No. 23-368

In the Supreme Court of the United States

HUNTINGTON INGALLS INCORPORATED,
PETITIONER,

v.

LYNNE BARROSSE; RAEGAN HOLLOWAY;
MAKENZIE STRICKER,
RESPONDENTS.

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

BRIEF FOR SHIPBUILDERS COUNCIL OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[*]

The Shipbuilders Council of America (SCA or "the Council") is a non-profit national trade association that represents companies involved in the U.S. shipyard industry. The Council represents 37 companies operating more than 80 shipyards nationwide, along with 105 partner companies providing goods and services to the shipyard industry. Numerous SCA member companies and their employees are subject to the no-fault workers' compensation scheme established under the Longshore and Harbor Workers' Compensation Act (LHWCA or "the Act"). Of particular relevance here, SCA represents 23 shipyards located in Louisiana that are covered by the Fifth Circuit's decision below. SCA also represents five shipyards in Texas and four shipyards in Mississippi, which also are in the Fifth Circuit.

SUMMARY OF ARGUMENT

This Court should grant review because this case presents a question of exceptional importance to the nation's maritime employers and employees. In the LHWCA, Congress established a no-fault workers' compensation system for maritime employees injured on or near the navigable waters of the United States. The Act reflects a fundamental compromise: maritime employers give up their right to contest fault in exchange for limited, predictable liability, while employees accept limited recovery

[*] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties have received timely notice of the intent to file this brief.

in exchange for prompt relief without the uncertainty, delay, and expense of a tort suit. As a key component of this compromise, the LHWCA expressly preempts state-law tort suits against employers who participate in the system by securing payment for compensation. Specifically, the Act states that an employer's liability under the Act "shall be exclusive" and "in place of all other liability" to an injured employee or anyone else otherwise entitled "to recover damages from such employer at law or in admiralty." 33 U.S.C. § 905(a).

In derogation of that plain text, the Fifth Circuit held that the LHWCA does *not* preempt a state-law tort suit by a maritime employee injured at the water's edge if the employee eschews compensation under LHWCA and his injuries are not covered by a state workers' compensation statute. That erroneous ruling warrants review for three principal reasons.

First, the Fifth Circuit's ruling contravenes the LHWCA's text and undermines the legislative compromise at the heart of the Act by exposing maritime employers to unlimited tort liability. Although the Fifth Circuit acknowledged that its ruling was in tension with the Act's text and purpose, it opined that its ruling was compelled by this Court's "twilight zone" cases. Those cases, however, address a jurisdictional dilemma inapplicable here. As originally enacted, the LHWCA applied only when recovery was unavailable under a state workers' compensation statute for land-based injuries. As a result, employees who were injured in the "twilight zone" at the water's edge often faced uncertainty about whether they should seek workers' compensation under the LHWCA or a state statute. To resolve that dilemma, this Court recognized concurrent jurisdiction under the LHWCA and state workers' compensation statutes for cases falling within

the "twilight zone." In so doing, this Court reasoned that concurrent jurisdiction would further the purposes of both the federal and state compensation systems by avoiding jurisdictional traps for unwary employees and promoting swift recovery.

The rationale of the "twilight zone" cases does not, however, extend to situations where, as here, a maritime worker is eligible to receive workers' compensation *only* under the LHWCA and not under a state system. In such situations, a worker faces no jurisdictional dilemma in choosing between workers' compensation systems. Accordingly, there is no warrant for extending the "twilight zone" cases to situations where an employee has no state compensation remedy and brings a state-law tort suit. Indeed, such an extension would be particularly unwarranted, given that concurrent jurisdiction in the "twilight zone" is a judicially created concept with no textual hook in the statute.

Furthermore, while the "twilight zone" cases were intended to further the LHWCA's purpose, extending those cases to state-law tort suits would do the opposite. Under the Fifth Circuit's ruling, any maritime employee who is injured at the water's edge and who lacks a state compensation remedy may bypass the LHWCA and seek unlimited recovery in tort. That result will frustrate the LHWCA's goals of ensuring predictable liability and avoiding costly litigation. It also will weaken the incentives of employers to support a federal compensation system that pays injured maritime employees and their families more than a billion dollars in benefits per year. Thus, unless reversed, the Fifth Circuit's decision will harm the interests of maritime employers and employees alike.

