

No. _____

In the Supreme Court of the United States

WAYNE VOLK AND KAREN VOLK,

Petitioners

VERSUS

A.J. FRANZ, JR., Trustee, as Owner and
BUCHANAN MARINE, L.P., as Bareboat Charterer
of the Barge B-252,

Respondents

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case poses important questions regarding “seaman” status under the Jones Act as applied to a vessel repair employee working exclusively on a fleet of vessels, while afloat, under the ownership and control of his employer.

Question I. Whether a long-term employee engaged exclusively in maintenance and repair work on a fleet of 150-200 deck barges afloat in the Hudson River is a “seaman” under the Jones Act (46 U.S.C. §30104) when the barges are under common ownership/operation of his employer, and he is injured while working on one of the vessels.

Question II: Whether the Second Circuit Court of Appeals misapplied the “*Chandris* test”¹ and other authority from the Court by holding, as a matter of law,

¹ *Chandris v Latsis*, 515 U.S. 347 (1995)

that Petitioner, Wayne Volk, was not a “seaman” under the Jones Act, 46 U.S.C. § 30104, thereby creating a conflict among the circuits.²

² A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

RULE 14.1 STATEMENT - LIST OF PARTIES

Petitioners (claimants-appellants below) are Wayne Volk and Karen Volk.

Respondents (petitioners-counter-defendants-appellees below) are A.J. Franz, Jr., Trustee, as owner and Buchanan Marine, L.P., as Bareboat Charterer of the Barge B-252.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Wayne Volk and Karen Volk respectfully petition for a writ of certiorari to review the judgment of the Second Circuit in *Matter of Buchanan Marine, L.P.*, 874 F.3d 356 (2d Cir. 2017) [App. A].

OPINIONS BELOW

The opinion of the court of appeals was rendered on October 27, 2017, *Matter of Buchanan Marine, L.P.*, Docket No. 16-1092-cv, 874 F.3d 356 (2d Cir. 2017) [App. A].

The opinion of the district court granting the summary dismissal of Volk's seaman claims was rendered on March 10, 2016, *Matter of Franz*, 2016 WL 922793 (N.D.N.Y. 3/10/16) [App. B].

JURISDICTION

The judgment of the court of appeal was entered on October 27, 2017. There was no application for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

46 U.S.C. § 30104 reads as follows:

Personal injury to or death of seamen

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.

STATEMENT OF THE CASE

This case raises important issues of federal law:

Question I. Was a long-term employee engaged exclusively in maintenance and repair work on a fleet of 150-200 deck barges afloat in the Hudson River a “seaman” under the Jones Act (46 U.S.C. §30104) when the barges were under common ownership/operation of his employer and he was injured while working on a vessel in this fleet?

Question II. Did the Second Circuit Court of Appeals misapply the “*Chandris* test”³ and other authority from the Court by holding, as a matter of law, that Petitioner, Wayne Volk, was not a “seaman” under the Jones Act, 46 U.S.C. § 30104, and thereby create a conflict among the circuits?

³ *Chandris*, 515 U.S. 347.

**THE FACTS AS STATED BY
THE COURT OF APPEAL**

According to the Second Circuit:⁴

The facts are largely undisputed and are summarized in the light most favorable to Volk, against whom summary judgment was granted.

Volk worked for petitioner-counter-defendant-appellee Buchanan Marine, L.P. (“Buchanan”) at the Clinton Point quarried rock processing facility on the Hudson River, in Dutchess County, New York, as a “barge maintainer” from 1999 until his accident on May 19, 2011.¹ At the Clinton Point facility, claimant-counter-claimant-appellee Tilcon New York, Inc.

⁴ *Matter of Buchanan Marine*, 874 F.3d 356, 361 (2d Cir. 2017) App. A, A-3-7. Although, as detailed in Appendix C, this factual statement is incomplete in important respects and sometimes misleading, it forms a sufficient basis upon which to make the legal determination that Mr. Volk was a seaman as a matter of law and to defeat summary judgment.

("Tilcon") processes quarried rock for use in, *e.g.*, construction work, and loads the rock onto barges supplied by Buchanan. Buchanan then transports the loaded barges, using its tugboats, down the Hudson River to Tilcon's customers.²

The court of appeals explained the three-step loading process:

The loading process has three steps. First, before an empty barge is loaded, and while it is tied to the dock, it is inspected by a Buchanan barge maintainer. The barge maintainer checks the barge for damage and excess water and repairs any damage so that the barge is in acceptable condition for loading. Second, the barge is moved to the loading facility by Tilcon, where it is loaded with quarried rock. Third, after the barge is loaded, it is moved back to the dock by Tilcon, where a Buchanan barge maintainer conducts a final inspection. During the first and third steps of the loading process, the barge is in the water and secured to the dock, either tied directly to the dock or to barges already tied to the dock. Moored barges may be three or four barges deep, with the closest barge tied to the dock and the outward barges tied to one another. When a barge was tied to other

barges—rather than tied directly to the dock—barge maintainers would climb over the barges to get to the one they needed to inspect.

