No. 23-368

In The
Supreme Court of the United States

HUNTINGTON INGALLS INCORPORATED,

Petitioner,

v.

LYNN BARROSSE, RAEGAN HOLLOWAY,
and MACKENZIE STRICKER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In decisions no party questions today, and with no hint of disapproval by Congress, this Court has (1) rejected the idea that the Longshore and Harbor Workers' Compensation Act (LHWCA) is the exclusive means of redress for injured workers in the so-called "twilight zone" along the water's edge, (2) recognized concurrent state and federal jurisdiction to legislate and provide remedies in that area, and (3) held that nothing in the LHWCA or the Constitution prevents a state from allowing workers to pursue tort claims for injuries in the twilight zone. Exercising its concurrent jurisdiction, Louisiana allowed some twilight-zone workers injured before 1975 to seek redress in court because state workers' compensation was unavailable for their illness. The question presented is:

Whether the LHWCA preempts Louisiana's decision, based on a since-repealed statute, to let a subset of former twilight-zone workers sue their employers in tort if they contracted an uncovered illness before 1975.

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INTRODUCTION

The petition of Huntington Ingalls Incorporated (Avondale) advances arguments this Court has rejected repeatedly. The Court need not revisit those arguments here, especially considering (1) the unique circumstances that gave rise to this case under a since-repealed state law, (2) the absence of any circuit split, and (3) this Court's consistent jurisprudence—in which Congress has acquiesced—recognizing the power of states to legislate in the "twilight zone" along the water's edge. If the jurisdiction of states in the twilight zone is to change after all these years, Congress should be the one to say so.

The parties largely agree on the controlling legal framework, and Avondale does not ask this Court to overrule any of its precedents. The parties agree that, since *Davis v. Department of Labor & Industries of Washington* in 1942, the states and the federal government have had concurrent jurisdiction over worker injuries in the twilight zone.[1] They also agree that compensation benefits are usually the sole remedy states offer injured longshore workers against their employers. And finally, the parties agree that twilight-zone workers may avail themselves of state or federal remedies even if state remedies are more generous to the worker, and even if employers have done everything federal law asks of them.

But in this unusual case, because of a quirk of Louisiana law that ended nearly 50 years ago, the

[1] 317 U.S. 249 (1942).

respondents' decedent had no state compensation remedy against his twilight-zone employer for much of the exposure period. The only state remedy against his employer then was a tort claim. And due to Louisiana's specific rules on claim accrual, liberative prescription, and *contra non valentem*, his claim survived in a dormant state despite the passage of decades. Thus, cases like this one are rare in Louisiana and elsewhere, making this case unworthy of Supreme Court review.

Until 1975, Louisiana provided workers' compensation benefits to employees only for certain occupational diseases listed in the governing statute. Under this schedule approach, unlisted diseases were not covered, and afflicted workers could not recover compensation benefits for any resulting disability or death. Those workers could, however, try to prove their claims in court under traditional negligence principles.

For most of the time Ronald Barrosse worked in Avondale's ship-building business in southeast Louisiana, the state's workers' compensation schedule did not include mesothelioma—a deadly cancer caused by exposure to asbestos—even though it did include other asbestos-induced diseases. The law changed in 1975 to cover all occupational diseases, but the change was not retroactive. Under state law, workers who contracted mesothelioma before the change—even if the disease had not yet manifested itself—had a vested right to the tort remedies available at the time of their harmful exposure. Thus, Mr. Barrosse's path to a courtroom was narrow and not easily replicated. And given the ubiquity of workers' compensation laws today, claims like

his seldom arise in Louisiana or elsewhere; they become rarer each year as the retiree population ages. As the Fifth Circuit confirmed, Louisiana closed the door to the accrual of this sort of employee tort claim after 1975. The issue presented here thus has minimal import for future cases.

Nor does any supposed circuit split warrant review. In most of the circuit cases Avondale cites, the injured workers invoked federal law, accepted LHWCA benefits, but also sought state remedies. That was not the case for Mr. Barrosse, and nothing in the Fifth Circuit opinion suggests any disagreement with the holdings of those cases. The remaining circuit decision, a Third Circuit case from 1990, is also distinguishable. The employer there had arranged for coverage under both the LHWCA and Virgin Islands law. The Third Circuit stressed that fact and based its ruling on it. But as the Fifth Circuit explained in distinguishing that case, Louisiana's compensation statute did not cover Mr. Barrosse's injury, so his employer could not have covered him under state law. Given the lengths both courts went to issue narrow, fact-bound rulings, no perceived conflict between them requires resolution.

And finally, on the merits, the Fifth Circuit stayed true to the text, structure, and history of the LHWCA, as well as the logic and holdings of this Court's decisions. Avondale, in contrast, bases its petition on discredited arguments at odds with the notion of concurrent jurisdiction for twilight-zone workers, which is central to both the LHWCA and this Court's cases.

Avondale points to section 905(a)'s statement that LHWCA compensation "shall be exclusive and in place of all other liability of such employer to the employee. . . ." It insists that this language "means what it says" and provides the exclusive remedies for injured longshore workers like Mr. Barrosse no matter where they were hurt.[2] Yet that language was enacted when the LHWCA applied only in areas of exclusive federal jurisdiction; it made clear that the LHWCA was the sole federal remedy available to injured workers. It was never intended to displace state-law remedies within areas of concurrent jurisdiction, as this Court has repeatedly acknowledged. Avondale eventually accepts that concurrent jurisdiction exists for state workers' compensation remedies in the twilight zone. But if the LHWCA remedy is not exclusive where a state provides a workers' compensation remedy, there is nothing in the text or history of the LHWCA—or in logic—that would make the LHWCA remedy exclusive where, as here, a state elects to provide a tort remedy for certain twilight-zone workers.