Second, the Fifth Circuit's decision creates a split among the federal circuits and deepens an existing split

among federal and state courts over the preemptive effect of the LHWCA. As detailed in the petition (at 13-23), four circuits and three state courts of last resort hold that the LHWCA preempts a maritime worker who is entitled to compensation under the Act from pursuing a state-law tort claim against his employer or co-workers. In contrast, the Fifth Circuit and the Louisiana Supreme Court hold that a maritime worker who is entitled to compensation under the LHWCA may elect to sue his employer for damages in tort. That conflict undermines the LHWCA's clear, nationwide rule with respect to tort suits: namely, that if an employer secures payment under the Act, it should be immune from the uncertainties posed by damages actions. And if the conflict spreads further, it threatens to subject employers who operate in multiple jurisdictions to even greater uncertainty, as tort regimes vary widely from state to state.

Third, the Fifth Circuit's decision will have sweeping consequences. The Fifth Circuit purported to cabin its decision in various ways, including by stating that its holding only concerned Louisiana. But Louisiana has one of the nation's largest maritime industries, is home to numerous shipyards, and is among the most popular federal forums for adjudicating maritime injury suits. Indeed, the decision below already is having an impact in Louisiana, as at least two federal decisions there recently have permitted tort claims to proceed. Moreover, if taken to its logical conclusion, the Fifth Circuit's ruling would apply to *any* state that bars recovery under its workers' compensation statute when recovery is available under a federal compensation scheme. Such states include not only the other two states in the Fifth Circuit, but also states in other circuits. Review is needed now, given the important interests at stake.

ARGUMENT

I. The Fifth Circuit's Extension of the "Twilight Zone" Cases Contravenes the LHWCA's Text and Purpose

This Court should grant review because the Fifth Circuit erroneously extended this Court's "twilight zone" precedents to permit maritime workers to bypass the LHWCA and bring tort suits for damages. That holding flouts the text of the LHWCA, misconstrues this Court's precedents, and undermines the "compromise at the heart" of the Act. *Wash. Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925, 932 (1984).

1. As the Fifth Circuit acknowledged, section 905(a) of the LHWCA provides a "clear proclamation of exclusivity." Pet.App.9a. Specifically, section 905(a) states that that an employer's liability under the Act "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." 33 U.S.C. § 905(a). A state-law tort action is a prototypical action for "damages … at law." Thus, by its plain language, the Act preempts a maritime employee from bringing a tort action against his employer.

2. Despite recognizing that section 905(a)'s text is "plain," the Fifth Circuit reasoned that it was "duty-bound" by this Court's "twilight zone" cases to allow respondents' tort action to proceed. Pet.App.9a, 18a. That conclusion was mistaken for three reasons. First, the "twilight zone" cases address a jurisdictional dilemma that is not presented here. Second, as an atextual, judge-made doctrine, the "twilight zone" should not be extended beyond the problem it was meant to address. And third, reading the "twilight zone" cases to permit state-law tort suits would undermine the core purpose of the LHWCA.

a. To start, the "twilight zone" cases simply do not apply here. Those cases arose in response to what this Court termed a "jurisdictional dilemma." *Davis v. Dep't of Lab. & Indus. of Wash.*, 317 U.S. 249, 255 (1942). As originally enacted, the LHWCA provided coverage only to maritime workers who fell outside the purview of state workers' compensation schemes. *See Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 717-18 (1980). The LHWCA covered injuries on the navigable waters, while state workers' compensation systems covered injuries on land. *Id.* For maritime workers injured at the water's edge, "the boundary at which state remedies gave way to federal remedies was far from obvious in individual cases." *Id.* at 718. As a result, such workers were "compelled to make a jurisdictional guess before filing a claim"—with the "price of error" being "unnecessary expense" at best or "foreclosure from the proper forum" at worst. *Id.*; *see Davis*, 317 U.S. at 254.

