No. 12-1053

In the Supreme Court of the United States

KELLER FOUNDATION/CASE FOUNDATION, ET AL.,
PETITIONERS

v.

JOSEPH TRACY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, covers American workers injured in the course of their maritime employment on foreign territorial waters.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 696 F.3d 835. The decision and order of the Benefits Review Board (Pet. App. 30-65) is reported at 43 Ben. Rev. Bd. Serv. (MB) 92. The decisions and orders of the administrative law judge (Pet. App. 66-70, 71-77, 78-97, 98-112) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2012. A petition for rehearing was denied on November 27, 2012. Pet. App. 113-114. The petition for a writ of certiorari was filed on February 22, 2013. 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 or Act), 33 U.S.C. 901 *et seq.*, establishes a federal workers' compensation system for employees disabled or killed in the course of covered maritime employment. 33 U.S.C. 902(2), 903(a), 908, 909. To be covered by the Act, a claimant must satisfy both a "status" requirement and a "situs" requirement. *Chesapeake & Ohio Ry.* v. *Schwalb*, 493 U.S. 40, 45 (1989). The "status" inquiry concerns whether the claimant is a maritime employee, including a "longshoreman[,] * * * harbor-worker[,] * * * [or] ship repairman." 33 U.S.C. 902(3). The "situs" requirement limits the Act's coverage to injuries "upon the navigable waters of the United States" or specified adjoining areas on land. 33 U.S.C. 903(a).

The Act does not define "the navigable waters of the United States" for purposes of Section 903(a). But the Act does provide for the creation of administrative compensation districts "to include the high seas" and grants venue over judicial proceedings "in respect of any injury or death occurring on the high seas" to the district courts in which the administrative compensation district offices are located. 33 U.S.C. 939(b). The Act does not define the term "high seas."

2. Respondent Tracy, a United States citizen, worked for petitioner Keller Foundation from July 1996 through November 1997 on the waters and in the ports of California. Pet. App. 33, 132-133. There is no dispute that this work, which included loading, unloading, and dismantling barges, satisfied the Act's status and situs requirements. *Id.* at 4, 132-133. From 1998 through 2002, Tracy worked for respondent Global Offshore International, Ltd. (Global). *Id.* at 133-134. During his

employment with Global, Tracy was assigned to various duties in the ports of Singapore and Indonesia, including loading, unloading, and repairing barges on the territorial waters of those countries. *Id.* at 9, 133-134.[1] In March 2002, Tracy retired from the maritime industry due to deteriorating health. *Id.* at 9, 134.

3. Tracy filed a claim for Longshore Act benefits in 2003. Pet. App. 9.

a. An Administrative Law Judge (ALJ) found that Tracy suffered from hearing loss as well as arthritis, carpal tunnel syndrome, and tendonitis. Pet. App. 34, 36, 75. The ALJ determined that those disabling injuries resulted from cumulative trauma and exposure to injurious noise throughout Tracy's career, including his employment with both petitioner and Global. *Id.* at 36, 73-74.

The ALJ also resolved a dispute between petitioner and Global over which of them was responsible for paying Tracy's compensation. When disability is caused by a cumulative injury or occupational disease, the last employer to employ a claimant in Longshore Act-covered work is generally liable for all compensation by operation of the "last employer rule." See *Foundation*

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[1] Tracy's employment with Global included some work in the United States, supervising the preparation, repair, and maintenance of a barge bound for Mexican waters. Pet. App. 8, 133. The court of appeals affirmed the ALJ's finding that Tracy was "a master or member of a crew of any vessel"—and thus excluded from Longshore Act coverage—during that period. *Id.* at 12-16; see 33 U.S.C. 902(3)(G). Petitioner does not challenge that holding. Nor does it challenge the court of appeals' holding that Global was not estopped from challenging Tracy's claim to Longshore Act compensation by the terms of its employment contract with Tracy, which provided that Tracy "is covered for worker's compensation benefits, if any, payable under the law of [his] country of origin." Pet. App. 24-28, 120.

Constructors, Inc. v. *Director, Office of Workers Comp. Programs*, 950 F.2d 621, 623 (9th Cir. 1991); *Travelers Ins. Co.* v. *Cardillo*, 225 F.2d 137, 145 (2d Cir.), cert. denied, 350 U.S. 913 (1955). If Tracy's work for Global were covered, application of the last employer rule would mean that Global, not petitioner, would be liable to pay his compensation.

