No. 20-1642

IN THE

Supreme Court of the United States

BRIAN DOTY,

Petitioner,

v.

TAPPAN ZEE CONSTRUCTION, LLC.,

Respondent.

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

REPLY BRIEF

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The following constitutes Petitioner's reply to the Respondent's brief in opposition to the Petition. Highlighted is the Respondent's failure to rebut the arguments that the Second Circuit ignored key principles adopted by the Supreme Court in how to assess seaman status, and Respondent's ignoring of pertinent arguments made by Petitioner in support of his Petition for a granting of certiorari here.

DISCUSSION

The Supreme Court said that there was no short-cut to determining seaman status as opposed to those solely covered by the LHWCA. The Second Circuit, at the urging of Respondent, did just that, took the easy way out to dispose of a righteously plead case for Jones Act seaman status, rather than submitting the issue for a jury to decide. As *Chandris, Inc. v Latsis*, 515 US 347 (1995) points out:

> drawing the distinction between those maritime workers who should qualify as seamen and those who should not has proved to be a difficult task and the source of much litigation—particularly because "the myriad circumstances in which men go upon the water confront courts not with discrete classes of maritime employees, but rather with a spectrum ranging from the blue-water seaman to the land-based longshoreman." The federal courts have struggled over the years to articulate generally applicable criteria to distinguish among the many varieties of maritime workers, often developing detailed multipronged tests for

> seaman status. Since the 1950's, this Court largely has left definition of the Jones Act's scope to the lower courts. Unfortunately, as a result, "[t]he perils of the sea, which mariners suffer and shipowners insure against, have met their match in the perils of judicial review." Gilmore & Black, supra, § 6–1, at 272. Or, as one court paraphrased Diderot in reference to this body of law: " 'We have made a labyrinth and got lost in it. We must find our way out.' " *Johnson v. John F. Beasley Constr. Co.,* 742 F.2d 1054, 1060 (CA7 1984), cert. denied, 469 U.S. 1211 (1985)...

Chandris, Inc. v Latsis, 515 US 347 at 356.

Chandris, applying principles from prior precedent, and in particular *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991) and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) provided the map to solving the labyrinth, stating guidelines that *a jury* would follow to reach the solution. Unfortunately, below, the Second Circuit failed to follow those rules, which is why certiorari should be granted to correct an injustice to the Petitioner.

1. Defendant fails to acknowledge that generally the Supreme Court has recognized that maintenance workers, similar to Mr. Doty, who work on and from vessels in navigation can and should be classified as seamen, as the Court in *Chandris* recognized when it acknowledged the correctness of the *Wilander* and *Gizoni* decisions. For instance, *Chandris* states:

In *Wilander*, decided in 1991, the Court attempted for the first time in 33 years to clarify the definition of a "seaman" under the Jones Act. Jon Wilander was injured while assigned as a foreman supervising the sandblasting and painting of various fixtures and piping on oil drilling platforms in the Persian Gulf. His employer claimed that he could not qualify as a seaman because he did not aid in the navigation function of the vessels on which he served. Emphasizing that the question presented was narrow, we considered whether the term "seaman" is limited to only those maritime workers who aid in a vessel's navigation.

After surveying the history of an "aid in navigation" requirement under both the Jones Act and general maritime law, we concluded that "all those with that 'peculiar relationship to the vessel' are covered under the Jones Act, regardless of the particular job they perform" and that "the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a vessel in navigation," Thus, we held that, although "[i]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, ... a seaman must be doing the ship's work." *Wilander* (498 U.S.) at 355. We explained that "[t]he key to seaman status is employment-related connection to a vessel in navigation," and that, although "[w]e are not called upon here to define this connection in all details, ...

> we believe the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status." Ibid. (Some citations omitted).

Chandris, Inc. v Latsis, 515 US 347, 357.

In denying Mr. Doty the right to a jury determination of his status, the Second Circuit did not cite *Wilander*, and here Respondent ignores the import of that case's holding which undercuts the argument that because Mr. Doty's primary work was to service the appurtenances on the many vessels in the fleet doing the maritime work of building the Tappan Zee Bridge, he could not be a seaman.

