No. 12-___

IN THE

Supreme Court of the United States

AMANDA BEECH, INDIVIDUALLY AND ON BEHALF OF MINOR CHILD, J.D.B.,
Petitioner,

— v.—

HERCULES DRILLING COMPANY, LLC,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

GEORGE W. HEALY, IV
GEORGE W. HEALY, IV & ASSOCIATES
1323 28th Avenue
Suite A
Gulfport, MS. 39501
(228) 575-4005

RYAN P. BATES
Counsel of Record
YETTER COLEMAN LLP
221 West Sixth Street
Suite 750
Austin, TX. 78701
(512) 533-0150
rbates@yettercoleman.com

Counsel for Petitioner

QUESTION PRESENTED

The Jones Act, 46 U.S.C. §30104, provides a remedy against an employer's negligence to any "seaman injured in the course of employment." To prove an employer's vicarious liability for the negligent acts of another crew member, a Jones Act plaintiff must prove that the co-worker was likewise acting in the course of his employment. In its opinion below, the Fifth Circuit narrowly construed "course of employment" to be limited to acts undertaken in furtherance of the employer's business, and rejected a broader interpretation applied by this Court and others that would include acts incidental to the seaman's duties. The Fifth Circuit thus joins the Seventh in squarely rejecting the analysis of the Sixth Circuit—which found employer liability on facts virtually identical to those of this case—and adds to a deep five-to-nine split among the federal circuits and state courts of last resort on this issue.

The question thus presented is: Did the Fifth Circuit err in restricting "course of employment" for purposes of Jones Act liability to only those acts that are subjectively intended to, and objectively do, further the employer's business interests?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption. The petitioner is Amanda Beech, who appears in both her individual capacity and as tutrix and guardian of her minor son, J.D.B. The respondent is Hercules Drilling Company, L.L.C., the employer of Ms. Beech's deceased husband.

TABLE OF CONTENTS

Appendix to the Petition

TABLE OF AUTHORITIES

STATUTES

OTHER MATERIALS

Petitioner Amanda Beech respectfully asks the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing and rendering a jury verdict for the death of her husband, Keith Beech, resulting from negligence of the respondent, Hercules Drilling, during Mr. Beech's service as a seaman employed by Hercules.

The decision below exacerbates a persistent and troubling five-to-nine split among the circuits and state courts of last resort over the scope of the parallel remedial provisions of the Jones Act and the Federal Employers' Liability Act (FELA), and brings the Fifth Circuit into conflict with this Court's decisions interpreting the meaning of "course of employment" in those contexts. Moreover, a petition raising the same issue as it arises under FELA, *Cluck* v. *Union Pacific Railroad Corp.*, No. 12-410, is now pending before the Court, providing a singular opportunity to resolve this issue in both statutory contexts simultaneously by granting both petitions in tandem.

OPINIONS BELOW

The district court's findings of fact and conclusions of law are reported at 786 F.Supp.2d 1140 and are reprinted in the

Appendix at App. 29a-55a.[1] Its judgment is likewise reprinted in the Appendix at App. 56a-57a. The court of appeals's opinion is reported at 691 F.3d 566 and is reprinted in the Appendix at App. 1a-28a.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§1331 and 1333. The court of appeals issued its judgment on August 14, 2012. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The pertinent provision of the Jones Act, 46 U.S.C. §30104 (previously codified as 46 U.S.C. §688), provides:

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

---

[1] Citations in the form "App. __" are to the petition appendix.

STATEMENT OF THE CASE

I. THE ACCIDENTAL DEATH OF KEITH BEECH

On the night of his accidental death at the hands of a shipmate, Keith Beech was employed as a crane operator aboard the Hercules 101, a jack-up drilling rig in the Gulf of Mexico owned by the respondent, Hercules Drilling. App. 2a. He was one of a four-man skeleton crew staffing the rig while it awaited a new drilling contract. App. 30a.

That evening, the only crewman on duty was Michael Cosenza, a driller and the vessel's second-in-command. App. 32a-33a. Mr. Cosenza's duties on the night watch included monitoring the rig's generators, checking equipment during occasional rounds, and reporting any unusual activity or problems that arose overnight. *Ibid.*

Because of the substantial risk of injury to someone working outside on the rig, alone and in the dark, a crewman assigned night watch duty was not expected to spend extended periods outside on the rig. App. 33a. Rather, the rig's design allowed the night watchman to monitor the generators from the rig's TV room—if the generator malfunctioned, the power to the television would turn off, indicating a problem requiring the crew's attention. App. 3a.

Indeed, Hercules encouraged Mr. Cosenza to watch television between rounds while on duty.

Ibid. And conversation with other crew members, even about personal matters, was likewise well within the permissible boundaries of Mr. Cosenza's job activity that night. App. 13a.

Thus, spending the night shift in the TV room, watching and talking with other crew members, was both anticipated and permitted. App. 3a. And that, in fact, was how Mr. Cosenza was spending the night shift on the evening of December 3, 2009—monitoring the generator while watching television from the TV room's couch between his rounds. *Ibid.*

Mr. Beech also went to the TV room to pass the time that evening. *Ibid.* (He was not on duty that night but was subject to duty's call. *Ibid.*) There, Mr. Beech and Mr. Cosenza, who were friends of long standing, talked and watched a hunting show. App. 62a. At some point, Mr. Beech mentioned that he had been thinking about buying a small handgun for his wife, Amanda. App. 33a. She had recently opened her own beauty salon, and he was worried about her closing up at night, alone. App. 61a-62a.

