

In the  
Supreme Court of the United States

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LIL' MAN IN THE BOAT, INC.,

*Petitioner,*

v.

THE CITY AND COUNTY OF SAN FRANCISCO ET AL.,  
*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

Pursuant to the Rivers and Harbors Act, Congress provided that “No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel” by any “non-Federal interest” for use of navigable waters under the authority of the United States, subject to specific provisions authorizing defined categories and limits on charges. 33 U.S.C. § 5(b). Notwithstanding that prohibition, and notwithstanding the provisions of 42 U.S.C. § 1983 providing a right of action for the deprivation of rights protected under the Constitution and federal statutes, the Court of Appeals for the Ninth Circuit concluded that any vessel assessed a fee or obligations in violation of the Rivers and Harbors Act has no right of action by which to obtain relief for costs and impositions upon it by a non-Federal entity.

The questions presented under this Petition are:

1. Whether an action can be maintained under 42 U.S.C. § 1983 for a violation of a Constitutional provision or federal statute by an entity protected by statute in its terms, here 33 U.S.C. § 5(b) enacted to codify congressional intent as to enforcement of the Tonnage Clause and Commerce Clause.
2. Whether a vessel operating in navigable waters of the United States that is assessed fees and obligations by a state or local government in violation of 33 U.S.C. § 5(b) may seek relief for that violation in court.

## **PARTIES TO THE PROCEEDING**

### **Petitioner**

- LIL' MAN IN THE BOAT, INC.

### **Respondents**

- CITY AND COUNTY OF SAN FRANCISCO
- SAN FRANCISCO PORT COMMISSION, operating under the title PORT OF SAN FRANCISCO
- ELAINE FORBES, Interim Executive Director, the San Francisco Port
- PETER DALEY, Deputy Director, Maritime, the San Francisco Port
- JEFF BAUER, Deputy Director of Real Estate, the San Francisco Port
- JOE MONROE, Harbormaster, South Beach Harbor, Pier 40

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Court Rule 29(6), Petitioner advises this Court that there is no parent or publicly held company owning 10% or more of the corporation's stock.

## **LIST OF PROCEEDINGS**

United States Court of Appeals for the Ninth Circuit  
No. 19-17596

Lil' Man In The Boat, Inc., a California Corporation,  
*Plaintiff-Appellant*, v. City and County of San  
Francisco; San Francisco Port Commission, operating  
under the title Port of San Francisco; Elaine Forbes,  
Interim Executive Director, the San Francisco Port  
Commission; Peter Daley, Deputy Director,  
Maritime, the San Francisco Port; Jeff Bauer,  
Deputy Director of Real Estate, the San Francisco  
Port; Joe Monroe, Harbormaster, South Beach  
Harbor, Pier 40, *Defendants-Appellees*.

Date of Final Opinion: July 15, 2021

Date of Rehearing Denial: August 20, 2021

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United States District Court for the Northern  
District of California

Case No. 17-cv-00904-JST

Lil' Man In The Boat, Inc., *Plaintiff*, v.  
City and County of San Francisco, et al., *Defendants*.

Date of Final Judgment: December 17, 2019

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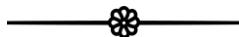
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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Lil' Man in the Boat, Inc. ("LMB") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.



## **OPINIONS BELOW**

This case was initially filed on February 22, 2017, in the United States District Court for the Northern District of California under the title of *Lil' Man in the Boat, Inc., v. City and County of San Francisco and the San Francisco Port Commission, et al*, Case Number 3:17-cv-00904 with four claims, (1) Civil Rights under 42 U.S.C. 1983, (2) California Bane Act, (3) Declaratory and Injunctive Relief and (4) Unjust Enrichment. It was superseded by the filing of the First Amended Complaint and excerpts of attachments, on claim for (1) Civil Rights under 42 U.S.C. § 1983, (2) Declaratory and Injunctive Relief and (3) Unjust Enrichment. (App.88a)

Plaintiff moved for summary judgment on the basis, and the City's expert agreed, that the terms of the "2016 Landing Rights Agreement," including fees and obligations, was not limited or related to the costs of service to the vessel as required by 33 U.S.C. 5(b), (App.133a-135a) Plaintiff's motion for summary judgment was denied and the City's motion for summary judgment was granted.

Upon the entry of judgment on December 17, 2019, (App.22a) Plaintiff Lil' Man in the Boat, Inc, filed an appeal to the Ninth Circuit Court of Appeal on December 27, 2019, in a case entitled *Lil' Man in the Boat, Inc. v. City & County of San Francisco, et al.*, Case No. 19-17596. The petition for En Banc review was denied on August 20, 2021. (App.86a)



## **JURISDICTION**

The Ninth Circuit's opinion on LMB's appeal was entered on July 15, 2021, (App.1a) and the Ninth Circuit subsequently denied LMB's Petition for Re-hearing En Banc on August 20, 2021. LMB invokes this Court's jurisdiction under 28 U.S.C. § 1254, having timely filed this petition for a writ of certiorari.



## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **U.S. Const. art. I, § 10, cl. 3 Tonnage Clause**

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

**U.S. Const. art. I, § 8, cl. 3****Commerce Clause, Article 1, Section 8, Clause 3**

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

[ . . . ]

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . .

**33 U.S.C. § 5(b)**

No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for—

- (1) fees charged under section 2236 of this title;
- (2) reasonable fees charged on a fair and equitable basis that—
  - (A) are used solely to pay the cost of a service to the vessel or water craft;
  - (B) enhance the safety and efficiency of interstate and foreign commerce; and
  - (C) do not impose more than a small burden on interstate or foreign commerce; or

- (3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.

#### **42 U.S.C. § 1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.



## STATEMENT OF THE CASE

Lil' Man in the Boat, Inc. (herein, "LMB"), operates a marine transportation and tour excursion business on San Francisco Bay. Since 1994, LMB sought to dock at the South Beach Harbor (herein, "SBH") Guest Dock, under the control of the Respondents, City and County of San Francisco (herein, "CCSF" or the "Port"). (App.129a) CCSF maintains a shoreline monopoly for vessel landings in San Francisco (App.137a) and controls and dictates the contract terms for landing anywhere along the CCSF waterfront, inclusive of South Beach Harbor at which LMB sought to dock its vessel, *Just Dreaming*. CCSF refused, and continues to refuse, to allow docking of *Just Dreaming*, unless LMB signs an agreement requiring payment of a flat fee, plus 7% or income for and more of *Just Dreaming*'s "Gross Revenues."<sup>1</sup> (App.128a) The "agreement" regulates much of the conduct for the vessel having nothing to do with "service to the vessel." The terms are unilaterally set by CCSF. (App.128a) The contract that led to the filing of the instant litigation, known as the "2016 Landing Rights Agreement: License to Land at Port of San Francisco Piers" (herein, "Landing Agreement"), requires that CCSF be paid \$110 plus 7% of the vessel's "Gross Revenues," (App.127a-128a) with increases to any percentage the City would later

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<sup>1</sup> Further, CCSF requires all docking vessels to comply with City-mandated contract terms, ranging from compelled hiring practices (App.129a) to prohibitions on doing business with certain entities, and compliance with every policy and ordinance of the City, (App.131a-132a) all impositions which would be crippling to maritime trade if applied by each port.

choose. (App.129a-130a) The Landing Agreement also contains terms waiving any right to appeal or challenge any action of CCSF including the fee unilaterally determined by CCSF, which is subject to random increase without limitations by CCSF unilaterally at any time, under pains of 10-fold damages if unpaid.<sup>2</sup> (App.129a-130a)

The Landing Agreement's 7% exactment applies even when operating to or among non-CCSF locations. The Landing Agreement defines "Gross Revenue" to include revenue received from any source whatever by the vessel and is not limited to revenues received only within the jurisdiction of San Francisco. (App.131a-132a) Indeed, its definitional breadth is so great, that the fee is set in a way to give CCSF whatever percentage it chooses of every meal served, every drink poured and every flower ordered (for an on-cruise wedding) for charters that never passes through

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2 The Landing Agreement's terms provide that CCSF reserves the right to increase the fees without limits and requires, (App.128a) notwithstanding this appeal, that the vessel waives any opportunity to contest or challenge the fees in Court at any time. The Port can increase the percentage as it wishes without limits. (App.129a-130a) The vessel shall "have no recourse with respect to" the Port for any claim against the Port. And the vessel may be responsible for attorney fees to the Port, should it be so bold as to challenge a contract fee. (App.130a) Finally, the Landing Agreement provides that any underpayment by the vessel of the percentage demanded by the Port requires the vessel to pay ten times what is should have paid to the Port. (App.129a) There is no accommodation for conflicts with federal law, maritime laws as well as restrictions under US Coast Guard regulations. Future changes in San Francisco's ordinances, policies or regulations must also be followed by the vessel regardless of that imposition or conflict. (App.129a)

or stops in San Francisco. (App.131a-132a)<sup>3</sup> If the vessel ever stops in San Francisco, then the City is entitled to a percentage of all of its activities.

By this litigation, LMB has challenged the fee and impositions imposed by CCSF under the Landing Agreement. Under its Amended Complaint, LMB asserted claims for (1) violation of 42 U.S.C. § 1983 based upon rights established pursuant to the Tonnage Clause, Commerce Clause, and the Rivers and Harbors Act (the “RHA”); (2) declaratory and injunctive relief; and (3) unjust enrichment. (App.89a-126a)

The record developed before the District Court conclusively established that the 7% or more of Gross Revenue docking fee formulation was established without regard to the services actually rendered to vessels which dock in San Francisco on occasion. The City engaged in no analysis as to the actual cost of services provided to the vessel. The City has never done any calculation of income, expenses or profit, related to the guest dock at SBH for all the years that commercial vessels landed there. Moreover, the City’s Deputy Director of Finance acknowledged that “a percentage of . . . gross profit of a vessel . . . could never be an approximation of the use of the North Dock at Pier 40.” (App.133a-136a) In short, the fees charged by CCSF were not set with the intention to isolate costs arising “solely” for the services to vessels as required by 33 U.S.C. § 5(b).

