No. _____

In the Supreme Court of the United States

HUNTINGTON INGALLS INCORPORATED,
Petitioner,

v.

LYNN BARROSSE; RAEGAN HOLLOWAY;
MAKENZIE STRICKER,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Longshore and Harbor Workers' Compensation Act (LHWCA) establishes a comprehensive system of no-fault workers' compensation for workplace injuries on or near the "navigable waters of the United States." 33 U.S.C. § 903(a). The Act's guaranteed no-fault compensation remedy for such injuries, however, comes with a corresponding benefit for employers. The Act expressly provides that the "liability of an employer" under the LHWCA "shall be exclusive and in place of all other liability of such employer" as to "anyone otherwise entitled to recover damages . . . at law or in admiralty on account of such injury." *Id.* § 905(a); *see also id.* § 933(i) (same "exclusive remedy" rule for suits brought against co-employees). Numerous federal courts of appeals and state high courts have held that the LHWCA means what it says, and thus preempts state-law tort actions against an injured worker's employer and co-employees—the quintessential actions for "damages . . . at law." Yet, the Fifth Circuit below—following Louisiana state-court precedent—held that a maritime employee who was injured on the job may pursue a state-law tort claim for damages against his employer, even though an LHWCA remedy for that injury is available.

The question presented is whether the Fifth Circuit correctly held—in conflict with the decisions of other federal and state courts of appeals—that an injured maritime employee who has a workers' compensation remedy under the LHWCA may pursue a state-law tort claim for damages instead.

CORPORATE DISCLOSURE STATEMENT

Petitioner Huntington Ingalls Incorporated is a wholly owned subsidiary of Huntington Ingalls Industries, Inc., a publicly traded company. No publicly traded corporation owns 10% or more of the stock of Huntington Ingalls Industries, Inc.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

Barrosse v. Huntington Ingalls, Inc., No. 21-30761, U.S. Court of Appeals for the Fifth Circuit, judgment entered June 12, 2023, rehearing denied July 10, 2023.

Barrosse v. Huntington Ingalls, Inc., No. 2:20-cv-2042-WBV-JVM, U.S. District Court for the Eastern District of Louisiana, judgment entered November 23, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Huntington Ingalls Incorporated respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 70 F.4th 315 (5th Cir. 2023). App. 1a-18a. The district court's opinion is available at 563 F. Supp. 3d 541 (E.D. La. 2021). App. 19a-57a.

JURISDICTION

The court of appeals entered judgment on June 12, 2023 (App. 1a-18a) and denied petitioners' petition for rehearing en banc on July 10, 2023 (App. 58a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions of the LHWCA are reproduced at App. 59a-68a.

INTRODUCTION

This case presents an important question—on which the federal courts of appeals and state courts are split—concerning the operation of a landmark maritime statutory scheme. The question is whether the federal Longshore and Harbor Workers' Compensation Act (LHWCA), which establishes a no-fault compensation scheme for maritime employees injured on or near the navigable waters of the United States, preempts state-law damages claims against maritime employers for injuries that are compensable under the LHWCA. The LHWCA's plain text supplies a clear answer: the LHWCA is the "exclusive" source of an employer's liability to its injured employees, and the no-fault compensation remedy guaranteed by the Act is "in place of all other liability" that might be sought in an action for "damages from such employer at law or in admiralty." 33 U.S.C. § 905(a); *see also id.* § 933(i). That quid pro quo—a guaranteed, no-fault compensation remedy for employees, in exchange for a guaranteed bar to state-law damages claims for employers—is central to the LHWCA.

In accordance with this unambiguous statutory text, numerous federal and state courts have held that the LHWCA preempts state-law tort claims for damages. And this Court has previously recognized as much in dicta. *See Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001) (Scalia, J.). Nevertheless, in the decision below, the Fifth Circuit held that the LHWCA *does not* preempt a maritime employee's state-law tort claims against his employer, even though he undisputedly has an available LHWCA compensation remedy. In so holding, the Fifth Circuit expressly adopted the outlier position of the Louisiana state courts, which

has been widely criticized as "patently erroneous." 1 Thomas J. Schoenbaum, *Admiralty & Martime Law* § 7:4 n.8 (6th ed. 2022 update, Westlaw).

The Fifth Circuit's decision warrants review. First, the Fifth Circuit's decision conflicts with the decisions of other federal and state courts concerning the preemptive effect of the LHWCA's "exclusive" liability provision. Under the Fifth Circuit's decision, injured maritime workers in Louisiana who are entitled to a no-fault compensation remedy under the LHWCA are allowed to elect to pursue state-law tort claims for damages against their employers. In so holding, the Fifth Circuit explicitly joined the outlier position of the Louisiana state courts in allowing such an election. By contrast, numerous other federal courts of appeals and state courts hold that no such election is permitted: in these courts, the availability of a compensation remedy under the LHWCA flatly bars maritime workers from pursuing damages claims in tort against their employers. That direct conflict over the reach of the LHWCA's express preemption provision necessitates review.

Second, the decision below contravenes the LHWCA's plain text and this Court's precedents construing the Act. Indeed, the Fifth Circuit itself recognized that the LHWCA's plain language preempts state-law tort claims for damages. But it believed that this Court's so-called "twilight zone" cases required it to disregard the Act's plain text. That was error. This Court's "twilight zone" jurisprudence holds that there is concurrent federal and state jurisdiction under the LHWCA as to *statutory workers' compensation remedies*, but those cases do not permit state *tort claims* to operate concurrently with the LHWCA. Nor could they.

Where an employer participates in the LHWCA's no-fault compensation scheme, allowing an employee to pursue a state-law damages claim would not only flout the Act's express preemption provision but vitiate the quid pro quo at the heart of the Act.

Third, the question presented in this case is vitally important to the Nation's maritime employers and employees. The Fifth Circuit's decision negates the bargain on which the LHWCA's no-fault compensation scheme rests. Furthermore, this case arises from one of the Nation's most important venues for workplace maritime-injury cases. The district courts of Louisiana are home to over one quarter of all federal maritime personal-injury cases nationwide, as well as a slew of cases seeking recovery for asbestos-related injuries stemming from shipbuilding activity during the same period at issue in this case. The Fifth Circuit's decision undermining the LHWCA in the Louisiana courts presents an especially pressing problem in its own right, and establishes a blueprint for evading the terms of the LHWCA in other courts as well. And this petition presents a clean vehicle for the Court to resolve this important question.

This Court should grant certiorari.

STATEMENT OF THE CASE

A. Statutory Background

1. Enacted in 1927 to protect maritime employees, the LHWCA establishes a uniform scheme of no-fault compensation for workers injured in maritime commerce on or near the navigable waters of the United States. *See* 33 U.S.C. § 903(a). These compensation benefits are often substantial—*e.g.*, 66.67% of a worker's average weekly wages in the case of "[p]ermanent total disability." *Id.* § 908(a). In

2017 alone, maritime employers paid over $2 billion in cash and medical benefits to injured workers and their families under the LHWCA.[1]

2. Before enactment of the LHWCA, some injured maritime workers claimed benefits under workers' compensation laws then emerging at the state level. But this Court held that such compensation statutes were inapplicable to maritime workers on the ground that application of divergent state workers' compensation schemes would violate the Constitution's mandate for "uniformity in respect to maritime matters." *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 217 (1917). The Court thus held that, if maritime workers were to receive no-fault compensation for workplace injuries, such compensation benefits must flow from a uniform statute enacted by Congress. *See Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924).

Congress responded by enacting the LHWCA. At the same time, however, Congress made clear that employees eligible for the LHWCA's no-fault compensation remedy would have no damages remedies at law for their injuries vis-à-vis their employers. The Act explicitly states that the "liability of an employer prescribed" by the LHWCA is "exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of [the employee's] injury or death." 33 U.S.C. § 905(a).

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[1] *See* Cong. Res. Serv., *The Longshore and Harbor Workers' Compensation Act (LHWCA): Overview of Workers' Compensation for Certain Private-Sector Maritime Workers* 1 (2021), https://crsreports.congress.gov/product/pdf/R/R41506/11.

The LHWCA's bar on damages claims arising "at law or in admiralty" is subject to just one exception: where "an employer fails to secure payment of compensation," the injured employee "may elect to claim compensation . . . *or* to maintain an action at law or in admiralty for damages." *Id.* (emphasis added). This exception operates as a penalty against employers who refuse to participate in the compensation scheme. And while the availability of an LHWCA remedy does not prevent the injured employee from pursuing "damages against [a] *third person*" who might be liable for such damages, *id.* § 933(a) (emphasis added), the LHWCA remains an employee's exclusive remedy against his *employer* (and the officers or employees of that employer) with respect to "the negligence or wrong of any other person or persons in the same employ," *id.* § 933(i).

The LHWCA thus "strike[s] a balance" between maritime employers and their employees: "Employers relinquish[ ] their defenses to tort actions in exchange for limited and predictable liability," while "[e]mployees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Comp. Programs*, 461 U.S. 624, 636 (1983). This quid pro quo is central to the Act.

3. Initially, Congress limited the availability of the LHWCA's compensation remedy to situations in which "recovery . . . through workmen's compensation proceedings" was unavailable under state law. Pub. L. No. 69-803, § 3(a), 44 Stat. 1424, 1426 (1927). But this raised a "jurisdictional dilemma," as it was often difficult for employers and employees to determine whether compensation for an injury was covered

under state workers' compensation law when an injury occurred at the water's edge. *Davis v. Department of Labor & Indus. of Wash.*, 317 U.S. 249, 255 (1942).

In a series of cases decided in the 1940s, 1950s, and 1960s, this Court sought to resolve that jurisdictional dilemma by recognizing a "twilight zone" in which the LHWCA and state workers' compensation law could operate in an overlapping (rather than strictly parallel) fashion. *Id.* at 255-56; *see also, e.g.*, *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 126-28 (1962). This case law, "in effect, gave an injured waterfront employee an election to recover compensation under either the Longshoreman's Act or the Workmen's Compensation Law of the State in which the injury occurred." *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273 (1959) (per curiam). The Court's twilight-zone jurisprudence assured that a compensation remedy would always be available to injured maritime employees covered by the Act.

Congress later extended the LHWCA to cover any injuries occurring on the navigable waters of the United States or "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." Pub. L. No. 92-576, § 2(c), 86 Stat. 1251, 1251 (1972). In *Sun Ship, Inc. v. Pennsylvania*, this Court held that its "twilight zone" cases survived the 1972 amendments, such that "federal jurisdiction would [still] coexist with *state compensation laws*" in cases involving maritime workplace injuries at the water's edge. 447 U.S. 715, 722 (1980) (emphasis added).

Accordingly, as this Court has summarized the LHWCA's remedial scheme: the LHWCA provides

"maritime workers . . . with no-fault workers' compensation claims" against their employers, and "expressly pre-empts all other claims" against those employers, except for "some state workers' compensation claims" as provided by this Court's twilight-zone precedents. *Norfolk Shipbuilding*, 532 U.S. at 818 (citing *Sun Ship*, 447 U.S. at 723-26).

4. While this Court has recognized "[c]oncurrent jurisdiction for state and federal compensation laws," *Sun Ship*, 447 U.S. at 723, many States have declined to supply any separate, state no-fault workers' compensation remedy where the worker in question has a federal compensation remedy under the LHWCA. For example, Louisiana's workers' compensation law provides that "[n]o compensation shall be payable in respect to the disability or death of any employee covered by . . . the [LHWCA]." La. Stat. Ann. § 23:1035.2 (citing 33 U.S.C. § 901 et seq.). Most other States have adopted similar provisions as part of their workers' compensation laws. *See, e.g.*, Fla. Stat. Ann. § 440.09(d)(2); N.J. Stat. Ann. § 34:15-36; Ohio Rev. Code Ann. § 4123.54(I); 77 Pa. Stat. and Cons. Stat. Ann. § 22; Va. Code Ann. § 65.2-101 (defining "employee"). In such States, the no-fault workers' compensation remedy under the LHWCA is the default remedy for maritime injuries.[2]

B. This Litigation

1. Petitioner Huntington Ingalls Incorporated is a wholly owned subsidiary of Huntington Ingalls Industries—the largest military shipbuilding

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[2] Where federal and state compensation remedies are both available, Congress has provided that any benefits awarded under state law must be credited against LHWCA benefits. *See* 33 U.S.C. § 903(e); *Sun Ship,* 447 U.S. at 723-24.

company in the United States. For decades, Huntington Ingalls has designed, built, and maintained aircraft carriers, nuclear submarines, destroyers, cutters, and other ships for the U.S. Navy and the U.S. Coast Guard. Huntington Ingalls is the successor-in-interest to Avondale Industries, Inc. (Avondale),[3] which operated a major shipyard outside of New Orleans that built and refurbished ships for the Navy and the Coast Guard throughout the 1960s and 1970s. *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 289 (5th Cir. 2020) (en banc). The Navy's contracts with Avondale during that period generally required the installation of asbestos for thermal insulation on the vessels it built and retrofitted. *Id.*

From 1969 to 1977, Ronald Barrosse worked as an electrician at Avondale, where he was exposed to asbestos while working on Navy destroyers docked on the Mississippi River. App. 2a, 37a. In March 2020, Barrosse was diagnosed with mesothelioma. *Id.* at 2a. Barrosse is entitled to significant compensation benefits for that injury under the LHWCA. *See* 33 U.S.C. § 903(a); Barrosse CA5 Br. 24-25, Dkt. 36. But he instead filed a damages action against Avondale under Louisiana law in tort, alleging that Avondale and its executives negligently failed to "provide and/or ensure a safe workplace for [Avondale's] employees, including Barrosse, free of hazardous concentrations of asbestos and asbestos-containing dust." App. 20a-21a; Pet. 10-15, D. Ct. Dkt. 1-1.[4]

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[3] Like the Fifth Circuit, we refer to Huntington Ingalls as "Avondale" in this petition.

[4] Sadly, Mr. Barrosse passed away during this litigation, so his survivors substituted themselves as plaintiffs-appellants,

2. Avondale removed Barrosse's case to federal district court and moved for summary judgment on the ground that the LHWCA preempts Barrosse's state-law tort claims. App. 2a. In opposing that motion, Barrosse argued that, because his injury arose in a "twilight zone" of concurrent state and federal jurisdiction, he was entitled to choose between the compensation remedy under the LHWCA and the only remedy available to him under state law—a damages action sounding in tort—and so was free to pursue his state-law damages claim. *Id.* at 45a-49a.

The district court granted summary judgment for Avondale. *Id.* at 19a-57a. As the court explained, "allowing state law tort claims would contradict the clear text of the LHWCA" and "would frustrate the LHWCA's purpose by undermining the *quid pro quo* that the statute guarantees to maritime employers and their employees." *Id.* at 45a. The court also rejected Barrosse's reliance on this Court's "twilight zone" cases, reasoning that the "twilight zone" doctrine allows only for "concurrent jurisdiction between state and federal *workers' compensation schemes*." *Id.* at 43a, 49a (emphasis added) (citation omitted). Allowing Barrosse to pursue a tort action, the court concluded, would "obstruct[ ] the purposes of the LHWCA." *Id.* at 49a (citation omitted). The district court thus held that "the LHWCA preempts" Barrosse's "state law negligence claims." *Id.*

C. Decision Below

The Fifth Circuit reversed. It reasoned that the LHWCA does not preempt Barrosse's state-law tort claims because "this is a twilight zone case," App. 8a,

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App. 2a n.1, and are named as respondents here. They are referred to collectively as "Barrosse."

and "LHWCA remedies exist concurrently with state-law remedies, *including at least some state-law tort claims*, in the twilight zone," *id.* at 9a-10a (emphasis added). The Fifth Circuit thus held that the LHWCA does not preempt any tort claims raised by any Louisiana maritime workers who are "injured in the twilight zone," "who neither seek nor obtain LHWCA compensation," and "whose injuries are not covered by [Louisiana's workers' compensation statute]." *Id.* at 14a. As to such employees, the Fifth Circuit held that they may "eschew[ ] the LHWCA entirely and . . . seek[ ] compensation in tort." *Id.*[5]

The Fifth Circuit acknowledged that its holding was in "[f]undamental tension" with the "plain text" of the LHWCA's preemption provision (33 U.S.C. § 905(a)), but believed that such tension was simply the inevitable product of "twilight-zone concurrent jurisdiction." App. 9a. The court thus held that, "despite the clear proclamation of exclusivity in the LHWCA's text," "there is no express preemption in the twilight zone." *Id.* (citing *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 363 (5th Cir. 1995)).

The Fifth Circuit also acknowledged that it was breaking with nearly all "existing caselaw." *Id.* at 10a. It recognized that "[n]umerous cases address LHWCA preemption of tort claims," *id.*, but

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[5] As the Fifth Circuit noted, Louisiana does not provide Barrosse with a state-law workers' compensation remedy because, at the time of his exposure to asbestos, Louisiana's workers' compensation scheme did not cover mesothelioma. App. 6a. Today, *every* maritime worker with a compensation remedy under the LHWCA necessarily lacks a workers' compensation remedy under state law because Louisiana makes any federal compensation remedy the applicable remedy for injured workers. *See* La. Stat. Ann. § 23:1035.2.

distinguished most of that case law on the grounds that it "concern[ed] plaintiffs attempting to obtain *both* LHWCA compensation *and* damages in tort," *id.* at 13a (collecting cases). Again relying on Fifth Circuit precedent, the court reasoned that an injured maritime employee is "bound by the provisions" of the LHWCA only if he "elect[s] the LHWCA remedy," *id.* (quoting *Hetzel*, 50 F.3d at 367).