The court of appeals continued:

When Volk was inspecting a barge, he would walk along the perimeter of the barge on the “margin decks,” which ran the length of the barge. App'x at 185. The margin decks were “so narrow [that] they were difficult to walk on or stand on,” *id.*, lacked guard or hand rails, and were often wet and soiled with excess gravel that spilt over from the loading process. When a barge required repairs, Volk would sometimes stand on a pontoon work boat—a flat floatable device powered by a motor—on the barge's water side to do the work.

Volk was not assigned to any specific barge; rather, he worked on all Buchanan barges that arrived for loading at the Tilcon facility. Volk was not a crewmember of any of Buchanan's tugboats that transported the barges down the Hudson River. He worked an hourly shift, went home at the end of each work day, and did not take meals or sleep on any barge. He was a member of the International Union of Operating Engineers, which represents equipment

operators. He did not belong to a maritime union or hold a maritime license.

On May 19, 2011, Volk was walking along the margin decks of Barge B-252 (the “Barge”), which had been loaded with stone, when he slipped on excess wet stone and injured his right arm and shoulder on the side of the Barge.

THE APPLICATION OF THE JONES ACT BY THE COURT OF APPEALS

The Second Circuit applied the seaman status test under the Jones Act, as follows:⁵

In weighing “the total circumstances” of Volk's employment, we conclude as a matter of law that Volk does not qualify as a seaman under the Jones Act. See *id.* As a reasonable factfinder could only conclude, his work on the barges did not regularly expose him to the special hazards and disadvantages of the sea. See *id.* at 369-70, 115 S.Ct. 2172.

Volk did not “derive[] his livelihood from sea-based activities.” *O'Hara*, 294 F.3d at 64 (internal

⁵ *Buchanan.*, 874 F.3d at 366-368, App. A, A-22-28.

quotation marks omitted). Volk never operated a barge and only worked aboard the barges when they were secured to the dock. See *Harbor Tug & Barge Co.*, 520 U.S. at 555, 117 S.Ct. 1535 (“For 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.”). The barges Volk worked on were moved to the loading dock by Tilcon workboats and Tilcon employees, and transported down the Hudson River by Buchanan tugboats. Volk was not a crew member of and did not serve on the Buchanan tugboats.⁹ Indeed, Volk reported to the dock foreman, not a ship’s officer, and it was the dock foreman who brought him to the medical clinic after his accident.

Volk belonged to a union that represents equipment operators. He did not belong to a maritime union and did not hold a maritime license or other “seaman’s papers.” *O’Hara*, 294 F.3d at 64. Finally, Volk never spent the night aboard a barge; he worked an hourly shift and went home every night after his shift ended. In contrast, a traditional Jones Act seaman normally serves for voyages or tours of duty. See, e.g., *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 731-32, 63 S.Ct. 930, 87 L.Ed.

1107 (1943) (voyages); *Sellers v. Dixilyn Corp.*, 433 F.2d 446, 447-48 (5th Cir. 1970) (tours of duty).

In *O'Hara*, we concluded that a dock worker who was injured while repairing the Staten Island pier aboard a barge was not a “seaman” as a matter of law because he had, at most, “a transitory or sporadic connection” to the barges “in their capacity as vessels in navigation.” 294 F.3d at 64 (emphasis omitted). Key to our holding was that the dock worker (1) belonged to a dock workers union rather than a maritime union, (2) lacked a maritime license, (3) never spent the night aboard a barge, and (4) never operated a barge or assisted in its navigation and only worked aboard the barges when they were fully secured to the pier that the dock worker was employed to repair. *Id.* We emphasized that, although the worker “spent more than half his working hours ... aboard the barges, ... he spent all of that time performing tasks related to the repair of the Staten Island pier while the barges were secured to the pier.” *Id.* This case is not substantially different from *O'Hara*.

Volk seeks to rely on the Fifth Circuit's decision in *Naquin v. Elevating Boats, LLC*, 744 F.3d 927 (5th Cir. 2014), cert. denied — U.S. —, 135

S.Ct. 1397, 191 L.Ed.2d 359 (2015). There, a shipyard worker “spent approximately 70 percent of his total time working aboard” so-called “lift-boats” that “were moored, jacked up or docked in [the] shipyard canal.” *Id.* at 930. His duties included “inspecting [the lift-boats] for repairs, cleaning them, painting them, replacing defective or damaged parts, performing engine repairs, going on test runs, securing equipment, and operating the vessels’ marine cranes and jack-up legs.” *Id.* The worker was occasionally “dispatched ... to repair a vessel or fill in as a vessel crane operator while the vessel was operating in open water.” *Id.* at 931. The Fifth Circuit affirmed the jury verdict in favor of the shipyard worker awarding Jones Act damages, finding that the shipyard worker was exposed to the perils of a maritime work environment such that he was a seaman. *Id.* at 935.

