

No. 17-1044

IN THE
Supreme Court of the United States

WAYNE VOLK, *et ux.*,

Petitioners,

v.

A. J. FRANZ, JR., *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

JOHN R. FOSTER
Counsel of Record
EDWARD P. FLOOD
MARTIN R. WEST II
LYONS & FLOOD, LLP
One Exchange Plaza
55 Broadway, Suite 1501
New York, NY 10006
(212) 594-2400
jfooster@lyons-flood.com

Counsel for Respondents

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	ii
INTRODUCTION.....	1
OPINIONS BELOW.....	3
JURISDICTION.....	3
STATEMENT.....	3
ARGUMENT.....	8
1. The petition should not be granted because it is interlocutory	9
2. Review by this court is also not warranted because there is no conflict....	10
2. a. The Second’s Circuit decision correctly applied the <i>Chandris</i> analysis.....	10
2. b. The Second Circuit’s decision does not conflict with any decision of another court of appeals.....	12
3. This matter is a poor vehicle for review because the record is problematic.....	15
CONCLUSION	17

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>Bunch v. Canton Marine Towing, Co.,</i> 419 F.3d 868 (8th Cir. 2005)	13
<i>Chandris, Inc. v. Latsis,</i> 515 U.S. 347 (1995)	<i>passim</i>
<i>Delange v. Dutra Const. Co.,</i> 183 F.3d 916 (9th Cir. 1999)	13, 14, 15
<i>Evans v. Stephens,</i> 544 U.S. 942 (2005)	9
<i>Grab v. Boh Bros. Const. Co.,</i> 506 F. App'x 271 (5th Cir. 2013)	13, 14
<i>Harbor Tug & Barge Co. v. Papai,</i> 520 U.S. 548 (1997)	<i>passim</i>
<i>Harden v. Gordon,</i> 11 F. Cas. 480 (D. Me. 1823)	1
<i>In re Endeavor Marine Inc.,</i> 234 F.3d 287 (5th Cir. 2000)	12, 13, 14
<i>Maryland. v. Baltimore Radio Show,</i> 338 U.S. 912 (1950)	15

Cited Authorities

	<i>Page</i>
<i>McDermott Int’l Inc. v. Wilander</i> , 498 U.S. 337 (1991)	2, 10, 11
<i>Naquin v. Elevating Boats, LCC</i> , 744 F.3d 927 (5th Cir. 2014), <i>cert. denied</i> , 135 S. Ct. 1397 (2015).	8, 12, 14
<i>Packwood v. Senate Select Comm. on Ethics</i> , 510 U.S. 1319 (1994)	16
<i>Scheuring v. Traylor Bros.</i> , 476 F.3d 781 (9th Cir. 2007)	13, 15
<i>Slatton v. Martin K. Eby Const. Co.</i> , 506 F.2d 505 (8th Cir. 1974).	13
<i>Stewart v. Dutra Const. Co.</i> , 543 U.S. 481 (2005)	10, 11
<i>Sw. Marine, Inc. v. Gizoni</i> , 502 U.S. 81 (1991)	10, 11
<i>The Osceola</i> , 189 U.S. 158, 175 (1903)	1
<i>Virginia Military Inst. v. United States</i> , 508 U.S. 946 (1993).	9

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES

28 U.S.C. § 1254(1).....	3
33 U.S.C. § 901.....	1
33 U.S.C. § 902 (3)(G)	2
46 U.S.C. §§ 30101-30106	1
46 U.S.C. §§ 30501-30512	6
N.D.N.Y. Local Rule 7.1(a)(3)	6, 16

INTRODUCTION

This matter concerns a worker, Wayne Volk, who was injured on May 19, 2011, while aboard a barge that was moored to a dock on the Hudson River. This petition, at its core, seeks determination of whether Wayne Volk is a seaman under the Jones Act, 46 U.S.C. §§ 30101-30106, or a harbor worker under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq* ("LWHCA").

The courts below found that Volk was not a seaman. Therefore, he could not sue under the Jones Act but could pursue claims against A.P. Franz (the barge owner) under the LHWCA. He also has negligence and New York State Labor Law claims against Tilcon New York, Inc. ("Tilcon"), the owner of the location where the accident occurred. These claims are still pending with the District Court.

