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 RESPONDENT

FREDERICK E. CONNELLY, JR.
Counsel of Record
HARVEY WEINER
JOHN J. O'CONNOR
PEABODY & ARNOLD LLP
30 Rowes Wharf
Boston, MA 02110
(617) 951.2100

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the First Circuit correctly held that the dredging platform Super Scoop is not a Jones Act vessel where: (1) the Petitioner was working only temporarily on the platform and lived ashore; (2) the platform has no effective means of propulsion and no living quarters; (3) the platform performs no commercial or transportation functions, and is used only as a dredge; and (4) while dredging, the platform was confined to inland coastal waters and held stationary by four anchors?

CORPORATE DISCLOSURE STATEMENT

The Respondent Dutra Construction Company, Inc. ("Dutra") is a privately held California corporation that is a wholly owned subsidiary of The Dutra Group, a privately held California corporation. No publicly held company owns ten percent or more of the stock of either Dutra entity.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES AND RULES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

OPINIONS BELOW, JURISDICTION, RELEVANT STATUTORY PROVISIONS

For these sections Dutra is satisfied with the statements provided by the Petitioner. Sup. Ct. Rule 24.2.

INTRODUCTION

This case presents the essential question whether the First Circuit correctly held that the dredging platform at issue here is not a Jones Act vessel. From the Petitioner's brief in this Court, one might suppose that this question was conclusively answered years ago by Title 1 U.S.C. § 3 and decisions of this Court. But the matter is not nearly that simple, as the Petitioner acknowledged below. Before the District Court and the First Circuit the Petitioner conceded that section 3 was *not* a controlling authority, and in his certiorari petition the Petitioner conceded that this Court has *never* directly addressed the issue presented here. These concessions, not the Petitioner's latest arguments, are correct, and the First Circuit's decision is solidly grounded in the logic of this Court's decisions and the Jones Act, and should be affirmed.

STATEMENT OF THE CASE

I. ESSENTIAL PROCEDURAL HISTORY

The Petitioner Willard Stewart sued Dutra in the United States District Court for the District of Massachusetts. (Joint App. 11) He asserted claims under the Jones Act and the Longshore and Harbor Workers

Compensation Act ("LHWCA"), alleging that he was injured while working on the dredging platform Super Scoop. Dutra moved for partial summary judgment on the Jones Act claim, arguing that the Super Scoop was not a vessel and the Petitioner was not a seaman within the meaning of the Jones Act. (Joint App. 17) The Petitioner opposed the motion, but he not only did not argue – as he does here – that 1 U.S.C. § 3 provides a controlling definition of the term "vessel" for Jones Act purposes, he acknowledged that it did *not*. (C.A. App. 67-79, 189-198, 204-206, 219)

Relying on the First Circuit's *en banc* decision in *DiGiovanni v. Traylor Bros., Inc*., 959 F.2d 1119 (1st Cir.), *cert. denied*, 506 U.S. 827 (1992), the District Court held that the Super Scoop was not a Jones Act vessel and granted Dutra's motion. The Petitioner took an interlocutory appeal and argued that *DiGiovanni* was wrong and, in any event, did not apply to the undisputed facts. Just as in the District Court, the Petitioner did *not* argue that section 3 provided a controlling and dispositive definition of "vessel." Indeed, the Petitioner conceded in his First Circuit brief that, "[u]nfortunately, there is no statute specifically defining ['vessel'] for the Jones Act." (Pet. C.A. br. at 19; *see also* C.A. App. 219)

The First Circuit affirmed. *Stewart v. Dutra Const. Co., Inc*., 230 F.3d 461 (1st Cir. 2000). On remand, the Petitioner pursued his alternative claim that, if he was not a Jones Act seaman, he was a longshoreman under the LHWCA, 33 U.S.C. § 905(b). The District Court granted summary judgment as to that claim as well, and the Petitioner appealed. In his second appeal, the Petitioner again did not contend that 1 U.S.C. § 3 provided a dispositive definition of "vessel." The First

Circuit affirmed. *Stewart v. Dutra Const. Co., Inc.*, 343 F.3d 10 (1st Cir. 2003).[1]

The Petitioner then requested certiorari. Yet again, the Petitioner did *not* make the argument that is the cornerstone of his brief in this Court – that 1 U.S.C. § 3 provides a controlling definition of "vessel." Instead, the Petitioner argued that the circuits were in disarray as to the definition of a Jones Act vessel, and the First Circuit's 2000 decision was wrong. (Pet. for Cert. at 6-16) The Petitioner did make a passing reference to section 3 in his petition in a context that implied that it did *not* definitively define "vessel." (Pet. for Cert. at 7) The Petitioner also conceded that this Court has "*never* addressed the [Jones Act's] vessel status requirement. . . . " (Pet. for Cert. at 5; emphasis added)

II. ESSENTIAL UNDISPUTED FACTS

A. Dutra's Work Pursuant To its Contract

Dutra was a subcontractor on a project known as the I-90 Immersed Tube Tunnel Project, in which a tunnel for Interstate 90 (the Massachusetts Turnpike) was being created below Boston Harbor and portions of South Boston and East Boston ("I-90 Project"). In addition to dredging below a part of Boston Harbor, the contract required Dutra

[1] The Petitioner implies in his brief that he will lose benefits if denied Jones Act coverage, but the reality is different. The Petitioner already has received *substantial* medical and lost-wage benefits under the LHWCA's worker's compensation provisions. *See generally Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp*., 350 U.S. 124, 129 (1956) (The LHWCA provides employees "a substantial *quid pro quo* in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims.")

to perform a number of land-based operations, including dredging non-harbor sediment "landward" on both the South Boston and East Boston sides of the harbor, loading the sediment onto trucks, stockpiling it on land prior to loading, and moving ledge removed from the harbor onto land. (Joint App. 109-147)

Dutra's harbor-related tasks on the I-90 Project included dredging part of the ocean floor below the harbor to create a trench for the tunnel, blasting, and drilling. Dredging was accomplished by the Super Scoop, a floating work platform with an integrated, permanently affixed crane and bucket. While dredging, the Super Scoop used an Electronic Positioning System ("EPS"). The EPS was used while the Super Scoop was stationary to pinpoint the precise spot where the Super Scoop's bucket was to remove sediment so that the trench met engineering specifications and there was quality control, not as a navigational tool. During the course of the project, Dutra's work and the jobsite were regularly inspected and supervised by the general contractor and government officials. (Joint App. 109-147; C.A. App. 253, 262-269)

B. The Petitioner and the Super Scoop

The Petitioner was hired by Dutra through the local mechanic's union to work as a mechanical engineer. (C.A. App. 135) He was not a Dutra employee and had no connection to the Super Scoop before the I-90 Project. (C.A. App. 46) The Petitioner was temporarily assigned to the Super Scoop for the I-90 Project; his job was to keep the Super Scoop's dredge functioning properly as it engaged in the earth-removal process. (C.A. App. 238) He is not by training or experience a mariner, and his job did not

include the handling or navigation of boats or ships. The Petitioner lived ashore in East Boston and commuted to work each day. (C.A. App. 90-91) He never resided on the Super Scoop, which had no living quarters or full kitchen. (C.A. App. 240-241, 247)

The Super Scoop was built in 1976 to operate solely as a dredge. It has virtually none of the features of a self-propelled, ocean-going vessel. It has no propulsion engine or propeller, and is not capable of efficient movement. (C.A. App. 138, 240) When it is moved to a jobsite it is pulled by tugboats. On such occasions, the Coast Guard requires that it be *unmanned*. (Joint App. 90-105) The Super Scoop can be manned by up to ten workers *only* when anchored and dredging in protected waters. (Joint App. 91) The Super Scoop is capable only of glacial, positional movement through manipulation of its anchors and cables. During a twelve-hour shift, the Super Scoop typically moved only about six times by distances of approximately 30-50 feet. (Pet. App. 17; C.A. App. 138) Each such movement required approximately five minutes. (C.A. App. 138) (After more than a year on the I-90 Project, the Super Scoop was moved a *total* of approximately three quarters of a mile. [United States Amicus br. at 20]) Otherwise, the Super Scoop was held stationary by four anchors.

