No. 13-1268

IN THE
Supreme Court of the United States

JENNIFER EVANS DIZE, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM SMITH DIZE,
Petitioner,

v.

ASSOCIATION OF MARYLAND PILOTS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER MATERIALS

Respondent does not dispute that: Mr. Dize's time operating the launches properly counts toward the 30% threshold established in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) (Pet. 20); he was one of the launches' crew members (Pet. 21); he faced "perils of the sea" when operating the launches (Pet. 14); the launches remained "in navigation" while docked (Pet. 5 n.3); all his work contributed to the launches' mission (Pet. 14); his dockside and onshore work, together with time operating launches, satisfies *Chandris*'s 30% threshold (Pet. 11; App. 16a-17a); and the inclusion or exclusion of the time dockside and ashore is therefore dispositive (Pet. 11, 25). Nor does respondent dispute that the question presented is important for maritime workers, the maritime industry, and the judicial system (Pet. 24-25; Maritime Lawyers Br. 7-14; Law Professors Br. 3-7, 9-19).

Respondent's opposition largely rests on erroneous interpretations of the decision below, this Court's precedents, and other decisions. When those decisions are properly understood, the conflict is stark and substantial. And, under this Court's precedents, the error below is clear.

I. THIS CASE RAISES THE QUESTION PRESENTED

A. The decision below categorically excluded "the time Mr. Dize spent maintaining vessels that were dockside or ashore." App. 3a. The court below granted discretionary review explicitly "to resolve whether, in determining Mr. Dize's [seaman status], work time spent maintaining vessels that are moored, dockside, or ashore is to be counted along with time spent at sea." App. 8a.

To resolve that question, the court considered different possibilities — including "that the employee

must spend at least 30 percent of the employee's time actually at sea." App. 20a. It rejected that approach as "somewhat at odds" with *Chandris*, *id.*, instead counting only duties "that regularly expose the worker to seagoing perils," App. 24a. In a passage that respondent cites or quotes four times (at 2, 13, 14, 18), the court explained it was not limiting its rule only to "time aboard a ship *in transit*." App. 24a (emphasis added). That caveat, however, does not negate the categorical approach the court did adopt. The court cited four cases to identify the "variety of other circumstances" (other than "aboard a ship in transit") that may count toward the 30% threshold. App. 24a-25a. Contrary to respondent's assertion (at 14), none involved docked vessels (and the "moored vessels" were moored offshore). All four instead concerned offshore vessels that typically remained stationary. Under the decision below, therefore, only offshore time counts toward the 30% threshold.

The court below categorically excluded all work done on vessels that are dockside or ashore because it mistakenly assumed that dockside or onshore work cannot expose a worker to perils of the sea. It thus excluded time spent on such work as a matter of law when calculating *Chandris*'s 30% threshold. App. 25a-27a.

Respondent seeks (at 13) to soften the court's categorical rule, characterizing the court as finding that dockside work "generally do[es] not expose workers to the perils of the sea," but that adverb is respondent's, not the court's.[1] The court excluded

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[1] The court actually stated that such work "'*hardly* exposes the plaintiff to "the perils of the sea."'" App. 25a (quoting *Casser v. McAllister Towing & Transp. Co.*, No. 10 Civ. 1554

Mr. Dize's work dockside and ashore solely because of where it occurred. Affirming a summary judgment order, the court's exclusion must have been categorical. Contrary to respondent's unsupported assertion (*id.*), the court below could not have "[c]onsider[ed] the particular duties Mr. Dize performed maintaining docked and onshore vessels." Upholding summary judgment necessarily means that, as a matter of law, no jury could consider Mr. Dize's particular dockside or onshore duties. That time "is not to be considered." App. 3a.

B. Although it concedes (at 9 n.3) that facts must be "viewed in the light most favorable to Mr. Dize at the summary judgment stage," respondent consistently shades the facts to bolster its argument. For example, it declares that Mr. Dize "estimated that he spent 42-50 percent of his time performing routine, *land-based* maintenance of the launches after they were removed from the water." Opp. 10 (respondent's emphasis). The term "*land-based*," however, is respondent's own characterization — not Mr. Dize's (or even the lower court's).[2] And the key phrase "after they were removed from the water" is entirely respondent's invention.[3] In the very passage

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(JSR), 2010 WL 5065424, at *3 (S.D.N.Y. Dec. 7, 2010)) (emphasis added).

