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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIAN RANGER,
Plaintiff and Appellant,

vs.

ALAMITOS BAY YACHT CLUB
Defendant and Respondent

After A Decision By The Court of Appeal,
Second Appellate District, Division Eight, Case No. B315302

Appeal From The Superior Court Of The State of California For
The County Of Los Angeles
The Honorable Mark C. Kim, Judge Presiding
Case No. 19STCV22806

OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIAN RANGER,
Plaintiff and Appellant,

vs.

ALAMITOS BAY YACHT CLUB
Defendant and Respondent

After A Decision By The Court of Appeal,
Second Appellate District, Division Eight, Case No. B315302

Appeal From The Superior Court Of The State of California For The County Of Los Angeles
The Honorable Mark C. Kim, Judge Presiding
Case No. 19STCV22806

OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

May a maritime worker who is excluded from coverage under the federal Longshore and Harbor Workers' Compensation Act ("LHWCA") (33 U.S.C. §§ 901-950) by operation of LHWCA § 2(3)(B), 33 U.S.C. § 902(3)(B), bring an action to recover for a workplace injury under the general maritime law, or does California's workers' compensation scheme provide the worker's exclusive remedy?

NATURE OF THE ACTION

This is a maritime tort action. Appellant Brian Ranger (hereinafter, "Ranger") seeks compensatory damages under general maritime law from Respondent Alamitos Bay Yacht Club (hereinafter, "ABYC") for a workplace injury he suffered on August 28, 2018. As the decision below summed up:

> The Alamitos Bay Yacht Club hired Ranger as a maintenance worker. He helped the club with its fleet by painting, cleaning, maintaining, repairing, unloading, and mooring vessels. One day, Ranger used a hoist to lower a club boat into navigable waters. He stepped from the dock onto its bow, fell, was hurt, and applied for workers' compensation. Then he sued the club in state court on federal claims of negligence and unseaworthiness. The trial court sustained the club's final demurrer to the second amended complaint. The court ruled there was no admiralty jurisdiction.

(*Ranger v. Alamitos Bay Yacht Club* (2023) 95 Cal.App.5th 240, 242 (*Ranger*).)

Appellant Ranger took a timely appeal to the California Court of Appeal for the Second Appellate District, and Division Eight of that court affirmed the trial court on September 6, 2023, "without deciding about admiralty jurisdiction." (*Id.*)

Ranger petitioned this Court for review on October 16, 2023, and this Court granted that Petition on December 20, 2023**.**

STANDARD OF REVIEW

As this Court has repeatedly explained:

> On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse.

(*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865 (citations omitted); see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

SUMMARY OF ARGUMENT

The general maritime law preempts the exclusive-remedy provisions of the California Workers' Compensation Act. (See Cal. Lab. Code § 3601.) A worker who has a personal-injury claim subject to admiralty jurisdiction, with the result that maritime law governs the claim, may pursue the claim free of any state-law constraints. Ranger is not subject to any federal-law constraint. Section 2(3)(B) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(B) excludes Ranger from that Act's coverage, and thus its exclusive-remedy provision (LHWCA § 5(a), 33 U.S.C. § 905(A)) does not apply.

The incident that gave rise to this action satisfies the test for admiralty tort jurisdiction; it occurred aboard a vessel operating upon navigable waters, and Ranger suffered injury doing ship's work. With admiralty jurisdiction comes the application of substantive admiralty law. That is true whether the case is submitted to a federal court sitting in admiralty or tried to a state court under the "savings-to-suitors clause." Federal maritime law is the "supreme Law of the Land" under Article VI of the U.S. Constitution and is therefore binding on all California state courts under the "reverse-*Erie* doctrine."

There are two types of federal maritime law—judge-made general maritime law (handed down by both the federal and state judiciaries in the manner of a common law court) and statutory maritime law (enacted by Congress). Since Congress rarely disagrees with the judicial result, maritime tort law is "judge-made law to a great extent."

It is a fundamental canon of judge-made, general maritime tort law that "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established inflexible rules." It is likewise well settled under general maritime law that every vessel owner "owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." Any breach of that duty—such as the failure to provide safe access to or from the vessel—results in tort liability for negligence. What is more, under the doctrine of "*Sieracki* unseaworthiness," vessel

owners also have an absolute obligation to furnish anyone who does "ship's work"—including longshoremen and harbor workers—with equipment that is reasonably fit for its intended purpose. Any breach of that duty—such as the failure to provide safe access to or from the vessel—leaves the owner strictly liable in tort.

There are no established or inflexible rules prohibiting harbor workers like Ranger from availing themselves of those remedies. The Supremacy Clause and the reverse-*Erie* doctrine trump the exclusive-remedy provisions of any applicable state workers' compensation legislation, and while the 1972 Amendments to the LHWCA abrogated the *Sieracki* unseaworthiness doctrine for workers covered by that Act, those who have been excluded from the LHWCA—such as club workers like Ranger—are not affected by that abrogation.

In sum, the Second Appellate District erred when it held that: "Federal law thus makes California state workers' compensation law paramount, which means Ranger's exclusive remedy is workers' compensation." (*Ranger*, *supra*, 95 Cal.App.5th at p. 243.) That brow-wrinkling holding ignores the mandate of Federal Supremacy, makes no mention of the savings-to-suitors clause or the reverse-*Erie* doctrine, disregards the *Sieracki* decision, misreads the caselaw on which it relies, vaunts the Eleventh Circuit's unpersuasive and widely criticized opinion in *Brockington v. Certified Electric, Inc.* (11th Cir. 1990) 903 F.2d 1523 (*Brockington*), and conflicts with the First

Appellate District's ruling in *Freeze v. Lost Isle Partners* (2002) 96 Cal.App.4th 45 (*Freeze*).

The decision below should be reversed.

LEGAL ARGUMENT

I. THE GENERAL MARITIME LAW PERMITS A MARITIME WORKER DESCRIBED BY 33 UNITED STATES CODE SECTION 902(3)(A) THROUGH (F) WHO SUFFERS AN INJURY WITHIN THE ADMIRALTY JURISDICTION TO BRING A TORT ACTION AGAINST THE TORTFEASOR THAT CAUSED THE INJURY.

A. The Incident That Gave Rise to This Action Satisfies the Requirements of Admiralty Tort Jurisdiction

The decision below dismissed the threshold question of whether the incident that gave rise to this case was subject to admiralty tort jurisdiction as "supernumerary" and "irrelevant." (*Ranger*, *supra*, 95 Cal.App.5th at pp. 242-243.) But no analysis of Ranger's substantive rights against ABYC can take place without considering the jurisdictional issue.

