No. 03-814

In The Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

To qualify for "seaman" status under the Jones Act, a worker must have an "employment-related connection to a vessel in navigation." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 357 (1995). What is the legal standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act "vessel"?

STATEMENT REGARDING PARTIES

All parties to the proceeding are listed in the caption of the case.

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OPINIONS BELOW

The court of appeals issued two reported opinions in this case. The opinion on the interlocutory appeal (*Stewart I*) – which addresses the vessel-status question presented here – is reported at 230 F.3d 461 (CA1 2000) and at 2001 AMC 1116, and is reprinted at Pet. App. 15. The opinion after final judgment (*Stewart II*) is reported at 343 F.3d 10 (CA1 2003) and at 2003 AMC 2734, and is reprinted at Pet. App. 1.

Neither of the district court's summary judgment orders is reported. The transcript of the hearing at which the district court orally granted summary judgment on the vessel status issue is reprinted at Pet. App. 33. The motion for summary judgment on the remaining claim, and the judge's handwritten notation granting that motion, is reprinted at Pet. App. 30. The formal judgment of the district court is reprinted at Pet. App. 32.

JURISDICTION

The court of appeals entered judgment on September 4, 2003. The Petition for Certiorari was filed on December 3, 2003. Exercising its jurisdiction under 28 U.S.C. § 1254(1), this Court granted the petition on February 23, 2004.

RELEVANT STATUTORY PROVISIONS

The Jones Act, 46 U.S.C. App. § 688(a), provides in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

Section 2 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902, provides in relevant part:

> When used in this Act –
>
> * * *
>
> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include –
>
> * * *
>
> (G) a master or member of a crew of any vessel. . . .

Section 3 of the Rules of Construction Act provides in relevant part:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. § 3.

STATEMENT OF THE CASE

Petitioner Willard Stewart was hurt doing his work as a marine engineer assigned to respondent Dutra Construction Company's dredge *Super Scoop*. Stewart seeks personal injury damages from Dutra under the Jones Act, 46 U.S.C. App. § 688(a), which affords "any seaman" a negligence action against his employer. The issue ultimately at stake here is whether Stewart was a Jones Act "seaman."

1. Legal Background

Enacted in 1920, the Jones Act does not define the term "seaman." Twenty-six years later, however, this Court recognized that Congress had indirectly provided a definition. *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 6-7 (1946), held that the provision of the 1927 Longshore and Harbor Workers' Compensation Act (LHWCA) excluding "a master or member of a crew of any vessel" from LHWCA coverage (presently codified as 33 U.S.C. § 902(3)(G)) draws a line establishing the mutually exclusive coverages of the Jones Act and the LHWCA. In *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991), this Court explained the meaning of *Swanson*: "[T]he Jones Act is restricted to 'a master or member of a crew of any vessel.'" The *Wilander* Court added a critical guidepost: "The key to seaman status is employment-related connection to a vessel in navigation." 498 U.S. at 355.

In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Court took up the *Swanson*/*Wilander* definition and crafted it into the following test for determining Jones Act seaman status:

> [T]he employment-related connection to a vessel in navigation necessary to qualify as a seaman

> under the Jones Act comprises two basic elements: The worker's duties must contribute to the function of the vessel or the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature.

Id. at 376 (internal quotation marks and citation omitted). Note that the *Chandris* Court's two-element test for Jones Act seaman status includes five requirements: (1) the worker must have been employed on a vessel; (2) the vessel must be in navigation; (3) the worker's duties must contribute to the vessel's function or mission; (4) the worker's connection to the vessel must be substantial in duration; and (5) the worker's connection to the vessel must be substantial in nature. The present case centers on the first of these requirements – whether the dredge *Super Scoop* was a vessel.

2. Factual Background

The *Super Scoop* is a large barge equipped with a clamshell bucket. It operates as a dredge, digging material from the ocean floor and loading it into one of two scows that serve it. The scows then take the material out to sea and dump it. During Stewart's employment on the S*uper Scoop*, it was digging a trench across Boston Harbor as part of the construction of the Ted Williams Tunnel.

The Coast Guard classifies the *Super Scoop* as an "industrial vessel." The *Super Scoop* has the "commonly

understood characteristics of a vessel,"[1] such as a captain and crew, navigational lights, ballast tanks, and a crew dining area. It is registered with the Coast Guard, and it is required to comply with safety regulations issued by the Coast Guard and the Department of Transportation. It has a load line certificate issued by the American Bureau of Shipping. And it is equipped with a global positioning system to enable it to navigate its planned route precisely.

The *Super Scoop* has limited means of self propulsion. It is moved long distances by tug. (To work on the Ted Williams Tunnel project, the dredge was towed from its home base in California through the Panama Canal and up the eastern seaboard to Boston Harbor.) It moves short distances by manipulating its anchors and cables. When dredging the Boston Harbor trench (working around the clock, seven days a week), the *Super Scoop* "typically move[d] once every two hours, covering a distance of thirty to fifty feet." *Stewart I*, Pet. App. 17.

On July 15, 1993, Stewart was working on board one of the scows. While Stewart was on deck, about ten feet above the engine area, the *Super Scoop* used its clamshell bucket to move the scow. The scow collided with the *Super Scoop*, causing a jolt that plunged Stewart headfirst through an open hatch down to the engine area below. He was seriously injured.

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[1] *Stewart I*, Pet. App. 26 n. 3 (quoting *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1120 (CA1) (en banc), *cert. denied*, 506 U.S. 827 (1992)).

3. Procedural Background

Stewart brought an admiralty action against Dutra in the United States District Court for the District of Massachusetts, seeking damages under the Jones Act. In the alternative – in the event that he were found not to qualify as a seaman – he sought recovery under section 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b).

The district court granted summary judgment for Dutra on the Jones Act claim, holding that Stewart did not qualify as a seaman under the First Circuit's standard announced in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (CA1) (en banc), *cert. denied*, 506 U.S. 827 (1992). *DiGiovanni* held that a barge or other float whose primary purpose was something other than the transportation of cargo, equipment, or persons across navigable waters is a Jones Act vessel "only when it is in actual navigation or transit" at the time of the plaintiff's injury. 959 F.2d at 1123.

As this is an admiralty case, Stewart was entitled to an interlocutory appeal under 28 U.S.C. § 1292(a)(3). On this appeal the First Circuit affirmed, holding that *DiGiovanni* compelled the district court's conclusion. *Stewart I*, Pet. App. 15-29. In the First Circuit's view, the *Super Scoop*'s "primary function" was dredging, "a form of construction," and thus not navigation or commerce. Pet. App. 27. And it was not in motion at the time of Stewart's injury.