Congress enacted the Merchant Marine Act of 1920 ("the Jones Act") in part as a response to the decision in *The Osceola*, 189 U.S. 158, 175 (1903), which precluded seamen from recovering for the "negligence of the master or any member of the crew." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). This legislation completed "the trilogy of legal protections (unavailable to other maritime workers) that seamen receive because of the exposure to the 'perils of the sea.'" *Id.* Justice Story has described the "perils of the sea" as "sudden sickness from change of climate, exposure to perils, and exhausting labour." *Harden v. Gordon*, 11 F. Cas. 480, 483 (D. Me. 1823)(No. 6047) (quoted in *Chandris*, 515 U.S. at 355).

As discussed in *Chandris*, the term “seaman” was not defined in the Jones Act. *Chandris*, 515 U.S. at 355. Thus, the job of defining “seaman” was left to the courts. *Id.* However, in 1927 Congress passed the LHWCA, providing compensation benefits to “a broad-range of land-based maritime workers.” *Id.* The LHWCA “explicitly excluded from its coverage “a master or member of a crew of any vessel.” *Id.* (quoting 33 U.S.C. § 902 (3)(G)). Thus, it is often stated that “it is odd but true that the key requirements for Jones Act status now appear in another statute.” *Chandris*, 515 U.S. at 356 (quoting *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991)).

Defining when workers qualify as Jones Act seamen “has proven to be a difficult task and the source of much litigation.” *Chandris*, 515 U.S. at 355. In *Chandris* this Court was faced with establishing a test for determining Jones Act status. Examining the long line of cases leading to *Chandris*, the Court noted several basic principles, including that “under the Jones Act, or general maritime law, seamen do not include land-based workers.” *Id.* at 358 (quoting *McDermott*, 498 U.S. at 348) (internal quotation marks omitted).

After examining the numerous cases discussing Jones Act status, *Chandris* cautioned that one must “eschew the temptation to create detailed tests to effectuate the congressional purpose, tests that tend to become ends in and of themselves.” *Chandris*, 515 U.S. at 369.

Chandris held that the Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to “the special hazards and disadvantages to which they who go down to sea in ships are subjected.” *Id.*

at 370. Seaman status should be determined by weighing the “total circumstances of an individual’s employment” to determine whether the putative seaman has “a connection with a vessel in navigation that is substantial in both duration and nature.” *Id.* Furthermore, “[f]or the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee’s connection to the vessel must concentrate on whether the employee’s duties take him to sea.” *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997).

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A-1–A-39) is reported at 874 F.3d 356. The opinion of the District Court (Pet. App. A-40–A-85) is available at 2016 WL 922793.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 2017, remanding the matter to the District Court on several issues. The mandate was entered with the District Court on November 17, 2017. The petition for a writ of certiorari was filed on January 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Tilcon owns and operates a rock-processing facility on the Hudson River in New York. Pet. App.

A-3–A-4.¹ Tilcon loads the quarried stone into Buchanan Marine, L.P.’s (“Buchanan”) barges at its facility. *Id.* at A-4. Buchanan uses its tugboats to transport empty barges upriver to Tilcon’s facility and loaded barges downriver to Tilcon’s customers. *Id.*

The loading process is divided into three steps. Pet. App. A-4. First, Buchanan’s tugboats bring empty barges to Tilcon’s facility. Pet. App. A-4. (Buchanan’s barges are “dumb barges”—they do not have an independent means of propulsion or a crew. They require a tug and the tug’s crew to move. Pet. App. A-37, n.2.) The barges are either tied directly to the dock at Tilcon’s facility or tied to other barges that are in turn tied to the dock. Pet. App. A-4–A-5. The empty barges are inspected by a Buchanan “barge maintainer” for damage and leaks. Pet. App. A-4.

Second, once an inspection and any necessary repair work are completed, Tilcon moves the empty barge along the dock and positions it under an overhead chute. Pet. App. A-4. Tilcon then loads the barge by dropping stone from the chute into the barge. Pet. App. A-4.

Third, after loading, Tilcon moves the barge to the barge nesting area. Pet. App. A-4–A-5. At the nesting area, the barges are again tied either directly to the dock or to other barges that are. Pet. App. A-5. The barge maintainer boards the barge at this location for a second inspection. Pet. App. A-5.

1. The facts are taken from the Second Circuit’s decision, examining them in the light most favorable to the Volks on an appeal of summary judgment.

