudence

The circuits have conflicting jurisprudential analyses of this issue.

The 6th Circuit found no ambiguity between the DBA and LHWCA review provisions since the latter's Sec. 921(c) reference to review in "the circuit where the injury occurred", could not apply to overseas claimants. *Home Indemnity* C9. 90. The 5th Circuit also followed this approach in *AFIAI CIGA Worldwide*, 1116.

This analysis suggests Congress intended discrete review provisions for territorial and extra- territorial claims, leaving the DBA 1653(b) unamended in 1972.

The 1st Circuit in *Truczinskas v. Director OWCP*, 699 F.3d 672, 674, also noted the different pre-1972 jurisdictional review requirements for domestic and overseas injuries, but judicially "amended" DBA's Sec. 1653(b) to maintain "congruence" with LHWCA's Sec. 921(c).

This approach implies a Congressional "oversight". But this is unclear in light of Sec. 921(c)'s inapplicability to extra- territorial injuries. See for example Congress' divergent review forums in the 1921 Packers and Stockyards Act, (Pet. 32).[6]

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[6] *Truczinskas*, 676, apparently made no distinction between provisions for administrative procedure and those for Federal court jurisdiction, the latter of which Congress can grant or deny. See *Lockerty v. Phillips*, 319 U.S. 182, 187, on whether a District or an Emergency court had jurisdiction.

The 9th Circuit viewed the DBA as a statute of general reference which incorporated the 1972 circuit court review amendment of the *LHWCA*. *Pearce v. Director OWCP*, 603 F.2d 763, 766, 767. It noted that the location of the ALJ' s office might now control the circuit court selection if an ALJ order was involved. (770, 771, Fn.2).[7]

The 2nd Circuit disagreed. The DBA's district court review provision was not amended as a statute of general reference, but the majority in *Service Employees International* 453, like the 1st Circuit, resolved the resultant ambiguity by the "hazardous process" of attributing a unifying intent to Congress for reviews to be in the circuit courts. (Cabranes J. dissenting, applying a literal interpretation of the DBA, 458).

Despite these varied and irreconcilably split circuit court opinions, the employer argues that this lacks a "compelling reason" for this Court to intervene since this split has lasted for several years. (Br. Op. 31).

This ignores the fact that this Court has previously intervened to review a 3rd circuit decision in *Director OWCP v. Greenwich Collieries*, 512 U.S. 267, involving less circuit dissent, to correct a 50 year old

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[7] In Petitioners' cases, the ALJ's hearings were in New York City, but her office was in Cherry Hill, New Jersey, in the 3rd Circuit, which has no District Director's office for review under DBA 1653(b). See Fn. 5 *supra.*

interpretation of the BLBA, which also affected the LHWCA.[8]

The current fundamental conflict of nine circuit courts on whether the district or circuit courts have review jurisdiction in DBA cases, clearly warrants this Court's guidance.

REPLY TO THE GOVERNMENT'S OPPOSITION BRIEF.

While this brief bears the Solicitor General's name, it was not drafted by lawyers in her office, but by the Department of Labor attorneys who drafted the Director's 1st circuit opposition brief, including attorney Matthew W. Boyle, who appeared in oral argument. (Lab. Br. Op 10). As an adversarial brief it cannot be relied on by the Court to objectively and impartially inform it of the law applicable to this Petition.

Notably, it disingenuously mis-characterizes the Petition's question for certiorari and, without a cross-petition, presents its own version, (Lab. Br. Op. 1), which excludes any reference to circuit court review-jurisdiction or the privately financed Special Fund. The Petition's actual review question only appears on the second last page of the brief. (Lab. Br. Op. 9).

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[8] The Court simultaneously reviewed the 3rd circuit's LHWCA's decision in "*Santoro*", along with that circuit's BLBA opinion. (*Greenwich Collieries*, 270). As previously noted, (Fn. 5), the 3rd circuit, like the 8th and 10th, has no District Director's office to review DBA cases under Sec. 1653(b). It appears to review LHWCA cases under that Act's Sec. 921(c) as the circuit in which the injury occurred.

Its argument, relying on *Yee v. City of Escondido*, 503 U.S. 519, 535, 528, that the question presented is "ambiguous" (Lab. Br. Op. 9-10), is misplaced.

Though *Yee's* additional questions for certiorari were rejected as not previously raised or addressed by California state courts, this Court noted in *Yee* that once a claim is properly raised in the lower courts, a petitioner has the ability to frame the question in any way he chooses.

Petitioners consistently challenged the Director's standing in ALJ hearings, (Pet. A. 80) and BRB proceedings, and in light of circuit court conflicts, also filed 28 U.S.C. § 1254(2) requests in both the 2nd and 1st circuits for clarification of their doubtful jurisdictions. (Pet. A.34, A 31).[9]

Since both the Director and employer fully addressed these lower court challenges, there can be no ambiguity about the question presented.

It is also argued, (Lab. Br. Op. 8), that the amended 1972 LHWCA repealed the DBA's jurisdictional provisions, without addressing the *ex facie* inapplicability of LHWCA Sec. 921(c) to extra-territorial injuries.

Instead it relies on the general principle in *Posadas v. National City Bank*, 296 U.S. 497 of a later act repealing a former, in contending DBA Sec 1653(b) was

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[9] Review in the 2nd circuit was thought possible because the Boston Director transferred Petitioners' cases from the Department's First Compensation District to its Second in New York.

repealed. But *Posadas*, 504 shows the application of this principle is highly case-specific and was not decisive in that case, 505.

The brief fails to particularize its argument on this issue, which is the very issue raised by the certiorari Petition.

Nine circuits clearly dispute whether the LHWCA impliedly amended the DBA review provision for extra-territorial injuries.

While the 9th circuit in *Pearce* 766, 767 considered the DBA as a general reference statute incorporating all amendment provisions, the 6th circuit in *Home Indemnity Co.*, 90, found no ambiguity with the repealed LHWCA, since Sec. 921(c) could not apply to overseas injuries, implying the two acts have separate and discrete review provisions.[10]

The 2nd circuit also found no amendment of the DBA's review jurisdiction as a general reference statue, but judicially imputed Congress with such a "unifying" intent in *Service Employees International* 453.

Clearly this issue warrants this Court's consideration.

The Labor Department's other arguments are fully addressed above in Reply to the employer's brief and are not repeated herein.

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[10] LHWCA 913(a) claim-filing requirements also, *ex facie,* appear inapplicable to overseas injuries and DBA 1652(a), (b) have discrete exceptions to the LHWCA's compensation scheme in computing and awarding certain benefits to "aliens and non-nationals".

CONCLUSION

For the above reasons issue of a Writ of Certiorari to the First Circuit Court of Appeals is warranted on the question presented.

Respectfully submitted,

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