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<sup>3</sup> By this “agreement” San Francisco has provided the model for other ports to proceed and take charge of the income and operation of any vessel wishing to land at its port. According to the Deputy Director for the port, that process has already started.

The District Court proceeding was terminated by that court's November 26, 2019, order denying summary judgment to LMB and granting summary judgment to CCSF. (App.24a-45a) In granting summary judgment in favor of Defendants, the District Court concluded that (i) the charges imposed pursuant to the Landing Agreement "are not a tax or duty subject to the Tonnage Clause," (ii) Defendants act "as a market participant exempt from the dormant Commerce Clause," and (iii) Section 5(b) of the RHA "does not apply to the fees charged in the 2016 Landing Agreement." *Lil' Man in the Boat, Inc. v. City & Cty. Of San Francisco*, 2019 U.S. Dist. LEXIS 229441 at \*16, 19, 22 (Nov. 26, 2019). (App.41a, 38a, 44a)

LMB timely appealed the District Court's grant of summary judgment to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals did not address the merits of the case or the conclusions reached by the District Court, but instead concluded that the RHA provides no private right of action to a vessel aggrieved by a violation of 33 U.S.C. § 5(b). *Lil' Man in the Boat, Inc. v. City & County of San Francisco, et al.*, 5 F.4th 952, 963-64 (9th Cir. 2021).



## REASONS FOR GRANTING THE PETITION

- I. REVIEW OF THE NINTH CIRCUIT'S DECISION IS NECESSARY TO RESTORE THE LEGAL FRAMEWORK PRESERVING FREEDOM OF NAVIGATION AND COMMERCE IN U.S. WATERWAYS AND TO UPHOLD THE CONSTRUCTION OF 42 U.S.C. § 1983 THAT HAS PREVIOUSLY BEEN CONCLUSIVELY ESTABLISHED BY THIS COURT**
  - A. The Ninth Circuit's Decision Has Upended the Protections Established by Congress to Ensure the Unimpeded Use of U.S. Waterways for Transportation and Commerce.**

The transportation of persons and materials by ship has been a core driver of the economy of the United States since the time of the nation's founding, and continues as such to this day. Data published by the U.S. Department of Transportation reflects that over \$1.7 trillion dollars in freight value was transported by waterborne vessels in 2019.<sup>4</sup> Ferry operators have transported more than 126 million passengers and 27 million vehicles in a single year.<sup>5</sup> In 2019, the last year preceding the COVID-19 pandemic, approximately 14 million Americans travelled on a cruise ship.<sup>6</sup>

With this Ninth Circuit published opinion, no vessels may secure the protection under the RHA for

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<sup>4</sup> See U.S. Department of Transportation, *Port Performance Freight Statistics Annual Report to Congress 2020*, at 1, available at <https://rosap.ntl.bts.gov/view/dot/54022>.

limitations of fees and other conditions by suit in Court. It leaves all steam ship companies, vessel operators, passenger vessels, and their companies without a means to secure the protections of statute with limits as to what local entities may charge vessels and companies operating on navigable waters.<sup>7</sup> Each local government entity is now free to impose terms and conditions that may violate the restrictions of section 5(b) without the vessel having a remedy in Court.

After a negative experience prior to the U.S. Constitution, and given the importance of maritime transportation, the principle that maritime activity should not be constrained by state and local governments was built into the Constitution itself via a provision stating that “[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage.” U.S. Const. art. I, § 10, cl. 3.

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<sup>5</sup> See Bureau of Transportation Statistics, *Ferry Passenger and Vehicle Boarding Counts*, available at <https://data.bts.gov/stories/s/National-Census-of-Ferry-Operators-NCFO-2018-Ferry/vyng-663x>.

<sup>6</sup> See Cruise Lines International Association, *2020 North America Market Report*, at 2, available at <https://cruising.org/-/media/research-updates/research/clia-one-resource-passenger-reports/clia-north-america-passenger-report-2020.ashx>.

<sup>7</sup> Multiple decisions in state courts rely on the RHA as valid and enforceable. See *Moscheo v. Polk County*, 2009 WL 2868754 (Tenn. App. Sept. 2, 2009) (white water rafting tax preempted by 33 U.S.C. § 5(b)); *City of Chicago v. Wendella Sightseeing Inc.*, 143 N.E.3d 771 (Ill. App. 2019) (even if vessels were not actively operating on federal waters at the time amusement tax was levied by city government, 33 U.S.C. § 5(b) still preempts local ordinance).

Congress later enacted and amended the RHA, which provides that, subject to certain defined exceptions, “[n]o taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States.” 33 U.S.C. § 5(b).