The Super Scoop was not even capable of performing all functions necessary to complete the dredging process; it could remove material from the ocean floor, but could not store, transport, or discard the material. For those purposes the Super Scoop was assisted by scows, which essentially were floating hoppers that also were incapable of propulsion. On the I-90 Project, material removed from the harbor was placed into the scows; tugboats then pulled the scows to deeper waters for dumping. (Pet. App. 17)

C. The Circumstances of the Petitioner's Accident

At the time of the Petitioner's accident, the Super Scoop was held stationary by four anchors. It was not in operation because of mechanical difficulties with one of the scows used in the dredging process – scow number 4. The Petitioner was on scow number 4, which was secured by lines to the side of the Super Scoop. (C.A. App. 92-93, 139-143) The Super Scoop placed its bucket into the scow and, using its winch, pulled on the bucket in order to move the scow closer to the Super Scoop's side. As scow number 4 came to rest against the side of the anchored and stationary Super Scoop, there allegedly was a jolt that the Petitioner says caused him to fall.

SUMMARY OF THE ARGUMENT

I. This Court has never definitively defined the term vessel for purposes of the Jones Act, and has never held that dredges are Jones Act vessels. But the Court has repeatedly discussed the related "vessel" and "seaman" concepts. These decisions state certain fundamental principles that bear on whether the Super Scoop is a Jones Act vessel.

The principles the Court has established provide, among other things, that a float's business and purpose are important considerations; commercial transportation of passengers or cargo is a core vessel characteristic; vessels engage in navigation/voyages; vessels do something other than simply dredge; vessels engage in operations that expose crew members to the perils of the sea.

The First Circuit's *Stewart* decision flows directly from and respects these principles. The First Circuit

focused on the primary purpose of the Super Scoop and correctly concluded that its primary purpose was construction/dredging, not commerce or transportation, that it was not in navigation, and that it was not a Jones Act vessel. The Super Scoop does not transport passengers or cargo. Rather, it is a floating, anchored work platform with an affixed dredge that does nothing but remove sediment from the harbor floor and place it into scows. The Super Scoop does not have a navigation capacity and is not engaged in navigation. It is capable only of incidental and very limited positional movement based on manipulation of its anchors. Distance travel is possible only when the Super Scoop is pulled by tugboats. On those occasions, the Super Scoop is unmanned and has no cargo. The Petitioner worked aboard the Super Scoop only when it was anchored and dredging in the inland coastal waters of Boston Harbor. He lived ashore and was not aboard the Super Scoop when tugboats moved it. He was not exposed to the perils of the sea, and is properly viewed as a land-based worker.

II. Title 1 U.S.C. section 3 provides a definition of the term vessel for purposes of certain federal transportation statutes, but *not* for purposes of the Jones Act. The Court need not consider any argument to the contrary because no such argument was raised below.

Legislative history indicates that Congress did not intend the Jones Act to include a broad definition of the vessel concept like that appearing in section 3. Beyond legislative history, the fact that the Jones Act does not define "vessel" and that numerous other federal statutes contain different and varying definitions of the term indicates that 1 U.S.C. § 3 was not an established definition in 1920 when the Jones Act was promulgated, and was not meant to serve as the effective definition of

"vessel." In fact, the definition was unsettled even through 1927, when the LHWCA was enacted. The LHWCA includes its own, *different* definition of the term, so Congress could not have meant the LHWCA to supply a section 3-like definition for purposes of the Jones Act.

Beyond questions of congressional intent, 1 U.S.C. § 3 cannot realistically be construed as supplying a dispositive definition of "vessel" for Jones Act purposes because this Court already has *rejected* section 3's broad definition. Section 3 would bestow vessel status on virtually *any* float even *capable* of transportation over water. This Court clarified long ago that "vessel" was not so broad a concept, and that vessels had to be capable of "practical" transportation over water. Considering these factors, all available contextual clues, and the fact that section 3's definition is simply too broad as a matter of policy, and it is clear that section 3 does not define "vessel" for the Jones Act.

III. The First Circuit's *Stewart* decision was required by this Court's decisions. It does not ignore an applicable statutory definition of the term vessel, because there is no such definition. It does not violate the strictures of *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). *Chandris* addressed the concept of the Jones Act seaman, not the Jones Act vessel. In any event, the First Circuit's decision is consistent with *Chandris*. The decision below does not undermine the mutual exclusivity of the Jones Act and the LHWCA. The notion that the vessel concept must have the same definition for both the Jones Act and the LHWCA is wrong. There is no necessary logical or other requirement of such congruity, and the decisional law is to the contrary. The First Circuit did not incorrectly deny vessel status to dredges. This Court has *never* held that dredges are, as

such, Jones Act vessels, and the First Circuit's decision is based on principles rather than labels. The decision below is consistent with the requirement that the Jones Act protect only those who are subject to the perils of the sea, because the Petitioner was *not* exposed to the perils of the sea while working on the Super Scoop. The First Circuit did not overemphasize the vessel status of the Super Scoop.

ARGUMENT

I. The First Circuit's Decision Follows Naturally From This Court's Precedents.

A. This Court Has Never Held That Dredges Are Jones Act Vessels.

In his First Circuit brief, the Petitioner did *not* argue that this Court has held that work platforms like the Super Scoop are Jones Act vessels. In his petition for certiorari, the Petitioner admitted that "this Court has *never* addressed the vessel status requirement under the Jones Act. Indeed, it does not appear to have directly addressed the meaning of the term 'vessel' (in any context) since 1903." (Pet. for Cert. at 5; emphasis added) Since then, the plaintiff has changed course. He now argues that this Court already has decided that dredges are vessels. (Pet. br. at 27, 35) The Petitioner is wrong.

The Petitioner cites three decisions in support of this argument. The two earliest cases, *The Virginia Ehrman and The Agnese*, 97 U.S. 309 (1878) and *Ellis v. United States*, 206 U.S. 246 (1907), were decided years before the Jones Act was enacted. In *Virginia Ehrman*, the Court addressed issues of negligence and property damage.

Whether the float involved there was a vessel was not at issue. In *Ellis*, the question presented was the constitutionality of an 1892 criminal statute governing the number of hours that could be worked by "laborers and mechanics" employed on certain public works projects. *Id*. at 254-255. The Court held the statute constitutional. The Court then discussed certain "subordinate" matters, and noted that the dredging project at issue was not a public work and the workers were not laborers or mechanics. *Id*. at 256-260.[2]

In *Senko v. LaCrosse Dredging Corp*., 352 U.S. 370 (1957), the only post-Jones Act decision cited on this point by the Petitioner, the Court upheld a jury finding that the plaintiff was a Jones Act seaman, noting that the plaintiff had responsibility for navigation when the dredge moved. *Id*. at 373. The Court clarified the limits of its decision (and the fact that whether dredges were Jones Act vessels remained an open issue) by emphasizing that "no question has been raised at any time as to whether the dredge involved here had the status of a 'vessel' at the time of Petitioner's injury." 352 U.S. at 371 n.1. Three Justices dissented in *Senko*, and observed that a dredge was merely an "earth-removing machine" that floated and occasionally was pushed from one place to another. 352 U.S. at 378.

The Petitioner was right to concede in his Petition for Certiorari that the Jones Act status of dredge-equipped work platforms like the Super Scoop is unresolved. This

[2] Even in this pre-Jones Act era, the dicta by the *Ellis* majority was controversial. The dissent (Justices Moody, Harlan, and Day) strenuously argued that the dredges and scows there were not vessels and the workers on them were not seamen. *Id.* at 264-267.

Court is free to hold that the First Circuit correctly ruled that the Super Scoop is not a Jones Act vessel.

