No. 23-368

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

REPLY BRIEF FOR PETITIONER

BRIAN C. BOSSIER
ERIN H. BOYD
BLUE WILLIAMS, LLC
3421 N. Causeway Blvd.
Suite 900
Metairie, LA 70002

GREGORY G. GARRE
Counsel of Record
CHARLES S. DAMERON
ALEXANDER G. SIEMERS
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

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INTRODUCTION

The question presented—whether the Longshore and Harbor Workers' Compensation Act (LHWCA) preempts state-law tort claims asserted by workers who have LHWCA coverage—goes to the heart of the LHWCA's no-fault workers' compensation scheme and is the subject of a split among federal and state courts. *Amicus curiae* Shipbuilders Council of America (SCA) correctly describes the question as one of "exceptional importance to the nation's maritime employers and employees." SCA Br.1.

The brief in opposition confirms that certiorari is warranted. Respondents do not meaningfully dispute that there is a split. Indeed, they acknowledge the conflict with the decisions of state high courts. Opp.19 n.48. As to the decisions of other federal circuits, they do not deny that the Third Circuit in *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3d Cir. 1990), *expressly rejected* the reasoning underlying the Fifth Circuit's rule. Instead, respondents argue that the Third Circuit's decision is "flaw[ed]." Opp.19. But that argument goes to the merits—it does not establish the absence of a split. And respondents' drive-by effort to distinguish three other cases in the split rests on a basis that Huntington Ingalls addressed and rebutted in the petition. Respondents offer no answer.

Instead of confronting the conflict, respondents mainly try to downplay the significance of this case, arguing that it hinges on a "quirk of Louisiana law," and affects only a "small" class of cases. Opp.11 (header), 13. That is wrong: This case raises a question of *federal* law, not state law. And, as SCA has explained, the immediate impact of the Fifth

Circuit's resolution of that question in Louisiana—"the center of the American domestic maritime industry," SCA Br.14 (citation omitted)—alone warrants review. The Fifth Circuit's decision indisputably implicates dozens of pending cases, and, if it is allowed to stand, "a tidal wave of litigation almost certainly will follow" in Louisiana. SCA Br.18-19. But the consequences of the Fifth Circuit's decision stretch far beyond Louisiana. Pet.32-33; SCA Br.15-16. Respondents provide no response.

Respondents devote most of their opposition to the merits of the decision below—the aspect of the case least material to whether certiorari should be granted. Respondents ignore the plain text of Section 905(a), and contend this Court's LHWCA jurisprudence broadly empowers States to "apply their laws (including tort laws) to workers injured in the twilight zone." Opp.23 (header). Not so. This Court's "twilight zone" cases hold that the LHWCA permits the concurrent operation of "*state workers' compensation* claims against [an] employer." *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001) (emphasis added). But the Act "expressly pre-empts all other claims." *Id.* The decision below rewrites the statute, and extends the Court's "twilight zone" cases beyond the problem they were meant to address. SCA Br.5.

Certiorari is needed.

ARGUMENT

I. The Split Stands Unrebutted

The petition identified a 7-2 split on whether an injured maritime employee who has a no-fault remedy under the LHWCA may pursue tort relief for his injury. Pet.13. The Louisiana state courts, and now

the Fifth Circuit, hold that he may. Pet.18-23. Seven other courts—four federal courts of appeals and three state high courts—hold that he may not. Pet.13-18. That split remains unrebutted.

Indeed, respondents do not deny that the Louisiana courts have adopted an outlier position on the question presented, or that the Fifth Circuit below expressly embraced that position. Pet.18-20. Nor do respondents dispute the conflict that exists among state high courts on the question presented. *See* Opp.19-20 n.48. They could not. *See Hill v. Knapp*, 914 A.2d 1193, 1203 & n.11 (Md. 2007) (recognizing "agree[ment] with" the Supreme Court of Alabama and noting disagreement with the Louisiana Supreme Court's decision in *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212 (La. 1976)); *Fillinger v. Foster*, 448 So. 2d 321, 325 (Ala. 1984) (rejecting Louisiana Supreme Court's reasoning in *Poche*). That undenied conflict among state high courts and the Fifth Circuit alone warrants certiorari. S. Ct. Rule 10(b).

Instead, respondents argue only that the "Fifth Circuit's ruling does not create a split with four federal circuit courts." Opp.16. That effort fails. *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3d Cir. 1990), held that a maritime worker who is injured in the "twilight zone" of concurrent federal and state jurisdiction and is entitled to benefits under the LHWCA may *not* pursue state tort remedies. *See id.* at 950-53. Judge Stapleton's opinion correctly explained that the availability of state tort remedies would "obstruct[ ] the purposes of LHWCA by depriving maritime employers of their side of LHWCA's *quid pro quo*." *Id.* at 953. Respondents effectively concede the conflict by simply disagreeing with the Third Circuit's reasoning, arguing that "*Hess*

Oil reads … this Court's twilight-zone jurisprudence too narrowly (and suffers from other flaws)." Opp.19.