It is apodictic that: "With admiralty jurisdiction comes the application of substantive admiralty law." (*East River S.S. Corp. v. Transamerica Delaval Inc.* (1986) 476 U.S. 858, 864.) "Choice of law questions raised in a maritime context have traditionally been analyzed in jurisdictional terms because as a general rule 'once admiralty jurisdiction is established, then all of the

substantive rules and precepts peculiar to the law of the sea become applicable.'" (*Jig The Third Corp. v. Puritan Marine Ins. Underwriters Corp*. (5th Cir. 1975) 519 F.2d 171, 174 n.3 (quoting *In re Dearborn Marine Service, Inc*. (5th Cir. 1974) 499 F.2d 263, 277 n.27 (ellipses omitted).) That is true whether the action is "'brought under federal admiralty jurisdiction, in state court under the saving-to-suitors clause, or in federal court under diversity jurisdiction.'" (*Wells v. Liddy* (4th Cir. 1999) 186 F.3d 505, 524 (quoting *Byrd v. Byrd* (4th Cir. 1981) 657 F.2d 615, 617).)

As the decision below explains: "Brian Ranger fell while stepping from a dock to a boat." (*Ranger, supra*, 95 Cal.App.5th at p. 242.) According to the allegations in the Second Amended Complaint, he was injured while boarding "the vessel *Latham B*," in order to "to unhook the vessel from [a] boom and thereafter moor it to [a] dock." (I CT 234-241.) Those allegations satisfy the "two-part" formula for admiralty tort jurisdiction. (See e.g., *Jerome B. Grubart Inc. v. Great Lakes Dredge & Dock Co*. (1995) 513 U.S. 527, 534 (*Grubart*); *Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 563 (*Barber*).)

Under that formula, "a tort claim must satisfy conditions both of location and of connection with maritime activity." (*Grubart*, *supra*, 513 U.S. at p. 534[1].) The allegation that

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[1] That formula calls on courts to "engage in a *counter-factual analysis*,'" *Barber*, 36 Cal.App.3d at p. 567 (original emphasis), so for the purposes of this appeal, we must not only accept Ranger's

Appellant Ranger was injured upon "the navigable waters" of Alamitos Bay satisfies the location condition, and "virtually every activity involving a vessel on navigable waters would be a traditional maritime activity sufficient to invoke maritime jurisdiction." (*Taghadomi v. United States* (9th Cir. 2005) 401 F.3d 1080.)

B. Although the "Saving-to-Suitors Clause" Gives California State Courts Concurrent Jurisdiction over Ranger's Legal Claims, Those Courts Must Exercise That Jurisdiction in Accordance with the "Reverse-*Erie* Doctrine" Whereby All Substantive Issues Are Governed by Federal Maritime Law.

While Article III, Section 2 of the United States Constitution grants federal courts "exclusive" jurisdiction over "admiralty and maritime claims," the "saving-to-suitors clause" in the Federal Judiciary Act of 1789, now codified at 28 U.S.C. § 1333(1), has always given state courts concurrent jurisdiction over *in personam* suits like Ranger's action.[2] (*Barber*, *supra*, 36 Cal. App.4th at pp. 562-563 (citing 28 U.S.C. § 1333(1)).) But

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allegations about the jurisdictional facts as true, but we must also give them "a liberal construction." (See *Gerawan Farming Inc. v. Lyons*, (2000) 24 Cal.4th 468, 515-516.)

[2] Maritime tort claims may be prosecuted either *in personam* against the operators of a peccant vessel or *in rem* against the vessel itself, but only the federal judiciary has the power to hear actions *in rem*. (*Leopard Marine & Trading, Ltd. v. Easy St. Ltd.* (2nd Cir. 2018) 896 F.3d 174, 187.)

state courts must exercise that jurisdiction under the "so-called 'reverse-*Erie* doctrine'" whereby federal maritime law governs all substantive questions and state rules of practice control all procedural issues.[3] (*Hutchins v. Juneau Tanker Corp*. (1994) 28 Cal.App.4th 493, 499; see also *Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1047; *Price v. Connolly-Pacific Co.* (2008) 162 Cal.App.4th 1210, 1213-1214.)

In other words, the substantive provisions of maritime tort law "preempt state law under the Supremacy Clause of the Constitution" whenever the underlying claim sounds in admiralty. (*In re Exxon Valdez* (9th Cir. 2007) 484 F.3d 1098, 1101 (citing U.S. Const. Art. VI, cl. 2).) To quote Justice Traynor:

> A state court having the same jurisdiction over a case that a federal court would have if the suit had been brought there, must determine the rights of the parties under the maritime law as a "system of law coextensive with, and operating uniformly in, the whole country." State law is inapplicable to a maritime cause "if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

(*Intagliata v. Shipowners & Merchants Towboat Co*. (1945) 26 Cal.2d 365, 371-372 (internal citations omitted) (*Intagliata*).)

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[3] Despite the popular name, recognition of the reverse-*Erie* doctrine pre-dates *Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64, by at least twenty years. (See *Chelentis v. Luckenbach Steamship Co*. (1918) 247 U.S. 372, 384.)

C. There Are Two Types of Federal Maritime Law—General Maritime Law and Statutory Maritime Law.

"There are two primary sources of federal maritime law: common law developed by federal courts exercising the maritime authority conferred on them by the Admiralty Clause of the Constitution ('general maritime law'), and statutory law enacted by Congress exercising its authority under the Admiralty Clause and the Commerce Clause ('statutory maritime law')." (*World Fuel Servs. Trading v. Hebei Prince Shipping Co*. (4th Cir. 2015) 783 F.3d 507, 520 (internal quotation marks and citation omitted).) Article III of the U.S. Constitution empowers the judiciary to hand down general maritime law "in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result." (*Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 489-490 (*Baker*).) By granting state courts concurrent jurisdiction over maritime tort cases, the saving-to-suitors clause gave the States an independent "role in the development" of the general maritime law. (*Romero v. International Terminal Operating Co.* (1959) 358 U.S. 354, 372 (*Romero*).) As a consequence: Maritime law is not a monistic system.

> The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.

(*Id*. at p. 374.)

Since Congress rarely disagrees with the judicial result, maritime tort law is "judge-made law to a great extent." (*Edmonds v. Compagnie Generale Transatlantique* (1979) 443 U.S. 256, 259.) Indeed, Congress has passed only six narrow and specialized statutes addressing the subject of maritime tort law: the Death on the High Seas Act, 46 U.S.C. §§ 30301-30308 (which provides a wrongful-death remedy for fatalities occurring "beyond three nautical miles from the shore of the United States"); the Jones Act, 46 U.S.C. § 30104 (which permits any "seaman injured in the course of employment" to sue the employer for negligence); the Suits in Admiralty Act, 46 U.S.C. §§ 30901-30918, and the Public Vessels Act, 46 U.S.C. §§ 31101-31113 (which waive federal sovereign immunity when admiralty tort proceedings could be maintained against a private defendant); the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (which provides waterfront workers with a no-fault remedy against their employers), and the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-1356b (which extends the Longshore Act and the littoral State's third-party remedies to offshore workers injured or killed on fixed platforms sitting in federal waters). Those six statutes sit like an isolated archipelago amidst a sea of judge-made law.

Of that archipelago, only the LHWCA is pertinent to this appeal. As explained in Section II(C), *infra*, the exclusive-remedy provision of California Workers' Compensation Act is constitutionally preempted by the Supremacy Clause.

D. The Judge-Made General Maritime Law Gives Appellant Ranger the Well-Settled Right to Bring a Tort Action against a Tortfeasor like ABYC.