The District Court and the Court of Appeals in this case agree that Congress intended to codify its view of enforcement under the Tonnage Clause in 33 U.S.C. § 5(b) to avoid a patchwork of state and local taxes and other impositions on vessels that would have the effect of impeding maritime transportation of passengers and freight.<sup>8</sup> *See* 5 F.4th at 963. The assurance provided by that law to vessel operators has operated as the basis for owners and operators of vessels to enter the commercial marketplace with the understanding that the transportation of passengers and freight will not be subject to the imposition of arbitrary fees, assessments, obligations, or regulations by

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<sup>8</sup> The Landing Agreement in issue permits no exception or offset for fees and impositions of other municipal ports. (App.128a) And with multiple ports on San Francisco Bay, each may demand not only a percentage fee, potentially putting the vessel out of business, but increase that percentage at will with no right to see judicial intervention. (App.129a-130a) Each local requirement may conflict with the next port. For example, to hire locally can conflict with the hiring requirements and restrictions of the next port and the one after. (App.131a) The continued operation of the vessel is thus at the mercy of each port and obligations, percentages, fines and penalties imposed, sometime ten times the actual “harm” suffered by that port. (App.129a)

the state and local governmental jurisdictions through which their vessels pass and at which they dock.<sup>9</sup>

By its decision in this case, the Ninth Circuit has taken a wrecking ball to the protections granted by Congress upon which the entire system of U.S. maritime transportation is based, as the Court of Appeals in this case concluded that a vessel has no right of action by which to seek relief for a violation of 33 U.S.C. § 5(b), the RHA. In addition to fundamentally disregarding the text of the RHA itself, the Ninth Circuit's decision also negated the right of a party to seek relief for a federal statutory violation pursuant to 42 U.S.C. § 1983, even if the statute was written for the protection of that entity. In doing so this decision construed Section 1983 in a manner at odds with past decisions of this Court and the Circuit Courts.<sup>10</sup>

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<sup>9</sup> Based on 33 U.S.C. 5(b), the Alaska Supreme Court struck down a per-passenger fee assessed against a boat company. *State, Department of Natural Resources v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1221, (Alaska 2010) That Court had no difficulty holding the protections of 33 U.S.C. 5(b) may be claimed by the vessel and that a fee imposed upon a vessel to be permissible under the 33 U.S.C. 5(b) must be as compensation for a service rendered to the vessel. Here, compensation to the port based on a percentage of gross revenue is not consistent with the notion that it is limited to fees for the services to the vessel.

<sup>10</sup> Where charges, taxes and or other obligations are directed at the vessels and was not in exchange for services to the vessel, they are routinely held unconstitutional. *Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. 1, 7, 129 S.Ct. 2277, 174 L.Ed.2d 1 (2009). *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 567 F.3d 79, 88 (2d Cir. 2009) where the Second Circuit struck down based on the Tonnage Clause a fee imposed on all passengers of a ferry. Although the tax in *Bridgeport* varied depending on whether the passenger was a person or vehicle, the tax was unconstitutional because it was directed at

**B. The Ninth Circuit Decision Is in Conflict with the Decisions of Other Circuits and of This Court for Application of 33 U.S.C. § 5(b).**

The Ninth Circuit in this case (*Id.* 959-960) states that there is no “private right of action” to secure the protections of 33 U.S.C. § 5(b). That is in large part because, “The statute prohibits non-federal entities from imposing fees or other charges (the obligation) and refers to vessels “only as an object of that obligation.” *Id.*; *see also* 33 U.S.C. § 5(b) (“No . . . fees . . . shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest. . . .”). Not only is the analysis erroneous, but in conflict with other Circuits and a plain reading of the statute.

Other circuits have not limited the notion of intended beneficiaries to vessels as is stated in 33 U.S.C. § 5(b). Other circuits have found 33 U.S.C. § 5(b) enforceable by local companies and the public as the intended beneficiaries. The Seventh Circuit decided that the protections of Section 5 were intended to benefit the vessels and free navigation for the public. The Seventh Circuit stated in *Indiana Port Commission v. Bethlehem Steel*, 835 F.2d 1207, 1210 (7th Cir. 1987) its interpretation of the law in direct conflict with the Ninth Circuit:

The limited legislative history [for Section 5(b)] suggests one purpose of this provision is to maintain free navigation for public use of the federal waterways. H.R. Rep. No. 1554,

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a vessel’s passengers and not payment for services rendered to the vessel.

48th Cong., 1st Sess. 6 (1884). . . . The IPC [that port] argues that the statute is a federal appropriations act, not a prohibition against states charging fees or tolls, and therefore, does not apply to this case. Even if we agree with IPC that Section 5 “is essentially a maintenance provision,” *Atchison, Topeka & Santa Fe Ry. v. Callaway*, 382 F.Supp. 610, 616 (D.D.C.1974), we cannot ignore the plain and precise language of the statute. The language of Section 5 is unambiguous. “No tolls” or “charges” can be collected from “any vessel” for “passing through” any “work for the use and benefit of navigation” . . . The text of the statute does not exclude states or private parties from this prohibition. Rather, it clearly says that no tolls can be charged on any vessels. “If the plain language of the statute is clear, we do not look beyond those words to interpret the statute.” *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270 (7th Cir. 1986) (citation omitted). The statute’s limited legislative history, nevertheless, seems to confirm this conclusion. The purpose of the prohibition on tolls was to ensure free navigation. H.R. Rep. No. 1554, 48th Cong., 1st Sess. 6 (1884). . . . To read Section 5 to allow states to levy tolls and charges on vessels travelling through federal waterways would undermine the purpose of the statute.