To solve this dilemma, this Court interpreted the LHWCA and state workers' compensation schemes to have concurrent jurisdiction over injuries that occur in the "twilight zone" between the navigable waters and the shore. *Davis*, 317 U.S. at 256-58. This judicially-created solution allowed employees injured at the water's edge to obtain compensation under either the LHWCA or the applicable state system, removing the risk of an incorrect choice. *Id.*; *Sun Ship*, 447 U.S. at 718-20.[1]

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[1] Although Congress amended the LHWCA in 1972 to extend it "beyond the shoreline," this Court held that concurrent jurisdiction in the "twilight zone" survived the amendment. *Sun Ship*, 447 U.S. at 719-20. The Court noted that the jurisdictional boundaries of the current LHWCA are "no less vague" than they were under the prior version of the statute. *Id.* at 725. Thus, adopting an "exclusivity rule"

As this history makes clear, the doctrine of concurrent jurisdiction in the "twilight zone" was intended to address a specific problem—namely, the difficulty a maritime worker faces when choosing whether to seek workers' compensation under the LHWCA or a state compensation statute. *Sun Ship*, 447 U.S. at 718-19.

That problem does not exist, however, when a maritime worker is eligible for workers' compensation *only* under the federal scheme. Here, for example, Ronald Barrosse was eligible for workers' compensation only under the LHWCA because the then-applicable version of the Louisiana statute did not cover mesothelioma. Pet.App.6a. And today, Louisiana (like many other states) bars maritime workers who are covered by the LHWCA from seeking workers' compensation under Louisiana's statute—meaning that such workers have a workers' compensation remedy only under federal law. La. Stat. Ann. § 23:1035.2; *see* Pet. 8 (citing similar statutes from other states).

Workers in this situation simply do not face any "jurisdictional dilemma," as they may seek workers' compensation only under the LHWCA. While they may have tort remedies under state law, section 905(a) clearly directs them *not* to file an "action at law" for "damages." The logic of the "twilight zone" cases therefore does not apply in this scenario, as there is no need for workers to guess about the proper jurisdiction for seeking compensation.

3. The nature of the "twilight zone" doctrine further counsels against extending it here. As the Fifth Circuit noted, this Court's recognition of concurrent jurisdiction in the "twilight zone" was a "controversial" solution that

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would "thrust employees into the same jurisdictional peril" that they previously faced. *Id.*

stands in "[f]undamental tension" with "the plain text of the Act." Pet.App.9a. Although the Fifth Circuit acknowledged this point, the court overlooked its implication. That concurrent jurisdiction is a judicially made concept without any basis in the text weighs heavily against extending it to new circumstances. *See Davis*, 317 U.S. at 261-64 (Stone, C.J., dissenting) (arguing concurrent jurisdiction was "plainly not permissible").

The Third Circuit made this very point in *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3d Cir. 1990). There, it rejected a maritime worker's argument that the "twilight zone" cases permitted his state-law tort suit to proceed. *Id.* at 951-53. The court explained that "the 'twilight zone' is a judicial construct borne of necessity and designed to eliminate the harshness" of the jurisdictional dilemma described above. *Id.* at 952. Accordingly, its "boundaries" should be limited to "the problems that gave rise to its creation." *Id.* Thus, as commentators have recognized, "[w]hile concurrent jurisdiction allows an injured employee to determine if he would like to file a claim under state workers' compensation or the LHWCA," it "does not allow a worker to choose whether to file a claim under state or federal tort principles." Kenneth G. Engerrand & Jonathan A. Tweedy, *A Tedious Balance: Third-Party Claims Under the Longshore and Harbor Workers' Compensation Act*, 10 Loy. Mar. L.J. 1, 50 (2011).

4. Additionally, the Fifth Circuit's extension of the "twilight zone" cases to tort claims would undermine, rather than advance, the purpose of the LHWCA. That result would flip the logic of the "twilight zone" cases on its head.

The LHWCA reflects a "legislated compromise between the interests of employees and the concerns of employers." *Johnson*, 467 U.S. at 931. On the one hand, "[e]mployers relinquished their defenses to tort actions in exchange for limited and predictable liability." *Morrison-Knudsen Constr. Co. v. Dir., Off. of Workers' Comp. Programs*, 461 U.S. 624, 636 (1983); *accord Potomac Elec. Power Co. v. Dir., Off. of Workers' Comp. Programs*, 449 U.S. 268, 281-82 & n.24 (1980). On the other, "[e]mployees accept[ed] the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Morrison-Knudsen*, 461 U.S. at 636; *see also Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 122-24 (1962) (emphasizing the LHWCA's goal of reducing uncertainty).

