No. 20-1642

In The
Supreme Court of the United States

BRIAN DOTY,

Petitioner,

v.

TAPPAN ZEE CONSTRUCTORS, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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DISCLOSURE STATEMENT

Respondent Tappan Zee Constructors, LLC is a limited liability company with four members: Fluor Enterprises, Inc.; American Bridge Company; Traylor Bros., Inc.; and Granite Construction Northeast, Inc. Two of these members, Fluor Enterprises, Inc. and Granite Construction Northeast, Inc., are subsidiaries of publicly held corporations: Fluor Corporation and Granite Construction Incorporated, respectively.

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INTRODUCTION

This matter concerns the issue of whether petitioner Brian Doty, a mechanic for a bridge construction company whose job was to maintain and repair equipment at the bridge construction site and who never did his work on vessels as they traveled over the water, should be considered a seaman. The District Court and the Second Circuit both held that Doty was not a seaman because no rational jury could find that the nature of his work was seaman's work.

The Merchant Marine Act of 1920 ("the Jones Act"), 46 U.S.C. § 30104, provides a seaman with the legal right to an action against the employer in negligence. The Jones Act was in part a response to the decision in *The Osceola*, 189 U.S. 158, 175 (1903), which barred seamen from recovering for the "negligence of the master or any member of the crew." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). The word "seaman" is not defined in the Jones Act, thus leaving to the courts the job of defining it. *Id.* at 355. In *Chandris*, the Court gave guidance to the lower courts on this issue. It held that the two essential requirements for seaman status are (1) that "an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission,'" and (2) that the employee "must have a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature." *Id.* at 368, quoting *McDermott Int'l Inc. v. Wilander*, 498 U.S. 337, 355 (1991). The first prong of this two-part test focuses on "the plaintiff's employment at the time of the injury." *Fisher v. Nichols*, 81

F.3d 319, 322 (2d Cir. 1996). The employee "must be doing the ship's work." *Wilander*, 498 U.S. at 355.

The second prong of the seaman status test is aimed at ascertaining "whether the plaintiff derives his livelihood from sea-based activities." *Fisher*, 81 F.3d at 322. As the Court observed in *Chandris*, 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. Seaman status is determined by weighing the "total circumstances of an individual's employment" to determine whether the putative seaman has "a connection with a vessel in navigation that is substantial in both duration and nature." *Id.* Furthermore, "[f]or the substantial connection requirement to serve its purpose, 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." *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997).

Here, the District Court and the Second Circuit both applied the *Chandris* analysis to the undisputed facts and determined that as a matter of law Doty was not a seaman, concluding that Doty's connection to vessels was insubstantial in terms of its nature. The Second Circuit's decision correctly applied the *Chandris* analysis and does not conflict with any decision of another circuit court. There is no reason, let alone a

compelling reason, for the Court to review the Second Circuit's decision.

OPINIONS BELOW

The District Court read from the bench its decision on respondent's motion for summary judgment on December 17, 2020. The transcript of the oral decision appears in Petitioner's Appendix B.

The Second Circuit's opinion was presented through a summary order with the indication that it does not have precedential effect. The opinion is reported at 831 Fed. Appx. 10 (2d Cir. 2020), and appears in Petitioner's Appendix A. The Second Circuit's Order denying Doty's petition for a panel rehearing or rehearing *en banc* is unreported and is included in Petitioner's Appendix C.

JURISDICTION

On March 19, 2020, the Court extended the deadline to file petitions for writs of certiorari in all cases due on or after the date of that order to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The Second Circuit entered judgment on October 22, 2020 and denied Doty's timely petition for a panel rehearing or rehearing *en banc* on December 23, 2020. The petition for a writ of certiorari was filed

on May 21, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

STATEMENT

Respondent Tappan Zee Constructors, LLC ("TZC") was hired by the New York State Thruway Authority to design and construct a new bridge, eventually named the Governor Mario M. Cuomo Bridge, to replace the aging Tappan Zee Bridge. Pet. App. A at 2a. In May 2014, TZC hired Doty to work as a night-shift mechanic, in which capacity he maintained and repaired vessels and the equipment appurtenant to vessels, including cranes mounted to moored barges. Pet. App. A at 2a. Significantly, other than taking a boat to and between moored barges, Doty did not work aboard a vessel while it was traveling over water. On November 19, 2014, Doty was injured while repairing a crane attached to a moored barge. Pet. App. A at 2a. Doty sued for damages under the Jones Act, contending that he was a seaman. Pet. App. A at 3a.[2]

[1] Doty incorrectly asserts that jurisdiction is invoked under 28 U.S.C. § 1257, which addresses review of judgments from the highest state courts.