Additionally, while multiple courts and the Supreme Court have found a right of action where a plaintiff occupies a position in the “zone of interest,” the Ninth Circuit decision ignores the zone of interest

test protecting vessels as stated in the statute, in denying a right to sue. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S 118, 128 (2014) (framing the zone-of-interests test as asking whether a particular plaintiff “falls within the class of plaintiff’s” protected under a particular law).

**C. The Ninth Circuit Decision Conflict with the Intent of Congress to Codify Its View For Enforcement of the Tonnage Clause in § 5(b).**

The findings of the District Court and the Court of Appeals in this case are that Congress intended to codify its view of enforcement of the Tonnage Clause. The Ninth Circuit and the District Court found that Congress wanted to follow existing decisions it agreed with that allowed a private plaintiff to enforce Section 5(b) but then decided these intended protections were not done to confer a benefit on the vessel.

The district court ruled that Congress could not have intended to preclude a private right of action in § 5(b)(2) because Congress crafted the 2002 amendment to mirror federal case law that developed pursuant to the Commerce Clause and Tonnage Clause. *Id.* at 845-47. Reasoning that private plaintiff’s had been allowed to enforce the limitations imposed by the Tonnage Clause, the court decided that Congress must have intended to allow private plaintiff’s to enforce the same restrictions pursuant to § 5(b)(2). *Id.* at 847 (“Because private plaintiff’s have been able to enforce the prohibitions of the Tonnage Clause in courts, Congress must have intended that

private plaintiff's would be able to enforce these same prohibitions under Section 5(b) of the RHAA."). We agree with the court's conclusion that Congress intended the 2002 amendment to codify common law that had developed pursuant to the Tonnage Clause and Commerce Clause since the RHA was enacted, but we are obliged to apply *Cort* to determine whether Congress intended to create a private right of action in § 5(b)(2). Having done so, we conclude the amendment was not enacted for the purpose of conferring a benefit on vessels.

*Lil' Man* 5 F.4th at 963. (App.20a-21a).

Rather than follow the enunciation of right and protections intended by Congress for vessels, as found by the District Court, and contained in the exact language of the statute, and rather than follow the principle of strict construction that the language of a statute means what it says in plain English, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979) the Ninth Circuit held exactly to the contrary. This enunciation of the law by the Ninth Circuit should not stand to deny every vessel on navigable waters the protections the Ninth Circuit acknowledges Congress intended.

**D. The Ninth Circuit's Decision Functionally Rewrites the Law of Section 1983 in a Manner Inconsistent with the Decisions of This Court.**

At the outset of its opinion, the Ninth Circuit recognized that LMB "brought suit . . . pursuant to 42 U.S.C. § 1983, alleging the Landing Agreement violated

the Tonnage Clause, the dormant Commerce Clause, the First Amendment, and § 5(b) of the RHA, 33 U.S.C. § 5(b).” *Lil’ Man in the Boat, Inc. v. City & Cty. Of San Francisco*, 5 F.4th 952, 955 (2021). After that initial recognition of the role of Section 1983 in LMB’s claim, however, the Ninth Circuit never again referenced Section 1983 or the standard set by this Court and the other circuits for enforcement of rights under that statute, but instead focused its analysis on whether or not an implied right of action could be found in the RHA.<sup>11</sup>

The Ninth Circuit thus ignored the text of Section 1983, as well as decisions of this Court addressing the standard for assessing the availability of relief under that statute for violation of rights created by a federal statute or constitutional provision.

Section 1983 provides that “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . . .”

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<sup>11</sup> The Ninth Circuit decision in this case relied heavily on *Cort v. Ash* 422 US 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975) *Cort* did not involve a Section 1983 mechanism of enforcement for a federal statute. Instead, *Cort* was an attempt to create a cause of action and a remedy against a corporate board of directors based solely on a criminal statute. In that case, Section 1983 was not discussed.

By ignoring Section 1983 and instead examining whether Section 5(b) of the RHA itself contained an implied private right of action, (as opposed to rights for the vessel) the Ninth Circuit functionally imposed a new requirement of a second enabling statute – separate from and in addition to Section 1983 – in order for a party to maintain a cause of action for the deprivation of a right granted by a federal statute. That interpretation of Section 1983 is wholly at odds with the manner in which the statute has been applied by this Court.

