No. 13-1268

In The Supreme Court of the United States

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

Petitioner,

v.

ASSOCIATION OF MARYLAND PILOTS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF OF MARITIME LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF MARITIME LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Amici Curiae respectfully submit this brief in support of Petitioner Jennifer Evans Dize pursuant to Rule 37.3.[1] *Amici* urge the Court to grant certiorari.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The *Amici* are scholars who teach, practice, and publish scholarly work in the field of admiralty and maritime law.

SUMMARY OF THE ARGUMENT

"Seaman's status" is a mixed question of law and fact. However, the incorrect result below is not simply due to a failure to correctly apply the facts to the law, but rather to a misinterpretation of the law as set forth in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995).

[1] No counsel or party made a monetary contribution to fund preparation or submission of this brief, nor was any portion of the brief authored by counsel for any party to this litigation. This brief is entirely the work of the Maritime Law Professors named herein. The printing of the brief was paid for by the Logistics and Transportation LL.M. Program at Florida Coastal School of Law. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amici*'s intention to file this brief and all parties have consented to the filing of this brief.

Inconsistent interpretation of *Chandris* can have substantial effects on the maritime industry. Because maritime employers are subjected to personal liability if they fail to secure compensation under the Longshore and Harbor Workers' Compensation Act (hereinafter "the LHWCA"), inaccurately predicting which way a court may decide can cause a substantial personal loss to the President, Secretary, or Treasurer of a maritime employer.

These inconsistent results can be redressed by a clarification of the duration requirement in *Chandris*. Therefore the undersigned maritime law professors request that the Court grant *certiorari*.

ARGUMENT

I. THE LOWER COURTS ARE DIVIDED ON HOW TO APPLY THE "DURATION REQUIREMENT" FROM *CHANDRIS, INC. V. LATSIS*.

"Seaman's status" is a mixed question of law and fact. However, the incorrect result in the case below is not simply due to a failure to correctly apply the law to the facts, but rather to a misinterpretation of the law as set forth in *Chandris*. The *Chandris* benchmark, and how to apply it to workers who have duties which are accomplished at sea and ashore, is a difficult concept. As a result, judges, whose cases run the full gamut from criminal to civil, statutory to administrative, are bound to have difficulties construing the

line between seamen and maritime workers. To the courts, these difficulties have one level of importance. To maritime employers, the degree of importance is substantially greater.

Under Section 38 of the LHWCA,[2] the President, Secretary, and Treasurer of an employer which fails to buy LHWCA coverage is personally liable to an injured maritime worker for medical expenses and workers' compensation. This is called "the §5(a) problem" because the duty to "secure compensation" arises under Section 5(a) of the Act.[3] Consequently, maritime employers maintain great personal interest in having a clear demarcation between employees who are "seamen" under the Jones Act and employees who are "maritime workers" under the LHWCA. If they guess wrong, and fail to accurately predict how a court in a given jurisdiction may rule, they can be subjected to crippling personal financial exposure.

Today, the law regarding "seaman's status" is in a state of uncertainty. Employees who have been traditionally thought to be seamen are being classified by the courts as "seamen" in some jurisdictions and as "maritime workers" in others. In order to avoid the §5(a) problem, a maritime employer has to procure double insurance coverage for each employee who might be classified as a "seaman" or as a "maritime worker" in order to avoid personal liability. This is

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[2] 33 U.S.C. §938 (2012).

[3] 33 U.S.C. §905(a) (2012).

because coverage under the Jones Act, 46 U.S.C. §30104, and coverage under the LHWCA are two separate insurance policies that are rated differently by insurers.

The liability exposure of maritime employers for "seamen" under the Jones Act is covered by a species of insurance known as "protection and indemnity" insurance. Protection and indemnity insurance is rated per vessel, and the crew liability portion is not based upon the number of hours spent as a "seamen" but rather on the number of seamen required to operate the vessel. Hence, within certain geographical limits, a vessel owner pays the same premium if the vessel and its three crewmembers sit alongside the dock as it does if the vessel and its three crewmembers are constantly at sea.