The Fifth Circuit’s decision is not controlling on us, and it is in any event distinguishable. The shipyard worker there clearly had a more substantial connection to seafaring vessels than Volk does. For example, the shipyard worker operated “the vessels’ marine cranes and jack-up legs” and worked aboard the vessels in open water, even if only “occasionally.” *Id.* at 930. Volk

did none of these things; Volk worked on barges that were moored, directly or indirectly, to the Tilcon dock and did not operate the Tilcon workboats or Buchanan tugboats that transported the barges. See *Schultz v. Louisiana Dock Co.*, 94 F.Supp.2d 746, 750 (E.D. La. 2000)⁶ (“Plaintiff’s duties were limited to inspecting and repairing barges moored at the facility. He did not go to sea or face the perils of the sea in the manner associated with seaman status. Plaintiff ate meals ashore and went home every night. He admitted that with respect to the vessels used to transport him around the facility he did not serve as a deckhand.”).

In sum, none of Volk’s work was of a seagoing nature. Volk’s duties were limited to inspecting and repairing barges that were secured to the dock at the Clinton Point facility. Volk did not go to sea and he was not exposed to the

⁶ This case may not be good law after *Naquin*. See *Duet v. Am. Commercial Lines LLC*, No. CIV.A. 12-3025, 2013 WL 1682988 (E.D. La. Apr. 17, 2013), reversed *sua sponte* in the unreported remand to state court, Doc. 58, filed 04/02/14.

“perils of the sea” in the manner associated with seaman status. See *Denson v. Ingram Barge Co.*, 5:07-cv-00084-R, 2009 WL 1033817, at *3 (W.D. Ky. Apr. 16, 2009) (“The hazards Denson states he faced do not rise to the level of the special hazards and disadvantages faced by seamen; they are hazards that longshoremen commonly encounter. Therefore, Denson was an intended beneficiary of the LHWCA.”). Accordingly, considering the total circumstances of Volk's employment, we conclude as a matter of law that Volk does not qualify as a “seaman” within the meaning of the Jones Act, and we affirm the dismissal of his Jones Act claims.

THE CIRCUIT CONFLICTS

The decision of the court below admittedly conflicts with *Naquin*, 744 F.3d 927, which, on substantially the same relevant facts, was decided by the Fifth Circuit, thereby creating an irreconcilable conflict on the issue of “seaman” status under the Jones Act, 46 U.S.C. § 30104 and exposure to “perils of the sea.” The opinion of the court below represents

a clear, significant and unwarranted departure from controlling precedent from this Court, including *Chandris*, and establishes an irreconcilable conflict on the test for “seaman” status under the Jones Act, between the Fifth Circuit and the Second Circuit courts of appeal.

In addition, the decision below also conflicts with the following circuit authority: **Fifth Circuit:** *In re Endeavor Marine Inc.*, 234 F.3d 287, 291 (5th Cir. 2000), *Grab v. Boh Bros. Const. Co.*, 506 F. App'x 271 (5th Cir. 2013); **Eighth Circuit:** *Slatton v. Martin K. Eby Const. Co.*, 506 F.2d 505 (8th Cir. 1974) *Bunch v. Canton Marine Towing Co.*, 419 F.3d 868 (8th Cir. 2005); **Ninth Circuit:** *Delange v. Dutra Const. Co.*, 183 F.3d 916, 920 (9th Cir. 1999) *Scheuring v. Traylor Bros.*, 476 F.3d 781, 786–87 (9th Cir. 2007).

THE CONFLICT WITH THIS COURT'S PRECEDENT

The decision of the court below is also inconsistent with this Court's precedents. With respect to the interpretation of "perils of the sea," this Court rejected the narrow interpretation of "perils of the sea" in *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991). The decision of the Second Circuit also deviates from this Court's decisions in *Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005) as quoted by the Fifth Circuit in *Naquin*, 744 F.3d at 934, *infra*; and *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997).

Without an appropriate clarification of the seaman test, the circuit split may intensify. At least one interested and knowledgeable practitioner has written a comprehensive blog post in which the

author suggests that this Court should resolve the conflict between the opinion of the court below and the opinion of the Fifth Circuit in, *inter alia*, *Naquin*.⁷

The Court should resolve these conflicts and reject the Second Circuit's interpretation of the seaman test.

