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**

## PETITIONER'S REPLY BRIEF


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## ARGUMENT

The parties agree that the Jones Act's remedies extend to "seamen" as the term was generally understood when the Act was passed in 1920, and that Congress implicitly defined the term "seaman" in the 1927 LHWCA as "a master or member of a crew of any *vessel*." Although not specifically defined in either statute, the term "vessel" should also be construed according to Congress's contemporary understanding. Under that understanding, reflected in 1 U.S.C. § 3 and the decisions of this Court and the lower courts, the *Super Scoop* was undoubtedly a "vessel."

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

Stewart has consistently maintained that the *Super Scoop* is a Jones Act "vessel" and has suggested 1 U.S.C. § 3 as an appropriate test for vessel status at every stage of this case.[1] Dutra's repeated assertions that Stewart has

[1] Dutra devotes major portions of its brief to its assertion that Stewart waived reliance on 1 U.S.C. § 3. In fact, Stewart urged the section 3 definition of "vessel" on both lower courts. Responding to Dutra's summary judgment motion in the district court, Stewart cited *Norton v. Warner Co.*, 321 U.S. 565 (1944), in which this Court relied centrally on 1 U.S.C. § 3 for the conclusion that a harbor barge is a "vessel," *see* 321 U.S. at 571 & n.4, and quoted *Early v. American Dredging Co.*, 101 F. Supp. 393, 395 (E.D. Pa. 1951) ("There can be no doubt that the dredge is a vessel. 'Vessel' is defined in R.S. § 3, 1 U.S.C. § 3, to include 'every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.' "). C.A. App. 75. *See also*, *e.g.*, C.A. App. 190 (relying on *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (CA5 1998) (placing 1 U.S.C. § 3 at the center of the discussion of Jones Act vessel status, *see* 135 F.3d at 347); C.A. App. 194 (relying on *Brinegar v. San Ore Constr. Co.*, 302 F. Supp. 630 (E.D. Ark. 1969) (ruling that a dredge worker was a Jones Act seaman as a matter of law and applying 1 U.S.C. § 3, *see* 302 F. Supp. at 639)).

In his district court motion for rehearing, Stewart explicitly argued:

> There are statutes that define "vessel" generally. "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."

C.A. App. 219 (quoting 1 U.S.C. § 3).

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"conceded," Resp. Br. 1, 2, 3, 10, 27, 33, 38, "acknowledged," *id*. at 1, 2, or "admitted," *id*. at 9, the inapplicability of the section 3 definition are simply wrong.[2] Dutra's substantive criticisms of section 3 are also unpersuasive. And the alternative tests proposed by Dutra's supporting amici should be rejected.

### A. Congress did not reject the 1 U.S.C. § 3 "vessel" definition when it enacted the Jones Act

Dutra asserts that when Congress passed the Jones Act it "effectively *deleted*" any "broad" vessel definition (including 1 U.S.C. § 3) because section 20 of the 1920 Merchant Marine Act (which constitutes the Jones Act) did not specifically incorporate the broad definition that applies to other parts of the 1920 Act. Resp. Br. 27-29. This makes no sense.

Most significantly, the 1920 provision known as the Jones Act does not contain the term "vessel," and thus the 1920 Congress would have perceived no need to define it. The term "vessel" did not enter Jones Act jurisprudence until 1927, when Congress used the LHWCA phrase "master or member of a crew of any vessel" to delineate the mutually exclusive coverages of the two Acts. *See* Pet. Br. 3, 11-12. Nothing can be read into the 1920 Congress's failure to incorporate a specific definition of a term that does not appear in the statute.

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In the court of appeals, Stewart again raised section 3. His first brief repeated the passage just quoted from the district court motion for rehearing. C.A. Br. 18-19. He proceeded to urge the plausibility of Judge Torruella's *DiGiovanni* dissent – which rested centrally on 1 U.S.C. § 3, *see* 959 F.2d at 1124-25, 1128, 1129-31 – and to quote *Benedict on Admiralty* for the proposition that section 3 codifies the accepted general maritime law's definition. Stewart's petition for initial hearing en banc (submitted prior to panel argument) strenuously urged the First Circuit to jettison *DiGiovanni* and adopt 1 U.S.C. § 3. *See* C.A. Pet. 23-26.

[2] Dutra provides no intelligible citation in support of any of these assertions. Most of its citations reflect nothing more than Stewart's recognition that the Jones Act does not specifically incorporate 1 U.S.C. § 3. The rest are completely irrelevant.

Moreover, even if Dutra were correct that the 1920 Congress made a deliberate choice not to use the Shipping Act definition of the term "vessel"[3] in the Jones Act, the conclusion that 1 U.S.C. § 3 was somehow also made inapplicable would not follow. Dutra overlooks the crucial fact that the Shipping Act definition of "vessel" is broader than the 1 U.S.C. § 3 definition in including ships under construction that have not yet been launched. Such ships would not have crews, so if Congress did reject the broader definition, it probably did so because it did not think the Jones Act required this expansion of the traditional maritime law's concept of a vessel. *See*, *e.g.*, *Tucker v. Alexandroff*, 183 U.S. 424, 438 (1902) (explaining that a craft under construction does not qualify as a "vessel" under maritime law until it has been launched). Most importantly, any decision by Congress to reject the broad Shipping Act definition in the Jones Act context would have left section 3's narrower default definition fully in place.