[2] Mr. Dize used the phrase "shoreside support tasks" (E204) to describe his work when he was not operating a launch. In context, "shoreside" contrasted with his offshore time (when he operated launches) and thus includes his work in the service of vessels in navigation that were dockside or ashore. "Shoreside" was not a synonym for "land-based" as *Chandris* used that term.

[3] In any event, under this Court's precedents, work ashore in service of a vessel in navigation properly counts toward the 30% threshold. *See* Pet. 19-23.

respondent cites, the court below made clear that the work in question was done "*while the launches were tied up at the dock*." App. 6a (emphasis added).

II. THE CONFLICT IS SUBSTANTIAL

A. The court below is not alone in categorically rejecting work on dockside or onshore vessels. The Eleventh Circuit adopted the same rule in *Clark v. American Marine & Salvage, LLC*, 494 F. App'x 32, 34-35 (11th Cir. 2012), refusing to consider "work on [land] or . . . while tethered to a land base." *See* Pet. 14-15. Respondent erroneously asserts as "fact" (at 15) that "the decision below *expressly rejected* the approach taken in *Clark*." The Maryland court mentioned a possible test for seaman status based on the "emphasis on sea-going duties" in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997), citing *Clark* as having also emphasized sea-going duties. App. 20a. The court declined to adopt that hypothetical test, *id*., but did not thereby "reject[]" *Clark*. On the contrary, it reached precisely the same result. Neither decision counted work done dockside or ashore; both accepted work on a stationary offshore vessel. *See supra* p. 2; 494 F. App'x at 34 (counting 70 hours' work from a dive barge).

Nor is it relevant that *Clark* is not technically binding in the Eleventh Circuit. Fifth Circuit Judge Jones has cited it approvingly. *See Naquin v. Elevating Boats, LLC*, 744 F.3d 927, 944 n.3 (5th Cir. 2014) (Jones, J., dissenting in part), *petition for cert. pending*, No. 14-28 (filed July 8, 2014). And respondent relied heavily on *Clark* in its brief below, even including the opinion in the appendix. *See* Resp. Md. Ct. App. Br. 20-21 & app.

B. In conflict with *Clark* and the decision below, most courts consider time spent in the service of dockside or onshore vessels when calculating *Chandris*'s 30% threshold. In *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 150 (3d Cir. 1998), the Third Circuit instructed the district court on remand to count the worker's "duties on the beach" that "contributed to the purpose" of the vessel's operations. *See* Pet. 15-16. That instruction was essential to *Shade*'s holding. Because the worker's evidence that he spent 90% of his time on the water (*see* Opp. 17) was disputed, the jury might not have accepted it on remand, thus making the beach time essential for satisfying the 30% threshold.

The Fifth Circuit's *Naquin* decision is the most recent to count dockside work. *See* Pet. 16-17. It rejected the dissent's *Clark*-based argument against seaman status premised on the fact that the worker "spent nearly all of his time dockside," 744 F.3d at 943 (Jones, J., dissenting in part). *Naquin*'s logical extension of *In re Endeavor Marine Inc.*, 234 F.3d 287 (5th Cir. 2000), which involved work on a stationary offshore vessel, in support of its holding (*see* Pet. 17) does not undermine the conflict, despite the Maryland court's citation of *Endeavor Marine* to illustrate when a worker on a stationary vessel might qualify for seaman status. *See supra* p. 2.

The Sixth Circuit's pre-*Chandris* cases also implicate the conflict. The *Chandris* Court based the 30% threshold on a line of cases going back to *Carumbo v. Cape Cod Steamship Co.*, 123 F.2d 991 (1st Cir. 1941), that was "applied in every Federal Circuit to have considered the issue." 515 U.S. at 367. Even when a threshold figure had not been quantified, courts requiring "a more or less permanent connec-

tion" or "a significant connection to a vessel in navigation" were already engaged in the same inquiry that *Chandris* mandated, *see id.* (internal quotations omitted), when deciding which activities count toward establishing the connection. The Sixth Circuit applied the "more or less permanent connection" requirement, *e.g.*, *Noack v. American S.S. Co.*, 491 F.2d 937, 938-39 (6th Cir. 1974), and the cases cited in the petition (at 17-18) counted dockside work in applying that requirement.

