S282264

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

REPLY BRIEF ON THE MERITS

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SUMMARY OF REPLY

The argument set forth in the Respondent's Answering Brief ("RAB")—that Congress abrogated Ranger's general maritime right to sue ABYC in tort when it amended the LHWCA in 1984—is wrong; it rests on a mistaken syllogism that adopts all the errors of the decision it was designed to defend.[1]

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[1] As the Court of Appeal framed the analysis:

- "'In contemporary maritime law, our overriding objective is to pursue the policy expressed in *congressional enactments*.'" (*Ranger v. Alamitos Bay Yacht Club* (2023) 95 Cal.App.5th 240, 243 (quoting *Dutra Grp. v. Batterton* (2019) 588 U.S. 358, 374) (ellipses omitted) (emphasis added by Court of Appeal).)

- "*A congressional enactment* does guide our decision. Congress enacted the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (Longshore Act), which established a workers' compensation program for 'any person engaged in maritime employment.'" (*Ibid.*) "In 1984 . . . Congress sharpened the Longshore Act's focus to exclude employees who, although they happened to work on or next to navigable waters, *lacked a sufficient nexus to maritime navigation and commerce*." (*Id.* at 244 (quoting Sen. Rep. 98-81 at p. 25) (emphasis added by the Court of Appeal).) "In response to the experiences of many witnesses, Congress adopted what it called a 'case-specific approach.' Congress determined certain categories of activities identified by witnesses did not merit coverage under the Longshore Act and 'the employees involved *are more aptly covered under appropriate state compensation laws.*'" (*Ibid.*) "Among the carveouts were employees working for *clubs*." (*Ibid.* (emphasis added by Court of Appeal).)

- "Congress determined in 1984 club employees '*are more aptly covered under appropriate state compensation laws'* because these employees lack *'a sufficient nexus to maritime*

According to that syllogism:

- The right to sue in tort under general maritime law is "only available to workers engaged in maritime employment," (*RAB* at 23.);
- "Congress determined in 1984 that workers employed by clubs, 'are more aptly covered under appropriate state compensation laws,' specifically because such workers' activities were determined by Congress to 'lack a sufficient nexus to maritime navigation and commerce,' to constitute maritime employment," (*RAB* at 16 (quoting *Ranger*, 95 Cal.App.5th 240, 244.);
- Since Ranger was engaged as a "club employee" when he was injured on California's coastal waters aboard a vessel owned by his employer, California Labor Code Section 3600 makes state workers' compensation his exclusive remedy against ABYC "'in lieu of any other liability whatsoever.'" (*RAB* at 13 (quoting Cal. Labor Code § 3600(a)).)

But the major premise is false. One does not have to be covered by the LHWCA to pursue a general maritime tort remedy; those remedies are available to anyone injured within the reach of admiralty jurisdiction. Nor can Congress abrogate a general maritime principle without speaking to that principle directly; nothing in the LHWCA abrogates the general maritime

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> *navigation and commerce*.'" (*Id.* at 245 (quoting (Sen.Rep. 98-81, *supra*, at p. 25) (emphasis added by Court of Appeal).) "Under California's workers' compensation law, employees may not sue their employers in tort. [citation omitted.] This analysis of statutory language and history demonstrates Ranger cannot sue his employer in tort." (*Id.* at 245.)

tort remedies Ranger is asserting here. In fact, the LHWCA neither explicitly nor implicitly abrogates those remedies for waterfront workers like Ranger.