This Court has previously held that Section 1983 “means what it says” and authorizes suits to enforce individual rights under federal statutes as well as the United States Constitution.” *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119 (2005) (quoting *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)). That holding was reaffirmed by a unanimous Court in *Fitzgerald v. Barnstable School Committee* 555 U.S. 246 (2009), in which the Court found that relief under Section 1983 was available even in the presence of another remedy provided by a separate statute.<sup>12</sup> The Court

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12 “In those cases in which the § 1983 claim is based on a statutory right, ‘evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute’s creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.’” *Fitzgerald* 555 U.S. at 252 (quoting *Abrams*, 544 U.S. at 120). And, “[C]ontext, not just literal text, will often lead a court to Congress’ intent in respect to a particular statute.” *Id.* at 253 (quoting *Abrams*, 544 U.S. at 127). Considering that 33 U.S.C. § 5(b) was a codification of the protections of the Tonnage Clause it makes no sense to codify the constitutional protections for which suit is often brought, by enacting a codification of those rights with no intent to have it be enforceable.

has explained that a plaintiff may sustain an action under Section 1983 where as here, “the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs.” *Abrams*, 544 U.S. at 120. Lil’ Man is the operator of a vessel, and 33 U.S.C. § 5(b) calls for protection of vessels.

The federal statute at issue in this case, Section 5(b) of the RHA, plainly creates such a right with respect to a class of beneficiaries, namely any “vessel or water craft” operating on the navigable waters of the United States. In this regard, the RHA specifically provides that, subject to certain limited exceptions, “[n]o taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States.” The only fair reading of that provision is that it establishes a right of vessels to be free from the imposition of charges by any non-Federal interest when operating in U.S. waterways. This Ninth Circuit decision findings are in direct contradiction to the statute.

This Court explained in *Abrams* that in circumstances where a statute creates a right in a class of beneficiaries to which the Plaintiff belongs, a rebuttable presumption arises that the right is enforceable under Section 1983. 544 U.S. at 120. The Court went on to state that such a presumption may be rebutted by the defendant by showing that Congress did not intend to provide a remedy for the right, via evidence of congressional intent “found directly in the statute creating the right, or inferred from the statute’s creation of a comprehensive enforcement scheme that is incompatible

with individual enforcement under § 1983.” *Id.* Here, no such evidence exists, as the RHA contains no language suggestive of an intention to preclude relief, nor does it provide a comprehensive enforcement scheme that would be incompatible with enforcement under Section 1983.

Any suggestion that Congress would have intended to preclude enforcement of the rights set forth under Section 5(b) of the RHA via a Section 1983 action is further belied by the fact that it is undisputed that the RHA was enacted to codify the Constitutional protections under the Tonnage Clause and the dormant Interstate Commerce Clause. Indeed, the Ninth Circuit specifically noted in its opinion that “[a]s several courts have observed, the 2002 amendment codified Commerce Clause and Tonnage Clause common law.” 5 F.4th at 957. Since civil actions are regularly filed under such constitutional provisions, it can be inferred that when Congress sought to codify those constitutional provisions, the resultant statutory provision would also be enforceable by private suit. “When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts.” *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 813, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). Because private plaintiffs have been able to enforce the prohibitions of the Tonnage Clause in courts, Congress must have intended that private plaintiffs would be able to enforce these same prohibitions under 33 U.S.C. 5(b). See, e.g., *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 566 F. Supp. 2d 81, 107 (D. Conn. 2008), aff’d 567 F.3d 79 (2d. Cir. 2009) (finding that fee imposed

by Port Authority of Bridgeport, Connecticut violated Tonnage Clause and enjoining collection of fees “in an amount that exceeds what is necessary for their expenses that benefit ferry passengers and fairly approximate their use of the Port”).

In sum, this Court’s and circuit court precedent establishes that where a right is conferred by a federal statute upon a defined class, that right is enforceable under Section 1983 absent a basis upon which to conclude that Congress sought to displace that remedy, such as by implementing a comprehensive enforcement mechanism. In its opinion, the Ninth Circuit turned that principle on its head, and failed to address applicable precedent governing the standard for enforcement of rights under Section 1983. The effect of that decision was to wholly deprive vessels of the protections specifically enacted by Congress for the purpose of preserving freedom to navigate the waters of the United States. As a result, any “non-federal interest” has now been given free rein to impose unlimited “taxes, tolls, operating charges, fees, or any other impositions” upon vessels in direct contravention of the RHA.

Section 1983 was enacted to address precisely that type of deprivation of rights secured by federal statutory and constitutional protections, and action by this Court is necessary both to prevent a complete loss of the protections upon freedom of the use of navigable U.S. waterways and to avoid a warping of this Court’s jurisprudence as to the scope and applicability of Section 1983.

**E. In the Alternative, the Standard Applied By the Ninth Circuit for Assessing Whether an Implied Right of Action Exists Compels the Conclusion that LMB Can Maintain a Cause of Action for the Violation of Section 5(b) of the RHA.**

As noted above, rather than applying the standard applicable to enforcement of rights pursuant to Section 1983, the Ninth Circuit undertook to determine whether or not an implied right of action exists under Section 5(b) of the RHA based upon a four-factor test derived from *Cort v. Ash*, 422 U.S. 66 (1975). Assuming *arguendo* that the four-factor test was the proper framework under which to analyze LMB's right to maintain its claim, the Ninth Circuit erred in refusing to find the existence of such an implied right of action.