The question of whether Ranger may sue ABYC in tort for the injuries he suffered aboard the vessel *Latham B* is governed by judge-made, general maritime law. (See e.g., *Howlett v. Birkdale Shipping Co.* (1984) 512 U.S. 92, 97-98; *Scindia Steam Navigation Co. v. De Los Santos* (1981) 451 U.S. 156, 166-167 (*Scindia*); *Federal Marine Terminals v. Burnside Shipping Co.* (1969) 394 U.S. 404, 415.) "Congress left to the courts the task of defining the vessel owner's duty of care." (*Scheuring v. Traylor Bros., Inc.* (9th Cir. 2007) 476 F.3d 781, 788 (*Scheuring*).)

It is a well settled principle of general maritime law that a vessel owner or operator like ABYC "owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." (*Kermarec v. Compagnie Generale Transatlantique* (1959) 358 U.S. 625, 630, 632 (*Kermarec*).[4]) Among other things, that duty specifically "requires a vessel to provide a safe means of access"

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[4] As we will explain further in Section I(E), *infra,* Congress called on the courts to refine that broad "*Kermarec* duty" with respect to longshore and harbor workers when it amended § 5(b) of the LHWCA in 1972. (See *Scindia,* 451 U.S. at pp. 163 n.10, 167-169, and 180-181.) But the *Kermarec* duty is still applicable to workers like Ranger who have been excluded from the LHWCA. (See *Prestenbach v. Global Int'l Marine Inc.* (5th Cir. 2007) 244 Fed.Appx. 557, 561 n. 32.)

to and from the vessel. (*Scheuring*, *supra,* 476 F.3d at p. 790.) The mere fact that the injured party happens to be an employee of the vessel's owner or operator does not inoculate the owner against that judge-made obligation. (*Id.*) The decision below failed to consider, weigh, discuss, or even mention that well-established principle.

E. Furthermore, Where, as Here, the Injured Worker Is a "Club Worker" Excluded from LHWCA Coverage, He or She May Also Sue a Vessel Owner or Operator for Unseaworthiness under the United States Supreme Court's decision in *Sieracki.*

The decision below also omitted any mention of the U.S. Supreme Court's lodestar decision in *Seas Shipping Co. v. Sieracki* (1946) 328 U.S. 85 (*Sieracki*). "In *Sieracki*, the Supreme Court extended the seaman's seaworthiness warranty to those workers, other than crew members, who were injured while working on board a ship in navigable waters 'because he or she is doing a seaman's work and incurring a seaman's hazards.'" (*Freeze, supra,* 96 Cal.App.4th at p. 51 (quoting *Sieracki*, 328 U.S. at p. 99).) Appellant Ranger "helped the club with its fleet by painting, cleaning, maintaining, repairing, unloading, and mooring vessels", (*Ranger, supra,* 95 Cal.App.5th at p. 242), and was injured on the foredeck of the *Latham B* while attempting to moor that vessel to a dock. (I CT 234-241.) He was clearly doing a seaman's work and incurring a seaman's hazards and was therefore covered by the warranty of seaworthiness. (*Sieracki*,

supra, 328 U.S. at p. 99.)

The warranty of seaworthiness arises "from the hazards which maritime service places upon men [and women] who perform it" and "is essentially a species of liability without fault, analogous to other well-known instances in our law." (*Id.* at pp. 94-95.) It famously imposes on vessel owners and operators such as ABYC, an "absolute duty" to furnish shipboard equipment that is reasonably fit for its intended purpose. (*Id.* at p. 99.) That absolute duty includes the obligation "to provide a reasonably safe means of access" to and from the vessel. (*Florida Fuels v. Citgo Petroleum Corp*. (5th Cir. 1993) 6 F.3d 330, 332.)

At one time, the warranty of seaworthiness reached only Jones Act seaman.[5] (*Sieracki*, *supra*, 328 U.S. at p. 90 (citing *The Osceola* (1903) 189 U.S. 158, 175).) But recognizing that "the liability applies as well when the ship is moored at a dock as when it is at sea," the *Sieracki* Court extended the warranty beyond seamen to longshoremen (*id*. at pp. 95-96) and to harbor workers covered. (See e.g., *Pope & Talbot, Inc. v. Hawn* (1953) 346 U.S. 406, 412-413 (ship repair worker) (*Pope*).) That extension became known as "the *Sieracki* unseaworthiness cause of action." (See e.g., *Rivera v. Kirby Offshore Marine L.L.C.*, (5th

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[5] The Jones Act, 46 U.S.C. § 30104, is part of a "trilogy of heightened legal protections" available to "sea-based" crew members who not only contribute to the mission of the vessel but also exhibit a work-related "connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." (*Chandris, Inc. v. Latsis* (1995) 515 U.S. 347, 354 and 368.)

Cir. 2020) 983 F.3d 811, 817 (*Rivera*).) But:

> In 1972 Congress amended the LHWCA to add section 905(b), which provides that any 'person covered' under the Act may no longer bring an action against a third-party vessel owner 'based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.' 33 U.S.C. § 905(b). Thus, Congress abolished the *Sieracki* unseaworthiness cause of action . . . for those employees covered by the LHWCA.
>
> Following the 1972 amendments, courts were faced with the question of whether *Sieracki* still survived with respect to those maritime workers not covered by the LHWCA.

(*Smith v. Harbor Towing & Fleeting, Inc*. (5th Cir. 1990) 910 F.2d 312, 313.)

As our own First District Court of Appeal explained in *Freeze*, when it upheld a *Sieracki* unseaworthiness claim for a restaurant worker in a position much like Ranger's:

> While the LHWCA expressly 'provides scheduled compensation (and the exclusive remedy) for injury to a broad range of land-based maritime workers,' it 'explicitly excludes from its coverage" certain workers, including Freeze. (*Chandris, Inc. v. Latsis* [(1995) 515 U.S. 347,] 355; 33 U.S.C. § 902(3)(B) [excluding 'individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet,' if individuals are subject to coverage under a state worker's compensation law].) ***Thus, workers 'who are not entitled to LHWCA benefits may still pursue their general maritime claims against the vessel owner.'*** (*Green v. Vermilion Corp*. (5th Cir. 1998) 144 F.3d 332, 337 (*Green*); see *Chandris, Inc. v. Latsis, supra*, 515 U.S. at p. 356 [workers not covered under the Jones Act or the

> LHWCA 'may still recover under an applicable state workers' compensation scheme or in admiralty, under general maritime tort principles (which are admittedly less generous than the Jones Act's protections).].')