Section 905 plays a limited role in areas of concurrent jurisdiction. The Court's 1942 decision in *Davis*—the case that first recognized concurrent jurisdiction in the twilight zone and rejected the sort of exclusivity argument Avondale presents here[3]—explained that, in areas of concurrent jurisdiction, the exclusivity language in section 905 "gains meaning" when the

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[2] Pet. i.

[3] 317 U.S. 249.

twilight-zone worker invokes federal law.[4] When the worker seeks only state remedies, section 905 presents no basis for federal courts to invade the province of a dual sovereign and micromanage the remedies the state makes available.

To be sure, not everyone agreed with the rationale of *Davis*. A dissenting justice, like Avondale here, viewed the matter in black-and-white terms.[5] Using the very phrase Avondale uses today, the dissent concluded, "I cannot say that this section [905] does not *mean what it says*. If there is liability under the federal act, that liability is exclusive."[6] That reasoning did not carry the day, however.

Avondale nevertheless faults the Fifth Circuit for not holding that state-law tort claims against twilight-zone employers go too far. But this argument is not new, either. An employer like Avondale made the same argument in *Hahn v. Ross Island Sand & Gravel Co.*[7] Like Avondale, that employer insisted that "[t]he 'twilight zone' [applies] only to a choice between federal and state compensation proceedings."[8] This Court disagreed. The worker's injury occurred in the twilight

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[4] *Id*. at 256.

[5] *Id*. at 260 (Stone, C.J., dissenting) (quoting 33 U.S.C. § 905).

[6] *Id*. (emphasis added). The dissent used the same line 20 years later in *Calbeck*. "I think the statute still means what it says[.]" *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 132 (1962) (Stewart, J., dissenting, joined by Harlan, J.).

[7] 358 U.S. 272 (1959).

[8] Brief of Respondent, *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959) (No. 52), 1958 WL 91643, at *22.

zone, and "nothing" in the LHWCA or the Constitution prevented a tort recovery if state law allowed it.[9]

The correctness of *Hahn* is not before the Court. Avondale accepts it as an accurate statement of the law and does not ask the Court to overturn it. But its efforts to distinguish the case fall short and echo the dissent there. According to Avondale's reasoning, the LHWCA did not preempt Oregon law in *Hahn* because the state meant to punish employers that did not fulfill a state-imposed obligation: securing state workers' compensation insurance.[10] But it makes little sense to say that the Supremacy Clause blocks state-law tort claims in the twilight zone except when states are pursuing their own policy objectives. That turns preemption on its head. When it comes to preemption, *Congress*'s objectives matter. And if giving tort claims to a subset of workers who could have elected LHWCA benefits is the abomination Avondale imagines, the employee in *Hahn* would have lost.

Louisiana had the right decades ago to structure its tort and compensation laws in the twilight zone as it saw fit. That right stems from concurrent jurisdiction in the twilight zone—something settled since *Davis*.[11] It is reasonable to presume that Congress would have acted if it disapproved of concurrent jurisdiction,

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[9] *Hahn*, 358 U.S. at 273.

[10] *Id*.

[11] *Id.* at 272; *Calbeck*, 370 U.S. 114; *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980) (unanimous opinion).

in general, or *Hahn*, in particular.[12] Indeed, Congress has moved swiftly to overturn LHWCA decisions with which it disagreed.[13] The absence of similar steps in this arena, after 80 years of high-profile jurisprudence, shows acquiescence.

The Fifth Circuit's ruling was faithful to decades of this Court's jurisprudence. Nothing supports revisiting the twilight zone or the concurrent jurisdiction that prevails within it; not even Avondale asks the Court to do that. Differences in remedies and procedures are inherent aspects of dual sovereignty. In other words, to accept concurrent jurisdiction in the twilight zone—as this Court and the Fifth Circuit have done—is to reject the idea that Congress demands uniformity there. If change in this settled area is needed, it should come from Congress.

For all these reasons, the petition should be denied.

STATEMENT OF THE CASE

Ronald Barrosse was an electrician. He worked for Avondale on ships being constructed in "wet dock" at Avondale's shipyard along the Mississippi River near New Orleans. Between 1969 and 1977, he was exposed to asbestos-containing insulation on steam pipes. Before installing that insulation, workers cut it with

[12] *See Wyeth v. Levine*, 555 U.S. 555, 574 (2009).

[13] *Infra* Part III(C).

saws, which caused asbestos dust to fill the air, coat the lungs of nearby workers with potentially deadly fibers, and cover their clothing. When ships were refurbished, old asbestos insulation was ripped off pipes, again releasing clouds of dust into the air and repeating the cycle.

Asbestos-related diseases usually take decades to appear, and Louisiana law vests tort rights in the victims at the time of exposure rather than upon manifestation of the illness. Mr. Barrosse was diagnosed with malignant mesothelioma in March 2020, long after he left Avondale's employment.

After his diagnosis, Mr. Barrosse filed negligence claims in state court against Avondale and other defendants, invoking the law as it existed decades before at the time of exposure. In this unique context, his claims were timely. That is because the statute of limitations (or *liberative prescription* in Louisiana) did not start until he knew or should have known of his illness.

Mr. Barrosse alleged that his exposure to asbestos resulted from Avondale's negligent failure to warn of the dangers of asbestos or to take reasonable safety precautions for handling it. Avondale removed the case to the United States District Court for the Eastern District of Louisiana. Meanwhile, Mr. Barrosse succumbed to his illness several months after his diagnosis; his

surviving spouse and children took his place in the suit.[14]

Neither Mr. Barrosse nor his survivors asserted LHWCA claims or received LHWCA benefits. Even so, Avondale moved for summary judgment and dismissal of the tort claims based on the argument that federal law was exclusive—even in the twilight zone. The plaintiffs and a second defendant opposed the motion. The district court granted it and dismissed the claims against Avondale.