In applying the four-factor test, the panel first addressed whether LMB "is one of a class 'for whose especial benefit the statute was enacted.'" 5 F.4th at 958 (quoting *Logan v. U.S. Bank Nat'l Ass'n*, 722 F.3d 1163, 1170 (9th Cir. 2013)). In considering that factor, the panel stated that "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Id.* (quoting *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001)). The Ninth Circuit went on to conclude that the RHA "refers to vessels 'only as an object of that obligation.'" *Id.* at 15 (quoting *Logan*, 722 F.3d at 1171).

In concluding that the focus of the RHA is on the "person regulated" (in this case, CCSF), rather than the "individuals protected" (here, the vessel compelled to pay an unlawful fee and other obligation), the Panel Decision misconstrues the nature of the provision at

issue. In this regard, Section 5(b) of the RHA does not “focus on the person regulated,” as it does not even identify such persons apart from a generalized reference to “any non-Federal interest.” In contrast, Section 5(b) clearly identifies the particular category of persons to be protected by the prohibition on collection of fees and other charges, namely the “vessel or other water craft” and “its passengers or crew.” The RHA’s text thus identifies a particular class for whose benefit the provision was enacted.

The fact that the statute delineates a particular category of protected individuals is not in conflict with the panel’s assessment that “[f]acilitating commerce” was a “focus” of the amendment to the Act. In prohibiting any non-Federal interest from imposing costs upon vessels, the commerce that Congress sought to facilitate was to be carried out by private businesses and their passengers. In admiralty, this class has long been identified as a class protected by the Constitution. The means by which such commerce was to be facilitated was by providing assurance to persons engaging in such commerce that their ability to operate would not be made contingent upon unforeseen demands for fees made at the whim of state or local governmental bodies, such that owners and operators of vessels would have the confidence to enter the marketplace. That purpose would be entirely defeated if, upon being subjected to a demand for payment of the very fees prohibited by the RHA as a condition of being permitted to operate, a vessel had no right of action by which to seek relief for such a violation.

The fact that Section 5(b) of the RHA specifically identifies a defined group of persons within the ambit of its protections signifies an intention to grant a right

of action to such individuals. In this manner, Section 5(b) stands in direct contrast to Section 10 of the RHA, which was the provision at issue in the Supreme Court's decision in *California v. Sierra Club*, 451 U.S. 287 (1981), in which the Court held that Section 10 did not create a private right of action. The Ninth Circuit extensively cited to *Sierra Club* as support for the conclusion that Section 5(b) does not provide a private right of action. Those two statutory provisions, however, are dramatically different in their structure and language, and the decision in *Sierra Club* does not provide any basis to support the Ninth Circuit's conclusion as to Section 5(b).

The section of the RHA at issue in *Sierra Club* provided that:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or enclosure within the limits of

any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 10. Unlike the wording of Section 5(b) of protecting vessels, there is no reference to in Section 10 to an identifiable class of intended beneficiaries.

In concluding that Congress did not intend to establish a private right of action under Section 10 of the RHA, this Court emphasized in *Sierra Club* that the section “states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further.” 451 U.S. at 294. The *Sierra Club* Court went on to describe the provision as “the kind of general ban which carries with it no implication of an intent to confer rights on a particular class of persons.” *Id.*

The language of Section 10 of the RHA, which consists of a straightforward ban on the construction of structures on navigable waterways outside of authorized areas and contains no reference whatsoever to any category of persons for whose benefit the prohibition was established, stands in stark contrast to the language of Section 5, which specifically identifies a “vessel or other water craft” and “its passengers or crew” as the provision’s beneficiaries. The Ninth Circuit’s decision in this case failed to account for that critical difference between the two sections when it

invoked *Sierra Club* as supporting its refusal to find a private right of action.<sup>13</sup>

In contrast to the conclusion reached in this case by the Ninth Circuit, the distinction between Section 5(b) and Section 10 was recognized by District of Alaska in *Cruise Lines Int'l Ass'n Alaska v. City & Borough of Juneau* when that court was faced with the question of whether an implied right of action exists under Section 5(b). 356 F. Supp. 3d 831 (D. Alaska 2018). There, in considering the language of Section 5(b) and its direct reference to vessels and their passengers, the court noted that “*California v. Sierra Club* does not control the issue of whether there is a private cause of action under Section 5(b) of the RHA because that case involved an entirely different section of the Act.” *Id.* at 846. The court went on to conclude that:

Section 5(b) was enacted for the benefit of vessels, and with respect to passengers and crews of vessels, as opposed to the general public. Section 5(b) expressly prohibits certain fees or taxes being imposed on vessels, crews, and passengers. For this additional reason,

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<sup>13</sup> In addition to the difference in statutory language, the facts of this case differ from those of *Sierra Club* in that the nature of the restriction at issue in Section 5(b) is such that any violation of that section will inherently cause a direct financial harm to an identifiable class of persons (*i.e.*, the owners of the vessels subjected to the unlawful charge). That same fact likewise distinguishes this case from another relied upon by the panel, *UFCW Local 1500 Pension Fund v. Mayer*, 895 F.3d 695 (9th Cir. 2018), in which this Court found no private right of action under a statute requiring investment companies engaged in interstate commerce to register with the Securities and Exchange Commission.

the court concludes that Congress intended that vessels (or associations representing vessels and their owners, such as plaintiffs here) could enforce Section 5(b).