### B. Dutra misreads the Rules of Construction Act, the Jones Act, and the 1927 LHWCA

Dutra attempts a double distortion when it asserts that 1 U.S.C. § 3 defines *vessel* "for purposes of certain federal transportation statutes, but *not* for purposes of the Jones Act." Resp. Br. 7 (emphasis in original).[4] First,

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[3] Dutra misquotes and miscites the Shipping Act definition. As enacted in 1916, the Act did not define "vessel." *See* Shipping Act, 1916, ch. 451, §§ 1-2, 39 Stat. 728-29 (1916). (The Act has no section 44. *Cf.* Resp. Br. 28.) Two years later, section 1 was amended to provide:

> *The term "vessel" includes* all water craft and *other* artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or *are* intended to be used as a means of transportation on water.

Shipping Act, 1918, ch. 152, § 1, 40 Stat. 900 (1918) (emphasis added to indicate omissions from Dutra's quotation, Resp. Br. 28).

[4] Amicus Signal makes a similar mistake in claiming that section 3 is an admiralty jurisdiction statute. *See* Signal Br. 7 & n.11. Nothing about the statute limits it to the admiralty jurisdiction context, and this

(Continued on following page)

Dutra's inventive limitation of the section 3 definition to "certain federal transportation statutes" is contradicted by the wording of section 1 of the Rules of Construction Act, which makes the Act's definitions applicable "in determining the meaning of *any* Act of Congress, unless the context indicates otherwise."[5] 1 U.S.C. § 1 (emphasis supplied). Second, Dutra's indirect and completely unsupported implication that the Jones Act is not a "transportation statute" is utterly wrong. The Jones Act is Congress's "[f]oremost . . . enactment[ ] in the field of maritime torts." *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994). It was enacted pursuant to Congress's constitutional authority over the "entire subject" of "the general maritime law, sometimes called the law of the sea." *Panama R. Co. v. Johnson*, 264 U.S. 375, 386 (1924). It "incorporates FELA's remedial scheme" by reference. *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 198 (1991). FELA is "major labor and social transportation legislation." *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538, 541 (1968). *A fortiori*, so is the Jones Act.

Dutra errs on multiple levels in asserting that the 1927 LHWCA could not have incorporated the section 3 definition of vessel because it "includes its own, *different* definition of the term." Resp. Br. 8 (emphasis in original); *cf. id*. at 32. LHWCA § 2(21), to which Dutra refers, does not define "vessel" but rather expands that term to include operators and the like.[6] Far more important, *this provision was not part of the 1927 Act*; it was added in 1972, when Congress extensively revised LHWCA and broadened its

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Court has consistently applied it in other contexts. *See*, *e.g.*, *Norton*, 321 U.S. at 571 & n.4; *Ellis v. United States*, 206 U.S. 246, 259 (1907).

[5] *See* Pet. Br. 14-18 (explaining that the "context" restriction was aimed at non-maritime uses of the term vessel, thus showing that Congress intended the section 3 definition to apply to all maritime statutes that do not include their own *vessel* definition).

[6] LHWCA § 2(21) "defines" vessel to mean "any vessel [on which a covered injury occurs] and said vessel's owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member."

landward reach. The 1927 Act makes "master or member of a crew of any vessel" the line of demarcation between LHWCA and Jones Act coverage without providing any definition of the term *vessel*. It is evident that Congress used the term in the usual sense, reflecting the settled acceptance of the section 3 definition.[7]

### C. Dutra distorts several of this Court's pivotal decisions

Dutra's claim that *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), approved the *DiGiovanni* approach to vessel status, Resp. Br. 25-26, is a serious distortion. *Chandris* vigorously condemned making seaman status turn on "the situation as it exists at the instant of injury," 515 U.S. at 363 (quoting *Easley v. Southern Shipbuilding Corp.*, 904 F.2d 1, 4 (CA5 1992), *cert. denied*, 506 U.S. 1050 (1993)), whereas the *DiGiovanni* court (writing before *Chandris* was decided) forthrightly identified its approach as "a varying status designation depending on the activity at the moment." 959 F.2d at 1123. *Chandris* found such approaches inappropriate because workers should not "oscillate back and forth between Jones Act coverage and other remedies." 515 U.S. at 363. As applied here, the *DiGiovanni* approach has Stewart and his fellow crew members oscillating in and out of Jones Act coverage every two hours. *See* Pet. App. 17. Plainly, *Chandris* prohibits any such test. Later in the opinion, *Chandris* quotes *DiGiovanni* for the proposition that "a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside." 515

[7] Congress has amended LHWCA on a number of occasions since the *Norton* Court construed the "master or member of a crew of any vessel" provision to incorporate the section 3 definition of *vessel*. 321 U.S. at 571 & n.4. Major amendments in 1972 and 1984 specifically addressed the scope of LHWCA coverage, reenacting the crewmember exclusion in each case without change. Pub. L. No. 92-576, § 2(a), 86 Stat. 1651 (Oct. 27, 1972) (amending LHWCA § 2(3)); Pub. L. No. 98-426, § 2(a), 98 Stat. 1653 (Sept. 28, 1984) (amending LHWCA § 2(3)). Under well-settled principles, these subsequent enactments constitute legislative adoption of this Court's prior construction of the statute. *See*, *e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993).

