No. 02-738

In the Supreme Court of the United States

CUSTOM SHIP INTERIORS AND
FREMONT COMPENSATION INSURANCE GROUP,
PETITIONERS

v.

MICHAEL ROBERTS, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether regular per diem payments by a ship remodeling firm to its employee, a ship remodeler, constitute "wages" within the meaning of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C 902(13), when the employer knew that the employee was incurring no board or lodging expenses during his assignment because the cruise line on whose ship he was working provided him with free board and lodging.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 300 F.3d 510. The decision of the Benefits Review Board (Pet. App. 13-22) is reported at 35 Ben. Rev. Bd. Serv. (MB) 65. The decision of the administrative law judge (Pet. App. 23-68) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2002. The petition for a writ of certiorari was filed on November 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, requires maritime employers to pay a compensation benefit when a work-related injury causes disability or death to a covered employee. 33 U.S.C. 908, 909. The amount of the benefit payable on account of disability is tied to an employee's average weekly wage at the time of his injury. 33 U.S.C. 908, 910. For example, in the case of total disability, the benefit to which a claimant is entitled is 66 2/3% of his average weekly wage, to be paid during the period of disability. 33 U.S.C. 908(a) and (b). The compensation to be included when computing an employee's average weekly wages is defined in Section 2(13) of the Act, which provides in pertinent part that "wages" means

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of [the Internal Revenue Code of 1954] (relating to employment taxes).

33 U.S.C. 902(13).[1]

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[1] A second sentence of Section 2(13) provides an exclusion of "fringe benefits," as follows:

> The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

2. Respondent Michael Roberts worked as a ship remodeler for petitioner Custom Ship Interiors for about nine years. Pet. App. 3.[2] Respondent's employment was seasonal, and he worked approximately two thirds of the year. *Ibid.* While working away from home, respondent was entitled under his employment contract to a per diem payment of $77.50 per day, in addition to his regular and overtime hourly wage. *Ibid.* According to petitioner, the per diem payments were intended to cover meal and lodging expenses, but employees could spend or save the payments as they saw fit. *Ibid.* Petitioner did not include the per diem payments as wages on its employees' W-2 forms. *Id.* at 14.

Respondent had been assigned by petitioner to perform remodeling work on Carnival cruise ships for about a year (including his period of seasonal unemployment), when, in August 1998, he was injured while working on a Carnival ship. Pet. App. 3. During the period he was assigned to Carnival, petitioner paid respondent the per diem in addition to his other pay. Respondent, however, incurred no meal or lodging expenses during his Carnival assignment, because the

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33 U.S.C. 902(13). The "fringe benefits" exclusion is not at issue in this case. See note 4, *infra.*

[2] Custom Ship Interiors' workers' compensation carrier, Fremont Compensation Insurance Group (Fremont), is also a petitioner in this case. For convenience, and because Fremont played no independent role in the case, we refer to Custom Ship Interiors as "petitioner," and make no further reference to Fremont. Similarly, references to "respondent" are to respondent Roberts, not to the federal respondent, the Director of the Office of Workers' Compensation Programs. (Though named as a respondent in the court of appeals and in this Court, the Benefits Review Board is not a proper respondent in a proceeding to review a decision by the Board. See 20 C.F.R. 802.410(b).)

cruise line provided free meals and lodging to ship remodelers. *Ibid.* Petitioner was aware of Carnival's policy, and of the fact that its employees incurred no board or lodging expenses while on assignment to Carnival, but petitioner paid the per diem anyway. *Ibid.*

3. Respondent filed a claim for benefits under the LHWCA for disability arising out of his August 1998 injury. Pet. App. 4. After a hearing, an administrative law judge (ALJ) determined that respondent was temporarily totally disabled due to his work injury and thus entitled to compensation benefits. *Id.* at 43-51. The ALJ refused, however, to include the per diem payments that respondent claimed were part of his "wages" in the calculation of benefits. *Id.* at 52-56. The ALJ ruled that tax-exempt per diem payments to defray expenses for meals and lodging do not fall within Section 2(13)'s definition of wages, and she accordingly awarded benefits under the Act based on a calculation of claimant's average weekly wage ($377.13) that excluded the per diem payments. *Id.* at 4, 54-56.