Unbeknownst to Mr. Beech, Mr. Cosenza in fact had just such a gun—a .22 caliber derringer pistol—on board the rig. App. 30a. Thinking that Mr. Beech might be interested in purchasing it for Ms. Beech, Mr. Cosenza took it upon himself to fetch the gun from his locker to show it to Mr. Beech. App. 33a. Mr. Beech did

not ask to see the gun or ask Mr. Cosenza to get it. *Ibid.* Indeed, it is not clear that Mr. Beech knew that the gun was even on board the rig before Mr. Cosenza returned to the TV room with it. *Ibid.*

Mr. Beech was not interested. App. 62a-63a. He did not handle the gun or even touch it. App. 33a. He just looked at it, told Mr. Cosenza he did not want to buy it, and tried to redirect both their attention back to the television show. App. 62a-63a. The whole process of Mr. Cosenza showing the gun and their conversation about it lasted only ten to fifteen seconds. App. 52a.

Having abandoned his purpose of showing off the gun, Mr. Cosenza sat down on the couch to watch more television. App. 51a. Tragically, as Mr. Cosenza was sitting down, his arm bumped the couch, accidentally causing the gun to fire. App. 33a. The bullet struck Mr. Beech in the arm and head. App. 34a. He died about half an hour later, having never regained consciousness. *Ibid.*

At the critical moment of discharge, Mr. Cosenza's only intent was to sit down, albeit in passive possession of the pistol. App. 49a-50a. That possession of a firearm on board the rig was a violation of a Hercules safety rule. App. 31a-32a. However, he was not, at the time of the accident, handling the gun in a purposeful manner. App. 33a. He did not, for example, aim it at Mr. Beech in jest or as a prank. App. 49a.

Hercules trained the rig's crew to call a "time out" and alert a supervisor upon becoming aware of a violation of a safety rule like that prohibiting on-board possession of firearms. App. 31a. However, as the district court found, Mr. Beech had no reasonable opportunity, in light of the short time between becoming aware of the gun's presence and its accidental firing, to respond to the situation according to Hercules's policy. App. 52a. Moreover, as the ranking crewmember on duty, Mr. Cosenza was Mr. Beech's supervisor at the time, and Mr. Beech was subject to his orders. *Ibid.*

II. PROCEEDINGS BELOW

Amanda Beech, Mr. Beech's widow, filed suit against Hercules on behalf of herself and J.D.B., their newborn son. App. 29a. She alleged claims under the Jones Act for unseaworthiness and wrongful death resulting from Hercules's direct and vicarious negligence, as well as various state-law tort causes of action. *Ibid.* The district court granted summary judgment in Hercules's favor on all claims except those for direct negligence and for vicarious liability based on Mr. Cosenza's actions. *Ibid.*

The case proceeded to a bench trial on those remaining claims. App. 30a. The district court, finding that "the shooting was entirely accidental," found that both Mr. Beech and Mr. Cosenza were within the course and scope of their employment by Hercules as seamen. App.

34a. Finding "no Fifth Circuit precedent addressing a situation precisely like the instant case, which involves a negligently-inflicted injury facilitated by the knowing violation of a company safety rule," the district court surveyed the conflicting positions staked out by the Sixth, Seventh, and Tenth Circuits in addressing the course of employment issue on analogous facts. App. 40a, 44a-47a. It contrasted the Seventh and Tenth Circuits' adoption of a requirement that, to support vicarious liability, an act must be "committed in furtherance of the employer's business" with the Sixth Circuit's "much broader test" that encompasses "not only actual service, but also those things necessarily incident thereto," but did not expressly select among those standards. App. 44a, 45a (quoting *Sobieski* v. *Ispat Island, Inc.*, 413 F.3d 628, 632 (CA7 2005), and *Baker* v. *Baltimore & Ohio R.R. Co.*, 502 F.2d 638, 641-642 (CA6 1974); and citing *Copeland* v. *St. Louis-S.F. Ry. Co.*, 291 F.2d 119, 121 (CA10 1961)).

Instead, from those cases and two others on comparable facts from the Fifth Circuit—*Stoot* v. *D & D Catering Serv., Inc.*, 807 F.2d 1197 (CA5 1987), and *Guidry* v. *S. La. Contractors, Inc.*, 614 F.2d 447 (CA5 1980)—the district court gleaned what it thought the applicable rule: "an employee whose wrongful, negligent conduct results in accidental injury to a fellow employee still acts in the course and scope of his

employment for purposes of vicarious liability, unless the act is motivated by some purpose inimical to the interests of the employer or co-worker." App. 42a, 47a.