B. Relevant Jones Act and Related Principles

This Court has issued a number of decisions discussing the vessel concept and related issues that bear on the question presented in this case. These decisions create a framework of fundamental principles that shape the Jones Act vessel concept. A survey of these decisions and the principles they represent provides context for the decision of the First Circuit below.

In *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625 (1887), the plaintiff sought a salvage award after saving a dry-dock that had broken its moorings. He argued that an unsecured dry-dock was a vessel for purposes of his claim because it was capable of transportation over water. The Court said that "vessel" includes "all navigable structures intended for transportation," *id.* at 629, and that the dry-dock only floated and could not "practically" be used for navigation, transportation, or commerce. *Id.* at 627-630. The Court concluded: "We think no case can be found which would construe the terms [ship or vessel] to include a dry-dock, a floating-bridge, or meeting-house, permanently moored or attached to a wharf." *Id.* at 630.

In *The Robert W. Parsons*, 191 U.S. 17 (1903), the Court considered whether a canal boat that transported commercial goods and was pulled along the canal by horses walking on shore was a vessel subject to federal admiralty jurisdiction. The Court held that it was such a vessel. The important factors, said the Court, were the "purpose for which the craft [was] constructed and the business in which it [was] engaged." *Id.* at 30. The Court

held that the boat was a vessel in admiralty because it was engaged in "commerce and navigation." *Id*. at 31.

In *Evansville and Bowling Green Packet Co. v. Chero Cola Bottling Co*., 271 U.S. 19 (1926), the owner of a wharfboat brought a petition in admiralty seeking a limitation of liability as the "owner of a vessel." The float at issue there was used to store and transfer goods. It was secured by cables to the shore and had no means of self-propulsion. It was towed up river each winter to avoid the ice, but it had no transportation function. The Court held that it was not a vessel because it was not "practically capable of being used . . . [for] transportation." *Id*. at 22.

In *Warner v. Goltra*, 293 U.S. 155 (1934), the Court held that the master of a vessel is protected by the Jones Act no less than a crew member. Defining "seaman" the Court said:

> [A] seaman is a mariner of any degree, who lives his life on the sea. It is enough that what he does affects the operation and welfare of the ship when she is upon a voyage.

Id. at 157.

In *Norton v. Warner Co.*, 321 U.S. 565 (1944), the employee lived and worked upon a barge, helped to maintain it, and assisted in its movement. He had no shore responsibilities and did not handle cargo. The Court held that he was not entitled to LHWCA coverage as he was a permanent member of the barge's crew. The Court noted that vessel crew members are workers on board who are naturally and primarily engaged in navigation, and who contribute to the "operation and welfare of the ship when she is upon a voyage." *Id*. at 572-573.

In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), the plaintiff was engaged to operate a sightseeing motor boat but was injured before actually starting work, and at a time when the boats were ashore for repairs. The Court held that the plaintiff was not a Jones Act seaman, reasoning that he was injured while engaged in repair work of the sort typically done by shore-based workers: "The distinct nature of the work is emphasized by the fact that there was no vessel in navigation at the time of decedent's death. All had been laid up for the winter." *Id*. at 191.

In *Senko*, 352 U.S. 370, the plaintiff worked on a dredge anchored in a river. There was evidence that the plaintiff was to have significant navigation-related responsibilities once the dredge was engaged in transit. The jury found that the plaintiff was a Jones Act seaman, and this Court affirmed. As noted above, the *Senko* Court clarified that it was *not* deciding whether dredges are Jones Act vessels. *Id*. at 371 n.1. On that point the dissent argued that dredges are only "earth-removing machine[s]," and not vessels. *Id*. at 378.

In *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), the Court considered whether Jones Act claimants had to aid in the navigation of a vessel to qualify as seamen. The Court said that the aid-in-navigation requirement that had appeared in prior decisions was inapplicable, and that the employee's connection to a vessel, not his/her job, was dispositive.

> The key to seaman status is employment-related connection to a vessel in navigation. . . . [A] necessary element of the connection is that a seaman perform the work of a vessel. In this regard, we believe the requirement that an employee's

> duties must "contribut[e] to the function of the vessel or the accomplishment of its mission" captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.

Id. at 355 (citations omitted).

In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Court focused on the type of relationship a worker must have to a vessel in order to achieve seaman status. The Court said that the Jones Act seaman inquiry is fundamentally "status based", in that workers who are seamen do not lose that status simply because they go ashore. *Id*. at 361. Accordingly, a maritime worker does not "oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured." *Id*. at 363. As to the connection to a vessel necessary for Jones Act seaman status, the Court said: (1) the employee's duties must "contribute to the function of the vessel or to the accomplishment of its mission"; and (2) the employee "must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Id*. at 368 (citation omitted). The purpose of the "substantial connection" requirement is to separate the sea-based, Jones Act employees from land-based workers who have only a "transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Id*.

Finally, the *Chandris* Court discussed the jury instructions to be given by the trial court following remand.

As part of this discussion, the Court quoted the First Circuit's *DiGiovanni* decision in support of the proposition that "[u]nder our precedent and the law prevailing in the Circuits, it is generally accepted that 'a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside. . . .'" *Id*. at 373-374 (citing 959 F.2d at 1121). Like *Wilander*, *Chandris* did not specifically discuss the definition of vessel.

In *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997), the Court revisited the issue of seaman status without discussing what constitutes a vessel. The focus of *Papai* was the connection a claimant needed with a fleet of vessels to qualify as a Jones Act seaman. The claimant Papai was a laborer who provided maintenance-type services through a local union. He worked on a short-term basis for different vessels performing various tasks while the vessels were docked. *Id*. at 553, 559. His work was not of a "seagoing nature." *Id*. at 560. The Court said:

> Jones Act coverage is confined to . . . those workers who face regular exposure to the perils of the sea. An important part of the test for determining who is a seaman is whether the . . . worker . . . has a substantial connection to a vessel or a fleet of vessels, and the latter concept requires a requisite degree of common ownership or control. * * * The only connection a reasonable jury could identify among the vessels Papai worked aboard is that each hired some of its employees from the same union hiring hall from which Papai was hired. That is not sufficient to establish seaman status under the group of vessels concept.

Id. The Court concluded that Papai's employer was entitled to summary judgment.

C. The First Circuit's Approach is Fully Informed By and Consistent With This Court's Opinions, and is Widely Followed.

1. The *DiGiovanni* and *Stewart* Decisions

The First Circuit's decision below is grounded in its 1992 decision in *DiGiovanni*, 959 F.2d at 1119, in which the court also addressed the question what is a vessel within the meaning of the Jones Act. A brief review of *DiGiovanni* is helpful to understanding of the *Stewart* decision below.

The *DiGiovanni* court summarized the essential facts as follows:

> The BETTY F was a barge, 100 feet in length, with a 40 foot beam and a raked bow and stern, and with nautical equipment, such as navigation and anchor lights. In all respects it met the commonly understood characteristics of a vessel, and, indeed, was inspected by the Coast Guard. It had no means of self-propulsion, except that positional movement could be achieved by manipulating its spud anchors. Its current use was to float at the Jamestown, Rhode Island, bridge, bearing a crane that was being used for bridge construction. Its permanent station was Davisville, Rhode Island, from which it was towed, by a tug, from time to time, to perform various shore jobs. It had been at the Jamestown bridge for a month. It was positioned about the bridge, and moved away from the pilings at night, to prevent damage.
>
> Plaintiff's principal duty was to handle a tag line to guide the crane, but he also did maintenance work, such as painting, and tended lines. Although he was attached to the BETTY F, at the

> time of his injury he was standing on the deck of a supply barge in order better to manipulate the line. Its deck proved to be slippery, and he fell. The supply barge was in general use to carry supplies, but also served as a work platform.

959 F.2d at 1120-1121.

From this recitation of the facts, the *DiGiovanni* court surveyed this Court's opinions discussing the Jones Act seaman concept and opinions from the other circuits – particularly the Fifth Circuit – addressing the term vessel. The court noted that the proper focus with regard to defining "vessel" was the use of the float in question, rather than its physical characteristics. From this premise, the court reasoned that, without regard to its particular characteristics, a float engaged in actual navigational operations was a Jones Act vessel. *Id*.