An employer's liability for injury to "maritime workers" under the LHWCA is covered under a workers' compensation policy. To further complicate matters, workers' compensation policies are rated separately for coverage under the LHWCA and state workers' compensation programs. Because federal LHWCA is substantially more expensive than state workers' compensation, maritime employers have an incentive to classify shoreside work as non-maritime to take advantage of the lower rates.[4]

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[4] Federal LHWCA rates are 170% of the comparable state workers' compensation rates. The difference in benefits accounts for 161% of the rate, the remaining 9% being attributable to

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The goal of clearly defining who is a "seaman" and who is a "maritime worker" is important so that employees do not walk into and out of "seaman's status" depending on what jurisdiction they happen to reside in. For that reason alone, clarification of the "duration standard" under *Chandris* is warranted.

Employers who inaccurately predict whether their employees will be considered to be seamen or maritime workers by the courts run a substantial risk. Under Section 5(a) of the LHWCA, the failure to "secure compensation" under the Act carries with it severe penalties.

Section 5(a) of the LHWCA has a number of objectives. First, it provides a maritime employer which "secures compensation" for its employees with immunity from suit for its own acts of negligence. The term "secure compensation" is a term of art which means that the employer either purchases insurance through a licensed insurer, or it becomes a registered self-insurer with the United States Department of Labor.[5] Simply "paying compensation"

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higher claims expenses. See *Michigan Workers' Compensation and Employer Liability*, http://www.caom.com/rates/facility/2014/2014%20Misc%20Pg%20correction.pdf (last accessed May 15, 2014). The source compares federal rates with Michigan workers' compensation rates.

[5] There are approximately 300 registered self-insured employers under the LHWCA. However, many of them are not typical maritime employers. The atypical maritime employers include Yale University, USC, NYU, Cornell, and Colorado State

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when an employee is injured is not "securing compensation" under the LHWCA. The Act was designed to prevent maritime employers from "going bare" unless they had adequate assets to pay for catastrophic injuries, not just minor injuries.

An employer which fails to "secure compensation" can be placed in severe financial difficulty under Section 5(a). It has no immunity from suits in tort because it has failed to provide the "consideration" or the *quid pro quo* to the worker by "securing compensation." That is the exchange: the employer "secures compensation" and the worker forfeits the right to sue in tort.

The injured worker, on the other hand, has a choice of remedies when a maritime employer fails to buy workers' compensation insurance or fails to become a registered self-insurer. These remedies include the following: suing the employer for the cost of the medical care and the compensation which the insurer would have provided, along with legal fees and costs; suing the employer in tort, as if the employee was not employed by the employer; suing the general contractor if the employer was a subcontractor; and even piercing the corporate veil to sue personally some of the officers and directors of the company.[6] Further, the employer has virtually no

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University. U.S. Department of Labor, http://www.dol.gov/owcp/dlhwc/lscarrier.htm.

[6] 33 U.S.C. §938 states that the " . . . president, secretary, and treasurer shall be severally personally liable, jointly with

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defenses,[7] including the defense of contributory negligence.

To illustrate the conflict between the Circuits, one can compare the decisions of the Fifth Circuit in *Naquin v. Elevating Boats, Inc.*[8] and the Eleventh Circuit in *Clark v. American Marine & Salvage*.[9] Naquin was a vessel repair supervisor on a fleet of lift-boats which he worked on while the boats were moored, jacked-up, or docked. His time expended working on the lift boats was found to be of a seafaring nature and was attributed to the duration of his service as a "seaman." Clark did similar work. He repaired work barges which were "on land, or. . . . tethered to a work base." However, Clark's time expended in repairing the barges was found to be "not of a seafaring nature" and hence did not contribute to the duration requirement.