Stewart then returned to the district court on his alternative claim for damages under LHWCA § 5(b), 33 U.S.C. § 905(b). The district court again granted summary judgment for Dutra. Stewart again appealed to the First

Circuit. While adhering to his argument that the *Super Scoop* was a Jones Act vessel, Stewart also argued that the district court had erred in denying his LHWCA claim. The court of appeals again affirmed. See Pet. App. 1-14 (*Stewart II*).

Because this Court is not presented with the LHWCA § 5(b) claim, only one aspect of the *Stewart II* holding is relevant here: The First Circuit held that, although the *Super Scoop* was not a vessel for Jones Act purposes, it *was* a vessel for LHWCA purposes. The *Stewart II* court took the view that "the LHWCA's definition of 'vessel' is 'significantly more inclusive than that used in evaluating seaman status under the Jones Act.'" Pet. App. 5 (quoting *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 607 (CA1 1996) (en banc), *cert. denied*, 520 U.S. 1117 (1997)).

SUMMARY OF THE ARGUMENT

The 1920 Jones Act enables "any seaman who shall suffer personal injury in the course of his employment" to sue the employer for negligence. It does not define the term "seaman." But Congress implicitly defined the term seven years later. In section 2 of the Longshore and Harbor Workers' Compensation Act (LHWCA), originally enacted in 1927, Congress uses the term "master or member of a crew of any vessel" to draw a line delineating the mutually exclusive coverages of the Jones Act and the LHWCA. LHWCA § 2(3)(G), 33 U.S.C. § 902(3)(G). In this way, Congress has defined a Jones Act "seaman" as "a master or member of a crew of any vessel" and thus read the term "vessel" into the Jones Act.

Neither LHWCA nor the Jones Act defines the term "vessel." In the Rules of Construction Act (which dates from 1873), Congress has defined a "vessel" as any "description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. The section 3 definition of "vessel" applies to all maritime statutes that do not otherwise define the term. The Jones Act is the "[f]oremost . . . enactment in the field of maritime torts." *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1997). Thus the statutory definition must apply to the LHWCA/Jones Act use of the term "vessel."

Moreover, this Court has consistently held that when Congress uses a maritime (or other federal-law jurisprudential) term of art without defining it, the term is presumed to have its established jurisprudential meaning. When the 1927 Congress used the term "vessel," the section 3 definition had been on the statute books for over half a century, and this definition was in widespread use in this Court's and the lower courts' admiralty and maritime decisions. There is no discernible reason to ignore the statutory definition of "vessel" in defining a Jones Act seaman. Indeed, this Court has applied the section 3 definition of "vessel" in a closely analogous seaman-status context. See *Norton v. Warner Co.*, 321 U.S. 565, 571 & n.4 (1944).

The dredge *Super Scoop* falls squarely within the 1 U.S.C. § 3 definition of "vessel." It regularly functions as a means of transportation on water, and it exposes its crew members to the characteristic seamen's dangers associated with employment on vessels at work on navigable water. Chief among these dangers is the risk of collision with other vessels. Petitioner Willard Stewart was injured in a

collision between the *Super Scoop* and another vessel on which he was temporarily working.

Dredges must move across the surface of the water to do their work. They are wholly unlike drydocks (which typically move only up and down) and wharfboats (which do not intentionally move at all). Throughout its maritime jurisprudence, this Court has consistently treated dredges as vessels, as have the lower courts. By the time Congress used the term "vessel" in the 1927 LHWCA, it was conclusively settled that a dredge is a maritime-law vessel, and it is clear that Congress knew this.

The First Circuit's test for Jones Act vessel status is deeply flawed in a number of respects. It ignores the fact that the controlling term "vessel" comes from the 1927 LHWCA and is therefore defined by the Rules of Construction Act. By making the Jones Act vessel status of nontraditional craft turn on whether the craft was in motion at the moment of injury, the First Circuit's test violates this Court's rule that seaman status cannot be made dependent on "the situation as it exists at the instant of injury." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 363 (1995). And it strips the protections of the Jones Act from most seamen who work on nontraditional vessels, to the detriment of thousands of nautical and amphibious workers. The First Circuit's approach is radically at odds with the rest of the maritime law.

Applying the Rules of Construction Act definition of "vessel" in Jones Act cases will not overstretch the Jones Act's coverage. A watercraft is not a vessel under the Rules of Construction Act unless it is used as a means of transportation or is "practically" capable of being so used. *Evansville & Bowling Green Packet Co. v. Chero Cola*

Bottling Co., 271 U.S. 19, 22 (1926). And the "vessel" requirement is only one of the five requirements for seaman status that this Court laid down in *Chandris*. By making the "vessel" requirement do most or all of the work of delineating the respective coverages of the Jones Act and LHWCA, the First Circuit has effectively minimized the importance and obscured the meaning and function of the other four.

ARGUMENT

I. Congress has explicitly defined the term "vessel" for Jones Act purposes in 1 U.S.C. § 3

This case presents a straightforward question of statutory construction: Does petitioner qualify as a "seaman" under the Jones Act? When construing the terms of a federal statute, it should go without saying that the courts must look first to Congress to define those terms. Congress has defined the central term at issue in this case, "vessel," in 1 U.S.C. § 3. The Court should therefore apply that definition here.

A. Congress defines a "vessel" as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water"

Title 1 of the United States Code was codified and enacted into positive law by the Act of July 30, 1947, ch. 388, 61 Stat. 633. Chapter 1 of Title 1 is captioned "Rules of Construction" and is often referred to as the Rules of Construction Act. It presently consists of eight sections. Section 3, 1 U.S.C. § 3, provides:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

B. Congress created the vessel requirement for Jones Act seaman status in the 1927 Longshore Act

The 1920 Jones Act, 46 U.S.C. App. § 688(a), gives "any seaman who shall suffer personal injury in the course of his employment" the right to sue the employer in tort for negligence. It does not define "seaman." In *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926), this Court held that the term encompassed a land-based longshoreman. The following year, Congress enacted the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, which provides a workers' compensation remedy for a broad range of maritime workers and immunizes those workers' employers against tort liability. Congress was concerned with land-based maritime workers and did not mean to bring seamen under the LHWCA: In section 2(3) of the LHWCA, it excluded "a master or member of a crew of any vessel" from LHWCA coverage. This provision is now codified as 33 U.S.C. § 902(3)(G).