The Ninth Circuit in *Keller Foundation/Case Foundation v. Tracy*, 696 F.3d 835 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2825 (2013), followed the majority approach in crediting a barge worker's three weeks' repairs, maintenance, and modification work at a Louisiana shipyard toward the 30% threshold. *See* Pet. 18-19. Respondent mischaracterizes that holding (at 21) as "dictum" based on the unsupported assertion that the worker's "time spent out on the water" "far exceeded [those] three weeks." The opinion specifies the worker spent three weeks in the shipyard and seven days in transit to Mexico, but does not say how long he spent in a Mexican port or offshore laying pipe before he was reassigned mid-voyage. 696 F.3d at 840. Counting time spent on shipyard repairs was central to the holding.[4]

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[4] The Maryland court's citation of two Ninth Circuit decisions for the proposition that a seaman should perform sea-based duties is unremarkable. The substantial connection requirement separates "sea-based maritime employees" from "land-based workers." *Chandris*, 515 U.S. at 368. Contrary to respondent's suggestion (at 20-21 & n.10), that citation has no bearing on whether the court below conflicts with the Ninth Circuit on the question presented.

C. The lower-court conflict is well-recognized and acknowledged. The decision below did not complain "of the common-law principle that different facts produce different results," as respondent contends (at 23). It instead documents the challenge of reconciling the completely different legal standards adopted by different courts. App. 17a-25a. It even criticizes *Chandris* for having "generated some confusion," App. 14a, and for having "used two different phrasings to refer to the 30 percent rule," App. 18a. The court below recognized that different courts have rendered inconsistent decisions in indistinguishable cases.

III. THE COURT BELOW ERRED

The Maryland court erred in categorically excluding time spent working on vessels that are dockside or ashore when calculating *Chandris*'s 30% threshold.

A. This Court has recognized that a particular task can be seaman's work when done by a crew member but not when done by a land-based worker. *Compare Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 96, 99 (1946) (crew members traditionally load and unload vessels), *with Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 4 (1946) (longshoreman loading a vessel is not a seaman, despite "rendering services customarily performed by seamen"). Similarly — and particularly relevant here — this Court has recognized that vessel maintenance is seaman's work when performed by a member of the crew, *see*, *e.g.*, *Chandris*, 515 U.S. at 373-74 (citing *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, 373 (1957)), but not when performed by a land-based worker, *see Papai*, 520 U.S. at 559-60.

Congress resolved this apparent dilemma when it implicitly defined a "seaman" as "a master or

member of a crew of any vessel." LHWCA § 2(3)(G); *see* Pet. 4-5. Seaman *status* is indeed status-based. *See Chandris*, 515 U.S. at 361. The issue is not whether a worker does enough seamen's work — some longshoremen do nothing but seamen's work — but whether the worker has a sufficient connection to a vessel in navigation. Mr. Dize was indisputably a "member of [the] crew" of the pilot launches, which had no other crew except Mr. Dize and similarly situated co-workers. The issue is accordingly whether he had a sufficient connection with those launches. His connection indisputably counted during the time he operated them — slightly less than 20% of his work time.

Because Mr. Dize spent an additional 42-50% of his time "in the service of a vessel in navigation," *id.* at 371, "while the launches were tied up at the dock," App. 6a, and additional time while the launches were drydocked or ashore, he easily passes the 30% threshold. That work properly counts toward the 30% threshold because he was a member of the launches' crew. *See Chandris*, 515 U.S. at 375 (recognizing that a crew member maintaining a vessel that was "'confined to berth for lengthy periods'" is entitled to Jones Act coverage "'even though the ship was never in transit during his employment'") (quoting *Senko*, 352 U.S. at 373).

B. The court below applied an alternate test premised on exposure to "perils of the sea." Although this Court long has recognized the importance of "perils of the sea" in the Jones Act context, "[s]eaman status is not coextensive with seamen's risks." *Chandris*, 515 U.S. at 361.