The district court first ruled that Mr. Barrosse's exposure to asbestos would have satisfied the requirements for a compensable claim under the LHWCA. The court then concluded that the LHWCA preempted his state-law claims even if he did not receive federal benefits. The court reasoned 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 frustrate the LHWCA's purpose by undermining the quid pro quo that the statute guarantees to maritime employers and their employees."[15]

Mr. Barrosse appealed, and the Fifth Circuit reversed. Focusing on *Davis* and *Hahn*, the Fifth Circuit started with the unchallenged premise that state and federal governments have concurrent jurisdiction in the twilight zone. It rejected Avondale's position that inevitable differences between state and

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[14] For simplicity, this opposition refers to the respondents as "Mr. Barrosse."

[15] Pet. App. 45a.

federal sovereigns were conflicts that had to be resolved in favor of federal law. That would be "tantamount to eliminating concurrent jurisdiction" in cases like this one.[16]

Remaining faithful to Supreme Court precedent, the Fifth Circuit saw no basis for the LHWCA to supplant Louisiana's pre-1975 decision to let victims of mesothelioma—a disease not included in the state's since-abandoned schedule approach to workers' compensation—bring claims for damages.[17] The type of relief (whether compensation or tort claims) was not dispositive. "Indeed, if tort claims themselves visited any inherent frustration on Congress's 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 'frustrat[e] the very purpose' of the LHWCA. But it did not."[18]

Avondale petitioned for rehearing en banc, which was denied without dissent.

[16] *Id*. at 16a.

[17] *Id*. at 16a–17a.

[18] *Id*. at 15a–16a.

REASONS FOR DENYING THE WRIT

I. This case hinges on a repealed quirk of Louisiana law and has minimal significance for future cases.

Because Mr. Barrosse was injured in the twilight zone—an area of concurrent jurisdiction—he was allowed to seek remedies "under state law."[19] Typically, the available remedy under state law is workers' compensation. In Louisiana—as elsewhere—workers' compensation is the default, exclusive remedy for almost all workplace injuries.[20] Mr. Barrosse, however, had access to a tort claim against his former employer due to a narrow set of circumstances that existed in only rare cases.

Under Louisiana law, tort rights in long-term-latency cases vest at the time of exposure to the harmful substance, not the manifestation of the illness.[21] But under the so-called "discovery rule," liberative prescription (or the statute of limitations) does not begin until the injured worker has reason to know of his injury.[22] With a disease like mesothelioma, a lengthy gap may exist between the tortious conduct, on one hand, and the worker's assertion of rights, on the other hand.

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[19] *E.g.*, *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 719 (1980).

[20] La. Rev. Stat. § 23:1032.

[21] *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1066 (La. 1992).

[22] *E.g.*, *Specialized Loan Servicing, LLC v. January*, 119 So. 3d 582, 586 (La. 2013).

In these unusual circumstances, old, often-repealed state laws govern the parties' claims and defenses.

Mr. Barrosse's unlikely path to a tort claim began with a since-repealed law. Originally, Louisiana's workers' compensation statute listed, on a schedule, certain occupational diseases as compensable. Compensation and employer immunity depended on the worker's specific malady being on the schedule. Mesothelioma was not on the schedule during most of Mr. Barrosse's tenure with Avondale. As a result, he was not covered by the state compensation statute and had access to a tort remedy under state law.[23] That changed in 1975; the Louisiana Legislature abandoned the schedule approach in favor of comprehensive compensation coverage.[24] But because Mr. Barrosse suffered harmful exposure before that change, and because the change was not retroactive, Louisiana law allows him to pursue a tort remedy.[25]

Thus, Mr. Barrosse's path to a state-law tort claim was narrow. The tort claim exists only because Mr. Barrosse developed a certain disease (mesothelioma); that disease was not covered by Louisiana's workers compensation statute in a certain period (pre-1975); and

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[23] *Rando v. Anco Insulations Inc.*, 16 So. 3d 1065, 1071, 1079 (La. 2009), *abrogated in part on other grounds by Pete v. Boland Marine & Mfg. Co., LLC*, No. 2023-C-00170, 2023 WL 6937381 (La. Oct. 20, 2023); *Cole*, 599 So. 2d at 1068.

[24] *Rando*, 16 So. 3d at 1080.

[25] Pet. App. 5a–6a.

Louisiana applies the law at the time of exposure for long-latency occupational illnesses.

Those limited circumstances will not exist for longshore workers injured in the future because state law now forecloses a tort remedy. Mr. Barrosse's path to a tort claim has been closed for nearly 50 years. State law would prohibit a tort claim if Mr. Barrosse were injured today rather than decades ago.

Given these facts, the Fifth Circuit correctly noted that its holding reached only a subset of injured workers like Mr. Barrosse. That is, (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 Louisiana's workers' compensation act.[26] The class of potential tort claimants meeting these criteria is small. Again, workers injured on the job today, who are subject to present-day Louisiana law, will invariably be limited to a compensation remedy under state law.

Avondale nonetheless suggests that, following *Barrosse*, any Louisiana worker injured in the twilight zone may decline federal benefits and pursue a state-law tort claim. That argument, raised for the first time on rehearing at the Fifth Circuit, rests on a 1990 revision to the Louisiana workers' compensation statute. The amendment provided that state compensation would not be payable to workers covered by the LHWCA, the Jones Act, or the Federal Employers'

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[26] *Id*. at 14a.

Liability Act.[27] In other words, the state chose no longer to exercise its concurrent jurisdiction fully in the twilight zone and relied on federal programs to provide for injured workers. Avondale sees things differently. It imagines that the 1990 law both took away state compensation benefits and opened the door to twilight-zone tort suits. It thus concludes that the Louisiana statute's employer-immunity provision has no effect, thereby exposing employers today to tort suits whenever workers suffer injuries of any sort in the twilight zone. This view is contrary to Louisiana law.