Swanson v. Marra Bros., 328 U.S. 1 (1946), held that Congress meant for the Jones Act and LHWCA to have mutually exclusive coverages, that LHWCA's broad coverage provisions overruled *Haverty*, and that LHWCA § 2(3) "confine[d] the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters." 328 U.S. at 6-7. In *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991), this Court explained *Swanson* as follows:

> "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute.

Id. at 347. As was again emphasized in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the LHWCA term "master or member of a crew of any vessel" thus draws a line between the "mutually exclusive compensation regimes" of the Jones Act and LHWCA. *Id.* at 355-56. This case turns on the meaning of the term "vessel" as used by the 1927 Congress in drawing that line.

C. When an Act of Congress uses a maritime term of art without defining it, the term is presumed to have its established meaning

As was noted above, the Jones Act does not define its key coverage term, "seaman." And neither it nor the LHWCA provides any definition of "vessel."[2] In *Wilander* this Court began its inquiry into the meaning of the term "seaman" by stating that "we assume that when a statute uses [a maritime term of art without defining it], Congress intended [the term] to have its established meaning." 498

[2] The Jones Act does not even use the term "vessel." At first blush LHWCA § 2(21), 33 U.S.C. § 902(21), looks like a definition, but it is circular: "Unless the context requires otherwise, the term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member."

U.S. at 342. The *Wilander* approach to defining statutory terms is not peculiar to the Jones Act or even to the maritime context. On the contrary, it is "[a] cardinal rule of statutory construction."[3] The rule should apply with equal force to determining the meaning of the term "vessel."

D. The 1 U.S.C. § 3 definition of "vessel" was well established in 1927

The definition of "vessel" in 1 U.S.C. § 3 replicates section 3 of the Revised Statutes of 1873, which provided:

> The word "vessel" includes every description of water-craft or other artificial contrivance used, or

[3] See *Molzof v. United States*, 502 U.S. 301, 307 (1992), where the Court addressed the meaning of the term "punitive damages" in the Federal Tort Claims Act, 28 U.S.C. § 2674, by stating: "A cardinal rule of statutory construction holds that 'where Congress borrows terms of art which are accumulated in the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.' " The *Molzof* Court was quoting from *Morissette v. United States*, 342 U.S. 246, 263 (1952), where the issue was the definition of the crime of knowing conversion of Government property. See also *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (dealing with the meaning of the term "held in trust" in the National Labor Relations Act, 29 U.S.C. § 186(c)(5), and stating that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."); *Braxton v. United States*, 500 U.S. 344, 351 note (1991) (taking the same approach to the term "attempt to kill" in a federal criminal statute).

> capable of being used, as a means of transportation on water.

This definition in turn derived from the Act of June 29, 1870, ch. 169, § 7, 16 Stat. 170. This Act was titled "An Act to reorganize the Marine Hospital Service, and to provide for the Relief of sick and disabled Seamen." Section 7 provided:

> For the purposes of this act, the term "vessel," herein used, shall be held to include every description of water-craft, raft, vehicle, and contrivance used or capable of being used as a means or auxiliary of transportation on or by water.

This same definition had earlier been used in the Act of July 18, 1866, ch. 201, § 1, 14 Stat. 178 – "An Act to prevent Smuggling and for other Purposes."

The purpose of section 3 was to supply a definition of "vessel" for general application throughout the Revised Statutes. Given the potential breadth of the definition's application, Congress would certainly have tried to define the term consistently with the current maritime-law understanding. A well-respected maritime-law expert has explained that Congress succeeded:

> There is no legally significant difference between the statutory definition of the term "vessel" and the meaning attributed to it by the general maritime law as obtaining in this country. While one may not ascribe to the Congress an intent to restate [nonstatutory] maritime law when it enacted a definition for the construction of statutes generally, it is highly unlikely that Congress, in formulating a definition of a word of so immediate a connection with maritime law and so likely

> to recur in maritime legislation, could have intended materially to depart from the meaning under the general maritime law. This conclusion is supported by subsequent enactments of Congress. For example, when Congress codified certain aspects of the law of maritime liens in the Maritime Lien Acts of 1910 and 1920, it had no intention to change the basic principles of maritime law. Nevertheless, Congress was content to leave the Acts to be construed in accordance with the general statutory definition of the word vessel, which if indeed different from the meaning under the general maritime law would have had the effect of changing the law. *It is manifest that the legislation was predicated on the assumption that the statutory definition was identical with the meaning under the general maritime law.*

Steven F. Friedell, 1 *Benedict on Admiralty* § 165 (7th rev. ed. 2003) (emphasis supplied) (footnotes omitted).

Professor Friedell's view is significantly confirmed by the fact that in the decades following its enactment in 1873, the section 3 definition was in widespread use throughout the country's maritime jurisprudence. In *Ellis v. United States*, 206 U.S. 246, 259 (1907), this Court used section 3 to hold that dredges were vessels, with the result that dredge crew members were characterized as seamen and excluded from the coverage of a federal statute limiting the working hours of "laborers and mechanics." In *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 20-22 (1926), the Court used the section 3 definition to hold that a wharfboat (floating warehouse) was not a vessel so that its owner could not claim the benefit of the Shipowners' Limitation of Liability Act. And in *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 626-27 (1887), the Court paraphrased the section 3 definition in

the course of holding that a dry dock was not a vessel and hence could not be the subject of a salvage award.

The section 3 definition had been widely applied by the lower courts as well.[4] The 1927 Congress is bound to have known that the maritime term of art "vessel" generally meant what Revised Statutes § 3 said it meant.

[4] See, e.g., *City of Los Angeles v. United Dredging Co.*, 14 F.2d 364, 365 (CA9 1926) (dredge was a section 3 vessel and hence exempt from city boiler-inspection requirements); *George Leary Constr. Co. v. Matson*, 272 F. 461, 462 (CA4 1921) (pile-driver scow was a section 3 vessel so that a crew member was entitled to seamen's personal injury remedies); *Eastern S.S. Corp. v. Great Lakes Dredge & Dock Co.*, 256 F. 497, 501 (CA1), *cert. dismissed*, 250 U.S. 676 (1919) (type of dredge termed a "drillboat" was a section 3 vessel so that its owner could seek the protection of the Shipowners' Limitation of Liability Act); *The International*, 89 F. 484, 484-85 (CA3 1898) (dredge was a section 3 vessel and thus exempt from seizure under a tariff act); *Saylor v. Taylor*, 77 F. 476, 477 (CA4 1896) (dredge was a section 3 vessel so that its crew members were entitled to seamen's wage liens); *Charles Barnes Co. v. One Dredge Boat*, 169 F. 895, 896 (E.D. Ky. 1909) (pumpboat was a section 3 vessel and hence subject to maritime liens for supplies) (citing and discussing dozens of vessel-status cases); *In re Eastern Dredging Co.*, 138 F. 942, 943 (D. Mass. 1905) (harbor scow was a section 3 vessel so that its owner could claim the protection of the Shipowners' Limitation of Liability Act); *Seabrook v. Raft of Railroad Cross-Ties*, 40 F. 596, 598 (D.S.C. 1889) (dredge and raft that struck it were both section 3 vessels for purposes of adjudicating collision liability); *The Pioneer*, 30 F. 206, 207 (E.D.N.Y. 1886) (dredge was a section 3 vessel and thus subject to a maritime lien for supplies); *Zurich Gen. Acc. & Liab. Ins. Co. v. Industrial Accident Comm'n*, 191 Cal. 770, 218 P. 563, 566 (1923), *cert. denied*, 263 U.S. 772 (1924) (dredge was a section 3 vessel so that a crew member's widow could not receive state workers' compensation benefits but must pursue seamen's remedies).