(*Freeze, supra,* 96 Cal.App.4th at p. 51 (emphasis added); see also *Cormier v. Oceanic Contractors, Inc.* (5th Cir. 1983) 696 F.2d 1112, 1113 ("the 1972 Amendment to the Longshoremen's and Harbor Workers' Compensation Act did not deny the warranty of seaworthiness to workers not covered by the LHWCA") (citations omitted); *Aparicio v. Swan Lake* (5th Cir. 1981) 643 F.2d 1109, 1116 ("Literally read, Section 905(b), which Congress enacted to abolish the Sieracki remedy, does not apply to maritime workers who are not within the coverage of the LHWCA. The statute manifests no intention to expand the abolition of the Sieracki-Ryan construct beyond the coverage of the LHWCA."); but see (*Normile v. Maritime Co. of the Philippines* (9th Cir. 1981) 643 F.2d 1380, 1383 (holding "that Congress intended to eliminate the longshoremen's action for unseaworthiness not only with respect to those longshoremen covered by the Act, but for other longshoremen whose rights were judicially created").)

Concluding that "[t]he 1972 amendments were the problem, not the solution[,]" (*Ranger*, *supra*, 95 Cal.App.5th at p. 249), and focusing all its attention on the 1984 LHWCA amendments instead, (*id.* at pp. 244-246), the decision below made no mention of *Normile,* and refused to follow *Freeze, Green, Aparicio,* or *Cormier*. As explained in Section III(D), *infra*, that was an error. Those last four cases make it clear that the maritime workers

described by LHWCA § 2(3)(A)–(F) within the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950), may bring an action to recover for a workplace injury under the general maritime law against their employers for both negligence and *Sieracki* unseaworthiness.

II. THE CALIFORNIA WORKERS' COMPENSATION SCHEME DOES NOT AND CANNOT PROVIDE APPELLANT RANGER'S SOLE REMEDY.

A. It Better Becomes the Settled Canons of Federal Maritime Law to Give Workers Like Appellant Ranger a Remedy for a Shipboard Injury Than to Withhold Such a Remedy, When Not Required to Withhold it by Established Inflexible Rules.

Judge-made, general maritime law has always shown "'special solicitude' for those who are injured within its jurisdiction." (*Sea-Land Servs. v. Gaudet* (1972) 414 U.S. 573, 588 (*Gaudet*).) That judicial solicitude is as vital today as it ever was. (See e.g., *Air & Liquid Sys. Corp. v. DeVries* (2019) 139 S.Ct. 986, 995 ("'Maritime law has always recognized a "special solicitude for the welfare' of those who undertake to 'venture upon hazardous and unpredictable sea voyages.'") (quoting *Am. Exp. Lines v. Alvez* (1980) 446 U.S. 274, 285) (*Alvez*).)

As the *Alvez* Court famously observed, """it is a settled canon of maritime jurisprudence that 'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by

established and inflexible rules.""" (*Alvez, supra,* 446 U.S. at pp. 281-281 (quoting *Moragne v. States Marine Lines* (1970) 398 U.S. 375, 387 quoting, with approval, *The Sea Gull* (C.C.D. Md. 1865) 21 F.Cas. 909, 910.) That "settled canon" was handed down more than 158 years ago by Chief Justice Chase in *The Sea Gull, supra*, and has been used ever since by State[6] and Federal courts[7] from every level of decision to shape general maritime tort law. The decision below failed to consider, weigh, discuss, or even mention that canon.

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[6] See e.g. *Poe v. PPG Indus.* (La.App. 2001) 782 So. 2d 1168, 1174 ("Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold a remedy, when not required to withhold it by established and inflexible rules."); *Horak v. Argosy Gaming Co.* (Iowa Sup. Ct. 2002) 648 N.W.2d 137, 147; *Choat v. Kawasaki Motors Corp.* (Ala.Sup. Ct. 1996) 675 So. 2d 879, 886; *Alvez v. Am. Exp. Lines* (N.Y.App. 1979) 46 N.Y.2d 634, 643; *Smith v. Allstate Yacht Rentals, Ltd.* (Del. Sup. Ct. 1972) 293 A.2d 805, 813.

[7] See e.g. *The Harrisburg* (1886) 119 U.S. 199, 206-207 ("it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules"); *Moragne*, *supra*, 398 U.S. at p. 387; *Gaudet*, 414 U.S. at p. 583; *Mobil Oil Corp. v. Higginbotham* (1978) 436 U.S. 618, 629-630; *Offshore Logistics v. Tallentire* (1986) 477 U.S. 207, 234 (*Tallentire*); *Yamaha Motor Corp. v. Calhoun* (1996) 516 U.S. 199, 213; *Baker*, *supra*, 554 U.S. at p. 522; *Davis v. Bender Shipbuilding & Repair Co.* (9th Cir. 1994) 27 F.3d 426, 429; *Ellenwood v. Exxon Shipping Co.* (1st Cir. 1993) 984 F.2d 1270, 1280; *In re Air Crash off Long Island* (2d Cir. 2000) 209 F.3d 200, 203.

B. Federal Law Establishes No Inflexible Rules That Require California Courts to Withhold the Remedies that Ranger Is Asserting Here.

The Second Appellate District concluded that "California's workers' compensation law is Ranger's exclusive remedy." (*Ranger, supra,* 95 Cal.App.5th at p. 250.) This is wrong. "[T]he 'saving-to-suitors' clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." (*Tallentire, supra*, 477 U.S. at pp. 222-223.) As this Court put it: "A state court having the same jurisdiction over a case that a federal court would have if the suit had been brought there, must determine the rights of the parties under the maritime law as a system of law coextensive with, and operating uniformly in, the whole country." (*Intagliata, supra,* 26 Cal.2d at p. 371.)

The decision below closes its ears to the reverse-*Erie* doctrine and trumpets that:

> Federal and state law are in accord. For employees like Ranger, both Congress and the California legislature have replaced the fault-based regime of tort with the no-fault alternative of workers' compensation. Both bodies have preferred the virtues of speedy, predictable, and efficient compensation for occupational accident victims like Ranger. The 'underlying philosophy is social protection rather than righting a wrong.' The Longshore Act, its 1984 amendments, and California workers' compensation

> law all share this philosophy. This federalism is harmonious, not discordant.

(*Ranger*, *supra*, 95 Cal.App.5th at pp. 245-246.)

But no such harmony exists, and the decision below, respectfully, oversimplifies the federal and state interests here, which are divergent and more than philosophical. Federal law, largely to the exclusion of state law, concerns the uniformity of maritime rules, and the regulation of vessel owner and operator conduct. The U.S. Supreme Court has taken pains to instruct that the strong federal interest in protecting maritime commerce "can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct." (*Foremost Ins. Co. v. Richardson* (1982) 457 U.S. 668, 674-675.) The importance and breadth of that interest is evident in section 5(b) of the LHWCA, which preserved even for covered employees a negligence cause of action where injury is caused by a covered employer acting in its capacity as vessel owner. For example, in *Scheuring, supra,* the Ninth Circuit permitted a crane operator covered by the LHWCA to sue his employer for a workplace injury he suffered while trying to board his employer's crane barge down in Long Beach Harbor:

> Here, the defendant is both the employer and the vessel owner, thus a case such as this is commonly referred to as a 'dual-capacity' suit. When the vessel owner and the employer are the same entity, an employee may recover for negligence if the negligence was that of the employer acting in its capacity as a vessel owner, not as an employer.

(*Scheuring*, *supra*, 476 F.3d at p. 788 (citing *Jones & Laughlin Steel Corp. v. Pfeifer* (1983) 462 U.S. 523, 531 n.6, 532 (*Pfeifer*).)

