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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The petition purports to present the following question: "When applying the *Chandris* 30-percent rule, may a court consider the time a maritime worker spends in the service of a vessel in navigation that is moored, dockside, or ashore, * * * or must a court categorically exclude such time * * * ?" Pet. i.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, the Association of Maryland Pilots states that it is an unincorporated association organized and existing under the laws of the State of Maryland, that it has no parent, and that no publicly held corporation has an ownership interest in it.

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BRIEF IN OPPOSITION

INTRODUCTION

In *Chandris, Inc.* v. *Latsis*, 515 U.S. 347 (1995), this Court held that, to qualify as a "seaman" under the Jones Act, an employee "must have a connection to a vessel in navigation (or an identifiable group of such vessels) that is substantial in terms of both its *duration* and its *nature*." *Id.* at 368 (emphasis added). With respect to the "duration" element of that requirement, the Court endorsed "an appropriate rule of thumb": "A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." *Id.* at 371. Such a worker is not "regularly expose[d] * * * to the perils of the sea"; is "land-based," not "sea-based"; and has "only a transitory

or sporadic connection to a vessel in navigation." *Id.* at 368.

The petition seeks review of a single, narrow question: whether a court applying *Chandris*'s 30-percent rule of thumb "may * * * consider" time spent "in the service of a vessel in navigation that is moored, dockside, or ashore," or "must" instead "categorically exclude" such time. Pet. i. That question is not presented here. Notwithstanding the petition's assertions, see *id.* at i, 12, 13, 14, 19, 22, 25, the Court of Appeals of Maryland *rejected* a categorical rule that an "employee must spend at least 30 percent of [his] time actually at sea" to qualify as a seaman, Pet. App. 20a. It expressly recognized that "a variety of other circumstances" may count toward *Chandris*'s 30-percent threshold. *Id.* at 24a. Petitioner effectively prevailed below on the sole question actually posed by the petition: Under the decision below, courts "may * * * consider" time in service of moored, dockside, and ashore vessels in determining whether an employee is a seaman. Pet. i. Petitioner's real complaint seems to be that the decision below erred in not counting the *particular* services William Dize performed for moored, dockside, and ashore vessels. The petition does not seek review of that fact-specific determination, which does not warrant review in any event.

The petition's misreading of the decision below also permeates its claimed conflict among lower courts. The petition alleges a conflict between the decision below and an unpublished Eleventh Circuit decision, on the one hand, and decisions of the Third, Fifth, Sixth, and Ninth Circuits, on the other. But the decision below *rejected* the very Eleventh Circuit decision the petition characterizes it as having "followed." Contrast Pet. 14 (citing Pet. App. 20a) with Pet. App. 20a. And the decision below *embraced* decisions of the Fifth and Ninth Circuits (among others). Pet. App. 23a-25a. The purported divi-

sion in the circuits thus rests entirely on an unpublished decision of a single federal court of appeals—a decision that does not even bind that court—and dictum within the decision at that. That "conflict" does not warrant this Court's review.

In any event, the decision below is correct. This Court has emphasized that "Jones Act coverage is confined to seamen, those workers who face regular exposure to the perils of the sea." *Harbor Tug & Barge Co.* v. *Papai*, 520 U.S. 548, 560 (1997). The Maryland Court of Appeals faithfully applied that directive, counting toward the 30-percent threshold all duties that expose a worker to the perils of the sea, whether or not he is in transit over the water. And it properly ruled that, on the facts of this case, Mr. Dize's routine maintenance of vessels ashore did not expose him to such perils. The petition does not challenge that fact-bound conclusion. Instead, it seeks a categorical rule *requiring* courts to count *all* duties in service of a vessel, wherever and however performed. That rule would make seamen of workers who are *never* exposed to the perils of the sea, obliterating the Jones Act's "fundamental distinction between land-based and sea-based maritime employees." *Chandris*, 515 U.S. at 359.

Finally, this case is an exceptionally poor vehicle. The "question presented" is not presented here, and the petition fails to challenge the actual basis for the decision below. This Court's ability to offer meaningful guidance would thus be severely hampered. And while the petition asks whether time spent in service of a vessel that is "moored" or "dockside" may count toward seaman status, Pet. i, Mr. Dize's claim below rested on "*shoreside* support tasks," E204 (emphasis added); see also Pet.

App. 35a.[1] Accordingly, Mr. Dize's claim depends on the sort of routine, land-based "maintenance work" this Court has held to be not "substantial for seaman-status purposes." *Papai*, 520 U.S. at 559. The total circumstances here make clear that Mr. Dize was a land-based worker who only sporadically performed launch operator duties and would not qualify as a seaman under any conceivable standard.

STATEMENT

I. LEGAL FRAMEWORK

A. The Jones Act and LHWCA

Under the Jones Act, a "seaman injured in the course of employment" may bring a negligence action against his employer. 46 U.S.C. §30104. That was not always the case. Before the Act's passage in 1920, seamen could pursue two remedies under general maritime law: an action for "maintenance and cure" for injuries suffered in a ship's service, and a damages action for injuries caused by the "unseaworthiness of the ship." *Chandris*, 515 U.S. at 354. This Court had held that general maritime law barred suits for negligence. *The Osceola*, 189 U.S. 158 (1903). The Jones Act removed that bar, "thereby completing the trilogy of heightened legal protections (unavailable to other maritime workers) that seamen receive because of their exposure to the 'perils of the sea.'" *Chandris*, 515 U.S. at 354; see also David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79, 118 (1985).

1. While affording special status to seamen, the Jones Act "does not define the term 'seaman.'" *Chandris*, 515 U.S. at 355. It "therefore leaves to the courts the determination of exactly which maritime workers are

[1] "E___" citations refer to the Record Extract to the Maryland Court of Special Appeals.

entitled to admiralty's special protection." *Ibid.* This Court's early Jones Act cases construed "seaman" broadly to include even land-based maritime workers, such as longshoremen who load and unload ships' cargo. *E.g.*, *Int'l Stevedoring Co.* v. *Haverty*, 272 U.S. 50, 52 (1926); see *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 346-347 (1991). Congress, however, "repudiated the *Haverty* line of cases" in 1927, when it enacted the Longshore and Harbor Workers' Compensation Act ("LHWCA"), codified as amended, 33 U.S.C. §§ 901 *et seq.* See *Chandris*, 515 U.S. at 361.