When a barge is tied alongside other barges, the barge maintainer walks from one barge to the other along the perimeter or “margin decks” of the barges. Pet. App. A-5.

b. Petitioner Wayne Volk was employed by Buchanan to inspect and maintain its barges when they were brought to Tilcon’s facility. Pet. App. A-3–A-6. Volk was not assigned to any particular barge nor was he assigned to the crew of any of the Buchanan tugboats. Pet. App. A-6. Instead, he inspected and maintained whatever Buchanan barges showed up at Tilcon’s facility. Pet. App. A-6.

Volk worked an hourly shift, went home each night, and did not sleep or eat aboard any barge. Pet. App. A-6. He was a member of an equipment operators’ union and did not hold any maritime licenses or maritime union memberships. Pet. App. A-6. Volk’s supervisor was a dock foreman. Pet. App. A-20.

c. Wayne Volk was injured on May 19, 2011. Pet. App. A-6–A-7. He was walking on the margin deck of the Barge B-252 at the nesting area after loading when he slipped on wet stone that had accumulated on the deck during the loading. Pet. App. A-6–A-7. Volk injured his shoulder and arm. Pet. App. A-7. Volk has not returned to work since the accident but has been receiving LHWCA benefits. Pet. App. A-7.

2. The Volks initially filed a complaint against Buchanan and Tilcon in the New York Supreme Court (the state court of general jurisdiction) in Ulster County. Pet. App. A-7. A.P. Franz (as trustee owner of the barge) and Buchanan (as its bareboat charterer) subsequently filed an action in the Northern District of New York

seeking exoneration from or limitation of liability under the Limitation of Liability Act, 46 U.S.C. §§30501-30512. Pet. App. A-7–A-8.

Pursuant to the Limitation Act, the district court enjoined any related actions and directed that Buchanan and Franz provide notice of the proceeding to potential claimants. Pet. App. A-8. The Volks and Tilcon asserted claims against Buchanan and A.P. Franz. Pet. App. A-8–A-9. The Volks then moved to dismiss the action. Pet. App. A-9. The District Court denied the motion. Pet. App. A-9.

3. Following discovery, A.P. Franz, Buchanan, and Tilcon moved for summary judgment; and the Volks cross-moved for summary judgment on Wayne Volk’s Jones Act status and Buchanan’s liability. Pet. App. A-49.

The District Court granted summary judgment in favor of A.P. Franz, Buchanan, and Tilcon, dismissing all the Volks’ claims. Pet. App. A-49. The District Court, in rendering its decision, found that the relevant facts were not in dispute and that the Volks’ failure “to comply with Local Rule 7.1 (a)(3) by admitting or denying each of the numbered paragraphs in Franz and Buchanan’s and Tilcon’s statements of material facts is not without consequences.” Pet. App. A-83–A-84, n.2.

Furthermore, the “Volks’ Statement of Relevant and Material Facts” was “riddled with legal conclusions, cites scant record support, and contains lengthy paragraphs which fail to admit or deny the numerical paragraphs of Franz and Buchanan’s and Tilcon’s statement of material facts.” Pet. App. A-83–A-84, n.2. As a result, the District

Court “deemed admitted” “Franz, Buchanan’s and Tilcon’s properly supported and uncontroverted facts.” Pet. App. A-83–A-84, n.2.

Relevant to the Volks’ petition to this Court, the District Court concluded that under the two-prong *Chandris* test, Wayne Volk’s connection “to the B-252 is far from substantial in either duration or nature.” Pet. App. A-55.

4. The Second Circuit affirmed on Wayne Volk’s Jones Act status but reversed in part on the Volks’ LHWCA claims against A.P. Franz. It also reversed on the Volks’ claims against Tilcon. Pet. App. A-36–A-37.

Citing to this Court’s decisions in *Chandris* and *Harbor Tug*, the Second Circuit rejected Petitioners’ argument that Wayne Volk was a Jones Act seaman. The court examined the “total circumstances” of Wayne Volk’s employment and concluded that “none of Volk’s work was of a seagoing nature.” Pet. App. A-28. Furthermore, the court explained that “Volk did not go to sea and he was not exposed to the ‘perils of the sea’ in the manner associated with seaman status.” Pet. App. A-28.

