NO. 22-1027

In the Supreme Court of the United States

THE DUTRA GROUP, INC. AND ENSTAR (US) INC., D/B/A ENSTAR ADMINISTRATORS FOR SEABRIGHT INSURANCE CO.,

Petitioners,

v.

KELLY ZARADNIK AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

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

REPLY BRIEF OF PETITIONERS

Barry W. Ponticello
Counsel of Record
Renee C. St. Clair
Samuel A. Eggleton
ENGLAND, PONTICELLO & ST. CLAIR
701 B Street, Suite 1790
San Diego, CA 92101
(619) 255-6450
bponticello@eps-law.com

August 18, 2023 *Counsel for Petitioners*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Petitioner Dutra Group is not aware of any parent corporation or any publicly held company that owns 10% or more of its stock. Petitioner Enstar (US) Inc. is a subsidiary of Enstar Group, Limited, a publicly traded company on the NASDAQ exchange (NASD: ESGR) which owns 20% of SeaBright Insurance Company.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

REPLY BRIEF
APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

JUDICIAL RULES

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

NO. 22-1027

In the Supreme Court of the United States

THE DUTRA GROUP, ET AL.,

Petitioners,

V.

KELLY ZARADNIK, ET AL.,

Respondents.

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

REPLY BRIEF OF PETITIONERS

SUMMARY OF REPLY ARGUMENT

Through the Opposition brief ("Opposition"), Federal Respondents ("Respondents") demonstrate (1) that a case may implicate multiple issues of various import, some of vital federal legal issues, and others only case specific sub-issues; (2) that the Ninth Circuit's constriction of the Benefits Review Board ("Board") jurisdiction was based on something other than law; and (3) disorder exists in the legal landscape arising from the Ninth Circuit's alteration of the bounds of limited jurisdiction in Agency cases arising under the Longshore and Harbor Workers' Compensation Act and its extensions ("the Act" or "LHWCA").

Petitioners do not dispute that this case, like many other cases, contains issues and sub-issues, not all of which rise to the level of review by this Court. Petitioners do, however, rebuff the notion that this Court will not review an important issue of federal law and appellate procedure simply because less relevant sub-issues can also be framed. They are not mutually exclusive. The Ninth Circuit, unlike any other circuit to address the matter, imbued itself with extra-statutory authority to exercise jurisdiction over direct appeals following Administrative Law Judge ("ALJ") decisions post-remand. Simultaneously, the Ninth Circuit injected into the federal regulations a technical requirement for a notice of appeal which does not exist, and which is antithetical to what Respondents admit are the "Board's lenient rules". (Opposition ("Opp.") at 8). It is not particularly difficult to find or frame case specific sub-issues in any matter. Doing so does not compromise the significance of also-present important questions of federal law and conflicts of law. The instant task however, which the Opposition sidesteps, is addressing whether appellate courts can restrict or expand statutory limited jurisdiction under the Act. This larger federal issue exists apart from any fact-driven framing of a sub-issue.

Petitioner's Question Presented is specifically whether appellate courts can create and impose non-statutory and non-regulatory requirements for a notice of appeal which restrict the Board's jurisdiction over appeals. Respondents avoid that question, rather binding themselves to case-based facts which do not bear on the broad issue of the scope of judicial authority. Respondents thoroughly discuss the fact of the underlying joint stipulations and parse the language

used by the parties to denote intent to appeal. Here, neither the fact of a stipulation nor reference by name to the Ninth Circuit therein has bearing on whether appellate courts can rewrite statutes and regulations from the bench.

Lost in the Opposition is any legal authority (cases, regulations, statutes) to justify the Ninth Circuit's imposition of a specific content requirement into 20 C.F.R. § 802.208(b), which is not contained in the Regulation. In its place, Respondents offer a concession: "The court's analysis focused on the common-sense proposition that if the stipulation was meant to serve as a notice of appeal to the Board, the stipulation would have mentioned the Board." (Opp.10). The Respondents appear to rest their position, not on the stated requirements of the Regulation, but rather on what Respondents asserts as "common sense". While what is viewed as "common- sense" is highly debatable, of most relevance is that "common-sense" is not law, and law is not always equivalent to "common sense". Respondents' concession only demonstrates the appropriateness of this matter for summary reversal.