Hoping to distract the Court from those truths, ABYC's Answering Brief turns its back on the record below and tries to reframe the question for review. (*RAB* at 12.) In the process, it misconstrues the Supremacy Clause, (*id.* at 19-23), misconceives the reverse-*Erie* doctrine, (*id.* at 14), misstates the principle of uniformity, (*id.* at 31-37), and misreads the dictates of *stare decisis*. (*Id.*) It next misuses the *dictum* it cites from *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19 and *Dutra v. Batterton* (2019) 588 U.S. 358, (*RAB* at 27-28 and 37), and erroneously dismisses the holdings in *Seas Shipping Co v. Sieracki* (1946) 328 U.S. 85 (1946), superseded by statute as stated in *Yamaha Motor Corp., U.S.A. v. Calhoun* (1996) 516 U.S. 199, and *Freeze v. Lost Isle Partners* (2002) 96 Cal.App.4th 45. (*RAB* at 45-56.) And to cap everything off, it misapplies the principles of admiralty tort jurisdiction. (*RAB* at 56-64.)

ARGUMENT

I. ABYC'S MAJOR PREMISE IS FALSE.

ABYC rests its entire argument on the premise that the "judge-made general maritime law tort causes of action" Ranger asserts "are recognized exclusively as being for the benefit of maritime workers" covered by the LHWCA. (*RAB* at 12.) Using that premise as its springboard, the Answering Brief leaps to the conclusion that the tort duties general maritime law imposes on vessel owners like ABYC do not extend to waterfront workers like

Ranger because when 33 U.S.C. Section 902(3)(B) was added to the LHWCA in 1984, "Congress specifically determined that the remedy best suited to a club employee injured on-the-job is the receipt of no-fault state workers' compensation[.]" (*RAB* at 20; see also *id.* at 22-31.) But that premise is false. The reach of admiralty tort jurisdiction is far broader than the ambit of the LHWCA, and status as a "maritime employee" under 33 U.S.C. Section 902(3) is ***not*** a prerequisite for asserting general maritime tort claims.

As we explained on pages 20-23 of our Opening Brief, federal maritime law governs the rights and duties of anyone who falls within the ambit of admiralty jurisdiction. (See, e.g., *East River S.S. Corp. v. Transamerica Delaval Inc.* (1986) 476 U.S. 858, 864 (maritime commerce is a "primary concern of admiralty law").) General maritime law places a vessel owner like ABYC under a duty of care to "to all who are on board for purposes not inimical to his legitimate interests[.]" (*Kermarec v. Compagnie Generale Transatlantique* (1959) 358 U.S. 625, 630, 632.) Since that duty provides judge-made tort rights to every passenger,[2] visitor,[3] licensee/invitee,[4] or guest[5] who boards a vessel, it reaches far beyond LHWCA beneficiaries to plaintiffs like a security guard employed by a ship repairer injured disembarking

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2 (*Doe v. Celebrity Cruises, Inc.* (11th Cir. 2004) 394 F.3d 891, 913.)

3 (*Morton v. De Oliveira* (9th Cir. 1993) 984 F.2d 289, 291.)

4 (*Kermarec, supra*, 358 U.S. at 629-631.)

5 (*Tau v. F/V St. Jude* (W.D. Wash. 2005) 2005 U.S. Dist. LEXIS 64411, *3.)

a docked vessel,[6] a potential buyer injured inspecting a 37-foot SeaRay,[7] a seismic technician killed aboard a chartered oil-exploration vessel,[8] a basketball player injured during a "pick-up game" on a cruise ship's "sports deck,"[9] an amateur angler injured aboard a 30-foot pleasure boat,[10] a gambler injured playing a slot machine aboard a casino boat,[11] the family of a decedent that operated a pleasure boat on the Amite River in Louisiana,[12] and an intoxicated reveler who "fell overboard one of the ship's balconies."[13]

The duty of care ABYC assumed as the owner of the *Latham B* would have thus extended to the butcher, the baker, and the candlestick maker had they been "lawfully aboard" that vessel. (See *Kermarec, supra*, 358 U.S. at 630.) ABYC indisputably owed that duty to Petitioner Ranger. To take the two most pertinent examples, in *Green v. Vermilion Corp*. (5th Cir. 1998) 144 F.3d 332, the Fifth Circuit ruled that Sam Green, a cook at a Louisiana duck-hunting camp, could sue the Vermillion Corp. for general maritime negligence, even though he

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6 (*White v. U.S.* (1995) 53 F.3d 43, 44, 47-48.)