In the "twilight zone" cases, this Court reasoned that concurrent jurisdiction between the LHWCA and state compensation systems would further these legislative purposes. *Sun Ship*, 447 U.S. at 720; *Davis*, 317 U.S. at 254-56; *Calbeck*, 370 U.S. at 125-26. In *Davis*, for instance, this Court explained that the LHWCA "seeks to give 'to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation,'" and state workers' compensation statutes similarly aim to provide "'sure and certain relief for workmen.'" 317 U.S. at 254 (citations omitted). Subjecting workers to a jurisdictional guessing game between compensation systems would "defeat[]" the accomplishment of both statutes' goals. *Id.*; *accord Sun Ship*, 447 U.S. at 720.

While the "twilight zone" cases were meant to further the LHWCA's purpose, the Fifth Circuit's extension of those cases to tort suits would do just the opposite. Under the Fifth Circuit's decision, a maritime worker injured in

the "twilight zone" who has a compensation remedy only under the LHWCA may "eschew[]" the Act "entirely" and sue his employer for tort damages. Pet.App.14a. If allowed to stand, that result will undermine the LHWCA's goal of ensuring "limited and predictable liability." *Morrison-Knudsen*, 461 U.S. at 636. It also will result in costly, time-consuming litigation over fault and damages. In other words, such a result would "undercut the value of the worker's compensation system, which is predicated on a no-fault regime and quick recovery." *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 150 (4th Cir. 2000).

The Fifth Circuit's ruling also will undermine the interests of maritime workers over the long term. As Judge Wilkinson has observed, allowing workers to circumvent the LHWCA and litigate tort cases to trial "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.*

Indeed, the Fifth Circuit's decision directly interferes with the incentives that Congress created to encourage employer participation in the LHWCA. Under the Act, if a maritime employer secures payment of compensation, the employer is immune from damages suits for injuries to covered employees. 33 U.S.C. § 905(a). However, if an employer does not secure payment, an injured employee or his representative may "maintain an action at law or in admiralty for damages." *Id.* The employer also is stripped of certain defenses and may be subject to misdemeanor liability. *Id.* §§ 905(a), 938(a). These provisions are designed to "induce employers to accept and participate in the LHWCA compensation scheme." *Brown v. Forest Oil Corp.*, 29 F.3d 966, 971 (5th Cir. 1994); *accord* Engerrand & Tweedy, *supra*, at 45-46, 51.

Under the Fifth Circuit's ruling, however, an employer may be subject to unlimited tort liability *even if it secures payment under the Act*. That result would have the unfortunate consequence of weakening employer incentives to participate in the LHWCA and thus would harm the very employees who benefit under the Act. *See White*, 222 F.3d at 150.

In short, the Fifth Circuit's extension of this Court's "twilight zone" cases to tort suits contravenes the LHWCA's text and purpose and is contrary to the reasoning of those cases. This Court should grant review to correct the Fifth Circuit's erroneous extension of those precedents.

II. The Fifth Circuit's Decision Exacerbates a Split Among the Lower Courts

This Court's review is further warranted because the Fifth Circuit's decision conflicts with decisions of other circuits and state high courts, as well as with this Court's prior guidance that the LHWCA preempts tort claims.

1. Before the Fifth Circuit's decision below, the federal courts of appeals uniformly had held that section 905(a) prevents covered employees from bringing state-law tort suits against their employers. *Tilcon N.Y., Inc. v. Volk (In re Buchanan Marine, L.P.)*, 874 F.3d 356, 363, 368 (2d Cir. 2017); *Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 1124 (11th Cir. 2011); *White*, 222 F.3d at 148-49, 151; *Peter*, 903 F.2d at 953. Similarly, several state high courts have reached the same conclusion with respect to tort suits brought against employers or co-employees. *Talik v. Fed. Marine Terminals, Inc.*, 885 N.E.2d 204, 211-12 (Ohio 2008); *Hill v. Knapp*, 914 A.2d

1193, 1202-05 (Md. 2007) (construing 33 U.S.C. § 933); *Fillinger v. Foster*, 448 So. 2d 321, 326 (Ala. 1984) (same).[2]

Only the Louisiana Supreme Court had taken the opposite position, holding that a worker injured in the "twilight zone" who is eligible for benefits under the LHWCA may elect to bring a state-law tort suit for damages. *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212, 1221 (La. 1976); *see also DiBenedetto v. Noble Drilling Co.*, 23 So. 3d 400, 405-06 (La. Ct. App. 2009). The Fifth Circuit decision below expressly joined that outlier position, greatly magnifying the importance of the conflict. Pet.App.16a-17a & n.13.