PROCEEDINGS BELOW

The following is taken from the opinion of the court of appeal:⁸

On October 16, 2012, Volk and his wife Karen Volk commenced a

⁷ <https://www.stridingthequarterdeck.com/naquin-door-circuit-split-second-circuit-suggests-emerging-split-fifth-circuit-regarding-jones-act-seaman-status-essentially-land-based-employees/#more-305>

⁸ *Matter of Buchanan Marine*, 874 F.3d at 362-363, App. A, A-7-9.

personal injury action against Buchanan and Tilcon in New York State Supreme Court, Ulster County. On April 15, 2013, A.P. Franz, Jr., the owner of the Barge, and Buchanan, as bareboat charterer of the Barge, commenced this action in the district court pursuant to the Limitation of Liability Act of 1851, 46 U.S.C. §§ 30501-30512, seeking exoneration from or limitation of liability. In accordance with Rule F of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure, the court approved a \$47,420.77 security bond, representing Franz and Buchanan's interest in the Barge, directed issuance of notice to all persons asserting claims affected by the limitation proceeding, ordered that any claim related to the incident be filed with the court within a specified time period, and enjoined the filing or prosecution of any suits related to the incident.

Tilcon and the Volks answered the complaint and asserted counterclaims. Tilcon asserted claims against Franz and Buchanan for indemnification or contribution. The Volks asserted claims against Franz, Buchanan, and Tilcon under the Jones Act, the LHWCA, general maritime law, and New York state law.

The Volks filed a motion to dismiss on August 16, 2013. The district court denied the motion on March 28, 2014. The parties thereafter cross-moved for summary judgment. On March 10, 2016, the district court granted the motions of Franz, Buchanan, and Tilcon, denied the Volks' cross-motion, and granted Franz and Buchanan's complaint for exoneration from liability. The court exonerated Franz, Buchanan, and Tilcon from liability for Volk's injury, except for Buchanan's liability for workers' compensation. The court concluded that Volk's Jones Act claims fail because he is not a "seaman" under the Jones Act. The court also concluded that all of Volks' remaining claims under the LHWCA, general maritime law, and state law fail.

The Second Circuit affirmed the district court's dismissal of Volk's Jones Act claim but held that "the district court erred in dismissing certain of Volk's remaining claims against the owner of the

barge and the operator of the rock processing facility.”⁹

Although the facts as recited in the opinion of the Second Circuit are incomplete, as discussed in detail at Appendix C and hereinafter, and led to unsupported, erroneous conclusions,¹⁰ Volk, a vessel repairer working exclusively on one employer’s fleet of vessels, engaged in traditional seaman’s work on

⁹ *Buchanan*, 874 F.3d at 361, App. A, A-3.

¹⁰ As stated in *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523, 527 (5th Cir. 1960): “Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts.”

the river, working aboard/from a motor-powered “little work barge,” was a seaman as a matter of law at the time that he was injured on the B-252, a vessel in Buchanan’s fleet. Alternatively, the motion for summary judgment should have been denied.

REASONS FOR GRANTING THE PETITION

This Court’s review is required to resolve the question of whether a “lunch box” maritime worker can qualify as a Jones Act Seaman when that maritime worker is exclusively employed to maintain and repair a fleet of employer-owned/operated unmanned vessels in inland waters and his duties do not literally take him out to sea but involve other navigable bodies of water, service on the entire fleet of vessels, and injury aboard one of those vessels. The decision of the Second Circuit on this important federal question establishes a conflict among the federal circuits courts of appeal with respect to the

legal standard for determining Jones Act seaman status for land-based maritime workers who perform all, or almost all, of their work on or over navigable waters in connection with a fleet of vessels under common ownership and control. Since *Chandris*,¹¹ there has been limited predictability as to the seaman status of such maritime workers. Perversely, an employer who exposes its employees to significant “perils of the sea” can escape Jones Act liability because of the gap in the current *Chandris* test as interpreted by the court below. This leaves hard-working men, who face “perils of the sea” daily, stranded and without the Jones Act protection intended by Congress.

¹¹ *Chandris, supra.*

I. THE LONG-CONFLICTED HISTORY OF THE “SEAMAN” DEFINITION

As stated by this Court in *Chandris*,¹² Congress did not include a definition of the term “seaman” in the Jones Act, meaning that it intended to leave this task to the courts. As may be seen from the volume of Jones Act litigation and varying results in the courts of appeal and in district courts, this has produced differing results in cases involving land-based maritime worker exposed to “perils of the sea.”

II. TEST FOR SEAMAN STATUS UNDER THE JONES ACT

This Court established a test to determine if a maritime worker is a seaman in *Chandris*:¹³

First, as we emphasized in *Wilander*, “an employee's duties must

¹² *Chandris*, 515 U.S. at 355.

¹³ *Chandris*, 515 U.S. at 368.

‘contribut[e] to the function of the vessel or to the accomplishment of its mission.’” 498 U.S., at 355, 111 S.Ct., at 817 (quoting *Robison*, 266 F.2d, at 779).

Second, and most important for our purposes here, 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.