U.S. at 373 (quoting *DiGiovanni*, 959 F.2d at 1121). This tangential use of *DiGiovanni* does not constitute an approval of its entire approach.[8]

Dutra is wrong to claim that *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926), "*rejected* section 3's broad definition" of a vessel. Resp. Br. 8 (emphasis in original); *see also id*. at 32-34. The *Evansville* Court in fact quoted section 3 as the operative definition – whereby "'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water" – and then concluded that the wharfboat at issue was not a vessel under section 3 because "[i]t was not practically capable of being used as a means of transportation." 271 U.S. at 20, 22. *Evansville* does not reject section 3; it instead construes and applies the section 3 language.

Dutra cannot challenge the fact that *Ellis v. United States*, 206 U.S. 246 (1907), applying section 3, explicitly held that dredges working in Boston Harbor (like the *Super Scoop*) were "vessels" and that the workers aboard them were "seamen as that name commonly is used." *Id*. at 259; *see* Pet. Br. 15, 27. Dutra instead seeks to rely on its mischaracterization of the dissent. Contrary to Dutra's assertion, Resp. Br. 10 n.2, 22, even the *Ellis* dissent accepted the vessel status of the dredges. *See* 206 U.S. at 265-66 (Moody, J., dissenting). The dissent argued that the dredge workers were not seamen despite the dredges' vessel status because "[t]hey had nothing whatever to do with navigation." *Id*.

Throughout its brief, Dutra distorts the thrust of this Court's seaman-status decisions by subtly misusing certain

[8] Dutra similarly misrepresents the thrust of many of the lower court cases cited in this connection. Four of the cited lower court cases – *Hatch*, *Gipson*, *Spears*, and *Gault* – do indeed "adopt[ ] the First Circuit's approach." Resp. Br. 26; *cf*. Pet. 8. The other six do not. Dutra seems to think that any court that mentions *DiGiovanni* in any context without express disapproval has adopted its vessel definition approach.

maritime terms of art. For example, Dutra quotes *Warner v. Goltra*, 293 U.S. 155, 157 (1934), for the proposition that a seaman is one who "lives his life on the sea," Resp. Br. 12, without mentioning that the Court was using the phrase to refer to the master of an Ohio River tugboat.[9] On the same page, Dutra quotes *Norton v. Warner Co.*'s reference to "the operation and welfare of the ship when she is upon a voyage," 321 U.S. at 572, without noting that the "ship" in question was a nondescript harbor barge whose "voyages" were confined to the waters of Philadelphia's harbor. More seriously, Dutra suggests that none of the work done by the aspiring seaman in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997), was deemed by this Court to have been "of a 'seagoing nature.'" Resp. Br. 15. In truth, the *Papai* Court was careful to explain that the work Papai did on vessels moving short distances within the harbor *was* to be regarded as having a "seagoing nature," as involving "seagoing duties" and "seagoing activity," and as "subjecting [Papai] to the perils of the sea." *Id.* at 558-59. Papai's claim for seaman status failed not because his work on moving harbor vessels was not "seagoing" – it was – but because he could not prove that he did a sufficient amount of such work for a single vessel or an identifiable fleet.

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

Dutra's attempt to show that 1 U.S.C. § 3 is "undesirably broad," Resp. Br. 36-37, overlooks the *Evansville* gloss on the statute as well as four of the five established requirements for Jones Act seaman status. *See* Pet. Br. 21-25. The *Evansville* wharfboat and the *Cope* drydock were not section 3 vessels because they were neither used for transportation nor practically capable of such use. For the same reason, neither a floating bridge nor a floating casino that has been permanently attached to the shore would be a section 3 vessel. The shipyard repair worker in *Desper v.*

[9] *See also McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 348-49 (1991) (referring to the Ohio River tugboat master in *Norton* as a "sea-based employee[ ]").

*Starved Rock Ferry Co.*, 342 U.S. 187 (1952), was not a Jones Act seaman because the boats with which he was engaged had been taken out of navigation. And even if one of these structures could qualify as a vessel, workers claiming Jones Act seaman status must still satisfy the other *Chandris* requirements, including the requirement of a vessel connection that is substantial in both duration and nature.

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

There can be little doubt that the *Super Scoop* satisfies the 1 U.S.C. § 3 vessel definition. *See* Pet. Br. 25-32. It is in fact "used . . . as a means of transportation on water." It regularly transports its workers and equipment over navigable water as it performs its dredging function. Dutra does not dispute that the *Super Scoop* would have been worthless to Dutra if it had been unable to perform its transportation function. *See* Pet. Br. 25; U.S. Br. 21-22.