This conflict disrupts the uniform, nationwide application of the LHWCA. While the Act has been interpreted to allow concurrent jurisdiction between federal and state workers' compensation systems, it provides a clear rule with respect to tort suits: as long as a maritime employer secures payment of compensation under the Act, the employer is immune from actions for "damages … at law or in admiralty" for injuries to covered employees. 33 U.S.C. § 905(a). Due to the conflict above, however, maritime employers in Louisiana face the threat of unlimited tort liability, even if they secure payment under the Act. This Court should grant review to resolve this conflict, as the Act's protections should not turn on the jurisdiction in which an employer happens to do business.

2. On top of exacerbating a split, the Fifth Circuit's decision runs contrary to this Court's guidance. Although

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[2] In language similar to that of section 905(a), section 933(i) provides that a maritime employee's right to compensation under the statute is his "exclusive remedy" if he is injured or killed "by the negligence or wrong" of a co-employee. 33 U.S.C. § 933(i).

this Court has not squarely decided the question presented, it has explained in dicta that the LHWCA preempts tort claims. For example, in *Norfolk Shipping & Drydock Corp. v. Garris*, this Court observed that "the LHWCA expressly pre-empts all other claims" against the employer, except for "some state workers' compensation claims." 532 U.S. 811, 818 (2001) (citing *Sun Ship*, 447 U.S. at 723-26). Similarly, in *Howlett v. Birkdale Shipping Co., S.A.*, the Court explained that the LHWCA requires the employer to "pay the statutory benefits regardless of fault," but in return, the employer "is shielded from any further liability to the longshoreman." 512 U.S. 92, 96 (1994). And in *Johnson*, the Court confirmed that, "[f]or the employer, the reward for securing compensation is immunity from employee tort suits." 467 U.S. at 931. These cases all reflect the fact that section 905(a)'s plain text preempts tort actions for damages.

This Court should intervene to resolve the conflict above and bring the Fifth Circuit in line with this Court's guidance that the LHWCA preempts tort claims.

III. The Fifth Circuit's Decision Will Have Broad Consequences

1. Review also is warranted because the Fifth Circuit's decision will have broad consequences for maritime employers and employees by opening the door to tort suits for unlimited damages. In an attempt to downplay these consequences, the Fifth Circuit purported to limit its holding to "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 [Louisiana Workers' Compensation Act]." Pet.App.14a. As petitioner correctly explains, however, these factors "narrow nothing." Pet. 30.

The first three factors would cover every maritime worker in Louisiana subject to the LHWCA who is injured at the water's edge. Pet. 30. The fourth factor is hardly a limit, since the Fifth Circuit's decision gives the worker the option to file a tort suit or seek compensation under the LHWCA. And the fifth factor does no work, given that Louisiana has eliminated state workers' compensation for any employee whose injuries are covered by the LHWCA. *See* La. Stat. Ann. § 23:1035.2.

Thus, even if confined to Louisiana, the Fifth Circuit's ruling will have a major impact on maritime injury cases. This alone is significant, as Louisiana is the "center of the American domestic maritime industry universe."[3] According to the American Maritime Partnership, Louisiana has more than 70,000 jobs in the industry, and ranks as the top state in maritime jobs per capita.[4] Louisiana also is a major center of shipbuilding, with 23 shipyards in the state. And according to the Bureau of Labor Statistics, more than 5,000 Louisianans work for more than 100 employers in the ship and boat building industries alone.[5]

Given the size of Louisiana's maritime industry, it is unsurprising that Louisiana district courts are among the most popular federal forums for maritime injury suits. For example, between June 2022 and June 2023, Louisiana district courts accounted for more than 16% of all

[3] American Maritime Partnership, *Maritime In Your Community By the Numbers* (2020), https://bit.ly/47tnVOn.

[4] *Id.*

[5] Bureau of Lab. Stat., *Employment Wages Data Viewer, Private, NAICS 3366 Ship and boat Building, All States and U.S.* (Sept. 7, 2022), https://bit.ly/46NdRzX.

maritime injury suits filed in federal courts nationwide.[6] Thus, even considering Louisiana alone, the Fifth Circuit's ruling will have a massive impact on maritime injury litigation and seriously disrupt the LHWCA's operation.