Respondents also try to distinguish *Hess Oil* on the ground that "[state] compensation law … 'does not cover'" the injury at issue here. *Id*. (citation omitted). But that only magnifies the conflict. As SCA explains (at 7), where state compensation law does not apply, there is no "jurisdictional dilemma" warranting the application of this Court's "twilight zone" precedents: workers in a case like this one have an undisputed LHWCA remedy, and that remedy is exclusive. This Court's twilight-zone precedents are designed to preserve the availability of a concurrent state "workmen's compensation remedy" where States offer a compensation remedy, not a "common law action for negligence." *Hess Oil*, 903 F.2d at 950. The Fifth Circuit's extension of the "twilight zone" to encompass state-law negligence claims squarely conflicts with the Third Circuit's decision in *Hess Oil*.[1]

Respondents argue that three of the cases in the split are distinguishable because the plaintiffs in those cases "sought and received LHWCA benefits and were thus held to the exclusivity of that remedy." Opp.17 & n.36 (citing *Tilcon N.Y., Inc. v. Volk (In re Buchanan Marine, L.P.)*, 874 F.3d 356, 362 (2d Cir. 2017); *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 148 (4th Cir. 2000); *Langfitt v. Federal Marine Terminals, Inc.*, 647 F.3d 1116, 1119 (11th Cir. 2011)). Respondents suggest (at 17) that those decisions somehow accord with the Fifth Circuit's conclusion that a plaintiff may "elect[ ]" between LHWCA benefits and state tort remedies. Pet.App.13a

[1] Respondents make no effort to rehabilitate the Fifth Circuit's failed attempt to distinguish *Hess Oil*. *See* Pet.21-23.

(quoting *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 367 (5th Cir. 1995)). That is incorrect.

The LHWCA's plain text preempts damages actions in tort except in one circumstance—where "an employer fails to secure" compensation coverage for its employees under the LHWCA. 33 U.S.C. § 905(a); *see also id.* § 932(a). And consistent with that plain statutory text, the decisions of the Second, Fourth, and Eleventh Circuits recognize that an employer is "*immune from all tort liability*" so long as the employer offers compensation coverage to its employees, as Huntington Ingalls has done (Pet.23 & n.7). *Langfitt*, 647 F.3d at 1124 (emphasis added); *see id.* at 1119 & n.9; *see also Buchanan Marine*, 874 F.3d at 368; *White*, 222 F.3d at 148. A maritime employer is hardly "immune" from tort liability if a covered employee may freely choose between a tort suit and LHWCA compensation. The reasoning of these decisions flatly contradicts the right of "elect[ion]" embraced by the Fifth Circuit below. Pet.App.13a (citation omitted). Again, the petition focused on this point. Pet.21. Respondents offer no response.

Instead, respondents restate their merits argument that, in the twilight zone, "concurrent jurisdiction" allows the injured worker to select either the LHWCA compensation remedy or a state tort remedy. Opp.17. But that reads this Court's "twilight zone" precedents as displacing Section 905(a). And they do no such thing. Instead, the Court's cases make clear that such "[c]oncurrent jurisdiction" extends only to "state and federal *compensation laws*." *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 723 (1980) (emphasis added); *see also Norfolk Shipbuilding*, 532 U.S. at 818. As most federal and state courts agree, that jurisdiction does not displace

the LHWCA's blanket "tort immunity" from claims for damages at law. *Langfitt*, 647 F.3d at 1127.

The Fifth Circuit's decision—which embraces the outlier approach of the Louisiana state courts, *see* Pet.App.16a & n.13—squarely conflicts with that consensus. Review is needed to resolve this split.

II. Respondents' Attempt To Downplay The Importance Of The Conflict Falters

Because respondents have no real answer to the split, they seek to downplay its importance by arguing that the decision below rests on a "quirk of Louisiana law" and so will have only "minimal significance for future cases." Opp.11 (heading). In other words, respondents ask this Court to look the other way, leave the conflict unresolved, and effectively allow a "Louisiana exception" to the LHWCA's express preemption provision. It should not do so.

To begin, even if the decision below were limited only to Louisiana, and only to tort claims based on exposure to asbestos before 1975, it still will have major consequences. Louisiana is "the 'center of the American domestic maritime industry.'" SCA Br.14 (citation omitted). As the petition explained, some sixty cases presenting claims like respondents' are *already pending*; more claims are filed regularly; district courts are already following the decision below; and potentially *hundreds* of copycat cases could be brought. Pet.33 & n.13; *see* SCA Br.14-15. Respondents do not contest this. The Fifth Circuit's decision vitiates the LHWCA's express preemption provision for all of those cases and threatens to impose crippling tort liability on shipbuilders and other maritime employers in Louisiana—in derogation of the LHWCA's express terms.