The legal obligations of a vessel-owning employer are in no way "diminished" by the exclusive-remedy provision in LHWCA § 5(a), 33 U.S.C. § 905(a),[8] or any other workers' compensation regime. (*Castorina v. Lykes Bros. S.S. Co.* (5th Cir. 1985) 758 F.2d 1025, 1033 (*Castorina*), cert. denied, 474 U.S. 846 (1985).) Federal law imposes on ABYC, as vessel owner, a duty to provide safe access to its vessel. That basic duty attaches regardless of whether Ranger was covered by or excluded from the LHWCA, and regardless of whether AYBC was compelled to pay Longshore or state compensation benefits. Violating that well-recognized federal duty subjected ABYC to tort liability under Federal maritime law.

Far from creating harmony, the decision below would create federal and state law discordance, and lead to inconsistent and perverse outcomes. It is inconsistent because that decision imposes on California's vessel-owning employers different duties and liabilities from those vessels operating in sister states. It is perverse because waterfront employees covered by the LHWCA and who benefit from the Act's more generous provisions could

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[8] That subsection provides, in pertinent part, that: "The liability of an employer prescribed in [the LHWCA] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death[.]"

sue a dual-capacity employer in tort, while excluded employees such as Ranger, who did not benefit from the Act's legislative bargain, but who otherwise are injured by the same tort, could not.

C. The Federal Supremacy Clause Constitutionally Prohibits the Application of Labor Code § 3601 to Maritime Torts.

If a vessel-owning employer's general maritime duties are not diminished by the exclusive-remedy provision Congress wrote into the LHWCA, (*Castorina*, *supra* 758 F.2d at p. 1033), it is difficult to imagine how California Labor Code § 3601 could immunize ABYC from Ranger's tort claim.

The federal Supremacy Clause flatly prohibits such a result. (See e.g. *In re Exxon Valdez,* 484 F.3d at p. 1101.) The United States Supreme Court decision in *Pope, supra,* is both instructive and binding. In that case, a carpenter in Pennsylvania sued a vessel owner for unseaworthiness and negligence. (*Pope, supra,* 346 U.S. at p. 407.) The vessel owner defended the case by alleging contributory negligence against the carpenter's employer, which if proven, would completely bar the carpenter's recovery under Pennsylvania law. (*Id*. at p. 409.) The Supreme Court rejected application of Pennsylvania's "harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery" because it reasoned that it was "completely incompatible with the modern admiralty policy and practice." (*Ibid*.) Once admiralty jurisdiction was properly invoked, a state law could not

constitutionally deprive a person of any substantial admiralty rights:

> True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution had placed under national power to control in 'its substantive as well as its procedural features * * *.' Panama R. Co. v. Johnson, 264 U.S. 375, 386, 44 S.Ct. 391, 393, 68 L.Ed. 748. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right to recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state-created remedy for this right, federal maritime law would be controlling. ***While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.*** These principles have been frequently declared and we adhere to them.

(*Id.* at pp. 408-410, emphasis added.)

A myriad of state and federal maritime cases from every level of decision have therefore held that the exclusive-remedy provision of a state workers' compensation regime ***cannot*** bar a federal maritime tort claim. (See e.g. *Chandris, Inc., supra,* 515 U.S. at p. 356 ("Injured workers [who are covered neither by the Jones Act nor the LHWCA] may still recover under an applicable state workers' compensation scheme," or "in admiralty, under general maritime tort principles"); *Chan v. Society Expeditions,*

Inc. (9th Cir. 1994) 39 F.3d 1398, 1402 ("[A] worker who accepts state workers compensation benefits for injuries is ordinarily barred from suing his employer in tort for the same injuries. However, this bar does not apply to a worker who has a right under federal maritime law.") (citations omitted); *Purnell v Norned Shipping B.V.* (3rd Cir. 1986) 801 F.2d 152, 156 ("the 'exclusive remedy provision in a state Workmen's Compensation Law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law'") (quoting *Thibodaux*, *supra*, 580 F.2d at p. 847); *King v. Universal Elec. Constr.* (5th Cir. 1986) 799 F.2d 1073, 1074 ("when admiralty jurisdiction exists, 'an exclusive remedy provision in a state workman's compensation law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law'"); *Western Boat Bldg. Co. v. O'Leary* (9th Cir. 1952) 198 F.2d 409, 411 ("that the Washington Commission had adjudicated and granted the award under the state act, we do not regard such action as constituting a bar to claimant's rights under the federal law"); *Mainzer v. State of Washington* (2009) 151 Wash.App. 850, 856 ("an exclusive remedy provision of state workers' compensation laws cannot bar federal claims under the general maritime law."); *Morrow v. Marinemax, Inc.*, (D.N.J. 2010) 731 F. Supp. 2d 390, 399 ("to allow a state workers' compensation law to preclude a plaintiff's maritime tort claim would be 'the quintessence of deprivation'"); *Moore v. Capitol Finishes, Inc.* (E.D.Va. 2010) 699 F. Supp. 2d 772, 780 (same); and *Ocello v. City of New York*,

(E.D.N.Y. 2012) 2012 U.S. Dist. LEXIS 144841, * 17 ("a plaintiff injured in the course of employment and not covered by the Jones Act or the Longshore and Harbor Workers Compensation Act 'may still recover under an applicable state workers' compensation scheme, or, in admiralty, under general maritime tort principles'") (quoting *Chandris, supra*, 515 U.S. at p. 356).)

In *Thibodaux*, for example, a Louisiana-based defendant was transporting a barge-load of its own workers to a job site on the Gulf of Mexico, when the barge sank and one of the workers drowned. (*Thibodaux*, *supra*, 580 F.2d at p. 842.) After the deceased worker's family sued for wrongful death under general maritime law, the defendant argued that the Louisiana Workers' Compensation Act immunized it from any liability outside that Act. (*Id.* at p. 846.) The district court accepted that argument and dismissed the case, but the Fifth Circuit reversed, ruling that "an exclusive remedy provision in a state workmen's compensation law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law." (*Id.* at p. 847.)

The Ninth Circuit reached the same conclusion in *Chan.* (*Chan, supra,* 39 F.3d at p. 1403.) The plaintiff in that case worked for a company that chartered cruise ships from its Seattle office. (*Id.* at pp. 1401-1402.) After taking a South Pacific cruise on one of those ships in the course of his employment, the plaintiff was injured on navigable waters when an inflatable raft overturned while ferrying him ashore. *(Ibid).* He sued his employer, just as Ranger is doing here, alleging a general

maritime claim for negligence. (*Id.* at p. 1402.) When the district court dismissed his claim on the ground that it was barred by Washington's workers' compensation law, (*ibid*), the Ninth Circuit reversed, holding that the worker "still ha[d] a general claim in admiralty for negligence" against his employer, "notwithstanding the exclusive-remedy provisions of the state workers' compensation act." (*Id.* at p. 1403 (footnote omitted).)