7 (*In re Re* (E.D.N.Y 2008) 2008 U.S. Dist. LEXIS 70417, at **17-18.)

8 (*Craig v. M/V Peacock* (9th Cir. 1985) 760 F.2d 953, 955.)

9 (*Beard v. Norwegian Caribbean Lines* (6th Cir. 1990) 900 F.2d 71, 72.)

10 (*Branch v. Schumann* (5th Cir. 1971) 445 F.2d 175, 178.)

11 (*Tagliere v. Harrah's Ill. Corp.* (7th Cir. 2006) 445 F.3d 1012, 1013-1014.)

12 (*Foremost Ins. Co. v. Richardson* (1982) 457 U.S. 668, 669, 676-677.)

13 (*Varner v. Celebration Cruise Operator, Inc.* (S.D.Fla. 2016) 2016 U.S. Dist. LEXIS 137588, **2, and 11-13.)

was excluded from the LHWCA by the "'club/camp' exclusion delineated at 33 U.S.C. § 902(3)(B)," because:

> Green was injured in the course of his employment while performing the traditional maritime activity of mooring a vessel; Vermilion owned the vessel on which Green fell; the vehicle involved was a vessel routinely employed on navigable waters; the alleged cause of Green's injury was an unkept deck; Green's injury was not uncommon in the maritime context; and 'upholding maritime jurisdiction does not stretch or distort long evolved principles of maritime law,' [citation omitted] since federal courts have long recognized unseaworthiness and general maritime negligence claims.

(*Green*, *supra*, 144 F.3d at 333, 336 (quoting *Kelly v. Smith* (1973) 485 F.2d 520, 526, abrogated by *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* (1995) 513 U.S. 527.) And in *Freeze v. Lost Isle Partners* (2002) 96 Cal.App.4th 45, the Court of Appeal held that Mary Freeze, a "laborer" and "all-around" helper "at a summer seasonal bar and restaurant," (*id.* at 49), whom Section 902(3)(b) also excluded from the LHWCA, was "entitled to pursue," (*id.* at 52), a "claim for negligence under general maritime law" (*ibid.*), when she was injured riding to work aboard "a pontoon boat," (*id.* at 49), owned by her employer pursuant to her "long-recognized right to recover in admiralty for negligence." (*Id.* at 52.) ABYC errs in insisting that *Kermarec's* general maritime negligence cause of action benefits only LHWCA workers.

Nor can ABYC argue that the *Sieracki* unseaworthiness cause of action protects only those workers. Quite the opposite is true. In the wake of the 1972 and 1984 Amendments to Sections

2(3) and 5(b) of the LHWCA, (33 U.S.C. §§ 902(3) and 905(b)), the waterfront workers whom Congress explicitly excluded from that Act are the primary persons who can still pursue that cause of action. (See, e.g., *Freeze, supra*, 96 Cal.App.4th at 51 (the "argument that Freeze's seaworthiness claim was nullified by the 1972 amendments to the LHWCA, which eliminated the seaworthiness claim for workers covered under the Act, is unpersuasive"); *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.").)

II. ABYC IS ALSO WRONG WHEN IT ARGUES THAT CONGRESS ABROGATED RANGER'S GENERAL MARITIME TORT RIGHTS WHEN IT AMENDED THE LHWCA

Congress took waterfront "club employees" like Ranger out of the realm of the LHWCA coverage in 1984. But ABYC is mistaken in contenting that: "there is no place for choice of law issues concerning judge-made general maritime remedies versus state law remedies" in this case. (RAB at 14-15.)

"[T]he Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and 'Congress had largely left to [the Supreme] Court the responsibility for fashioning the controlling rules of admiralty law.'" (*United States v. Reliable Transfer Co.* (1975) 421 U.S. 397, 409 (quoting *Fitzgerald v. United States Lines Co.* (1963) 374 U.S.