But the decision below is not confined to "a repealed quirk of Louisiana law." Opp.11 (heading). As respondents acknowledge (at 2), the key to the Fifth Circuit's rule is that "respondents' decedent had no state compensation remedy against his twilight zone employer." In that situation, the Fifth Circuit now allows an employee to elect a tort remedy, in place of the LHWCA's workers' compensation remedy. But under current Louisiana law, *every* maritime employee who has an LHWCA remedy necessarily lacks a compensation remedy under Louisiana law, La. Stat. Ann. § 23:1035.2. Thus, respondents' reliance on state law offers no limit at all.

Respondents argue that maritime workers are nevertheless "covered" by Louisiana compensation law, asserting that Louisiana's workers' compensation statute distinguishes between (1) injuries that are not covered and (2) "injuries which are covered, but for which no compensation is payable." Opp.14 (quoting *O'Regan v. Preferred Enters., Inc.*, 758 So. 2d 124, 136-37 (La. 2000)). But *O'Regan* itself refutes respondents' theory.

O'Regan holds that Louisiana's Workers' Compensation Act "preclude[s] … civil tort actions … for workplace injuries" that are "*compensable* under the Act." 758 So. 2d at 134. But under the Louisiana Act, maritime injuries are categorically *not* compensable if they are covered by the LHWCA. *See* La. Stat. Ann. § 23:1035.2. Accordingly, Louisiana law does not bar the assertion of state tort claims as to those injuries; only the federal *LHWCA* does so. But the Fifth Circuit's decision guts the LHWCA's express preemption provision where employees lack a state workers compensation remedy. The upshot is that the decision below leaves all maritime workers

in Louisiana—no matter when they were injured—free to seek damages at law against their employers. *See* Pet.11 & n.5, 30-31; SCA Br.14.

Moreover, the impact of the decision below is not confined to Louisiana. Numerous States—including every State in the Fifth Circuit—expressly bar recovery under state workers' compensation law to employees who have a remedy under the LHWCA. Pet.8, 30-33; SCA Br.15; *see* Miss. Code Ann. § 71-3-5; Tex. Labor Code Ann. § 406.091(a)(2). Thus, all maritime employees in the Fifth Circuit—nearly 150,000—*necessarily lack* a state-law workers' compensation remedy by virtue of their LHWCA coverage. SCA Br.14-15. Under the Fifth Circuit's reasoning, all of these maritime employees, if injured, may assert damages claims against their employers so long as they "neither seek nor obtain LHWCA compensation." Pet.App.14a. (And who would after the decision below? *See* Pet.30.) Respondents fail to address this crucial point. But as the SCA stressed, it is no exaggeration to say that the Fifth Circuit's decision will have a "massive impact on maritime injury litigation"—not only in Louisiana, but throughout the Fifth Circuit and beyond. SCA Br.15.

The decision below also subjects maritime employers like Huntington Ingalls, with operations in multiple States, to conflicting liability regimes, "disrupt[ing] the uniform, nationwide application of the LHWCA." SCA Br.12. The whole point of the LHWCA was to establish a binding (and uniform) no-fault compensation scheme for *all* maritime workplace injuries. The Fifth Circuit's decision, even on respondents' account, carves out an exception to that scheme for pre-1975 injuries in Louisiana, which may be remedied in tort. Creating one regime for

certain injuries in Louisiana—the focal point of the nation's shipbuilding industry—and one for the rest of the country will subject employers and employees to different rules based on the vagaries of geography and timing, in clear derogation of the uniform scheme established by Congress. *See* SCA Br.16.

The "sweeping consequences" of the decision below weigh strongly in favor of review. SCA Br.4.

III. The Decision Below Is Wrong

The decision below also starkly conflicts with the plain text of the LHWCA § 905(a) and this Court's precedents construing that text, including *Norfolk Shipbuilding,* 532 U.S. at 818. Pet.7-8; SCA Br.13. Respondents' attempt to defend the decision below just underscores why intervention is needed.