2. The Supreme Court has rejected what the Second Circuit accepted at the urging of Tappan Zee here, that there be a "voyage" requirement for a person to be considered a seaman, by making it clear that a voyage might be a factor, however, the primary analysis must about the worker's connection to a vessel in terms of status, a connection substantial in duration and nature. As the court in *Chandris* stated, "[a] brief survey of the Jones Act's tortured history makes clear that we must reject the initial appeal of such a "voyage" test and undertake the more difficult task of developing a status-based standard that, although it determines Jones Act coverage without regard to the precise activity in which the worker is engaged at the time of the injury, nevertheless best furthers the Jones Act's remedial goals." 515 US at 358

The court reiterated its prior holdings that, "'[t]he right of recovery in the Jones Act is given to the seaman

as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.'" (Citing *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42–43). *Chandris*, 515 US at 360/

3. Respondent fails to acknowledge that the Supreme Court directed that a jury is the entity that must decide the determination of seaman status. That seaman status presents a jury question, not one for the court to decide except in the most clear circumstances, is undeniable, As the court stated in *Chandris*, referring to *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991):

> Under the Jones Act, "[i]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury."[1] *Wilander*, 498 U.S. at 356. On the facts of this case, given that essential points are in dispute, reasonable factfinders could disagree as to whether Latsis was a seaman. Because the question whether the Galileo remained "in navigation" while in drydock should have been submitted to the jury, and because the decision on that issue

1. The Jones Act guarantees the right to a jury trial. 46 USC § 30104. "A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, *with the right of trial by jury,* against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."

> might affect the outcome of the ultimate seaman status inquiry, we affirm the judgment of the Court of Appeals remanding the case to the District Court for a new trial.
>
> On remand, the District Court should charge *the jury* in a manner consistent with our holding that the "employment-related connection to a vessel in navigation" necessary to qualify as a seaman under the Jones Act, id., at 355, comprises two basic elements: The worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature. As to the latter point, the court should emphasize that the Jones Act was intended to protect sea-based maritime workers, who owe their allegiance to a vessel, and not land-based employees, who do not. By instructing juries in Jones Act cases accordingly, courts can give proper effect to the remedial scheme Congress has created for injured maritime workers.

Chandris, Inc. 515 US at 376-77.

4. Like the Second Circuit, Respondent again ignores that the facts in *Gizoni* are essentially identical to the facts here, and that the Supreme Court expressly stated it was a jury question as to whether Mr. Gizoni could be found to be a seaman. *Chandris* specifically acknowledged the correctness of the *Gizoni* decision:

> To say that our cases have recognized a distinction between land-based and sea-based maritime workers that precludes application of a voyage test for seaman status, however, is not to say that a maritime employee must work only on board a vessel to qualify as a seaman under the Jones Act. In *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81 (1991), decided only a few months after *Wilander,* we concluded that a worker's status as a ship repairman, one of the enumerated occupations encompassed within the term "employee" under the LHWCA, 33 U.S.C. § 902(3), did not necessarily restrict the worker to a remedy under that statute. We explained that, "[w]hile in some cases a ship repairman may lack the requisite connection to a vessel in navigation to qualify for seaman status, ... not all ship repairmen lack the requisite connection as a matter of law. This is so because '[i]t is not the employee's particular job that is determinative, but the employee's connection to a vessel.' " *Gizoni,* supra, at 89 (quoting *Wilander*, 498 U.S., at 354) (footnote omitted). Thus, we concluded, the Jones Act remedy may be available to maritime workers who are employed by a shipyard and who spend a portion of their time working on shore but spend the rest of their time at sea.

Chandris, Inc., 515 US at 363-64.

The Second Circuit, as pointed out in Petitioner's primary brief, cited neither *Wilander* nor *Gizoni* and Respondent here, in its opposition to the petition,

ignores the analyses and holdings in both because they do not fit Respondent's false narrative about Mr. Doty's employment.

5. Respondent ignores the undisputed assertion that on a daily basis, around a half dozen times a day, Mr. Doty transported equipment, tools and materials on necessary trips across various parts of the three mile wide river. Again, as the court has noted, he does not have to aid in the navigation of the vessel, but must be doing the work of that vessel or fleet, here he was doing the work of transporting equipment, tools and materials, just as did the repair person in *Gizoni*. Mr. Doty thus clearly aided in the function of the vessels, and contributed to their mission, and was seagoing, facts conveniently ignored by Respondent. See, *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 560 (1997).[2]