2. The LHWCA provides "scheduled compensation" (akin to workers' compensation) as the exclusive remedy "for injury to a broad range of land-based maritime workers," excluding those workers from the Jones Act's coverage. *Chandris*, 515 U.S. at 355. The LHWCA "also explicitly excludes from *its* coverage 'a master or member of a crew of any vessel.'" *Ibid.* (emphasis added). Consequently, this Court has recognized that the Jones Act and the LHWCA are mutually exclusive compensation regimes. See *Swanson* v. *Marra Bros., Inc.*, 328 U.S. 1, 7 (1946); *Wilander*, 498 U.S. at 347; *Chandris*, 515 U.S. at 355-356; *Papai*, 520 U.S. at 553. The phrase "master or member of a crew of any vessel" in the LHWCA is a refinement of the term "seaman" in the Jones Act, and "it excludes from LHWCA coverage those properly covered under the Jones Act." *Wilander*, 498 U.S. at 347. "[I]t is odd but true that the key requirement for Jones Act coverage now appears in another statute." *Ibid.*

B. This Court's Jones Act Precedent

In three cases in the 1990s—*Wilander*, *Chandris*, and *Papai*—this Court clarified the proper scope of seaman status. Each time, the Court was careful to maintain the Jones Act's and the LHWCA's "clear distinction between

land-based and sea-based maritime workers." *Wilander*, 498 U.S. at 347.

1. *Wilander*

Wilander held that a maritime worker need not "aid in the navigation of a vessel" to be considered a seaman. 498 U.S. at 339. Rather, "[a] seaman is a mariner of any degree, who lives his life upon the sea. It is enough that what he does affects the operation and welfare of the ship when she is upon a voyage." *Id.* at 349 (quoting *Warner* v. *Goltra*, 293 U.S. 155, 157 (1934)) (quotation marks omitted). The Court concluded that seaman status should be defined "solely in terms of the employee's connection to a vessel in navigation," regardless of his role in navigating. *Wilander*, 498 U.S. at 354. "All who work at sea in the service of a ship," the Court reasoned, "face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." *Ibid.*

2. *Chandris*

Chandris refined *Wilander*'s test for seaman status. It prescribed a two-step inquiry. First, the "employee's duties must contribute to the function of the vessel or to the accomplishment of its mission." 515 U.S. at 368 (quoting *Wilander*, 498 U.S. at 355). That "contribute to the function" step, the Court stated, is a "threshold requirement" and, accordingly, "very broad": "'All who work at sea in the service of a ship' are *eligible* for seaman status." *Ibid.* (quoting *Wilander*, 498 U.S. at 354) (emphasis in original).

Second, and more importantly, "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its *duration* and its *nature*." *Chandris*, 515 U.S. at 368 (emphasis added). "The fundamental purpose of this substantial connection requirement," the Court ex-

plained, "is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Ibid.* A temporal or "duration" element is necessary, the Court explained, because a "maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are." *Id.* at 371. "The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.'" *Id.* at 370 (quoting *Seas Shipping* v. *Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting)).

To help courts apply the duration element, *Chandris* endorsed a "rule of thumb": "A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." 515 U.S. at 371. Still, the Court recognized that the seaman-status inquiry is "of necessity fact specific" and that "departure" from the 30-percent guideline may "be justified in appropriate cases." *Ibid.*

While providing guidance specific to the duration element, *Chandris* also instructed that the nature and duration elements should be "taken together." 515 U.S. at 370. "'[T]he total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon.'" *Ibid.* (quoting *Wallace* v. *Oceaneering Int'l*, 727 F.2d 427, 432 (5th Cir. 1984)).

3. *Papai*

Papai elaborated on *Chandris*'s "substantial connection" requirement. "For the substantial connection requirement to serve its purpose," the Court explained, "the inquiry into the nature of the employee's connection to the vessel must concentrate on *whether the employee's duties take him to sea.* This will give substance to the inquiry both as to the *duration* and *nature* of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees." 520 U.S. at 555 (emphasis added).

Mr. Papai had been hired to paint the housing structure on a tug, the *Pt. Barrow*, and was injured falling from a ladder. 520 U.S. at 551. That duty "did not include any seagoing activity." *Id.* at 559. Mr. Papai had also worked on the *Pt. Barrow* a few other times. *Ibid.* "Each of these engagements," however, "involved only maintenance work while the tug was docked." *Ibid.* "The nature of Papai's connection to the *Pt. Barrow* was [thus] no more substantial for seaman-status purposes by virtue of these engagements than the one during which he was injured." *Ibid.* Nor was there evidence that Mr. Papai's other work for Harbor Tug "involved work of a seagoing nature." *Id.* at 560; see also *id.* at 559 (employment contract gave "no reason to assume that any particular percentage of Papai's work would be of a seagoing nature, subjecting him to the perils of the sea"). Accordingly, he was not a Jones Act seaman as a matter of law. *Id.* at 560. "Jones Act coverage," the Court concluded, "is confined to seamen, those workers who face regular exposure to the perils of the sea." *Ibid.*[2]

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[2] This Court also commented on the Jones Act seaman-status test in *Lozman* v. *City of Riviera Beach*, 133 S. Ct. 735 (2013), which addressed whether a "floating home" qualified as a vessel. In concluding that the home was not a vessel, the Court noted that

II. PROCEEDINGS BELOW

Mr. Dize brought this Jones Act negligence action for injuries allegedly sustained while sandblasting a boat hull. The trial court, intermediate appellate court, and Maryland's highest court all agreed that Mr. Dize could not prevail, because he was not a seaman.