E. Legislative history shows that Congress meant for the 1 U.S.C. § 3 definition to have broad application throughout the maritime law, including the Jones Act context

Section 1 of the Rules of Construction Act, 1 U.S.C. § 1 (captioned "Words denoting number, gender, and so forth") includes four rules of construction and eleven definitions. It introduces all of this with the phrase: "In determining the meaning of any Act of Congress, unless the context indicates otherwise – ." Section 1 of the Revised Statutes was similarly structured. It set forth three rules of construction and a number of definitions and provided that these should apply throughout the Revised Statutes and to any act of Congress passed after February 25, 1871, "unless the context shows that such words were intended to be used in a more limited sense."

In defining "vessel," 1 U.S.C. § 3 does not include the "context indicates otherwise" proviso. Nor did section 3 of the Revised Statutes. Therefore, it is not clear that the proviso can impose *any* limit on the applicability of the definition set forth in 1 U.S.C. § 3.

But even should the proviso be deemed applicable, it cannot possibly detract from the applicability of the 1 U.S.C. § 3 definition in Jones Act cases. In the first place, the Jones Act is the "[f]oremost . . . enactment[] in the field of maritime torts." *American Dredging Co. v. Miller*, 510 U.S. 443, 445 (1997). The context therefore supports the applicability of Congress's maritime-law definition of "vessel" rather than in any way indicating otherwise.

In the second place, the legislative history of the 1 U.S.C. § 3 definition of "vessel" shows that the "context-otherwise" proviso, if applicable at all, has a very narrow

range of applicability. The current definition is a verbatim reenactment of section 3 of the Revised Statutes (omitting only the hyphen in "watercraft"). The commissioners appointed by Congress to compile the Revised Statutes accompanied the statute defining "vessel" with the following commentary:

> It should be observed that this definition is subject, as are the others in the chapter, to the general rule, (section 24 [referring to the commentary on Revised Statutes § 1],) that it applies only where the context or the nature of the provision does not show that the term is used in a different sense. This will protect the few instances where the word "vessel" is used in the statutes in the sense of a utensil for holding commodities, *e.g.*, act of July 20, 1868, ch. 186, § 19, [15] *Stat. at L.*, 132; "every person * * owning any still, boiler, or other *vessel* used for the purpose of distilling spirits."

Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose ch. 3, p. 20, Sec. 27 (1872). This commentary – cautioning against using the section 3 definition of "vessel" to discriminate among pots and pans – shows that the definition was intended and expected to apply broadly throughout the maritime law, and to be displaced only when self-evidently inapplicable.

In light of the broad maritime-law applicability of the 1 U.S.C. § 3 definition and the *American Dredging* characterization of the Jones Act as the centerpiece of maritime tort law, there is no discernible justification for ignoring the section 3 definition in Jones Act vessel-status cases.

F. Other statutes show that Congress meant for the 1 U.S.C. § 3 definition to have broad application

Congress has vouched for the broad applicability of the 1 U.S.C. § 3 definition in at least nineteen other statutes which either incorporate the section 3 definition by reference or set forth a definition that is very close to the section 3 definition.[5] The congressional aim for broad application of the definition could hardly be plainer.

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[5] The Shipping Act, 46 U.S.C. § 2101(45), incorporates section 3 by reference. Seventeen statutes contain functionally identical paraphrases of the section 3 definition. See the Merchant Marine Act of 1920, 46 U.S.C. App. § 801; the International Regulations for Preventing Collisions at Sea Act, 33 U.S.C. § 1601(1); the Inland Navigation Rules Act of 1980, 33 U.S.C. § 2003(a); the Whaling Convention Act, 16 U.S.C. § 916(e); the Oil Pollution Act of 1990, 33 U.S.C. § 2701(37); the Federal Water Pollution Control Act, 33 U.S.C. § 1321(a)(3); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601(28); the Public Health Service Act, 42 U.S.C. § 201(i); the Contraband Seizure Act, 49 U.S.C. § 80301(3); the Tariff Act of 1930, 19 U.S.C. § 1401(a); the Interstate Act Against Importation of Motor Vehicles, Vessels and Aircraft, 18 U.S.C. § 553(c)(3); the Excise Taxes Act, 26 U.S.C. § 5688(c); the Neutrality Act of 1939, 22 U.S.C. § 456(c); the Interstate Commerce Act, 49 U.S.C.A. § 13102(23) (Supp. 2003); the Communications Act of 1934, 47 U.S.C. § 153(39)(A); the Sentencing Reform Act, 18 U.S.C. § 3667; the Anti-fouling Paint Control Act of 1988, 33 U.S.C. § 2402(11). The Deepwater Ports Act, 33 U.S.C. § 1502(19), is a looser paraphrase of the section 3 definition, omitting the "capable of being used" language. Other statutes with broadly similar definitions of *vessel* are the Submarine Cables Act, 47 U.S.C. § 30, and the Federal Ship Mortgage Insurance Act, 46 U.S.C. App. § 1271(b). For a much more inclusive definition, see the Anti-Gambling Act, 18 U.S.C. § 1081.

G. This Court has used 1 U.S.C. § 3 to determine the meaning of the term "vessel" for analogous seaman-status purposes

The question in *Norton v. Warner Co.*, 321 U.S. 565 (1944), was whether a worker who had sole charge of a harbor barge was denied LHWCA coverage by the provision excluding "a master or member of a crew of any vessel," 33 U.S.C. § 902(3)(G). In answering that he was, this Court quoted 1 U.S.C. § 3 as the authoritative definition of "vessel." 321 U.S. at 571 n. 4. The Court did not *hold* that the worker was covered by the Jones Act (it could not, since he was not before the Court seeking Jones Act coverage); but it said he was. See *id.* at 573, 569 n. 3. *Norton* thus came close to deciding the precise issue presented here.