Applying this test, the district court determined that both Mr. Beech and Mr. Cosenza were acting within the course and scope of their employment by Hercules when Mr. Beech was killed. App. 36a. It turned first to whether Mr. Cosenza's violation of Hercules's firearms policy defeated vicarious liability, and answered no—"this fact alone is not dispositive and does not preclude the imposition of vicarious liability on Hercules. . . . Permitting an employer to avoid Jones Act liability merely because an on-duty employee breached established safety rules does not seem to fulfill Congress' intent." App. 48a-49a. Nor did Mr. Cosenza's subjective intent defeat vicarious liability. His conduct was not a prank, and he had "no intent to scare, startle, surprise, or stun Mr. Beech." App. 50a. Likewise, "Mr. Cosenza did not intend to harm or injure Mr. Beech in any way." *Ibid.* Indeed, he "did not expect or believe that his actions would have negative consequences." App. 49a. And at the instant of the accident, "Mr. Cosenza had abandoned his purpose of showing off the gun" entirely and had returned to his duty. App. 51a. Finally, Mr. Cosenza did not disregard his duty—before the accident, he completed his assigned night-watch tasks at appropriate intervals, and he "was

clearly under the control of Hercules at the time of the accident." App. 50a.

Leaving open the possibility that Mr. Cosenza may not have been acting in the course of his employment, the court found "that at the critical moment—when the gun discharged—Mr. Cosenza was acting in the course and scope of his employment." App. 51a. The district court accordingly granted judgment in favor of Ms. Beech, both individually and on behalf of J.D.B., and awarded them approximately $1.2 million in damages. App. 52a, 54a-55a.

On appeal, the Fifth Circuit reversed. First addressing the standard of review applicable to the issue of course of employment, the court of appeals rejected its past precedent, which held that "[w]hether or not an employee acted within the scope of his employment is a question for the factfinder" and thus subject to clear-error review. App. 4a (quoting *Smollen* v. *United States*, 1995 WL 29214, at *4 (CA5 Jan. 11, 1995) (unpublished; precedential under 5th Cir. R. 47.5.3)). Relying instead on a nonprecedential opinion issued after *Smollen*, the court of appeals recharacterized course of employment as a mixed question of fact and law, subject to de novo review when "legal questions predominate." App. 5a (quoting *Hussaini* v. *Marine Transp. Lines, Inc.*, 1998 WL 648590, at *2 (CA5 Sept. 8, 1998) (unpublished)). Accordingly, considering all of the factual points

to be undisputed, the panel reviewed de novo the district court's finding that Mr. Cosenza was acting within the course of his employment. *Ibid.*

Turning to the merits, the court acknowledged that "the Jones Act is entitled to a liberal construction to accomplish its beneficent purposes," which has led to "broader employer liability under the Jones Act and FELA than would have been possible under the common law." App. 8a, 10a. Nonetheless, the court wrote, "the common law's limits on employer liability are entitled to great weight in FELA and Jones Act cases 'subject to such qualifications as Congress has imported into those terms.'" App. 10a-11a (quoting *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994)). The question, in the Fifth Circuit's view, thus turned on the common-law boundaries of the doctrine of respondeat superior, as "analyzed within the framework of established agency principles." App. 14a-15a (quoting *Stoot*, 807 F.2d, at 1199-1200).

Observing that it had never endorsed the proposition that different standards for vicarious liability would apply "depending on whether the underlying injury was caused intentionally or negligently," the court turned to articulating the standard for evaluating course of employment. App. 16a. In surveying other circuits' decisions, the court found two potential standards elaborated there. The first, drawn

from *Baker* v. *Baltimore & Ohio Railroad Co.*, 502 F.2d, at 641-642, a Sixth Circuit FELA case involving an accidental shooting of an employee on his break by a coworker, defines course of employment to "include[] not only actual service but also 'those things necessarily incident thereto.'" App. 17a. In contrast, a second, narrower rule applied in *Sobieski* v. *Ispat Island, Inc.*, 413 F.3d, at 632, a Seventh Circuit Jones Act case involving a crewman injured by a shipmate's unrequested chiropractic adjustment, demands "that the employee's tort [have been] committed in furtherance of the employer's business." App. 18a. Despite recognizing that the Fifth Circuit had previously "applied a standard similar to *Baker*'s in our prior cases," App. 19a (citing *Fowler* v. *Seaboard Coastline R.R. Co.*, 638 F.2d 17, 20 (CA5 1981)), the court of appeals made clear its altered allegiance to the Seventh Circuit's formulation of the rule:

> "[R]egardless of whether the underlying injurious conduct was negligent or intentional, the test for whether a Jones Act employee was acting within the course and scope of his employment is whether his actions at the time of the injury were in furtherance of his employer's business interests." App. 20a.