Although Ranger's rights to sue ABYC in tort and receive benefits under the California workers' compensation scheme are "'independent and cumulative'", "that does not mean that double recovery may be had for the same item of damage." (*Guay v. American President Lines, Ltd.* (1947) 81 Cal. App. 2d 495, 519; see also *Hamilton v. County of Los Angeles* (1982) 131 Cal. App. 3d 982, 997.) ABYC is entitled to a dollar-for-dollar tort credit for any workers' compensation it has paid. (See e.g. *Southwest Marine v. Gizoni* (1991) 502 U.S. 81, 88 (holding that a waterfront employer who faces potential liability under two different regimes may credit any sums paid under one regime against any liabilities arising under the other); *Figueroa v. Campbell Industries* (9th Cir. 1995) 45 F.3d 311, 315; *Biggs v. Norfolk Dredging Corp.* (4th Cir. 1969) 360 F.2d 360, 364; *Hamilton*, *supra*, 131 Cal.App.3d at p. 997.)

The decision below failed to consider, weigh, discuss, or even mention any of those cases. The California workers' compensation scheme was not Ranger's exclusive remedy.

III. THE DECISION BELOW WAS POORLY REASONED.

A. The Second Appellate District Did Not Grasp the Need or Reason for Determining Admiralty Jurisdiction.

California state courts ordinarily employ a three-step, "governmental- interest analysis" when called upon to make a choice of law. (See e.g. *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1202-1203 (*Sullivan*).[9]) That process determines the governing law a la carte, on an issue-by-issue basis. (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 584 ("The key step in this process is delineating the issue to be decided").) However, the choice-of-law process in a maritime tort case like Appellant Ranger's does not take place a la carte; "once admiralty jurisdiction is established, then all of the substantive rules and precepts peculiar to the law of the sea become applicable." (*Branch v. Schumann* (5th Cir. 1971) 445 F.2d 175, 178

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[9] "First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies 'the law of the state whose interest would be the more impaired if its law were not applied." (*Sullivan*, 51 Cal.4th at p. 1202 (internal quotation marks and citations omitted).)

(emphasis added).)

The decision below deemed the jurisdictional question "supernumerary" because "state courts may adjudicate *in personam* maritime claims." (*Ranger*, *supra*, 95 Cal.App.5th at pp. 242-243.) But properly framed, the question was not whether the Superior Court had jurisdiction to adjudicate *in personam* maritime claims, but whether having been called upon to exercise that jurisdiction in this case it should have applied California or maritime law. (See *In re Dearborn Marine Service, Inc.*, *supra*, 499 F.2d at p. 277, n. 27.) The answer was maritime law.

"With admiralty jurisdiction comes the application of substantive admiralty law." (*East River S.S. Corp.*, *supra*, 476 U.S. at p. 864.) The Second Appellate District failed to grasp that dispositive point.

B. Misinterpreting a Dictum from *Batterton*, the Second Appellate District Misconstrued the Judiciary's Role in the Development of General Maritime Law.

The United States Supreme Court has repeatedly held that Article III, Section 2 of the Constitution empowers the federal judiciary to hand down general maritime law "in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result." (*Baker*, *supra*, 554 U.S. at pp. 489-490.) "Congress has largely left to the Court the responsibility for fashioning the controlling rules of admiralty law." (*Fitzgerald v. United States Lines Co.* (1963) 374 U.S. 16, 20.) The savings-to-suitors clause gives state

judiciaries a role in that process too. (*Romero*, *supra,* 358 U.S. at p. 372.) Federal maritime law is thus "judge-made law to a great extent." (*Edmonds*, *supra,* 443 U.S. at p. 259.)

Seizing on a *dictum* from *Dutra Group v. Batterton* (2019) 139 S.Ct. 2275 (*Batterton*), the decision below concluded that: "When exercising their common law authority, admiralty courts look primarily to legislative enactments for policy guidance." (*Ranger*, 95 Cal. App. 5th at p. 243 (citing *Batterton*, *supra*, 139 S.Ct. at p. 2278). But the decision below misread that *dictum* when it tried to apply it to this case.

The *Batterton* Court quoted *Miles v. Apex Marine Corp*. (1990) 498 U.S. 19 (*Miles*), for the proposition that "'an admiralty court should look primarily to . . . legislative enactments for policy guidance." (*Batterton, supra,* 139 S.Ct. at p. 2278 (quoting *Miles, supra,* 498 U.S. at p. 27). When *Miles* was first handed down, it threatened to "swallow the whole of maritime personal injury and death law" by inspiring some lower courts to take "upon themselves the agenda of tort reform despite the fact that Congress itself has not seen fit to do so." (Force, "The Legacy of *Miles v. Apex Marine Corp*." (2006) 30 Tul.Mar.L.J. 35, 54: see also Peltz, "Circuit Courts Gone Wild: Restoring Rationality to the Interpretation of *Miles*" (2014) 26 U.S.F. Mar. L.J. 49 ("Although the Supreme Court in *Miles v. Apex Marine Corp.* repeatedly warned that its rationale was limited to those specific circumstances where 'Congress has spoken directly to the question,' a number of circuit courts subsequently seized upon what they perceived to be the '*Miles*' philosophy" to limit

remedies in many situations that were not contemplated by the Court").) We now know that such a "reading of *Miles* is far too broad." (*Atlantic Sounding Co. v. Townsend* (2009) 557 U.S. 404, 419.)

The question in *Miles* was "whether the parent of a seaman who died from injuries incurred aboard respondents' vessel may recover under general maritime law for loss of society" when such damages are not available under the Jones Act. (*Miles, supra,* 498 U.S. at p. 21.) Resolving to "restore a uniform rule applicable to all actions for the wrongful death of a seaman," (*id.* at p. 33) *Miles* held that where "Congress has spoken directly to the question of recoverable damages," a court called upon to fashion a remedy under general maritime law "is not free to go beyond those limits." (*Id.* at pp. 24 and 31.) It is well settled however that: "In order to abrogate a common-law principle, a statute must speak directly to the question addressed by the common law." (*Baker*, *supra*, 554 U.S. at p. 489.) It follows *a fortiori* that "the uniformity spoken of in *Miles* is not universal uniformity of maritime tort remedy, but rather uniformity in the face of applicable legislation." (*Stogner v. Cent. Boat Rentals, Inc.* (E.D.La. 2004) 326 F.Supp.2d 754, 758.)

In *Batterton,* the Supreme Court refused to allow a seaman to seek punitive damages for willful unseaworthiness under general maritime law after reviewing the long history of unseaworthiness claims, noting *inter alia* that: "The rule of *Miles* — promoting uniformity in maritime law and deference to the policies expressed in the statutes governing maritime law —

prevents us from recognizing a new entitlement to punitive damages where none previously existed." (*Batterton, supra*, 139 S.Ct. at p. 2287.[10]) But that is not the situation here.