16, 20 and citing *Kermarec*, *supra*, 358 U.S. at 630-632).) As we pointed out on page 44 of our Opening Brief: "'In order to abrogate a common-law principle, a statute must speak directly to the question addressed by the common law.'" (App. Opening Br. ("AOB") at 44 (quoting *Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 489 (quoting *United States v. Texas* (1993) 507 U.S. 529, 534)).) As the *Batterton* Court put it:

> By granting federal courts jurisdiction over maritime and admiralty cases, the Constitution implicitly directs federal courts sitting in admiralty to proceed 'in the manner of a common law court.' *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489-490 (2008). Thus, where Congress has not prescribed specific rules, federal courts must develop the 'amalgam of traditional common-law rules, modifications of those rules, and newly created rules' that forms the general maritime law. *East River S. S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864-865 (1986).

(*Batterton*, *supra*, 588 U.S. at 360.)

Congress has not prescribed any rules prohibiting a waterfront club worker like Brian Ranger from pursuing maritime tort actions for negligence or unseaworthiness. Quite the opposite is true.

Everyone agrees that Congress has the power "to regulate the rights and remedies available to workers employed on and around navigable waters." (*RAB* at 24 (citing *Detroit Trust Co. v. The Thomas Barlum* (1934) 293 U.S. 21, 43-44); see also *Calbeck v. Travelers Ins. Co.* (1960) 370 U.S. 114, 120.) That is why it passed the LHWCA in 1927, after the Supreme Court ruled in *Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205 that state

statutes purporting to compensate workers who were injured on navigable waters "invaded the federally reserved field of maritime law and interfered with its uniform and harmonious operation." (Gilmore and Black, *The Law of Admiralty* (2d ed. 1975) § 1-17, at p. 48.)

As our Opening Brief explains on pages 28-31 and 52-53, Congress amended the LHWCA in 1972 "to extend coverage of the Act to include certain contiguous land areas, to eliminate the longshoremen's strict-liability seaworthiness remedy against shipowners, to eliminate shipowner's claims for indemnification from stevedores, and to promulgate certain administrative reforms." (*Dir. OWCP v. Perini N. River Assocs.* (1983) 459 U.S. 297, 313 ("*Perini*").) By extending coverage ashore, the 1972 Amendments "changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured." (*Id.* at 314 (quoting *Northeast Marine Terminal Co.* (1977) 432 U.S. 249, 264-265 (some internal quotation marks omitted).)[14] Congress rooted that new status requirement in 33 U.S.C. Section 902(3), which limits shoreside LHWCA coverage to persons "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-

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[14] Since it bears directly on Congress' subsequent decision to exclude waterfront club workers like Ranger from expanded LHWCA coverage, it is worth noting that the 1972 Amendments also "removed the requirement, present in § 3(a) of the 1927 Act, that federal compensation would be available only if recovery 'may not validly be provided by State law.'" (*Perini*, *supra*, 459 U.S. at 313.)

worker including a ship repairman, shipbuilder, and shipbreaker[.]" (33 U.S.C. § 902(3).) The 1972 Amendments deprived LHWCA beneficiaries of the *Sieracki* unseaworthiness remedy by adopting 33 U.S.C. Section 905(b), which provides that:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(33 U.S.C. § 905(b).) Nothing in those Amendments supports the Answering Brief.

ABYC is incorrect to argue that a person injured within the reach of admiralty jurisdiction must be covered by the LHWCA before asserting general maritime tort rights; the situs/status test for LHWCA coverage codified in 33 U.S.C. Sections 902 and 903 and the situs/nexus test for admiralty tort jurisdiction announced in *Executive Jet Aviation, Inc. v. City of Cleveland* (1972) 409 U.S. 249 and its progeny[15] are "two entirely different" things, "each with different legislative histories and jurisprudential interpretations over the course of decades."

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15 (*Jerrome B. Grubart, Inc. v. Great Lakes Dredge & Dock, Co.* (1995) 513 U.S. 527; *Sisson v. Ruby* (1990) 497 U.S. 358; *Foremost Ins. Co. v. Richardson* (1982) 457 U.S. 668.)