In reaching this conclusion, the Fifth Circuit relied on the Louisiana Court of Appeals' decision in *DiBenedetto v. Noble Drilling Co.*, 23 So. 3d 400, 406 (La. Ct. App. 2009), which the Fifth Circuit deemed "persuasive," App. 16a n.13. Following *DiBenedetto*, the Fifth Circuit reasoned that, "because the LHWCA does not 'supplant[ ]' state law, Barrosse may pursue the remedy available to him under that law which, as state law applies here, is *only* a tort claim." *Id.* at 17a (citation omitted) (citing *DiBenedetto*, 23 So. 3d at 406). In the Fifth Circuit's view, "preserving concurrent jurisdiction in the twilight zone" required this result. *Id.* at 18a.

The Fifth Circuit therefore held that Barrosse's tort claims "survive preemption," and remanded the case for further proceedings in the district court. *Id.*

REASONS FOR GRANTING THE WRIT

This case readily satisfies the criteria for certiorari. *See* Sup. Ct. R. 10(a). First, the Fifth Circuit's decision below deepens a conflict among federal courts of appeals and state high courts over whether an LHWCA-covered employee may eschew an available compensation remedy under the Act and pursue a state-law damages action in tort instead. Second, the Fifth Circuit's decision adopting that election-of-remedies rule is patently wrong and

negates the LHWCA's express, unambiguous preemption of damages claims in tort. And, third, the question presented is undeniably important and cleanly presented here. Certiorari is warranted.

I. The Fifth Circuit's Decision Conflicts With The Decisions Of Numerous Other Courts

In its decision below, the Fifth Circuit joined the Louisiana courts in holding that an injured maritime worker who is entitled to LHWCA benefits may nevertheless "eschew[ ] the LHWCA entirely," App. 14a, and sue his employer for damages in tort. That decision creates a 7-2 split on the recurring question whether the LHWCA preempts state-law tort claims.

A. Four Circuits And Three State High Courts Recognize That The LHWCA Preempts State Tort Claims

1. Four federal courts of appeals have held that—consistent with its plain terms—the LHWCA preempts state-law tort claims asserted by maritime workers against their employers or fellow employees where the workers are entitled to a no-fault compensation remedy under the LHWCA.

In *Peter v. Hess Oil Virgin Islands Corp.*, the Third Circuit reversed a state-law negligence judgment on the ground that the judgment conflicted with the LHWCA's prohibition on claims in tort for injuries compensable under the LHWCA. 903 F.2d 935, 953 (3d Cir. 1990). In *Peter*, the plaintiff was injured at an oil refinery on the water's edge in the Virgin Islands. *Id.* at 937. He alleged that, even if his injuries were compensable under the LHWCA, he was nevertheless entitled to pursue his negligence claim because his injuries lay in the "twilight zone" of concurrent state and federal jurisdiction. *Id.* at 952.

The Third Circuit, in an opinion by Judge Stapleton, squarely rejected this argument. As the court explained, the existence of a "twilight zone" of concurrent jurisdiction supported only the narrow proposition that "the Virgin Islands could validly provide [the plaintiff] with a workmen's compensation remedy" for his injuries. *Id.* at 950. But "the availability of state *tort* relief" was a different matter. *Id.* (emphasis added). "Congress intended that compensation, not tort damages, were to be the primary source of relief for workplace injuries for longshoremen against their employers." *Id.* at 952. Accordingly, the "application of [state] tort law in situations like this does not further the availability of no-fault compensation for injured maritime workers; it simply obstructs the purposes of LHWCA by depriving maritime employers of their side of LHWCA's *quid pro quo*." *Id.* at 953.

Similarly, in *Langfitt v. Federal Marine Terminals, Inc.*, the Eleventh Circuit held that the LHWCA preempted an injured longshoreman's state-law negligence claims against his employer. 647 F.3d 1116, 1135 (11th Cir. 2011). The plaintiff was injured on a ship docked at a Florida pier—a place where Florida could validly provide workers' compensation benefits under the "twilight zone" doctrine. *See id.* And, just as Louisiana does not provide maritime employees like Barrosse with a state workers' compensation remedy for his injury, neither did Florida offer a state workers' compensation remedy for the plaintiff in *Langfitt*, since he was covered by the LHWCA. *See* Fla. Stat. Ann. § 440.09(d)(2) (citing 33 U.S.C. § 901 *et seq.*). Yet, unlike the Fifth Circuit below, the Eleventh Circuit held that the plaintiff was barred from seeking a tort remedy under Florida law,

since a maritime employer is "immune from all tort liability due to the [LHWCA's] exclusivity provision." *Langfitt*, 647 F.3d at 1124 (citing 33 U.S.C. § 905(a)).

The Fourth Circuit reached the same conclusion in *White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000). The plaintiff there was injured aboard a ship docked at the water's edge. *Id.* at 148. As in this case and *Langfitt*, the State where the injury occurred (Maryland) excluded from its state workers' compensation scheme employees covered by a federal workers' compensation statute, including the LHWCA. *See* Md. Code Ann., Lab. & Empl. § 9-223(a).

Nevertheless, the Fourth Circuit, in an opinion by Judge Wilkinson, held that the plain language of the LHWCA preempted the injured employee's common-law claim for negligence. *See White*, 222 F.3d at 151. As the court explained, under the LHWCA, "[c]overed employees cannot bring a personal injury action against their employer; their only remedy with regard to their employer is through the LHWCA." *Id.* at 148. Allowing the plaintiff's tort claim to proceed "would undercut the value of the worker's compensation system, which is predicated on a no-fault regime and quick recovery," and it would "harm the very workers who are injured by creating incentives for employers to distrust the workers' compensation system and to work against its operation." *Id.* at 150. The LHWCA is the plaintiff's "exclusive remedy." *Id.* at 151.

The Second Circuit has upheld the same bright line against state tort claims. *See Tilcon N.Y., Inc. v. Volk (In re Buchanan Marine, L.P.)*, 874 F.3d 356 (2d Cir. 2017). In *Buchanan* the plaintiff was injured while inspecting a barge docked on the water's edge. *Id.* at 362. He brought a personal injury action under New York law against his employer. *Id.* at 362-63.

The Second Circuit held that the LHWCA preempted his state-law claims. *Id.* at 368-69. It explained that the LHWCA's "scheduled no-fault compensation structure is the *exclusive* remedy for injured workers against their employers." *Id.* at 363 (citing 33 U.S.C. § 905(a)). Because the defendant was plaintiff's employer at the time of the injury, the employer was "liable exclusively for [the plaintiff's] workers' compensation payments under the LHWCA," and was otherwise "immune from suit under 33 U.S.C. § 905(a)." *Id.* at 368. The Second Circuit therefore held that the plaintiff's state-law claims against his employer "were properly dismissed." *Id.*

2. Three state courts of last resort have likewise held that the LHWCA preempts tort claims asserted by maritime employees as to injuries compensable under the LHWCA. In *Talik v. Federal Marine Terminals, Inc.*, the plaintiff was injured at a dock in Cleveland and was eligible for workers' compensation benefits under both the LHWCA and Ohio law. *See* 885 N.E.2d 204, 205, 212 (Ohio 2008). After he obtained compensation benefits under the Ohio scheme, the plaintiff filed a tort claim against his employer for the injury. *Id.* at 205-06.[6] Ohio law permitted this tort claim. But the Supreme Court of Ohio, recognizing that the plaintiff's tort claim interfered with the LHWCA's provision of a "uniform compensation system," held that the LHWCA preempted it. *Id.* at 212 (quoting *Director, Office of*

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[6] After the decision in *Talik*, the Ohio General Assembly amended Ohio's workers' compensation statute to exclude from Ohio workers' compensation coverage any injuries that are covered under the LHWCA. *See* 2008 Ohio Laws File 120 (Am. Sub. H.B. 562) (codified at Ohio Rev. Code Ann. § 4123.54(I)).

Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297, 318 n.26 (1983)).

Likewise, in *Hill v. Knapp*, the Maryland high court held that the LHWCA preempts state-law tort claims asserted by an injured maritime worker against his co-employee. 914 A.2d 1193, 1195 (Md. 2007). In *Hill*, the injured worker was eligible for LHWCA compensation but declined to file for LHWCA benefits. *See id.* Instead, he pursued a state-law negligence claim. *Id.* The court held that the LHWCA preempted this tort claim. As it explained, the LHWCA expressly provides that the LHWCA's compensation remedy is "the exclusive remedy to an employee when he is injured . . . by the negligence or wrong of any other person or persons in the same employ," *id.* at 1197 (quoting 33 U.S.C. § 933(i)), and "[a]llowing a negligence claim is in direct conflict with Congress' intent . . . to permit a uniform compensation system for injured maritime workers," *id.* at 1205. Thus, the court held that the LHWCA preempted the injured worker's tort claim, "even where [he] did not file a LHWCA claim." *Id.* at 1203.

And in *Fillinger v. Foster*, the Alabama Supreme Court held that the LHWCA preempts state-law negligence claims asserted by an injured maritime worker against his coworkers. 448 So. 2d 321, 326 (Ala. 1984). The injured employee in *Fillinger* sought state workmen's compensation benefits and then filed a state tort claim against his manager for failing to provide proper safety equipment and instruction. *Id.* at 323. Citing Louisiana case law, the plaintiff argued that the LHWCA did not preempt his claim because "concurrent jurisdiction exists between federal and state *remedies* and . . . [a] plaintiff is not barred by the LHWCA *unless* he elects to pursue

remedies under the LHWCA." *Id.* The Alabama Supreme Court disagreed, holding that the "twilight zone" doctrine permits only "concurrent jurisdiction for pursuit of benefits under a state's *workmen's compensation schemes*," not "common law suits for damages against co-employees." *Id.* at 326 (emphasis added). And the court further held that the "exclusivity provisions" of the LHWCA plainly bar the assertion of a state-law negligence claim. *Id.*

In these jurisdictions, Barrosse's state-law damages claim would be preempted by the LHWCA.

B. The Fifth Circuit's Decision Below Joins The Louisiana Courts' Outlier Position On The Question Presented

The Louisiana state courts have carved out an outlier position on the question presented by permitting maritime workers to "elect" between LHWCA benefits and state-law tort suits against their employers and co-employees. That rule was long confined to the Louisiana state courts—and criticized by others as "patently erroneous." 1 Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 7:4 n.8 (6th ed. 2022 update, Westlaw) (citing *Fillinger*, 448 So. 2d at 325). Yet in the decision below, the Fifth Circuit explicitly embraced Louisiana's outlier position. App. 16a-17a & n.13.

1. For nearly four decades, the Louisiana state courts have refused to honor the plain terms of the LHWCA's express preemption provision by holding that injured maritime workers may "elect" between LHWCA benefits and claims in tort for the same injury. That approach rests on a basic misreading of this Court's "twilight zone" decisions. Thus, in *Poche v. Avondale Shipyards, Inc.*, the Louisiana Supreme

Court held that, because the LHWCA "and state compensation[ ] statutes could operate concurrently," any state tort claims not inconsistent with state workers' compensation law may be asserted with respect to an injury that is compensable under the LHWCA—so long as the plaintiff has not "elected to pursue his remedies under the federal compensation statute." 339 So.2d 1212, 1221 (La. 1976).

In *Poche*, Louisiana's high court, applying this election-of-remedies approach, distinguished between two sets of plaintiffs who had sued Avondale and Avondale's executives under a state-law negligence theory. One set of plaintiffs—the widow and children of an injured Avondale worker—"declined to accept [LHWCA] benefits when they were offered by Avondale Shipyards"; the court held that these plaintiffs were therefore permitted to pursue state-law tort claims against Avondale's executives. *Id.* Another plaintiff was "receiving compensation payments" under the LHWCA; the court held that this plaintiff "elected to pursue his remedies under" the LHWCA, and was therefore barred from pursuing tort claims against Avondale's executives. *Id.*

The Louisiana Supreme Court's decision in *Poche*—allowing injured maritime workers to "elect" between no-fault compensation under the LHWCA and state tort remedies for the same injury—has been rejected by other courts and denounced as "patently erroneous." Schoenbaum, *supra*, § 7:4 n.8 (citing *Fillinger*, 448 So. 2d at 325); *see also, e.g.*, *Becnel v. Anco Insulations, Inc.*, No. 08-315, 2011 WL 304866, at *2-3 (E.D. Pa. Jan. 28, 2011); *In re All Maine Asbestos Litig.*, 589 F. Supp. 1563, 1569 (D. Me. 1984) (citing *Poche* and rejecting "the doctrine of election of remedies [as] completely out of place as between state

and Longshore remedies") (citation omitted); *Hill*, 914 A.2d at 1203 n.11 (holding that "[w]e are not persuaded by *Poche* . . . ."); *Fillinger*, 448 So. 2d at 325 (noting that *Poche*'s invocation of the "election of remedies doctrine" has been "severely criticized").

Yet Louisiana has continued to permit injured maritime workers to assert tort claims against their employers and co-employees for injuries that are compensable under the LHWCA. Thus, in *DiBenedetto v. Noble Drilling Co.*, the Louisiana Court of Appeals—relying on *Poche*—concluded that because the LHWCA "supplement[s], rather than supplant[s], state compensation law," the LHWCA cannot "exclude remedies offered by other jurisdictions." 23 So. 3d 400, 405 (La. Ct. App. 2009). On that ground, it held that an injured maritime worker who does "not seek benefits under the LHWCA," but "choos[es] instead to file a tort claim in state court" against his maritime employers may do so because "the federal compensation scheme is not his exclusive remedy." *Id.* at 404-05; *see also, e.g.*, *Bourgeois v. A.P. Green Indus.*, 841 So. 2d 902, 907, 910-11 (La. Ct. App. 2003) (rejecting argument that state tort claims against Avondale and its executives were preempted by the LHWCA (citing *Poche*)).

2. The Fifth Circuit below expressly followed *DiBenedetto*, *see* App. 16a-17a & n.13—and the Louisiana courts' outlier election-of-remedies rule—by holding that an injured maritime worker covered by the LHWCA may recover on a state tort claim so long as he has "eschewed the LHWCA," *id.* at 14a. In reaching that conclusion, the Fifth Circuit sought to distinguish the contrary precedents identified above on various grounds, but none withstands scrutiny.

First, the Fifth Circuit sought to distinguish the numerous cases in other circuits holding state tort claims preempted by the LHWCA on the ground that they "concern[ed] plaintiffs attempting to obtain *both* LHWCA compensation *and* damages in tort." *Id.* at 13a (discussing *Buchanan*, *Langfitt*, *White*, and others). That distinction is consistent with Louisiana's election-of-remedies approach. But it flouts the reasoning of the federal appellate cases discussed above. Those cases squarely hold that it is an employer's *status* as such, and consequent liability to an "injured employee for the [LHWCA's] compensation benefits," that makes the employer "*immune from all tort liability*" under the LWHCA. *Langfitt*, 647 F.3d at 1124 (emphasis added); *see also Buchanan*, 874 F.3d at 368 ("Buchanan is Volk's employer and ordinarily would be *immune from suit* under [the LHWCA]." (emphasis added)).

It would have been senseless for these courts to have said that a maritime employer is "immune" from tort liability if such immunity could be overridden at the sole discretion of an injured employee based on an election of remedies. As these courts recognize, it is not the *disbursement of LHWCA benefits* that preempts state tort claims; rather, it is the simple fact that the *employee has LHWCA coverage* that preempts state tort claims. *See White*, 222 F.3d at 148 ("Covered employees cannot bring a personal injury action against their employer . . . ."). This position is also compelled by the plain text of the LHWCA.

Second, while the Fifth Circuit recognized that the Third Circuit's decision in *Peter* was "potentially persuasive authority" for the proposition that the LHWCA bars state tort claims as to maritime employees who have not filed claims for LHWCA

benefits, App. 12a n.10, it nevertheless attempted to distinguish *Peter* on the ground that the employee in that case had access to a state workers' compensation scheme in which the employer participated, *id.* at 11a-12a & n.10. Thus, the Fifth Circuit reasoned that *Peter* is inapplicable "where, as here, an employer has obtained coverage under the LHWCA but *not* under a state or territorial statute." *Id.* at 12a. But that result-driven reading of *Peter* is untenable.

In *Peter* the Third Circuit (per Judge Stapleton) recognized that, under this Court's "twilight zone" cases, the "Virgin Islands could provide a *workmen's compensation remedy*" to injured longshoremen. 903 F.2d at 950 (emphasis added). But as the Third Circuit explained, *Peter* dealt "not with an award of compensation benefits *but with a common law action for negligence*." *Id.* (emphasis added). And, as the court continued, "there is a substantial difference between liability for a fixed and determinable compensation award and liability for unlimited damages in tort"; allowing damages claims in tort would "obstruct[ ] the purposes of the LHWCA by depriving maritime employers of their side of the LHWCA's *quid pro quo*." *Id.* at 952-53. Rejecting the plaintiff's reliance on this Court's "twilight zone" cases (*Sun Ship* and *Hahn*), the court held that, because the plaintiff and employer were subject to the LHWCA, the LHWCA "and the Supremacy Clause bar the Virgin Islands from imposing negligence liability on [the employer]." *Id.* at 953.