The ALJ found that Tracy's work for Global in Singapore and Indonesia failed to satisfy the Act's situs requirement. Pet. App. 93-96. The ALJ accordingly ordered petitioner, as Tracy's employer in his last employment covered by the Act, to pay his disability compensation. *Id.* at 36.

b. Petitioner and Tracy appealed to the Benefits Review Board, which affirmed. Pet. App. 31-65.[2]

c. The court of appeals affirmed. Pet. App. 1-29. The Director of the Department of Labor's Office of Workers' Compensation Programs (Director) joined petitioner and Tracy in arguing that Tracy's employment with Global on the waters of Singapore and Indonesia was covered by the Longshore Act.[3] The court of appeals disagreed. The court acknowledged that it had previously suggested, and the Second Circuit had previ-

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[2] Tracy would receive compensation under the Act no matter which employer was liable, but he would receive more compensation for his hearing loss if Global paid the compensation because his salary was higher with that employer. See ALJ's Decision and Order, *J.T.* v. *Global Offshore Int'l. Ltd., et al.*, Docket No. 2004-LHC-0698, at 90 (Dep't of Labor Aug. 28, 2007); 33 U.S.C. 910.

[3] The Director administers the Longshore Act on the Secretary of Labor's behalf. Secretary's Order 10-2009, 74 Fed. Reg. 58,834 (Nov. 13, 2009). As the Secretary's delegate, the Director, rather than the Benefits Review Board, is the proper agency-respondent in this action. See *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Comp. Programs*, 519 U.S. 248, 264-270 (1997).

ously held, that the Act's coverage extends beyond American territorial waters at least into international waters, based largely on 33 U.S.C. 939(b)'s reference to injuries on the "high seas." Pet. App. 17 (citing *Saipan Stevedore Co.* v. *Director, Office of Workers' Comp. Programs*, 133 F.3d 717, 723 (9th Cir. 1998), and *Kollias* v. *D & G Marine Maint.*, 29 F.3d 67 (2d Cir. 1994), cert. denied, 573 U.S. 1146 (1995)). It also acknowledged that it had interpreted the Death on the High Seas Act, 46 U.S.C. 30301 *et seq.* (DOHSA), which provides a remedy for deaths "caused by wrongful act * * * occurring on the high seas beyond 3 nautical miles from the shore of the United States," 46 U.S.C. 30302, to apply to deaths on foreign territorial waters. Pet. App. 18 (citing *Howard* v. *Crystal Cruises, Inc.*, 41 F.3d 527, 530 (9th Cir. 1994), cert. denied, 514 U.S. 1084 (1995)).

The court of appeals held that those precedents were insufficient to "overcome the strong presumption that enactments of Congress do not apply extraterritorially." Pet. App. 19 (citing *Morrison* v. *National Austl. Bank, Ltd.*, 130 S. Ct. 2869 (2010)). Even assuming that Section 939(b)'s reference to the "high seas" was sufficient to indicate that Congress intended to cover maritime workers injured on international waters, the court reasoned that it "does not address, and therefore cannot overcome, the presumption that the Act does not apply to foreign territorial water or a foreign sovereign's lands." *Id.* at 21-22.

The court of appeals also rejected petitioners' reliance on the interpretation of the term "high seas" in *Howard*, because DOHSA "is extraterritorial by its very nature." Pet. App. 22. In light of this analysis, the court held that the Director's position was not entitled to deference. *Id.* at 22-23. The court accordingly held that

"foreign territorial waters and their adjoining ports and shore-based areas are not 'the navigable waters of the United States' as the Act defines that phrase." *Id.* at 23 (quoting 33 U.S.C. 903(a)).

ARGUMENT

Petitioner renews its contention (Pet. 7-12) that the Longshore Act covers American workers injured on the territorial waters of a foreign nation. Although the Director also advanced that contention in the court of appeals, further review of that issue is not warranted. The court of appeals' decision does not conflict with any decision of this Court or of another court of appeals. Nor does the decision implicate a frequently occurring issue of general importance.

1. The court of appeals' decision does not conflict with any decision of this Court, which has never considered whether the Longshore Act covers injuries on foreign waters. The Court has considered questions regarding the Act's *inward* reach on several occasions. See, *e.g.*, *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 279-280 (1977) (injury on a pier that was not used to load or unload vessels but was part of a larger facility used for those purposes was covered by the Act). But the Court has never had occasion to address the Act's seaward reach.