Explaining the second prong of the test, this

Court held:¹⁴

We agree with the Court of Appeals that seaman status is not merely a temporal concept, but we also believe that it necessarily includes a temporal element. 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. Naturally, substantiality in this context is determined by reference to the period covered by the Jones Act plaintiff's maritime employment, rather than by

¹⁴ *Chandris*, 515 U.S. at 371.

some absolute measure. Generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: A worker who spends less than 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act.

III. THE CONFLICTING CIRCUIT DECISIONS

The Fifth Circuit. In *Naquin*, 744 F.3d 927, that court affirmed a jury verdict that Naquin, a vessel repair supervisor, was a seaman. Naquin's responsibilities were to maintain and repair Elevating Boats, LLC ["EBI"]'s fleet of lift-boat vessels while he was aboard moored, jacked-up, or docked lift-boats in EBI's shipyard canal, and spent "70 percent of his total time working aboard these vessels." *Id.* at 930. In addition, two to three times a week, Naquin most often worked on vessels while they were being moved in a **canal**. *Id.* at 930-931.

The Fifth Circuit had no doubt “that Naquin did the ship's work and contributed to the function of EBI's vessels,” and held that “an individual can still qualify for seaman status even if he divides his time among multiple vessels under common ownership or control.” *Id.* at 934.

As opposed to Naquin's lesser percentage, Volk spent almost 100 percent of his total working time aboard Buchanan's unmanned fleet of barges/scows and the “little work barge,” trying to keep the Buchanan barge fleet as seaworthy as possible so these vessels could be loaded with quarried crushed stone or gravel and make the trip south from Clinton Point.¹⁵ Like Naquin's duties as a vessel repair supervisor, Volk's duties as a barge maintainer-repairer contributed to the mission and function of

¹⁵ App. C, A-86-87.

the vessels, as “vessel repair is classic seaman's work.”¹⁶ As was true with Naquin, Volk’s job as a barge maintainer-repairer was essential to the Buchanan barge fleet’s performance of its intended mission.

In *Naquin*, EBI’s argument that, because Naquin’s duties did not “regularly expose [him] to the perils of the sea,” he did not qualify as a seaman, is almost exactly the same argument used by the Second Circuit in its attempt to distinguish *Naquin*. However, in *Naquin*, the Fifth Circuit disagreed:¹⁷

EBI emphasizes that Naquin was rarely required to spend the night aboard a vessel, that the vessels he worked upon were ordinarily docked, and that **he almost never ventured**

¹⁶ *Naquin*, 744 F.3d at 927.

¹⁷ *Id.* [Emphasis added].

beyond the immediate canal area¹⁸ or onto the open sea. However, courts have consistently rejected the categorical assertion that workers who spend their time aboard vessels near the shore do not face maritime perils. While these near-shore workers may face fewer risks, they still remain exposed to the perils of a maritime work environment.²⁸ As the Supreme Court explained in *Stewart v. Dutra*:

[I]t seems a stretch of the imagination to class the deck hands of a mud dredge in the quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic; but such and so far-reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world.²⁹

¹⁸ This canal, a quiet body of water, is a man-made slip, an extension of the Houma Navigational Canal located in an industrial area of Houma, Louisiana, miles from the Gulf of Mexico or any other open body of water.

Volk worked on barges (scows) and aboard the “little work barge” on the Hudson River, a busy navigable river traversed by big ships—certainly more dangerous than the navigational canal on which Naquin worked.

The decision below also conflicts with *In re Endeavor Marine Inc.*, 234 F.3d 287 (5th Cir. 2000), a case cited by Volk but not discussed by the court below. In *Endeavor*, the Fifth Circuit held that even though “his duties [did] not literally carry him to sea,” a crane operator, injured on a crane barge used to unload a cargo vessel on the brown waters of the Mississippi River, satisfied the nature test and he was a Jones Act seaman.¹⁹

The Second Circuit’s interpretation of the “going to sea” test, citing *Harbor Tug* 520 U.S. 548,

¹⁹ *Endeavor*, 234 F.3d at 292.

conflicts with the Fifth Circuit's interpretation. The Second Circuit held:²⁰

Volk never operated a barge and only worked aboard the barges when they were secured to the dock.²¹ *See Harbor Tug & Barge Co.*, 520 U.S. at 555, 117 S.Ct. 1535 (“For 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.”).

However, in *Endeavor*, the Fifth Circuit reversed the district court's decision “that found that Baye's connection to the FRANK L was not substantial in nature because ‘it did not take him to

²⁰ *Buchanan*, 874 F.3d at 366, App. A, A-23.

²¹ This statement appears inconsistent with that court's statement that, “When a barge was tied to other barges—rather than tied directly to the dock—barge maintainers would climb over the barges to get to the one they needed to inspect.”

sea. His work brought him aboard the barge only after the vessel was moored or in the process of mooring,” and held that the crane operator was regularly exposed to the “perils of the sea.”²²

The Fifth Circuit also explained the duration and nature of the connection requirement:²³

The duration of the worker's connection to a vessel and the nature of the worker's activities taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time. *Chandris*, 515 U.S. at 370, 115 S.Ct. 2172 (citations omitted).