4. The Benefits Review Board reversed. Pet. App. 13-22 (per curiam). The Board relied on the Fourth Circuit's decision in *Universal Maritime Service Corp.* v. *Wright*, 155 F.3d 311 (1998), which held that, under the first clause of LHWCA Section 2(13), "wages" include the money rate of compensation that is to be provided (1) for the employee's services, (2) by an employer, (3) under the employment contract in force at the time of injury. Pet. App. 17. The Board determined that the per diem payments met this test, because they were money received by the employee from the employer each week and were part of the contract for employment services. *Id.* at 20-21. The Board concluded that, because the per diem fell within the first clause of Section 2(13), the provision's second

clause, which states that wages "includ[e]" the reasonable value of an "advantage" included in employment tax withholding, did not apply. *Id.* at 20. The Board accordingly determined that the payments should be considered part of respondent's wages, regardless of whether they were subject to tax withholding. Respondent's average weekly wage was thus determined to be $690.11, rather than the $377.13 calculated by the ALJ. *Id.* at 20-21.[3]

5. The court of appeals affirmed. The court held that, under the first clause of Section 2(13), cash compensation provided by an employer under the employment contract for services rendered by the employee falls within the definition of "wages." Pet. App. 6 (citing *Wright*, 155 F.3d at 319). The court concluded that the per diem payments here had "every indicia of an ordinary wage," because respondent regularly received those payments in his paycheck based on the number of days he worked, and there was no requirement that he spend the payments on his room or board, or even that he incur such expenses. Pet. App. 7. The court rejected petitioner's argument that the payments were in the nature of reimbursement for expenses, rather than regular compensation. *Ibid.* While per diem payments are traditionally viewed as reimbursements for expenses, rather than taxable income, the court determined that that characterization does not apply here. Petitioner's argument that the pay-

[3] The Board rejected respondent's argument that the average weekly wage should also include the value of the free room and board provided by Carnival, reasoning that inclusion of both the per diem and the value of the room and board would violate the LHWCA's policy against double recovery. Pet. App. 21. Respondent did not seek review of that ruling, and the issue is not before this Court.

ments were reimbursements, the court said, "flies in the face of its decision to regularly provide [respondent] the payments despite knowing that he had no expenses to reimburse" during his Carnival assignment. *Ibid.* The court reasoned that, unlike "[t]rue per diem reimbursement[]" arrangements, which "bear at least some rough approximation to room and board expenses," the payments here "were not linked to actual expenses of any sort." *Id.* at 8.

The court of appeals found it irrelevant whether the payments were subject to employment tax withholding, because such withholding is not an exclusive test for wages under the LHWCA and does not apply to compensation that falls within the first clause of Section 2(13). Pet. App. 8. The withholding criterion appears in the second clause of Section 2(13), which enlarges the definition of wages to include "advantage[s]" such as the provision of food and lodging in kind, if subject to employment tax withholding. *Ibid.* The court explained, however, that the second clause does not purport to speak to the basic money rate of compensation for services rendered, which is included in the "wages" definition by virtue of the first clause of Section 2(13). *Ibid.*

The court of appeals distinguished the Fifth Circuit's decision in *H.B. Zachry Co.* v. *Quinones*, 206 F.3d 474 (2000), and the Ninth Circuit's decision in *Wausau Insurance Cos.* v. *Director, OWCP*, 114 F.3d 120 (1997), on the ground that those cases involved an employer's provision of food and lodging in kind, and that such in-kind benefits are properly considered "wages" under the "advantage" clause only if subject to employment tax withholding. Pet. App. 8-9. By contrast, the Court reasoned, the "so-called per diem" payments at issue here were "nothing more" than "a disguised wage" that

must be included in respondent's average weekly wage if he is to be adequately compensated under the Act for his loss of wage-earning capacity. *Id.* at 9. The court also distinguished *McNutt* v. *Benefits Review Board*, 140 F.3d 1247 (1998), where the Ninth Circuit held that per diem payments not subject to employment tax withholding were not part of LHWCA "wages," on the ground that the claimant in *McNutt*, unlike respondent, had incurred actual room and board expenses. Pet. App. 9 n.*.