A. Mr. Dize's Employment

Mr. Dize was the Assistant Station Manager at the Pilot Transfer Station/Maintenance and Repair Facility (the "Facility") of respondent Association of Maryland Pilots ("Association") in Solomons, Maryland. E204. The Association's member pilots navigate commercial ships in the Chesapeake Bay. Boats called pilot launches shuttle pilots to and from the small percentage of ships transiting the Chesapeake Bay that require a mid-Bay pilot change. Pet. App. 5a.[3]

The Facility occupies 1.2 acres, including a main station building, a pilot dormitory, an engine rebuilding shop, and a travel lift, as well as docks for the launches. Mr. Dize's position entailed a variety of duties around the Facility. Mr. Dize maintained the buildings and grounds, shopped for groceries and workshop supplies, unloaded

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"[l]iability statutes such as the Jones Act recognize that sailors face the special 'perils of the sea.'" *Id.* at 744 (quoting *Chandris*, 515 U.S. at 354). It concluded that the floating home's occupant "face[d] no special sea dangers," even though his residence was moored in a slip on navigable water. *Ibid.*

[3] The petition states that the "relevant facts are undisputed." Pet. 25. That is true insofar as the facts are viewed in the light most favorable to Mr. Dize at the summary judgment stage. But there are a number of disputed facts that would be litigated in the event of a trial. For example, the petition alleges that Mr. Dize developed silicosis from exposure to free silica during a sandblasting project. Pet. 10. By contrast, respondent's expert witnesses testified that Mr. Dize suffered from the effects of a 20-plus-year history of smoking, not from silicosis. See also p. 10, n.5, *infra*.

trucks, installed rugs, painted rooms, mowed the lawn, ordered parts and supplies, cleaned the docks, maintained the Facility's forklift, and maintained the boat travel lift. E23-25, 29-31, 205; Pet. App. 6a. He also maintained and repaired the pilot launches. Pet. App. 35a. And he operated the launches from time to time, as needed. E23-25, E29-31.

While the petition characterizes operating pilot launches as Mr. Dize's "primary responsibility," Pet. 9, 14, 23, that task occupied only a small portion of his time. During the five years preceding his injury, Mr. Dize spent less than 20 percent of his work time operating launches on the water. Pet. App. 5a-6a & n.8.[4] On the other hand, he 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, including "painting; sanding; changing propellers, rotors, shafts, and rub rails; replacing zinc anodes; cleaning the boat interiors; and fueling" the launches. *Ibid.*[5]

Mr. Dize was allegedly injured in June 2007 while performing one of his many onshore maintenance duties.

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[4] While Mr. Dize was on duty 24 hours a day during his "on" weeks, both parties calculated his working hours based on a 12-hour day. See Pet. 9, E31.

[5] Mr. Dize described what he would typically do in terms of maintenance and repair of the pilot launches: "I would work, as a laborer, on all of these boats when they came in and were *drydocked*. Our longest days, over four or more hours a day, would be spent working on the boats when they *were pulled out of the water and drydocked* in the spring and the fall for Re-Fit projects. My regular maintenance duties were sanding, puttying, painting and re-gelling the boats. The most time consuming tasks was pulling off and installing rub rails on the sides of these boats, which often required the use of a forklift * * * ." E205 (emphasis added). Mr. Dize's supervisor disagreed with his time estimate, stating that Mr. Dize "spent no more than half of an hour a day on average" maintaining and repairing the launches. Pet. App. 34a.

See Pet. 10; Pet. App. 30a-31a. He was allegedly exposed to free silica while sandblasting paint from the bottom of a launch boat that had been removed from the water. See Pet. App. 31a; Pet. 10; *id.* at 2 n.1.

B. Proceedings in the Trial Court

Mr. Dize brought this Jones Act negligence action against the Association in the Circuit Court for Baltimore City in 2008. Granting the Association's motion for summary judgment, Pet. App. 49a-58a, the Circuit Court found the "dispositive question" before it to be whether *Chandris*'s 30-percent rule of thumb "applies only to time spent on the water," or also "include[s] other time spent in the performance of duties that might be viewed as seaman's duties or that contributed to the operation of vessels." Pet. App. 53a. Observing that the "purpose of the duration requirement is to ensure that the individual's service regularly exposes him to the perils of the sea," the court concluded that the 30-percent threshold should be "limited to time spent on the water." *Id.* at 54a, 55a. Because "[t]here is no dispute" that Mr. Dize's time "on the vessel * * * falls well short of 30%," the trial court held that he failed the Jones Act's substantial duration requirement. *Id.* at 53a.

The Circuit Court recognized *Chandris*'s statement that "'departure from'" the 30-percent rule of thumb "'will certainly be justified in appropriate cases.'" Pet. App. 51a (quoting *Chandris*, 515 U.S. at 371). The court concluded, however, that Mr. Dize had not shown "why the threshold is not [an] appropriate tool under the facts of th[is] case." *Ibid.*

C. The Decision of the Maryland Court of Special Appeals

The Court of Special Appeals, Maryland's intermediate appellate court, affirmed. Pet. App. 29a-48a. Noting that the trial court had "looked to all of Mr. Dize's activi-

ties," the Court of Special Appeals concluded that the court had "properly focused on the activities he performed on board a vessel that actively subjected Mr. Dize to 'the perils of the sea.'" *Id.* at 47a. Because there was "no dispute that Mr. Dize's time aboard a pilot launch was less than 30% of his time," the court agreed that he was not a seaman. *Ibid.* The court also rejected Mr. Dize's argument that "the court would be justified in departing from the [30-percent] rule given the circumstances of his employment," as "Mr. Dize ha[d] not given any persuasive reason why the 30% rule should be rejected here." *Ibid.*

D. The Decision of the Maryland Court of Appeals

Maryland's highest appellate court, the Court of Appeals, accepted Mr. Dize's petition for review. After carefully surveying this Court's precedents, it unanimously affirmed. Pet. App. 1a-28a.