In so holding, the Third Circuit also recognized that, where an *employer declines to participate* in an available state workers' compensation scheme, the state scheme may penalize the employer by giving the injured employee a tort remedy, and the LHWCA does

not forbid that result. *See id.* at 952-53 (citing *Hahn*, 358 U.S. at 273). As the court explained, "negligence liability in [that] context is entirely consistent with the scheme imposed by LHWCA," since Congress included "a similar sanction in [the] LHWCA." *Id.* at 953; *see supra* at 6. But as was true for the employer in *Peter,* Avondale participates in both the LHWCA and Louisiana's workers' compensation schemes.[7] Accordingly, there is no basis for allowing a tort claim to proceed "as a sanction for the employer's failure to secure coverage." 903 F.2d at 953.[8]

The bottom line is that, despite the Fifth Circuit's (and Barrose's) result-driven attempts to draw fine factual distinctions between the cases, there is a fundamental conflict among federal and state courts on whether the LHWCA permits an injured maritime employee to "eschew[ ]" (App. 14a) an available workers' compensation remedy under the LHWCA and pursue a state-law damages claim instead. That square conflict of authority warrants review.

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[7] *See* Statement Uncontested Facts ¶ 2, D. Ct. Dkt. 86-2; La. Workforce Comm'n, Worker's Compensation: For Employers, https://www.laworks.net/WorkersComp/OWC_EmployerMenu.asp (last visited Sept. 21, 2023) (Authorized Self-Insured Company Listing) (listing Avondale as a self-insured participant in the Louisiana workers' compensation system).

[8] As noted, the Louisiana legislature has decided *not* to offer a state workers' compensation remedy to any employee already covered by the LHWCA. *See supra* at 8, 11 n.5. But there is no basis to penalize an employer for *that* legislative decision, and that is a common legislative choice—one operating in the background of many of the cases discussed above. *See, e.g.*, *Langfitt*, 647 F.3d at 1124; Fla. Stat. Ann. § 440.09(d)(2).

II. The Decision Below Is Clearly Wrong

The reason the split in this case is so lopsided is that the merits are so straightforward: The LHWCA unambiguously bars maritime employees with an available LHWCA remedy from "recover[ing] damages from [his] employer at law or in admiralty." 33 U.S.C. § 905(a). The Fifth Circuit recognized as much, but it declined to give effect to this plain text based on a mistaken understanding of this Court's "twilight zone" precedents. App. 8a-9a. That was error. The Court's "twilight zone" precedents simply recognize a need for concurrent federal and state *workers' compensation remedies* at the water's edge; they do not override the LHWCA's express preemption of state *damages* actions. *See Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001). The LHWCA preempts Barrosse's fault-based tort claims for damages at law.

A. The Decision Below Flouts The Unambiguous Text Of The LHWCA

On the text of the LHWCA, this is an easy case. The LHWCA generally provides that every maritime employer "shall be liable for and shall secure the payment to his employees" of certain compensation prescribed by statute, 33 U.S.C. § 904(a), and that such compensation "shall be payable irrespective of fault as a cause for the injury," *id.* § 904(b). This no-fault compensation scheme provides maritime laborers and their families with a guaranteed recovery in the event of injury or death.

Then—in a section of the statute entitled "Exclusiveness of liability"—the statute expressly provides that the "liability of an employer prescribed in section 904 of this title shall be exclusive and in

place of all other liability of such employer to the employee . . . and anyone *otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death*." 33 U.S.C. § 905(a) (emphasis added).[9] That preemption rule admits of only one exception: "if an employer fails to secure payment of compensation as required by this chapter," then an employee (or his representative) may "maintain an action at law or in admiralty for damages on account of such injury or death." *Id.*

The LHWCA thus expressly preempts the negligence suit at issue here. It is undisputed that Barrosse is entitled to worker's compensation benefits under LHWCA § 904(a), and that Avondale has secured payment under the Act. Barrosse CA5 Br. 24-25, Dkt. 36. Yet Barrosse seeks damages for the allegedly negligent failure of Avondale and its executives to "ensure a safe workplace" for Avondale's employees. App. 21a; *see* Pet. 10-15, D. Ct. Dkt. 1-1. He thus seeks to hold his employer and co-employees liable for "damages . . . at law" in connection with injuries arising from their alleged negligence, 33 U.S.C. § 905(a); *see id.* § 933(i). The LHWCA expressly preempts his action for damages.

Section 905(a)'s express preemption provision should have been the beginning—and end—of this case. As Justice Scalia observed for the Court, the LHWCA requires maritime employers to make no-fault compensation available to their injured employees, and "expressly preempts all other claims" an injured employee might raise against his employer

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[9] The LHWCA elsewhere *repeats* this "exclusive" liability rule in preempting tort liability against the co-employees of an injured maritime worker as well. 33 U.S.C. § 933(i).

and co-employees, except for "some *state workers' compensation* claims." *Norfolk Shipbuilding,* 532 U.S. at 818 (emphasis added).

B. The Decision Below Fundamentally Misconstrues This Court's Precedents

The Fifth Circuit itself observed that "the LHWCA's exclusivity language would seem to express congressional intent to preempt state law claims" like Barrosse's. App. 8a-9a (quoting *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 363 (5th Cir. 1995)). But the court declined to give effect to that language on the ground that there is a "[f]undamental tension between the plain text of the Act and twilight-zone concurrent jurisdiction." *Id.* at 9a. This was mistaken—there is no such tension. As explained, the "twilight zone" cases simply recognize concurrent federal and state jurisdiction over *workers' compensation* remedies. They do not—and could not—erase the LHWCA's unambiguous, express preemption of state damages action in tort.[10]

As discussed, this Court developed its "twilight zone" doctrine to resolve a "jurisdictional dilemma" for injured maritime workers who were not sure whether they should seek compensation under a state workers' compensation law or under the LHWCA and might forfeit a remedy by seeking compensation in

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[10] Indeed, consistent with this Court's twilight-zone precedents, the text of the LHWCA itself recognizes that employees may obtain relief under state workers' compensation laws, stating that "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter *pursuant to any other workers' compensation law* . . . shall be credited against any liability imposed by this chapter." 33 U.S.C. § 903(e) (emphasis added).

the wrong forum. *Davis v. Department of Labor & Indus. of Wash.*, 317 U.S. 249, 255-56 (1942). These decisions, "in effect, gave an injured waterfront employee an election to recover compensation under either the Longshoreman's Act *or the Workmen's Compensation Law of the State* in which the injury occurred." *Hahn*, 358 U.S. at 273 (emphasis added). So, as this Court has repeatedly explained, the "twilight zone" doctrine ensures that "federal jurisdiction [will] coexist with *state compensation laws*" with respect to maritime injuries. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 722 (1980) (emphasis added); *see Norfolk Shipbuilding*, 532 U.S. at 818 (citing *Sun Ship*, 447 U.S. at 723-26).

The decision below rests on the fundamental misapprehension that this Court's body of "twilight zone" precedents require concurrent jurisdiction even when a State declines to adopt a separate workers' compensation remedy for maritime workers injured at the water's edge. Given that no state-law workers' compensation remedy is available to Barrosse under Louisiana law, the Fifth Circuit reasoned that he must be entitled to pursue a damages action in tort instead. *See* App. 6a-7a, 14a n.11. As the Fifth Circuit put it, if Barrosse is limited to his available workers' compensation remedy under the LHWCA, "[s]tate law is nowhere to be found." *Id.* at 10a. In the Fifth Circuit's view, this result would lead to the LHWCA "'supplant[ing]' rather than 'supplement[ing]' state law by effectively eliminating the twilight zone and contradicting the Supreme Court's instruction in *Sun Ship*, 447 U.S. at 720." *Id.*

But that is a blatant misreading of *Sun Ship*. As this Court explained in *Sun Ship*, the LHWCA "supplements, rather than supplants, *state*

compensation law." 447 U.S. at 719-20 (emphasis added). Here, however, the Fifth Circuit invoked this Court's twilight-zone cases to allow Barrosse to bring a *damages* action in place of a compensation remedy. That not only disregards this Court's reasoning in *Sun Ship*; it also disregards Louisiana's express policy choice to rely on the LHWCA's compensation remedy for injured employees (instead of adopting its own workers' compensation remedy for such workers). *See* La. Stat. Ann. § 23:1035.2. In this situation, federal and state law are truly concurrent in identifying the same compensation remedy.

The Fifth Circuit also pointed to this Court's decision in *Hahn*. App. 10a-11a. In *Hahn*—a 2-page per curiam opinion—the Court held that a maritime worker could pursue "a negligence action for damages" under Oregon law. 358 U.S. at 273. But as the Fifth Circuit itself recognized, the employer in *Hahn* had declined to participate in the Oregon workers' compensation scheme, and the Oregon Workmen's Compensation Act explicitly provided that an employee could maintain a negligence action in that situation—as a compensation remedy. *See id.*; *see* App. 11a. In this case, by contrast, Barrosse's claims are freestanding tort claims. App. 11a (noting that Barrosse's "tort claims . . . are *not* included in the [Louisiana Workers' Compensation Act]"). And, more fundamentally, the LHWCA itself explicitly permits an employee to pursue a damages action when an employer declines to participate in an available compensation scheme. *Supra* at 6. As the Third Circuit explained in *Peter* in distinguishing *Hahn,* subjecting an employer to "negligence liability in this

context is [thus] entirely consistent with the scheme imposed by LHWCA." 903 F.2d at 953.[11]

In the end, even the Fifth Circuit recognized that *Hahn* is distinguishable and so does not compel the result the Fifth Circuit reached in this case. App. 11a. Yet the Fifth Circuit nevertheless held that *Hahn* somehow supports a broad-based rule that employees who have an available compensation remedy under the LHWCA may simply elect to pursue a state-law damages action instead. *Id.* at 16a-18a. That is a massive extension of *Hahn*—which specifically explained that the "twilight zone" doctrine "gave an injured waterfront employee an election to recover compensation either under the Longshoreman's Act *or the Workmen's Compensation Law of the State* in which the injury occurred." *Hahn*, 358 U.S. at 273 (emphasis added). The Fifth Circuit's decision turns *Hahn*'s narrow ruling based on the peculiarities of Oregon worker's compensation scheme into a wrecking ball that dismantles the express preemption provision at the heart of the LHWCA.

The Fifth Circuit's clear misreading of this Court's precedents warrants review. Only this Court can

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[11] The Fifth Circuit attempted to distinguish *Peter* on the ground that the employer in *Peter* had "obtained workmen's compensation coverage . . . under both [the] LHWCA and the state or territorial statute." App. 11a-12a (alteration in original) (quoting 903 F.2d at 953). But Avondale also participates in both the LHWCA and the Louisiana workers' compensation scheme. *See supra* at 23 & n.7. Unlike *Hahn,* therefore, there is no basis in this case for penalizing the employer for not participating in an available compensation scheme. The reason Barrosse lacks a no-fault workers' compensation remedy under Louisiana law is *Louisiana*'s own decision to make its state-compensation remedy unavailable to employees who are covered by the LHWCA's compensation remedy. *See supra* at 23 & n.8.

clarify that its own cases do not override the LHWCA's express preemption provision, and the Court should grant certiorari and say so here.

C. The Fifth Circuit's Error Strikes At The Heart Of The LHWCA

Having taken the momentous step of overriding the LHWCA's express preemption provision, the Fifth Circuit attempted to downplay the significance of its ruling by suggesting that it would apply only to a "small" category of cases meeting five factors. App. 14a. But the factors it recited narrow nothing. And no matter how the Fifth Circuit (and respondent) try to slice it, the Fifth Circuit's error goes at the heart of the LHWCA and the *quid pro quo* on which it rests.

The first three factors cited by the Fifth Circuit—(1) maritime workers (2) injured in the twilight zone (3) in Louisiana—cabin nothing. The Fifth Circuit's decision covers all employees subject to the question presented in Louisiana—thousands—and the Fifth Circuit itself recognized that the reasoning of its ruling extends beyond Louisiana wherever "a plaintiff's choice are the LHWCA or state-law tort." *Id.* at 14a n.11. The fourth allegedly limiting factor—restricting the availability of damages claims to employees who forgo an LHWCA remedy—will nearly always be met in the wake of this decision, since the Fifth Circuit's ruling creates a nearly risk-free option to pursue tort claims. *See* 33 U.S.C. § 913(d) (tolling accrual of LHWCA claim during pendency of state-law action for damages where such action is dismissed based on available LHWCA remedy). And the final factor—injuries not subject to a state compensation remedy—provides no limit either: as discussed, Louisiana—like many other States—has eliminated a

stand-alone state compensation remedy for all injuries covered by the LHWCA. *See supra* at 8.

In other words, despite the Fifth Circuit's attempt to "clad" its ruling in "sheep's clothing," "this wolf comes as a wolf." *Morrison v. Olson,* 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

III. The Question Presented Is Important, And Warrants Review In This Case

The importance of the question presented also weighs heavily in favor of certiorari. The question presented goes to the heart of the LHWCA—a vital workers' compensation statute that guarantees the payment of billions of dollars in no-fault compensation to injured maritime workers and their families every year. *See supra* at 4-5 & n.1. The sheer number of LHWCA cases decided by this Court—and the Fifth Circuit—underscores the importance of this statutory scheme and recurring nature of the issue.

The decision below all but negates the LHWCA by vitiating the quid pro quo at the center of the Act. As Judge Wilkinson has explained, depriving employers of the benefits of that quid pro quo means vitiating the LHWCA's system of "no-fault [liability] and quick recovery." *White*, 222 F.2d at 150. If injured maritime workers were able to freely pursue tort claims notwithstanding the LHWCA's exclusivity provisions, that result "would harm the very workers who are injured by creating incentives for employers to distrust the workers' compensation system and to work against its operation." *Id.* The Fifth Circuit's erroneous decision below commands that unfortunate outcome. Certiorari is warranted so that this Court may protect the basic operation of the statute.

The need for review is all the more heightened in this case because Louisiana is a crucial forum for the adjudication of maritime workplace injuries. Between June 2021 and June 2022, over one quarter of all maritime personal-injury cases filed in federal district courts nationwide were filed in the district courts of Louisiana; during that time, more maritime personal injury cases were filed in the federal district courts of Louisiana than were filed in all of the district courts of the First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits—combined.[12] If there is any forum where the LHWCA's proper application is most important, it is Louisiana. Indeed, Avondale estimates that the decision below will spawn hundreds of potential tort actions against it in Louisiana alone, all in derogation of the LHWCA's express preemption provision. Far from "*sui generis*" (*id.*), the decision below will therefore interfere with the LHWCA in countless personal-injury cases if it is allowed to take root.

But the disruptive consequences of the decision below will not be confined to Louisiana. The Fifth Circuit's reasoning would directly support the assertion of a state-law tort claim in *any* case where the plaintiff is injured in the "twilight zone" but lacks a state compensation remedy. *See id.* And that will almost always be the case for maritime workers on the water's edge, because most States bar recovery under their own state workers' compensation schemes where recovery is available under a federal workers'

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[12] *See* U.S. Courts, Table C-3—U.S. District Courts—Civil Statistical Tables For The Federal Judiciary (June 30, 2022), https://www.uscourts.gov/statistics/table/c-3/statistical-tables-federal-judiciary/2022/06/30.

compensation scheme (such as the LWHCA). *See supra* at 8; *see also, e.g.*, Haw. Rev. Stat. § 386-7; 820 Ill. Comp. Stat. 305/1; Okla. Stat. tit. 85A, § 2; Or. Rev. Stat. § 656.027(4); W. Va. Code § 23-2-1(b)(9).

Indeed, the Fifth Circuit itself recognized that this situation "may arise under other states' laws." App. 14a n.11. And it is easy to see why. The Fifth Circuit's decision provides a roadmap for plaintiffs in any State that adopts the LHWCA's compensation remedy as a default to seek damages in tort notwithstanding the availability of a compensation remedy under the LHWCA. This Court should take up this question now before further damage is done.

Finally, this case presents an ideal vehicle for addressing the question presented. Avondale built and retrofitted numerous ships in Louisiana according to government contracts requiring the installation of asbestos; it therefore faces the prospect of hundreds of copycat claims based on alleged exposure to asbestos during the time period at issue in this case, or other alleged wrongs.[13] At the same time, the decision below was entirely focused on the question presented, *see id.* at 8a ("Here, the sole issue is preemption, which 'is a question of law.'" (citation omitted)), and that question was carefully addressed by the Fifth Circuit and the district court in decisions reaching opposite conclusions. There are no obstacles to its resolution in this Court, and all would benefit from this Court's immediate resolution of the issue.

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[13] Avondale estimates that, as to Avondale alone, there are at least 60 pending cases presenting similar claims. And the Fifth Circuit has stayed the briefing in one case before it pending a decision by this Court on whether to grant review here. *See Sentilles v. Huntington Ingalls*, No. 22-30428 (5th Cir.).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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October 3, 2023

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APPENDIX

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[70 F.4th 315]

**UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT**

Lynn BARROSSE; Raegan Holloway; Makenzie Stricker, Plaintiffs—Appellants

v.