A maritime worker's entitlement to recover tort damages for a workplace injury suffered within the admiralty jurisdiction is well established. (See e.g. *Pfeifer*, *supra*, 462 U.S. at p. 531 n.6; *Scheuring*, *supra*, 476 F.3d at p. 788.) Neither the LHWCA nor any other Federal statute prohibits a claim for vessel-owner negligence. Indeed, as further explained in Section (III)(D), *infra,* LHWCA § 5(b) explicitly grants such a claim. What is more, the 1972 Amendment to § 5(b) prohibiting longshore and harbor workers from suing for *Sieracki* unseaworthiness does not reach club "workers 'who are not entitled to LHWCA benefits[.]'" (*Freeze, supra,* 96 Cal.App.4th at p. 51 (quoting *Green*, *supra*, 144 F.3d at p. 337).

Nor is there anything in Federal maritime law—other than the Eleventh Circuit's outlier opinion in *Brockington, supra,* which we will discuss in Section (III)(D), *infra*—which holds, suggests, or even hints that an admiralty court should look for legislative guidance beyond the uniform enactments of Congress to the various workers' compensation schemes adopted by states.

The decision below misreads the *dictum* in *Batterton* and misconstrues the judiciary's role in the development of general

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[10] For an in-depth analysis of the *Batterton* decision, see Sturley, *Making Sense of Batterton and the Availability of Punitive Damages under FELA and the Jones Act*, vol. 52:2, Journal of Maritime Law & Commerce, pp. 79-130.

maritime law.

C. The Second Appellate District's Reliance on Justice Holmes' "Celebrated" Dissent in Jensen Was Misplaced.

The Supreme Court's lodestar decision in *Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205, has long been cited for the principle that state statutes purporting to compensate longshore and harbor workers for injuries incurred upon navigable waters "infringe[] the Constitution, in that they invade[] the federally reserved filed of maritime law." (Gilmore and Black, *The Law of Admiralty* (2d ed. 1975) § 1-17, at p. 48.) Dismissing *Jensen* as a "*Lochner*-era decision" and "an infamous five-to-four holding", the decision below relies instead on Justice Holmes's "'celebrated' dissent." (*Ranger*, *supra*, 95 Cal.App.5th at p. 248.) But that reliance was misplaced.[11]

To be sure, *Jensen* has been criticized. Indeed, Congress enacted legislation — the LHWCA — to prospectively change the result of *Jensen* on its facts. But the basic principle that the *Jensen* Court applied has remained strong, and the federal Supreme Court has continued to rely on it. In *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.* (2004) 543 U.S. 14, 27-

[11] "It has long been settled that a dissent does not serve as precedential authority." (*Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398, 425 (citing *Del Mar Water, Light & Power Co. v. Eshleman* (1914) 167 Cal. 666, 682); see also *People v. Lopez* (2012) 55 Cal.4th 569, 585 ("dissenting opinions are not binding precedent"); *Fischer v. Time Warner Cable Inc.* (2015) 234 Cal.App.4th 784, 797 ("a dissent has no precedential value").

29, for example, the Court did not cite *Jensen*, but it unanimously applied the *Jensen* principle in holding that state law must yield to the general maritime law when state law would interfere with a federal interest. The well-established federal interests here include fully compensating the victims of maritime negligence (an interest that countless cases have recognized, going back at least to *Kermarec*, *supra*, and protecting those who do ship's work from unseaworthy conditions (the interest most famously recognized in *Sieracki*, *supra*. Because the exclusive-liability provision of state workers' compensation statutes would defeat those federal interests if they applied, they are preempted.

By erroneously painting the Fifth Circuit's decision in *Green* as unduly reliant on *Jensen,* the opinion below casts aside the development of maritime law since 1917 and fails to appreciate that *Green* was decided not during "the *Lochner* era" but in 1998. (*Green*, *supra*, 144 F.3d 332.) Moreover, the Fifth Circuit reaffirmed *Green*'s reasoning less than four years ago in *Rivera*, *supra*. *Green* and *Rivera* relied primarily on the Supreme Court's 1946 decision in *Sieracki* and Congress's failure to abrogate that decision for workers (such as Green, Rivera, and Ranger) who were excluded from LHWCA's coverage.

D. The Second Appellate District's Reliance on ***Brockington*** Was Equally Ill-Considered.

The decision below touts the Eleventh Circuit's decision in *Brockington*, "as 'an excellent example of admiralty preemption analysis.'" (*Ranger*, *supra*, 95 Cal. App. 5th at 246 (quoting 1 Schoenbaum, Admiralty and Maritime Law (6th ed. 2022 supp) §

4:5, n.12).) In truth, that analysis is a widely criticized outlier.

Ignoring the dictate that "[w]ith admiralty jurisdiction comes the application of substantive admiralty law[,]" (*East River*, *supra*, 476 U.S. at p. 864) and acting as if the Supremacy Clause posed nothing but a standard conflict-of-laws issue, (see *Rest. (2d), Conflict of Laws*, § 145), the *Brockington* opinion deviated from an otherwise unanimous consensus and held that the exclusive- remedy provisions of a State workers' compensation statute could trump the general maritime law in a case involving an electrician who was injured on navigable waters while commuting to a wiring job on Sapelo Island, Georgia, in a 16-foot skiff. (*Brockington*, *supra*, 903 F.2d at p. 1524.) After correctly concluding that the accident off Sapelo Island fell "within the purview" of admiralty law (*id.* at p. 1529), the *Brockington* court applied an unusual "balancing test" not unlike California's governmental-interest analysis previously discussed in Section (III)(A) and decided that "the interest in applying general maritime law to the present action is not substantial" while "the interest in applying state law is relatively high." (*Id*. at p. 1532.) But until the Second Appellate District followed it in this case, that balancing test had been criticized and rejected by every court to consider it outside of the Eleventh Circuit.

As a district court from the Fourth Circuit explained, when it acknowledged *Brockington*, but cleaved instead to *Thibodaux* and the majority rule:

> The Eleventh Circuit's . . . balancing test, however, is

> neither the only possible reading of the relevant Supreme Court jurisprudence nor even necessarily a widely accepted one. Indeed, the United States Court of Appeals for the Fifth Circuit has explicitly rejected aspects of the Eleventh Circuit's approach in *Brockington*. See *Green v. Vermilion Corp.*, [144 F.3d at 336-37]. In *Green*, the Fifth Circuit discussed its prior decision in *Thibodaux v. Atlantic Richfield Co.*, [*supra*], in which the court was "'squarely presented with the issue of whether an exclusive remedy provision in a state workmen's compensation statute can operate to deprive a party of a cause of action afforded by federal maritime law.'" *Green*, 144 F.3d at 336 (quoting *Thibodaux*, 580 F.2d at 846). The Fifth Circuit in Thibodaux 'concluded that relevant Supreme Court and Fifth Circuit precedent made "'it clear that an exclusive remedy provision in a state workmen's compensation law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law.'" *Green*, 144 F.3d at 336 (quoting *Thibodaux*, 580 F.2d at 847). The Fifth Circuit in *Thibodaux* thus 'specifically held that "the exclusive remedy provision of the Louisiana Workmen's Compensation Act" does not preclude a plaintiff from pursuing a claim for wrongful death occasioned in state territorial waters since the Supreme Court has expressly recognized such a suit under admiralty jurisdiction.' *Green*, 144 F.3d at 336 (quoting *Thibodaux*, 580 F.2d at 847).