[2] The facts are taken from the Second Circuit's decision, examining them in the light most favorable to Doty on an appeal of summary judgment.

ARGUMENT

I. The Second Circuit correctly applied Supreme Court precedent

The Second Circuit's decision is consistent with and faithful to the Supreme Court's guidance on the seaman status issue. The second prong of the Court's *Chandris* analysis requires a court to examine whether the employee has "a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature." *Chandris*, 515 U.S. at 368, quoting *McDermott*, 498 U.S. 337 at 355. The Second Circuit considered this guidance and the undisputed facts that Doty (1) performed maintenance work exclusively on stationary vessels rather than vessels navigating over water; (2) did not operate or otherwise assist in the navigation of any vessel; (3) held no maritime license; and (4) went home at the end of an hourly shift and never slept aboard a vessel. Consistent with the Court's holding in *Papai* that "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," *Papai*, 520 U.S. at 554 (1997), the Second Circuit correctly concluded that Doty, as an employee who did none of his work on vessels while they traveled over water, had an insubstantial connection to a vessel in navigation.

Doty argues that the Second Circuit's decision is inconsistent with the Court's decision in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), but Doty misunderstands the Court's holding in *Gizoni*. In *Gizoni*,

the Court held that a ship repairman is not necessarily disqualified from seaman status merely because of the job title alone. *Id.* at 88-89. However, *Gizoni* does not stand for the inverse proposition that a ship's mechanic always qualifies for seaman status. Rather, the employee still must show a substantial connection to a vessel in navigation. *Id.* at 88-89. The Court did not decide whether the employee in *Gizoni* qualified as a seaman, but that employee, unlike Doty, assisted in the navigation of vessels as they traveled over water. *Id.* at 84. The Second Circuit did not decide that Doty was not a seaman merely because he was a mechanic, but because he was a mechanic who did not have a substantial connection to a vessel in navigation.

It is unclear why Doty cites *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005). In *Stewart*, the defendant employer conceded that the employee was a crewmember of a dredge that carried people and things over water. The issue in the case was whether the dredge was a vessel, not whether the employee had a substantial connection to the dredge. *Id.* at 485, 495. The Court's analysis in *Stewart* has nothing to do with the second prong of the *Chandris* test.

Finally, the Second Circuit did not conclude, as Doty appears to argue, that Doty is not a seaman because he is a harbor worker covered by the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq*. Rather, the Second Circuit concluded that Doty is not a seaman by applying the undisputed facts to the *Chandris* analysis. The only LHWCA analysis in which the Second Circuit engaged

addressed Doty's alternative claim that under § 905(b) of the LHWCA he is entitled to sue TZC in its capacity as vessel owner. The Second Circuit determined that the undisputed facts show that TZC was not negligent in this capacity. That ruling is not the subject of Doty's petition for a writ of certiorari.

II. Doty incorrectly states that the Second Circuit's decision conflicts with the decisions of other circuit courts

Doty's idea of a circuit court split seems to be circuit courts reaching different results based on different facts or different issues of law. In fact, there is no conflict between the Second Circuit and any other circuit court. Each circuit court case cited by Doty is addressed below.

A. *Stewart v. Dutra Construction Co.*, 418 F.3d 32 (1st Cir. 2005).

The First Circuit did not address whether the employee had a substantial connection to a vessel in navigation because the defendant conceded that the employee did. *Id.* at 35. The only issue raised in *Stewart* was whether that dredge at issue was in fact a vessel.

B. *Foulk v. Donjon Marine Co., Inc.*, 144 F.3d 252 (3d Cir. 1998).

The Third Circuit applied the *Chandris* analysis to whether a commercial diver is a seaman. As the district court held in that case, commercial divers are unique because:

> A diver's work necessarily involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land. . . . When a diver descends from the surface, bracing the darkness, temperature, lack of oxygen, and high pressures, he embarks on a marine voyage in which his body is now the vessel. Before he can complete his assigned task, he must successfully navigate the seas. . . . It is the inherently maritime nature of the tasks performed and perils faced by his profession . . . that makes [a commercial diver] a seaman.

Foulk v. Donjon Marine Co., Inc., 961 F. Supp. 692, 697 (D.N.J. 1997), quoting *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 436 (5th Cir. 1984). Doty was not a commercial diver, his body never became a vessel, and he never navigated the seas.