The *DiGiovanni* court relied on the Fifth Circuit's decision in *Bernard v. Binnings Constr. Co*., 741 F.2d 824 (5th Cir. 1984), which articulated the following test for assessing whether a particular float was a vessel:

> The test is whether it was . . . used primarily for the transportation of cargo, equipment, or persons across navigable waters or was, at the time of [the plaintiffs] injuries engaged in navigation. . . . A structure whose purpose or primary business is *not* navigation or commerce across navigable waters may nonetheless satisfy the Jones Act vessel requirement if, at the time of the worker's injury, the structure was actually in navigation.

959 F.2d at 1123 (quoting *Bernard*, 741 F.2d at 829). Restating this test, the *DiGiovanni* court said:

> In sum, if a barge, or other float's 'purpose or primary purpose is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise ought to be considered seamen only when it is in actual navigation or transit.

Id.

In the *Stewart* decision below, the court summarized the facts bearing on the Petitioner's suit as follows:

> The Super Scoop is a large floating platform . . . equipped with a clam shell bucket. It operates as a dredge, removing silt from the ocean floor and dumping the sediment onto one of two scows that float alongside. Once the scows are full, tugboats tow them out to sea and dispose of the dredge material.
>
> Though largely stationary, the Super Scoop has navigation lights, ballast tanks, and a dining area for the crew. Crew members control the clam shell bucket by manipulating a tag-line cable attached to a counter weight. The Super Scoop is incapable of self-propulsion. Crew members use anchors and cables to achieve positional movement at near-glacial speeds. The Super Scoop typically moves once every two hours, covering a distance of 30-50 feet. Its scows also lack any means of self-propulsion. Tugboats normally are used to achieve movement. Alternatively, the dredge's crew drops a bucket from the dredge into one of the scow's hoppers; by manipulating the cables, the crew then swings the bucket so that it glides the scow around the dredge.

230 F.3d at 464.

Against the backdrop of these facts, the court reviewed *Chandris* and *Wilander* and this Court's requirement that a Jones Act seaman must have a connection to a "vessel in navigation." The court then restated the *DiGiovanni* holding that, if a barge or other float's "purpose or primary purpose is not navigation or commerce" then workers assigned to it are to be considered Jones Act seamen only when it is in actual navigation or transit. *Id*. at 467 (citing *Bernard*, 741 F.2d at 829).

Moving to the merits of the Petitioner's arguments, the court reasoned first that the Super Scoop was a "barge or other float" within the meaning of *DiGiovanni*. The court then rejected the Petitioner's argument that the Super Scoop qualified as a vessel because its "purpose or primary business" – dredging – constituted navigation or commerce within the meaning of *DiGiovanni*. As to this argument, the court reasoned as follows:

> This construct distorts the functional analysis that we endorsed in *DiGiovanni*. That analysis focuses on *primary* functions and, at bottom, dredging is primarily a form of construction. Any navigation or transportation that may be required is incidental to this primary function. In this respect, the only real distinction between the Super Scoop and the Betty F is that the former was being used in the construction of a cross-harbor tunnel while the latter was being used in the construction of an over-the-bay bridge. It does not help the appellant that both structures were moved with some regularity across navigable waters; even regular movement of a floating structure across navigable waters will not transform that structure into a vessel when that motion is incidental to the central purpose served by the structure. *See Bernard*, 741 F.2d at 830-831.

> Because both the Super Scoop and the Betty F were floating stages used primarily as extensions of the land for the purpose of securing heavy equipment to construct a passage across the sea, neither is a vessel in navigation within the jurisprudence of the Jones Act.

Id. at 468-469 (citing *Powers v. Bethlehem Steel Corp*., 477 F.2d 643, 646 (1st Cir.), *cert. denied*, 414 U.S. 85 (1973)).

As to the Petitioner's argument that, even if the Super Scoop itself was not a vessel in navigation, scow number 4, on which the Petitioner was located at the time of his accident, *was* a Jones Act vessel because it was in actual transit at the time of the accident, the court said that the Petitioner was assigned to and part of the crew of the Super Scoop, *not* scow number 4. For that reason, and because the Super Scoop was not in motion at the time of the accident, the fact that the scow was moving was irrelevant. *Id*. at 469.

The court also rejected the argument that scow number 4 was part of a flotilla connected to the Super Scoop, which comprised a fleet of vessels. The court said:

> This asseveration misconstrues Supreme Court precedent. The Court has held that a plaintiff's relationship to a fleet of vessels, rather than to a particular ship, can establish the *connection* needed to confer seaman status. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 555-57 (1997); *Chandris*, 515 U.S. at 368. Here, however, the connection element is not an issue (Dutra has conceded the point). The common ownership of the dredge and scow has no probative force on the subjacent issue: whether the floating work

> station was – or was not – a vessel in navigation for Jones Act purposes.

Id. (citing *DiGiovanni*, 959 F.2d at 1124).

2. The *Stewart* Approach is Based On Principles Stated By This Court, and is Followed By Many Other Courts.

The First Circuit's decision is solidly grounded in the Jones Act and vessel principles articulated by this Court. To begin with, the decision is a direct doctrinal and spiritual descendent of fundamental vessel principles identified in the *Cope*, *Robert W. Parsons*, and *Evansville* cases. These authorities emphasize that vessel status depends on the subject float's *purpose and business*, that is, whether the float was engaged in commerce, navigation, or transportation. Consistent with this view, and following the lead of the Fifth Circuit in *Bernard*, the First Circuit looked past the physical attributes of the Super Scoop to its "primary purpose." Focusing on that factor, the court concluded that the Super Scoop was not a Jones Act vessel because its primary purpose was construction/dredging, *not* commerce, navigation, or transportation.

This was a correct conclusion in light of the cases. In its limited, construction-related function, the Super Scoop closely resembles the *Cope* dry-dock and the *Evansville* wharfboat, and contrasts with the canal boat in *Robert W. Parsons*, which was a pure instrument of commerce. In implicitly recognizing this distinction, the First Circuit decision followed the logic of the *Senko* dissent, which correctly pointed out that a dredge is nothing more than an earth-moving machine that occasionally is moved from place to place. 352 U.S. at 378. *Accord Ellis*, 206 U.S. at

264-267 (Moody, J. dissenting) (dredges and scows are not vessels; dredgemen and scowmen are not seamen).

The First Circuit's decision also respects the central importance of the transportation function to vessel analysis, as clarified in *Cope*, *Robert W. Parsons*, and *Evansville*. The Super Scoop is not engaged in transportation. When being moved by tugboats, the Super Scoop by regulation is *unmanned*, and it carries no cargo. It is not transporting, but is being *transported*. Because it carries no passengers or cargo when being moved, it has no commercial function. It has utility *only* when it is anchored and engaged in dredging. Of course, it does not in any sense transport its dredge. The Super Scoop *is* the dredge, with a work platform at its base. The dredge is a *permanent* fixture on the platform; it is not transported by the Super Scoop any more than a sailing ship transports its masts, or its decking, or the paint on its hull. A float not engaged in transportation cannot be a vessel.[3]

---

[3] *See* 1 Robert Force & Martin J. Norris, *The Law of Seamen*, § 2:15 at 2-70 (5th ed. 2003):

> Distinction is made between structures used for transportation purposes and those that serve merely as work platforms. Thus, the use made of a structure may undermine its capability of being an instrumentality of commerce, that is, it is not used for transporting goods, equipment, or passengers, but instead is used as a surface from which work is done. In these circumstances the structure functions more like land or a building than a vessel.

See also Manuel v. P.A.W. Drilling and Well Serv., Inc., 135 F.3d 344 (5th Cir. 1998) (traditionally, vessels transport passengers, cargo, or equipment from place to place across navigable waters). *See also infra* note 4.