Respondents describe Board rules as "lenient" (Opp.8) and, specifically, 20 C.F.R. § 802.208(b) as "permissive notice rules" (Opp.10). The notice regulations do not require appellants to name the court or agency to which an appeal will be taken. That alone illustrates the Ninth Circuit's improper constriction of agency (Board) jurisdiction. Even if we indulge the "common-sense" proposition, "common-sense" dictates that no such requirement exists because Congress has created the LHWCA scope of jurisdiction, and thus it is Congress who can expand or restrict the

Board's jurisdiction and delegate regulatory action that controls the notice of appeal requirements.

Lastly, the Ninth Circuit's direct appeal proclamations are a pinch point which the Respondents were unable to grease. Respondents are unable to articulate a full-throated endorsement of jurisdiction in 33 U.S.C. § 921 and square that with the Ninth Circuit's overreach. If even Respondents are unable to convincingly reconcile the Ninth Circuit's finding with the statutory authority and decisions arising in the Third, Eighth and Eleventh Circuits, it is incumbent upon this Court to do so for the benefit of all parties practicing under the Act and before the Department of Labor. Throughout the Opposition, Respondents are forced to flipflop between the blackletter of 33 U.S.C. § 921 on appellate jurisdiction, and the Ninth Circuit's imagined take thereon. Respondents fared no better in discussing the Ninth Circuit's "common-sense proposition" on the content of notice of appeals in the same breath as 20 C.F.R. § 802.208(b). The former is unprecedented, harsh, and restricts appellate rights and Board jurisdiction. The latter is "lenient", "permissive", and serves the interests of justice. Respondents' vacillation on multiple issues involving clear statutory and regulatory text illustrate the discord in the legal landscape under the Act in the wake of the Ninth Circuit's judicial activity that call out for review.

The lack of legal authority on some of these points was construed by Respondents as an indication of a "rarity of dispute", without any support for that proposition. (Opp.10-11). Petitioner's contention specifically is a lack of authority on point, as opposed to the infrequency of the issues arising. No authority was given by Respondents as to the frequency of

Agency jurisdictional issues. There was no clarification on whether these issues arise frequently and are denied without comment at the appellate level, or pursued only at the Trial level (Petitioner asserts that the "rarity" herein is not the Agency jurisdictional dispute, but the underlying facts that involve stipulations of the parties). Nonetheless, the import of the judicial overreach, and the need for judicial guidance on Agency matters, are separate and distinct from the frequency and/or presence or absence of existing published authority.

A stark contrast exists between the Petition and the Opposition. Petitioner frames and argues issues within the scope of review by this Court; namely whether appellate court authority exists to reject or rewrite the law of appellate jurisdiction under the Act. In so doing, this case presents an opportunity for clarity in law and uniformity amongst circuits on a fundamental appellate issue which directly impacts parties litigating Agency claims under the umbrella of Respondents and the Department of Labor, in particular. Rather than acknowledge that the Ninth Circuit took extraordinary liberties with the Board's rules, regulations and federal statutes, Respondents sidestep these issues, creating sub-arguments built on granule case specific premises. Respondents' narrow focus does nothing to address the judicial overreach and judicial neglect of the separation of powers that the Petition presents.

REPLY ARGUMENT

I. Through Both Concession and Silence, the Opposition Demonstrates the Judicial Overreach and Important Federal Question Present, Such That the Court Should Grant the Petition for Writ of Certiorari to Restore the Bounds of Limited Jurisdiction Set Forth by Congress and Regulators as to Not Only Appellate Jurisdiction, but Also as to the Limits of Court's Role as to Agency Regulations.

Respondents' concessions underscore the important Federal question at issue and the need for summary reversal or review. In particular, Respondents acknowledge that the Ninth Circuit decision could not be based on the text of the Regulation at issue (20 C.F.R. § 802.208(b)), because there is no such language requirements included that Respondents seek to apply. The brief thus demonstrates that there is no authority[1] that supports the Ninth Circuit's restriction of Agency (Board) jurisdiction.