(*Moore*, *supra,* 699 F. Supp. 2d at pp. 780-781.[12])

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[12] It is important to recall that the plaintiff in *Green* was a club worker and a post-1972, "*Sieracki* seaman" just like Ranger. As the *Green* court emphasized: "The 1972 Amendments to the LHWCA, which Congress enacted to abolish the Sieracki remedy, [do] not apply to maritime workers who are not within the coverage of the LHWCA. Where the LHWCA does not apply, we

As a district court from the Third Circuit explained when it too refused to follow *Brockington*:

> Interestingly, the [Eleventh Circuit] did declare that, had the plaintiff's claim been for wrongful death rather than for personal injury, then the general maritime law would have prevailed, presumably without the need for any balancing test. Brockington, 903 F.2d at 1531.[] It is difficult to understand the rationale for drawing such a line, allowing general maritime law to control as a matter of course for claims involving mortal injuries but engaging in an interests balancing analysis for claims involving non-mortal ones. In the present matter, involving a plaintiff who suffers from permanent paralysis, the Court finds this line to be particularly blurred, thereby rendering *Brockington's* reasoning less persuasive.

(*Morrow*, *supra*, 731 F.Supp.2d at p. 396 n.8.) After noting that the Fifth and Ninth Circuits had both rejected *Brockington (id*. at p. 396), the *Morrow* court detailed the Fifth Circuit's decision in *Green*, *supra,* 144 F.3d at pp. 341-342, and the Ninth Circuit's analysis in *Chan*, *supra*, 39 F.3d at pp. 1402-1403, see *Morrow*, *supra,* 731 F.Supp.2d at pp 396-397, and pointed out that: "Although *Brockington* had been decided nearly four years

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refuse to expose maritime workers to the variegated state workers' compensation schemes, especially where Congress has expressly found that 'most State Workmen's Compensation laws provide benefits which are inadequate.' H.R. Doc. 92-1441, 92th Cong., 2nd Sess. 1972 U.S.C.C.A.N. 4698, 4707. Green may pursue his *Sieracki* claim against Vermilion despite the availability of relief under the Louisiana Workers' Compensation Act." (*Green*, *supra*, 144 F.3d at p. 337-338 (some internal quotation marks and citations omitted).

earlier, the Ninth Circuit did not cite the case at all, despite the fact that the two cases presented the identical legal question." (*Morrow, supra,* 731 F.Supp.2d at p.397 n.10.) A district court from the Second Circuit recited the very same criticisms and reached the very same result in *Ocello*, *supra,* 2012 U.S. Dist. LEXIS 144841 at *21-*22.

Whatever *Brockington* or the decision below may have concluded, every other court to consider the issue has held that "'an exclusive remedy provision in a state workmen's compensation law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law.'" (*Green*, *supra,* 144 F.3d at p. 336 (quoting *Thibodaux*, *supra*, 580 F.2d at p. 847.) The Second Appellant District erred when it held otherwise here.

E. The Second Appellate District's Reading of the LHWCA's Statutory Language and History Was Likewise Undue.

Reasoning that the 1972 LHWCA Amendments "were the problem, not the solution[,]" (*Ranger*, *supra*, 95 Cal.App.5th at p. 249), the Second Appellate District turned instead to the 1984 Amendments, concluding that:

> Congress determined in 1984 club employees "are more aptly covered under appropriate state compensation laws" because these employees lack "a sufficient nexus to maritime navigation and commerce." (Sen. Rep. 98-81, supra, at p. 25, italics added.) Under California's workers' compensation law, employees may not sue their employers in tort. (See Lab. Code, §§ 3351, 3600, subd. (a).)

> This analysis of statutory language and history demonstrates Ranger cannot sue his employer in tort.

(*Id.* at p. 245.) But that reading was undue.

Here, Appellant Ranger is suing ABYC for general-maritime-law negligence and *Sieracki* unseaworthiness. The LHWCA provisions that deal with such claims are found in LHWCA § 5(b), 33 U.S.C. § 905(b). As originally enacted in 1927, those provisions permitted longshore and harbor workers injured aboard a ship to collect workers' compensation from their employers and sue third-party vessel owners for negligence. But after *Sieracki* allowed longshore and harbor workers to sue vessel owners for unseaworthiness—even when the unseaworthy equipment belonged to the LHWCA employer—the Supreme Court held that vessel owners could implead such an employer under "an implied warranty of workmanlike performance" despite the statutory immunity guaranteed the latter by LHWCA § 5(a), 33 U.S.C. § 905(a). (*Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.* (1956) 350 U.S. 124.)

The 1972 Amendments were designed to eliminate that "tortured triangle." (*Derr v. Kawasaki Kisen K.K.* (3d Cir. 1987) 835 F.2d 490, 492.) Those Amendments involved "a trade-off among interest groups" that abrogated *Ryan* and *Sieracki* on the one hand in return for higher compensation benefits and broader coverage on the other. (*Capotorto v. Compania Sud Americana de Vapores, Chilean Line, Inc.* (2d Cir. 1976) 541 F.2d 985, 989-990.) But even after those changes, an injured maritime worker

— even if he or she was covered by the amended LHWCA — could still sue a vessel-owning employer (such as ABYC) for negligence. As the *Pfeifer* court explained, after the 1972 Amendments:

> The first sentence of § 5(b) authorizes a longshoreman whose injury is caused by the negligence of a vessel to bring a separate action against such a vessel as a third party. Thus, in the typical tripartite situation, the longshoreman is not only guaranteed the statutory compensation from his employer; he may also recover tort damages if he can prove negligence by the vessel. The second sentence of § 5(b) makes it clear that such a separate action is authorized against the vessel even when there is no independent stevedore, and the longshoreman is employed directly by the vessel owner. That sentence provides: 'If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.' If § 5(a) had been intended to bar all negligence suits against owner-employers, there would have been no need to put an additional sentence in § 5(b) barring suits against owner-employers for injuries caused by fellow servants.

(*Pfeifer*, *supra*, 462 U.S. at pp. 530-531.) What is more, far from negating such dual-capacity claims, the 1984 Amendments explicitly acknowledged them by barring workers engaged "to provide shipbuilding, repairing, or breaking services" from suing their employers *qua* vessel owner. (Pub. L. No. 98-426, 98 Stat. 1639.)

The Second Appellate District has misread the statutory

language and history of the LHWCA.

CONCLUSION

WHEREFORE we respectfully urge the Court to reverse the decision below and to remand the case for further proceedings.

DATED: January 30, 2024

Respectfully submitted,

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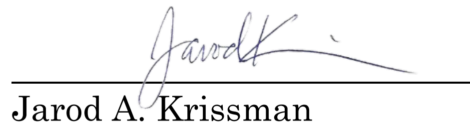
By: 
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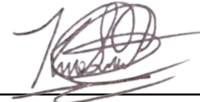

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OPENING BRIEF ON THE MERITS

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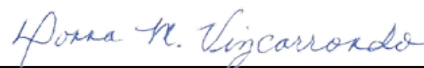

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