The *Norton* decision is relevant also for two aspects of the Court's methodology. First, the Court prefaced its quotation of 1 U.S.C. § 3 with a signal that Revised Statutes § 3 contained the same definition. See 321 U.S. at 571 n. 4. The Court also examined the pre-1927 vessel-status jurisprudence.[6] In these respects, the *Norton* Court exemplified the *Wilander*-prescribed methodology – seeking the general maritime-law understanding of a maritime term of art that Congress has not defined in the statute under scrutiny.

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[6] In addition to quoting 1 U.S.C. § 3 and referencing Revised Statutes § 3, the *Norton* Court cited a number of older vessel-status cases, including *Ellis* (discussed *supra* at 15) and the lower courts' decisions in *Seabrook*, *Eastern Dredging*, and *City of Los Angeles* (discussed *supra* at 16 n. 4). See 321 U.S. at 571.

Second, in its ultimate deference to the language of 1 U.S.C. § 3 – i.e., in its use of 1 U.S.C. § 3 to supply the definition of a term that Congress had left undefined in the statute that controlled the case – *Norton* is an early example of the approach to maritime personal injury issues that became expressly dominant in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). The *Miles* Court held that the implications of the Jones Act prevented it from extending to the survivors of fatally injured seamen a general maritime law remedy that is available to other maritime workers' survivors. The Court said that "[m]aritime tort law is now dominated by federal statute," *id.* at 36, and that "[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance." *Id.* at 27. In light of *Norton* and *Miles*, there can be no justification for failure to apply Congress's definition of the maritime term "vessel" to cases arising under the "[f]oremost . . . enactment in the field of maritime torts." *American Dredging*, 510 U.S. at 455.

H. The 1 U.S.C. § 3 definition is not overly inclusive in the Jones Act context

In its prior uses of the section 3 definition, this Court has significantly narrowed its potential scope. The proponent of vessel status in *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926), owned and operated a wharfboat on the Ohio River at Evansville, Indiana. This structure was essentially a floating warehouse. When in use, it was secured to the shore by four or five cables, and it was connected to the city's water, electricity, and telephone systems. It had no means of propulsion and was not subject to government inspection. Since its installation at Evansville in 1910, its

only movement was an annual trip, under tow, to Green River harbor to protect it from winter ice. When it sank in 1922, damaging others' merchandise, the owner petitioned for limitation of liability under a statute that protects only "the owner of any vessel." Revised Statutes § 4282 (Limitation Act § 3), now codified at 46 U.S.C. App. § 183. In claiming to be a shipowner, the company invoked the Revised Statutes § 3 definition of a vessel, arguing that the wharfboat qualified because it was "capable" of being used for transportation. This Court rejected the argument, stating:

> It was not *practically* capable of being used as a means of transportation. It served at Evansville as an office, warehouse, and wharf, and was not taken from place to place. The connections with the water, electric light, and telephone systems of the city evidence a permanent location. It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed.

271 U.S. at 22 (emphasis added).

The *Evansville* narrowing of the section 3 definition was foreshadowed in *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887), in which the plaintiff sought a salvage award for having prevented a permanently moored dry dock from sinking and argued that the dry dock was a vessel because it was a "water-craft and artificial contrivance, used and capable of being used as a means of transportation on water." *Id.* at 626. The *Cope* Court rejected the plaintiff's argument, explaining that in doing its work,

the dry dock moved up and down but never horizontally, and that it was therefore not a vessel because "[i]t was not designed for navigation, and could not be *practically* used therefor." *Id.* at 627 (emphasis supplied).

The definition of "vessel" set forth in 1 U.S.C. § 3 has thus been significantly limited by the authoritative gloss applied by this Court in *Cope* and *Evansville*, whereby the statutory term "capable of being used as a means of transportation on water" means "*practically* capable" of being so used.

Moreover – and perhaps more importantly – the vessel requirement is only one of five separate requirements for seaman status: aspiring seamen must also show that the vessel was in navigation, that their work furthered its mission or function, that their connection to it was substantial in duration, and that their connection to it was substantial in nature. See *Chandris*, 515 U.S. at 376. The *Chandris* Court explained each of these four requirements in such a way as to provide the lower courts with suitable tools for "focus[ing] upon the essence of what it means to be a seaman." *Id.* at 369. Each of the tools performs a substantial limiting function.

When the *Chandris* opinion is properly consulted, the way in which each of the four requirements limits Jones Act coverage – and the application of each of them in the present case – is readily understood. (a) The "in navigation" requirement addresses whether the vessel has been taken out of service. See 515 U.S. at 372-75. A vessel will be considered out of service, i.e., "withdrawn from navigation,"

id. at 374, if it has been laid up for a substantial period of time for major repairs, overhauling, or refitting.[7] Employment aboard such a vessel is not seaman's work.[8] The *Super Scoop* was plainly in navigation at the time of Stewart's injury. Although dredging operations had been suspended for repairs to one of the *Super Scoop*'s scows, Dutra has not contended that this temporary shutdown took the dredge out of navigation. Rather, Dutra's argument has been that the *Super Scoop*'s stationary condition at the moment of injury kept it from being a Jones Act vessel. (b) The contribution-to-ship's function requirement asks whether the worker was "doing the ship's work." *Id.* at 357, 368. Amphibious workers who ride a vessel to work (for example, on a fixed offshore oil or gas platform) or sleep and eat on a vessel without doing any work there fail this requirement.[9] Dutra has not argued that Stewart, a

[7] The "in navigation" inquiry examines the vessel's "navigational status," *Waganer v. Sea-Land Service, Inc.*, 486 F.2d 955, 958 (CA5 1973), and not its activities at the moment of injury. A vessel has navigational status while doing its work on the water, whatever that work is, and it retains that status until and unless it is "withdrawn from navigation," *Gonzales v. United States Shipping Board*, 3 F.2d 168, 171 (E.D.N.Y. 1924), or "taken out of service," *Wayne Construction, Inc. v. Lenard*, 56 F.3d 75, 1995 WL309188 at *3 n.2 (CA9 1994) (unpublished).

[8] See *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952) (denying Jones Act seaman status to a worker on a fleet of sightseeing motorboats that was laid up for the winter). Cf. *Roper v. United States*, 368 U.S. 20 (1961) (holding that a worker on a ship in the mothball fleet could not bring an action for unseaworthiness); *West v. United States*, 361 U.S. 118 (1959) (same).