Respondents also pointedly acknowledge that Board rules are broad, lenient, and permissive. The Respondents' brief characterizes the requirements

---

[1] It is noted that, at best, Respondents cite to *Porter v. Kwajalein Srvcs. Inc.*, 31 Ben. Rev. Bd. Serv. (MB) 112 at 113 (1997), for the proposition that the Board requires that it be named in a Notice of Appeal. *Porter* is inapplicable and unrelated because the issue was whether a motion made at the trial level to rescind a settlement agreement, and request a new trial, evinced any intent to seek appellate review.

for a Notice of Appeal as "broad," and "lenient", going so far as to recognize that 20 C.F.R. § 802.208(b) provides "permissive notice requirements." (Opp.8, 10). Perhaps most telling is the indication that if the Stipulation of the parties in this case contained the word "Board", as opposed to the words "Ninth Circuit", then there would no question that the Regulation at issue would consider the Stipulations, received by multiple Department of Labor, as accurately and timely filed. To wit, the Respondents state:

> . . . the stipulation at issue is not merely silent on the body to which petitioners could then proceed following the ALJ's entry of the requested order. The stipulation specifically identifies the Ninth Circuit as the relevant body. Given these statements, and the existing Ninth Circuit precedent permitting direct appeals . . . neither the Board nor the court of appeals erred in declining the stipulation as a notice of appeal to the Board." (Opp.8).

Respondents' brief can thus only be construed to conclude that if Petitioner's stipulations had not named any appellate body, or had named the Board, then there would be unquestioned Board jurisdiction. Respondents fail to address why including the reference to the Ninth Circuit removes the dictates of 802.208(b) (" . . . any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, shall be sufficient notice for purposes of 802.205") The failure is an intentional side-step of the underlying important issue of Federal law: whether an Appellate Court can impose judicial requirements

onto plainly written Agency regulations. 20 C.F.R. § 802.208 either allows what it states, or a Court is free to add judicial requirements in addition.

This Court has of course often addressed the issue of judicial overreach and the blurred lines of separation of power. In a case deciding the application of Title VII, this Court stated "only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the peoples representatives." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020).

33 U.S.C. § 939(a) empowers the Secretary of Labor to prescribe all rules and regulations necessary for the administration and enforcement of the Act. The rules of practice and procedure guiding a notice of appeal, 20 C.F.R. 802.208, are clear and unambiguous, expressly defining the requirements for a Notice of Appeal, per 20 C.F.R. 802.208(a), and the express requirements for what constitutes a Notice of Appeal, i.e. the decision that is being appealed, and the parties affected or aggrieved thereby under 20 C.F.R. 802.208(b).

Analogous to the matter before this Court, is *Perez v. Mortg. Banker's Ass'n.*, 575 U.S. 92 (2015). There, this Court overturned the lower court's judicial requirements, indicating that the lower court "improperly impose[d] on agencies an obligation beyond the maximum procedural requirements' specified in the [Administrative Procedures Act] APA." *Id.* at 100. The lower court decision required that Agencies submit

to the notice and comment procedures when a new interpretation of a regulation that deviated significantly to the one previously adopted, whereas the Administrative Procedure Act plainly does not. *Id.* This Court recognized that the Court of Appeals improperly intruded upon Agency decision making processes by engrafting its own notions of the proper procedure upon an agency entrusted with substantive functions by Congress. *Id.* at 102.

The Ninth Circuit herein has restricted the plain meaning of 20 C.F.R. § 802.208, and given itself the power to craft constricting regulations on agency jurisdiction, beyond those that are codified and apparent in the plain language of the text. 20 C.F.R. 802.208(a) enumerates several factors to be included within a notice of appeal, none of which indicate that the court to which an appeal is sought be named. 20 C.F.R. 802.208(b), arguably supplants 20 C.F.R. 802.208(a), requiring that "any written communication which reasonably permits identification of the decision from which an appeal is sought, and the parties affected or aggrieved thereby, shall be sufficient notice for purposes of §802.205." (emphasis added). Had the Secretary of Labor intended that a Notice of Appeal requires naming the court to which the appeal was being taken, then the regulations would plainly state so, and be included in the enumerated factors of 20 C.F.R. 802.208(a), or in the broad requirements of 20 C.F.R. § 802.208(b). Respondents' contention that "common-sense" governs ("the common-sense proposition that if the stipulation was meant to serve as a notice of appeal to the Board, the stipulation would have mentioned the Board." (Opp.10)), as opposed to Agency regulation text, is incorrect, misplaced, and

again illuminates the Federal question needing to be addressed. Such Court intrusion on the Agency rule making process, oversteps the scope of the Court's review function, and provides an unknown scope of appellate jurisdiction to all practitioners under the Act. Permitting Appellate Courts to amend (as opposed to striking down) Agency Regulations creates chaos for litigants and speaks to the important Federal issue present. This Court should declare that Appellate Courts may not insert additional requirements into regulations that do not exist in the clear regulation text. The instant matter thus provides the opportunity to clearly and unequivocally outline the role of the Courts in review of Agency regulations, as opposed to the Agency's role in drafting and creating the Regulations.