The court of appeals' decision does not conflict with *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962). Petitioner correctly notes that *Calbeck* suggested that the Act's coverage extends to the full extent of federal admiralty jurisdiction. Pet. 7 (quoting *Calbeck*, 370 U.S. at 125, 130). Moreover, as petitioner also points out, it is well-established that federal admiralty jurisdiction extends to foreign territorial waters. Pet. 8; see, *e.g.*, *Panama R.R.* v. *Napier Shipping Co.*, 166 U.S. 280, 285

(1897) ("[T]he law is entirely well settled both in England and in this country that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court.").

But the issue in *Calbeck* was whether the Act covers injuries on a navigable river in Texas and Louisiana, where state workers' compensation laws could also constitutionally apply. 370 U.S. at 115 n.2, 124-125. The Court's analysis was therefore, as in *Caputo*, focused on the Act's inward reach. Nothing in *Calbeck* suggests that the Court considered the Act's outer limits (much less whether those outer limits include foreign territorial waters) in reaching its decision. *Calbeck* therefore presents no direct conflict with the decision below.

The court of appeals' decision likewise does not conflict with *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953). Cf. Pet. 8-10. *Lauritzen* established a flexible, multi-factor test to resolve choice-of-law issues in Jones Act cases. 345 U.S. at 573, 583-592; see also *Hellenic Lines, Ltd.* v. *Rhoditis*, 398 U.S. 306, 308-309 (1970). *Lauritzen* has subsequently been applied to other maritime claims. See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382 (1959) (applying *Lauritzen* choice-of-law analysis to maritime tort claim). The decision below does not conflict with that line of authority.

The Director agrees that choice-of-law disputes under the Longshore Act should be resolved by applying the *Lauritzen* test (appropriately tailored to the context of amphibious workers). Cf. *Kollias* v. *D & G Marine Maint.*, 29 F.3d 67, 72 (2d Cir. 1994) ("Although no case has previously held that *Lauritzen* applies in cases in which the [Longshore Act] is invoked, we are confident that the *Lauritzen* analysis or another choice of law analysis would be used to determine the applicable body

of law in such cases."), cert. denied, 513 U.S. 1146 (1995). But the decision below addresses an entirely separate question: whether the Longshore Act offers Tracy a remedy for his injury. The answer turns on the meaning of the Act's situs provision, 33 U.S.C. 903(a), not on a choice-of-law analysis.

2. The court of appeals' decision does not conflict with any decision of another court of appeals. Indeed, because no court of appeals has held that the Longshore Act applies to injuries on foreign waters, petitioner does not allege a direct conflict.[4]

Petitioner instead claims that the decision below conflicts with decisions of four circuits, including the Ninth Circuit itself, holding that the term "high seas" as used in DOHSA includes foreign territorial waters. Pet. 11 (citing *Howard* v. *Crystal Cruises, Inc.*, 41 F.3d 527, 530 (9th Cir. 1994), cert. denied, 514 U.S. 1084 (1995); *Sanchez* v. *Loffland Bros. Co.*, 626 F.2d 1228, 1230 & n.4 (5th Cir. 1980), cert. denied, 452 U.S. 962 (1981); *Public Adm'r of N.Y. Cnty.* v. *Angela Compania Naviera, S.A.*, 592 F.2d 58, 60-61 (2d Cir.), cert. dismissed, 443 U.S. 928 (1979); *Jennings* v. *Boeing Co.*, 660 F. Supp. 796, 803-804 & n.9 (E.D. Pa. 1987), aff'd, 838 F.2d 1206 (3d Cir. 1988) (Table)).[5]

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[4] As petitioner acknowledges, the court of appeals did not limit the Act's coverage to injuries on the territorial waters of the United States. Pet. 5; see Pet. App. 17, 21. The decision below therefore does not conflict with *Reynolds* v. *Ingalls Shipbuilding Div.*, 788 F.2d 264, 268 (5th Cir.) ("[T]he Act's use of the term 'navigable waters' includes the high seas."), cert. denied, 479 U.S. 885 (1986), or *Kollias*, 29 F.3d at 75 (same).

[5] To the extent petitioner argues that the decision below conflicts with *Howard*'s holding concerning the reach of DOHSA, it does not warrant further review for the additional reason that it alleges a merely intra-circuit conflict. See *Wisniewski* v. *United States*, 353

There is no conflict because the relevant language of DOHSA and the Longshore Act differs in significant ways. Most importantly, DOHSA is not limited to deaths "occurring upon the navigable waters of the United States." Compare 46 U.S.C. 30302 with 33 U.S.C. 903(a). DOHSA's situs provision instead encompasses deaths "caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States[.]" 46 U.S.C. 30302. While the Longshore Act also refers to injuries on the "high seas," 33 U.S.C. 939(b), it does not similarly define that term. In any event, the fact that the Longshore Act and DOHSA have different situs provisions renders any conflict between the decision below and the cited cases indirect at most.[6]

3. The decision below does not implicate an issue of general significance that could merit this Court's review even absent a conflict.