1. The Court of Appeals recognized the parties' agreement that Mr. Dize "contributed to the function of a vessel" and therefore satisfied *Chandris*'s first requirement. Pet. App. 16a. It also recognized their agreement that the vessels—the pilot launches—were "in navigation." *Ibid.* Accordingly, "the only issue [wa]s whether Mr. Dize's position had a connection to those vessels that was substantial in both duration and nature." *Ibid.*

The Court of Appeals noted *Papai*'s statement that the substantial-connection inquiry must "'concentrate on whether the employee's duties take him to sea.'" Pet. App. 20a (quoting 520 U.S. at 555). The court recognized that one might therefore "requir[e], as the Circuit Court held, that the employee must spend at least 30 percent of the employee's time actually at sea." *Ibid.* It concluded, however, that that categorical approach is "somewhat at odds" with *Chandris* and other courts' analysis of the substantial connection requirement. *Ibid.*

The Court of Appeals instead "focused on whether the employee's duties are 'sea-based' activities"—*i.e.*, activities "that regularly expose the worker to seagoing perils." Pet. App. 24a. But, the court cautioned, "*[t]his is not to say that only time aboard a ship in transit over the water counts.* There may be a variety of other circumstances that involve sea-based duties that expose a worker to the 'perils of the sea.'" *Ibid.* (emphasis added). The court believed that this approach, though "not as bright a line as that drawn by the Circuit Court, serves the purpose of the statute with the degree of flexibility that the Supreme Court's decisions permit." *Id.* at 25a.

2. Applying that analysis to the facts, the Court of Appeals held that Mr. Dize could not satisfy *Chandris*'s 30-percent rule of thumb. It assumed without deciding that the 20 percent of Mr. Dize's time spent piloting launches should count. Pet. App. 25a. But it found in the case law a "widely shared conclusion" that repairs and inspections of dockside vessels generally do not expose workers to the perils of the sea. *Ibid.* This Court, for example, held in *Papai* that "maintenance work and painting aboard a docked tugboat were not 'substantial for seaman-status purposes.'" *Ibid.* (quoting 520 U.S. at 559). Considering the particular duties Mr. Dize performed maintaining docked and onshore vessels, the Court of Appeals ruled that "[t]his work plainly did not subject Mr. Dize to the perils of the sea, and therefore did not comprise sea-based activities that should have been counted in the * * * duration analysis." *Id.* at 27a.

REASONS FOR DENYING THE PETITION

The petition purports to present the question whether the court below erred by "categorically exclud[ing]" time spent servicing a vessel "that is moored, dockside, or ashore" when determining whether a worker meets *Chandris*'s 30-percent rule of thumb for establishing

seaman status. But the court below did not adopt a categorical rule. The purported circuit split is far from genuine. And this case is a singularly poor vehicle for providing lower courts with guidance.

I. This Case Does Not Raise The Question Presented

Petitioner asks this Court to resolve a single, narrow question: When applying *Chandris*'s 30-percent rule of thumb, "may a court consider" time spent in service of a vessel that is moored, dockside, or ashore, or "must a court categorically exclude" that time? Pet. i. The petition accuses the Maryland Court of Appeals of having chosen the latter course, repeatedly urging that the decision below "categorically exclud[ed]" any time spent in service of vessels that are moored, dockside, or ashore. See Pet. i, 12, 13, 14, 19, 22, 25.

On the contrary, the decision below explicitly *rejected* a categorical approach. See Pet. App. 20a, 24a-25a. While focusing on whether a worker's duties were "sea-based," the Court of Appeals emphatically disclaimed the bright-line rule petitioner attributes to it: "*This is not to say that only time aboard a ship in transit over the water counts*. There may be a variety of *other* circumstances that involve sea-based duties that expose a worker to the 'perils of the sea.'" *Id.* at 24a (emphasis added). Emphasizing that point, the Court of Appeals cited with approval a number of cases that credited activities involving docked and moored vessels. See *id.* at 24a-25a.

Indeed, the Court of Appeals expressly rejected the trial court's categorical holding that only "time spent on the water," Pet. App. 54a, should count. The Court of Appeals acknowledged the "great appeal" of a "straightforward rule that is easy to apply," but ultimately declined to follow that approach because it appeared "somewhat at odds" with this Court's precedent. *Id.* at

20a. The Court of Appeals thus applied a sea-based duties analysis that does not draw "as bright a line as that drawn by the Circuit Court," but rather "serves the purpose of the statute with the degree of flexibility the Supreme Court's decisions permit." *Id.* at 25a. The petition ignores all of that.

The petition similarly errs in describing the Court of Appeals' treatment of *Clark* v. *American Marine & Salvage, LLC*, 494 F. App'x 32 (11th Cir. 2012) (per curiam). The petition states that "the court below followed" *Clark* in adopting a categorical rule. Pet. 14 (citing Pet. App. 20a); see also Pet. 12 (decision below "rejected [other] decisions in favor of the position taken by * * * *Clark*") (citing Pet. App. 20a). In fact, the decision below *expressly rejected* the approach taken in *Clark*, finding it "at odds with the discussion of the 'in navigation' requirement in *Chandris* and other courts' analysis of the 'substantial nature' determination under [*Papai*]." Pet. App. 20a.

The petition thus rests on a fundamental misunderstanding of the decision below. That decision did not adopt the "categorical[ ]" rule petitioner attacks, but rather *agreed* with petitioner (and other courts) that it "may * * * consider" time spent in service of moored, docked, and ashore vessels. Pet. i. The sole "question presented" is *not* presented by this case.

Petitioner's actual complaint seems to be that the decision below erred in not counting the *particular* services Mr. Dize performed for moored, dockside, and ashore vessels that did not expose him to the "perils of the sea." The petition, however, does not seek review of that fact-specific determination. See Pet. i. Moreover, an alleged "misapplication of a properly stated rule of law" is not an appropriate subject of this Court's review. Sup. Ct. R. 10. The petition should be denied on that basis alone.