II. Respondents Recognize that 33 U.S.C. § 921 Prescribes the Congressional Bounds of Jurisdiction Under the Act, Thereby Reinforcing the Split in Circuit Authority as to Scope of Agency (Board) Jurisdiction.

Respondents do not dispute that the Ninth Circuit is in conflict with the other Circuits by allowing direct appeals to be taken from an Administrative Law Judge decision to the Circuit Court of Appeal, as opposed to the Agency appellate body (Board). "[n]o part of Section 921, or any other section of the Longshore Act, provides for direct review of ALJ orders by courts of appeals." This conflict, while acknowledged, is however for some reason noted as "overstated." (Opp.13).

Respondents refuse to address the legal requirements of Section 921 and the Court's use of a whole cloth created exception in opining on this matter,

instead opting to summarize cases. In doing so, Respondents state that "[t]he Ninth Circuit has nevertheless, held that . . . a party may appeal an ALJ's decision on remand from the Board directly to the courts of appeals." *Id.*

The Respondents' briefing thus brings attention to another manner in which the Ninth Circuit exceeded its role in this case-by expanding its own jurisdiction, and limiting the scope of required Agency jurisdiction. In permitting these direct appeals, the Ninth Circuit has decided to override the Congressional scope of jurisdiction: "the Ninth Circuit has nevertheless held that . . . a party may appeal an ALJ's decision on remand from the Board directly to the court of appeals." (Opp.11). The Ninth Circuit then referred to this beyond-statute jurisdiction in their rationale. The Respondents attempt to utilize both of these judicial overreaches as justification for the Ninth Circuit's imposition of a naming requirement for a Notice of Appeal because of "existing Ninth Circuit precedent which permits a direct appeal of an ALJ order on remand." (Opp.9. *See also National Steel & Shipbuilding Co. v. Director, OWCP*, 703 F.2d 417, 418-419 (1983)).

All Circuit Courts who have addressed the scope of judicial appeal have found in accord with Section 921 (Third, Eighth, and Eleventh Circuits). Of relevance, Respondents quote the holding in *RMK-BRJ v. Brittain,* that "[t]he law does not provide for a direct appeal from an ALJ's order to the court of appeals. (Opp.13, citing 832 F.2d 565, 566 (11th Cir. 1987)). They recognize that in *Aubrey v. Director, OWCP*, the Eighth Circuit did not adopt *National Steel*, *supra,* noting that the ALJ was authorized to make

new findings of fact and conclusions of law on remand. 916 F.2d 451, 452-453 (8th Cir. 1990). They quote the holding in *Elliot Coal Mining Co. v. Director, OWCP*, that "[e]ven if *National Steel* were not distinguishable, [the court] would decline to follow it." (Opp.14, citing *Elliot Coal Mining co v. Director*, 956 F.2d 448, 450 (3rd Cir. 1992)).

Respondents equivocation as to the clear statutory standard of 33 U.S.C. § 921 and case law nuance, demonstrates that there is a fractured landscape regarding Agency appellate jurisdiction amongst the Circuit Courts. Respondents appear to take no position regarding direct appeals of Administrative Law Judge decisions[2] and do not specifically comment upon the Ninth Circuit's expansion of authority in contradiction to statute, other than it is for some reason an over-stated point. No basis was set forth as to why a Circuit Court of Appeal can extend its jurisdictional authority (while limiting the Agency scope) in contravention of statute, or why a Court of Appeal can impose regulatory requirements that are not contained within the plain text of the Regulation. These issues call out for a grant of review to restore the statutory and regulatory authority and scope of the Agencies and Courts.

From the bench, the Ninth Circuit has drastically restructured the jurisdiction under the Act. It has restricted regulatory rules Congress has entrusted the Department of Labor to enact. Simultaneously, it

---

[2] No indication was given by Respondents as to the concern that a new scope of litigation could develop as to whether an appeal to the BRB was futile or not (and the need to define the same) in direct appeal situations, if the Ninth Circuit's expansion of jurisdiction is allowed to continue.

has expanded its own jurisdiction over agency appeals, and in contradiction to the separation of powers.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Barry W. Ponticello
Counsel of Record
Renee C. St. Clair
Samuel A. Eggleton
ENGLAND, PONTICELLO & ST. CLAIR
701 B Street, Suite 1790
San Diego, CA 92101
(619) 255-6450
bponticello@eps-law.com

Counsel for Petitioners

August 18, 2023