2. The Fifth Circuit's reasoning, however, extends well beyond Louisiana. Taken to its logical conclusion, the ruling would apply to *any* state that eliminates workers' compensation coverage for maritime workers whose injuries are covered by the LHWCA. Indeed, the Fifth Circuit itself recognized that this situation "may arise under other states' laws." Pet.App.14a n.11.

Notably, states with such laws include the other two states in the Fifth Circuit, Texas and Mississippi. *See* Tex. Lab. Code Ann. § 406.091(a)(2); Miss. Code Ann. § 71-3-5. Both of these states are major maritime centers as well. According to the American Maritime Partnership, Texas has more than 56,000 jobs in the maritime industry, and Mississippi has more than 13,000.[7]

Numerous other states have eliminated state workers' compensation coverage for workers covered by federal compensation schemes, such as the LHWCA. To take a few examples of states with maritime industries, Hawaii, Indiana, Kentucky, Maine, Massachusetts, and Oregon all have such statutes. *See* Haw. Rev. Stat. § 386-7; Ind. Code § 22-3-2-19; Ky. Rev. Stat. Ann. § 342.650(4); Me. Stat. tit. 39-A, § 102; Mass. Gen. Laws ch. 152, § 1(4)(f); Or. Rev. Stat. § 656.027(4). The Fifth Circuit's rationale thus could extend well beyond Louisiana.

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[6] U.S. Courts, *Table C-3—U.S. District Courts—Civil Statistical Tables For The Federal Judiciary* (June 30, 2023), https://bit.ly/46WZglt.

[7] American Maritime Partnership, *supra*, https://bit.ly/47tnVOn.

Moreover, the Fifth Circuit's ruling threatens to expose maritime employers to conflicting tort regimes. As discussed, the LHWCA establishes a uniform, nationwide system of no-fault compensation for maritime workers, supplemented by state workers' compensation schemes. Under the Fifth Circuit's ruling, however, a maritime employee who lacks a state compensation remedy may circumvent the LHWCA and bring a tort suit for damages. If that rule were to apply more broadly, employers who do business in multiple states could face liability under varying tort systems. For example, states have different tort rules concerning statutes of limitations, the availability of punitive damages, and caps on compensatory damages. As a result, an employer's tort liability could vary significantly depending on the jurisdiction in which a covered employee is injured. Allowing tort claims thus would "inject numerous conflicting" bodies of law into "an otherwise uniform national system," Engerrand & Tweedy, *supra*, at 47 (citation omitted), and produce the very uncertainty that the LHWCA was designed to avoid.

3. The Fifth Circuit's ruling also will undermine the practical operation of the LHWCA. Consider first the speed of recovery under the Act. The LHWCA requires employers to make prompt payments to employees. 33 U.S.C. § 914; *cf. Morrison-Knudsen*, 461 U.S. at 636-37 (emphasizing the LHWCA's "goal of providing prompt compensation to injured workers"). That mandate works: in 2020, employers issued the first LHWCA payment to employees within 28 days in 88% of cases.[8] Compare that timeframe with the protracted timeframe of an average civil case. The median time between filing and disposition

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[8] U.S. Dep't of Lab., Off. of Workers' Comp. Programs, *Program Performance Page – Longshore Program*, https://bit.ly/3G0LvXn.

in the Fifth Circuit is 10.9 months.[9] And Louisiana district courts are especially slow; for instance, the Eastern District's median time is 68.9 months.[10] Allowing tort claims will thus undercut the LHWCA's goal of promoting prompt resolution.

Take next the certainty of recovery. Under the LHWCA, employees receive statutorily set payments, which have steadily increased each fiscal year.[11] In 2020 alone, employees received $1.69 billion in cash and medical payments under the LHWCA.[12] In contrast, tort suits expose employees and employers alike to high litigation costs and uncertain damages awards. Indeed, tort suits are an inherently inefficient mechanism for delivering compensation to injured workers. One study found that only 53% of dollars in the tort system reflected recoveries, while the remaining 47% covered litigation costs.[13] The administrative costs of the LHWCA, by contrast, are a significantly smaller fraction of the overall scheme.[14]

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[9] U.S. Courts, *Table C-5—U.S. District Courts—Civil Statistical Tables For The Federal Judiciary* (June 30, 2023), https://bit.ly/3MlX12L.