HUNTINGTON INGALLS INCORPORATED, formerly known as Northrop Grumman Shipbuilding, Incorporated, formerly known as Northrop Grumman Ship Systems, Incorporated, formerly known as Avondale Industries, Incorporated, Defendant—Appellee.

No. 21-30761

FILED June 12, 2023

Before Richman, Chief Judge, and Ho and Engelhardt, Circuit Judges.

Kurt D. Engelhardt, Circuit Judge:

Federal law is the "supreme Law of the Land." U.S. Const. art. VI. When a state law looks like it might conflict with a federal statute or regulation, courts consider preemption to see if the state law in question must yield. *Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257, 1261 (5th Cir. 1992). Here, Defendant-Appellee argues that Plaintiffs-Appellants' state-law tort claims are preempted by the federal Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act"). But,

under the specific facts of this case and applicable Supreme Court caselaw, they are not. We therefore REVERSE and REMAND.

I

A

Ronald Barrosse[1] worked for Defendant-Appellee Huntington Ingalls (formerly "Avondale") as a shipyard electrician from February 1969 to June 1977. In March 2020, Barrosse was diagnosed with mesothelioma. Following his diagnosis, he filed a state-law tort suit in the Civil District Court for the Parish of Orleans alleging that Avondale, among other defendants, caused Barrosse to contract mesothelioma by exposing him to asbestos in a negligent manner. Because Barrosse primarily worked on United States Navy ships when he was exposed, Avondale removed the case to federal district court under the federal officer removal statute. *See* 28 U.S.C. § 1442; *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (en banc). Barrosse never claimed benefits under the LHWCA, which provides a no-fault compensation remedy to injured workers. 33 U.S.C. § 904.

Avondale moved for summary judgment. Relevant here, Avondale argued that Barrosse's state-law tort claims were preempted by the LHWCA because they directly conflicted with and frustrated the purposes of the Act. The district court agreed and held that the claims are preempted. *Barrosse v. Huntington Ingalls*

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[1] Barrosse unfortunately passed away mid-litigation, so his survivors substituted themselves as Plaintiffs-Appellants. To avoid confusion, they will collectively be referred to herein as "Barrosse."

Inc., 563 F. Supp. 3d 541, 559 (E.D. La. 2021). Barrosse appeals.

B

While cases about statutes typically begin with the text, recounting the development of federal maritime compensation law is necessary to understand the nuances presented in this case. In 1917, the Supreme Court "declared that States were constitutionally barred from applying their compensation systems to maritime injuries." *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 717, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980) (citing *S. Pac. Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917)). After failed efforts to delegate compensation matters to the states, Congress passed the LHWCA in 1927 to provide compensation for maritime workers. *Id.* The original LHWCA expressly limited its application to those cases where state worker's compensation laws did not apply. *Id.* at 717–18, 100 S.Ct. 2432.

But that limited application caused problems because it was unclear where "the boundary at which state remedies gave way to federal remedies" was. *Id.* at 718, 100 S.Ct. 2432. Injured workers had to guess whether to file a claim under state or federal law, and "the price of error was unnecessary expense and possible foreclosure from the proper forum." *Id.* The Supreme Court responded with the creation of the so-called "twilight zone," an area of concurrent jurisdiction that applies on a case-by-case basis. *Id.* (discussing *Davis v. Dep't of Labor*, 317 U.S. 249, 253–56, 63 S.Ct. 225, 87 L.Ed. 246 (1942)).[2] Notably, it did

[2] The district court noted that "there appears to be no genuine [dispute] of material fact that this is a twilight zone

so over a strong dissent which argued that the plain language of the Act "left no room for an overlapping dual system" of concurrent jurisdiction. *Davis*, 317 U.S. at 261, 63 S.Ct. 225 (Stone, C.J., dissenting). According to the dissent, the majority interpreted the LHWCA to "not mean what it says"—that "[i]f there is liability under the federal act, that liability is exclusive." *Id.*

Nevertheless, the twilight zone prevailed. Among other cases, the Supreme Court decided *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273, 79 S.Ct. 266, 3 L.Ed.2d 292 (1959) (per curiam). In *Hahn*, the plaintiff brought a state-law tort claim. *Id.* Because the plaintiff was in the twilight zone and compensation "could have been, and in fact was, validly provided by [s]tate law,"[3] the LHWCA "did not bar" the claim. *Id.* (quotation marks omitted). Like *Davis, Hahn* was decided over a dissent which argued that the twilight zone's regime of concurrent jurisdiction extended only to "a state workmen's compensation act or the [LHWCA]," and not to torts. *Id.* at 274, 79 S.Ct. 266 (Stewart, J., dissenting).

"In 1972, Congress . . . extend[ed] the LHWCA landward beyond the shoreline of the navigable

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case," and the parties do not contest that conclusion on appeal. *Barrosse*, 563 F. Supp. 3d at 556.

[3] This particular phrase is in reference to the pre-1972 version of the LHWCA, which extended LHWCA coverage only if the state does not—and could not—validly provide recovery. *See Newport News Shipbuilding & Dry Dock Co. v. Dep't of Labor*, 583 F.2d 1273, 1277 (4th Cir. 1978) (discussing the language and its subsequent removal). The district court held that the post-1972 version of the LHWCA applies here, and Barrosse does not challenge that holding on appeal. *Barrosse*, 563 F. Supp. 3d at 548–52.

waters of the United States." *Sun Ship*, 447 U.S. at 719, 100 S.Ct. 2432. Rather than "resurrecting the jurisdictional monstrosity" of pre-*Davis* longshore compensation law, the Supreme Court reaffirmed the twilight zone because it remained unclear where federal jurisdiction ended and state jurisdiction began, even though that point "is fixed upon land." *Id.* at 719–20, 100 S.Ct. 2432. The upshot is that despite the text of the Act expressly providing that employer liability for injuries falling under its ambit is "exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty," the Supreme Court has limited that exclusivity to cases outside the so-called twilight zone. 33 U.S.C. § 905(a).

C

The pertinent development of Louisiana compensation law is shorter, but just as relevant in this case of concurrent jurisdiction. Louisiana passed the applicable version of its Workers' Compensation Act ("WCA") in 1952. *See* La. Rev. Stat. § 23:1031.1 (1952). Like most workers' compensation statutes, the WCA gave an injured worker a remedy that was "exclusive of all other rights and remedies." *Id.* The pertinent portion of the statute took a schedule approach, only covering the diseases listed in the statutory text. *See Rando v. Anco Insulations Inc.*, 16 So. 3d 1065, 1072-73 (La. 2009). If a disease was not listed, an afflicted worker could only bring a tort suit as neither the compensation nor the exclusivity provisions of the WCA applied. *Id.* at 1071.

Barrosse is one of those workers. Mesothelioma, the disease Barrosse suffered from, was not covered by the WCA until it was amended in 1975. *Id.; see*

Williams v. Lockheed Martin Corp., 990 F.3d 852, 864 (5th Cir. 2021). When survivors of a decedent bring state-law claims "based on asbestos exposure," we apply "the law in effect when the exposure occurred." *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457, 464 (5th Cir. 2016), *overruled on other grounds Latiolais*, 951 F.3d at 296 n.9.[4] Barrosse's claims are based on alleged exposure, as mesothelioma injuries in Louisiana are deemed to occur "at the time of significant exposure to asbestos, not later when [the] disease . . . manifest[s] itself." *Rando*, 16 So. 3d at 1083; *see Williams*, 990 F.3d at 865. Barrosse claims that his significant exposure first occurred vis-à-vis Avondale in 1969. Thus, the applicable version of the WCA does not cover the injury he suffered. *See Rando*, 16 So. 3d at 1071.[5] As a result, Barrosse's *only* state-law remedy is a tort suit. *Id.*

The upshot of these parallel events and their timing[6] is that once Barrosse discovered his injury, he

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[4] We do not address the district court's interpretation of *Savoie* or its holding that the post-1972 LHWCA applies to this dispute. Those issues are not presented here.

[5] The plaintiff in *Rando* was injured in 1970, but the 1952 WCA applied. *Rando*, 16 So. 3d at 1072.

[6] Condensing these developments, the following timeline emerges:

- 1927: Congress passes the LHWCA, providing workers' compensation remedies to maritime workers.
- 1942: The Supreme Court decides Davis, creating a regime of concurrent jurisdiction in twilight zone cases.
- 1952: Louisiana passes the applicable version of the WCA, which neither covers mesothelioma nor prohibits tort claims based on mesothelioma injuries.

could seek relief under *either* the LHWCA *or* state tort law.[7] The question presented in this case is whether state tort law is preempted by the LHWCA in the twilight zone under those circumstances.

II

We review the district court's grant of summary judgment de novo and affirm if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Renfroe v. Parker*, 974 F.3d 594, 599 (5th Cir.

• 1959: The Supreme Court decides Hahn, permitting a state-law tort claim in a twilight zone case when that tort claim was included in the state-law regime.

• 1969: Barrosse begins working for Avondale and suffers injury in the twilight zone for purposes of his present claims.

• 1972: Congress amends the LHWCA, expanding its coverage landward.

• 1975: Louisiana amends the WCA to cover mesothelioma injuries.

• 1980: The Supreme Court decides Sun Ship, reaffirming Davis and its twilight-zone progeny after the 1972 LHWCA amendment.

• 2020: Barrosse is diagnosed with mesothelioma and brings this suit.

[7] We do not address whether a plaintiff who brings a tort claim could subsequently obtain relief under the LHWCA. On at least one occasion, the Supreme Court has sanctioned LHWCA compensation *after* the beneficiary received state-law compensation, but only when the state payments were credited against LHWCA relief. *See Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 131, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962) (upholding compensation payments under both the LHWCA and state law where the state payments were credited against the LHWCA payments so "no impermissible double recovery [wa]s possible"). Whether that holding extends to tort remedies is a question we leave for another day.

2020). Here, the sole issue is preemption, which "is a question of law." *Baker v. Farmers Elec. Co-op., Inc.*, 34 F.3d 274, 278 (5th Cir. 1994). "Preemption of state law may be the result of either express preemption, field preemption, or conflict preemption." *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 389 (5th Cir. 2005).

Express preemption applies "[w]here Congress expresses an explicit intent to preempt state law." *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 363 (5th Cir. 1995). "Conflict preemption applies (1) where complying with both federal law and state law is impossible; or (2) where the state law creates an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 200 (5th Cir. 2013) (quotation omitted). Courts may not conduct "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives [because] such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *Chamber of Com. v. Whiting*, 563 U.S. 582, 607, 131 S.Ct. 1968, 179 L.Ed.2d 1031 (2011) (quotation omitted). For a state law to be conflict preempted, "a high threshold must be met." *Id.* (quotation omitted).

III

Avondale argues that both express and conflict preemption bar Barrosse's claims.

A

Express preemption does not apply. There is no dispute that this is a twilight zone case. *Id.* at 556. In the twilight zone, "although the LHWCA's exclusivity language would seem to express

congressional intent to preempt state law, the Supreme Court has found that total preemption was not intended." *Hetzel*, 50 F.3d at 363.[8] Thus, despite the clear proclamation of exclusivity in the LHWCA's text that prohibits any liability "at law or in admiralty" for injuries covered by the Act, there is no express preemption here. 33 U.S.C. § 905(a).

Fundamental tension between the plain text of the Act and twilight-zone concurrent jurisdiction has been apparent and controversial from the very beginning. Indeed, *Davis* itself created the twilight zone over a dissent which argued that the twilight zone "is plainly not permissible" and "controverts the words of the statute," which "left no room for an overlapping dual system" of concurrent jurisdiction. *Davis*, 317 U.S. at 261–64, 63 S.Ct. 225 (Stone, C.J., dissenting). Avondale would have us agree, but a dissent is just that. Perhaps time and Supreme Court reconsideration will ultimately conclude that the twilight zone's creation was beyond "judicial competence," *id.* at 260, 63 S.Ct. 225, but until then, there is no express preemption in the twilight zone. *Hetzel*, 50 F.3d at 363.

B

Neither does conflict preemption apply under these circumstances. The Supreme Court has recognized that LHWCA remedies exist concurrently

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[8] It is apparent from context that the *Hetzel* panel was discussing express preemption despite using the phrase "total preemption." *See Hetzel*, 50 F.3d at 363. We clarify this point only to ensure that *Hetzel*'s imprecise language is not confused with "complete" preemption, an entirely different doctrine. *See Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 585 n.2 (5th Cir. 2022).

with state-law remedies, including at least some state-law tort claims, in the twilight zone. Consistent with that binding recognition, we cannot find that the limited and unusual circumstances that gave rise to Barrosse's state-law tort claims pose "an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Janvey*, 712 F.3d at 200. A contrary holding would, at least as far as Barrosse and similarly situated plaintiffs are concerned, have the LHWCA "supplant" rather than "supplement" state law by effectively eliminating the twilight zone and contradicting the Supreme Court's instruction in *Sun Ship*, 447 U.S. at 720, 100 S.Ct. 2432. Indeed, Avondale concedes that if Barrosse's claims are preempted, his "exclusive remedy for any injury he suffered working for Avondale was—and is—available under the LHWCA." State law is nowhere to be found.

We begin our analysis by noting that existing caselaw is of little assistance. Numerous cases address LHWCA preemption of tort claims, but none address the situation before us—an injured employee, in the twilight zone, who declines to invoke the LHWCA but, under state law, is limited to a tort claim for relief.[9]

The most on-point case is *Hahn*, but *Hahn* neither prohibits nor endorses the claims at issue here. *Hahn* does not endorse claims like Barrosse's because it did

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[9] Some district court cases address a similar fact pattern but neither acknowledge nor analyze the complications presented by a concurrent-jurisdiction regime where the only state-law remedy is a tort claim. *See, e.g., Hulin v. Huntington Ingalls, Inc.*, 2020 WL 6059645, at *5–7 (E.D. La. Oct. 14, 2020).

not address a freestanding tort claim. The state statute in *Hahn* permitted employers to "elect[ ] to reject" the statute's "automatic compensation provisions," in which case an injured employee could bring "a negligence action for damages." *Hahn*, 358 U.S. at 273, 79 S.Ct. 266. Thus, *Hahn* only sanctioned a state-law tort claim that was expressly contemplated by state statute. Here, Barrosse's tort claims arise under state law because they are *not* included in the relevant statute, i.e., the WCA. Barrosse cannot obtain automatic compensation for mesothelioma, but neither does the WCA's exclusivity provision apply to any tort claims he might bring for that injury. *Hahn* does not prohibit claims like Barrosse's either. Nothing in *Hahn* holds that tort claims are *only* permissible when expressly contemplated by state compensation statutes. *Hahn* clearly opens the door to at least some tort claims, but it is ultimately inapposite.

Avondale would nevertheless have us read *Hahn* to limit state-law tort claims in the twilight zone to claims "provided for by state workers' compensation law" as a sanction for failing to secure coverage. But *Hahn* doesn't say that, and the lone federal court of appeals case that Avondale cites for that proposition is distinguishable. In *Peter v. Hess Oil Virgin Islands Corp.*, the Third Circuit considered an injured worker's negligence action under Virgin Islands law. 903 F.2d 935, 936–37 (3d Cir. 1990). The employer had obtained coverage under *both* the LHWCA *and* the relevant Virgin Islands workers' compensation act. *Id.* at 953. The court held that "where an employer has obtained workmen's compensation coverage for its LHWCA employee under both [the] LHWCA and the state or territorial statute," tort

claims are preempted. *Id.* On its own terms, *Peter* does not apply where, as here, an employer has obtained coverage under the LHWCA but *not* under a state or territorial statute. Thus, contrary to Avondale's assertion at oral argument, permitting Barrosse's claims under these circumstances does not create a circuit split.[10]

Other cases likewise do not bear on the question before us. Some permit claims against alleged third-party tortfeasors, not employers. *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 819–20, 121 S.Ct. 1927, 150 L.Ed.2d 34 (2001) (permitting general maritime negligence claim against a third party); *McLaurin v. Noble Drilling (US) Inc.*, 529 F.3d 285, 292–93 (5th Cir. 2008) (holding that plaintiff did not have a vessel negligence claim but could bring a state-law tort claim against the vessel owner as a third-party tortfeasor). Others address injuries that occurred on the Outer Continental Shelf, which is outside the twilight zone. *Hebron v. Union Oil Co.*, 634 F.2d 245, 246 (5th Cir. 1981) (per curiam); *Gaudet v. Exxon Corp.*, 562 F.2d 351, 354 (5th Cir. 1977); *see LeSassier v. Chevron USA, Inc.*, 776 F.2d 506, 509 (5th Cir. 1985) (noting that Outer Continental Shelf claims do not involve the twilight zone or any other "confusing concurrent jurisdictional realm").

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[10] The district court supposed that Barrosse "could have sought compensation under Louisiana's Workers' Compensation Act." *Barrosse*, 563 F. Supp. 3d at 556. If that were true, *Peter* would be applicable and potentially persuasive authority. But the district court's assumption was incorrect. *See Rando*, 16 So. 3d at 1071.