In *Endeavor*, although Baye normally worked while the barge was moored to the shore, his duties did “place him on the brown waters of the

²² *Endeavor*, 234 F.3d at 291-292.

²³ *Endeavor*, 234 F.3d at 290-291.

Mississippi River.”²⁴ Similarly, Volk’s duties placed him on the Hudson River, as the barges he worked on were tied to one another, to the pier, and moved from unloaded to loaded racks through the open waters of the Hudson.²⁵ Volk was daily required to leave the dock to perform his work directly afloat on the Hudson River,²⁶ as he loaded his repair tools and equipment onto the “little work barge” to navigate it to the barges. Volk and the other barge maintainers would “man the pumps” while riding aboard each empty barge when pushed from the “unloaded” rack of barges out into open water in the Hudson River.²⁷

²⁴ *Endeavor Marine*, 234 F.3d at 287, n. 3.

²⁵ App. C, A-92-93.

²⁶ App. C, A-88; A-96.

²⁷ App. C, A-95-96.

Volk was **not** an “employee who happen[ed] to be working on the vessel at a given time.”²⁸ Rather, Volk had worked 100% of his time as a barge maintainer-repairer on the open waters of the Hudson for 12 years.

The Second Circuit’s decision also conflicts with the Fifth Circuit’s decision in *Grab*, 506 F. App’x 271. In *Grab*, the Fifth Circuit affirmed the district court’s determination that two ironworkers who “performed part of their work from a derrick barge, the BIG MAC, and part of their work from the bridge structure,” were seamen.²⁹ In *Grab*, the court rejected the employer’s argument “that Kinchen cannot satisfy the second *Chandris* prong because Kinchen is a land-based worker whose job does not

²⁸ *Endeavor*, 234 F.3d at 291.

²⁹ *Grab*, 506 F. App’x at 273.

regularly expose him to the ‘perils of the sea,’ ”³⁰ and held that:³¹

[T]he fact that Kinchen returned home daily did not remove him from his exposure to cognizable dangers of the sea.¹ Nor does the classification of Kinchen as a bridge ironworker, a traditionally land-based occupation, serve to negate the seaman status to which Kinchen would otherwise be entitled by virtue of his connection to the BIG MAC. *See Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81, 89, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991).²

As was true with the ironworkers in *Grab*, the fact that Volk returned home nightly did not mean that he was not exposed to “perils of the sea.” Similarly, what Volk’s occupation might have been called cannot supersede the “seaman status to which [Volk] would otherwise be entitled by virtue of his

³⁰ *Id.* at 275.

³¹ *Id.* at 276.

connection to the [Buchanan fleet of vessels].”³² During Volk’s employment, he and the other barge maintainers knew and experienced the constant daily perils of operating and navigating the “little work barge” on the river in open water in all types of weather to access and repair Buchanan’s loaded and unloaded barges. They kept a constant lookout over the waters of the Hudson River so “they didn’t get crushed.”³³

In *Braniff*, 280 F.2d at 528, the court held:

The usual thing, of course, is for a person to have a Jones Act seaman status in relation to a particular vessel. But there is nothing about this expanding concept to limit it mechanically to a single ship. If the other factors summarized above and set out in such detail in *Offshore Company v. Robison*, *supra*, are otherwise present, we see no insurmountable

³² *Id.*

³³ App. C, A-96.

difficulty with respect to element (1) in the fact that such person is ‘assigned permanently to’ several specific vessels ‘or perform(s) a substantial part of his work on the’ several specified ‘vessel(s).’ *Offshore Company v. Robison, supra*, 266 F.2d 769, 779.

The Second Circuit also held that: “Here, Franz had bareboat chartered the Barge along with his fleet of other barges and tugboats to Buchanan. Pursuant to the bareboat charter, Franz transferred exclusive control to Buchanan to use, operate, command, and navigate his fleet of barges and tugboats.”³⁴

Volk serviced every Buchanan-owned/operated barge that came to the Tilcon facility (12-16 per day) and not just one. Volk had a substantive connection to an “identifiable fleet” of vessels, all under common control of Buchanan, his employer.

³⁴ *Buchanan*, 874 F.3d at 370, n. 3, App. A, A-37.