Respondent cites statements suggesting a worker may need to face perils of the sea "regularly" to

qualify for Jones Act protection. *See*, *e.g.*, *id.* at 368 (noting that "land-based workers" with "only a transitory or sporadic connection to a vessel in navigation" are "not regularly expose[d]" to "perils of the sea"); *Papai*, 520 U.S. at 560 (describing "seamen" as "workers who face regular exposure to" "perils of the sea").[5] Even under that approach, Mr. Dize qualified. He regularly faced perils of the sea — every time he performed his primary job duties by taking a launch out on Chesapeake Bay.

C. Respondent seeks to rewrite *Chandris* to require that a seaman spend 30% of his working time exposed to perils of the sea (rather than "in the service of a vessel in navigation," as the *Chandris* Court actually held). Even under that approach, however, the court below erred in categorically excluding time spent maintaining vessels that are dockside or ashore. As the *Eastland* disaster so graphically illustrates, a dockside vessel is very much exposed to perils of the sea. *See* Union Br. 15-16. More than 840 passengers and crew drowned when the *Eastland* sank at its pier. Even today, vessels sink at piers with surprising regularity.[6]

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[5] *Papai* held that the plaintiff's limited engagements with the vessel at issue in that case were insufficient to make him a member of that vessel's crew. *Papai* did not address whether an employee who goes to sea regularly can count dockside maintenance of the vessels he operates when calculating the 30% threshold.

[6] Recent dockside vessel casualties include:

http://www.shipwrecklog.com/log/2014/03/pesante/ (21-meter-long dredger sank while berthed at Dutch shipyard);

http://www.shipwrecklog.com/log/2011/06/deneb-capsized/ (101-meter-long container ship *Deneb* capsized at a Spanish port while unloading containers).

Nor are those working on drydocks or ashore immune from perils of the sea. In the Texas City disaster, a shipboard fire on the *SS Grandcamp*, then docked in the port, led to an explosion that killed more than 500 (most of whom were ashore), injured thousands more, and completely leveled the port area. *See generally*, *e.g.*, HUGH W. STEPHENS, THE TEXAS CITY DISASTER, 1947 (1997). More recently, the allision between the containership *Jolly Nero* and the Genoa port's control tower killed port authority personnel in the tower,[7] and the capsizing of the tugboat *TCG Degirmendere* while being lowered into the sea after maintenance work at a shipyard drydock killed 10 (including two dockyard workers) and injured 17.[8]

IV. THIS CASE OFFERS AN EXCELLENT VEHICLE TO RESOLVE AN IMPORTANT QUESTION

Respondent does not dispute the importance of the question presented. Maritime workers and their employers need a clear dividing line between the Jones Act and LHWCA, the principal statutes for compensating injury victims in a particularly dangerous industry. *See* Pet. 24-25; Maritime Lawyers Br. 7-13; Law Professors Br. 3-7, 9-19. The issue is also important for the judicial system, which must decide which statute applies — an issue largely irrelevant to the underlying merits. *See* Maritime Lawyers Br. 13-14.

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[7] *See* Tom Kington, *Ship hits port tower in Italy; 7 die*, L.A. TIMES, May 9, 2013, at A8.

[8] http://uk.reuters.com/article/2013/12/23/uk-turkey-ship-idUKBRE9BM0N220131223?feedType=RSS&feedName=worldNews.

Apart from its erroneous contention that this case fails to raise the question presented, respondent's secondary objections (at 29-30) are both red herrings. Mr. Dize is a typical maritime worker, much like countless others who spend part of their time on the open sea and also work in support of their vessels dockside or ashore. His job title "was a name-only title that held little or no managerial authority." E205. He accordingly remained a member of the Seafarers International Union throughout his career, *see* Pet. 9, which would have been impossible if he had held a true managerial job. In any event, seaman status turns on "actual duties," not "job title." *Papai*, 520 U.S. at 558 (citing cases); *see also Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 88-89 (1991) (holding that a worker can qualify for Jones Act seaman status even if his job title is expressly covered by LHWCA).

The status under the Jones Act of Mr. Dize's passengers — the Chesapeake Bay pilots— is also irrelevant to his seaman status. Although lower courts have held that pilots are not "seamen" (*see* Opp. 29), the rationale has nothing to do with the nature of their work. Because each assignment involves a new vessel, they lack a sufficient connection with any particular vessel (or fleet of vessels) to satisfy the 30% threshold. Mr. Dize, in contrast, worked in the service of only the launches in respondent's fleet.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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