No. 05-907

In the Supreme Court of the United States

LOCKHEED MARTIN CORPORATION, ET AL.,
PETITIONERS

v.

LORRAINE MORGANTI, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq*., an individual whose job duties are not within one of the exemptions to the Act's coverage is entitled to benefits when injured during the course of employment while on actual navigable waters.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 412 F.3d 407. The decision and order of the Benefits Review Board (Pet. App. 33-54) is reported at 37 Ben. Rev. Bd. Serv. (MB) 126. The decision and order of the administrative law judge (ALJ) (Pet. App. 55-112) is reported at 36 Ben. Rev. Bd. Serv. (MB) 775. The notice of affirmance of the Benefits Review Board (Pet. App. 26-28) and the decision and order of the ALJ on remand (Pet. App. 30-32) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22-23) was entered on June 24, 2005. A petition for rehearing was denied on September 20, 2005 (Pet. App. 113). On November 28, 2005, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including January 18, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, provides compensation for the death or disability of an "employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States," including any of the adjoining areas specified in the Act. 33 U.S.C. 903(a). The Act defines the term "employee" to mean "any person engaged in maritime employment" unless the employee is expressly excluded from the Act's definition. 33 U.S.C. 902(3).[1] The requirement that injury occur on navigable waters is referred to as the "situs" requirement, and the requirement that the employee be engaged in maritime employment is referred to as the "status" requirement.

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[1] Six categories of individuals are expressly excluded if they are subject to coverage under a state workers compensation law. 33 U.S.C. 902(3)(A)-(F). Two other exceptions—for "a master or member of a crew of any vessel" and for "any person engaged by a master to load or unload or repair any small vessel under eighteen tons net"— are not dependent on the availability of state worker's compensation. 33 U.S.C. 902(3)(G)-(H).

Director, OWCP v. *Perini N. River Assocs.*, 459 U.S. 297, 314-315 (1983) (*Perini*).

This Court held over two decades ago in *Perini* that "when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in §2(3) [33 U.S.C. 902(3)], and is covered under the LHWCA, providing, of course, that he is the employee of a statutory 'employer,' and is not excluded by any other provision of the Act." *Perini*, 459 U.S. at 324. The Court reasoned (*id.* at 325) that when the status requirement, *i.e.*, the requirement that a worker be engaged in "maritime employment," 33 U.S.C. 902(3), was added to the Act in the 1972 amendments, Congress did *not* intend "to withdraw coverage from employees injured on the navigable waters in the course of their employment as that coverage existed before the 1972 Amendments." The Court explained that such employees were considered "to be 'engaged in maritime employment' not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters." 459 U.S. at 324 (quoting 33 U.S.C. 902(3)). In a footnote, the Court "express[ed] no opinion whether [the Act's] * * * coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters." *Id.* at 324 n.34.

2. Petitioner Lockheed Martin Corporation employed respondent Rocco Morganti as a test engineer at its Naval Electronics and Surveillance Systems Division, which manufactured transducers, a component required for sonar equipment that Lockheed Martin supplied to the United States Navy. Pet. App. 34, 61. Lockheed Martin tested the transducers in Cayuga Lake in upstate New York because the lake "replicate[d] the mari-

time conditions in which this sonar is likely to be used." *Id.* at 60. Morganti's work duties included analyzing computer data generated by testing the transducers in the water from his location on the *Paganelli*, a 110' by 34' barge floating in the Lake. *Id.* at 35, 62, 69-70. The *Paganelli* is moored to two anchored mooring buoys a quarter mile from shore in Cayuga Lake but could be disconnected from its buoys within minutes. *Id.* at 43, 48. Morganti traveled between Portland Point, a docking facility owned by Lockheed Martin on the lakeshore, and the *Paganelli* on a 32-foot shuttle boat, the *Little Toot II*, also owned by Lockheed Martin. *Id.* at 34-35, 65. The voyage took five minutes each way. *Ibid.* Morganti spent 30%-40% of his employment time on Cayuga Lake, either on the *Paganelli* or in transit to and from the *Paganelli* on the *Little Toot II*. *Id.* at 17, 35, 70.

On December 20, 2000, while untying the *Little Toot II* from the *Paganelli* to return to shore, Mr. Morganti fell overboard and drowned. Pet. App. 35, 56-57. Shortly thereafter his wife, respondent, applied for survivor's benefits under the LHWCA. *Id.* at 57.