The Eighth Circuit. In *Slatton*, 506 F.2d at

510:

Here the barge was in navigable waters and the men were working on a maritime installation. Part of plaintiff's work was on the barge itself in connection with his other duties constructing the dolphin. There appears to be a sufficient nexus between the plaintiff's work on the floating barge and the installation of the maritime dolphin structure to merit submitting the issue to the jury. In light of the record, we cannot say as a matter of law that the jury's verdict was legally erroneous. The jury can approve Jones Act coverage if there is evidence that (1) the injured workman performed at least a substantial part of his work on the vessel (virtually any floating structure used for transport in navigable waters) and (2) the capacity in which he was employed and duties which he performed contributed to the function of the vessel or to the accomplishment of its mission. *Offshore Company v. Robison*, *supra* at 779.⁶

In *Bunch*, 419 F.3d 868, the court reversed summary judgment adverse to a barge cleaner. Bunch worked on a cleaning barge which could not

move by itself, “originally [] built for navigation,” and which “was later moored to the bed of the Missouri River by spud poles” *Id.* at 870, citing this Court’s decision in *Stewart*, 543 U.S. 481.

As in *Bunch*, barge B-252 was a vessel in navigation, as that barge was moved from the southern nesting or fleeting area to be loaded with quarried crushed stone or gravel and then made its river voyage from Clinton Point to New York Harbor or nearby Long Island Sound.³⁵

There are conflicting district court summary judgment determinations concerning floating casino boats in the Southern District of Iowa. Please see *Lara v. Harveys Iowa Mgmt. Co.*, 109 F. Supp.2d 1031 (S.D. Iowa 2000) and *Frederick v. Harvey's*

³⁵ App. C, A-87, 98, 99.

Iowa Mgmt. Co., 177 F. Supp.2d 933 (S.D. Iowa 2001).

The Ninth Circuit. In *Delange*, 183 F.3d at 920, the court reversed a determination that Delange, who was hired as a carpenter but who actually did “mechanical work, welding, carpentry, supply runs, and occasionally pile driving” work, was a land-based worker and not a member of the crew of a barge or tug used in Dutra’s construction projects.

The result was the same in *Scheuring*, 476 F.3d at 786–87. The Ninth Circuit reversed the determination that a crane operator on a construction barge was not a seaman. That court examined “whether the plaintiff has presented evidence that would allow a jury to find a substantial connection to the vessel both in terms of duration and nature” and assessed the perils of the sea he faced while performing his duties:

Here, Scheuring alleges that the boat was subject to sea swells, wind waves, vessel wakes and tidal currents. He further alleges that the barge floated on her anchor lines on a daily basis. And, most importantly, on at least three occasions, the plaintiff was aboard the barge as it was unmoored and moved by a tugboat.

Volk's duties exposed him to the "perils of the sea" as the "lower Hudson River is a tidal estuary, subject to tidal variations, weather conditions, wind conditions and strong currents."³⁶

In citing *Denson v. Ingram Barge Co.*, 2009 WL 1033817 (W.D. Ky. 4/16/09) as authoritative, the Second Circuit was apparently unaware of *Gulasky v. Ingram Barge Co.*, 2006 WL 119381 (W.D. Ky. 1/10/06) (denying summary judgment to the same employer but at a different location). See also,

³⁶ App C, A-96.

Luckett v. Cont'l Eng'g Co., 649 F.2d 441, 442–45 (6th Cir. 1981) (reversing summary judgment).

IV. THE SECOND CIRCUIT'S OPINION IS INCONSISTENT WITH RULINGS OF THIS COURT

Neither the court below nor Buchanan adverted to or discussed three cases from this Court cited by Volk that establish seaman-status tests conflicting with the Second Circuit's opinion. The Second Circuit also misapplied *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997).

In *Wilander*, 498 U.S. 337, 355, this Court held that “[i]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.” This Court rejected the narrow interpretation of

“perils of the sea” embraced by Second Circuit and stated:³⁷

We believe 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. This rule best explains our case law and is consistent with the pre-Jones Act interpretation of “seaman” and Congress' land-based/sea-based distinction. **All who work at sea in the service of a ship face those particular perils to which the protection of maritime law,** statutory as well as decisional, is directed. See generally Robertson, A New Approach to Determining Seaman Status, 64 Texas L.Rev. 79 (1985). It is not the employee's particular job that is determinative, but the employee's connection to a vessel.

As is discussed in detail in Appendix C, Volk's working conditions were **perilous**. He worked every day of the work week (when the Hudson River was not frozen over) from 5:30 A.M. to as late as 9:00

³⁷ *Wilander*, 498 U.S. at 354 [Emphasis added].

P.M. pumping out and patching up the Buchanan barges so that they would not capsize as happened just a few weeks before his accident.³⁸ Not only was the seaman work that Volk performed for 12 years dangerous, but, after the capsizing, Tilcon insisted that the Buchanan barge maintainers board the barges after they were loaded.³⁹ Many of these barges, such as the B252, on which Volk was so badly hurt, had margin decks no more than eighteen inches wide (and normally much less) cluttered with wet stone that were so dangerous that Tilcon forbade its own employees from boarding them. Older barges, such as the B-252 which was subsequently scrapped, were not only worn out with weepers and scuppers

³⁸ Appendices D and E are dramatic photographs of these two barges.