Louisiana distinguishes "between [1] injuries which do not come within the [compensation statute's] coverage provisions and [2] injuries which are covered, but for which no compensation is payable."[28] A longshore worker injured on the job post-1990 falls into the latter category. Under Louisiana law, injuries resulting from "accidents" during the course and scope of employment are covered by Louisiana's workers' compensation scheme—and the exclusive remedy precluding state-law tort claims applies—even if compensation is not actually payable.[29] Employers like Avondale, therefore, have not lost their immunity from tort suits by injured longshore workers. Instead, Louisiana has decided, as part of its workers' compensation law, that workers also covered by federal law should look to

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[27] La. Rev. Stat. § 23:1035.2.

[28] *O'Regan v. Preferred Enters., Inc.*, 758 So. 2d 124, 137 (La. 2000).

[29] *Deshotel v. Guichard Operating Co.*, 916 So. 2d 72, 83 (La. 2004).

federal law for payment of benefits rather than to state law. The 1990 amendment had nothing to do with permitting tort suits.

Based on its reading of the 1990 amendment, Avondale speculates that the Fifth Circuit's ruling might spawn hundreds of tort actions against it in Louisiana alone.[30] That speculation is unfounded. Louisiana state courts have allowed twilight-zone workers to pursue state remedies (including tort claims, if permitted by the state's compensation statute before 1975) for decades.[31] If the 1990 amendment had opened the door to tort claims for every twilight-zone injury, someone would have noticed and exploited the opportunity in the last 30 years. Indeed, the Southern Reporter would be filled with such cases. Avondale, however, does not point to one.

Avondale's view of the 1990 amendment as expanding state regulation in the twilight zone is backwards. By eliminating state compensation for workers covered by federal programs, the state became more deferential to federal law, not less. Moreover, Congress does not "hide elephants in mouseholes,"[32] and neither do state legislatures. If Louisiana had intended to strip employers of immunity in large swaths of cases, it would have done so overtly and after public debate.

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[30] Pet. 32.

[31] *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212 (La. 1976); *DiBenedetto v. Noble Drilling Co.*, 23 So. 3d 400, 406 (La. Ct. App. 2009).

[32] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The legislative history of the amendment contains nothing to suggest the bold, controversial changes Avondale envisions.

Finally, even if Avondale were correct in its assessment of state law, the wisdom of state policy choices in a concurrent-jurisdiction regime is for the state to decide. The Louisiana Legislature—if it agrees that a loophole or mistake exists—could repeal the 1990 law or amend it to further clarify that the exclusive remedy remains in effect for federally covered workers. Intervention by this Court, on an issue of state law, is unnecessary.

II. No circuit split exists.

Contrary to Avondale's assertion, the Fifth Circuit's ruling does not create a split with four federal circuit courts.

The Fifth Circuit's opinion is expressly limited to cases arising in narrow circumstances under Louisiana law.[33] Avondale suggests that the Fifth Circuit recognized that its reasoning would extend beyond Louisiana.[34] Not so. In fact, the court limited its holding to workers injured "in Louisiana" and clarified that the question "whether such claims are preempted [in other jurisdictions] should be determined on a case-by-case and state-by-state basis."[35] Decisions in other

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[33] Pet. App. 14a.

[34] Pet. 30.

[35] Pet. App. 14a.

circuits, involving other states' laws, will not conflict with the limited, Louisiana-specific holding in *Barrosse*.

The decision below does not conflict with the federal cases cited by Avondale. In three of the four federal circuit cases cited, the plaintiffs sought and received LHWCA benefits and were thus held to the exclusivity of that remedy.[36] That is not the case for Mr. Barrosse.[37] Had Mr. Barrosse accepted LHWCA benefits, he would have lost in the Fifth Circuit.[38] In other words, the Fifth Circuit, as shown by its precedent, would have ruled for the employers in three of the four cases Avondale cites.

Avondale insists that the distinction between electing or spurning federal benefits is meaningless, but this Court's jurisprudence shows otherwise. In the unique context of injuries in the twilight zone, concurrent jurisdiction allows the injured worker to select federal benefits or remedies "under state law."[39] And,

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[36] *Matter of Buchanan Marine, L.P.*, 874 F.3d 356, 362 (2d Cir. 2017) ("Volk . . . has been receiving workers' compensation benefits under the LHWCA."); *White v. Bethlehem Steel Corp*., 222 F.3d 146, 148 (4th Cir. 2000) ("White received workers' compensation for his injury under the LHWCA."); *Langfitt v. Fed. Marine Terminals, Inc*., 647 F.3d 1116, 1119 (11th Cir. 2011) ("Langfitt . . . has been paid the compensation benefits by Able Body's LHWCA insurer. . . .").

[37] *E.g*., Pet. App. 2a.

[38] *See id*. at 13a; *see also*, *e.g*., *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 367 (5th Cir. 1995).

[39] *E.g*., *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 719 (1980).

when those workers choose state law, this Court has explained that section 905(a) is no bar. That is because the exclusivity language "gains meaning" only when the twilight-zone worker occupies the federal side of the line.[40] The workers in *Buchanan Marine*, *White*, and *Langfitt* all selected federal remedies. Section 905(a) thereby "gain[ed] meaning" for them and operated as their exclusive remedy.[41] That was not so, however, for Mr. Barrosse, who sought only state remedies.[42] *Barrosse*, therefore, does not conflict with those cases.

The remaining circuit case cited by Avondale, *Peter v. Hess Oil Virgin Islands Corp.*, is also distinguishable. In *Hess Oil*, the Third Circuit reviewed this Court's precedent and acknowledged that "within the twilight zone, a state tort remedy does not violate the constitutional principle enunciated in [*Southern Pacific Co.*] *v. Jensen*" and that "in certain circumstances a state tort remedy [is] available to a worker covered by the LHWCA."[43] Those circumstances, in the Third Circuit's view, existed when the employer failed to

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[40] *Davis v. Dep't of Lab. & Indus. of Washington*, 317 U.S. 249, 256 (1942); *see also Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 132 n.16 (1962) (section 905's exclusivity language is "not involved" in a twilight-zone case involving concurrent jurisdiction); *Sun Ship, Inc.*, 447 U.S. at 722 n.4 (section 905's exclusivity language is "not involved" in a twilight-zone case involving concurrent jurisdiction).