II. THE PETITION'S ALLEGED CONFLICT IS NON-EXISTENT

For similar reasons, petitioner's claim of a circuit conflict fails. The petition alleges that the decision below and an unpublished decision of the Eleventh Circuit "categorically exclude" time in service of moored, docked, and ashore vessels, in conflict with decisions of the Third, Fifth, Sixth, and Ninth Circuits, which purportedly do not. Pet. i, 13. As already explained, see pp. 14-15, *supra*, the decision below did not adopt the categorical rule petitioner asserts. It thus does not conflict, but rather agrees, with courts holding that a court may consider time spent in service of vessels that are moored, dockside, or ashore when applying *Chandris*'s 30-percent rule and, indeed, cites many of them with approval. The claimed conflict thus reduces to an alleged inconsistency between dictum in an unpublished Eleventh Circuit decision and the approach followed by other circuits (as well as the decision below). There is no conflict warranting this Court's review.

A. The Lower Courts Are Not in Conflict

In attempting to create the appearance of a circuit conflict, the petition walks through a handful of cases to show that workers have been afforded seaman status in some cases but not in others. Those different results stem not from any fundamental disagreement about how to apply *Chandris*'s 30-percent rule, but from the unremarkable reality that "many cases turn on their specific facts." *Papai*, 520 U.S. at 550.

1. The Third Circuit

Petitioner's alleged conflict begins with *Shade* v. *Great Lakes Dredge & Dock Co.*, 154 F.3d 143 (3d Cir. 1998). But *Shade* did not address what activities should be "include[d] in the 30-percent calculation" when applying *Chandris*'s substantial connection requirement. Pet. 15.

It had no reason to. The worker there presented evidence that he "was on the water 90% of the time" during the project where he was injured, 154 F.3d at 146, which would satisfy *Chandris*'s duration element under any conceivable standard.[6] The language the petition plucks from *Shade* addressed a different question: whether the worker's duties "contributed to the function of a vessel"—*Chandris*'s first, threshold requirement—even though he was on shore when he was injured. *Id.* at 150. In that context, the Third Circuit remarked that "even Shade's duties on the beach were not unrelated to the work of a vessel in navigation; instead they contributed to the purpose of the dredging operation," which was moving sand to the beach. *Ibid.*

Shade is thus wholly consistent with the ruling below. It is undisputed that Mr. Dize, like Mr. Shade, satisfied *Chandris*'s first requirement. His duties contributed to the function of a vessel. Pet. App. 16a; see also *Chandris*, 515 U.S. at 368 ("threshold requirement" that worker contribute to function of a vessel is "very broad"). However, the fact that a worker who spent 90 percent of his time "on the water" satisfied *Chandris*'s duration element has no bearing on what onshore duties count when deciding whether an employee who spent less than 20 percent of his time on the water should qualify as a seaman.

The other Third Circuit decisions petitioner invokes, *Kuhlman* v. *W. & A. Fletcher Co.*, 20 F.2d 465 (3d Cir.

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[6] *Shade*'s only discussion of *Chandris*'s duration element held that the inquiry must focus on the worker's assignment at the time of injury (*i.e.*, the entire dredging operation) and that it was improper to admit evidence concerning unrelated employment on other projects. 154 F.3d at 154. The court did not address which activities during the relevant period should count toward the duration element.

1927), and *Rogosich* v. *Union Dry Dock & Repair Co.*, 67 F.2d 377 (3d Cir. 1933), are less relevant still. See Pet. 16. *Kuhlman* deemed a carpenter to be a seaman based on *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50 (1926), where this Court construed the Jones Act to cover land-based maritime workers. See *Kuhlman*, 20 F.2d at 468 (citing *Haverty*).[7] The adoption of the LHWCA in 1927, however, "undercut the Court's reasoning in the *Haverty* line of cases," as the LHWCA "emphasize[d] that land-based maritime workers should not be entitled to the seamen's traditional remedies." *Chandris*, 515 U.S. at 359; see *id.* at 361 ("LHWCA repudiated the *Haverty* line of cases"); *Wilander*, 498 U.S. at 348 ("LHWCA overrules *Haverty*"); p. 5, *supra*. Petitioner's alleged conflict thus relies on authority repudiated nearly 80 years ago.

2. The Fifth Circuit

The alleged conflict between the decision below and *In re Endeavor Marine Inc.*, 234 F.3d 287 (5th Cir. 2000) (per curiam), as well as *Naquin* v. *Elevating Boats, LLC*, 744 F.3d 927 (5th Cir. 2014), see Pet. 16-17, is similarly unsupported. The decision below cited *Endeavor Marine* with *approval* as an illustration of the sort of "sea-based duties," other than "time aboard a ship in transit over the water," that can "expose a worker to the 'perils of the sea'" and therefore "count for the purposes of the duration analysis." Pet. App. 24a. The worker in *Endeavor Marine* "spent almost all of the prior eighteen months on" a derrick barge and was injured when a cable snapped and struck him. 234 F.3d at 289, 292. In affording him seaman status, the Fifth Circuit applied the same test as the decision below: a worker is a seaman if his "connection to the vessel regularly expose[d] him to the perils of the sea," even if it "d[id] not literally carry him

[7] *Rogosich*, in turn, simply cited *Kuhlman*. 67 F.2d at 378.

to sea." *Id.* at 291, 292 (quotation marks omitted); see Pet. App. 24a. *Naquin*—issued after the decision below—simply followed *Endeavor Marine*. It concluded that a worker who "spent approximately 70 percent of his total time working aboard" liftboats "faced precisely the same type and degree of maritime perils" as the worker in *Endeavor Marine*, and thus qualified as a seaman. 744 F.3d at 930, 935; see also Pet. App. 25a (acknowledging that service on liftboats can count as sea-based duties).[8]

The workers in *Endeavor Marine* and *Naquin* were seamen because they were "'sea-based maritime employees whose work regularly expose[d] them to the special hazards and disadvantages to which they who go down to sea in ships are subjected.'" *Endeavor Marine*, 234 F.3d at 292 (quoting *Chandris*, 515 U.S. at 370) (additional quotation marks omitted). Mr. Dize, by contrast, was not a seaman because he did not spend even 20 percent of his time "perform[ing] sea-based duties that give rise to those unique dangers." Pet. App. 27a. Those different outcomes are not the result of conflicting legal rules, but rather the application of the *same* fact-specific "perils of the sea" analysis to very different facts.