In its Statement, Dutra stresses how the *Super Scoop* differs from a traditional ocean-going vessel,[10] but this is irrelevant. This Court has clearly held, for example, that vessel status does not require "motive power of its own." *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944); *cf.* Resp. Br. 5 ("[*Super Scoop*] has no propulsion engine or propeller"). The issue before this Court is when "special purpose watercraft," Pet. i, qualify as vessels. Similarly, Dutra questions whether Stewart faced "the perils of the sea," but that challenge also misses the point.[11]

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[10] Dutra has been highly selective. For example, its discussion of the Coast Guard inspection certificates, Resp. Br. 5, omits a key datum showing that *Super Scoop* workers faced the perils of the sea: "While vessel is manned, a rescue vessel . . . shall be standing by." J.A. 91, 96, 99.

[11] Dutra's discussion of the recitation of seamen's hazards in David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79 (1985), *see* Resp. Br. 25, omits the following key passage:

> The sea is obviously a high risk workplace. So is a vessel in motion on navigable water, even though it may be within sight and hailing distance of land. Vessels in active operation are complex industrial enterprises presenting a range of hazards that differ significantly from those incident to work on land,

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Dutra's principal contention on this issue – made here for the first time – is that the *Super Scoop* was "out of navigation" because it "was out of service due to a mechanical problem with one of the scows." Resp. Br. 24. But the fact that the *Super Scoop* was temporarily not digging (for a total of two days) while awaiting on-site repairs to a scow does not begin to meet the out-of-navigation standard established by *West v. United States*, 361 U.S. 118 (1959), and *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952). In *West*, the out-of-navigation vessel had been in the Government's moth-ball fleet "in total deactivation for several years." 361 U.S. at 119. In *Desper*, the out-of-navigation boats were laid up for the winter – "beached and put up on blocks." 342 U.S. at 188. More recently, *Chandris* held that six months in drydock did not necessarily take a ship "out of navigation," noting that "six months . . . seems to be a relatively short period of time for important repairs on oceangoing vessels." 515 U.S. at 374.

## III. Amicus Signal's argument that seaman status should be restricted to workers who sleep aboard the vessel is badly misguided and contrary to all relevant statutory, judicial, and secondary authority

Signal begins by presenting a highly misleading picture of the situation facing employers when some

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> piers, drydocks, and even vessels that are temporarily out of active marine operation while securely moored or anchored in protected inland water. A worker whose duties frequently take him aboard moving vessels, or who is otherwise significantly exposed to risks generated by moving vessels, confronts seamen's dangers. Like the perils of the sea, the risks attending the movement of vessels on navigable water are also distinguishing characteristics of the seaman's work environment.

64 Tex. L. Rev. at 80-81. Stewart's injury occurred when the floating scow on which he was working moved across the water's surface and collided with the floating *Super Scoop*. This key fact makes nonsense of Dutra's statement that "[t]he proximity of the harbor was coincidental" to Stewart's injury. Resp. Br. 24.

employees are near the border between Jones Act seamen and LHWCA coverage.[12] It then puts forward a radical new proposal to limit seamen's benefits to workers whose service to vessels includes sleeping on board. Signal's sole supporting authority is a one-judge dissent in a 1956 Second Circuit decision. The Second Circuit's decision and a plethora of other authority directly and powerfully rebut Signal's argument.

### A. In any event, Signal's argument is not properly before this Court

Not only is Signal wrong as a matter of substance, its argument is not even properly before this Court. Most importantly, the argument is irrelevant to the question presented. Whether an employee sleeps aboard the vessel or commutes from a land-based home is recognized as one factor that the jury may consider to determine whether an injured worker satisfies the *Chandris* connection requirements, but it has nothing to do with the vessel status issue. *See*, *e.g.*, *Bertrand v. Int'l Mooring & Marine, Inc.*, 700 F.2d 240, 247 & n.15 (CA5 1983). Indeed, the sole authority supporting Signal's argument (*see infra* part III-B) treats the issue of where the worker sleeps as relevant only "[i]n determining whether a worker has such a permanent connection with a ship as makes him a 'seaman.'"

[12] It is not true, as Signal asserts, that employers must immediately pay whatever benefits an injured worker seeks. *See* Signal Br. 1-2. LHWCA § 14(a) expressly recognizes an employer's right to controvert LHWCA responsibility. An employer may also resist responsibility for seamen's benefits (as Dutra did here). Nor is it true, as Signal implies, that employers face double liability. *See* Signal Br. 2. LHWCA § 3(e) credits Jones Act damages against the employer's LHWCA exposure, and case law provides for "full compensation credit" when an employer first pays LHWCA benefits and is then held responsible for seamen's benefits. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 n.5 (1991). *See also Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (CA9 1995) ("double recovery of any damage element is precluded"); Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 435 (2d ed. 1975) ("compensation payments will be routinely deducted from the damage recovery if the Jones Act action is successful").