³⁹ App. C, A-106.

that leaked stone onto the margin decks but had gunwales that were razor sharp from unloading the stone.⁴⁰

When Volk slipped on the stone on the margin deck, he just barely avoided being impaled on the gunwale and crushed or drowned between the B252 and the barge tied next to it.⁴¹

In Gizoni, 502 U.S. 81, 92, this Court held that:

Because a ship repairman may spend all of his working hours aboard a vessel in furtherance of its mission—even one used exclusively in ship repair work—that worker may qualify as a Jones Act seaman. By ruling as a matter of law on the basis of job title or occupation alone, the District Court foreclosed Gizoni's ability to make this showing.

⁴⁰ App C, A-107-109.

⁴¹ App C, A-106-109.

The several-employer-owned vessels from which Gizoni worked included a pontoon barge similar to the “little work barge”⁴² from which Volk made repairs to the fleet of Buchanan-owned unmanned barges (scows) when he was not actually aboard each barge for inspection and repair.

The holding in *Gizoni*⁴³ was characterized in *Chandris*, as “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.” Of course, “at sea” while working for Southwestern Marine, meant San Diego Bay. Volk spent **no** time working on shore and all of his time on barges and other vessels afloat on the

⁴² App. C, A88, 90.

⁴³ *Chandris*, 515 U.S. at 364, 368.

dangerous Hudson River. Volk did not spend just a fraction of his time on the barges and the “little work barge.” His work aboard these vessels was neither transitory nor sporadic. Volk was therefore not “land based,” even though he went home every night and had a non-seaman union affiliation.⁴⁴

In *Naquin*, as quoted *supra*, *Stewart v. Dutra* was properly relied on by the Fifth Circuit.

Unlike in the present case where all 150-200 barges and other vessels were owned/operated by Buchanan, there was no fleet of vessels under common control in *Harbor Tug*, 520 U.S. at 555-556. According to Justice Stevens in dissent, “If all of that deckhand work had been performed for petitioner

⁴⁴ *Chandris*, 515 U.S. at 371; *Harbor Tug*, 520 U.S. at 558-559, citing *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268, n. 30 (1977).

[the employer], there would be no doubt about Papai's status as a seaman.”⁴⁵

**V. THE MOST AUTHORITATIVE
COMMENTATORS HAVE EITHER REJECTED
“PERILS OF THE SEA” AS A DEFINING
CATEGORY OR HAVE URGED THIS COURT
TO PROVIDE CLARITY TO THIS TROUBLED
AND UNCERTAIN AREA OF MARITIME LAW**

Please see the careful discussion in § 2:8. Jones Act seaman—Seamen—Perils of the sea, 1, Force and Norris, *The Law of Seamen* § 2:8 (5th ed.) and in their “Members of a crew” distinguished from longshoremen, harborworkers—Seamen: Perils of the sea, *The Law of Maritime Personal Injuries* § 4:10.

In Admiralty & Mar. Law § 6-9 (5th ed.), § 6-9. Seaman status, Schoenbaum characterizes the present law as flawed and fundamentally unfair.

Other commentators have addressed the conflicts among the circuits in determining “seaman”

⁴⁵ *Harbor Tug*, 520 U.S. at 561.

status under the Jones Act and the appropriateness of this Court’s clarification of the “seaman” test.”⁴⁶

CONCLUSION

⁴⁶ Please see McCormack, How Congress & Scotus Have Failed the American Seaman: A Modern Analysis of Obtaining "Seaman" Status Under the Jones Act & the United States Supreme Court's 2014 Denial of William S. Dize, 29 U.S.F. Mar. L.J. 1, 2–27 (2017); Coley, The "Perils of the Sea" -Man Status Question: The Fifth Circuit Falls Behind FELA's Advancements in Remedies in Favor of the Continued Confusion Surrounding the Seaman Definition, 39 Tul. Mar. L.J. 371, 372–81 (2014); Gennaro, Jones Act Status: How the *Naquin* and *Dize* Decisions Perpetuate Status Confusion and Prove Need for Clarification, 15 Loy. Mar. L.J. 345, 346–74 (2016).

Considering the conflict between the courts of appeal, this Court should grant review to provide guidance on the proper standards when applying the seaman test to ship maintainers, ship repairers, and all other maritime workers who are truly exposed to the “perils of the sea” on a daily basis while maintaining and repairing a vessel or fleet of vessels under the common ownership of their employers. Above all, it is important that Volk, on the face of the facts found by the court below, meets every test established by this Court. Importantly, Volk was injured on the B-252, a Buchanan vessel that he maintained.

This case presents an appropriate opportunity to clarify the law and, by so doing, to remove some of the arbitrariness and unfairness apparent in the jurisprudence and bemoaned by at least one

distinguished commentator and universally criticized
by others. The petition should be granted.

Respectfully submitted,

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