What makes the corresponding cases so notable is that the Eleventh Circuit used to be part of the

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such corporation, for any compensation or other benefit which may accrue under the said Act in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required by section 32 of this Act." [33 U.S.C. §932].

[7] 33 U.S.C. §905(a) provides that " . . . In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee."

[8] 744 F.3d 927 (5th Cir. 2014).

[9] 494 F. Appx. 32, 34 (11th Cir. 2012) (per curiam).

Fifth Circuit, and the two courts have traditionally followed each other in their reasoning and precedents.[10] However, on this issue they are in conflict. If two courts, whose jurisprudence is so closely connected, can reach diametrically opposite conclusions, then the law regarding the *Chandris* duration requirement must need clarification.

II. THIS ISSUE PRESENTED IS AN IMPORTANT AND RECURRING ONE. UNDER THE LONGSHORE ACT, INACCURATELY CLASSIFYING EMPLOYEES CAN RESULT IN PERSONAL LIABILITY TO CORPORATE OFFICERS.

History and Purpose of the LHWCA

In the early 1900s a number of states began applying state workers' compensation statutes to longshoremen injured while loading and discharging ships. This Court struck down these attempts.[11] The reasoning was that because workers' compensation was a program that assigned liability to an employer without fault, it was contrary to the general maritime law. Hence each time a state attempted to apply state workers' compensation laws to maritime workers, or to interpret the Savings to Suitors Clause[12] to permit

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[10] *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[11] *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (striking down a NY workers' compensation law as applied to a longshoreman).

[12] 28 U.S.C. §1333.

such state-created statutory remedies, it was stricken down by the Court.[13]

In 1927 Congress passed the Longshore and Harbor Workers' Compensation Act to address this situation. It was intended to provide a schedule of compensation to land-based maritime workers who were injured in the maritime industry, but who were not "a master or member of a crew of any vessel."[14] It was intended to work in tandem with the Jones Act. The Jones Act was supposed to provide tort remedies to sea-based maritime workers and the LHWCA was supposed to provide workers' compensation to land-based maritime employees.[15]

The problem here becomes where to draw the line between the "master or member of a crew of any vessel" and "maritime workers." Drawing this line so that the same result is identical in different

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[13] *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) (striking down a federal law that expanded the Savings to Suitors Clause to preserve to claimants the rights and remedies of workers' compensation laws of any state); *State Indus. Comm. of State of N.Y. v. Nordensholt Corp.*, 259 U.S. 263 (1922); *T. Smith & Son v. Taylor*, 276 U.S. 179 (1928).

[14] 33 U.S.C. §902(3)(G) (2012).

[15] The LHWCA was amended in 1972 to extend coverage to more workers by broadening the definition of the phrase "navigable waters of the United States" to include adjoining areas such as piers, dry docks, wharfs, and terminals. This didn't affect the line between seamen and maritime workers but did affect the line between federal LHWCA workers and state workers' compensation workers. See *Northeast Marine Terminal v. Caputo*, 432 U.S. 249 (1977).

jurisdictions is vital to numerous types of vessel operators, including operators of pilot boats, salvage vessels, fireboats, and other craft which are subject to long periods of inactivity but which can be called into service at a moment's notice.

Pilot Boats

The most dangerous part of a harbor pilot's job occurs from the moment the pilot steps from a moving pilot launch onto the rope ladder hanging over the side of a moving ship at sea, to the moment when the pilot steps from the ladder onto the deck of the vessel. If a pilot is going to be seriously injured on the job, that is when it is going to happen.[16]

Understanding the skill that is required of the launch operator, and the primary duty for which the launch operator is hired, will assist the Court in understanding why the launch operator is considered, among those employed in the maritime industry, to be a seaman. The fact that the majority of the launch operator's time is spent either ashore or alongside a stationary pilot boat doesn't confuse those who are employed in the industry, most of whom are surprised that the lawyers employed by the protection and