Further, the First Circuit's decision is in line with the *Cope/Evansville* requirement that a vessel must be *practically* capable of transportation over water. Undeniably, the Super Scoop cannot meet the practical transportation standard. The Super Scoop is just a work platform surrounding a permanent dredge. It is anchored and virtually immobile unless moved by tugboats. It cannot by law carry people on those occasions, and, as an unsecure open platform, is of no practical utility in storing or moving goods. The Super Scoop is not even capable of performing its dedicated *dredging* functions unaided. It cannot store or carry the earth it dredges, so it needs scows; it and the scows require tugboats for effective movement. The Super Scoop has no more *practical* transportation capacity than the *Cope* dry-dock or the *Evansville* wharfboat.

The First Circuit's decision also adheres to the principle that vessel status and navigation go hand-in-hand. Whether discussing the attributes of seamen or of vessels, this Court has consistently returned to the important feature that is common to these related concepts – a vessel on its voyage, *in navigation*. *Chandris*, 515 U.S. at 355, 368; *Wilander*, 498 U.S. at 354-355; *Norton*, 321 U.S. at 571-573; *Warner*, 293 U.S. at 157; *Robert W. Parsons*, 191 U.S. at 31. The First Circuit took this requirement into account in holding that the primary purpose of the Super Scoop is dredging, *not* navigation. This was the right conclusion. A work platform that is attached to the harbor floor by four anchors, is incapable of self-propulsion, is unmanned when it is moved by tugboats, and is used only for removing material from the ocean floor is *never* engaged upon a "voyage" or capable of anything else that can

fairly be considered navigation.[4] This is particularly so here considering that, at the time of Petitioner's accident, the Super Scoop was out of service due to a mechanical problem with one of the scows. *Compare West v. United States*, 361 U.S. 118, 122 (1959) (during repairs vessel not in navigation); *Desper*, 342 U.S. at 191 (laid up boat not in navigation). The First Circuit's decision honors the "in navigation" requirement.

In addition, the decision below is consonant with the Jones Act goal of protecting only those exposed to the perils of the sea. *E.g.*, *Papai*, 520 U.S. at 560; *Chandris*, 515 U.S. at 354-355. This is so because the Petitioner was *not* exposed to the perils of the sea. The Petitioner alleges that he was injured when he fell. Fall hazards exist everywhere (particularly in construction work) and certainly are not peculiar to the sea. The Petitioner's fall may be evidence that construction work can be perilous, but it says *nothing* about risks associated with the sea or navigation. The Super Scoop was an anchored, stationary, and inactive work platform when the Petitioner fell. It was not in navigation or even transit. The proximity of the harbor was coincidental.

---

[4] Navigation entails "transportation and commerce." Steven F. Friedell, 1 *Benedict on Admiralty*, § 18 (7th ed. 2003). *See also Norton*, 321 U.S. at 572 (navigation includes contributing to the "operation and welfare of the ship when she is upon a voyage"); *United States v. Utah*, 283 U.S. 64, 76 (1931) (navigation includes trade and travel); *The Silvia*, 171 U.S. 462, 466 (1898) (navigation includes control of a vessel, its equipment, and its cargo during a voyage); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 37 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) (vessel in navigation is "engaged as an instrument of commerce or transportation. . . ."); *McNeill v. J. E. Brenneman Co.*, 1986 A.M.C. 2241, 2249 (E.D. Pa. 1983) (barge's "incidental movement is to navigation what a bird's hopping around a cage is to flying.")

Further, the Petitioner lived in East Boston and commuted to work every day. He was assigned to the Super Scoop on a temporary basis and worked on it *only* when it was at anchor in the inland coastal waters of Boston Harbor. As such, the Petitioner faced none of the acknowledged perils of the open sea. *See* David W. Robertson, *A New Approach To Determining Seaman Status*, 64 TEXAS L. REV. 79, 79-80 (1985) (listing risks; hereinafter "Robertson"). There was no deep-water threat because the Petitioner was on a platform that was the functional equivalent of a dock. Wind and weather were no more of a threat to the Petitioner than to any land-based laborer in the vicinity of Boston Harbor. Tides and currents were no threat, as the Super Scoop was anchored and stationary while the Petitioner was on it. Ocean predators plainly were no threat to the Petitioner (he was at greater risk of suffering a dogbite outside his apartment). Nor was the Petitioner isolated or separated from "shore-side facilities for aid and succor." *Id*. He worked on a project closely supervised by interested parties and the government; he lived ashore and had the same access to "aid and succor" as anyone else.

In the circumstances, the Petitioner was in no real sense exposed to the perils of the sea. To hold otherwise is to render meaningless the distinction drawn by the *Chandris* Court between "sea-based" workers and "land-based" workers who have only "transitory or sporadic connection to a vessel in navigation, and . . . whose employment does not regularly expose them to the perils of the sea." 515 U.S. at 363. *See also Papai*, 520 U.S. at 555, 560.

In sum, the First Circuit's "primary purpose" approach to vessel status under the Jones Act is in complete accord with this Court's vessel/seaman jurisprudence. For

this reason this Court cited *DiGiovanni* with approval in *Chandris* (515 U.S. at 373), and a strong movement of lower courts has adopted the First Circuit's approach. *See Hatch v. Durocher Dock and Dredge, Inc.*, 33 F.3d 545, 548 (6th Cir. 1994); *Kathriner v. Unisea, Inc.*, 975 F.2d 657, 661 (9th Cir. 1992); *Gipson v. Kajima Eng. & Const., Inc.*, 972 F. Supp. 537, 542 (C.D. Cal. 1997), *aff'd*., 173 F.3d 860 (9th Cir.), *cert. denied*, 528 U.S. 815 (1999); *Ketzel v. Mississippi Riverboat Amusement, Ltd.*, 867 F. Supp. 1260, 1263-64 (S.D. Miss. 1994); *Taylor v. Cooper River Const.*, 830 F. Supp. 300, 302-304 (D.S.C. 1993); *Newsom v. Continental Grain Co.*, 820 F. Supp. 1187, 1189 (D. Minn. 1993); *Johnson v. ADM/Growmark River Sys., Inc.*, 295 Ill. App. 3d 436, 442-44, 693 N.E.2d 447, 480-82 (Ill. App. 1998); *Leggett v. Sovran Leasing Corp.*, 909 S.W.2d 664, 665-67 (Mo. 1995); *Spears v. Kajima Eng. & Const'n, Inc.*, 101 Cal. App. 4th 466, 475-78 (2002); *Gault v. Modern Continental/Roadway Const'n Co.*, 100 Cal. App. 4th 991, 1000-1002 (2002).

II. 1 U.S.C. § 3 Clearly Does Not Provide A Controlling Definition of The Term Vessel.

A. This Court Need Not Consider This Contention Because it Was Not Raised Below.

The Petitioner's primary argument here is that this Court must hold that the Super Scoop is a Jones Act vessel because it falls within the definition of "vessel" at 1 U.S.C. § 3, and that definition is controlling for Jones Act purposes. (Pet. br. at 10-30)[5] As noted above, the Petitioner is

[5] Title 1 U.S.C. section 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."

a recent convert to this argument; he *conceded* before the District Court and the First Circuit that section 3 did *not* define "vessel" for Jones Act purposes, and he did not even make his current section 3 argument in his Petition for Certiorari. (C.A. App. 219; Pet. C.A. br. at 19) As such, neither the District Court nor the First Circuit had a chance to consider or discuss this point. This is not an ideal context for review by this Court. In the circumstances, this argument need not even be considered. *E.g.*, *Chandris*, 515 U.S. at 353 n.*; *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984); *United States v. Estate of Donnelly*, 397 U.S. 286, 295 n.5 (1970); Sup. Ct. Rules 14.1(a), 24.1(a).

B. Legislative History Demonstrates That Congress Meant To Reject Broad Definitions of "Vessel," Like Section 3, for Purposes of the Jones Act.