3. The ALJ denied respondent's claim for benefits. Pet. App. 55-112. The ALJ concluded that Morganti was not a maritime employee under *Perini* because the *Paganelli* is not a vessel but rather a fixed work platform. *Id.* at 104. The ALJ accordingly reasoned that Morganti was only on navigable waters while on the *Little Toot II* as it made the trip between the shores of Cayuga Lake and the *Paganelli*. *Ibid.* The ALJ further determined that Morganti was on board the *Little Toot II* "transiently when he sustained his fatal accident" and, for this reason, found that he was not covered by

the Act. *Id.* at 106 (calculating that Morganti was on the *Little Toot II* "less than 1% of his time at work").

4. a. The Benefits Review Board reversed. Pet. App. 33-54. The Board concluded that Morganti was a "maritime employee" under Section 2(3) of the Act because Morganti died on actual navigable waters while in the course of his employment on those waters and was not excluded from coverage by another statutory provision. *Id.* at 41 (citing *Perini*, 459 U.S. at 323-324). The Board rejected the ALJ's conclusion that the *Paganelli* is a fixed work platform and concluded that the "30 percent of his time [spent] performing work aboard the *Paganelli*" was time spent on navigable waters for purposes of the Act. *Id.* at 43. The Board explained that "[t]here is no requirement that an employee must be injured on a vessel in order to be covered under the Act." *Id.* at 45. Further, the Board noted, the *Perini* rule grants coverage to employees who would have been covered prior to 1972 by virtue of an injury on navigable waters. *Ibid.* The Board then found that "[t]he undisputed evidence of record * * * established that the *Paganelli* is a barge afloat on the navigable waters of Cayuga Lake and is fully capable of being moved should such movement be required." *Id.* at 48. The Board remanded the case to the ALJ to determine the rate at which benefits should be paid. *Id.* at 53.

b. The ALJ and the Board subsequently entered final orders awarding benefits. Pet. App. 26-29, 30-32.

5. The court of appeals affirmed. Pet. App. 1-21. The court observed that it "need not decide in this case whether to adopt" an exception to the *Perini* rule for employees only fortuitously or transiently connected to navigable water, *id.* at 13, because Morganti "was on actual navigable waters whenever he was on either the

Little Toot II or the Paganelli, and was thus on actual navigable waters for thirty to forty percent of his work week," *id.* at 17.

The court also observed (Pet. App. 14) that this Court held in *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 422-424 (1985), that an individual working and injured on an offshore oil rig that was a fixed platform, and thus akin to an artificial island, was not covered by the Act. The court of appeals found, however, that the *Paganelli* was not a fixed platform under *Herb's Welding*, because the *Paganelli* was floating in navigable waters and was not fixed to the seabed like the oil rig in *Herb's Welding*. Pet. App. 14. The court explained that employees working on floating platforms are subject to greater maritime risks than employees working on an artificial island. *Id.* at 15. The court also rejected as irrelevant petitioners' argument that the *Paganelli* was not a vessel, explaining that coverage under the Act turns on whether the employee is injured on navigable waters, not whether the injury occurs on a vessel. *Ibid.*[2]

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or other courts of appeals. Further review is therefore not warranted.

1. Petitioners argue (Pet. 10-11) that the decision of the court of appeals is inconsistent with *Perini*'s express preservation of an independent status requirement.

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[2] The court of appeals also held that Morganti met the Act's situs requirement because Cayuga Lake is a navigable waterway of the United States, Pet. App. 3, 9-12, and that Morganti did not fall within the Act's exception for individuals employed exclusively for data processing, *id.* at 3, 17-21 (see 33 U.S.C. 902(3)(A)). Petitioner does not challenge those rulings in this Court.

Petitioners are mistaken, however, because the Second Circuit recognized an independent status requirement in stating that "coverage under the Act still requires both situs and status." Pet. App. 9. As the Court in *Perini* explained, "a worker's performance of his duties upon actual navigable waters is necessarily a very important factor in determining whether he is engaged in 'maritime employment.'" 459 U.S. at 324 n.34; *id.* at 324 ("We consider the[] employees to be 'engaged in maritime employment' not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters.").

In this case, Morganti was required to perform his employment duties—testing sonar transducers in the deep waters of Cayuga Lake—while on navigable waters. Indeed, petitioner does not dispute the court of appeals' conclusion (Pet. App. 13-15, 17) that because Morganti worked on the floating *Paganelli*, and not a fixed platform or artificial island, Morganti was required to perform 30%-40% of his job duties on navigable waters. Thus, like the employee in *Perini*, Morganti was "required to perform [his] employment duties upon navigable waters." *Perini*, 459 U.S. at 324. No more is required under *Perini* to meet the Act's status requirement for maritime employment. *Ibid.* ("[W]hen a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in §2(3), and is covered under the LHWCA, providing, of course, that he is the employee of a statutory 'employer,' and is not excluded by any other provision of the Act.").