[9] See, e.g., *Ketnor v. Automatic Power, Inc.*, 850 F.2d 236, 239 (CA5 1988) ("Ketnor merely rode on the vessels to go from rig to rig so that he could perform his rig servicing duties on the rig. He thus was not a Jones Act seaman."); *Roberts v. Williams-McWilliams Co.*, 648 F.2d 255,

(Continued on following page)

marine engineer, did not further the *Super Scoop*'s mission. (c) The substantial-in-duration requirement generally means that the worker must have spent at least "30 percent of his time [while working for the current employer] in the service of a vessel in navigation." *Id.* at 371. Stewart spent 100% of his work time with Dutra serving the *Super Scoop*. (d) The substantial-in-nature requirement addresses whether the worker's duties "regularly expose[d] [the worker] to the perils of the sea." *Id.* at 368. Stewart's work exposed him to a range of deep-water and vessel-movement dangers, and he was hurt in a collision between two vessels.

II. Under 1 U.S.C. § 3, the dredge *Super Scoop* is a vessel

A. The *Super Scoop* regularly functions as a means of transportation on water

In order to perform the Boston Harbor project, the *Super Scoop* had to be towed from the Pacific to the Atlantic Ocean, bringing its essential equipment with it. It then had to "move through Boston Harbor, from East Boston to South Boston, digging the ocean bottom as it moved." *Stewart II*, Pet. App. 2. Its job at Boston was to produce a gigantic trench. Stationary dredging would have produced a hole, not a trench. The *Super Scoop* cannot do its work without transporting its crew and equipment across the water.

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263 (CA5 1981) (holding that an offshore worker could not claim to be a member of the crew of a barge on which he slept every night).

Despite changes in technology, the *Super Scoop* differs in no material way from the dredge *Pioneer*, which an experienced admiralty judge readily characterized as a vessel over a century ago. In *The Pioneer*, 30 F. 206 (E.D.N.Y. 1886), Judge Benedict looked for guidance to the definition of "vessel" in section 3 of the Revised Statutes. See *id.* at 207. He also explained why the *Pioneer* was a vessel under any suitable definition:

> She is a dredge used for the purpose of moving the steam-shovel from place to place, upon navigable water, and maintaining the same afloat while being operated to deepen the channel by shoveling up sand, mud, and silt, from the bottom, and depositing the same in other scows. It is evident that, without the ability to navigate and transport the shovel and engine on navigable water, secured by the method of her construction, the structure in question could not perform the work for which it was intended, and, without this ability, the shovel would be substantially useless. . . . A certain form and certain characteristics have been given her, for the sole purpose of enabling her to navigate the water, and to transport from place to place and maintain afloat the shovel placed upon her; and her occupation is to transport and maintain afloat on navigable water the shovel, the engine, and the coals used to work the engine.

Id. at 206. Except for the reference to "coals," everything Judge Benedict said about the *Pioneer* is applicable to the *Super Scoop*.

The court below was thus simply wrong in characterizing the *Super Scoop* as an "extension[ ] of the land." *Stewart I*, Pet. App. 27. No part of the *Super Scoop*'s work

in Boston Harbor occurred while it was attached to or extended from the land, and it could not perform any of its normal operations while so attached.

B. This Court has consistently treated dredges as vessels

This Court has decided three cases in which it held or assumed that dredges are vessels. In *Ellis v. United States*, 206 U.S. 246, 259 (1907), the Court held that two dredges working in Boston harbor were vessels, relying on the definition of "vessel" in Revised Statutes § 3. *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957), held that a dredge crew member (who had never even seen the dredge move) was a Jones Act seaman. In *The Virginia Ehrman*, 97 U.S. 309 (1877), a ship being towed by a tug ran into an anchored steam dredge, sinking the dredge. In holding that the ship and tug were both liable to the owners of the dredge, the Court repeatedly referred to the dredge as a "ship," *id.* at 310, "vessel at anchor," *id.* at 315, and "vessel," *id.* at 315, 316.

C. When Congress created the vessel requirement for Jones Act seaman status in 1927, the vessel status of dredges was conclusively established

When the 1927 Congress used the word "vessel" in the course of drawing a line between the coverages of the Jones Act and the LHWCA, it is bound to have known that the maritime law of the United States had conclusively settled the vessel status of dredges. This Court's decisions in *Ellis* and *Virginia Ehrman* were on the books, as were dozens of lower court decisions treating dredges as vessels

(such as *The Pioneer*, *supra* at 26). By 1915, there had been so many decisions classifying dredges as vessels that a court could quickly reject a contrary argument as too "unsound" to merit discussion. *The Steam Dredge No. 6*, 222 F. 576, 580 (S.D.N.Y. 1915), *aff'd*, 241 F. 69 (CA2 1917). A decade later there remained "no doubt" that dredges are vessels. *The Hurricane*, 2 F.2d 70, 72 (E.D. Pa. 1924), *aff'd*, 9 F.2d 396 (CA3 1925). In 1930, the Fourth Circuit said the vessel status of dredges "is sustained by the overwhelming weight of authority." *Butler v. Ellis*, 45 F.2d 951, 955 (CA4 1930).

D. Legislative history confirms that the 1927 Congress used the term "vessel" to include dredges

When Congress began working on the LHWCA, a seaman's union lobbied vigorously against including seamen under the Act's coverage. See 68 Cong. Rec. 5908 (March 4, 1927). Persuaded, the Senate sent the House of Representatives a bill (S. 3170) that excluded "a master or seaman as defined in section 4612 of the Revised Statutes." Union Calendar No. 644, 69th Cong., 2d Sess. at 2 (1927). (Revised Statutes § 4612 defined "master" to include "every person having command of any vessel belonging to any citizen of the United States," "seaman" to include "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board [any vessel belonging to any citizen of the United States]," and "vessel" to "comprehend *every description of vessel navigating on any sea or channel, lake, or river*." Emphasis supplied.)

The House Judiciary Committee disagreed with the Senate and wanted to include seamen in the LHWCA. It

reported out a bill that contained the following definition of the workers to be covered by the LHWCA:

> The term "employee" means an employee employed in maritime employment, in whole or in part, upon the navigable waters of the United States, including any dry dock, *or as master or member of a crew of any barge, lighter, tug, dredge, vessel, or other ocean, lake, river, canal, harbor, or floating craft owned by a citizen of the United States*.

H.R. Rep. No. 69-1767, 69th Cong., 2d Sess. at 1 (1927) (emphasis supplied).