In 1915, in an effort to give seamen the right to sue in negligence (among other things), Congress enacted An Act to Promote the Welfare of American Seamen in the Merchant Marine of the United States, to Abolish Arrest and Imprisonment as a Penalty for Desertion and to Secure the Abrogation of Treaty Provisions in Relation Thereto, and to Promote Safety at Sea. Act of March 4, 1915, ch. 153, §§ 1-20, 38 Stat. 1164-85 ("Act of 1915"). Section 20 of the Act of 1915 created a right of recovery for injuries suffered on a vessel, and limited the effect of the fellow-servant defense. *Wilander*, 498 U.S. at 341-342.

The Act of 1915 was amended by the Act of June 5, 1920. Act of June 5, 1920, ch. 250, §§ 1-39, 41 Stat. 988-1008 (codified at 46 U.S.C. app. § 688) ("Act of 1920"). The Act of 1920 provided that the term vessel should have the

meaning assigned by sections 1 and 2 of the Shipping Act of 1916, as amended. Act of June 5, 1920, ch. 250, § 37. The Shipping Act defined "vessel" as:

> All watercraft and 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 intended to be used as a means of transportation on water.

Act of September 7, 1916, ch. 451, § 44, 39 Stat. 728. "[L]awmakers amended section 20 of the Act of 1915 by substituting section 33 of the Act of 1920." *Warner*, 293 U.S. at 159. Section 33, of course, is what is now known as the Jones Act. Section 33 did *not* include its own definition of vessel and did *not* incorporate the term's definition from the Act of 1920 or elsewhere. Thus, the Jones Act became law without a definition of vessel.

By amending section 20 of the Act of 1915 by way of section 33 of the Act of 1920, Congress effectively *deleted* from the Jones Act the broad definition of vessel incorporated into the Act of 1920. This choice by Congress is properly considered as evidence of its intentions with respect to the Jones Act. *E.g.*, *Board of County Commissioners v. Seber*, 318 U.S. 705, 711 n.10 (1943); *Spring City Foundry Co. v. Commissioner of Internal Revenue*, 292 U.S. 182, 187 (1934); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913). Congress' deletion of an expansive vessel definition from the Jones Act indicates: (1) its desire that the Jones Act *not* contain a specific definition of the vessel concept; and (2) its rejection of a broad definition describing a vessel as any watercraft or contrivance capable of transportation on water. As that broad language is the heart of the definition appearing in 1 U.S.C. § 3, the

history of the Jones Act demonstrates that Congress did *not* intend that that definition, or any definition like it, be part of the Jones Act.

C. Beyond Legislative History, Congress' Treatment of the Term Vessel in the Jones Act And Other Statutes Implies That 1 U.S.C. § 3 was Not Meant to Supply a Dispositive Jones Act Definition.

As the Petitioner acknowledges, many federal statutes, including at least one as old as the Jones Act, define the term "vessel" in various contexts. (Pet. br. at 19 n.5 (citing Merchant Marine Act of 1920, 46 U.S.C. App. § 801; International Regulations of Preventing Collisions at Sea Act, 33 U.S.C. § 1601(1); Inland Navigation Rules Act of 1980, 33 U.S.C. § 2003(a); Whaling Convention Act, 16 U.S.C. § 916(e); Oil Pollution Act of 1990, 33 U.S.C. § 2701(37); Federal Water Pollution Control Act, 33 U.S.C. § 1321(a)(3); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601(28); Public Health Service Act, 42 U.S.C. § 201(i); Contraband Seizure Act, 49 U.S.C. § 80301(3); Tariff Act of 1930, 19 U.S.C. § 1401(a); Interstate Act Against Importation of Motor Vehicles, Vessels and Aircraft, 18 U.S.C. § 533(c)(3); Excise Taxes Act, 26 U.S.C. § 5688(c); Neutrality Act of 1939, 22 U.S.C. § 456(c); Interstate Commerce Act, 49 U.S.C. § 13102(23) (Supp. 2003); Communications Act of 1934, 47 U.S.C. § 153(39)(A); Sentencing Reform Act, 18 U.S.C. § 3667; Anti-Fouling Paint Control Act of 1988, 33 U.S.C. § 2402(11); Deepwater Ports Act, 33 U.S.C. § 1502(19), Submarine Cables Act, 47 U.S.C. § 30; Federal Ship Mortgage Insurance Act, 46 U.S.C. App. § 1271(b); Anti-Gambling Act, 18 U.S.C. § 1081.)) In the Shipping Act,

Congress expressly incorporated section 3. 46 U.S.C. § 2101(45).

These statutes are significant for two reasons. First, they demonstrate that, for as long as the Jones Act has been in force, Congress has: (1) included in statutes integrated definitions of the term vessel where it believed that a legislative definition of that term was necessary; and (2) expressly incorporated 1 U.S.C. § 3's provisions where it considered that appropriate. In light of this practice, apart from the legislative history of the Jones Act, Congress's decision *not* to include an integrated definition of the term vessel in the Jones Act and *not* to incorporate section 3 into the Jones Act indicates an intention that section 3 was *not* controlling, and that the vessel concept for Jones Act purposes was to be developed *judicially*. *See also Chandris*, 515 U.S. at 355 ("Jones Act . . . leaves to the courts the determination of exactly which maritime workers are entitled to admiralty's special protection."); Steven F. Friedell, 1B *Benedict on Admiralty*, § 11A (7th ed. 2003).

Second, the statutes do not uniformly define "vessel", and the different definitions are not identical to that provided in section 3. *See generally* Martin J. Norris, *The Law of Maritime Personal Injuries* (4th ed. 2003) (discussing varying definitions given "seaman" and "vessel"). The Petitioner suggests that the definitions are close enough to the section 3 concept to amount to Congressional vouching for the broad applicability of section 3 (Pet. br. at 19); but this is exactly backwards. If anything, the diversity of definition as to this concept indicates that section 3 is *anything but* an essential, fundamental definition. The variety of legislation and the fact that Congress did not incorporate section 3 or another definition of vessel in the

Jones Act demonstrates that the vessel concept is elusive and defies simple, definitive explication. This evidence militates *against* the notion that Congress intended 1 U.S.C. § 3 to have broad application, and in favor of natural judicial evolution of the definition. *See Chandris*, 515 U.S. at 355.

D. Congress Could Not Have Intended to Follow Section 3 When it Enacted the Longshore and Harbor Workers Compensation Act.

The Petitioner contends that, with regard to defining the term vessel, Congress had section 3 in mind in 1927 when it referred to "master or member of a crew of any vessel" in the newly enacted LHWCA. According to the Petitioner, section 3's definition of "vessel" was well established in 1927, so Congress must have meant for it to define the term "vessel" as used in the LHWCA. (Pet. br. at 11-16) The Petitioner is wrong.

As a threshold matter, it bears mention that the Petitioner requested a writ of certiorari on the ground that the Jones Act's vessel requirement "remains unclear," that the Circuits are in disarray as to the issue, and that guidance is "urgently" and "demonstrably" required. (Pet. for Cert. at 5-6) Needless to say, if the definition of "vessel" is unclear *now*, it can hardly have been well established seventy-seven years ago.

In fact, the definitions of the intertwined vessel/seaman concepts were by *no means* well established in 1927. Prior to 1920, "the courts had not provided any clear definition" of seaman. Robertson, 64 TEXAS L. REV. at 85. The Jones Act became law in 1920; it defines neither

seaman nor vessel, and does not incorporate 1 U.S.C. § 3 or, as described above, the definition of "vessel" from the Act of 1920 of which the Jones Act was a part. After 1920, the Court defined seaman expansively to include longshoremen who happened to be injured on water. Robertson, 64 TEXAS L. REV. at 85 (citing *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926)). In 1927, Congress effectively overruled the *Haverty* approach to seaman status by enacting the LHWCA.