In holding that Wayne Volk was not a Jones Act seaman, the court relied on a number of undisputed facts, including:

- Wayne Volk worked aboard the barges when they were secured to the dock;
- He was not a crew member and did not serve aboard the Buchanan tugboats;

- He reported to a dock foreman, not a master, captain, or mate;
- He belonged to an equipment operators' union, not a maritime union, nor did he have merchant mariner credentials;
- He never spent a night aboard a ship;
- He never took meals aboard a ship.

Pet. App. A-5–A-6, A-23–A-24, A-28.

The court also opined that Wayne Volk likely waived an argument raised for the first time on appeal—that Volk was a crew member of a small pontoon work boat—but even if he had not, the occasional use of a small pontoon boat as a work platform was not substantial enough to change the court's analysis. Pet. App. A-28, n.9.

Finally, the Second Circuit distinguished *Naquin v. Elevating Boats, LCC*, 744 F.3d 927 (5th Cir. 2014), *cert. denied* 135 S. Ct. 1397 (2015), explaining that the plaintiff there “clearly had a more substantial connection to seafaring vessels than Volk does.” In *Naquin* the plaintiff “spent approximately 70% of his time working aboard” boats that were in the shipyard canal and would occasionally work aboard vessels “operating in open water.” Pet. App. A-26–A-27.

ARGUMENT

The petition should not be granted for several reasons: 1) the petition is interlocutory; 2) there is no conflict

between the Second Circuit’s decision and this Court’s precedent, nor is there any conflict between the Circuits; 3) this matter is a poor vehicle for review because the Petitioners seek a factual review of a cloudy record.

1. The petition should not be granted because it is interlocutory

This Court’s practice is to “await final judgment in the lower courts before exercising . . . certiorari jurisdiction.” *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari); *see also Evans v. Stephens*, 544 U.S. 942, 942 (2005) (Stevens, J., respecting denial of certiorari) (noting that one of the “valid prudential concerns supporting the decision to deny certiorari” was that the “petitioners [sought] review of an interlocutory order”). There is no reason for the Court to depart from this practice in this case.

Here, the Second Circuit reversed the District Court’s grants of summary judgment on the Volks’ claims against A.P. Franz and Tilcon, with the matter then being remanded. Pet. App. A-37. The District Court’s resolution of the remaining claims may make the Volks’ claims against Buchanan—and the question of whether Wayne Volk is a Jones Act seaman—moot. Further proceedings in the lower courts could therefore influence this Court’s decision to grant certiorari. Consequently, the status of those claims counsels against a piecemeal review of this matter. *See Virginia Military Inst.*, 508 U.S. at 942.

2. Review by this court is also not warranted because there is no conflict

The Volks mistakenly contend that the Second Circuit’s decision conflicts with this Court’s precedent, as well as with holdings in the Fifth, Eighth, and Ninth Circuits. The Second Circuit’s decision does neither.

2. a. The Second’s Circuit decision correctly applied the *Chandris* analysis.

The Volks argue that the Second Circuit’s holding conflicts with this Court’s decisions in four prior cases:

- *McDermott Int’l Inc. v. Wilander*, 498 U.S. 337 (1991);
- *Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991);
- *Stewart v. Dutra Const. Co.*, 543 U.S. 481 (2005);
and
- *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997).

Yet the Volks offer no explanation as to how the Second Circuit deviated from this Court’s precedent, except to say that “this Court rejected the narrow interpretation of the ‘perils of the sea’ in *McDermott*.” Pet. Brief, p. 14.

However, *McDermott* does not address “perils of the sea.” That case involved the “narrow” question of whether “Wilander should be precluded from seaman status because he did not perform transportation-related functions on board [the vessel].” 498 U.S. at 356-57.

McDermott does not mention “perils of the sea”; the word “perils” appears only once in *McDermott*: “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. It is not the employee’s particular job that is determinative but the employee’s connection to a vessel.” *Id.* at 354 (internal citation omitted). Thus, Petitioners analysis of *McDermott* is clearly incorrect.

Southwest Marine held that a ship repairman was not excluded from being a Jones Act seaman solely because his job title was “ship repairman”—a title specifically identified as a covered employee in the LHWCA. In the present matter, the lower courts made no such mistake. They specifically analyzed all the facts relevant to Wayne Volk’s employment status under both the *Chandris* and *Harbor Tug* precedents.