The court, applying this rule to Mr. Cosenza's actions, determined, contrary to the district court's finding, that he was not in the

course of his employment when Mr. Beech was accidentally killed. Defining Hercules's business interests first according to Mr. Cosenza's undisputed job duties—monitoring the generator, checking equipment, and reporting any suspicious activities or problems—the court then turned to "common sense" for the proposition that Hercules's safety policies gave it a business interest "in ensuring its workers' safety, particularly with regard to firearms." App. 22a. The court then distinguished away the trial court's reasoning for finding Mr. Cosenza acted in the course of his employment. Even if Mr. Cosenza's presence and actions in the TV room served Hercules's interest in monitoring the generator, the court reasoned, his failure to report his own possession of a firearm ran contrary to Hercules's interest in having Mr. Cosenza "report suspicious activities or problems." App. 23a. Nor did it matter, the court held, that Mr. Cosenza was not showing his gun to Mr. Beech when it discharged—both showing off a gun and "sitting down on the couch while holding one" were, in the court of appeals's view, equally "inimical" to Hercules's business interests. App. 24a. Perhaps most crucially, the court found Mr. Cosenza's "extraordinary breaches of Hercules' safety policies" highly relevant, if not quite formally dispositive. *Ibid.* While "[i]t may be true that not *every* violation of safety policy automatically casts an employee outside the course of his

employment," "if Cosenza's conduct . . . did not take him outside the course of his employment," the court concluded, "it is unclear what could have." App. 25a (emphasis added). Because Mr. Cosenza was not acting in the course of his employment, it held, Hercules could not be held vicariously liable, requiring reversal of the judgment in favor of Ms. Beech. App. 28a.

This petition timely followed.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit has now joined the Seventh Circuit and placed itself squarely in conflict with the Sixth Circuit's decision in *Baker* v. *Baltimore & Ohio Railroad Co.* by rejecting the broad "incident to duties" formulation of the Jones Act's course of employment requirement. In doing so, the Fifth Circuit further compounded a deep and abiding split among the lower courts about the proper scope of that requirement, which only this Court can finally resolve.

Nearly seventy years ago, the Court denounced the then-"recent tendency" among lower courts "to confine the scope of [a shipowner's] obligation to those shipboard injuries which are caused by the requirements of the seaman's duties" as "consonant neither with the liberality which courts of admiralty traditionally have displayed toward seamen who are their wards nor with the dictates of

sound maritime policy." *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, 732, n.15 (1943) (citations omitted). As the Fifth Circuit's decision demonstrates, that tendency is once again afoot, leading to a split of authority over the meaning of course of employment for purposes of seamen's recoveries against their employers under the Jones Act.

In the decision below, the Fifth Circuit, joining the Seventh, adopted a narrow construction of the statutory phrase that requires that an act constituting negligence must have been undertaken "in furtherance of the employer's business," both as an objective matter and in terms of the employee's subjective purpose, in order to justify the imposition of liability. That rule conflicts directly with the Sixth Circuit's interpretation, which requires only that a negligent act be "incidental to" a seaman's duties without regard to subjective intent. Other courts have likewise divided along this interpretive fault line, producing what is now a five-to-nine split. Notably, the Fifth, Seventh, and Tenth Circuits, in adopting the "in furtherance" formulation, have created apparent intra-circuit splits as well. This discord takes on added importance in light of

the largely parallel construction given to the Act and the similarly remedial provisions of FELA.[2]

The Fifth Circuit's restrictive reading of the Jones Act, unlike the Sixth Circuit's construction, cannot be squared with either this Court's equation of course of employment with the longstanding admiralty concept of "in service of the ship" or its repeated instructions that, consistent with congressional intent, the provisions of the Act are to be liberally construed in favor of remedying injuries seamen suffer aboard ship. Indeed, by allowing employers to shield themselves from liability behind paper walls of company policies, the Fifth Circuit's erroneous interpretation would institute a radical diminution of the scope of liability under the Jones Act. This case thus provides a critical opportunity for the Court to explain the proper analysis and protect the broad negligence remedy Congress intended to provide to seamen.

---

[2] The Jones Act expressly incorporates the remedy provisions of FELA. 46 U.S.C. §30104. It is thus well settled and widely understood among lower courts that decisions regarding the scope of liability under the Jones Act or FELA are largely applicable in both contexts. See, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 29 (1990); *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 439 (1958). Accordingly, petitioner treats decisions under both statutes as evidencing the relevant split of authority.

I. THE DECISION BELOW WIDENS THE CONFLICT OVER THE MEANING OF COURSE OF EMPLOYMENT UNDER THE JONES ACT AND FELA.

The Fifth Circuit's opinion adopts a construction of the Jones Act that is at odds with the precedents of six other circuits, two state high courts, and its own prior decisions.

A. Five Appellate Courts Now Require That An Act Be In Furtherance Of The Employer's Business.

In addition to the Fifth Circuit, three other federal circuit courts and at least one state high court have adopted the "in furtherance" construction of the course of employment requirement for Jones Act or FELA liability. These courts are:

- the Second Circuit, *e.g.*, *Brailas* v. *Shepard S.S. Co.*, 152 F.2d 849, 850 (CA2 1945) ("a master will not be liable for the negligent acts of his servant unless they are performed in the course of or in furtherance of the master's business");
- the Seventh Circuit, *e.g.*, *Sobieski*, 413 F.3d, at 633-634 (applying the "traditional scope of employment test" requiring proof that a

coworker "acted in furtherance of the ship's business");[3]

- the Tenth Circuit, *e.g.*, *Copeland*, 291 F.2d, at 121 ("[A]n employer is not liable under the F.E.L.A. for assaults by employees upon fellow employees, which assaults are not committed within the scope of the wrongdoers' employment in furtherance of the master's business."); see *Feichko* v. *Denver & Rio Grande W. R.R. Co.*, 213 F.3d 586, 592 (CA10 2000) (affirming conclusion that plaintiff "was not acting within the scope of his employment pursuant to any duties or in furtherance of the railroad's interest"); and
- the Supreme Court of Missouri, *e.g.*, *Cluck* v. *Union Pac. R.R. Co.*, 367 S.W.3d 25, 29 (Mo. 2012) ("It is well-settled that the course and scope of employment test is . . . whether the conduct of that employee was performed in furtherance of the employer's business.").