Notably, the petition nowhere contends that Mr. Dize's routine maintenance activities exposed him to the perils of the sea. To the contrary, the petition virtually concedes that they did *not*. Contrast Pet. 14 (stating that "Mr. Dize's primary responsibility was operating launch boats, and he faced the 'perils of the sea' *during that time*" (emphasis added) (citations omitted)) with *ibid.* (describing Mr. Dize's maintenance activities but omit-

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[8] The plaintiff in *Naquin* filed a petition for a writ of certiorari on July 8, 2014. See Pet. for Cert. in No. 14-28 (docketed July 11, 2014). That petition presents the question of whether emotional damages arising from the death of a relative are recoverable under the Jones Act; it does not concern the plaintiff's seaman status. See *id.* at i.

ting any reference to perils of the sea). Mr. Dize would not have been a seaman in the Fifth Circuit, either.

3. The Sixth Circuit

Seeking to establish a conflict with the Sixth Circuit, petitioner (at 17-18) invokes the 30-year-old decision in *Searcy* v. *E.T. Slider, Inc.*, 679 F.2d 614 (6th Cir. 1982) (per curiam). That case predated *Chandris* by 13 years. It thus did not—and could not—address the question posed by the petition: how to count particular activities "[w]hen applying the *Chandris* 30-percent rule." Pet. i. Nor did it consider the principles this Court later articulated in *Wilander* and *Papai*, which also undergirded the decision below, see Pet. App. 11a-16a, 18a-25a. *Searcy* thus sheds little light on how the Sixth Circuit would approach a case like this today.[9] The unpublished decision in *Taylor* v. *Anderson-Tully Co.*, No. 91-6022, 1992 WL 78101 (6th Cir. Apr. 17, 1992) (per curiam), likewise predates *Chandris* and thus fails to show how the Sixth Circuit would apply *Chandris*'s 30-percent rule of thumb.

4. The Ninth Circuit

While alleging a conflict between the decision below and the Ninth Circuit, the petition overlooks that the Maryland Court of Appeals expressly borrowed its "sea-based activities" focus from the Ninth Circuit. Far from

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[9] *Searcy* is also outdated in another way: It reflected then-existing skepticism toward summary judgment, holding that seaman status was a jury question unsuitable for summary judgment. See 679 F.2d at 616. The Sixth Circuit has since observed, however, that *Wilander* "specifically approve[d] the use of summary judgment in Jones Act cases and therefore relaxe[d] what seemed to be a rigid rule" requiring that juries decide "all aspects of Jones Act cases." *Boyd* v. *Ford Motor Co.*, 948 F.2d 283, 289 (6th Cir. 1991); see also *ibid.* (noting this "Court's trilogy in 1986 dealing with summary judgments").

conflicting with standards applied by that court, the decision below adopts them.[10]

The sole Ninth Circuit case the petition mentions, *Keller Foundation/Case Foundation* v. *Tracy*, 696 F.3d 835 (9th Cir. 2012), cert. denied, 133 S. Ct. 2825 (2013), creates no conflict. There, a maritime worker sought workers' compensation under the LHWCA. To obtain that benefit, he had to establish that he was *not* a seaman. See *id.* at 838-840. He "d[id] not dispute that he qualified as a seaman" while the *Iroquois*, the derrick barge to which he was assigned, was being towed from Louisiana to Mexico and was laying pipe off the Mexican coast. *Id.* at 841. Rather, he urged that his first three weeks of employment, when the barge was in a shipyard, "should be viewed as a different work assignment" during which he was not a seaman. *Ibid.* The Ninth Circuit rejected that argument, finding "no basis for artificially separating Tracy's first three weeks on the *Iroquois* from the rest of his *Iroquois* assignment." *Id.* at 842-843.

Tracy rests chiefly on the principle that seaman status depends on the "total circumstances" of the individual's employment, rather than a mere "snapshot." 696 F.3d at 842. No one disputes that here. While the Ninth Circuit also suggested that the time spent on the derrick barge while it was floating in a shipyard counted toward *Chandris*'s 30-percent threshold, *id.* at 840, 843, that statement was dictum: Tracy's time spent out on the water—clearly exposed to perils of the sea—far exceeded his three weeks on the floating derrick barge in the shipyard, thereby satisfying the *Chandris* duration element

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[10] The court cited *Cabal* v. *Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 1293 (9th Cir. 1997), and *Scheuring* v. *Traylor Bros., Inc.*, 476 F.3d 781, 786 (9th Cir. 2007). Pet. App. 23a-24a n.22. The petition likewise ignores the Court of Appeals' agreement with the Second Circuit. *Ibid.*

in any event. *Ibid.* The court below, moreover, acknowledged that time spent on a floating derrick barge could expose a worker to the perils of the sea. See Pet. App. 24a (citing *Endeavor Marine*).

5. The Eleventh Circuit

The lone case with which the decision below arguably conflicts is the Eleventh Circuit's unpublished decision in *Clark* v. *American Marine & Salvage, LLC,* 494 F. App'x 32 (11th Cir. 2012) (per curiam). The decision below rejected *Clark*'s rationale that an "employee must spend at least 30 percent of the employee's time actually at sea," finding that rule "somewhat at odds" with *Chandris*. Pet. App. 20a. Ironically, the petition ignores that disagreement, instead asserting that the decision below "followed" *Clark*. Pet. 14 (citing Pet. App. 20a).

Regardless, a purported conflict with a single unpublished decision from a single court of appeals does not warrant this Court's review. Because it is unpublished, *Clark* is not binding precedent even in the Eleventh Circuit. 11th Cir. R. 36-2. The petition identifies no published Eleventh Circuit decision that has endorsed a categorical rule. The Eleventh Circuit thus remains free to adopt the flexible approach followed below and by other courts.