Likewise, it is difficult to see how *Stewart* is relevant to Wayne Volk’s Jones Act status. *Stewart*’s question was “whether a dredge is a ‘vessel’ under § 2(3)(G) of the Longshore Harbor Workers’ Compensation Act.” 543 U.S. at 484. Again, without an explanation by Petitioners, it is difficult to see how this case is relevant or how the Second Circuit deviated from its holding.

Regarding *Harbor Tug*, the Second Circuit clearly applied *Harbor Tug* in its analysis, repeatedly citing to that decision and quoting from it. *See* Pet. App. A-19, A-21, A-23. The decision below does not conflict with this Court’s holding in *Harbor Tug*—rather the Second Circuit relied substantially on that decision.

Accordingly, the Second Circuit's decision does not conflict with this Court's precedent.

2. b. The Second Circuit's decision does not conflict with any decision of another court of appeals

The Volks' putative circuit split is simply courts reaching different results based on different facts. All the cases cited by the Petitioners as evidence of a circuit split rely on the same standards articulated by this Court in *Chandris* and *Harbor Tug* (except *Slatton v. Martin K. Eby Const. Co.*, 506 F.2d 505 (8th Cir. 1974), which was decided before the *Chandris* and *Harbor Tug* decisions). The cases identified by the Volks are addressed below—contrary to the Petitioners' assertions, the Second, Fifth, Eighth, and Ninth Circuits all apply the same test for determining whether a worker qualifies as a Jones Act seaman.

The cases Petitioners cite from the Fifth Circuit rely on the same precedent as the Second Circuit did in this matter. In *Naquin* the Fifth Circuit expressly explained that the district court's jury instruction “mirrors the Supreme Court's explanation of seaman status in *Chandris v. Latsis*.” *Naquin*, 744 F.3d at 936. *In re Endeavor Marine Inc.*, 234 F.3d 287 (5th Cir. 2000) applied the same two-prong *Chandris* test² test as well

2. “First, ... an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission.... Second, ... 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.” *Endeavor Marine*, 234 F.3d at 290 (quoting *Chandris*, 515 U.S. at 370).

as the subsequent holding in *Harbor Tug*,³ just as the Second Circuit did here. *Grab v. Boh Bros. Const. Co.*, 506 F. App'x 271 (5th Cir. 2013), (per curiam) also applied the two-part *Chandris* test, focusing its analysis on whether the claimants had a connection to the vessel that was “substantial in both nature and duration.” *Id.* at 275.

Likewise, the Ninth Circuit also applies the same test as the Second and Fifth Circuits. The case cited by the Petitioners, *Delange v. Dutra Const. Co.*, 183 F.3d 916 (9th Cir. 1999), applied *Chandris*'s two-prong test and *Harbor Tug*—the same as the other circuits. *Scheuring v. Traylor Bros.*, 476 F.3d 781 (9th Cir. 2007), also applied *Chandris* and *Harbor Tug*, quoting nearly the same language as that of the Fifth Circuit in *Endeavor Marine* and the Second Circuit in this case. 476 F.3d at 785-86.

None of the Eighth Circuit cases cited by Petitioners is relevant to the issues at hand. *Slatton v. Martin K. Eby Const. Co.*, 506 F.2d 505 (8th Cir. 1974), was decided before *Chandris* and *Harbor Tug* and is therefore of no relevance in determining whether there is a currently a circuit split. *Bunch v. Canton Marine Towing, Co.*, 419 F.3d 868 (8th Cir. 2005), noted the two-part *Chandris* test, but the question there was whether the plaintiff worked aboard a “vessel in navigation.” *Id.* at 871. Thus, *Bunch*, like *Slatton*, is not relevant to the questions at issue in this matter.

3. “The Court revisited *Chandris* in *Harbor Tug* in 1997” and “explained that the ‘the inquiry into the worker’s employment-related connection to the vessel ‘must concentrate on whether the employee’s duties take him to sea.’” *Endeavor Marine*, 234 F.3d at 291 (quoting *Harbor Tug*, 520 U.S. at 555).

Accordingly, the Petitioners are mistaken in arguing that there is a circuit split—all the cited cases properly apply this Court’s precedent.