---

[3] In one earlier decision, the Seventh Circuit distinguished, for purposes of vicarious liability, an intentional tort, which must be "committed in furtherance of the employer's objectives," from negligence in hiring or supervising an employee, which need not be. *Lancaster* v. *Norfolk & W. Ry. Co.*, 773 F.2d 807, 818 (CA7 1985).

B. In Contrast, Nine Appellate Courts Only Require That An Act Be Incidental To An Employee's Duties.

In counterpoint, at least seven circuits—including some that later reverted to the "in furtherance" test—and two other state courts of last resort have construed course of employment in accordance with the "incidental to" interpretation employed by the Sixth Circuit in *Baker*. These courts include:

- the Second Circuit, *e.g.*, *Rostocki* v. *Consol. Rail Corp.*, 19 F.3d 104, 106 (CA2 1994); see *Mostyn* v. *Del., Lackawanna & W. R.R.*, 160 F.2d 15, 17-18 (CA2 1947) (Hand, J.) ("[W]hen a railroad provides shelter or food or both for its employees, and they are using the accommodations so provided to prepare themselves for their work, or to rest and recuperate, they must be regarded as in its 'employ.'");
- the Third Circuit, *e.g.*, *Carney* v. *Pittsburgh & Lake Erie R.R. Co.*, 316 F.2d 277, 278-279 (CA3 1963) (using outside accommodations provided by defendant is among "related activities [found] to be 'necessarily incident' to one's employment");
- the Fourth Circuit, *e.g.*, *Virginian Ry.* v. *Early*, 130 F.2d 548, 550 (CA4 1942) ("the scope of employment includes not only actual

service, but also those things necessarily incident thereto");

- the Fifth Circuit, *e.g.*, *Smith* v. *Med. & Surgical Clinic Assn.*, 118 F.3d 416, 419 (CA5 1997) ("the scope of employment encompasses acts incidental to the employment as well as the actual work"); *Fowler*, 638 F.2d, at 20 (same);
- the Sixth Circuit, *e.g.*, *Baker*, 502 F.2d at 642-643 ("the better view is that the scope of employment includes not only actual service, but also those things necessarily incident thereto");[4]
- the Seventh Circuit, *e.g.*, *Wilson* v. *Chicago, Milwaukee, St. Paul, & Pac. R.R.*, 841 F.2d 1347, 1355 (CA7 1988) ("Even if not required, an act could be within the scope of employment if it is a necessary incident of his day's work. When cases . . . use the word 'necessary,' it is in the sense of 'appropriate;' they do not refer only to those acts which the employer requires.");

---

[4] See also *Russell* v. *United States*, 465 F.2d 1261, 1261-1264 (CA6 1972) (vacating finding that Army nurse was outside course of her employment in FTCA case involving patient shot when nurse's purse, containing a pistol, was accidentally dropped; cited in *Baker*).

- the Tenth Circuit, *e.g.*, *Atchison, Topeka & Santa Fe R.R. Co.* v. *Wottle*, 193 F.2d 628, 630 (CA10 1952) ("the Employers' Liability Act extends to and covers not only the actual work performed in interstate commerce, but those acts which can be said to be necessarily incident thereto.");
- the Supreme Court of Nebraska, *e.g.*, *Holsapple* v. *Union Pac. R.R. Co.*, 776 N.W.2d 11, 16-17 (Neb. 2009) ("Course and scope of employment includes not only actual service, but also those things necessarily incident thereto . . . ."); and
- the Supreme Court of Tennessee, *e.g.*, *Mills* v. *CSX Transp., Inc.*, 300 S.W.3d 627, 632 (Tenn. 2009) ("the scope of employment includes both actual work and acts that are necessarily incidental to actual work").

The breadth of the division among the lower courts is underscored by the fact that, in at least three cases, the circuit courts have, by adopting the more restrictive formulation of course of employment, generated intra-circuit conflicts about the meaning of that phrase in the Jones Act and FELA contexts. Such broad confusion underscores the need for this Court's intervention to return cohesion and uniformity to the interpretation of these remedial statutes.

II. THE FIFTH CIRCUIT'S INTERPRETATION OF COURSE OF EMPLOYMENT DEPARTS SHARPLY FROM THE COURT'S PRECEDENTS.

A. This Court Has Long Held That Liability Under The Jones Act Is Not Rigidly Defined By Common-Law Restrictions.

The relationship between the common law of negligence and the Jones Act, as this Court has regularly made clear, is far more complicated than the decision below assumes. In particular, "Congress did not mean that the standards of legal duty must be the same by land and sea." *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, 378 (1932); see also *Norfolk Shipbuilding & Drydock Corp.* v. *Garris*, 532 U.S. 811, 815 (2001) ("[Negligence] is no less a distinctively maritime duty than seaworthiness: The common-law duties of care have not been adopted and retained unmodified by admiralty, but have been adjusted to fit their maritime context."). The Fifth Circuit's error in construing course of employment under the Act by resort to a restrictive view of vicarious liability can largely be traced to its failure to recognize this fact.