[10] *Id.*

[11] U.S. Dep't of Lab., Off. of Workers' Comp. Programs, *National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 10(f))*, https://bit.ly/3MsmW97.

[12] National Academy of Social Insurance, *Workers Compensation: Benefits, Costs, and Coverage* 76 (Nov. 2022).

[13] U.S. Chamber of Commerce Institute for Legal Reform, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System* 4 (Nov. 2022).

[14] National Academy of Social Insurance, *supra*, at 76.

Keep in mind that employers already bear significant burdens associated with the LHWCA. In 2020 alone, employers bore more than $1.8 billion in costs to ensure the scheme's functioning.[15] As maritime employers made clear during the passage of the 1972 amendments, these burdens are workable only if the LHWCA represents the exclusive source of liability to injured maritime employees. *See Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 261-63 & n.18 (1977); *White*, 222 F.3d at 148-49. Exposing employers to both the costs of the LHWCA and the threat of unlimited tort liability would be unduly burdensome and reduce incentives to support the system. *See White*, 222 F.3d at 150.

4. This Court should grant review now because the Fifth Circuit's decision is already undermining the operation of the LHWCA. As the petition explains, there are already at least 60 pending cases presenting similar claims. Pet. 33 n.13. In addition, at least two district court cases in Louisiana already have permitted tort claims to proceed in the wake of the Fifth Circuit's decision.

Cadiere v. Huntington Ingalls, Inc. provides a particularly stark illustration of the decision's impact. 2023 WL 4637056 (E.D. La. July 20, 2023). In that case, a maritime employee filed a complaint alleging that he contracted mesothelioma through a combination of direct and secondary exposure to asbestos. *Id.* at *1. In his complaint, however, the employee "expressly repudiated a direct asbestos exposure claim because of the 'exclusivity provision of the [LHWCA].'" *Id.* (citation omitted). After the Fifth Circuit's decision below, however, the employee moved for leave to amend his complaint to raise a direct

[15] *Id.*

asbestos claim. *Id.* The court granted the motion, explaining that the employee's claim "had previously been deemed preempted" but was now viable. *Id.* at *3.

Robichaux v. Huntington Ingalls Inc. tells a similar story. 2023 WL 5846829 (E.D. La. Sept. 11, 2023). There, the district court denied the employer's motion for summary judgment on a maritime employee's tort claims based on asbestos exposure. In so doing, the court explained: "This [c]ourt is duty-bound to follow binding Fifth Circuit precedent, and does not find, under [the Fifth Circuit's decision below], that [the employee's] state law tort claims are preempted by the LHWCA." *Id.* at *3.

These two cases are only the beginning. With at least 60 pending asbestos cases against petitioner Huntington Ingalls alone, Pet. 9, 33 n.13, and the lure of massive tort damages created by the decision below, a tidal wave of litigation almost certainly will follow. And rather than being promptly resolved through the LHWCA, those suits could spawn costly civil litigation, lengthy delays, and unpredictable damages awards.

This Court should intervene to restore the proper reach of the LHWCA's exclusivity provision and prevent further damage to the Act. In recognition of the importance of a properly functioning workers' compensation system, this Court has frequently granted review in LHWCA cases.[16] The Court should do the same here.

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[16] *See, e.g.*, *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93 (2012); *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005); *Garris*, 532 U.S. 811; *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121 (1997); *Ingalls Shipbuilding, Inc. v. Dir., Off. of Workers' Comp. Programs*, 519 U.S. 248 (1997); *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291 (1995); *Howlett*, 512 U.S. 92; *Bath Iron Works Corp. v. Dir., Off. of Workers' Comp. Programs*, 506 U.S. 153 (1993); *Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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40 (1989); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985); *Johnson*, 467 U.S. 925; *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983); *Morrison-Knudsen*, 461 U.S. 624; *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529 (1983); *Dir., Off. of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297 (1983); *U.S. Indus./Fed. Sheet Metal, Inc. v. Dir., Off. of Workers' Comp. Programs*, 455 U.S. 608 (1982); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981); *Potomac Elec. Power Co.*, 449 U.S. 268; *Sun Ship*, 447 U.S. 715; *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979); *Caputo*, 432 U.S. 249; *Calbeck*, 370 U.S. 114; *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959); *Pa. R.R. Co. v. O'Rourke*, 344 U.S. 334 (1953); *Davis*, 317 U.S. 249.

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