C. *Saylor v. Taylor*, 77 F. 476 (4th Cir. 1896).

This Fourth Circuit case was not only decided before *Chandris*, but also 24 years before the Jones Act was even enacted. For these reasons alone, it is puzzling why Doty would cite *Saylor* as an example of a conflict between the Second Circuit and the Fourth

Circuit as to the application of the *Chandris* analysis. It is even more puzzling given that the Fourth Circuit noted that the purpose of the vessel in that case, a dredge, was "to transport from place to place the steam shovel placed upon her, and that her occupation was to transport from place to place such steam shovel and the engine and hands employed on her, and to maintain them afloat in her work of deepening channels in navigable waters." *Saylor*, 77 F. at 477. Nowhere does the decision stand for the proposition that one who does not work on vessels that travel over water can still be considered a seaman.

D. *In Re Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir. 2000).

Incredibly, Doty cites this case as an example of a conflict between the Second Circuit and the Fifth Circuit when he knows that the Fifth Circuit, in an *en banc* decision issued on May 11, 2021, determined that the panel in *Endeavor Marine* had incorrectly applied the *Chandris* analysis. In *Sanchez v. Smart Fabricators of Texas, L.L.C.*, 997 F.3d 564, 2021 WL 1882565 (5th Cir. 2021) (en banc), the Fifth Circuit ruled that *Endeavor Marine* improperly focused on whether the employee was exposed to the "perils of the sea" as the primary test of the second prong of the *Chandris* analysis. *Sanchez*, 997 F.3d 574, *id.* at *6. The Fifth Circuit observed that although "this is one of the considerations in the calculus, it is not the sole or even the primary test." *Id.* The Fifth Circuit explained as follows:

> In *Chandris*, the Court made clear that seamen and non-seamen maritime workers may face similar risks and perils, and that this is not an adequate test for distinguishing between the two. We therefore conclude that the following additional inquiries should be made:
>
> (1) Does the worker owe his allegiance to the vessel, rather than simply to a shoreside employer?
>
> (2) Is the work sea-based or involve seagoing activity?
>
> (3) (a) Is the worker's assignment to a vessel limited to performance of a discrete task after which the worker's connection to the vessel ends, or (b) Does the worker's assignment include sailing with the vessel from port to port or location to location?
>
> Simply asking whether the worker was subject to the "perils of the sea" is not enough to resolve the nature element. Consider the captain and crew of a ferry boat or of an inland tug working in a calm river or bay, or the drilling crew on a drilling barge working in a quiet canal.[3] No one would question whether those workers are seamen. Yet, their risk from the perils of the sea is minimal.

Sanchez, 997 F.3d 574, *id.* at *7.

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[3] As the Fifth Circuit observed, the crew of a drilling barge "stay[s] with the vessel when it moves from one drilling location to another." *Sanchez*, 997 F.3d 574, *id.* at *9.

The Second Circuit's application of the *Chandris* analysis is identical to the Fifth Circuit's. Both courts apply the second prong of the *Chandris* analysis with the aim of ascertaining whether the employee's job duties are of a seagoing nature. Under the *Sanche*z holding, the Fifth Circuit would agree with the Second Circuit that Doty is not a seaman.

E. *Bunch v. Canton Marine Towing Co.*, 419 F.3d 868 (8th Cir. 2005).

This Eighth Circuit case did not address the second prong of the *Chandris* analysis. Rather, it addressed an entirely different issue, whether a certain cleaning barge was a vessel. The Eighth Circuit's decision therefore does not conflict with the Second Circuit's decision.

F. *Scheuring v. Traylor Bros.*, 476 F.3d 781, 786-87 (9th Cir. 2007).

In *Scheuring*, the Ninth Circuit ruled that a triable issue existed as to a crane operator's seaman status because "most importantly, on at least three occasions, the plaintiff was aboard the barge as it was unmoored and moved by a tugboat. The plaintiff contends that during those movements, he performed duties that could be characterized as 'sea-based' duties, such as handling lines, weighing and dropping anchors, standing lookout, monitoring the marine band radio and splicing wire and rope." *Id.* at 783. Meanwhile, the Ninth Circuit affirmed the denial of seaman status

through a summary judgment motion in another case, *Cabral v. Healy Tibbits Builders*, 128 F.3d 1289 (9th Cir. 1997), that involved a crane operator working on a barge. In *Cabral*, the employee, like Doty, did not work on the barge while it was traveling over water, did not engage in any sea-based duties and could not be characterized as a crew member of the barge. *Id.* at 1292-93. Rather, the employee worked on a barge that "was simply a platform upon which he happened to be performing his work as a crane operator." *Id.* at 1292. The Second Circuit and Ninth Circuit are perfectly aligned with respect to the application of the *Chandris* analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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