The Jones Act "brings into the maritime law new rules of liability," such as vicarious liability. *The Arizona* v. *Anelich*, 298 U.S. 110, 119 (1936). "The source from which these rules are drawn defines them but prescribes nothing

as to their operation in the field to which they are transferred." *Ibid.* Thus, "the scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships." *Braen* v. *Pfeifer Oil Transp. Co.*, 361 U.S. 129, 132 (1959).

"[T]he term 'course of employment' under the Act" is instead "the equivalent of the 'service of the ship' formula used in maintenance and cure cases." *Id.*, at 132-133; see 2 R. Force & M. Norris, The Law of Seamen §30:33 (5th ed. 2003) (same).[5]

> "[T]he Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure . . . by giving to him the indemnity which the maritime law afforded to a seaman injured in consequence of the unseaworthiness of the vessel or its

[5] See also *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 18 (1963) ("Although remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures, they . . . depend in large part upon the same evidence, and involve some identical elements of recovery.").

> tackle." *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42-43 (1943).

Accord *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 360 (1995) (seamen "may recover under the Jones Act whenever they are injured in the service of a vessel, regardless of whether the injury occurs on or off the ship."); *Braen*, 361 U.S., at 131 (acknowledging that, in the Jones Act, Congress "extend[ed] a right of recovery in trial by jury to a seaman injured while in the service of his vessel by negligence" (quotation marks omitted)).

The "in service of the ship" standard for course of employment is broad, much more so than the Fifth Circuit's cramped interpretation of its "in furtherance of the employer's business" test. "[U]nlike the statutory liability of employers on land," the liability for maintenance and cure "is not limited to strictly occupational hazards or to injuries which have an immediate causal connection with an act of labor." *Aguilar*, 318 U.S., at 734. The "responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in, activities required by [a seaman's] employment." *Id.*, at 732; see *Warren* v. *United States*, 340 U.S. 523, 529-530 (1951) (noting that maintenance and cure extends to injuries incurred while departing for or returning from shore leave, regardless of personal motive, and is "as applicable to injuries

received during the period of relaxation while on shore as it is to those received while . . . reaching it"). "The shipowner's liability is not restricted to injury or illness 'arising out of' or causally related to the seaman's shipboard duties"; rather, the limits of "service to the ship" are largely defined by "gross and willful misconduct." G. Gilmore & C. Black, Jr., The Law of Admiralty §6-6, at 281 (2d ed. 1975).

That broad standard is not restricted by any implication that can be read into the Jones Act's language. Other than its specific modification of the fellow servant and contributory negligence rules, the Act does not "purport to enlarge or modify the defenses available in maritime law to suits brought to recover" for injuries to seamen. *The Arizona*, 298 U.S., at 120. "In the absence of such a definite command the scope of the new rules of liability and the nature of the defenses to them must be ascertained by reference to their new setting in the admiralty system." *Ibid.* Thus, as it always has done, "the maritime law imposes upon a shipowner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship." *Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918).

B. The Court Has Required That The Jones Act Be Liberally Construed In Keeping With Congress's Remedial Aims.

The Fifth Circuit, by narrowing unduly the test for vicarious liability of employers in the context of Jones Act and FELA negligence actions, has likewise disregarded this Court's plain instruction that those statutes are to be broadly construed to achieve Congress's remedial purpose.

The Jones Act "was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. Its provisions . . . are to be liberally construed to attain that end." *The Arizona*, 298 U.S., at 123. The Court has instructed that the Act "not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning." *Jamison* v. *Encarnacion*, 281 U.S. 635, 640 (1930). "[T]he nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes." *Aguilar*, 318 U.S., at 735. Thus, "[i]f leeway is to be given in either direction, all the considerations which brought the liability into

being dictate it should be in the sailor's behalf." *Ibid*.[6]

However, instead of "[a]pproaching the decision of this case in a like spirit of liberality," the Fifth Circuit adopted one of the "refinements of construction" that this Court has warned are inappropriate in the context of the Jones Act, even if "a different spirit might approve" them elsewhere. *Cortes*, 287 U.S., at 375. Restricting course of employment to include only acts that, both in aim and in manner, are undertaken with a subjective purpose to further the employer's business and that objectively do so in the estimation of a reviewing court excludes a substantial proportion of seamen's conduct, both aboard ship and onshore.[7] Equally importantly, it

---

[6] FELA is given a similarly liberal interpretation. Cf. *Gottshall*, 512 U.S., at 543 ("We have liberally construed FELA to further Congress' remedial goal."); *Reed v. Pa. R.R. Co.*, 351 U.S. 502, 505 (1956) (FELA "was designed to obliterate fine distinctions as to coverage between employees who, for the purpose of this remedial legislation, should be treated alike").

[7] Even if the "in furtherance" formulation were an appropriate construction of the Jones Act's language, these principles demonstrate that the Fifth Circuit's application of that test was inappropriately restrictive. Indeed, as this Court noted in determining the jurisdictional reach of

provides employers with strong incentives to simply enact hollow policies on shipboard conduct to defeat Jones Act claims, rather than take the concrete measures to ensure the safety of seamen that the Act was meant to encourage. See *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Rock*, 279 U.S. 410, 414 (1929) ("The enforcement of the act is calculated to stimulate them to proper performance of that duty.").