Further, Petitioners’ argument focuses almost entirely on the facts of each case. But the facts differ significantly in each—explaining the different outcomes despite the application of the same law. For example, in *Naquin* the Fifth Circuit found that the plaintiff spent “70% of his total time working” aboard vessels that “were moored, jacked-up, or docked in the shipyard canal.” 744 F.3d at 930. Naquin would also occasionally “repair a vessel or fill in as a vessel crane operator while the vessel was operating in open water.” *Id.* at 931. In *Endeavor Marine* the plaintiff worked aboard a barge that would moor alongside cargo vessels in the Mississippi River to assist in offloading cargo from the cargo vessel. 237 F.3d at 289. That plaintiff was injured when his barge, pushed by a tugboat was “making up” to a cargo vessel—*i.e.* while the vessel was in motion on the open water. *Id.*

Grab involved two workers, one who was “indistinguishable from the” plaintiff in *Endeavor Marine* and one who was injured on his first day on the job. 506 Fed. App’x. at 276-77. There was an “intense factual dispute at the bench trial” as to what portion of the second plaintiff’s duties would be “in service of the vessel.” *Id.* at 277. The Fifth Circuit held that, in light of the factual dispute, there was no clear error in the district court’s findings. *Id.*

In *Delange* the plaintiff alleged that he served as a “look out, cargo stower, line handler, and occasional pilot.” 183 F.3d. at 920. Accordingly, the court found that there

were questions of fact precluding summary judgment. *Id.* at 921. And in *Scheuring v. Traylor Bros.* the plaintiff made a showing that he was exposed to “vessel-movement or other characteristic seamen’s risks.” 476 F.3d at 787.

Each of these cases presents a unique factual background, especially when examined in the context of the “total circumstances” of each plaintiff’s respective employment. *Chandris* at 370. Accordingly, each case turned on its own facts, even when the same legal standard was applied.

3. This matter is a poor vehicle for review because the record is problematic

It is clear from Petitioners’ argument that they seek a factual review of the underlying record.⁴ But, there are significant problems with this record.

It is well established that this Court will often deny certiorari even where “[a] case may raise an important question but the record may be cloudy.” *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918, (1950)

4. The request for factual review is apparent by Petitioners’ improper submission of Appendix C “A Careful Recitation of the Facts Taken from The Record on Appeal” in which Petitioners argue that the Second Circuit’s “factual recitation of facts is incomplete and led to incorrect legal conclusions.” Pet. App. A-73. Furthermore, Appendix C should be disregarded in its entirety because all the references are to the record on appeal, which was not provided to the Court with Petitioners’ submissions. Respondents contend that the number of misstatements of facts and arguments raised for the first time in the petition are simply too numerous to address without a proper underlying record.

(Frankfurter, J., respecting denial of certiorari); *see also Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320–21 (1994) (Rehnquist, C.J., denying request to stay pending appeal) (“Because resolution of applicant’s claim would entail a factbound determination of the nature and scope of respondent’s investigation, I do not think his claim raises an issue on which four Members of the Court would grant certiorari.”).

Starting in the District Court, the Petitioners failed to properly respond to Respondents’ Statement of Material Facts pursuant to N.D.N.Y. Local Rule 7.1 (a)(3), which required the Petitioners to admit or deny (and/or refute) the Respondents’ undisputed material facts. Pet. App. A-83–A-84, n.2. As the District Court noted, Petitioners’ opposition was “riddled with legal conclusions, cite[d] scant record support, and contain[ed] lengthy paragraphs which fall to admit or deny the numerical paragraphs of Franz and Buchanan’s and Tilcon’s statement of material facts.” *Id.*

The problem is compounded by Petitioners raising new arguments for the first time on appeal, specifically that Wayne Volk was a crewmember of a “little work barge/a little work boat with a motor on it.” Pet. App. A-28, n. 9. While the Second Circuit suggested, without ruling on the point, that these arguments were waived, it noted that even absent waiver the argument was insufficient to change the court’s analysis. Pet. App. A-28, n. 9.

In their petition to this Court, the Petitioners repeatedly advance the argument that Wayne Volk qualifies as a Jones Act seaman because of his occasional use of this “little work boat.” Pet. App. A-75–80, 84.

Because Petitioners did not advance this argument before the District Court, the record is now cloudy and deficient. Accordingly, this matter presents a poor vehicle for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN R. FOSTER
Counsel of Record
EDWARD P. FLOOD
MARTIN R. WEST II
LYONS & FLOOD, LLP
One Exchange Plaza
55 Broadway, Suite 1501
New York, NY 10006
(212) 594-2400
jfooster@lyons-flood.com

Counsel for Respondents

February 2018