Most of Avondale's cited cases concern plaintiffs attempting to obtain *both* LHWCA compensation *and* damages in tort. *See Hetzel*, 50 F.3d at 367; *Levene v. Pintail Enters., Inc.*, 943 F.2d 528, 530 (5th Cir. 1991) (plaintiff filed suit under the LHWCA); *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083, 1084 (5th Cir. 1987) (plaintiff received LHWCA benefits from his nominal employer then sued his borrowing employer); *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 148 (4th Cir. 2000) (same); *Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 1119 (11th Cir. 2011) (same); *In re Buchanan Marine, L.P.*, 874 F.3d 356, 362 (2d Cir. 2017) (plaintiff received LHWCA benefits but filed a tort suit anyways). But an injured worker cannot eat his cake and have it too. Once a worker "receives LHWCA benefits," he "may not sue his employer under state law for any additional compensatory damages." *Jowers v. Lincoln Elec. Co.*, 617 F.3d 346, 357 (5th Cir. 2010). Instead, once a worker "elect[s] the LHWCA remedy, he is bound by the provisions of the Act," including the exclusivity provision of § 905(a). *Hetzel*, 50 F.3d at 367. That comports with the Supreme Court's instruction that § 905(a)'s exclusivity provision "gains meaning only after a litigant has been found to occupy one side or the other of the doubtful jurisdictional line." *Davis*, 317 U.S. at 256, 63 S.Ct. 225; *see Sun Ship*, 447 U.S. at 722 n.4, 100 S.Ct. 2432 (clarifying that, in the twilight zone, § 905(a) "does not exclude remedies offered by other jurisdictions"); *see also Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 131, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962) (upholding compensation payments under both the LHWCA and state law where the state payments were credited against the LHWCA payments, so "no impermissible

double recovery [wa]s possible"); *Hahn*, 358 U.S. at 273, 79 S.Ct. 266 (holding that the exclusivity provision did not "prevent[ ] recovery" via a state-law tort claim). Barrosse did not engage in double-dipping. He has eschewed the LHWCA entirely and is only seeking compensation in tort.

Thus, even considering the cases raised by the parties and the district court, this is a *sui generis* case. We resolve this issue of first impression by holding that, on these facts and pursuant to binding jurisprudential authority, Barrosse's state-law tort claims are not preempted. As a preliminary matter, we emphasize that the category of claims we address here is small. Our holding concerns only: 1) maritime workers; 2) injured in the twilight zone; 3) in Louisiana; 4) who neither seek nor obtain LHWCA compensation; and 5) whose injuries are not covered by the relevant version of the WCA.[11]

Recall that "[c]onflict preemption applies (1) where complying with both federal law and state law is impossible; or (2) where the state law creates an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Janvey*, 712 F.3d at 200. But we may not conduct "a freewheeling judicial inquiry" to find such an obstacle, and the threshold for finding conflict preemption is "high." *Whiting*, 563 U.S. at 607, 131 S.Ct. 1968. This dispute concerns only the second species of conflict preemption, so we look to whether

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[11] The situation presented here, where a plaintiff's choices are the LHWCA or state-law tort, may arise under other states' laws. Whether such claims are preempted should be determined on a case-by-case and state-by-state basis, so our holding is limited.

the operation of state tort law in this case "creates an unacceptable obstacle" to the purpose of the LHWCA. *Janvey*, 712 F.3d at 200. And, in the twilight zone, the Supreme Court has interpreted the LHWCA to avoid "resurrecting the jurisdictional monstrosity that existed" prior to *Davis*. *Sun Ship*, 447 U.S. at 720, 100 S.Ct. 2432. Thus, we consider conflict preemption with the understanding that the LHWCA "supplements, rather than supplants, state compensation law" and runs "concurrently with state remedies." *Id.*

The purpose that Barrosse's tort claims must not unacceptably obstruct is the "balance" between employer and employee wherein "[e]mployers relinquish[ ] their defenses to tort actions in exchange for limited and predictable liability," while "[e]mployees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Morrison-Knudsen Constr. Co. v. Dep't of Labor*, 461 U.S. 624, 636, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983) (citations omitted). Permitting Barrosse's claims upsets that balance to some extent. But conflict preemption is not triggered by ordinary incongruities or minor annoyances, only by "unacceptable obstacle[s]." *Janvey*, 712 F.3d at 200. Here, the Supreme Court has expressly carved out space for concurrent operation of often-asymmetrical state and federal law in the twilight zone, lessening any concern that obstacles posed by state law are "unacceptable." *Id.*; *see Sun Ship*, 447 U.S. at 723–25, 100 S.Ct. 2432 (noting that "state remedial schemes" often differ from the LHWCA).

Indeed, if tort claims themselves visited any inherent frustration on Congress' goals sufficient to

trigger conflict preemption, the Supreme Court would have sided with the dissent in *Hahn*, which argued that permitting tort claims in the twilight zone would "frustrate th[e] very purpose" of the LHWCA. *Hahn*, 358 U.S. at 275, 79 S.Ct. 266 (Stewart, J., dissenting). But it did not. Given the limited circumstances permitting Barrosse's claims under Louisiana law, they pose little, if any, greater obstacle to congressional purpose than the category of tort claims permitted by *Hahn*. The only difference is that the Oregon legislature in *Hahn expressly* permitted negligence claims under certain *circumstances*, while the Louisiana legislature *implicitly* permitted negligence claims for certain *injuries* by excluding those injuries from the expressed schedule of covered diseases in the WCA.

What is more, that distinction simply reflects the differing policy choices of different states, a feature of any concurrent-jurisdiction regime. Accepting Avondale's arguments is, therefore, tantamount to eliminating concurrent jurisdiction in cases like Barrosse's.[12] We do not think that mesothelioma's exclusion from the pre-1975 WCA's schedule of covered diseases "mandate[s] the result that [Barrosse] can only seek recovery under the federal compensation scheme." *DiBenedetto v. Noble Drilling Co.*, 23 So. 3d 400, 406 (La. Ct. App. 2009).[13] Instead,

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[12] As noted above, Avondale effectively concedes this point.

[13] Although *DiBenedetto* is a state court case and not binding here, we find it persuasive as it is the *only* case that we or the parties are aware of that addresses the factual scenario before us head on. In *DiBenedetto*, the plaintiff was injured in Louisiana, in the twilight zone, before 1975, was diagnosed with mesothelioma, did not seek LHWCA benefits, and brought a tort suit. *Id.* at 404–05. Like Avondale, the defendants argued that

because the LHWCA does not "supplant[ ]" state law, *Sun Ship*, 447 U.S. at 720, 100 S.Ct. 2432, Barrosse may pursue the remedy available to him under that law which, as state law applies here, is *only* a tort claim. *See DiBenedetto*, 23 So. 3d at 406.

The Supreme Court has already rejected the principal arguments to the contrary. Writing separately, Justices in *Davis* and *Hahn* criticized the twilight zone as illogical, contrary to the text, beyond the power of the judiciary to create, and unfair to employers who are deprived of the benefits of the LHWCA's quid pro quo and must instead secure compensation coverage under both federal and state law. *Hahn*, 358 U.S. at 275, 79 S.Ct. 266 (Stewart, J., dissenting) (characterizing the twilight zone as "illogic"); *Davis*, 317 U.S. at 259, 63 S.Ct. 225 (Frankfurter, J., concurring) (same); *id.* at 260–62, 63 S.Ct. 225 (Stone, C.J., dissenting) (arguing that recognizing the twilight zone is not "within judicial competence . . . [,] controverts the words of the statute," and "imposes an unauthorized burden on the employer" who will be subject to liability under state law). These 80-year-old objections have yet to overcome the twilight zone. We cannot hold that they do.

In sum, our conclusion that conflict preemption does not apply is supported by the existence of concurrent jurisdiction and the acceptable incongruity inherent therein, the Supreme Court's consistent rejection of arguments resisting that regime, the LHWCA's role of supplementing rather than supplanting state law, the limited category of

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the LHWCA preempted his claims. *Id.* at 404. The court held that it did not. *Id.* at 405.

claims at issue here, and the similarity between these claims and those the Supreme Court has already permitted in *Hahn*.

IV

The Supreme Court has recognized a twilight zone of concurrent jurisdiction, permitted by the LHWCA, in cases like this one. We are duty-bound to interpret and apply the law consistent with that guidance. Here, that means preserving concurrent jurisdiction in the twilight zone and avoiding the resurrection of a "jurisdictional monstrosity" by allowing Barrosse's state-law tort claims to proceed. *Sun Ship*, 447 U.S. at 720, 100 S.Ct. 2432. We reiterate the highly unusual fact pattern that brought Barrosse to this point and reemphasize that our holding is narrow. It is only through the peculiar nature and application of Louisiana's pre-1975 worker's compensation statute, combined with the other characteristics of this case listed above, that Barrosse's claims survive preemption. We accordingly REVERSE and REMAND for further proceedings consistent with this opinion.

[563 F. Supp. 3d 541]

UNITED STATES DISTRICT COURT
E.D. LOUISIANA

Ronald BARROSSE,

v.

HUNTINGTON INGALLS INCORPORATED, et al.

CIVIL ACTION NO. 20-2042-WBV-JVM

Signed 09/24/2021

SECTION: D (1)

ORDER AND REASONS

WENDY B. VITTER, UNITED STATES DISTRICT JUDGE

Before the Court is a Motion for Summary Judgment filed by defendants, Huntington Ingalls Incorporated (f/k/a Northrop Grumman Shipbuilding, Inc., f/k/a Northrop Grumman Ship Systems, Inc., f/k/a Avondale Industries, Inc.) ("Avondale") and Lamorak Insurance Company (f/k/a OneBeacon America Insurance Company) (collectively, the "Avondale Interests").[1] Plaintiffs oppose the Motion,[2] as does defendant, ViacomCBS Inc. f/k/a CBS Corporation f/k/a Viacom Inc., successor by merger to CBS Corporation f/k/a Westinghouse Electric

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[1] R. Doc. 86. Lamorak Insurance Company was sued as the alleged insurer of Avondale Industries, Inc. and some of its executive officers. R. Doc. 1-1 at p. 20; R. Doc. 77 at pp. 13, 20; R. Doc. 77-2.

[2] R. Doc. 101.

Corporation ("Westinghouse").[3] The Avondale Interests filed one Reply brief in response to the two Opposition briefs.[4] After careful review of the parties' memoranda, the record, and the applicable law, the Motion is **GRANTED** and Plaintiffs' negligence claims against the Avondale Interests are **DISMISSED WITH PREJUDICE**.

I. FACTUAL BACKGROUND

This is an asbestos exposure case. On or about May 11, 2020, Ronald J. Barrosse filed a Petition for Damages in Civil District Court for the Parish of Orleans, Louisiana, against The Cajun Company, Eagle, Inc., Huntington Ingalls, Incorporated, The McCarty Corporation, OneBeacon America Insurance Company, and Taylor-Seidenbach, Inc.[5] Barrosse alleged that he was exposed to asbestos and/or asbestos-containing products during the course of his employment at Avondale Industries, Inc. and Union Carbide between 1969 and 1979, and that such products were produced, installed, removed, maintained, sold, and/or distributed by the defendants.[6] Barrosse alleged that he had suffered physical and mental injuries as a result of his exposure to asbestos, including malignant mesothelioma, which he "has only recently, within one year, discovered."[7]

Pertinent to the instant Motion, Barrosse alleged that he was exposed to asbestos while employed by

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3 R. Doc. 114.

4 R. Doc. 124.

5 R. Doc. 1-1, *generally*, and at p. 20.

6 *Id.* at ¶ 4.

7 *Id.* at ¶¶ 4-5, 12-14.

Avondale Industries, Inc. and working as an electrician helper/electrician at Avondale Shipyard from February 3, 1969 through June 10, 1977.[8] Barrosse testified that during his employment, he worked on commercial vessels and United States Navy Destroyer Escorts on Wet Dock 1 in the Main Yard at Avondale Shipyard.[9] In the Petition, Barrosse asserted a negligence claim against the Avondale Interests for failing to provide and/or ensure a safe workplace for their employees, including Barrosse, free of hazardous concentrations of asbestos and asbestos-containing dust.[10]

The Avondale Interests removed the matter to this Court on July 17, 2020, asserting that the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1441 because the action arises "under the Constitution, laws or treaties of the United States," and under the federal officer removal statute, 28 U.S.C. § 1442, because Avondale Industries, Inc. and its executive officers were acting under an officer of the United States when it built Destroyer Escorts for the United States Navy pursuant to a contract between Avondale Industries, Inc. and the United States Government.[11] The Avondale Interests claim that Barrosse testified during his May 27, 2020 deposition that he was exposed to asbestos dust at Avondale Shipyard from working around other crafts using asbestos-containing insulation, cloth, and mastics while working aboard Destroyer Escorts built

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8 *Id.* at ¶¶ 1, 4, 26 and at p. 19.

9 R. Doc. 1-2 at pp. 2-6.

10 *Id.* at ¶¶ 25-41.

11 R. Doc. 1 at Introductory Paragraph.

for the Navy.[12] Barrosse testified during his deposition that he was diagnosed with mesothelioma in early March 2020.[13]

Barrosse passed away on October 13, 2020,[14] and this Court allowed Barrosse's surviving spouse and children, Lynn Barrosse, Raegan Holloway and Makenzie Striker, to substitute themselves as plaintiffs in this case on January 5, 2021.[15] The Court also allowed Lynn Barrosse, Raegan Holloway and Makenzie Striker ("collectively, Plaintiffs") to file a First Supplemental and Amended Petition/Complaint (the "Amended Complaint") on January 5, 2021, in which Plaintiffs assert a survival action claim pursuant to La. Civ. Code art. 2315.1.[16] In the Amended Complaint, Plaintiffs assert new allegations regarding Barrosse's off-site exposure to asbestos through his contaminated work clothes. Plaintiffs allege that Barrosse's clothing was contaminated with asbestos dust while working at Avondale Shipyard, that he wore those clothes home and, as a result, was exposed to asbestos in his car and in his home through his work clothes.[17] Plaintiffs further allege that, "Mr. Barrosse has not asserted a Longshore and Harbor Workers' Compensation Act claim."[18] As in the original Complaint, Plaintiffs assert a negligence claim against the Avondale

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12 *Id.* at ¶ 3 (*citing* R. Doc. 1-2 at pp. 2-15).

13 R. Doc. 86-4 at p. 2.

14 R. Doc. 67

15 R. Docs. 69 & 76.

16 R. Docs. 76 & 77; R. Doc. 77 at ¶ 4.

17 R. Doc. 77 at ¶ 6.

18 *Id.* at ¶ 7 (emphasis in original).

Interests, alleging that the Avondale Interests failed to provide and/or ensure a safe workplace for their employees, including Barrosse, free of hazardous concentrations of asbestos and asbestos-containing dust.[19]

The Avondale Interests filed the instant Motion for Summary Judgment on January 13, 2021, seeking dismissal of Plaintiffs' negligence claims against them based upon the exclusivity provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 905(a) and 933(i) (the "LHWCA").[20] The Avondale Interests argue that the LHWCA preempts Plaintiffs' state law negligence claims against them because Louisiana law directly conflicts with §§ 905(a) and 933(i) and frustrates the underlying purpose of those provisions of the LHWCA.[21] Plaintiffs argue that their negligence claims are not preempted by the pre-1972 version of the LHWCA, which was in effect at the time of Barrosse's asbestos exposure, and that Barrosse's off-site exposure to asbestos is not covered by the LHWCA.[22] Plaintiffs also assert that retroactively applying the 1972 amendments to the LHWCA to divest Plaintiffs of their negligence cause of action violates their due process rights.[23] Westinghouse likewise asserts that the Motion should be denied because the LHWCA does not preempt Plaintiffs' negligence claims against

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19 *Id.* at ¶¶ 32-49.

20 R. Doc. 86.

21 R. Doc. 86-1 at pp. 1-2.

22 R. Doc. 101 at pp. 2-3.

23 *Id.* at pp. 30-32.

the Avondale Interests.[24] In response, the Avondale Interests maintain that the LHWCA preempts Plaintiffs' negligence claims against them, and further assert that application of the LHWCA would not result in an unconstitutional divestment of Plaintiffs' rights.[25]

II. LEGAL STANDARD

Summary judgment is appropriate where there is no genuine disputed issue as to any material fact, and the moving party is entitled to judgment as a matter of law.[26] When assessing whether a dispute regarding any material fact exists, the Court considers "all of the evidence in the record but refrain[s] from making credibility determinations or weighing the evidence."[27] While all reasonable inferences must be drawn in favor of the nonmoving party, a party cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions or "only a scintilla of evidence."[28] Instead, summary judgment is appropriate if a reasonable jury could not return a verdict for the nonmoving party.[29]

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[24] R. Doc. 114.

[25] R. Doc. 124.

[26] Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986).

[27] *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398-99 (5th Cir. 2008) (citations omitted).

[28] *Id.* (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)) (internal quotation marks omitted).

[29] *Delta & Pine Land Co.*, 530 F.3d at 399 (citing *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505).