[41] *E.g.*, *Davis*, 317 U.S. at 256.

[42] *E.g.*, Pet. App. 2a.

[43] *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 947 (3d Cir. 1990).

make a compensation remedy available to the worker under state law. It was on that basis that the Third Circuit considered itself free to depart from *Hahn*. "Here, Hess arranged coverage for Peter under *both* LHWCA *and* the Virgin Islands' compensation Act."[44] Accordingly, the Third Circuit held that, "where an employer has obtained workmen's compensation coverage for its LHWCA employee under *both* the LHWCA *and* the state or territorial scheme, § 905(a) and the Supremacy Clause bar a state or territorial tort recovery against the employer."[45]

Hess Oil reads *Hahn* and this Court's twilight-zone jurisprudence too narrowly (and suffers from other flaws).[46] But even so, the facts underlying the Third Circuit's decision do not exist here, where "the applicable version" of the Louisiana compensation law "does not cover the injury [Mr. Barrosse] suffered."[47] For that reason, the decision below poses no conflict with the Third Circuit's decision.[48]

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[44] *Id*. at 953 (emphasis added).

[45] *Id*. (emphasis added).

[46] Among other things, the Third Circuit mistakenly relied on two acceptance-of-benefit cases without appreciating their significance. *Id.* at 952 (relying on *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083 (5th Cir. 1987) and *Lorton v. Diamond M Drilling Co.*, 540 F.2d 212 (5th Cir. 1976), cases that each involved workers who elected to pursue federal remedies under the LHWCA).

[47] Pet. App. 6a.

[48] *Id*. at 12a. Avondale also highlights three state court cases. Two of them overlooked *Hahn*. *Fillinger v. Foster*, 448 So. 2d 321 (Ala. 1984); *Talik v. Fed. Marine Terminals, Inc*., 885 N.E.2d 204

III. The Fifth Circuit's decision properly applies this Court's precedent.

Finally, this Court's review is not warranted because the Fifth Circuit applied the Court's precedent and correctly determined that the LHWCA does not preempt Louisiana's pre-1975 decision to permit limited tort remedies in the twilight zone.

A. In the twilight zone, the LHWCA operates concurrently with state remedies; it does not preempt them.

Dual sovereignty is incontestably established in the Constitution,[49] and it is an inherent aspect of our republic.[50] Under this system, both the federal government and the states wield sovereign powers.[51] These powers "often overlap, allowing both to regulate."[52] Remedies for longshore workers injured along the water's edge are one area in which both state and federal sovereigns wield power and lawfully regulate.

(Ohio 2008). The third relegated *Hahn* to a footnote. *Hill v. Knapp*, 914 A.2d 1193, 1204 n.13 (Md. 2007).

[49] *Printz v. United States*, 521 U.S. 898, 918 (1997).

[50] *See Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019).

[51] *Id.*

[52] *Id*.

1. Congress passed the LHWCA to provide minimum benefits where state law did not reach, not to displace available state remedies.

The LHWCA's purpose was to provide a floor of benefits to maritime workers who might otherwise not have access to them.[53] The law stemmed from a "congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters."[54] Congress "meant to assure the existence of a [federal] compensation remedy for every such injury," even if state law might also apply.[55] In other words, the statute ensures a "federal minimum" of benefits[56] to "hardworking [longshore and harbor workers], engaged in a somewhat hazardous employment."[57]

The relevant history begins in 1917—ten years before the LHWCA's enactment. In *Southern Pacific Co. v. Jensen*, the Court ruled that a state workers' compensation statute could not be applied to injuries on

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[53] *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 258 (1977) (the LHWCA "was designed simply to be a gapfiller to fill the void created by the inability of the States to remedy injuries on navigable waters").

[54] *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 120 (1962).

[55] *Id*. at 120–21.

[56] *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 723–24 (1980).

[57] *Davis v. Dep't of Lab. & Indus. of Washington*, 317 U.S. 249, 254 (1942).

navigable waters.[58] But the Court soon carved out an exception. It permitted state remedies for workers injured on water when the work was "maritime but local" in character.[59] As the Court later noted, though, the line of demarcation for that exception was a "shadowy area" and all but impossible to gauge in advance.[60]

In 1927, Congress passed the LHWCA, thereby providing a federal compensation remedy to non-seaman workers injured on navigable waters.[61] The LHWCA was not "intended to encroach on the field occupied by" state law, however.[62] Making clear its purpose to "permit state compensation protection whenever possible," Congress limited the LHWCA's sphere to cases in which state compensation "may not validly be provided."[63] In other words, the LHWCA was passed originally to provide benefits in areas that state law could not reach. It was designed to operate in an exclusively federal sphere. And within that limited federal sphere, Congress provided that the LHWCA would be a covered worker's exclusive remedy for on-the-job injuries.[64]

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[58] *See Calbeck*, 370 U.S. at 117–18 (citing *Jensen*, 244 U.S. 205 (1917)).

[59] *Id*. at 118–19 (citing *Western Fuel v. Garcia*, 257 U.S. 233 (1921) and *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922)).

[60] *Davis*, 317 U.S. at 253; *see also Calbeck*, 370 U.S. at 119.

[61] *Davis*, 317 U.S. at 252–53; *Sun Ship, Inc.*, 447 U.S. at 717.

[62] *Davis*, 317 U.S. at 255.

[63] *Id.* at 253.

[64] 33 U.S.C. § 905.