[16] "Pilots say getting on and off ships is the most dangerous part of their job." Reistrup, *View from the Bridge*, Chesapeake Bay Magazine (2013), http://www.chesapeakeboating.net/Media/Feature-Stories/View-from-the-Bridge.aspx (last accessed May 14, 2014).

indemnity insurer for the Maryland Pilot's Association would argue, and the Maryland Court of Appeals would accept, that a pilot launch operator is not a seaman. The goal of the case is to assist the courts in harmonizing the ordinary understanding of the maritime industry with the legal theories applied by courts in differentiating between seamen and shoreside maritime workers.

No matter how skilled a person may be at duties such as "running the office at [the Association's Pilot Transfer Station (PTS)]" or " enforcing Association policies and work rules, dealing with local vendors, [and] managing the shop,"[17] if a launch operator is not highly skilled in putting pilots aboard, and taking them from moving ships, that person will never be considered for the position of launch operator. While the actual number of minutes or hours spent operating a launch, by boarding or disembarking pilots, may be few, the nature of the position demands expertise during that brief period of time, and launch operators are subjected to the hazards of the sea.

Launch operators operate their vessels in heavily trafficked sea lanes, in darkness and daylight, in calm seas and storms, and in the dead of winter as well as the balmy days of summer. Some pilot associations, such as those in Maryland and Delaware, operate from shoreside Pilot Transfer Stations while

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[17] *Dize v. Association of Maryland Pilots*, 435 Md. 150, 2013 AMC 2576 (2013).

others such as in New York and New Jersey, operate from offshore pilot boats which spend their existence near the Ambrose Pilot Station over twenty miles from shore.[18] Regardless of whether the base of operations is ashore or at an offshore pilot station, launch operators perform their primary function at sea. Any additional work is assigned to fill the time between boarding assignments.

Ships arrive and depart from our nation's harbors twenty-four hours a day, 365 days each year, and therefore the launch captain (a/k/a the "operator") and the crewmen work 24 hours a day, week on and week off. Their schedules are designed to render them available for sea duty on a moment's notice. Certainly during a portion of their working hours they sleep, eat, and bathe, but all of those activities are accomplished in support of their ability to be ready at a moment's notice to fulfill their primary function of safely putting pilots aboard ships.

Putting pilots aboard ships is not a casual occupation. In order to place a pilot aboard a ship, the launch operator must come up alongside the moving ship, matching the speed of the launch to the speed of the ship. The operator must stabilize the launch after it crosses the wake of the ship, so that it is not excessively rocking from side-to-side as the pilot attempts

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[18] "*Four Injured After New York Pilot Boat Collides With Cargo Ship*," g*Captain* (March 19, 2014), http://gcaptain.com/four-injured-as-new-york-pilot-boat-collides-with-cargo-ship/ (last accessed May 14, 2014).

to step from the launch to the ladder. The operator must accurately judge the suction from the moving ship so that the launch does not slam against the ship's side. The operator must accurately judge the height and period of the sea swell so that the launch does not come up against the rope ladder at the crest of a wave, pinch the ladder, and then fall into the trough of a wave, ripping the ladder from the ship in the process, or crushing its lower rungs.[19] The launch must stay safely beneath the pilot as the pilot ascends the ladder, a perilous climb of over sixty feet on an oil tanker or bulk cargo ship, so that should the pilot fall, the launch will catch the pilot and prevent the pilot from being sucked into the ship's props and killed. All of this happens in reverse order when a pilot on an outbound ship is taken off of a ship and returned to the shore.

Who would entrust their life to a launch operator who was hired because he or she excelled at "supervising the housekeeping crew"?[20] Pilot launch operators are not the only seamen whose duties make their service ashore subsidiary to their skill in operating a vessel.

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[19] "[T]he process of meeting up with a big ship in rough weather and clambering up the ladder can be scary, particularly off Cape Henry, where ships show up year round in all kinds of weather. 'It's a controlled crash; that's really what it is.'" *View from the Bridge, supra* note 16.