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2. Papai was assigned by a union to paint the exterior of a tugboat. He had worked for that employer about 12 times over the prior 2-1/2 months. On the first day of this next assignment, he was injured. The decision to deny Mr. Papai seaman status turned on two points. First, he could not show that there was common ownership or control of the vessels he worked on during the relevant time period analyzed, thus failing the *Chandris* requirement of work on a vessel or group of vessels that was substantial in duration."Since the substantial connection standard is often ... the determinative element of the seaman inquiry, it must be given workable and practical confines. When the inquiry further turns on whether the employee has a substantial connection to an identifiable group of vessels, common ownership or control is essential for this purpose." *Id* at 557. Common ownership and control is not an issue in the within matter. The second point Papai failed was that his work was sporadic and transitory, and did not involve the boat actively being used on the water. He only worked a few days for this employer in the past 2-1/2 months. The court did not say that his maintenance work on

6. Respondent ignores the argument that exposure to the sea, and working at sea, does not mean that the vessel has to be moving across water to provide seaman status. Respondent ignores the Supreme Court's recognition that even workers performing labor on vessels sunk to the bottom of the Gulf of Mexico, and which obviously were not sailing from port to port, can be classified as seamen if exposed to the hazards of the navigable waters and are performing ship's work. *Chandris*, like *Wilander* before it, recognized the foundational authority of *Offshore Co. v. Robison,* 266 F.2d 769 (CA5 1959) where that injured worker's drill vessel work platform was sunk to the bottom of the waterway to stabilize it, yet the worker was entitled to seaman status because of his labors to accomplish its mission. *Chandris* noted that:

> The second major body of seaman status law developed in the Court of Appeals for the Fifth Circuit, which has a substantial Jones Act caseload, in the wake of *Offshore Co. v. Robison*, 266 F.2d 769 (CA5 1959). At the time of his injury, Robison was an oil worker permanently assigned to a drilling rig mounted on a barge in the Gulf of Mexico. In sustaining the jury's award of damages to Robison under the Jones Act, the court abandoned the aid in navigation requirement of the traditional test

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the boat (painting its exterior) was not 'seaman's work', but noted it was done while the boat was tied to the pier and his assignment to this company was sporadic and infrequent. This is in contract to Mr. Doty who was in the middle of the Hudson River 90% of his work day, transporting equipment and materials on a vessel to and from many other vessels, and then working on maintaining those other vessels. *Id.* at 557-60.

> and held as follows:"[T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel ... or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." Id., at 779 (footnote omitted).
>
> Soon after *Robison*, the Fifth Circuit modified the test to allow seaman status for those workers who had the requisite connection with an "identifiable fleet" of vessels, a finite group of vessels under common ownership or control. (Citations omitted)

Chandris, Inc. 515 US at 365-66.

This last quoted comment is significant here as it relates to the connection of the maritime worker not having to be connected to an individual vessel, as opposed to an identifiable fleet, so long as there is a showing of common ownership and/or control, which it is indisputable that Tappan Zee had both.

7. As predicted, Respondent places mis-reliance on the recent Fifth Circuit's recent decision in *Sanchez v. Smart Fabricators of Texas, L.L.C.*, 997 F.3d 564 (5th Cir. 2021) (en banc). In *Sanchez* it was clear that the worker was

primarily land-based, the vessel was all the time secured to the pier at his employer's facility, he worked much of the time on shore. This is in contrast to Mr. Doty, a maritime worker who spent 90% of his time on the water from asserting his rights under the Jones Act. Mr. Doty was almost always out at sea exposed to true marine perils aiding in the function and mission of the vessels to which he was attached, and further was involved in transporting to the fleet of vessels upon which he worked, the materials and equipment needed to perform his job in aid to his maritime duties. See, *Gizoni*, supra.

8. Nor does Respondent address the inconsistency in approach by the Second Circuit where it denied the widow of a maintenance engineer who worked for a short time on a construction vessel *to be covered* by LHWCA, and required any assertion of a claim for benefits to be made under the Jones Act without the claimant being entitled to a jury trial on the issue. *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138 (2d Cir. 2005) This irreconcilable approach from two different panels is internally inconsistent, conflicts with other Circuit decisions and is contrary to Supreme Court principles, many of which are discussed above.

CONCLUSION

For the reasons stated herein and in Petitioner's opening briefing, the Court should grant the petition for certiorari to the Second Circuit, and correct an injustice whereby the Second Circuit denied him the right to a jury determination of his seaman status.

Dated: New York, New York
July 9, 2021

Respectfully Submitted,

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