*Id.* at 847.

The court's conclusion was further supported by the fact that "Congress could not have intended to preclude a private cause of action under Section 5(b) of the RHAA because it was Congress' clear intent to mirror the federal common law of the Commerce Clause and the Tonnage Clause when it enacted Section 5(b). . . . Because private plaintiffs have been able to enforce the prohibitions of the Tonnage Clause in courts, Congress must have intended that private plaintiff would be able to enforce these same prohibitions under Section 5(b) of the RHAA." *Id.* at 846-47.

Notwithstanding the fact that the Ninth Circuit expressed its agreement with the conclusion in *Cruise Lines Int'l* that "Congress intended the 2002 amendment to codify common law that had developed pursuant to the Tonnage Clause and Commerce Clause since the [RHA] was enacted," it nevertheless rejected that court's conclusion that such an intention supported a finding of a private right of action. 5 F.4th at 963. In doing so, the panel disregarded the principle of statutory interpretation that "[w]hen Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989).

Indeed, the Ninth Circuit's recognition that in passing the RHA, Congress' intention was to codify

common law that had developed under the Tonnage Clause and Commerce Clause, stands in direct conflict with its conclusion that Congress did not intend to provide a right of action for violations of the RHA. In addition to the fact that the common law that Congress sought to codify itself supported a private right of action, the panel's interpretation of Congress' intention in enacting Section 5(b) amounts to a conclusion that Congress found the conduct at issue sufficiently important to warrant legislation, yet simultaneously intended to provide no means by which to remedy a violation of the conduct it sought to prohibit.

In sum, Section 5(b) of the RHA specifically identifies a category of persons for whose benefit the prohibition on fees for use of navigable waterways was enacted. The language of the RHA, as well as its purposes and its acknowledged intent to codify previously existing common law, all compel the conclusion that a private right of action exists in favor of a vessel that has been prohibited from operating due to its refusal to pay a fee that is made unlawful under the Act's terms. As a result, even if the existence of an implied right of action under Section 5(b) of the RHA was a prerequisite to the maintenance of an action under 42 U.S.C. § 1983 – which, as discussed *supra*, is not the case – such a right of action can properly be implied from the text of Section 5(b) as well as its acknowledge purpose of codifying the common law developed pursuant to the pursuant to the Tonnage Clause and Commerce Clause.

## **F. In Considering Only Damages Cases, the Ninth Circuit Decision Ignores That Injunctive Relief Available to Enforce a Federal Statute.**

The Ninth Circuit opinion concludes that there was no implied cause of action under 33 U.S.C. § 5(b). “The absence of an expressly identified remedy in § 5(b)(2) also presents a significant textual clue that Congress did not intend to confer private rights.” (App.13a) The cases upon which the Ninth Circuit relied considered whether or not there was an implied cause of action for damages claims. None of the cases considered in that opinion deal with enforcement of a federal statute by injunctive relief. That limitation is contrary to the Supreme Court decision on point. The Supreme Court has held that where there may be no implied cause of action for damages, a party may still secure enforcement of a federal statute by injunctive or equitable relief.

Hence the Ninth Circuit opinion impliedly voids a long standing and undisturbed Supreme Court decision, *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis* 444 U.S. 11 (1979). There appears to be no decision which changes or challenges the notion that a congressional intent to protect is all that is needed for enforcement by a federal court injunction of a federal statute. *Sullivan v. Little Hunting Park, Inc.* 396 U.S. 229 (1969).

In *Transamerica* the court rejected a request for an implied cause of action for damages and at the same time upheld the jurisdiction to issue an injunction for violation of a federal law, just as was sought by Lil’ Man here. Lil’ Man dropped their request for damages

seeking only injunctive relief at the time of summary judgment.

In the case of § 215, we conclude that the statutory language itself fairly implies a right to specific and limited relief in a federal court. By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere. At the very least Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract. But the legal consequences of voidness are typically not so limited. . . .

For these reasons we conclude that when Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for “rescission or for an injunction against continued operation of the contract, and for restitution. Accordingly, we hold that the Court of Appeals was correct in ruling that the respondent may maintain an action on behalf of the Trust seeking to void the investment advisers contract.”

In light of the *Transamerica* decision, Section 5(b) of the RHA supports the entry of an injunction to address the voidness of the contract provisions that Respondents have sought to impose upon LMB as a condition of being allowed to dock at port facilities under their control. *See Sullivan v. Little Hunting Park, Inc.* 396 U.S. 229 (1969) (“Existence of statutory right implies existence of all necessary and appropriate remedies.”).



## CONCLUSION

For the reasons set forth herein, Petitioner respectfully submits that the Petition be granted.

Respectfully submitted,

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