*Weiss v. Central R.R. Co*., 235 F.2d 309, 315 (CA2 1956) (Lumbard, J., dissenting). Thus, in Signal's only authority vessel status was admitted. *See*, *e.g.*, *id*. ("Here of course there was no question that the ship was in navigation.").

Vessel status is now the sole issue in this case. *See* Pet. App. 21 (noting that Dutra has conceded the remaining requirements for seaman status); Pet. i (question presented is "the legal standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act 'vessel' "). Whether Stewart had a sufficient connection to the *Super Scoop* is not before the Court.

Even if Signal's novel argument were relevant to the question presented, it has not been advanced by either party and was neither raised nor passed on below. This Court should thus decline to address it. *See*, *e.g.*, *Reno v. Koray*, 515 U.S. 50, 55-56 n.2 (1995) (such an amicus "argument is not properly before the Court"); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) ("declin[ing] to address" an amicus argument that "was neither raised below nor squarely considered by the Court of Appeals; nor was it advanced by respondents").

### B. In pre-Jones Act cases, courts routinely provided seamen's remedies to seamen who slept ashore

Signal argues that the Jones Act should be limited to seamen who sleep on the vessel on the asserted theory that they were the only workers entitled to recover "maintenance and cure," one of the traditional seamen's remedies, at the time Congress passed the Act. Signal cites no case supporting its claim that pre-Jones Act seamen who did not sleep aboard vessels were ineligible for maintenance and cure.[13] Signal's sole authority for the argument

[13] Signal cites *Reed v. Canfield*, 20 F. Cas. 426 (No. 11,641) (C.C.D. Mass. 1832), for the proposition that "[a] voyage away from home was the basis for a maintenance and cure award." Signal Br. 8. But in *Reed*'s most relevant passage, Justice Story rejected the argument "that the maritime law applies only to . . . injuries occurring in the ship's service

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that such a limitation *should* be imposed is Judge Lumbard's 1956 dissent in *Weiss*. *See* Signal Br. 15. In that very case, however, the Second Circuit held that a ferryboat deckhand could recover maintenance and cure despite the fact that "he . . . slept ashore," 235 F.2d at 311. The court explained that it "kn[e]w of no authority . . . for holding that a seaman is not entitled to the traditional privileges of his status merely . . . because he sleeps ashore." *Id*. at 313; *see also The Bouker No. 2*, 241 F. 831 (CA2 1917) (permitting maintenance and cure for a harbor tug engineer who slept at home a great deal of the time).

Moreover, even if the maintenance and cure remedies had been limited to seamen who slept on the vessel, this would be irrelevant because the controlling test is whether a worker would have been considered a seaman "under the general maritime law when Congress passed the Jones Act." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). As the *Wilander* Court explained, Congress intended Jones Act seamen to be not only those workers who were entitled to maintenance and cure (and other traditional tort remedies) under the general maritime law, but also those workers who were entitled to a maritime lien against the vessel for unpaid wages. *Id*. at 343.

The pre-Jones Act case law established that seamen were entitled to wage liens whether or not they slept aboard the vessel. In *The Minna*, 11 F. 759, 760 (E.D. Mich. 1882), for example, then-Judge Henry Billings Brown, who was later to author this Court's opinion in *The Osceola*, 189 U.S. 158 (1903), upheld a wage lien on behalf of a seaman who served on a vessel during the day and lodged ashore at night. In *The May Queen*, 16 F. Cas. 1268 (No. 9,360) (D. Mass. 1861), the court explained a wage lien for sleep-ashore seamen as follows:

> [L]iving on shore is by no means a decisive criterion. . . . Indeed, such is the rapidity with which passages are now made, that a steamer may run

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during the voyage abroad," *id*. at 427, and thus affirmed a maintenance and cure award for a seaman injured in the vessel's home port.

> by daylight, on the high seas, from state to state, and yet the officers may sleep and take their meals on shore.

*Id.* at 1269.[14] *See also The Virginia Belle*, 204 F. 692, 694 (E.D. Va. 1913) (upholding a sleep-ashore seaman's wage lien).[15]

In any event, it was well-established before Congress passed the Jones Act that workers on dredges were seamen under maritime law. Indeed, Dutra has not disputed that in *Ellis*, 206 U.S. at 259, the Court specifically found that workers on dredges performing work in Boston Harbor were "seamen as that name commonly is used," and that the pre-Jones Act decisions of the lower courts had uniformly treated dredges as vessels whose workers were entitled to seaman

[14] This passage from *The May Queen* highlights the way in which a changing technology – the advent of steam – enabled seamen to perform their duties at sea while sleeping on land. As the Diamond Offshore amicus brief illustrates, this process accelerated during the late twentieth century. Denying these workers their seamen's benefits would be inconsistent with *Wilander*'s theme that maritime law must continually evolve to keep pace with the "'new kinds of property [vessels] as they spring into existence in the progress of society' " and in recognition of "the myriad purposes for which ships set to sea." 498 U.S. at 344 (quoting Erastus C. Benedict, *The American Admiralty* § 241, at 133 (1850)); *see also Saylor v. Taylor*, 77 F. 476, 478-79 (CA4 1896) ("far-reaching [admiralty] principles . . . 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").