Subsequently the view that seamen should be excluded prevailed on the House side as it had in the Senate. The House Judiciary Committee version of the bill was amended to take the form – with the "master or member of a crew of any vessel" exclusion – in which it was ultimately enacted into law. See 68 Cong. Rec. 5402-03 (March 2, 1927).

Comparing the three versions of S. 3170 makes it plain that Congress thought dredges are vessels for seaman-status purposes. The contentious point was whether seamen should be in or out of the LHWCA. (1) Believing seamen should be out, the Senate defined them as the crew members of "every description of vessel." (Here the term "vessel" is obviously used generically.) (2) Believing seamen should be in, the House Judiciary Committee defined them as the crew members of "any barge, lighter, tug, dredge, vessel, or other ocean, lake, river, canal, harbor, or floating craft." (Here the term "vessel" is not used generically; it means *ship*. The generic term in this version is "floating craft.") (3) Eventually agreeing that

seamen should be out, the House defined them as the crew members of "any vessel." (As in the Senate version, "vessel" here is generic.)

On the floor of the House, the Chair of the Judiciary Committee repeatedly assured his colleagues that the final version of the bill "make[s] clear the taking out of the seamen." 68 Cong. Rec. 5402 (March 2, 1927); see also *id.* at 5410. In vigorous support of that claim, another House member stated:

> The opposition to the inclusion of seamen became so great that every reference to them was taken out of the bill. . . . Seamen and fishermen were entirely eliminated.

Id. at 5412. The final floor debate in the Senate also included repeated assurances that "the seamen want to be out . . . [a]nd they are [now] out." *Id.* at 5908. In neither chamber was there any countervailing claim: Everyone who spoke concurred that the term "vessel" (as used in the final version of the bill with the purpose of excluding seamen) covered everything that had been spelled out in the House version to include seamen, *viz.*: barge, lighter, tug, *dredge*, vessel [ship], or other ocean, lake, river, canal, harbor, or floating craft.

E. Because Stewart's work exposed him to the perils of the sea, classifying the *Super Scoop* as a vessel furthers the purposes of the Jones Act

In *Chandris*, this Court said that "seamen receive protection [from the Jones Act] because of their exposure to the 'perils of the sea.'" 515 U.S. at 354. "Perils of the sea" is a term of art that this Court has regularly used to

signify the dangers characteristic to seamen's work.[10] The *Super Scoop*'s work exposes its crew to many of these dangers. In the relatively open waters of the harbor, the workers face wind and weather risks that are different from those confronting dock workers. Working at a significant distance from shore and often in deep water, dredges' crews run a grave risk of drowning. The reported Jones Act jurisprudence suggests, for example, that special-purpose vessels may be more prone to capsizing than traditional ships.[11] Dredges must generally move across the water to do their work, which generates a range of vessel-movement dangers. Being afloat, frequently out in

[10] See, e.g., *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 558-59 (1997) (referring to the work of a deckhand on a harbor craft as "seagoing activity" and stating that such work subjects the worker to "the perils of the sea"). In *Chandris*, 515 U.S. at 354, and in *Wilander*, 498 U.S. at 354, the Court indicated its general view of the nature of the perils of the sea by citing David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79 (1985). This article identifies the characteristic seamen's dangers as including "the full range of dangers associated with deep water, wind and weather, tides and currents, ocean predators, great distances from shore, relative isolation, and inaccessibility of shore-side facilities for aid and succor" as well as the full range of "risks attending the movement of vessels on navigable water." *Id.* at 80-81. Cf. *Chandris*, 515 U.S. at 355 (characterizing work on an Ohio River towboat as "life upon the sea") (quoting *Warner v. Goltra*, 293 U.S. 155, 157 (1934)).

[11] See *Offshore Co. v. Robison*, 266 F.2d 769, 780 (5th Cir. 1959) (noting that "in many instances Jones Act seamen [on special-purpose vessels] are exposed to more hazards than are blue-water sailors. They run the risk of top-heavy drilling barges collapsing."); *Gault v. Modern Continental/Roadway Constr. Co.*, 100 Cal. App. 4th 991, 123 Cal. Rptr.2d 85, 87 (2002) (describing the capsizing of a construction barge). Cf. *Conoco, Inc. v. Halter-Calcasieu, L.L.C.*, 865 So.2d 813, 816 (La. App. 2003) (non-Jones Act decision describing the sinking of a drydock whose operator unwisely tried to use it as a means of transportation).

the open, and continually changing their position, dredges like the *Super Scoop* are at significant risk of collision with other vessels, an obvious and indeed paradigmatic seaman's risk. Here, Stewart was injured because of that very risk: He was hurt when the vessel on which he was temporarily working collided with the dredge to which he was assigned.

III. The First Circuit's test for Jones Act vessel status is fundamentally flawed

A. The First Circuit, impermissibly ignoring the applicable statutory definition, treats a nontraditional vessel as a Jones Act vessel only when the vessel is in motion

The decision below purported to make no new law but merely to follow the First Circuit's *en banc* decision in *DiGiovanni*. See *Stewart I*, Pet. App. 16, 25, 29. The *DiGiovanni* court accepted the defendant's argument that the crane barge *Betty F* "was not to be regarded as a [Jones Act] vessel," 959 F.2d at 1120. It held that a floating structure or apparatus is not a Jones Act vessel unless "it was 'used primarily for the transportation of cargo, equipment, or persons across navigable waters' " or was "in actual navigation or transit" when the Jones Act plaintiff was injured. *Id.* at 1123 (quoting *Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 829 (5th Cir. 1984)). The court indicated that by "actual navigation or transit" it meant movement across the surface of the water.

B. The First Circuit's test violates the *Chandris* Court's anti-snapshot rule

In *Chandris*, a majority of this Court rejected an argument that "anyone working on board a vessel for the duration of a 'voyage' in furtherance of the vessel's mission has the necessary employment-related connection to qualify as a seaman." 515 U.S. at 357. The Court articulated its rejection of the argument as follows:

> In evaluating the employment-related connection of a maritime worker to a vessel in navigation, courts should not employ "a 'snapshot' test for seaman status, inspecting only the situation as it exists at the instant of injury; a more enduring relationship is contemplated in the jurisprudence." Thus, a worker may not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged when injured.

Id. at 363 (quoting *Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1, 5 (CA5 1992)). The Court explained that it was rejecting what it regarded as a "snapshot" argument because of "the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act (and, perhaps more importantly for purposes of the employers' workers' compensation obligations, who will be covered by the LHWCA) before a particular workday begins." 515 U.S. at 363.