For similar reasons, petitioners are mistaken in arguing (Pet. 12-15, 18) that the court of appeals erred in

failing to consider whether Morganti would have been covered by the Act before 1972, and they are also wrong in suggesting that Morganti would not have been so covered because he did not work on a vessel. The Act's "maritime employment" requirement contemplated benefits for an employee who would have been covered before 1972 *because his injury occurred on navigable waters*. *Perini*, 459 U.S. at 325. After analyzing in detail the scope of coverage under the original Act and the legislative history and purposes of the Act's 1972 amendments, the Court in *Perini* concluded that the Act traditionally covered employees injured on navigable waters during the course of their employment. "[T]he consistent interpretation given to LHWCA before 1972 by the Director, the deputy commissioners, the courts and the commentators was that (except for those workers specifically excepted in the statute), *any* worker injured upon navigable waters in the course of employment was 'covered . . . without any inquiry into what he was doing (or supposed to be doing) at the time of his injury.'" *Id.* at 311 (citation omitted); accord *Herb's Welding*, 470 U.S. at 424 n.10 (Court's construction of "'maritime employment' does not preclude benefits for those whose injury would have been covered before 1972 *because it occurred on 'navigable waters*.'") (emphasis added).

Likewise, the relevant inquiry under the Act's "situs" requirement is whether "the disability or death results from an injury occurring *upon the navigable waters* of the United States," including any of the adjoining areas specified in the Act. 33 U.S.C. 903(a) (emphasis added). An employee need not be on a vessel to be considered "on navigable waters" for purposes of the LHWCA. Where, as here, the employee is injured while on an ob-

ject that is floating in navigable waters—be it a vessel or another floating man-made structure—the employee is "on navigable waters" for purposes of 33 U.S.C. 903(a). See *Herb's Welding*, 470 U.S. at 416 n.2 ("Workers on [floating platforms,] * * * unlike workers on fixed platforms, * * * enjoy the same remedies as workers on ships. * * * [I]f not [crewmembers], *they are covered by the LHWCA because they are employed on navigable waters*.") (emphasis added). There simply is no requirement that a worker be connected to a vessel in order to be covered under the Act.[3]

2. Petitioners also argue (Pet. 19) that this case "presents an ideal vehicle" for this Court to determine whether there is an exception to the *Perini* rule for workers who have only a "transient or fortuitous" connection to navigable waters and, if so, the contours of the exception. But those questions are not presented in this case, and, indeed, the court of appeals expressly declined to address the propriety of an exception. The court of appeals found (and petitioner does not dispute) that Morganti spent 30%-40% of his employment on navigable waters, and that Morganti was thus covered under the Act whether or not the court recognized such an exception to *Perini*. Because the court of appeals correctly concluded that it was unnecessary to address the exception, this case is hardly an "ideal vehicle" for this Court to explore that issue.

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[3] By contrast, a worker's connection to a "vessel" is relevant in determining whether the employee is *excluded* from the Act's coverage. 33 U.S.C. 902(3)(G) (covered employee does not include "a master or member of a crew of any vessel"). Similarly, the Act provides a third-party negligence action against an owner of a "vessel." 33 U.S.C. 905(b). Neither of those provisions is at issue in this case.

Petitioners argue (Pet. 17-19) that the exception is nonetheless relevant in this case either because (1) workers on floating platforms are traditionally not engaged in maritime employment or (2) because the floating platform here was only fortuitously located on navigable waters. Petitioners' contention conflicts not only with this Court's holding in *Perini* that a worker who is injured and is required to perform his job duties on navigable waters is covered under the Act but also with the common sense conclusion reached by the court of appeals (Pet. App. 15) that workers on floating structures routinely face maritime hazards.

Moreover, petitioners' suggestion that the floating platform here was "fortuitously" on navigable waters ignores the fact that, for whatever reason, it was *Lockheed* that had determined to use the floating platform for its operations. In any event, the Court has left open an exception for injuries that occur "transiently or fortuitously upon actual navigable waters," *Perini*, 459 U.S. at 324 n.34, such as an injury that occurs on water while the employee commutes by boat to a *land-based* job. See *Herb's Welding,* 470 U.S. at 427 n.13. Petitioners cite no authority for the proposition that the exception would apply in cases such as this, where the employer intentionally selects a work location that is on navigable waters, the employer requires a worker to perform a substantial percentage of his time on navigable waters, and the worker is in fact injured while on navigable waters.