[20] *Dize, supra* note 17.

Cable Repair Vessels

There are over 30 cableships worldwide.[21] While cableships are designed to lay undersea telephone cables, the majority of them spend their time in port on cable repair duty. What is "cable repair duty"? It is "stand-by" duty, awaiting a break in an undersea fiber-optic or, less frequently, copper conductor cable.[22]

Because undersea telephone cables carry the vast majority of worldwide telephone and internet traffic, a break or interruption in undersea telephone service can cost the operators millions of dollars an hour in lost revenue as cable traffic must be re-routed to other cables. Because of the potential for lost revenue, ships on cable repair duty remain fully crewed, and operational at all times, even though they are alongside the dock, awaiting a call to go to sea and repair a damaged or defective cable.[23]

An analysis of the time spent by the officers and crew of a cableship would reveal that over the course of a year, unless the ship is involved in cable-laying duty, substantially less than 30% of their time is actually spent "exposed to the perils of the sea."

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[21] *Cableships of the World*, http://www.iscpc.org/information/Cableships_1.htm (last accessed May 14, 2014).

[22] *C.S. Longlines*, AT&T Archives, http://techchannel.att.com/play-video.cfm/2011/3/21/AT&T-Archives-CS-Longlines (last accessed May 14, 2014).

[23] Cable breaks can be caused by fishing trawlers, anchored vessels, or even sharks and other marine life, *C.S. Longlines, supra*, note 22 (last accessed May 15, 2014).

Nevertheless neither the cableship operators, the unions employing the officers and crew, nor their fellow mariners would think to dispute that they are "seamen" as that term is used in the maritime industry.

Declaring that as a matter of law "time spent in other tasks on land, even if those activities are activities traditionally performed by seamen or are activities that contribute to the navigational operation of the vessel, do not contribute to this purpose . . . " and that " . . . the duration requirement must be measured in terms of the time actually spent aboard vessels in navigation . . . "[24] would lead to some strange results. One strange result would be that the only way to become a captain or chief engineer aboard a cableship would be to never serve on one. It would only be in service to ships which were not involved in the cable repair industry that a prospective captain could assemble enough sea time to raise their license.[25] Consequently, the most senior officers on a cableship would need to get their experience on oil tankers, containerships, and other vessels which spend their time at sea, and not on cableships.

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[24] *Dize v. Association of Maryland Pilots*, 2010 AMC 880 (Md. Cir. Ct. 2010).

[25] See generally 46 C.F.R. Part 11 entitled Requirements for Officer Endorsements. Ship's officers who serve on vessels which do not get underway, or which infrequently get underway, continue to be credited with sea service by the United States Coast Guard toward raising of their licenses. See in particular, Sea Service, 46 C.F.R. §10.232(e).

Shuttle Retrieval Vessels

From 1972 through 2011 NASA operated the Space Transportation System (STS), commonly known as the Space Shuttle Program. In support of the program, NASA, through government contractors including Morton-Thiokol, Boeing, Lockheed-Martin and United Space Alliance, operated shuttle retrieval vessels which included the *MV Liberty Star*[26] and *MV Freedom Star*.[27] These vessels supported the Space Flight Operations conducted during the development of the space shuttles, and the International Space Station when the space shuttles were being used to support the operation of the space station.

The primary activity of the shuttle retrieval vessels was to recover the solid rocket boosters after a launch so that they could be reused in future launches. They occasionally served other functions, such as towing the space shuttle external fuel tanks from their assembly plant in New Orleans to the Vehicle Assembly Building at the Kennedy Space Center in Florida, and recovering the pieces from the failed mission of the Space Shuttle Challenger. However, the vessels spent most of their time docked alongside

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[26] The *MV Liberty Star* is now operated by the U.S. Merchant Marine Academy at Kings Point and has been renamed the *TV (training vessel) Kings Pointer*, http://en.wikipedia.org/wiki/MV_Liberty_Star (last accessed May 14, 2014).