Any "conflict," moreover, is purely theoretical. *Clark* refused to count repair work performed "on land" or "while tethered to a land base" because it was "not of a seafaring nature" (*i.e.*, involving transit over water). The Eleventh Circuit, however, also considered the employee's argument, based on Fifth Circuit law, that "performing repairs to the work barge exposed him to the dangers of the sea." 494 F. App'x at 35 (citing *Endeavor Marine*). That argument was unavailing, however, as "most of his repairs" were done "while he was on land" and away from the perils of the sea. *Ibid.* Because the worker needed to

count *all* of his repair time to even approach the 30-percent threshold—and much of that time certainly would not count—he could not prevail even under the flexible standard followed by the Fifth Circuit, other circuits, and the decision below.

B. This Court Has Provided Ample Guidance on the Question Presented

The petition makes much of the Court of Appeals' account of "a bewildering array of decisions" addressing seaman status, Pet. App. 18a; see Pet. 2, 12, 13, urging that it reflects "an entrenched and irreconcilable conflict about how to apply the 30-percent rule of thumb" requiring this Court's intervention, Pet. 13. As the foregoing makes clear, however, there is no fundamental disagreement among lower courts on that question.

The so-called "tempest" of decisions, Pet. App. 2a; Pet. 2, stems instead from the basic character of the Jones Act inquiry: It "is of necessity *fact specific*; it will depend on the nature of the vessel and the employee's precise relationship to it." *Wilander*, 498 U.S. at 356 (emphasis added). As a result, moored, dockside, or ashore work may count toward seaman status on some facts but not on other facts. Each court focuses, as this Court has directed, on the fundamental basis for seaman status—whether the individual's duties expose him to "the perils of the sea." *Papai*, 520 U.S. at 560; *Chandris*, 515 U.S. at 354. That is not a "conflict" meriting this Court's review, but a reflection of the common-law principle that different facts produce different results.

Even if reasonable jurists may sometimes disagree whether an individual worker faced perils of the sea on particular facts,[11] such fact-bound questions of applica-

[11] In *Naquin*, for example, Judge Jones disagreed with the majority's view that the worker faced "the uniquely maritime

tion "rarely" warrant this Court's review. Sup. Ct. R. 10. Notably, while this Court has acknowledged that the distinction between land-based and sea-based workers "can be difficult to implement" because "many cases turn on their specific facts," *Papai*, 520 U.S. at 550, it has addressed the test for seaman status only sporadically over the years. That is at least in part because the Court has "eschew[ed] the temptation to create detailed tests" and instead directed courts to "focus upon the essence of what it means to be a seaman." *Chandris*, 515 U.S. at 369. The lower courts agree that seamen are, in essence, "those workers who face regular exposure to the perils of the sea," *Papai*, 520 U.S. at 560, and have applied that principle to the cases before them. Petitioner has not shown that further guidance is needed on that point. Nor does the petition provide an opportunity for such guidance. The petition nowhere disputes that Mr. Dize spent far less than 30 percent of his time performing tasks that exposed him to the perils of the sea. See Pet. App. 27a-28a; Pet. 14 (alleging exposure to perils only with respect to the less than 20 percent of his work time spent operating launches).

III. THE DECISION BELOW IS CORRECT

The Maryland Court of Appeals properly focused its *Chandris* analysis on duties that "regularly expose the worker to seagoing perils," without requiring those duties be conducted on a vessel in open water. Pet. App. 24a. That approach faithfully applies this Court's directive that "[t]he Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.'" *Chandris*, 515 U.S. at 370. The Court of Appeals also correctly

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dangers" present in *Endeavor Marine*, and so would have denied seaman status. 744 F.3d at 943 (Jones, J., dissenting).

concluded that the particular activities Mr. Dize performed for moored, dockside, and ashore vessels did not expose him to the perils of the sea, a determination the petition does not challenge. Accordingly, the court correctly held that Mr. Dize was not a seaman as a matter of law.

A. This Court has consistently recognized that the defining attribute of a "seaman" is his "exposure to the 'perils of the sea.'" *Chandris*, 515 U.S. at 354. Because of those hazards, seamen are accorded "heightened legal protections (unavailable to other maritime workers)," including the negligence action afforded by the Jones Act. *Ibid.* At the same time, "[s]eaman status is not coextensive with seamen's risks." *Id.* at 361. A land-based worker may "confront the perils of the sea" from time to time, yet be denied seaman status if he "fails to demonstrate that a significant portion of his work was done aboard a vessel." *Id.* at 361-362 (quotation marks omitted). The Court did not (although it could have) require that a majority of the worker's time be spent exposed to those perils. Instead, it adopted a 30-percent rule of thumb. That rule serves to "separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers * * * whose employment does not *regularly* expose them to the perils of the sea." *Id.* at 368 (emphasis added).

The Court of Appeals correctly applied *Chandris*'s 30-percent rule of thumb in light of that purpose. It aptly recognized that a test designed to police the "distinction between land-based and sea-based maritime employees," *Chandris*, 515 U.S. at 359, should focus on an employee's "'sea-based' duties." Pet. App. 24a. A worker who spends *less* than 30 percent of his time (a relatively low threshold) performing duties that expose him to the perils of the sea is not "regularly" exposed to such perils, and thus not a seaman.

The Court of Appeals nonetheless recognized that not all sea perils are encountered while "in transit over the water." Pet. App. 24a. It thus recognized that time spent on stationary vessels could count toward the 30-percent threshold in appropriate cases, ensuring "the degree of flexibility that [this] Court's decisions permit." *Id.* at 25a.[12] Like this Court, the Court of Appeals "eschew[ed] the temptation to create detailed tests" and instead "focus[ed] upon the essence of what it means to be a seaman." *Chandris*, 515 U.S. at 369.

Petitioner would ignore that essence. While the question the petition poses is phrased permissively—"*may* a court *consider*" time spent in service of moored, dockside, or ashore vessels, Pet. i (emphasis added)—petitioner demands, and could only prevail under, a categorical rule *mandating* that *all* such time be counted toward the 30-percent threshold. "So long as a vessel is 'in navigation,'" petitioner asserts, "an employee's work in service of the vessel in navigation counts." Pet. 22. Petitioner offers no further qualification.