2. States may apply their laws (including tort laws) to workers injured in the twilight zone.

The LHWCA did not operate within an exclusively federal sphere for long. Congress's limitation of the LHWCA's jurisdiction to cases in which state compensation "may not validly be provided" created uncertainty for shore-based workers injured on navigable waters.[65] Those who sought compensation under the federal system risked learning later that the "maritime but local" exception applied. If so, only state compensation would be available, and the worker might miss the window to seek those benefits. Likewise, a worker who sought state benefits risked guessing wrong and losing the opportunity to seek federal compensation benefits.[66]

In 1942, the Court sought to resolve the dilemma faced by longshore workers injured in this so-called "twilight zone." In *Davis v. Department of Labor & Industries of Washington*, the Court "effectively established a regime of concurrent jurisdiction" in the twilight zone by permitting workers injured there to obtain either state or federal compensation remedies.[67] Writing for the Court, Justice Black recognized that concurrent jurisdiction served congressional purposes. Those purposes included permitting state

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[65] *Davis*, 317 U.S. at 253.

[66] *See id.* at 254.

[67] *Sun Ship, Inc.*, 447 U.S. at 718.

compensation remedies "whenever possible."[68] Concurrent jurisdiction also aligned with the Court's inclination to resolve any doubts in favor of finding state remedies constitutional.[69]

Many twilight-zone cases (including *Davis*) involved workers choosing between state and federal compensation remedies. That is to be expected. By 1948, all states had enacted workers' compensation statutes, which usually (but not always) provide compensation benefits as the worker's exclusive remedy against the employer.[70] Thus, in most cases, state law—not federal law—limited workers' options to a choice between compensation remedies. To be sure, *Davis* did not purport to decide which remedies a state might offer in the exercise of its concurrent jurisdiction. As the case came to this Court, Washington had made that decision for Mr. Davis. State law limited him to a compensation remedy.

But this Court has recognized that workers' choices are not always so limited. In *Hahn v. Ross Island Sand & Gravel Co.*, a longshore worker injured in the twilight zone filed a state-law tort suit against his employer. He did so even though (1) he was covered by the LHWCA, and (2) his employer had procured LHWCA benefits on his behalf. Oregon law allowed workers to sue their employers in tort if the employers

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[68] *Davis*, 317 U.S. at 252–53.

[69] *Id*. at 257–58.

[70] *See*, *e.g.*, Shauhin Talesh, *Insurance Law as Public Interest Law*, 2 U.C. Irvine L. Rev. 985, 1000 (2012).

had rejected compensation coverage.[71] Despite this law, the Oregon Supreme Court held that, while state compensation remedies were permissible under twilight-zone concurrent jurisdiction, a tort suit went too far and was precluded by the LHWCA.[72] In other words, the Oregon high court agreed with Avondale.

This Court reversed. It applied *Davis* and allowed the longshoreman to pursue state tort remedies over LHWCA remedies.[73] The Court so ruled despite the views of two dissenting justices, who maintained—like Avondale—that the worker could not spurn available LHWCA benefits and "submit his claim to a state court jury."[74]

The LHWCA was amended in 1972 to extend its reach landward to areas customarily used for loading, unloading, repairing, dismantling, or building

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[71] *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273 (1959). While the employer in *Hahn* had secured LHWCA compensation coverage, it had not secured coverage under the Oregon statute. *Id*. at 274 (Stewart, J., dissenting, joined by Harlan, J.).

[72] *Hahn v. Ross Island Sand & Gravel Co*., 320 P.2d 668, 675–77 (Or. 1958), *rev'd*, 358 U.S. 272 (1959) ("In our view, the 'twilight zone' was a contrivance . . . for discouraging jurisdictional disputes as between state and federal compensation laws and not as between the Federal Compensation Law and the right to bring an action for damages under state law. . . . We think this a case to which the Longshoremen's and Harbor Workers' Act clearly applies, and that compensation under it is the plaintiff's sole remedy for his injury.").

[73] 358 U.S. at 273.

[74] *Id*. at 275 (Stewart, J., dissenting, joined by Harlan, J.).

vessels.[75] That led the Court and litigants to examine anew the vitality of parallel remedies for workplace injuries. The amendment, however, did not change the existing regime of concurrent jurisdiction. In *Sun Ship, Inc. v. Pennsylvania*, decided several years post-amendment, the Court reaffirmed its twilight-zone jurisprudence and extended the rule of concurrent jurisdiction to the newly covered areas.[76] The Court saw no signs that Congress intended to alter the "accepted understanding" of concurrent jurisdiction in the twilight zone.[77]

Sun Ship explained that allowing state remedies—even those that might provide a recovery greater than available under the LHWCA—did not undermine any supposed need for uniformity.[78] Providing a federal remedy to those with access to state remedies simply ensured that a "federal minimum" of benefits was

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[75] 33 U.S.C. § 903(a); *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 719 (1980).

[76] *Sun Ship, Inc.*, 447 U.S. at 719–20; *see also id*. at 720 (stating that the "Longshoremen's Act r[uns] concurrently with state remedies").

[77] *Id*. at 722.

[78] *Id*. at 723–24; *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2392–93 (2020) (Alito, J., concurring, joined by Gorsuch, J.) (exceptions to the Affordable Care Act's contraception mandate undermined the asserted need for a uniform rule).

available.[79] And this federal minimum "supplements, rather than supplants, state compensation law."[80]

Giving workers access to greater state benefits does not violate any policy to protect employers either. The Court found "no evidence that Congress was concerned about a disparity between adequate federal benefits and superior state benefits."[81] Nor does permitting remedies under state law violate the LHWCA's exclusivity language. The Court reiterated that it did "not construe § 905(a) to exclude remedies offered by other jurisdictions."[82] For that reason, the availability of those remedies did not "give[] rise to a conflict that, from the employer's standpoint," demands "exclusivity for each compensation system within a separate sphere."[83] No one dissented.