The new LHWCA clarified that, contrary to *Haverty* and related decisions, longshoremen who were not part of a vessel's crew were *not* Jones Act seamen, but were LHWCA longshoremen. *Id*. *See also* Pet. br. at 11. Like the Jones Act, the LHWCA did not incorporate 1 U.S.C. § 3. Instead, it included a definition of "vessel" that was *unlike* section 3 and that applied "[u]nless the context requires otherwise." 33 U.S.C. § 902(21). Thus, in 1927 the definition of the term vessel not only was *not* well established, it had just been effectively *revised* by a definition that was expressly subject to considerations of context.

Moreover, this Court's working definition of "vessel" in 1927 *differed* from section 3's definition. As described below, between 1887 and 1926 this Court *repeatedly* held that a float that was not "practically" capable of water transportation was not a vessel. *See Evansville*, 271 U.S. 19; *Cope*, 119 U.S. 625. Early opinions also linked vessel status to commerce. *See id*.; *Robert W. Parsons*, 191 U.S. at 30-31. These features make for a much *narrower* definition of "vessel" than section 3's definition, and the primacy of the narrower concept in the decisions confirms that section 3 was *far* from clearly established. In this context, there is no reasonable basis on which to say that Congress in 1927

intended that section 3 define the term for Jones Act purposes.[6]

E. The Notion that 1 U.S.C. § 3 Supplies a Dispositive Definition of "Vessel" For the Jones Act is Inconsistent With This Court's Decisions.

If this Court adopts section 3 as the governing definition of the term vessel for Jones Act purposes, it will effectively overrule prior decisions. This is so because, as the Petitioner concedes (Pet. br. at 21), in its prior treatment of the vessel concept under section 3, this Court has *rejected* the broad scope of section 3 and clarified that the appropriate definition of "vessel" is *narrower* than section 3's definition.

In *Evansville*, 271 U.S. 19, the Court denied a wharfboat owner's petition seeking relief under a statute limiting the liability of "the owner of any vessel." The boat was

[6] The lower court decisions cited in the Petitioner's brief (page 16 n.4) are immaterial here. The decisions are inconsistent at least with *Evansville* and *Cope*, and this inconsistency contradicts the notion that section 3 stated a clearly established definition. Indeed, in the lower courts in general, section 3's definition of vessel "has not been very influential in admiralty and maritime cases. * * * * When courts mention the definition favorably, it usually seems to be a makeweight argument." David W. Robertson, Steven F. Friedell, and Michael F. Sturley, *Admiralty and Maritime Law in the United States*, 59 (Carolina Acad. Press 2001) (hereinafter "Robertson and Sturley"). *See* Brief of the Amicus United Brotherhood of Carpenters and Joiners at 12 ("The lower courts have developed a gaggle of conflicting vessel definitions."). *See also Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 359 (5th Cir. 1999), *cert. denied*, 588 U.S. 1155 (2000) (implicitly rejecting broad, section 3-like definition of vessel; anchored float that had limited movement but theoretical transportation capacity not a vessel); *Burchett v. Cargill*, 48 F.3d 173, 177-178 (5th Cir. 1995) (same).

secured to the shore by cables. It was towed annually up river for winter, but otherwise was not engaged in transportation. *Id*. at 20-21. When it sank and damaged the claimants' merchandise, the owner argued that it was a section 3 vessel because it was capable of water transportation.

Given the opportunity to adopt section 3 as the definition of "vessel" for purposes of the claim at issue there, the Court in effect said *No*. Instead, the Court ruled that the float there was not a vessel because it was not "*practically* capable of being used as a means of transportation." *Id*. at 22 (emphasis added). In this way, the Court implicitly rejected section 3 as overbroad, and, at least in that context, introduced a requirement of *practical* water transportation that is not part of section 3. This Court must overrule *Evansville* and discard its practicality dimension if it is to adopt section 3 now.

In *Cope*, 119 U.S. 625, discussed above, the Court rejected the argument that an unsecured dry-dock was a vessel because it was capable of being used as a means of transportation. The Court reasoned that, when in use, the dry-dock did not move horizontally over the water, but only floated on it, and therefore "could not be *practically* used" for navigation or transportation. *Id*. at 627-630 (emphasis added). If this Court reads section 3's definition of "vessel" into the Jones Act as the Petitioner proposes, it will effectively reverse *Cope*.

F. 1 U.S.C. § 3 Does Not Apply in This Context.

Section 1 of the Dictionary Act provides as a preface that the Act's provisions apply "[i]n determining the

meaning of any Act of Congress, unless the context indicates otherwise. . . . " 1 U.S.C. § 1. The Petitioner argues half-heartedly that the "context indicates otherwise" proviso may not apply to section 3 (Pet. br. at 17), but there is nothing to this argument. All of the statute's sections combine to provide general rules of construction and usage as to other sections, and must be read together as a unified whole. *E.g.*, *Stafford v. Briggs*, 444 U.S. 527, 535 (1980); *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972); *Markham v. Cabell*, 326 U.S. 404, 410-411 (1945). Even the legislative authority cited by the Petitioner supports the view that the "context indicates otherwise" phrase applies to section 3. (Pet. br. at 18 (quoting legislative report suggesting that the "vessel" definition *is* subject to considerations of context)). *See also* Robertson and Sturley at 59 ("But on the vessel issue . . . [a]ll we know is that the definitional criteria will probably vary contextually.").

So context must be considered. And the contextual clues strongly indicate that section 3's definition of vessel does *not* apply to the Jones Act. To begin with, as discussed above, Congress' effective *deletion* of a broad, section 3-like definition from the Jones Act and this Court's prior decisions suggest that 1 U.S.C. § 3's definition is *too* broad.

Furthermore, the Court has said that section 3 applies only to a limited class of statutes that does *not* include the Jones Act. In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), the Court addressed the vessel concept in considering whether questions arising from a collision of pleasure boats were cognizable in admiralty. The Court indicated that section 3 applied only to shipping and transportation statutes, saying:

> Congress defines the term "vessel," for the purpose of determining the scope of various shipping and maritime transportation laws, to include all types of waterborne vessels, without regard to whether they engage in commercial activity. *See, e.g.*, 1 U.S.C. § 3.

457 U.S. at 676.

Moreover, as described above, Congress intentionally did not define "vessel" within the Jones Act itself and did not incorporate section 3's definition into the Jones Act, even though in many other statutes implicating the vessel concept it did one or the other. *See Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993) ("context" means text of statute at issue or related statutes). Context confirms that section 3 is inapplicable here.

G. 1 U.S.C. § 3's Definition of "Vessel" is Undesirably Broad.

Beyond the fact that section 3's definition of "vessel" is at odds with this Court's decisions requiring that a vessel be *practically* capable of water transportation, section 3 is undesirably broad as a matter of policy. Under section 3, virtually *any* structure that floats and can theoretically be moved over water with cargo or passengers is a Jones Act vessel. Use of this definition would enormously expand the class of Jones Act vessels. In this approach, the unmoored dry-dock in *Cope* is a Jones Act vessel; the wharfboat in *Evansville* is a Jones Act vessel; the sightseeing boats under repair in *Desper* are Jones Act vessels; floating casinos while docked and anchored are Jones Act vessels; floating bridges are Jones Act vessels; and all (or nearly

all) of the work platforms typically considered non-vessels are Jones Act vessels.[7]

Adoption of this standard will cause: (1) an extraordinary enlargement of the class of claimants entitled to the Jones Act's special protections well beyond those claimants reasonably and as a matter of common sense exposed to the perils of the sea; (2) an increase in problematic litigation as undeserving and marginal claimants seek to bring their claims within the Jones Act's newly extended limits; and (3) confusion and an increase in "vessel" – related litigation under the Jones Act and other admiralty/maritime statutes as litigants and courts sort out what a redefinition of "vessel" means.