3. Petitioners also assert (Pet. 17) that the decision below conflicts with decisions of the Fifth and Eleventh Circuits because "[u]nlike the Fifth and Eleventh Circuits, the Second Circuit simply refused to consider the 'transient or fortuitous' limitation." But a court of ap-

peals' failure to resolve an issue that is not properly before the court hardly creates a conflict with decisions that do address the issue. As explained above, the court of appeals in this case had no occasion to consider the propriety of the limitation urged by petitioners because the court found that Morganti was required to spend 30-40% of his job duties on navigable waters.

In any event, the decision below creates no conflict. *Brockington* v. *Certified Electric, Inc.*, 903 F.2d 1523, 1528 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991)—without mention of a potential "transient or fortuitous" exception to the *Perini* rule—held that a worker, who took a boat to perform work on land, was not entitled to LHWCA benefits because his only connection to the water was that when he was injured "he happened to be traveling over it *incidental* to land-based employment." Cf. *Herb's Welding*, 470 U.S. at 427 n.13 (noting "a substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work"). In contrast, Morganti regularly tested sonar transducers in the lake's deep waters, a job specific to the marine environment, and spent 30%-40% of his job on navigable waters.

The court of appeals' decision in this case is also fully consistent with the Fifth Circuit's decision in *Bienvenu* v. *Texaco, Inc.*, 164 F.3d 901 (1999) (en banc), which held that an oil production specialist who worked on fixed production platforms off the Louisiana coast was covered under the Act because he was injured on navigable waters as he traveled by boat between the platforms. Indeed, the court specifically acknowledged that "all *Perini* requires is that the claimant show that he was

injured on navigable waters while in the course of his employment." *Id.* at 907. The court also concluded that the *Perini* rule is subject to a "transient or fortuitous" exception, but concluded that "[t]he presence * * * of a worker injured on the water and who performs a 'not insubstantial' amount of his work on navigable waters is neither transient nor fortuitous." *Id.* at 908. The court declined to specify the exact amount of work performance on navigable waters that would be necessary to trigger LHWCA coverage, because the court found that the 8.3% of time that the worker spent on navigable waters is "not an insubstantial amount" and "is sufficient to trigger LHWCA coverage." *Ibid.* Because in this case it is undisputed that Morganti spent 30-40% of his work time on navigable waters, there is no conflict between this case and *Bienvenu*.

4. Petitioners also argue (Pet. 20-24) that the court of appeals' decision creates confusion and uncertainty over the Act's coverage. That claim lacks merit. The court of appeals merely applied the long-settled *Perini* rule that workers, such as Morganti, who are required to perform their duties over navigable waters are covered by the Act when injured on navigable waters. Petitioners complain that such a rule creates a regime in which workers step in and out of LHWCA coverage. But such a regime is inherent under the Act, which has a situs requirement and thus extends coverage "only if the disability or death results from an injury occurring upon the navigable waters of the United States." 33 U.S.C. 903(a); see *Bianco* v. *Georgia Pac. Corp.*, 304 F.3d 1053, 1059-1060 (11th Cir. 2002) ("the phenomenon of moving into and out of coverage * * * necessarily attends any geographical boundary of coverage"). Moreover, for over two decades, employers have been subject

to the *Perini* rule and thus have understood that injuries occurring on navigable waters in the course of employment are compensable under the LHWCA in the same manner that they were before the 1972 landward extension of the Act, *i.e.*, if the injury occurred on navigable waters. Indeed, petitioners reveal (Pet. 24) that their real complaint is that "this Court's decision in *Perini* has created confusion," but *Perini*, based on the clear intent of Congress, merely left intact the Act's pre-1972 coverage for employees injured while performing their duties on navigable waters.

Finally, Congress has not seen fit to change the *Perini* rule despite having ample opportunity to do so. For instance, shortly after the decision, Congress altered the scope of the Act in order to provide greater guidance to employers. H.R. Rep. No. 570, 98th Cong., 1st Sess. 6 (1983). Congress did not change the rule of *Perini* but rather excluded from coverage employees engaged in six categories of employment when the employees are covered by state worker's compensation laws. 33 U.S.C. 902(3)(A)-(F). Thus, employers are on clear notice that if their employees are not within one of the Act's specified exclusions and are required to perform their duties over navigable waters, those employees are covered by the Act if injured on navigable waters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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