If the dispositive issue is one on which the moving party will bear the burden of proof at trial, the moving party "must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial."[30] The nonmoving party can then defeat summary judgment by either submitting evidence sufficient to demonstrate the existence of a genuine dispute of material fact, or by "showing that the moving party's evidence is so sheer that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party."[31] If, however, the nonmoving party will bear the burden of proof at trial on the dispositive issue, the moving party may satisfy its burden by merely pointing out that the evidence in the record is insufficient with respect to an essential element of the nonmoving party's claim.[32] The burden then shifts to the nonmoving party who must go beyond the pleadings and, "by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"[33]

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[30] *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991).

[31] *Id.* at 1265.

[32] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

[33] *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. at 2553 (*quoting* Fed. R. Civ. P. 56(e)).

III. ANALYSIS

A. The Applicable Version of the LHWCA.

The LHWCA is a federal workers' compensation statute that provides covered maritime workers with "medical, disability, and survivor benefits for work-related injuries and death."[34] Before 1972, the LHWCA covered workers on "navigable waters of the United States (including any dry dock)."[35] In 1972, however, Congress "extend[ed] the LHWCA landward beyond the shoreline of the navigable waters of the United States."[36] In doing so, "the Longshoremen's Act became, for the first time, a source of relief for injuries which had always been viewed as the province of state compensation law."[37]

The parties in this case dispute whether the pre-1972 or post-1972 version of the LHWCA applies to Plaintiffs' negligence claims against the Avondale Interests. The Avondale Interests argue that the date of disease manifestation, not the date of exposure, determines which version of the LHWCA applies.[38]

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[34] *MMR Constructors, Inc. v. Dir., Office of Workers' Comp. Programs*, 954 F.3d 259, 262 (5th Cir. 2020).

[35] *Id.* (*citing* 33 U.S.C. § 903(a) (pre-1972)).

[36] *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 719, 100 S.Ct. 2432, 2436, 65 L.Ed.2d 458 (1980) (*citing* Pub. L. No. 92-576, 86 Stat. 1251, amending 33 U.S.C. § 903(a)).

[37] *Sun Ship, Inc.*, 447 U.S. at 719, 100 S.Ct. at 2436.

[38] R. Doc. 86-1 at p. 5 (citing *Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1031 (5th Cir. 1985); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1290 (9th Cir. 1983); *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434 (9th Cir. 1990); *Newport News Shipbuilding and Dry Dock Co. v. Harris*, 934 F.2d 548, 551-52 (4th Cir. 1991); *Ins. Co. of N. Am. v. U.S. Dep't of Labor, Office of Workers Comp. Programs*, 969 F.2d 1400 (2d

Because Barrosse's mesothelioma manifested on March 17, 2020, the Avondale Interests claim the post-1972 version of the LHWCA applies and preempts Plaintiffs' negligence claims.[39] In contrast, Plaintiffs argue that the LHWCA does not apply to Barrosse's off-site asbestos exposure, and that the pre-1972 version of the LHWCA applies to Barrosse's exposure at Avondale Shipyard because asbestos exposure claims are governed by the law in effect when the exposure occurred.[40]

In *Hulin v. Huntington Ingalls, Inc.*, another Section of this Court squarely addressed whether the pre-1972 or post-1972 version of the LHWCA applies in a factually similar asbestos exposure case.[41] The plaintiff in *Hulin* worked at Avondale Shipyard from January 1954 to May 1973, and alleged that he was diagnosed with lung cancer in July 2019 as a result of regular exposures to asbestos at Avondale Shipyard prior to 1972.[42] As in this case, the Avondale defendants in *Hulin* argued that the plaintiff's state law negligence claims were preempted by the LHWCA, and the parties disputed whether the pre-

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Cir. 1992); *Hulin*, 2020 WL 6059645, at *3-4; *Pitre v. Huntington Ingalls, Inc.*, Civ. A. No. 17-7029, 2018 WL 2010026, at *3 (E.D. La. Apr. 30, 2018)).

39 R. Doc. 86-1 at pp. 5-6.

40 R. Doc. 101 at pp. 21-23 (citing *Savoie v. Huntington Ingalls, Inc.*, 817 F.3d 457 (5th Cir. 2016), overruled on other grounds by *Latiolais v. Huntington Ingalls, Incorporated*, 951 F.3d 286 (5th Cir. 2020); *Adams v. Ethyl Corp.*, 838 Fed.Appx. 822 (5th Cir. 2020)).

41 Civ. A. No. 20-924, 2020 WL 6059645 (E.D. La. Oct. 14, 2020) (Vance, J.).

42 *Id.* at *1 (citations omitted).

1972 or post-1972 version of the LHWCA applied.[43] Citing the Fifth Circuit's decision in *Castorina v. Lykes Bros. S.S. Co.*, the *Hulin* court reasoned that, "Courts use the 'date of injury' to determine which version of the LHWCA applies."[44] The *Hulin* court further explained that, "In the context of long-latency diseases arising from asbestos exposure, the Fifth Circuit in *Castorina* held that manifestation, not exposure, determines the date of injury."[45]

In *Castorina*, the plaintiff's exposure occurred between 1965 and 1972, but his disease (asbestosis) manifested in 1979.[46] Relying upon judicial authority from outside this Circuit, the Fifth Circuit held that, "[i]n cases of occupational diseases with long latency periods, the trend is clearly toward the application of the time of manifestation rule."[47] The Fifth Circuit reasoned that, "The [LHWCA] is not concerned with pathology, but with industrial disability; and a disease is no disease until it manifests itself."[48] The Fifth Circuit found additional support for its conclusion in the 1984 amendments to the LHWCA, evidencing Congress's intent in its express adoption

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[43] *Id.* at *2.

[44] *Id.* at *3 (citing *Castorina*, 758 F.2d 1025, 1029 (5th Cir. 1985)).

[45] *Hulin*, Civ. A. No. 20-924, 2020 WL 6059645 at *3 (citing *Castorina*, 758 F.2d at 1031).

[46] *Castorina*, 758 F.2d at 1027-28.

[47] *Id.* at 1031 (quoting *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1290 (9th Cir. 1983)) (internal quotation marks omitted).

[48] *Castorina*, 758 F.2d at 1031 (quoting *Grain Handling Co. v. Sweeney*, 102 F.2d 464 (2d Cir. 1939)) (internal quotation marks omitted).

of the manifestation rule.[49] In the 1984 amendments to the LHWCA, Congress included the following definition of "injury" for occupational diseases:

> [I]n the case of an occupational disease which does not immediately result in a disability or death, an injury shall be deemed to arise on the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the disease . . . .[50]

The Fifth Circuit concluded that, "Although no such language appears in the 1972 amendments, it is clear that Congress has now adopted the 'date of manifestation' approach to determining the date of injury under the [LHWCA] . . . ."[51]

Relying upon *Castorina* and the 1984 amendments, the *Hulin* court concluded that the plaintiff's injury in that case was deemed to arise on the date it manifested, which was 2019.[52] As such, the *Hulin* court applied the LHWCA as it existed in 2019, the date of the plaintiff's injury.[53] In this case, Barrosse's injury, malignant mesothelioma,

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[49] *Castorina*, 758 F.2d at 1031 (*citing* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 28(g)(1), 98 Stat. 1639, 1655 (September 28, 1984)).

[50] Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 28(g)(1), 98 Stat. 1639 (September 28, 1984).

[51] *Castorina*, 758 F.2d at 1031.

[52] *Hulin v. Huntington Ingalls, Inc.*, Civ. A. No. 20-924, 2020 WL 6059645, at *3 (E.D. La. Oct. 14, 2020).

[53] *Id.*

manifested at the time of his diagnosis in March 2020.[54] For the same reasons set forth in *Hulin*, this Court concludes that the post-1972 version of the LHWCA, which was in effect when the disease manifested, applies here. The Court further rejects Plaintiffs' argument that more recent decisions from the Fifth Circuit, including *Savoie v. Huntington Ingalls, Inc.*[55] and *Adams v. Ethyl Corporation*,[56] require this Court to apply the version of the LHWCA that was in effect at the time of Barrosse's exposure. The Court acknowledges that in *Savoie*, the Fifth Circuit held that:

> But as a survival action allows survivors to bring the claims the decedent could have asserted were he still alive, survival claims based on asbestos exposure are governed by the law in effect when the exposure occurred. *See, e.g.*, *Rando v. Anco Insulations Inc.*, 16 So.3d 1065, 1072 (La. 2009) (explaining that "law effective on the date of [ ] significant exposure to asbestos" applies to claim alleging occupational asbestos exposure) (internal quotations omitted). Because Savoie worked at the shipyard for almost half a century prior to Louisiana's abolition of strict liability, *that pre-1996 law governs*.[57]

Plaintiffs implore this Court to construe *Savoie* as holding that the version of the LHWCA on the date of exposure applies in this case. That request ignores

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54 *See*, R. Doc. 101 at p. 1.

55 817 F.3d 457 (5th Cir. 2016).

56 838 Fed.Appx. 822 (5th Cir. 2020).

57 817 F.3d at 464 (emphasis added).

the italicized language above, which is a clear reference to *state law* and Louisiana's abolishment of strict liability in 1996.[58] It is evident to the Court that *Savoie* only addressed which version of Louisiana law, not which version of the LHWCA, applied to the plaintiff's claims in that case.

The Court likewise rejects as baseless Plaintiffs' argument that the Fifth Circuit held in *Adams v. Ethyl Corporation* that the law in effect at the time of exposure determines which version of the LHWCA applies to an asbestos claim. The Court recognizes that the *Adams* Court held, "When a case involves long-latency occupational diseases like mesothelioma, the law in effect at the time of the exposure applies."[59] As in *Savoie,* however, it is clear that in *Adams*, the Fifth Circuit was referring to the state law applicable to the strict liability claims at issue in that case. This is evident from the Fifth Circuit subsequently stating that, "Here, the applicable law is the Louisiana Civil Code article 2317 in effect between 1955 and 1959," the alleged dates of exposure.[60] Thus, like *Savoie,* the Fifth Circuit in *Adams* only addressed which version of Louisiana law applied to the strict liability claims at issue, *not* which version of the LHWCA applied to such claims.

Nonetheless, the Court recognizes that the Fifth Circuit made additional comments in *Savoie* regarding the law applicable to asbestos exposure

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58 *Id.* ("Strict liability was abolished in Louisiana in 1996.") (quotation marks omitted) (citing authority).

59 838 Fed.Appx. 822, 829 (5th Cir. 2020) (citing *Watts v. Georgia-Pac. Corp.*, 2012-0620 (La. App. 1 Cir. 9/16/13), 135 So.3d 53, 59).

60 *Adams*, 838 Fed.Appx. at 825, 829.

claims in the context of the defendants' burden of proving removal was appropriate under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). In determining whether removal was proper, the Fifth Circuit mentioned that the defendants had alleged two "colorable" federal defenses, the federal contractor defense and a preemption defense under the LHWCA.[61] The Fifth Circuit, however, remanded the case for the district court to determine whether the defenses were colorable. In doing so, the Fifth Circuit specified that, "As only the survival claims alleging strict liability satisfy the first two requirements of federal officer removal, it is only defenses to those claims—that is, *defenses existing under the law that existed when Savoie was exposed to asbestos*—that should be considered in determining whether the shipyard asserts colorable federal defenses."[62] In a footnote, the Fifth Circuit further explained that,

> This means that Defendant's preemption defense is governed by the law at the time Savoie was exposed to asbestos, which occurred before the Louisiana Worker's Compensation Act was amended in 1989 to eliminate any concurrent coverage between that Act and the federal Longshore and Harbor Workers' Compensation Act. *See* La.Rev.Stat. 23:1035.2 (providing that "[n]o compensation shall be payable in respect to the disability or death of any employee covered by . . . the Longshoremen's and Harbor Worker's

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61 *Savoie*, 817 F.3d at 466 (citations omitted).

62 *Id.* (emphasis added).

> Compensation Act, or any of its extensions . . .").[63]

The Court agrees with the *Hulin* court's assessment that the foregoing language constitutes non-binding dicta, as the *Savoie* court explicitly stated that it did not decide whether the defendants had asserted a colorable federal preemption defense.[64] The Court further finds the footnote reference to the 1989 amendment to the Louisiana Worker's Compensation Act, which eliminated concurrent jurisdiction between that statute and the LHWCA, indicates that the Fifth Circuit was alluding to the applicable version of state law rather than the applicable version of the LHWCA. Finally, the *Savoie* court does not mention its prior ruling in *Castorina*,[65] or otherwise suggest that the foregoing language represents a departure from the prior ruling. It is well established that one Fifth Circuit panel cannot overrule another without an intervening change in the law.[66] No party has provided, nor has the Court found, any support for the claim that the Fifth Circuit overruled its earlier decision in *Castorina* through the dicta in *Savoie*.

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[63] *Id.* at n.6.

[64] *Hulin v. Huntington Ingalls, Inc.*, Civ. A. No. 20-924, 2020 WL 6059645, at *3 (E.D. La. Oct. 14, 2020); *Savoie*, 817 F.3d at 466 ("As the district court never had the opportunity to consider these defenses are colorable, we will remand to allow it to do so in the first instance.") (citations omitted).

[65] *Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1031 (5th Cir. 1985).

[66] *United States v. Darrington*, 351 F.3d 632, 634 (5th Cir. 2003); *Tigner v. Cockrell*, 264 F.3d 521, 526 (5th Cir. 2001) (citing *Tucker v. Johnson*, 242 F.3d 617, 621 n.6 (5th Cir. 2001)).

B. Application of the Post-1972 Version of the LHWCA to Barrosse's Injuries.

Since 1972, the LHWCA provides workers compensation benefits to covered employees who meet the Act's "status" and "situs" requirements.[67] To meet the status requirement, an employee must be "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . ."[68] According to the Fifth Circuit, the status test is satisfied when the person is "directly involved in an ongoing shipbuilding operation."[69] To meet the situs requirement, "disability or death [must have] result[ed] from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."[70]

1. Barrosse's Asbestos Exposure at Avondale Shipyard.

The Avondale Interests argue that Barrosse's asbestos exposure at Avondale Shipyard satisfies the status test because he worked as an electrician on

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[67] *New Orleans Depot Servs. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 389 (5th Cir. 2013).

[68] 33 U.S.C. § 902(3).

[69] *Ingalls Shipbuilding Corp. v. Morgan*, 551 F.2d 61, 62 (5th Cir. 1977) (per curiam) (quoting *Jacksonville Shipyards Inc. v. Perdue*, 539 F.2d 533, 544 (5th Cir. 1976)) (internal quotation marks omitted).

[70] 33 U.S.C. § 903(a).

vessels being constructed and retrofitted.[71] The Avondale Interests assert that Barrosse pulled cables and installed equipment throughout the vessels, contributing to the construction and repair process. The Avondale Interests argue that this work clearly amounts to direct involvement in a shipbuilding operation and qualifies Barrosse as a "harborworker" under the LHWCA. They note that the court in *Hulin* specifically recognized that the term "harborworker" in 33 U.S.C. § 902(3) includes electricians engaged in shipbuilding and repair.[72] Plaintiffs do not dispute these assertions. In fact, Plaintiffs do not address either the status or situs requirement of the LHWCA with respect to Barrosse's alleged exposure on the premises of Avondale Shipyard.[73] Plaintiffs assert only that Barrosse's off-site exposure does not meet the status or situs test, and dedicate the bulk of their Opposition brief to the issue of preemption. In doing so, Plaintiffs appear to concede that the situs and status requirements are met for Barrosse's exposure at Avondale Shipyard.

Barrosse testified during his video deposition that all of his work at Avondale Shipyard occurred at Wet Dock 1 in the Main Yard, where he initially worked on a commercial vessel before working exclusively on Destroyer Escorts for the United States Navy, which involved "mostly new construction."[74] Barrosse testified that while working on Destroyer Escorts, which are approximately 450 feet long, he worked

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[71] R. Doc. 86-1 at p. 7.

[72] *Id.* at p. 8 (citing *Hulin v. Huntington Ingalls, Inc.*, Civ. A. No. 20-923, 2020 WL 6059645, at *4 (E.D. La. Oct. 14, 2020)).

[73] *See, generally,* R. Doc. 101.

[74] R. Doc. 86-4 at pp. 6-10.

throughout the ships "pulling cable" and installing electrical equipment, explaining that he rolled the cable throughout the ship, sometimes bow-to-stern.[75] Based on these facts, and Plaintiffs' silence on the issue, there is no genuine dispute that Barrosse was a "harbor worker" under the LHWCA when the exposure at Avondale Shipyard occurred.[76] The Court notes that in *Hulin,* the judge cited secondary authority indicating that the LHWCA's definition of "harborworker" includes electricians.[77] Accordingly, the Court finds that Barrosse's asbestos exposure at Avondale Shipyard satisfies the LHWCA's status requirement.

The Court likewise finds that Barrosse's exposure at Avondale Shipyard satisfies the situs requirement of the LHWCA. After the 1972 amendments, the situs test requires that the injury occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel)."[78] Barrosse's asbestos exposure allegedly

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[75] *Id.* at pp. 14-15.

[76] *See, McLaurin v. Noble Drilling (US) Inc.*, 529 F.3d 285, 289 (5th Cir. 2008) ("Under the LHWCA, those persons injured while working in or near harbor facilities as longshoremen, shipbuilders, ship repairers, and various harbor workers, such as carpenters, cleaners, or painters are limited to compensation claims against their employers.")