The Petitioner recognizes the overbreadth of section 3, and says this need not be a problem because the gloss on section 3 from *Evansville* and *Cope* confines sections 3's definition to floats that are "practically capable" of transportation on water. (Pet. br. at 21-23) But this argument undercuts the Petitioner's very premise – that Congress through section 3 already has defined "vessel" for Jones Act purposes – and begs the question why the Court should read into the Jones Act an admittedly flawed,

---

[7] As one treatise writer said about section 3:

> [1 U.S.C. § 3] may apply in certain circumstances, for example, in determining whether a contract is a maritime contract or whether or not a person has a maritime lien against a particular structure. In fact, the broad statutory definition coupled with the likewise broad definition of the term 'seaman' prompted the late Judge Brown to remark that even the 'three men in a tub' could qualify as Jones Act seamen.

1 Robert Force & Martin J. Norris, *The Law of Seamen*, § 2:11, p. 2-70 (5th ed. 2003) (citing *Burks v. American River Trans. Co.*, 679 F.2d 69 (5th Cir. 1982))

overinclusive definition that requires judicial modification to be useful. In truth, the Petitioner essentially concedes that section 3 clashes with years of this Court's decisions.

III. THE PETITIONER'S CRITICISM OF THE FIRST CIRCUIT'S DECISION IS *UNFOUNDED.*

The Petitioner makes a number of miscellaneous arguments challenging the decision below as flawed. (Pet. br. at 32-37) All are meritless.

First, the Petitioner says that the First Circuit impermissibly ignored the "applicable statutory definition" of vessel. (Pet. br. at 32) The First Circuit did no such thing. As explained in detail above, *there is no applicable statutory definition*. *See Chandris*, 515 U.S. at 355. The First Circuit properly synthesized and followed precedent and held that the Super Scoop was not a Jones Act vessel. The court ignored nothing.

Second, the plaintiff contends that the decision below violates what the plaintiff refers to as the "*Chandris* Court's anti-snapshot rule," even going so far as to suggest that *Chandris overruled* the First Circuit's decision in *DiGiovanni*. (Pet. br. at 33-34) The Petitioner misstates the import of *Chandris* and misreads the First Circuit's decision. In *Chandris*, the Court did not say what a Jones Act vessel was, but addressed the relationship that a worker must have with a vessel to qualify as a Jones Act seaman. In the decision below, the First Circuit considered the *entirely different* question whether a floating work platform that supports a crane or dredge and is not capable of navigation is a Jones Act vessel. *Chandris* and the decision below thus address *different* facets of the Jones Act. To the extent that *Chandris* and the First Circuit's

decision in *DiGiovanni* may overlap, they are consistent. Indeed, as noted above, *Chandris* cited and quoted with approval a portion of the *DiGiovanni* opinion. 515 U.S. at 373.

Nor can the First Circuit's "primary purpose" approach reasonably be characterized as a "snapshot test." In *DiGiovanni* and the decision below, the First Circuit looked at the "purpose or primary business" of the floats at issue, and particularly at whether the float's business is navigation or commerce. This standard draws directly on this Court's primary vessel authorities. *E.g.*, *Cope*, 119 U.S. 625; *Robert W. Parsons*, 191 U.S. 17; *Evansville*, 271 U.S. 19. *See also Bernard*, 741 F.2d at 829. There is no "snapshot" quality to this approach, just a clear-eyed assessment of what the float at issue is, and what it is not. Under the "primary purpose" approach, a long list of nontraditional vessels can qualify as Jones Act vessels so long as they are primarily engaged in commercial transportation of cargo or passengers on navigable waters. The Petitioner's suggestions to the contrary are specious.

The First Circuit's standard does have a kind of "second bite" feature, in that it can result in Jones Act vessel status for floats that otherwise are nonvessels when they are, in fact, in actual navigation or transit at the time of injury. It is inaccurate and unfair to characterize this feature as a snapshot test in violation of *Chandris*. In fact, it represents a *generous addition to* the Court's "primary purpose" analysis that can humanely enlarge the vessel concept for the benefit of some Jones Act claimants, and that accords with this Court's statements. *See Senko*, 352 U.S. at 371 n.1 (no issue as to dredge's status "at the time of petitioner's injury"); *Desper*, 342 U.S. at 190-191 ("[T]here was no vessel engaged in navigation at the time

of the decedent's death."). *See also DiGiovanni*, 959 F.2d at 1123 (citing *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971) for proposition that "varying status designation . . . is not a novel concept").

Third, the Petitioner argues that the two decisions issued by the First Circuit undermine the mutual exclusivity of the Jones Act and the LHWCA because the first decision held that the Super Scoop was *not* a Jones Act vessel, while the second decision said that the Super Scoop *was* an LHWCA vessel. (Pet. br. at 34) There are two significant problems with this argument. The first problem is that the Petitioner *has not requested review of the second decision*, so its propriety in all its aspects is irrelevant. *See* Pet. For Cert. at 1, 4.

The second problem is that the Petitioner is wrong; the term vessel need *not* have the same definition under both statutes. By comparison with the Jones Act, "vessel" for LHWCA purposes is broadly defined. *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 607 (1st Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997); *Kathriner*, 975 F.2d at 659-663; *see McCarthy v. The Bark Peking*, 716 F.2d 130, 134 & n.2 (2d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984) (noting established view that vessel is defined differently for Jones Act and LHWCA). Moreover, in general, the terms seaman and vessel can properly have variable meanings depending on the particular statutes in which they appear. *See* Martin J. Norris, *The Law of Maritime Personal Injuries*, Ch. 4 (5th ed. 2003). *Compare Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518, 520-524 (5th Cir. 1989) (employee may be a non-seaman under the Fair Labor Standards Act but a seaman under the Jones Act); *Presley v. The Vessel Caribbean Seal*, 709 F.2d 406, 408-409 (5th Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984)

(scientists were seamen under general maritime law but not under the Jones Act; research ship was not a Jones Act vessel but was a vessel for other purposes). There is no requirement of or need for consistency here.

Fourth, the Petitioner argues that the First Circuit's rule incorrectly denies vessel status to dredges, and therefore is inconsistent with this court's decisions in *Ellis*, *Senko*, and *The Virginia Ehrman and The Agnese*. (Pet. br. at 35-36) As discussed above, *none* of these decisions holds that dredges are vessels within the meaning of the Jones Act; in fact, this Court *never* has held as such. Rather, this Court has identified a series of principles bearing on the vessel/seaman concept that, applied to the undisputed facts of this case, require the conclusion that the Super Scoop here is not a Jones Act vessel as a matter of law.

Fifth, the Petitioner argues that the First Circuit's decision is inconsistent with the Jones Act's goal of protecting workers who face the perils of the sea. (Pet. br. at 36-37) As explained above, the Petitioner manifestly was *not* exposed to the perils of the sea, and the First Circuit's decision is entirely congruent with the Jones Act. Moreover, even if the Petitioner in some theoretical sense was exposed to sea-related perils, it does not follow simply from that that the Super Scoop is a Jones Act vessel. The Super Scoop is a work platform anchored to the harbor floor. It is immobile and fixed when work is being conducted. In the circumstances, sea-related risks notwithstanding, it *still* cannot properly be considered a vessel. *See* Robertson, 64 TEXAS L. REV. at 102 ("If the facts suggest no significant possibility of work aboard the structure while in motion, the outcome has generally been

a determination against vessel status as a matter of law."; citing cases). *See also Cope*, 119 U.S. at 630.

Sixth, the Petitioner argues that the First Circuit overemphasized the vessel status of the Super Scoop. (Pet. br. at 37) It is not clear what the Petitioner means by this argument. The case presented the First Circuit with a discrete question, and the court answered it. Issues unrelated to the Super Scoop's vessel status were not before the court. The court was not required to discuss at length the relationship between its approach to the vessel issue and its views as to other seaman-related issues not presented. There is no undue emphasis in the First Circuit's decision. This argument is a makeweight.

CONCLUSION

The First Circuit's decision should be affirmed.

FREDERICK E. CONNELLY, JR.
Counsel of Record
HARVEY WEINER
JOHN J. O'CONNOR
PEABODY & ARNOLD LLP
30 Rowes Wharf
Boston, MA 02110

Attorneys for Respondent
Dutra Construction Company