Judge Niemeyer dissented. Pet. App. 10-12. In his view, the payments, instead of being compensation for services rendered, were reimbursements for food and lodging paid to every employee who worked away from home, regardless of whether the employee received free room and board. *Id.* at 10-11. Judge Niemeyer believed that the per diem payments were therefore an "advantage" within the meaning of LHWCA Section 2(13), and that they did not qualify as part of LHWCA "wages," because the payments had not been reported to the Internal Revenue Service (IRS). *Id.* at 12.

ARGUMENT

The court of appeals correctly held that, on the particular facts of this case, the per diem payments made to respondent constituted "wages" under the LHWCA. Its decision, moreover, does not conflict with any decision of another court of appeals. Review by this Court is therefore unwarranted.

1. The court of appeals properly determined that the per diem payments at issue in this case, which were paid by petitioner notwithstanding its knowledge that respondent was incurring no room and board expenses on his work assignment, were part of respondent's wages. The court's ruling correctly interprets the

LHWCA's definition of wages in Section 2(13) of the Act, 33 U.S.C. 902(13), and correctly applies it to the particular facts of this case. As the court of appeals explained, Section 2(13)'s first clause provides a basic definition of "wages" that covers the "money rate" at which the service rendered by an employee is compensated by an employer under the employment contract. The first clause is followed by a second clause (the "advantage" clause), which provides that the definition "includ[es] the reasonable value of any advantage" that is subject to employment tax withholding. The court properly concluded that the per diem payments here fall within the first clause of Section 2(13) because they were part of the money rate at which the claimant was compensated for his services pursuant to his employment contract, and that they are thus "wages" under the LHWCA without regard to whether they fall within the "advantage" clause, and without regard to whether they were subject to employment tax withholding. Pet. App. 8.[4]

Petitioner contends (Pet. 8-9) that the court of appeals' analysis is flawed because the "uncontested facts" show that the per diem "was not intended to be a

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[4] It is undisputed that the payments are not "fringe benefits" within the meaning of Section 2(13)'s second sentence, which excludes such benefits. See note 1, *supra*. The payments do not fall within this exclusion because they were not contributions to an employee benefit plan "contingent on fulfilling conditions that might never be satisfied" or otherwise something given in addition to the employee's regular monetary pay whose value is too speculative to be readily converted into a cash equivalent. See *Wright*, 155 F.3d at 324. See generally *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624 (1983). Rather, they were cash payments given directly and unrestrictedly to the employee each pay period.

'money rate' for 'services rendered,'" and was instead intended "to be used as a reimbursement for food and/or housing expenses." Petitioner, however, like Judge Niemeyer in dissent, essentially ignores the court's critical determination that petitioner made the payments with full knowledge that respondent was incurring no board or lodging expenses, and that the per diem payments were not in any way like a true reimbursement arrangement, in which payments bear at least some rough approximation to actual expenses. Pet. App. 7-8. In these circumstances, the court properly concluded that the unrestricted payments "were virtually indistinguishable from [respondent's] regular hourly wages." *Id.* at 7.[5]

Petitioner also contends (Pet. 6) that the court of appeals improperly "bypassed" Section 2(13)'s "advantage" clause, and thus erred in failing to exclude the payments from wages on the ground that employment taxes had not been withheld from them. As the court explained, however, the "advantage" clause enlarges the scope of compensation that will be considered LHWCA wages under Section 2(13) and does not impose a tax-withholding test applicable to all compensation. Pet. App. 8. The primary purpose of the advantage clause is to ensure that non-monetary compensation that would not otherwise be readily viewed as falling within Section 2(13)'s first clause, such as the provision of food and lodging in kind, will be included in

[5] Respondent received per diem payments from petitioner during an earlier assignment when he did incur food and lodging expenses, see Pet. 3, but the LHWCA "wage" status of those payments, which predated his injury by more than a year, is not at issue here. See 33 U.S.C. 910(a)-(d) (average weekly wage at time of injury controls, and is generally derived from consideration of earnings during year before injury).