But there "is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of his employment' do not mean what they say." *O'Donnell*, 318 U.S., at 39. "On the contrary it seems plain that . . . Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable *so far as the words and the Constitution permit . . . .*" *Ibid.* (emphasis added).

The congressional intent "to provide liberal recovery for injured workers," *Kernan*, 355 U.S., at 432, thus starkly conflicts with the Fifth Circuit's narrow interpretation of the Act, which effectively reads terms into the statute that are not present in its text. Had Congress intended seamen's recoveries to be limited to acts in

---

FELA, "[t]he word 'furtherance' is a comprehensive term. Its periphery may be vague, but admittedly it is both large and elastic." *Reed*, 351 U.S., at 507 (quotation marks omitted).

furtherance of their employers' business, it could have said so plainly. But while Congress "is free to say this much and no more,' we will not attribute words to Congress that it has not written." *Atl. Sounding Co.* v. *Townsend*, 557 U.S. 404, 424 (2009) (quoting *Miles*, 498 U.S., at 24). The Fifth Circuit's failure to adhere to this instruction further counsels in favor of the Court's review.

C. This Court's Decisions Adopt The "Incidental To" Formulation Of Course Of Employment.

Finally, the narrow rule announced by the Fifth Circuit below and adopted by these other courts is in significant tension with the analyses this Court has typically employed. In *Erie Railroad Co.* v. *Winfield*, for example, the Court found the employer liable because the employee leaving the carrier's yard at day's end "was a *necessary incident* of his day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another." 244 U.S. 170, 173 (1917) (emphasis added).[8] And in *Spokane & Inland Empire*

[8] Even this Court, however, has not been completely consistent in its formulation. See *Jamison*, 281 U.S., at 641 (holding assault fell within Jones Act coverage because "it was committed in the course of the discharge of his duties and in furtherance of the work of the employer's business").

Railroad Co. v. *Campbell*, the Court suggested that even disregard of orders, if not committed willfully, might be "no more than a mistake" that could reasonably be attributed to "mental aberration," "inattention," or failure to understand, and thus "not a departure from the course of his employment." 241 U.S. 497, 508 (1916). Indeed, "[t]o hold otherwise," warned the Court, "would have startling consequences." *Id.*, at 509; see also *Sinkler* v. *Mo. Pac. R.R. Co.*, 356 U.S. 326, 330-331 (1958) (requiring "an accommodating scope" be given to statutory terms "to give vitality to the standard governing the liability of carriers to their workers injured on the job").

III. THIS CASE IS A GOOD VEHICLE BECAUSE SELECTION OF THE ERRONEOUSLY RESTRICTIVE STANDARD WAS DISPOSITIVE.

The Fifth Circuit's requirement that Mr. Cosenza's action be "in furtherance" of Hercules's interest—as opposed to simply incident to his duties—in order to be in the course of his employment fundamentally determined the outcome of this case. Under the facts as found by the district court, it is evident that Mr. Cosenza was acting in the course of his employment under the Sixth Circuit's "incidental to" formulation adopted in *Baker*.

According to the district court, at the moment that the accident occurred, the act in which Mr. Cosenza was engaged was consistent

with and incidental to his duties as the rig's night watchman—sitting down on the couch to monitor the generator indirectly by watching television. App. 50a-51a. The sole intent Mr. Cosenza held at that time was to advance his employer's interests through completion of those duties; he had abandoned any intent of showing the gun to Mr. Beech. *Ibid.* Thus, the only possible basis for finding that Mr. Cosenza's act to be outside the course of his employment was the *manner* in which he accomplished it—that is, sitting down on the TV room couch while in possession of a gun. But it is well-settled in the precedents of this and lower courts that accomplishing a valid end through improper means does not take a seaman outside the course of employment. E.g., *Jamison*, 281 U.S., at 641 (wrongful assault nonetheless within course of employment); *Campbell*, 241 U.S., at 508-509 (disregard of orders nonetheless within course of employment). Rather, Mr. Cosenza "was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders." *Braen*, 361 U.S., at 133. "No more," this Court has made clear, "is required by the Jones Act." *Ibid.*

The opinion below asserts that its result would not change under the Sixth Circuit's "incidental to" test, but that cannot be true, as the similarity of this case to *Baker* itself demonstrates. In *Baker*, a railcar inspector,

Kuntz, brought a pistol into the inspectors' shanty to show another employee during the lunch break. He left the pistol in the coat's pocket when he later hung it on a candy machine, and when Kuntz picked the coat up, the pistol fell out and discharged, injuring Baker. 502 F.2d, at 640. Holding that Kuntz acted in the course of employment under its "incidental to" formulation of that requirement, the Sixth Circuit made clear its rejection of the logic on which the Fifth Circuit's claim relies. In particular, it rejected the suggestion that the act to the analysis was "Kuntz' bringing a pistol into the inspector's shanty"; rather, "the act complained of was Kuntz' removing his coat from the candy machine while forgetting about the pistol." *Id.*, at 643. Because that act was incidental to Kuntz's duties, regardless of the pistol's presence or the earlier act of bringing the pistol into the shanty, Kuntz was within the course of his employment when the accident occurred.