That rule would stretch the Jones Act past the breaking point. It would afford workers the special protections of the Jones Act—protections "seamen receive because of their exposure to the 'perils of the sea,'" *Chandris*, 515 U.S. at 354—even if they *rarely* or *never* face sea hazards. A worker who spent 99 percent of his time painting vessels on land could claim seaman status simply because his duties contributed to the vessels' function. That would collapse *Chandris*'s first and second steps. It would obliterate the "fundamental distinction between

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[12] Additionally, this Court has recognized that "departure" from the 30-percent rule of thumb may "be justified in appropriate cases." *Chandris*, 515 U.S. at 371. While Mr. Dize argued for such a departure in the lower courts, see Pet. App. 47a, 56a, the petition abandons any argument that a departure is warranted here.

land-based and sea-based maritime employees." *Id.* at 359. And it would resurrect the overly broad construction of the Jones Act this Court adopted in *Haverty*, but which Congress repudiated in the LHWCA. See pp. 5, 18, *supra*.

Petitioner leans heavily on *Chandris*'s disapproval of a broadly worded instruction directing the jury to disregard time spent in drydock "*for any purpose*." 515 U.S. at 375 (emphasis in original); see Pet. 20-22. But petitioner overreads the Court's opinion. The Court chiefly objected to the district court ruling that the vessel was not in navigation as a matter of law, without first finding the standard for summary judgment satisfied. See *Chandris*, 515 U.S. at 373. While the Court stated that time spent with the vessel "while the ship was out of navigation could not count as time spent at sea," *ibid.*, the Court nowhere held that time spent with the vessel while it was in navigation *must* count as "time spent at sea." To the contrary, the Court acknowledged that the jury could draw inferences *against* the worker based on the drydock time. *Id.* at 376. The Court merely held that such time should not be completely disregarded.

The decision here did not disregard the time Mr. Dize spent with vessels that were moored, dockside, or ashore. Instead, it considered the totality of his employment and concluded that no reasonable jury could find he was a seaman. That is entirely consistent with *Chandris*. It is also correct. The petition nowhere challenges the conclusion that Mr. Dize's routine maintenance of vessels that were moored, dockside, or ashore did not expose him to the perils of the sea. Indeed, the petition appears to agree that they did *not*. See pp. 19-20, *supra*.

B. The decision below was plainly correct to exclude Mr. Dize's routine maintenance activities. *Papai* practically compels that conclusion, holding that Mr. Papai was not a seaman as a matter of law because his painting and

other "maintenance work while the tug was docked" was not "substantial for seaman-status purposes." 520 U.S. at 559. The petition identifies no way in which Mr. Dize's land-based maintenance activities—which ranged from mowing the lawn and buying groceries to refitting vessels that had been hauled out of the water—were meaningfully different from those *Papai* found insufficient.

IV. THIS CASE IS A POOR VEHICLE

Even if the lower courts required additional guidance on the proper application of *Chandris*'s 30-percent rule of thumb, this case would be an exceptionally poor vehicle for doing so.

A. The Petition's Narrow Focus and Unusual Facts Render It an Unsuitable Vehicle

The petition asks this Court to address only a narrow question—whether courts should "categorically exclude" certain time from the 30-percent calculation. Pet. i. But the decision below *did not* categorically exclude any time. See pp. 14-15, *supra*. And the petition does not ask the Court to decide in what circumstances courts "may * * * consider" time spent in service of moored, dockside, and ashore vessels. (To the extent petitioner urges that courts must *always* count such time, see Pet. 22, no case supports that position.) Prevailing on the "question presented" in the petition thus would leave petitioner exactly where she stands today. That alone is reason to deny review.

Petitioner, moreover, has not challenged the actual basis for the decision below—that Mr. Dize's *particular* duties involving moored, dockside, and ashore vessels do not count *because they did not expose him to sea-based perils*. Nor is any such challenge subsumed within the question presented, and "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a); see *Chandris*, 515

U.S. at 353-354 n.*. This Court's ability to provide meaningful guidance thus would be severely hampered by the question petitioner has—and has not—chosen to offer for review.

The unusual fact pattern here is also unlikely to provide substantial guidance for future cases. Mr. Dize was not a typical maritime worker. He was the Assistant Station Manager at the Association's Facility. The petition asks whether time spent in service of a vessel that is "moored" or "dockside" may count toward seaman status, Pet. i, but Mr. Dize's claim below rested on what he himself described as "*shoreside* support tasks." E204 (emphasis added). Accordingly, petitioner's claim depends on counting routine, land-based "maintenance work"—precisely the sort of activity this Court has held to be not "substantial for seaman-status purposes." *Papai*, 520 U.S. at 559. Mr. Dize would not qualify as a seaman under any standard, and analysis of the unusual facts surrounding his employment is unlikely to provide guidance for more typical cases.

B. Petitioner's Focus on the Role of Pilots Underscores the Vehicle Problems

Finally, petitioner and *amici* devote considerable attention to celebrating the role of marine pilots from biblical times through today. See Pet. 7-8 & nn.5-7; Maritime Law Professors Br. 10-13. Respondent emphatically agrees that pilots are vital to successful local navigation of large vessels. But petitioner's focus on the role of marine pilots underscores a potential vehicle defect. Marine pilots are not Jones Act seamen. See *Evans* v. *United Arab Shipping Co.*, 4 F.3d 207 (3d Cir. 1993); *Harwood* v. *Partredereit AF 15.5.81*, 944 F.2d 1187 (4th Cir. 1991); *Bach* v. *Trident S.S. Co.*, 920 F.2d 322 (5th Cir. 1991); David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the Na-*

tional Level and in the Fifth and Eleventh Circuits, 37 Tulane Mar. L.J. 401, 433-434 (2013).

Here, Mr. Dize was not even a pilot. He managed a facility from which marine pilots were taken by launch to commercial vessels. To the extent petitioner contends that Mr. Dize should be deemed a seaman based on assistance to other seamen, the argument falters at its premise—the pilots Mr. Dize assisted as Assistant Station Manager were not seamen either.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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