the wage calculation if it is subject to employment tax withholding. *Ibid.*; see *Wright*, 155 F.3d at 320 ("'any advantage' was meant to include nonmonetary advantages"); see also *Wausau Ins. Cos.* v. *Director, OWCP*, 114 F.3d 120, 121 (9th Cir. 1997) ("[T]he statute defers to the IRS criteria for deciding whether non-monetary compensation counts as wages. If it is not money, or an 'advantage' subject to withholding, it is not included."); *H.B. Zachry Co.* v. *Quinones*, 206 F.3d 474, 479 (5th Cir. 2000) (under Section 2(13), "'wages' equals monetary compensation plus taxable advantages"); *James J. Flanagan Stevedores, Inc.* v. *Gallagher*, 219 F.3d 426, 431 (5th Cir. 2000) ("[t]he rule we glean from *Quinones* * * * is that for a [container royalty benefit] to constitute a wage, it must be considered either monetary compensation or a taxable advantage"). The payments at issue here, which constitute monetary compensation for services rendered and meet the requirements of the first clause of Section 2(13), need not meet the requirement of employment tax withholding in order to be wages under the LHWCA.[6]

The court of appeals' decision is consistent not only with the text of Section 2(13) but also with its purpose. As with workers' compensation statutes generally, the purpose of tying LHWCA benefits to individualized wages is to ensure that there is a correlation between the benefits and what has been lost by virtue of the employee's disability. See generally *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 298 (1995) ("[t]he fundamental purpose of the [LHWCA] is to compensate

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[6] This case has been litigated on the assumption that the payments were not subject to employment tax withholding. The Director, who first participated in this case in the court of appeals, has taken no position on the correctness of the parties' assumption.

employees * * * for wage-earning capacity lost because of injury"). Because the per diem payments here did not reimburse respondent for his actual or even approximate expenses, and thus represented a real gain to him, they should be reflected in his LHWCA wages. Were that not the case, respondent would not be adequately compensated for his loss of wage-earning capacity, as contemplated by the Act. Pet. App. 9.

2. Contrary to petitioner's assertion (Pet. 6-8), the court of appeals' decision does not conflict with any decision of any other court of appeals. As the court explained, each of the cases on which petitioner relies is distinguishable. Pet. App. 8-9 & n.*. In particular, none held that per diem payments "given in the face of knowledge that the employee has no expenses," *id.* at 7, are not "wages" under the LHWCA.

Thus, the Ninth Circuit in *Wausau Insurance*, 114 F.3d at 121-122, and the Fifth Circuit in *H.B. Zachry*, 206 F.3d at 477-479, each addressed an employer's provision of food and lodging in kind, in contrast to the monetary compensation at issue here. The holdings in those cases that such in-kind compensation is not included in LHWCA wages because it was exempt from employment tax withholding are entirely consistent with the court of appeals' application of Section 2(13) in this case.

Petitioner is also mistaken in its assertion (Pet. 7) that the decision below conflicts with the Ninth Circuit's decision in *McNutt* v. *Benefits Review Board*, 140 F.3d 1247 (1998). In *McNutt*, the court held that a $100 per diem for food and lodging was not includable as wages under the LHWCA, because the per diem arrangement was an "advantage" not subject to employment tax withholding. *Id.* at 1248. Although the

employee in *McNutt* was permitted to keep the difference if he managed to spend less on food and lodging than the amount of the per diem, *ibid.*, there is no indication in the court's brief per curiam opinion that the per diem at issue there was anything other than a reasonable approximation of the board and lodging expenses that the employer expected the employee to incur. There is therefore nothing to suggest that *McNutt* was a case like this one, in which the employer was aware that the employee would incur *no* board or lodging expenses on his assignment, but made the per diem payment anyway. In this case, the court expressly declined to decide whether "a true per diem reimbursement payment should be includable as a 'wage' under the Act," because the payments here "did not resemble reimbursements in any way." Pet. App. 7-8. The court clearly did not hold, therefore, that per diem payments reflecting the approximate expenses the employer expected the employee to incur are includable as "wages" merely because an employee, as in *McNutt*, may realize some gain if he spends less than the amount of the per diem payments.[7]

[7] Because the court of appeals expressed no view on per diem payments that reasonably approximate expenses an employee is expected to incur, petitioner is mistaken both in its assertion (Pet. 9) that the court's decision will result in differential treatment of longshore workers who receive the same per diem, depending on whether the longshoreman spends "lavishly" or "frugally," and in its assertion (Pet. 9-10) that the decision will require "copious" record-keeping of actual expenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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