[15] In many other cases arising prior to the Jones Act, the opinions do not specifically say where the seamen slept (which the courts would have considered irrelevant), but it can be inferred from the nature of the work that the seamen probably slept ashore. *See*, *e.g.*, *George Leary Const. Co. v. Matson*, 272 F. 461 (CA4 1921); *Southern Log Cart & Supply Co. v. Lawrence*, 86 F. 907 (CA5 1898); *Saylor v. Taylor*, 77 F. 476 (CA4 1896); *McRae v. Bowers Dredging Co.*, 86 F. 344 (C.C.D. Wash. 1898); *The Herdis*, 22 F.2d 304 (D. Md. 1927); *The Hurricane*, 2 F.2d 70 (E.D. Pa. 1924), *aff'd*, 9 F.2d 396 (CA3 1925); *Steam Dredge No. 1*, 87 F. 760 (D.N.J. 1898); *Lawrence v. Flatboat*, 84 F. 200 (S.D. Ala. 1897); *The Starbuck*, 61 F. 502 (E.D. Pa. 1894); *The Atlantic*, 53 F. 607 (D.S.C. 1893); *The Hattie Thomas*, 59 F. 297 (D. Conn. 1894); *The Maggie P.*, 32 F. 300 (E.D. Mo. 1887).

benefits. *E.g.*, *Saylor v. Taylor*, 77 F. 476 (CA4 1896); *McRae v. Bowers Dredging Co.*, 86 F. 344 (C.C.D. Wash. 1898); *The Atlantic*, 53 F. 607 (D.S.C. 1893).

### C. Signal distorts the pre-Jones Act jurisprudence by misusing the maritime term of art *voyage*

Signal also tries to support its novel theory with the erroneous assertion that a seaman's maritime-law entitlement to wages "to the end of the voyage" somehow requires Jones Act seamen to "embark[ ] on voyages away from home." Signal Br. 10. But this conclusion misuses the term "voyage" as used to limit an employer's obligation to pay an injured seaman unearned wages (i.e., the wages that the seaman would have earned if he had continued working instead of being injured).

The duration rule for the wages obligation is often expressed in terms of "the end of the voyage," but this means (and has always meant) the conclusion of the contractual period of employment. Professor Schoenbaum, counsel for Signal, clearly articulates this rule in his academic writings:

> A seaman who is injured or becomes sick during his service is granted the wages he would have earned had he been able to complete the contractual terms of his employment. Such unearned wages are due until the end of his period or until he becomes fit for duty, whichever is first. Traditionally this means that the seaman is paid until the end of the voyage. . . . *If the seaman is employed for a definite contract term instead of on a voyage basis, he may recover wages for the entire period that is the basis of his employment*.

1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6-29, at 381-82 (4th ed. 2004) (footnotes omitted) (emphasis added).[16] Plainly the right to unearned wages was no more

[16] An earlier passage in this treatise accepts the vessel status standard based, as Stewart argues here, on the statutory definition

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tied to any traditional idea of a voyage away from home than was the right to maintenance and cure.[17] Thus in *The J.F. Card*, 43 F. 92, 93 (E.D. Mich. 1890), then-Judge Henry Billings Brown awarded unearned wages beyond the end of a Great Lakes trip on the view that the seaman was contractually bound to the ship for a month. *See also, e.g.*, *Farrell v. United States*, 336 U.S. 511, 519-21 (1949).

### D. Confining seaman status to those who sleep aboard would be at odds with all modern jurisprudence

In the 84 years since the enactment of the Jones Act, the courts have continued to recognize the complete availability of the seamen's personal injury actions – including damages under the Jones Act and maintenance, cure, and unearned wages – to workers who sleep ashore.[18]

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(with no reference to a vessel-as-home test). *See* Schoenbaum, § 6-9, at 299 & n.86 (citing 1 U.S.C. § 3).

[17] The duration rule for the maintenance and cure obligation is based on when the injured seaman reaches "maximum cure." *See*, *e.g.*, *Farrell v. United States*, 336 U.S. 511, 518 (1949); *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 530 (1938). This duration rule was recognized long before Congress enacted the Jones Act. *See*, *e.g.*, *Great Lakes S.S. Co. v. Geiger*, 261 F. 275, 277 (CA6 1919); *Reed v. Canfield*, 20 F. Cas. 426, 429 (No. 11,641) (C.C.D. Mass. 1832) (Story, J.); *The City of Alexandria*, 17 F. 390, 393 (S.D.N.Y. 1883) (Addison Brown, J.).