[77] *Hulin v. Huntington Ingalls, Inc.*, Civ. A. No. 20-923, 2020 WL 6059645, at *4 (E.D. La. Oct. 14, 2020) (*citing* 1 Robert Force and Martin J. Norris, *The Law of Maritime Personal Injuries* § 3:9 (5th ed.)).

[78] 33 U.S.C. § 903(a).

occurred while he was working on and around vessels being built or repaired at Avondale Shipyard.[79] According to the Avondale Interests, Avondale Shipyard was always situated adjacent to a navigable water of the United States of America, the Mississippi River.[80] Plaintiffs do not dispute that Barrosse's exposure occurred at Avondale Shipyard, or that Avondale Shipyard was always located along the Mississippi River. This Court has repeatedly recognized that work performed on and around vessels being built or repaired at Avondale Shipyard satisfies the situs requirement.[81] Here, Plaintiffs dispute the applicable version of the LHWCA, but not whether Barrosse's exposure satisfies the situs test of the LHWCA.[82] As in prior cases, the Court finds that Avondale Shipyard, located on and adjacent to the navigable waters of the United States, is a covered situs under the LHWCA.

Based on the foregoing, the Court finds that Barrosse's asbestos exposure at Avondale Shipyard satisfies the status and situs requirements of the LHWCA. Thus, Barrosse could have brought an LHWCA claim against the Avondale Interests.

2. Barrosse's Off-Site Exposure in His Car and Home.

To the extent Plaintiffs argue that Barrosse's off-site exposures from the asbestos dust on his work

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79 *See*, R. Docs. 77 & 86-4.

80 R. Doc. 86-1 at p. 8 (*citing* R. Doc. 86-5).

81 *See, Pitre v. Huntington Ingalls, Inc.*, Civ. A. No. 17-7029, 2018 WL 2010026, at *3 (E.D. La. Apr. 30, 2018) (Vance, J.); *Hulin*, Civ. A. No. 20-923, 2020 WL 6059645, at *5.

82 R. Doc. 101 at pp. 21-25.

clothes are not covered by the LHWCA, the Court rejects that argument as unsupported by the evidence. In *Dempster v. Lamorak Insurance Co.*, another Section of this Court recently addressed similar allegations that off-site exposure to asbestos dust carried home on an Avondale employee's clothing was not covered under the LHWCA.[83] The *Dempster* court recognized that the LHWCA defines the term "injury" as "an accidental injury or death arising out of and in the course of employment,"[84] and that:

> To occur in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the employer's business, at a place where the employee may reasonably be expected to be in connection with the employment, and while the employee was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[85]

The *Dempster* court further held that, "The words 'arising out of' instruct that the employment must have caused the injury."[86] The plaintiff in *Dempster*

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[83] Civ. A. No. 20-95, 2020 WL 5071115, at *7 (E.D. La. Aug. 26, 2020) (Brown, C.J.).

[84] *Id.* at *6 (*quoting* 33 U.S.C. § 902(2)) (internal quotation marks omitted).

[85] *Dempster*, Civ. A. No. 20-95, 2020 WL 5071115, at *6 (*quoting* LHWCA Procedure Manual, https://www.dol.gov/owcp/dlhwc/lsProMan.htm). The Court notes that the quoted language can be found at the foregoing web address under "Chapter 0-0300, LHWCA Coverage (Jurisdiction) and Benefits," under Paragraph 6 "Employment-Relatedness of the 'Injury.'"

[86] Civ. A. No. 20-95, 2020 WL 5071115, at *6 (quoting *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)) (internal quotation marks omitted).

argued that the off-site exposures were not covered under the LHWCA based upon the Supreme Court's decision in *Voehl v. Indem. Ins. Co. of North America*, wherein the Court noted the "general rule" that, "injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment."[87] The *Dempster* court held that, "This case does not fall within the coming and going exception because Plaintiffs are alleging both occupational exposure to asbestos at Avondale and second-hand exposure to asbestos carried home from Avondale."[88] The *Dempster* court concluded that, "Under Plaintiff's theory of the case, the exposure began at work and then Decedent carried some of the asbestos material home. Therefore, the alleged injury arose out of and in the course of Decedent's employment."[89]

The Court reaches the same conclusion in this case. In the Amended Complaint, Plaintiffs allege that Barrosse was exposed to asbestos fibers in his home and in his car after leaving work at Avondale Shipyard "due to the asbestos dust and fibers brought home on his work clothing."[90] Plaintiffs further allege that while working as an electrician aboard ships being constructed by Avondale Shipyard from 1969 to 1977, Barrosse worked near other crafts, including

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87 *Dempster*, Civ. A. No. 20-95, 2020 WL 5071115, at *7 (quoting *Voehl v. Indemnity Ins. Co. of N. Am.*, 288 U.S. 162, 165, 53 S.Ct. 380, 77 L.Ed. 676 (1933)) (internal quotation marks omitted).

88 *Dempster*, Civ. A. No. 20-95, 2020 WL 5071115, at *7.

89 *Id.*

90 R. Doc. 77 at ¶ 6.

insulators, who cut and applied asbestos insulation throughout the ships, which created visible asbestos dust that got on his clothing.[91] Plaintiffs allege that Barrosse wore his dust-laden clothing home from work every day, including when he walked from the shipyard to his car, when he drove home in his car, and when he arrived home.[92]

As in *Dempster*, Plaintiffs have clearly alleged that Barrosse's off-site exposures began while he was working at Avondale Shipyard, and that he thereafter carried it home from work on his clothing. The Court rejects Plaintiffs' assertion that, "Plaintiffs do not contend that Mr. Barrosse's off-site exposures began at work, instead, as discussed below, these off-site exposures occurred each time Mr. Barrosse inhaled asbestos dust (and sustained contemporaneous injury) in his car and at home."[93] As the Avondale Interests point out, another Section of this Court has rejected this argument, finding that such off-site exposures from asbestos carried home on an Avondale worker's clothing "is not totally unrelated to work . . . because you allege they were exposed at work and they just carried some of it home."[94] The Court finds similarly. Indeed, Barrosse would not have had asbestos dust to inhale, whether in his car or at home, had it not arisen out of his employment at Avondale Shipyard. Accordingly, the Court finds that Barrosse's off-site exposures to asbestos arose out of

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91 *Id.* at ¶ 6(a) & (b).

92 *Id.* at ¶ 6 (e) & (f).

93 R. Doc. 101 at pp. 9-10.

94 R. Doc. 86-1 at pp. 27-28 (*citing* R. Doc. 86-8). *See*, R. Doc. 86-8 at p. 8.

and in the course of his employment at Avondale Shipyard, and is therefore covered by the LHWCA.

C. LHWCA Preemption.

The Court now turns to the crux of the dispute between the parties—whether the LHWCA's exclusivity provision in 33 U.S.C. § 905(a) immunizes the Avondale Interests from tort liability and preempts Plaintiffs' negligence claims. Under the LHWCA, "an employer, whether negligent or without fault, has a duty to pay workers' compensation to a covered employee."[95] The exclusivity provision of the LHWCA provides that:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .[96]

The Fifth Circuit has held that, "When the LHWCA applies, workers' compensation is an employee's exclusive remedy against the employer in its capacity as an employer."[97]

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[95] *Moore v. Phillips Petroleum Co.*, 912 F.2d 789, 791 (5th Cir. 1990) (*citing* 33 U.S.C. § 903).

[96] 33 U.S.C. § 905(a).

[97] *Moore*, 912 F.2d at 791 (*citing* 33 U.S.C. § 905(a)); *see, McLaurin v. Noble Drilling (US) Inc.*, 529 F.3d 285, 291-92 (5th Cir. 2008) ("If a maritime worker is eligible for workers' compensation from his employer, § 904 allows him to collect compensation and § 905(a) instructs him that his remedy under the LHWCA is his exclusive remedy against his employer. Section 933 specifically forbids a claim against 'the employer or

When the LHWCA was amended in 1972 to cover certain land-based injuries, the Supreme Court in *Sun Ship, Inc. v. Pennsylvania*, addressed whether the extension of the LHWCA's coverage displaced states from applying their own workers' compensation schemes to land-based injuries that fell under the expanded federal coverage.[98] The Supreme Court held that it did not, explaining that, "the 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law."[99] As a result, the Supreme Court recognized a "twilight zone" of concurrent jurisdiction between the LHWCA and state workers' compensation laws.[100] The Court explained that concurrent jurisdiction was warranted because, "To read the 1972 amendments as compelling laborers to seek relief under two mutually exclusive remedial systems would lead to the prejudicial consequences which we described in *Davis* . . . ."[101]

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a person . . . in his employ,' leaving § 904 as the only avenue of recovery against the employer or negligent coworker."). *See also*, *Dempster v. Lamorak Insurance Co.*, Civ. A. No. 20-95, 2020 WL 5071115, at *6 (E.D. La. Aug. 26, 2020) (quoting *Moore, supra*); *Brown v. Performance Energy Services, LLC*, Civ. A. No. 08-852, 2009 WL 152505, at *5 (E.D. La. Jan. 20, 2009) (Africk, J.) (quoting *Moore, supra*).

98 *Hulin v. Huntington Ingalls, Inc.*, Civ. A. No. 20-924, 2020 WL 6059645, at *5 (E.D. La. Oct. 14, 2020) (citing *Sun Ship*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980)).

99 *Sun Ship*, 447 U.S. at 720, 100 S.Ct. at 2436.

100 *Sun Ship*, 447 U.S. 715, 720, 100 S.Ct. at 2435-36 (citing *Davis v. Department of Labor and Indus. of Washington*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942)).

101 *Sun Ship*, 447 U.S. at 720, 100 S.Ct. at 2436 (citing *Davis*, 317 U.S. 249, 63 S.Ct. 225).

Although Plaintiffs do not directly address the issue, there appears to be no genuine issue of material fact that this is a twilight zone case because the relevant asbestos exposures occurred on land at the Avondale Shipyard between 1969 and 1977.[102] Thus, under *Sun Ship*, Barrosse could have sought compensation under Louisiana's Workers' Compensation Act, La. R.S. 23:1031, *et seq.*, which is not preempted by the LHWCA.[103] Barrosse, however, chose not to seek compensation under Louisiana's workers' compensation regime, and asserted only state law negligence claims against the Avondale Interests. Thus, the issue before the Court is whether the LHWCA preempts Plaintiffs' state law negligence claims for injuries that fall within the twilight zone of concurrent jurisdiction between state and federal workers' compensation schemes.

This same issue was squarely before another Section of this Court in *Cobb v. Sipco Services & Marine, Inc.*[104] and the *Hulin* case.[105] In both cases, the Court concluded that the LHWCA preempts state law tort claims in twilight zone cases. The *Hulin*

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[102] *Hulin v. Huntington Ingalls, Inc.*, Civ. A. No. 20-924, 2020 WL 6059645, at *5 (E.D. La. Oct. 14, 2020) (citing *Cobb v. Sipco Servs. & Marine, Inc.*, Civ. A. No. 95-2131, 1997 WL 159491, at *6 (E.D. La. Mar. 27, 1997) (Vance, J.)).

[103] 447 U.S. at 719-22, 100 S.Ct. at 2436-38.

[104] Civ. A. No. 95-2131, 1997 WL 159491 at *6 ("This raises the issue of the effect of section 905(a) of the LHWCA, the exclusive remedy provision, on the availability of state tort relief for a plaintiff whose injury falls within the twilight zone.") (footnote omitted).

[105] Civ. A. No. 20-924, 2020 WL 6059645 at *5 ("Thus, the question is whether the LHWCA preempts state law negligence claims for injuries in the twilight zone.")

court found that, "The text of the LHWCA, the intention underlying the statute, and the weight of authority make clear that plaintiff's state law tort claims are conflict preempted."[106] The *Hulin* court reasoned that the LHWCA's exclusivity provision "evidences an unmistakable intention to embody the *quid pro quo* that defines most workmen's compensation statute [sic]. Specifically, the employee gets the benefit of no-fault compensation, and the employer enjoys immunity from tort liability for damages."[107] The court in *Hulin* pointed out that the Supreme Court has recognized that the LHWCA "was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other."[108] "Employers relinquish their defenses to tort actions in exchange for limited and predictable liability. Employees accepted the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail."[109] The *Hulin* court held that, "Allowing state law tort claims would contradict the text of the statute and would frustrate the Act's purpose by undermining the

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[106] *Id.* at *6.

[107] *Id.* (quoting *Cobb*, Civ. A. No. 95-2131, 1997 WL 159491 at *7) (internal quotation and quotation marks omitted).

[108] *Hulin*, Civ. A. No. 20-924, 2020 WL 6059645 at *6 (quoting *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 626, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983)).

[109] *Morrison-Knudsen*, 461 U.S. at 626, 103 S.Ct. at 2052 (citing *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 282 and n.24, 101 S.Ct. 509, 516 and n.24, 66 L.Ed.2d 446 (1980); H.R.Rep. No. 1767, 69th Cong., 2d Sess. 19020 (1927)).

quid pro quo."[110] The court pointed out that several courts, including the Fifth Circuit, "have recognized as much."[111]

This Court reaches the same conclusion. The Court specifically finds that allowing state law tort claims would contradict the clear text of the LHWCA, namely the exclusivity provision in 33 U.S.C. § 905(a), and would frustrate the LHWCA's purpose by undermining the *quid pro quo* that the statute guarantees to maritime employers and their employees. Plaintiffs contend that this case is distinguishable from the preemption cases cited by the Avondale Interests (and relied upon by the *Hulin* court) because: (1) Plaintiffs are not alleging asbestos

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[110] *Hulin*, Civ. A. No. 20-924, 2020 WL 6059645, at *6.

[111] *Id.* (citing *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083, 1085 (5th Cir. 1987)) (the LHWCA bars a "state law negligence claim" because "[u]nder the LHWCA, workers compensation is the exclusive remedy for an injured employee against his employer."); *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 366-67 (5th Cir. 1995) (finding that, "[p]reemption of [a] state [tort] act is required to avoid frustration of the policies and purpose behind the LHWCA," and that, "[c]ongressional policy would be frustrated if an injured worker were allowed to collect benefits under the Act, and then sue his employer under a state statutory tort theory."); *Cobb v. Sipco Servs. & Marine, Inc.*, Civ. A. No. 95-2131, 1997 WL 159491, at *8 (E.D. La. Mar. 27, 1997) ("[A]pplication of Louisiana tort law, which plaintiff concedes is not a workmen's compensation remedy, does not further the availability of no fault compensation, and it obstructs the purposes of the LHWCA."); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 953 (3rd Cir. 1990) (holding that, "§ 905 (a) [of the LHWCA] and the Supremacy Clause bar the Virgin Islands from imposing negligence liability on [a covered employer]," and that Congress "intended that compensation, not tort damages, were to be the primary source of relief for workplace injuries for longshoremen against their employers.").

exposure after 1975 (when a tort suit was no longer an available remedy under Louisiana law); (2) Plaintiffs are not simultaneously seeking benefits under the LHWCA; and (3) Plaintiffs have not already received LHWCA benefits.[112] The Court rejects these arguments as baseless. To the extent Plaintiffs claim that this case is distinguishable from *Cobb* because Plaintiffs are not alleging exposure after 1975, Plaintiffs ignore the fact that the preemption analysis in *Cobb* was not based upon a change in Louisiana law in 1975.[113] Regarding Plaintiffs' two remaining arguments, the Court agrees with United States District Judge Sarah S. Vance's assessment in *Hulin* that, "The Fifth Circuit has made clear that, if the LHWCA covers an employee's injury, his only remedy lies in workers' compensation. Any other result would conflict with LHWCA's text and undermine the *quid pro quo* that Congress enacted."[114] The Court rejects Plaintiffs' arguments for the same reasons. The Court finds further support from the Fifth Circuit, which has recognized that, "Worker's compensation under the LHWCA is the exclusive remedy for an employee against his employer because the Act bars all common law tort actions against the employee."[115]

Although Plaintiffs and Westinghouse cite *Hahn v. Ross Island Sand & Gravel Co.* in support of their position that the LHWCA does not preempt state law

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[112] R. Doc. 101 at pp. 28-30.

[113] *Cobb*, Civ. A. No. 95-2131, 1997 WL 159491 at *1, 7-8.

[114] *Hulin*, Civ. A. No. 20-924, 2020 WL 6059645 at *7.

[115] *Jackson v. Total E & P USA Inc.*, 341 Fed.Appx. 85, 86 (5th Cir. 2009).

tort claims,[116] the Court finds *Hahn* distinguishable from the facts of this case. In *Hahn,* a *per curiam* opinion, the Supreme Court specifically recognized that, "As to cases within this 'twilight zone,' Davis, in effect, gave an injured waterfront employee an election to recover compensation under either the Longshoremen's Act or *the Workmen's Compensation Law of the State* in which the injury occurred."[117] The Supreme Court concluded that because the petitioner's injury had occurred in this "twilight zone," he could have sought recovery under the Oregon Workmen's Compensation Act, which was not barred by the LHWCA. However, because the petitioner's employer had not obtained coverage under the state statute, the Supreme Court found that, "the automatic compensation provisions of the Oregon Workmen's Compensation Act did not apply to the claim."[118] The Supreme Court, however, pointed out that the Oregon Workmen's Compensation Act contained a provision specifying that when an employer has elected to reject the state statute's automatic compensation provisions, his injured employee may maintain a negligence action for damages. The Supreme Court acknowledged that such negligence claims would be barred by the LHWCA if the case were not within the "twilight zone" of concurrent jurisdiction. The Supreme Court

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[116] R. Doc. 101 at p. 21 (citing *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 79 S.Ct. 266, 3 L.Ed. 2d 292 (1959)); R. Doc. 114 at pp. 4-5 (citing *Hahn, supra*).