B. Avondale's efforts to evade precedent fall short.

The parties agree that the controlling cases are *Davis*, *Hahn*, and *Sun Ship*. Avondale does not ask the Court to overrule any of them. Instead, Avondale

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[79] *Sun Ship, Inc.*, 447 U.S. at 723–24.

[80] *Id*. at 720. While *Sun Ship* mentioned the concurrence of federal and state compensation remedies, that was because the case concerned application of a state workers' compensation scheme in areas newly covered by the LHWCA. *Id*. at 716. In other words, Pennsylvania made that decision. The Court did not overrule *Hahn* or otherwise limit concurrent jurisdiction to compensation benefits.

[81] *Id*. at 724.

[82] *Id*. at 722 n.4.

[83] *Id*. at 725.

pivots to dicta and inapposite cases.[84] It also tries in vain to distinguish *Hahn*. There, faced with the same question Avondale presents today,[85] the Court held that "nothing in the LHWCA or the U.S. Constitution" prohibited the state-law tort suit.[86] That decision ought to be the end of this dispute.

Avondale seeks the opposite result here. But its arguments mirror the employer's losing arguments in *Hahn* and provide no basis for the Court to depart from precedent.

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[84] *Norfolk Shipbuilding & Drydock Corp. v. Garris* did not involve an employee's claim against an employer. In *Norfolk*, the survivors of a deceased employee sued non-employer parties asserting (among other things) a negligence claim *against non-employers* for breach of maritime duties causing death. *See*, *e.g.*, *Garris v. Norfolk Shipbuilding & Drydock Corp.*, 210 F.3d 209, 211 (4th Cir. 2000), *aff'd*, 532 U.S. 811 (2001). The holding of *Norfolk* was that such a claim is cognizable. *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 812, 820 (2001). *Norfolk* did not hold anything on preemption of worker remedies vis-à-vis the employer. The Court briefly discussed the LHWCA's exclusivity language in dicta.

[85] *Compare* Brief of Respondent, *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959) (No. 52), 1958 WL 91643, at *1 ("The question presented is whether or not the petitioner is barred from maintaining a damage action on the grounds that the sole and exclusive liability of the respondent to the petitioner employees is that liability provided for under the Longshoremen & Harbor Workers' Compensation Act (USCA Secs. 901-950)."), *with* Pet. i ("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.").

[86] *Hahn*, 358 U.S. at 273.

1. *Hahn* sanctioned a tort remedy, not a compensation remedy.

Focusing on the Oregon statute's authorization of a tort remedy against non-participating employers, Avondale argues that *Hahn* simply approved a state *compensation* remedy.[87] That view is impossible to square with the language and result of that case.

A tort remedy is different from a compensation remedy. The Oregon workers' compensation statute in *Hahn* did not incorporate jury trials or general damages awards into its administrative scheme for non-participating employers. Instead, the statute allowed workers in those circumstances to forgo the administrative remedy altogether and proceed "in the courts" with a "negligence action for damages."[88]

That the plaintiff in *Hahn* was pursuing a tort remedy instead of compensation was no secret. According to the Oregon Supreme Court and the dissent in this Court, that was the very problem; permitting a state tort suit allegedly flouted a rule limiting state remedies to compensation benefits.[89] Avondale

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[87] Brief of Defendant-Appellee, *Barrosse v. Huntington Ingalls, Inc.*, 70 F.4th 315 (5th Cir. 2023) (No. 21-30761), 2022 WL 1017980, at *30–31.

[88] *Hahn*, 358 U.S. at 273.

[89] *Hahn*, 320 P.2d at 675–76 (finding the twilight-zone doctrine does not apply "where the injured workman is not seeking re-dress under any compensation statute but through the medium of an action at law"); *Hahn*, 358 U.S. at 274–75 (Stewart, J., dissenting, joined by Harlan, J.) (the twilight-zone doctrine serves only to guarantee availability of a compensation remedy and

advances the same argument here.[90] But this Court rejected it. The *Hahn* majority understood that, in reversing the Oregon Supreme Court and squaring off with the dissent, it was upholding a state-sanctioned tort remedy against a LHWCA-participating employer. And the majority did so because, based on concurrent jurisdiction, Oregon had the right to make tort claims available to injured workers. The same is true in Louisiana for mesothelioma claims accruing before 1975.[91]

2. *Hahn* is not limited to state statutes that allow tort remedies as penalties against non-participating employers.

Avondale argues that *Hahn* applies only if the state workers' compensation statute is worded a certain way. That is, injured twilight-zone workers may bring state-law tort suits against their employers only when the state's workers' compensation law permits the suit to penalize an employer's non-participation in the state scheme.[92] That reading of *Hahn* is too narrow

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should not permit a "personal injur[y]" suit brought by a plaintiff in state court).

[90] *E.g.*, Pet. 26.

[91] *Rando v. Anco Insulations Inc.*, 16 So. 3d 1065, 1071, 1080 (La. 2009), *abrogated in part on other grounds by Pete v. Boland Marine & Mfg. Co., LLC*, No. 2023-C-00170, 2023 WL 6937381 (La. Oct. 20, 2023); *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1068 (La. 1992).

[92] *See*, *e.g.*, Brief of Defendant-Appellee, *Barrosse v. Huntington Ingalls, Inc.*, 70 F.4th 315 (5th Cir. 2023) (No. 21-30761), 2022 WL 1017980, at *30–31.

and improperly transplants a state's motivations into the question of federal conflict preemption.

Hahn's discussion of Oregon law explained why (unlike the typical case) the plaintiff had a tort remedy against his employer. It was because the Oregon statute allowed an employee to sue its employer in tort when the employer did not participate in the state compensation program.[93] The Oregon statute did not create the tort claim, however. The statute simply established rules governing when a tort claim was available to an employee.