[18] *See*, *e.g.*, *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957); *Lorimer v. Great Lakes Dredge & Dock Co.*, 36 Fed. Appx. 294 (CA9 2002); *Deisler v. McCormack Aggregates*, 54 F.3d 1074 (CA3 1995); *Barnes v. Andover Co.*, 900 F.2d 630, 641 (CA3 1990); *Williamson v. Western Pac. Dredging Corp.*, 441 F.2d 65 (CA9 1971); *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523 (CA5 1960); *Weiss v. Central R.R. Co.*, 235 F.2d 309 (CA2 1956); *McKie v. Diamond Marine Co.*, 204 F.2d 132 (CA5 1953); *Bailey v. City of New York*, 153 F.2d 427 (CA2 1946); *Pariser v. City of New York*, 146 F.2d 431 (CA2 1945); *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991 (CA1 1941); *Maryland Cas. Co. v. Lawson*, 94 F.2d 190 (CA5 1938); *Butler v. Ellis*, 45 F.2d 951 (CA4 1930); *Buffalo & Grand Island Ferry Co. v. Williams*, 25 F.2d 612 (CA2 1928); *The Falco*, 20 F.2d 362 (CA2 1927); *Brinegar v. San Ore Constr. Co.*, 302 F. Supp. 630 (E.D. Ark. 1969); *Duplantis v. Williams-McWilliams Industries, Inc.*, 298 F. Supp. 13 (E.D. La. 1969); *Richardson v. St. Charles-St. John the Baptist Bridge & Ferry Auth.*, 284

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Judge Rubin provided a good explanation for the soundness of this rule in *Hudspeth v. Atlantic & Gulf Stevedores, Inc.*, 266 F. Supp. 937, 943 (E.D. La. 1967):

> To deny one who is clearly a seaman the right to maintenance merely because he does not receive lodging and meals aboard ship raises problems that would distort the simple lines of the maintenance remedy. The logical extension of such a rule would be to hold that, if such a seaman is hospitalized, he must provide his own meals; his employer need provide only the cure. If a seaman were at sea five days a week, but was normally ashore and provided his own lodging and food for two days a week, the same reasoning would indicate that he should be paid maintenance only for 5/7 of the period during which he is disabled.

Such elaborations – which the Signal rule would require – are antithetical to this Court's oft-repeated admonition that maintenance and cure must remain simple and as nonlitigious as possible.[19] As Judge Bailey Aldrich observed, defendants that try to confine the seamen's remedies to "'blue water' seamen [are] trying to reverse history." *Macedo v. F/V Paul & Michelle*, 868 F.2d 519, 521 (CA1 1989).[20]

### E. Signal distorts the 1927 LHWCA

The question at the heart of this case is the meaning of the term *vessel* in the 1927 LHWCA provision – "a

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F. Supp. 709 (E.D. La. 1968); *Hudspeth v. Atlantic & Gulf Stevedores, Inc.*, 266 F. Supp. 937 (E.D. La. 1967); *Ledet v. U.S. Oil, Inc.*, 237 F. Supp. 183 (E.D. La. 1964); *Creppel v. J.W. Banta Towing, Inc.*, 202 F. Supp. 508 (E.D. La. 1962); *Early v. American Dredging Co.*, 101 F. Supp. 393 (E.D. Pa. 1951). *See also* 1B *Benedict on Admiralty* § 51 at 4-79 to 80 (7th rev. ed. 2002) (collecting cases).

[19] *See*, *e.g.*, *Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975); *Warren v. United States*, 340 U.S. 523, 530 (1951); *Farrell*, 336 U.S. at 516; *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 735-36 (1943).

[20] Even if Signal were correct that maintenance and cure should now be confined to seamen who sleep on ships, this would have little bearing on Jones Act seaman status and none whatsoever on the meaning of the term "vessel." *Cf. supra* at 10-11, 12.

master or member of a crew of any vessel" – drawing the line between LHWCA and Jones Act coverage. Congressional activity leading to the enactment of the 1927 LHWCA, *see* Pet. Br. 28-30, comprised four relevant steps. First, the Senate sent the House of Representatives a bill (S. 3170, 69th Cong., 1st Sess. (1926)) that excluded all seamen from LHWCA coverage,[21] leaving the seamen to their Jones Act and general maritime remedies. Second, the House Judiciary Committee disagreed with the exclusion of seamen from LHWCA coverage and sought to bring them all under the LHWCA by including them in its bill's "coverage" provision, section 3(b):

> This act shall apply to any maritime employment performed . . . as master or member of a crew of a 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. 1767, 69th Cong., 2d Sess. at 2 (1927).[22] Third, the House Judiciary Committee included the following provision in section 5 of its bill:

> If the injured employee be *a master or member of a crew as provided in section 3(b) of this act*, he shall have and retain, in addition to compensation under this act, maintenance and cure and wages to the end of the voyage as now provided in maritime law . . . .

[21] The Senate bill excluded from LHWCA coverage "a master or seaman as defined in section 4612 of the Revised Statutes." Union Calendar No. 644, 69th Cong., 2d Sess. 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."

[22] The House Judiciary Committee's bill also used the quoted language to define "employee" in section 2(3) and in defining "employer" in section 2(4). *See* H.R. Rep. No. 1767 at 1.