[117] *Hahn*, 358 U.S. at 272, 79 S.Ct. at 267 (citing *Davis v. Dep't of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942)) (emphasis added).

[118] *Id.*

concluded that, "Since this case is within the 'twilight zone,' it follows from what we held in Davis that nothing in the Longshoremen's Act or the United States Constitution prevents recovery."[119] As a result, the Supreme Court reversed the decision of the Oregon Supreme Court, which had affirmed judgment entered for the defendant notwithstanding a verdict for the plaintiff, and remanded the case to the Supreme Court of Oregon for further proceedings.

A clear reading of the *Hahn* decision shows that the Supreme Court allowed a state tort recovery for an injury within the scope of the LHWCA because it was a twilight zone case and the Oregon's worker's compensation law specifically provided for tort recovery as a sanction for an employer's failure to obtain workmen's compensation coverage.[120] Plaintiffs and Westinghouse gloss over this point in their briefs.[121] As the Third Circuit pointed out in *Peter v. Hess Oil Virgin Islands Corp.*:

> The existence and function of that [negligence] liability [in *Hahn*] was entirely consistent with Congress's intent to ensure a seamless intersection between state and federal compensation coverage. That negligence liability in this context is entirely consistent with the scheme imposed by LHWCA is apparent from Congress's inclusion of a similar sanction in LHWCA.[122]

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[119] *Id.* (citing *Davis*, 317 U.S. 249, 63 S.Ct. 225).

[120] *Cobb v. Sipco Services & Marine, Inc.*, Civ. A. No. 95-2131, 1997 WL 159491, at *8 (E.D. La. Mar. 27, 1997).

[121] R. Doc. 101 at p. 21; R. Doc. 114 at pp. 4-5

[122] *Hess*, 903 F.2d 935, 953 (3d Cir. 1990).

As explained by another Section of this Court, "That is not the case here, where application of Louisiana tort law, which plaintiff concedes is not a workmen's compensation remedy, does not further the availability of no fault compensation, and it obstructs the purposes of the LHWCA."[123] Additionally, since *Hahn,* the Fifth Circuit has held that the LHWCA bars an injured employee's state law negligence claim because "Under the LHWCA, workers compensation is the exclusive remedy for an injured employee against his employer."[124] The Court reaches the same conclusion.

Based on the foregoing analysis, the Court finds that the LHWCA preempts Plaintiffs' state law negligence claims against the Avondale Interests.

D. Due Process and Divestment of Barrosse's Tort Claim.

Plaintiffs assert in their Opposition brief that under Louisiana law, Barrosse's cause of action accrued on the date he was exposed to asbestos, and that he acquired a vested property right at that time.[125] Plaintiffs contend that the Avondale Interests seek to divest Plaintiffs of their vested property right through the retroactive application of the LHWCA's 1972 amendments. Plaintiffs argue that the Court should deny the Motion because the retroactive application of the LHWCA to divest

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[123] *Cobb*, Civ. A. No. 95-2131, 1997 WL 159491, at *8 (E.D. La. Mar. 27, 1997).

[124] *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083, 1085 (5th Cir. 1987) (*citing* 33 U.S.C. §§ 904(a), 905(a), and 933(i); *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977); *Hebron v. Union Oil Co.*, 634 F.2d 245 (5th Cir. 1981)).

[125] R. Doc. 101 at p. 31.

Plaintiffs of their cause of action would violate both the United States and Louisiana Constitutions.[126] Recognizing that the *Hulin* court rejected the same argument, Plaintiffs urge the Court not to follow *Hulin* because the decision "not only effectively overrules *Davis* and *Sun Ship* in finding that the LHWCA preempts a plaintiff's state law remedies, the Court goes far beyond preemption in holding that the LHWCA *actually divests the plaintiff of a cause of action that has accrued and become a vested property right*."[127] Plaintiffs assert that their vested property right is protected by due process guarantees.[128]

The Avondale Interests assert that Plaintiffs' due process argument is meritless because Congress acted consistently with due process by substituting a guaranteed workers' compensation remedy for an uncertain tort remedy.[129] The Avondale Interests point out that Judge Vance thoroughly considered and rejected Plaintiffs' divestment argument in *Hulin*.[130] The Avondale Interests assert that federal courts apply a rational basis test to evaluate the constitutionality of laws that abolish or alter tort rights, under which such laws are constitutional unless Congress acted in an arbitrary or irrational way.[131] The Avondale Interests assert that the

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[126] *Id.*

[127] *Id.* (emphasis in original).

[128] *Id.* at p. 30 (citing *Anderson v. Avondale Indus., Inc.*, 2000-2799 (La. 10/16/01), 798 So.2d 93, 99).

[129] R. Doc. 124 at p. 19.

[130] *Id.* (citing *Hulin v. Huntington Ingalls, Inc.*, Civ. A. No. 20-924, 2020 WL 6059645, at *8-9 (E.D. La. Oct. 14, 2020)).

[131] R. Doc. 124 at p. 19 (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-18, 96 S.Ct. 2882, 49 L.Ed.2d 752

Supreme Court has held that, "[L]egislative Acts adjusting the burdens and benefits of economic life **come to the Court with a presumption of constitutionality**, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."[132] The Avondale Interests claim that Plaintiffs do not acknowledge this burden, much less attempt to meet it. As such, the Avondale Interests argue that, as in *Hulin*, Plaintiffs have failed to carry their burden of proof on this issue.

1. Retroactivity of the LHWCA.

In *Landgraf v. USI Film Products,* the Supreme Court recognized a "presumption against retroactive legislation" and delineated a two-part test to determine whether a statute is retroactive.[133] Under that test, this Court must first "determine whether Congress has expressly prescribed the statute's proper reach."[134] "If Congress clearly intended the

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(1976); *Hammond v. United States*, 786 F.2d 8, 13 (1st Cir. 1986); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996); *In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 990-91 (9th Cir. 1987)).

[132] R. Doc. 124 at p. 19 (quoting *Usery*, 428 U.S. at 15, 96 S.Ct. 2882) (internal quotation marks omitted and emphasis added by the Avondale Interests).

[133] *Terrazas-Hernandez v. Barr*, 924 F.3d 768 (5th Cir. 2019) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)) (internal quotation marks omitted).

[134] *Terrazas-Hernandez*, 924 F.3d at 772 (quoting *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483) (internal quotation marks omitted).

statute to be retroactive, the inquiry ends."[135] If not, the Court must proceed to the second step and determine whether retroactive application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[136]

The Court agrees with the *Hulin* court's conclusion that, "Congress expressly prescribed that the amended statute applies to latent disease claims arising from exposures occurring before the amendment dates."[137] As the *Hulin* court pointed out, Congress stated that the 1984 amendments to the LHWCA "shall be effective on the date of enactment," which was September 28, 1984, "and shall apply with respect to claims filed after such date and to claims pending on such date."[138] One of the changes made to the LHWCA in 1984 was the express adoption of the manifestation rule, which provides that, "in the case of an occupational disease which does not immediately result in a disability or death, an injury shall be deemed to arise on the date on which the

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[135] *Hulin v. Huntington Ingalls, Inc.*, Civ. A. No. 20-924, 2020 WL 6059645, at *7 (E.D. La. Oct. 14, 2020) (citing *Terrazas-Hernandez*, 924 F.3d at 772).

[136] *Terrazas-Hernandez*, 924 F.3d at 772-73 (quoting *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483) (internal quotation marks omitted).

[137] Civ. A. No. 20-924, 2020 WL 6059645, at *7.

[138] Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 28(a), 98 Stat. 1639 (September 28, 1984). *See, Hulin*, Civ. A. No. 20-924, 2020 WL 6059645 at *7 (*quoting* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 28(a), 98 Stat. 1639, 1655).

employee or claimant becomes aware, or in the exercise of reasonable diligence . . . should have been aware, of the disease . . . ."[139] The Court is satisfied that these provisions, taken together, indicate that the manifestation rule applies to claims filed after September 28, 1984, regardless of whether the exposures occurred before the amendment date.[140] Thus, because the date of injury controls which version of the LHWCA applies,[141] the Court finds that this is an express recognition by Congress that the LHWCA, as amended in 1984, will apply to claims arising from exposures like those of Barrosse, which occurred before the amendments. As aptly explained by the Eleventh Circuit:

> The provision that 'the amendments made by this Act shall be effective on the date of enactment of this Act and shall apply . . . to claims *filed* after such date' (emphasis added) is obviously not necessary to apply the new law to claims *arising* after the effective date. The only sensible reading of the provision, then, is that Congress was addressing claims that arose *before* the effective date of the statute but were filed *after* the effective date.[142]

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[139] Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 28(g)(1), 98 Stat. 1639.

[140] *Hulin*, Civ. A. No. 20-924, 2020 WL 6059645, at *7.

[141] *See*, *Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1031 (5th Cir. 1985).

[142] *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 1564 (11th Cir. 1991), *overruled on other grounds*, *Bath Iron Works Corp. v. Director, Office of Workers' Comp. Programs*, 506 U.S. 153, 113 S.Ct. 692, 121 L.Ed.2d 619 (1993).

The same rationale applies here. There was no need for Congress to specify that the manifestation rule applies to claims "filed" after the amendment date if it applied only to claims "arising" after the amendment date.

2. Due Process

Although Plaintiffs cite Louisiana Supreme Court cases in support of their due process argument, federal constitutional law governs this issue.[143] According to the Fifth Circuit, "The *Erie* doctrine does not apply . . . in matters governed by the federal Constitution or by acts of Congress."[144] The Supreme Court has held that legislative acts, including retroactive legislation, enjoy a "presumption of constitutionality."[145] In *Usery v. Turner Elkhorn Mining Co.*, the Supreme Court recognized in 1976 that, "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."[146] The Supreme Court further explained that, "[T]his Court long ago upheld against due process attack the competence of Congress to

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[143] *Hulin*, Civ. A. No. 20-924, 2020 WL 6059645, at *8 (citing *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 363).

[144] *Hetzel*, 50 F.3d at 363 (quoting *Grantham v. Avondale Indus., Inc.*, 964 F.2d 471, 473-74 (5th Cir. 1992)).

[145] *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 727-29, 104 S.Ct. 2709, 2717, 81 L.Ed.2d 601, 610-11 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976).

[146] *Usery*, 428 U.S. at 15, 96 S.Ct. at 2892 (citing authority).

allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles analogous to those enacted here, regardless of contravening arrangements between employer and employee."[147] The Supreme Court ultimately found that, in the context of a workers' compensation law that retroactively imposed liability on coal mine operators, "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor the operators and the coal consumers."[148]

The Fifth Circuit has likewise recognized that the "rational basis" test is used to determine whether the retroactive application of a statute violates due process.[149] Although not addressed by the Fifth Circuit, at least three other Circuit courts have applied the "rational basis" test to determine the constitutionality of retroactive legislation abolishing or affecting tort actions.[150] The *Hulin* court reviewed these cases in detail and this Court adopts that analysis, finding it equally applicable to the facts of

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[147] *Id.* (citing authority).

[148] *Id.*, 428 U.S. at 18, 96 S.Ct. at 2893.

[149] *See, Ferman v. U.S.*, 993 F.2d 485, n.5 (5th Cir. 1993) ("Outside of the tax context, the Court has held that the retroactive application of a statute must be 'arbitrary and irrational' to violate due process. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976)").

[150] *Hammond v. United States*, 786 F.2d 8, 13 (1st Cir. 1986); *In re TMI,* 89 F.3d 1106, 1113 (3d Cir. 1996); *In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 990-91 (9th Cir. 1987).

this case.[151] Pursuant to *Usery* and the persuasive authority from other Circuit courts, this Court must determine whether Plaintiffs have carried their burden of proving that Congress acted arbitrarily and irrationally by immunizing employers covered by the LHWCA from tort claims, even if those claims already accrued under state law. This is Plaintiffs burden to sustain. It is clear to the Court that Plaintiffs have not met this burden. Plaintiffs make conclusory statements in their Opposition brief that the retroactive application of the LHWCA would "divest Plaintiffs of their vested property right" and would "divest Plaintiffs of their cause of action," which "would violate both the U.S. and Louisiana Constitutions."[152] The Court finds that these conclusory statements, without more, fail to carry Plaintiffs' burden of showing that Congress acted arbitrarily and irrationally.[153]

The Court likewise agrees with Judge Vance's determination that, "Congress had a rational basis to retroactively expand the extent of the LHWCA's coverage of exposures to hazardous materials, like asbestos, that cause long-latency occupational diseases. The ends of the LHWCA, enacting the *quid pro quo* of workers' compensation remedies, are unquestionably legitimate."[154] Thus, the Court finds

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[151] *Hulin v. Huntington Ingalls, Inc.*, Civ. A. No. 20-924, 2020 WL 6059645, at *8 (E.D. La. Oct. 14, 2020).

[152] R. Doc. 101 at p. 31.

[153] *Hulin*, Civ. A. No. 20-924, 2020 WL 6059645, at *9.

[154] *Id*. *See*, *Usery*, 428 U.S. at 15, 96 S.Ct. 2882 (noting that Congress has the authority "to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles."); *Hammond*, 786 F.2d at 13 (finding

that Congress's decision to retroactively apply the LHWCA to toxic exposures was neither irrational nor arbitrary.[155] By enacting the manifestation rule, Congress ensured that workers like Barrosse were protected by the guarantees set out within the LHWCA. In doing so, Congress merely substituted a no-fault remedy for the uncertain liability of common law torts.[156] The Court finds that Plaintiffs have failed to carry their burden of proving that Congress acted in an arbitrary and irrational way and, as such, has failed to show a constitutional violation. Accordingly, the Avondale Interests are entitled to summary judgement.

IV. CONCLUSION

IT IS HEREBY ORDERED that the Motion for Summary Judgment[157] is **GRANTED** and Plaintiffs' negligence claims against Huntington Ingalls Incorporated and Lamorak Insurance Company are **DISMISSED WITH PREJUDICE**.

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that Congress had a "rational" or "legitimate" reason when it relieved private contractors from liability for tort claims).

[155] *Hulin*, Civ. A. No. 20-924, 2020 WL 6059645, at *9; *See, In re TMI*, 89 F.3d at 1113 (upholding retroactive application of a choice of law provision where it furthered the relevant act's goals of "uniformity, equity, and efficiency.").

[156] *Hulin*, Civ. A. No. 20-924, 2020 WL 6059645, at *9.

[157] R. Doc. 86.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-30761

LYNN BARROSSE; RAEGAN HOLLOWAY; MAKENZIE STRICKER,

Plaintiffs—Appellants,

versus

HUNTINGTON INGALLS, INCORPORATED, *formerly known as* NORTHROP GRUMMAN SHIPBUILDING, *formerly known as* NORTHROP GRUMMAN SHIP SYSTEMS, *formerly known as* AVONDALE INDUSTRIES, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:20-CV-2042

ON PETITION FOR REHEARING EN BANC

Before RICHMAN, *Chief Judge*, HO, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

33 U.S.C. § 903

§ 903. Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

(b) Governmental officers and employees

No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

(c) Intoxication; willful intention to kill

No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(d) Small vessels

(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary, the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels (as defined in paragraph (3) of this subsection), unless the injury occurs while upon the navigable waters of the United States or

while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels.

(2) Notwithstanding paragraph (1), compensation shall be payable to an employee—

(A) who is employed at a facility which is used in the business of building, repairing, or dismantling small vessels if such facility receives Federal maritime subsidies; or

(B) if the employee is not subject to coverage under a State workers' compensation law.

(3) For purposes of this subsection, a small vessel means—

(A) a commercial barge which is under 900 lightship displacement tons; or

(B) a commercial tugboat, towboat, crew boat, supply boat, fishing vessel, or other work vessel which is under 1,600 tons gross as measured under section 14502 of title 46, or an alternate tonnage measured under section 14302 of that title as prescribed by the Secretary under section 14104 of that title.

(e) Credit for benefits paid under other laws

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 30104 of title 46 shall be credited against any liability imposed by this chapter.

33 U.S.C. § 905

§ 905. Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance

with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(c) Outer Continental Shelf

In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this Act by virtue of section 1333 of title 43, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a

person entitled to receive benefits under this chapter by virtue of section 1333 of title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

33 U.S.C. § 933

§ 933. Compensation for injuries where third persons are liable

(a) Election of remedies

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation operating as assignment

Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

(c) Payment into section 944 fund operating as assignment

The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Institution of proceedings or compromise by assignee

Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Recoveries by assignee

Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and

the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be

entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

(3) Any payments by the special fund established under section 944 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a). Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.

(4) Any payments by a trust fund described in section 917 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under

subsection (a). Such lien shall have priority over a lien under paragraph (3) of this subsection.

(h) Subrogation

Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.