The Fifth Circuit's suggestion that its holding would be the same under either test cannot survive this logic. The "act complained of" here—i.e., the negligent act that resulted in Mr. Beech's injury—was Mr. Cosenza's act of sitting down on the TV room's couch. But the Fifth Circuit, adopting the reasoning *Baker* expressly rejected, focused instead on other aspects of Mr. Cosenza's conduct—specifically, whether "leaving the break room to retrieve a

loaded firearm" and "having a loaded firearm in the break room against company policies" were incidental to Mr. Cosenza's duties. App. 25a, 26a. As *Baker* demonstrates, however, under the "incidental to" test those are the wrong questions. Unless one simply gives dispositive weight to Hercules's safety policy—which the Fifth Circuit insisted it was not doing, App. 24a-25a—selection of one formulation of course of employment over the other thus was determinative.

IV. THE SIGNIFICANT IMPACT OF THE DECISION BELOW IN BOTH THE JONES ACT AND FELA CONTEXTS HIGHLIGHTS THE IMPORTANCE OF THIS ISSUE.

The rule the Fifth Circuit has adopted—demanding a close evaluation of whether the seaman's subjectively held purpose for the negligent act and the manner in which it was committed was to further his employer's business—will effectively immunize shipowners from responsibility under the Jones Act for a broad range of negligent conduct, in contravention of Congress's plain intent. And the largely parallel construction given to the Jones Act and FELA further magnifies the influence this erroneous decision will have, by extending its reach far beyond the precise and unusual factual scenario presented in this case.

Virtually every shipboard accident can be linked, at some level, to a violation of a safety

rule. But by elevating such violations of an employer's safety policies to being functionally determinative of whether an employee is acting within the course of his employment, the Fifth Circuit's rule opens a gaping loophole in the statutory scheme. Thus, for example, a seaman injured when a drunken captain negligently runs the ship aground will likely have no recourse against an employer who, like Hercules, has adopted a company-wide policy outlawing alcohol aboard ship. And a railroad could escape liability for injuries its employees suffered in a derailment caused by an engineer who missed a signal while talking on a cell phone, if it had resorted to the simple expedient of adopting a policy against cell phone use. Further examples abound. See App. 48a-49a.

The decision below will have broad repercussions for another reason not necessarily apparent on the opinion's face. Although the issue in this case arose in the context of determining vicarious liability for negligence of a co-worker, the Fifth Circuit's narrow construction of course of employment is not limited to that context. Quite the contrary—it is equally applicable to direct claims of negligence, such that an individual's violation of a company policy now provides his employer a strong, even dispositive argument that there can be no liability for any resulting injury under the Jones Act. The decision below thus in fact represents a sweeping revision to the scope of Jones Act

liability in the nondescript guise of a seemingly fact-bound case.

Finally, allowing the split of authority among the lower courts to continue would have negative consequences of its own. Given the wide array of lower courts that have weighed in on the issue, no further development in the circuits is needed. And permitting the split to persist would sharply disserve the critical goal of uniformity in the maritime law. See *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375, 392 (1924) ("This Court has specifically held that the Jones Act is to have a uniform application throughout the country unaffected by local views of common law rules."); see also *Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952) (insisting that FELA "be given that uniform application throughout the country essential to effectuate its purposes"). A seaman should not be subject to differing rules depending on whether his vessel docks in Duluth, Milwaukee, Cleveland, or Erie, yet that is precisely the situation that now obtains.

V. A PENDING PETITION PRESENTS THE SAME ISSUE ARISING UNDER FELA, AND THE COURT SHOULD TAKE THIS OPPORTUNITY TO RESOLVE THE ISSUE IN BOTH STATUTORY CONTEXTS SIMULTANEOUSLY.

The question presented by this petition—the meaning of course and scope of employment for purposes of vicarious liability under the Jones

Act—is coterminous with the question presented in a petition recently filed in this Court in *Cluck* v. *Union Pacific Railroad Corp.*, No. 12-410 (filed Oct. 1, 2012). *Cluck* raises the same question as it arises under the largely parallel remedial scheme of FELA, based on a decision of the Missouri Supreme Court that reached a conclusion similar to the Fifth Circuit's in the decision below.

The pendency of two petitions raising this crucial question within both statutory schemes presents a singular opportunity for the Court to simultaneously provide clarity in both contexts. Accordingly, petitioner respectfully suggests that the Court grant certiorari in both cases and resolve them in tandem or, alternatively, grant certiorari and hold this petition pending the disposition of *Cluck*, if certiorari is granted in that case.

CONCLUSION

The Court should grant the petition and issue a writ of certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

Ryan P. Bates
Counsel of Record
YETTER COLEMAN LLP
221 West Sixth Street,
Suite 750
Austin, Texas 78701
(512) 533-0150

George W. Healy, IV
GEORGE W. HEALY, IV
& ASSOCIATES
1323 28th Avenue
Suite A
Gulfport, MS 39501

(228) 575-4005

Counsel for Petitioner Amanda Beech, individually and on behalf of minor child J.D.B.