H.R. Rep. No. 1767 at 3 (emphasis supplied). Fourth, the House Judiciary Committee was eventually persuaded to acquiesce in the Senate position. Accordingly it amended its bill to restore the Senate language. *See* 68 Cong. Rec. 5402 (Mar. 2, 1927). Then – having "understood upon examination that [the Senate language] created confusion and would interfere with and mar the harmony of the bill," *id.* at 5403, the Judiciary Committee substituted the following exclusion provision that was subsequently enacted into law:

> The term "employee" does not include a master or member of a crew of any vessel . . . .

1927 LHWCA § 2(3), 44 Stat. 1425.[23]

Signal's treatment of the 1927 LHWCA, Signal Br. 11-14, acknowledges the first two steps in the foregoing account but veers away at step three by claiming that section 5 of the House Judiciary Committee bill preserved the seamen's remedies of maintenance, cure, and wages for only a "narrow class" of seamen, those "seafarers who embarked on voyages away from home" – *viz.*, workers on traditional ocean-going ships – and not for "the crew[s] of the barges, lighters, tugs, dredges, or other ocean, lake, river, canal, harbor, or floating craft who were also to be included in the LHWCA." Signal Br. 12-13 & n.20. This claim is wrong; it is flatly contradicted by the above-italicized language of section 5, which preserved the seamen's remedies for all of the masters and crew members covered by "section 3(b) of this act."[24] Then – without any intelligible argument in support of the supposed connection[25] – Signal simply

[23] The same language was used in 1927 LHWCA § 3(a)(1), 44 Stat. 1426.

[24] Signal accomplishes its distortion by omitting to quote section 5 and instead manipulating the House Report's language summarizing the bill. *See* Signal Br. at 12 (paraphrasing and quoting H.R. Rep. No. 1767 at 20 rather than *id*. at 3, where the text of section 5 actually appears).

[25] The selection from Andrew Furuseth's testimony, Signal Br. 13 n.21, shows only that witness's preoccupation with traditional ocean-going sailors. Other witnesses directed congressional attention to the fact that many of the "large number of employees engaged on harbor craft, on tugs, on lighters, and all of the diversified employees who are engaged in

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asserts that when the House Committee ultimately decided to take seamen out of its bill, it meant to take out only the "narrow class" to which (on Signal's mistaken view) the section 5 provision had been confined.

Signal's reading of the 1927 Act is wrong for at least five reasons: **(1)** Most fundamentally, Signal ignores what the Act says: It excludes "a master or member of a crew of *any* vessel." 1927 LHWCA § 2(3) (emphasis supplied). Confining the term "any vessel" to "a traditional ocean-going ship" is a tortured construction. **(2)** Signal's reading rests entirely upon the false premise that section 5 of the House Committee bill preserved the seamen's remedies only for workers on traditional ocean-going ships. Quite to the contrary, this proposed section confirms Congress's understanding that dredge workers were entitled to the traditional seamen's remedies of "maintenance and cure and wages to the end of the voyage." **(3)** Signal ignores the explanations of the 1927 Act on the House and Senate floors as it was being enacted.[26] **(4)** Crediting Signal's claim would mark a huge break from prior Jones Act jurisprudence as it would exclude from seaman status not only dredge workers but also workers on barges, lighters, tugs, and other ocean, lake, river, canal, harbor, or floating craft – a broad class of workers whose entitlement to seaman status has repeatedly been affirmed by this Court. *E.g.*, *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957) (dredge); *Norton v. Warner Co.*, 321 U.S. 565 (1944) (barge); *Butler v. Whiteman*, 356 U.S. 271 (1958) (tug); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) (per curiam) (other floating craft). **(5)** Congress reenacted the "master or member of a crew of any vessel" provision in 1972 and

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transportation in the harbors" are also seamen. Hearings on S. 3170 before the House Judiciary Comm., 69th Cong., 1st Sess. 141-42 (1926).

[26] *See* 68 Cong. Rec. 5402-03, 5410-12 (Mar. 2, 1927), where the Chair of the House Judiciary Committee (Rep. Graham) as well as several of his colleagues repeatedly proclaimed that the language excluding "a master or member of a crew of any vessel" was entirely clear in removing all seamen from LHWCA coverage. For identical claims by Senate supporters of the Act, *see* 68 Cong. Rec. 5908 (Mar. 4, 1927).

again in 1984, well knowing that this Court's 1944 decision in *Norton* had interpreted the provision to incorporate the 1 U.S.C. § 3 definition of *vessel*. *See supra* note 7.

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

The First Circuit's *DiGiovanni-Stewart* rule conflicts with *Chandris*. *See supra* at 5; Pet. Br. 33-34. It also conflicts with *Wilander*'s emphasis on the courts' "obligation not to narrow unduly the class for whom Congress provided recovery under the Jones Act." 498 U.S. at 351. Even Dutra's supporting amici are unwilling to defend it. LaQuay does not discuss the First Circuit rule, and Signal correctly attacks it as "hav[ing] no grounding in legislative history" and as "impractical to administer," Signal Br. 19. This Court should now reject *DiGiovanni* and follow Congress's definition of the statutory term "vessel."

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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