First, respondents assert that the LHWCA embodies an "'accepted understanding' of concurrent [federal-state] jurisdiction in the twilight zone." Opp.26 (quoting *Sun Ship*, 447 U.S. at 722). But respondents just ignore that the LHWCA's recognition of "[c]oncurrent jurisdiction" is limited to "state and federal *compensation laws*." *Sun Ship*, 447 U.S. at 723-24 (emphasis added); *id.* at 722 (noting an "accepted understanding that federal jurisdiction would coexist with state compensation laws"). The coexistence of state and federal no-fault *compensation* law is consistent with the LHWCA's text. *See* 33 U.S.C. § 903(e). But the LHWCA expressly prohibits the assertion of claims for "*damages* … at law." *Id.* § 905(a) (emphasis added). Thus, notwithstanding that the Court's cases recognize concurrent jurisdiction as to *compensation* remedies, the LHWCA unambiguously bars tort claims. *See supra* at 5-6.

Second, respondents' reliance on *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959) (per curiam), likewise fails. In *Hahn*, Oregon's workers' compensation law (like the LHWCA, *see* 33 U.S.C. § 905(a)) permitted injured employees to pursue tort claims against their employers *if the employers failed to secure compensation coverage*. 358 U.S. at 273. This Court recognized that the operation of a state tort remedy in that limited circumstance did not violate the LHWCA. *See id.* As the Third Circuit has recognized, *Hahn*'s allowance of Oregon's "sanction for the employer's failure to secure coverage" was "consistent with Congress's intent to ensure a seamless intersection between state and federal compensation coverage." *Hess Oil*, 903 F.2d at 953. It did not blow open the doors more broadly to "state … tort recovery against the employer." *Id.*

Respondents argue that the Third Circuit's reading of *Hahn* is "too narrow," and is not "logical." Opp.30-32. But the Third Circuit got it right. *See* SCA Br.8. Its decision squares *Hahn* with the plain text of the LHWCA, which prohibits suits for "damages … at law," except where the employer "fails to secure" compensation coverage. 33 U.S.C. § 905(a). Respondents do not even attempt to grapple with Section 905(a)'s plain text. The Fifth Circuit's decision makes a hash of this Court's "twilight zone" cases by extending them beyond the jurisdictional problem they addressed and reading them to eliminate the LHWCA's express preemption provision. SCA Br.5-11. Only this Court can correct that fundamental misreading of its precedents.

Finally, respondents suggest that "Congress's inaction" in the face of *Hahn* indicates that the LHWCA broadly permits the assertion of state tort

claims. Opp.34-35. Not so. Congressional inaction is rarely probative. *See, e.g., United States v. Craft*, 535 U.S. 274, 287 (2002). And that is especially true here. The bills cited by respondents (at 33-34 & n.96) would have amended the LHWCA by preempting *state workers' compensation* claims. *See* S. 669, 112th Cong. § 6 (2011) (proposing to amend 33 U.S.C. § 905 to preempt state-law "alternative remedies," including remedies pursuant to an "administrative proceeding"); S. 236, 111th Cong. § 6 (2009); S. 846, 110th Cong. § 6 (2007); S. 3987, 109th Cong. § 6 (2006). If anything, these bills simply confirm the key distinction that respondents—and the Fifth Circuit—refuse to acknowledge: the LHWCA permits the concurrent operation of "state workers' compensation claims" while "expressly pre-empt[ing] all other claims." *Norfolk Shipbuilding*, 532 U.S. at 818.[2]

The fact that the Fifth Circuit has erroneously negated the cornerstone for the LHWCA's no-fault compensation regime—i.e., Section 905(a)'s express preemption of damages actions in tort—for the most important maritime jurisdiction in America necessitates this Court's intervention.

* * *

The LHWCA is a vital federal statute that provides billions of dollars in no-fault compensation every year for injured maritime workers. Pet.4-5. Reflecting its importance, this Court has frequently granted certiorari to address LHWCA issues. *See, e.g.*, *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 486

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[2] Respondents' reliance (at 35 & n.100) on *Wyeth v. Levine,* 555 U.S. 555, 574 (2009), is also misplaced; here, Congress *did* enact an express preemption provision—Section 905(a). The problem is that the Fifth Circuit vitiated it.

(2005); *Norfolk Shipbuilding*, 532 U.S. at 818-19; *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 84-86 (1991); *Sun Ship*, 447 U.S. at 723-24; *Crowell v. Benson*, 285 U.S. 22, 36-37 (1932). Certiorari is required again: the decision below deepens an existing conflict, drives a stake through the LHWCA's no-fault compensation scheme, and thus disrupts the operation of this important Act in the "center of the American domestic maritime industry universe," SCA Br.14 (citation omitted)—Louisiana, and beyond.

CONCLUSION

The petition should be granted.

Respectfully submitted,

BRIAN C. BOSSIER
ERIN H. BOYD
BLUE WILLIAMS, LLC
3421 N. Causeway Blvd.
Suite 900
Metairie, LA 70002

GREGORY G. GARRE
Counsel of Record
CHARLES S. DAMERON
ALEXANDER G. SIEMERS
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

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