[27] *MV Freedom Star*, http://en.wikipedia.org/wiki/MV_Freedom_Star (last accessed May 14, 2014).

each other next to the Solid Rocket Booster processing facility at the Cape Canaveral Air Force Station in Florida.[28] Nevertheless, they maintained a crew of ten crewmembers and nine retrieval specialists, which included divers.[29] Consequently, while persons assigned to the vessel did not frequently go to sea, most in the maritime industry would consider them to be seamen even though the "time actually spent aboard vessels in navigation" fell well below the 30% benchmark.

Salvage Vessels and Fireboats

While fireboats and salvage vessels have distinctly different functions, one to extinguish fires on behalf of local governments and the other to rescue vessels in marine peril on behalf of for-profit private operators, they share some common features, including the fact that they remain fully crewed even though they seldom put to sea.[30]

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[28] *NASA Recovery Ship*, http://en.wikipedia.org/wiki/NASA_recovery_ship (last accessed May 14, 2014).

[29] *MV Liberty Star*, http://en.wikipedia.org/wiki/MV_Liberty_Star (last accessed May 14, 2014).

[30] Other vessels which remain fully crewed but which get underway infrequently are those of the San Diego Maritime Museum. It has over six vessels, each of which are crewed by licensed officers and seamen who rotate between the vessels, and are assigned shore duties when the vessels are not at sea. Those vessels include the *SV Surprise* from the movie Master and Commander, the *SV Star of India* (1863), the *SV San Salvador* (replica of 1542 Spanish galleon). The vessels serve an

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No one ashore would dispute that firefighters remain firefighters even though they may spend the majority of their time sleeping, working out, and maintaining their equipment. They nevertheless remain ready to be the first-responders in the case of a building fire or explosion, and hence are firefighters even if they seldom respond to fires. The same could be said of firefighters who serve on fire boats. Ship fires are rare events, but when they occur, the potential for oil pollution, blockage of navigational channels, and loss of life is substantial. It would be an odd turn of events if the crew aboard a fireboat were not considered to be seamen merely because modern vessel construction codes and safety equipment made shipboard fires rare events.

The same is true for salvage vessels. Small vessel salvors maintain a radio watch, and are prepared to get underway on a moment's notice to save property, something the U.S. Coast Guard will not do.[31] When they are exposed to the perils of the sea, they are frequently at greater personal risk than the average deep sea crew member, but the duration of their sea service is small because the frequency of salvage

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educational function, even though they remain alongside the dock for much of the time.

[31] Coast Guard Authorization Act of 1982, Pub.L. No. 97-322 §113, 96 Stat. 1581 (1982); 14 U.S.C. §88 (2012), note entitled *Coast Guard Policies and Procedures for Towing and Salvage of Disabled Vessels for Minimization of Coast Guard Competition or Interference with Commercial Enterprise*.

situations is similarly small. Nevertheless, most persons in the maritime industry would classify both salvors and fireboat operators as seamen, and not as maritime workers.

III. CLARIFICATION OF THE "DURATION REQUIREMENT" WILL LEAD TO MORE CONSISTENT RESULTS.

The *Chandris* benchmark currently fails to take into account a number of factors which assist the maritime industry in drawing a line between "seaman" and "maritime worker." Some of those factors include whether the employee's primary duty involves the operation of a vessel in navigation, whether the employee's primary duty requires the employee to have a United States Coast Guard license, and whether the employee's shore-based functions are assigned to simply fill the time between when the employee engages in vessel operations.

A strict comparison of hours spent in different activities is too blunt a tool to accomplish the task of making a clear demarcation between the classification of an employee as a "seaman" or a "maritime worker." The Court should clarify the matter for the guidance of lower courts, the maritime bar, and the maritime industry.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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