DiGiovanni was decided before *Chandris*, and the *DiGiovanni* court proudly labeled its approach as a snapshot test, proclaiming: "That there should be a varying status designation depending on the *activity at the moment* is not a novel concept." 959 F.2d at 1123 (emphasis added). On this ground alone, it is plain that the First

Circuit test is wrong. *Chandris* implicitly[12] overruled *DiGiovanni*.

C. The First Circuit rule is in tension with this Court's decisions holding that the term "seaman" in the Jones Act is defined by section 2(3)(G) of the LHWCA

Each of this Court's modern seaman-status decisions has reiterated the *Swanson* holding, 328 U.S. at 6-7, that LHWCA § 2(3)(G), which excludes a "member of a crew of any vessel" from that Act's coverage, also defines the term "seaman" in the Jones Act. See *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 553 (1997); *Chandris*, 515 U.S. at 355-56; *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 86-88 (1991); *Wilander*, 498 U.S. at 347. Section 2(3)(G) thus draws a line between the mutually exclusive coverages of the two statutes.

It would undermine the mutual exclusivity of the two statutes if the phrase "member of a crew of any vessel" had different meanings for Jones Act and LHWCA purposes. It necessarily follows that "vessel" must have the same meaning in the Jones Act and LHWCA contexts. Yet the court below held to the contrary. In *Stewart I*, it held

[12] While it did not directly address *DiGiovanni*'s test for vessel status, the *Chandris* Court's vigorous condemnation of the moment-of-injury approach to seaman status unmistakably disapproves the heart of *DiGiovanni*. The *Chandris* Court quoted a dictum from *DiGiovanni* that "a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside." 515 U.S. at 373 (quoting *DiGiovanni*, 959 F.2d at 1121). This quotation of a tangential aspect of the First Circuit's opinion cannot be seen as an endorsement of the holding that was indirectly condemned.

that the *Super Scoop* was not a Jones Act vessel. Then in *Stewart II*, it recognized that the *Super Scoop* was a LHWCA vessel. See Pet. App. 5 (citing *Morehead*, 97 F.3d at 607). One of these conclusions must be wrong. Permitting inconsistent meanings of the term "vessel" would bring a fundamental incoherence to the very center of this Court's delineation of seaman status.

D. The First Circuit's rule is inconsistent with this Court's decisions recognizing the vessel status of dredges and comparable watercraft

The First Circuit's rule denies vessel status to dredges (unless they are in motion at the time of the incident in suit) and is thus inconsistent with this Court's decisions in *Ellis*, *Senko,* and *Virginia Ehrman*. See *supra* at 27. It is also in tension with other decisions of this Court in which the vessel status of dredges was indirectly assumed or signaled,[13] and with a number of other decisions in which

[13] See *Standard Dredging Co. v. Murphy*, 319 U.S. 306, 308 n.3 (1943) (citing with evident approval Internal Revenue Service Cumulative Bulletin 1937-1, p. 408, which states that "dredges used for navigation and transportation in carrying on the work of deepening and removing obstructions from channels and harbors are vessels within the meaning of . . . the Social Security Act"); *Norton*, 321 U.S. at 571 & n.4 (citing approvingly to *Ellis* and two lower-court cases upholding the vessel status of dredges – *City of Los Angeles v. United Dredging Co.*, 14 F.2d 364 (CA9 1926), and *Seabrook v. Raft,* 40 F. 596 (D.S.C. 1889) – in support of its conclusion that a harbor barge was a Jones Act vessel); *The Robert W. Parsons*, 191 U.S. 17, 30 (1903) (citing *The Alabama*, 22 F. 449 (C.C.S.D. Ala. 1884), which upheld the vessel status of a dredge-scow flotilla, in support of its holding that horse-drawn Erie Canal boats were vessels).

the vessel status of comparable watercraft was explicitly[14] or implicitly[15] recognized by this Court.

E. The First Circuit's rule is inconsistent with the purposes of the Jones Act

The thrust of the First Circuit's approach to vessel status is to strip the protections of the Jones Act from most seamen on nontraditional vessels, although these workers regularly face the perils of the sea. The First Circuit's restrictive test denies statutory benefits to workers that Congress intended to protect. It is a radical departure, affecting thousands of nautical and amphibious workers. The Petition for Certiorari demonstrates how

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[14] See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 535 (1995) (indicating that a crane/pile-driving barge is undebatably a vessel "for admiralty tort purposes"); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 83, 92 (1991) (holding that a jury could reasonably find that a shipyard's crane barge was a Jones Act vessel); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) (per curiam) (holding that a jury could reasonably find that an offshore construction barge was a Jones Act vessel); *Gianfala v. Texas Co.*, 350 U.S. 879 (1955) (per curiam) (holding that a trier of fact could reasonably find that a submerged drilling barge was a Jones Act vessel); *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930) (holding that a railroad "car float" was a vessel for LHWCA purposes).

[15] See *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983) (treating a coal barge as a vessel for LHWCA purposes); *Director v. Perini North River Associates*, 459 U.S. 297 (1983) (treating a water-front construction barge as a vessel for LHWCA purposes); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 566 (1982) (awarding seaman's penalty wages to "pipeline welder" on "Lay Barge 27"); *Cantey v. McLain Line, Inc.*, 312 U.S. 667 (1941) (per curiam) (treating a harbor dump scow as a Jones Act vessel); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940) (treating a harbor scow as a vessel for LHWCA purposes).

radically the First Circuit's doctrine departs from the law in the other maritime circuits. The extent of the departure is obvious and alarming.[16]

F. The First Circuit's overemphasis on the vessel requirement for seaman status discourages lower courts and counsel for properly attending to the other four requirements

By making the vessel requirement for seaman status do most or all of the work of drawing the line between Jones Act and LHWCA workers, the First Circuit's approach diverts the attention of courts and counsel from the other four requirements for seaman status and thus from key facts that the other requirements are designed to elicit and evaluate. For example, one cannot tell from reading the *DiGiovanni* opinion the extent to which the injured worker was exposed to vessel-movement dangers. And while the court below must have realized that Stewart's work regularly exposed him to vessel-movement dangers – indeed, he was hurt in a collision between two vessels – the court's preoccupation with the vessel requirement seems to have prevented it from realizing the significance of this fact.

[16] The Second Circuit Court of Appeals has noted that the First Circuit's rule is "far more restrictive than [that of] any [other] circuit." *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30, 34 (CA2 1996). Dissenting in *DiGiovanni*, Judge Torruella complained that the First Circuit approach is "clearly more restrictive" and "goes far beyond" that of any other circuit. 959 F.2d at 1128.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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