Louisiana law was similar before 1975. Its compensation statute addressed the circumstances in which workers' tort claims were barred (in most cases) but allowed for limited circumstances when they were not (*e.g.*, for certain occupational diseases).[94] Louisiana law—since amended—thus provided a path to the same result in *Hahn* but in a slightly different way.

It does not matter for purposes of federal law whether the state workers' compensation law expressly permits a tort suit or implicitly authorizes it. Regardless of the paths in Oregon and Louisiana, the destination is the same: a jury trial, possible fault-based liability, and the potential for general damages. Allowing injured twilight-zone workers to pursue these rights against their employers either frustrates the LHWCA or it does not. *Hahn* holds that it does not.

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[93] *Hahn*, 358 U.S. at 273.

[94] *Rando*, 16 So. 3d at 1071, 1080 (mesothelioma not covered by Louisiana's statute until 1975).

Minor differences in state law concerning how the worker enters the tort system do not change the core holding of *Hahn* that federal law does not supplant state law in this respect. After all, the meaning of the LHWCA does not turn on state laws and procedures.

Nothing in *Hahn* shows the Court allowed the worker's tort claim because Oregon sought to penalize the employer's non-compliance with the state compensation program. Avondale suggests the loss of the exclusive remedy as a sanction somehow furthers Congress's objective of ensuring that compensation is the sole remedy for workplace injuries. But if ensuring that workers had only a compensation remedy were Congress's goal, the Court in *Hahn* would have affirmed the state court. By reversing, the Court ensured that compensation would *not* be the worker's exclusive remedy. And considering that the *Hahn* employer had complied with the LHWCA and secured federal compensation, it is hard to understand why Congress (or this Court) would deny it the benefits of a federal bargain because it did not follow a state's directives.

The penalty theory of *Hahn* thus fails to persuade. The better and more logical explanation is that this Court found the exclusivity language in section 905 did not apply in that twilight-zone case because Oregon, like Washington in *Davis*, had concurrent jurisdiction to protect its citizens. What remedies the state makes available in the twilight zone are up to the state.

Oregon's motivations, whatever they were, could not have insulated its law from preemption if, as Avondale argues, the LHWCA prohibited tort claims in the twilight zone or if tort claims frustrated Congress's objectives. Under the Supremacy Clause, state law yields to federal law if a serious conflict exists. Yet Avondale imagines the opposite in *Hahn*. It supposes that federal law yielded to state law—sacrificed in the interest of promoting a state objective. The employer in *Hahn* had done everything asked of it by federal law. It is unreasonable to suggest that this Court (1) read the LHWCA as generally denying states the ability to grant tort claims to twilight-zone workers but (2) rejected preemption and upheld a tort recovery anyway so that Oregon could promote its own objectives.

C. Any change in this area should come from Congress.

"[I]t is Congress rather than the courts that preempts state law."[95] But Congress has not chosen to preempt state law in the twilight zone. In the decades since *Hahn*, Congress has not overruled that case or any other case in the Court's twilight-zone jurisprudence.

Some have proposed doing so. In 2006, 2007, 2009, and 2011, a Senator introduced bills seeking to establish federal preemption of state-law remedies and displace state jurisdiction when (among other things) the employer pays LHWCA compensation or the injured

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[95] *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011).

worker could have brought a claim under the LHWCA.[96] The proposed amendment never became law.

Congress's inaction with respect to the twilight-zone cases is instructive in the light of its swift action to override LHWCA precedent with which it disagreed. In 1972, Congress amended the LHWCA to override this Court's ruling permitting longshore workers to recover for unseaworthiness against vessel owners.[97] Congress amended the LHWCA that year also in direct response to *Nacirema Operating Co. v. Johnson*, which held that the LHWCA did not extend to injuries on a pier attached to land.[98] Later, in 1984, Congress amended the LHWCA to override *Washington Metro. Area Transit Auth. v. Johnson*, which had found general contractors entitled to tort immunity under the LHWCA against claims by subcontractor employees if they paid for compensation coverage.[99]

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[96] *See* S.3987, pp. 11–12 (introduced 9/28/2006), available at Congress.gov, https://www.congress.gov/109/bills/s3987/BILLS-109s3987is.pdf; S.846, pp. 11–12 (introduced 3/12/07), available at Congress.gov, https://www.congress.gov/110/bills/s846/BILLS-110s846is.pdf; S.236, pp. 11–12 (introduced 1/14/09), available at Congress.gov, https://www.congress.gov/111/bills/s236/BILLS-111s236is.pdf; S.669, pp. 11–12 (introduced 3/29/11), available at Congress.gov, https://www.congress.gov/112/bills/s669/BILLS-112s669is.pdf.

[97] *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 (1979) ("Congress acted in 1972, among other things, to . . . overrule *Sieracki* and *Ryan*.").

[98] 396 U.S. 212, 218–20 (1969); *see also Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 904 (5th Cir. 1999).

[99] 467 U.S. 925, 938 (1984); *see also West v. Kerr-McGee Corp.*, 765 F.2d 526, 530 (5th Cir. 1985) (concluding that

Yet Congress never amended the LHWCA to abolish concurrent jurisdiction or eliminate the availability of any state-law remedies upheld in *Davis*, *Hahn*, and *Sun Ship*.

Any change in the status quo, if needed or desirable, would have to come from Congress. With *Wyeth* as a guide, Congress's view on the matter is not hard to discern.[100] If Congress believed that *Hahn* (and other cases) posed an obstacle to its objectives, it would have acted in the 60-plus years since then.

"Congress's sole purpose in amending § 904(a) and § 905(a) [in 1984] was to overrule WMATA").

[100] *See Wyeth v. Levine*, 555 U.S. 555, 574 (2009) ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the [Federal Food, Drug, and Cosmetic Act]'s 70-year history.").

CONCLUSION

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

Respectfully submitted,

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