Petitioner argues that the court of appeals' decision "threatens the certainty and uniformity that federal authority over maritime matters was meant to assure" because it sets the outer limits of Longshore Act coverage at the boundary between international and foreign waters, "a boundary that is subject to constant change,

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U.S. 901, 902 (1957) (per curiam). In addition, the Third Circuit's summary affirmance in *Jennings* was non-precedential.

[6] Petitioner appears to contend that the court of appeals erred by applying the presumption against extraterritorially to the Act. See Pet. 7-8 (citing *Morrison* v. *National Austl. Bank, Ltd.*, 130 S. Ct. 2869 (2010)); see also *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). Yet petitioner does not identify any decision of this Court or another court of appeals adopting a conflicting view. To the contrary, the Second Circuit has held that the presumption against extraterritoriality applies to the Longshore Act. *Kollias*, 29 F.3d at 70-73.

including changes by foreign nations." Pet. 13-15. It is, of course, true that Congress has the power to establish uniform laws to the full extent of federal admiralty jurisdiction. But petitioner has identified no authority for the proposition that Congress must assure maximal uniformity by regulating to the full extent of that jurisdiction whenever it decides to address a maritime matter.

To the contrary, in *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986)—upon which petitioner relies (Pet. 15) in its uniformity argument—this Court acknowledged that Congress had not done so when it enacted DOHSA. See 477 U.S. at 222 (recognizing that Congress "wanted to preserve the right to recover under the law of another [foreign] sovereign for whatever measure of damages that law might provide, regardless of any inconsistency with the measure of damages provided by DOHSA"); see also *id.* at 233 (acknowledging that DOHSA permits the survivors of those who die in state territorial waters to obtain certain state remedies unavailable to other survivors). The court of appeals' implicit conclusion that Congress had not regulated to the full extent of federal admiralty jurisdiction in enacting the Longshore Act therefore presents no unique challenge to maritime law necessitating immediate correction by this Court.

Moreover, the question presented arises only rarely. The Benefits Review Board, which has appellate jurisdiction over all Longshore Act claims, see 33 U.S.C. 921(b)(3), held that the Act applied to an injury in a foreign port in a published decision nearly 20 years ago. *Weber* v. *S.C. Loveland Co.*, 28 Ben. Rev. Bd. Serv. (MB)

321 (1994), aff'd, 35 Ben. Rev. Bd. Serv. (MB) 75 (2001).[7] This case is the first involving a claim seeking Longshore Act compensation for an injury on foreign waters to reach the Board or the courts of appeals since then.[8] Further review of this rarely occurring issue is unnecessary.

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[7] The Board in this case found *Weber* distinguishable on the ground that *Weber* presented a "purely American controversy" because the American employee there spent 90-95% of his time in the United States and was injured abroad while on a temporary assignment. Pet. App. 47-48. The Board contrasted those circumstances with those of this case, in which the claimant "was a long-term, contractual, Global employee who was based overseas between 1998 and 2002." *Id.* at 48.

[8] The issue was addressed in one decision outside the Act's claims-resolution process. See *Grennan* v. *Crowley Marine Servs., Inc.*, 116 P.3d 1024 (Wash. Ct. App. 2005). In *Grennan*, a state intermediate appellate court, applying the Board's reasoning in *Weber*, held that an American worker injured on Russian waters while unloading materials from one barge to another was covered by the Act. *Id.* at 1026, 1030. The issue was relevant because the injured worker had brought an unseaworthiness claim against his employer under general maritime law. *Id.* at 1026. That claim was dismissed because the Longshore Act is an employee's exclusive remedy against his or her employer for covered injuries. *Id.* at 1032-1033; see 33 U.S.C. 905(a) ("The liability of an employer [for compensation under the Act] shall be exclusive and in place of all other liability of such employer to the employee[.]"). The injured employee also filed a claim for Longshore Act compensation, 116 P.3d at 1026, which the employer ultimately paid. A conflict between the court of appeals' decision here and a state intermediate appellate court does not warrant this Court's review. Cf. Sup. Ct. R. 10(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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