(*Boudreaux v. American Workover, Inc.* (5th Cir. 1982) 680 F.2d 1034, 1049-1050; see also *Perini*, *supra*, 459 U.S. at 320 fn.29.)

Nor can ABYC use 33 U.S.C. Section 905(b) to shield itself from tort liability. Because the unseaworthiness bar in Section 905(b) applies only to "the liability of the vessel under this subsection," (33 U.S.C. § 905(b)), those whom Congress excluded from the reach of that subsection can still avail themselves of their rights under *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). As the Fifth Circuit put it:

> In Sieracki and Ryan[16] the Supreme Court formulated remedies to deal with the peculiar perils faced by maritime workers based on policy considerations it determined to be controlling given those conditions of maritime work. Until Congress abrogates the remedies created by the Supreme Court as they apply to maritime workers not covered by the LHWCA, those workers remain entitled to relief and their employers and vessel owners remain bound by the *Sieracki-Ryan* doctrine.

(*Aparicio, supra*, 643 F.2d at 1118 (footnote added); see also *Cormier v. Oceanic Contractors, Inc.* (5th Cir. 1983) 696 F.2d 1112, 1113 ("the 1972 Amendment to the [LHWCA] did not deny the warranty of seaworthiness to workers not covered by the LHWCA.") (citation omitted).)

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16 (*Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.* (1956) 350 U.S. 124, superseded by statute as stated in *Edmonds v. Compagnie Generale Transatlantique* (1979) 443 U.S. 256) (allowing indemnification action by the vessel against the stevedoring company for breach of the warranty of workmanlike performance).)

Congress amended LHWCA Sections 2(3) and 5(b) again in 1984, but those Amendments won't shield ABYC either.

Subsection 2(3)(B) bars "individuals employed by a club, camp, recreational operation, restaurant museum, or retail outlet" from LHWCA coverage so long as they "are subject to coverage under a State workers' compensation law." (33 U.S.C. §§ 902(3); 902(3)(B).) In ABYC's view, "the Court of Appeal correctly found that with the adoption of 33 U.S.C. Section 902(3)(B), Congress foreclosed club employees like the Plaintiff from bringing tort claims of any kind against their employers, regardless of the purported source of such claims." (*RAB* at 46.)

ABYC and the decision below are mistaken. While Section 902(3)(B) clearly relegates waterfront workers "employed by a club, camp, recreational operation, museum, or retail outlet" to state rather than federal workers' compensation (if state coverage is available), it does not abrogate, speak to, or even mention their general maritime right to sue in tort whenever they are injured aboard a vessel within the reach of admiralty jurisdiction. As the *Freeze* court ruled:

> 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*. Thus, workers 'who are not entitled to LHWCA benefits may still pursue their general maritime claims against the vessel owner.'

(*Freeze*, *supra*, 96 Cal. App. 4th at 51 (citations omitted).) Those claims include both the *Sieracki* count for unseaworthiness and the *Kermarec* count for negligence. (*Id.* at 52 ("In *Pope & Talbot,*

Inc. v. Hawn [(1953) 346 U.S. 406,] 413-414, the Supreme Court recognized that while a *Sieracki* seaman was granted the additional claim of unseaworthiness for injuries incurred on shipboard, that worker was not deprived of his or her 'long-recognized right to recover in admiralty for negligence.'").)

Unable to find help in the text of 33 U.S.C. Section 902(3)(B), the Court of Appeal and ABYC search for it in the legislative history. The decision below relies heavily on the Senate Report issued in connection with the 1984 Amendments. (Sen. Rep. No. 98-81, 1st Sess. (May 10, 1983); See *Ranger*, *supra*, 95 Cal.App.5th at 243-244, 245, and 249.) The Answering Brief mentions that Report nineteen times. (See *RAB* at 16, 17, 21, 22, 23, 30, 36, 38, 39, 43, 44, 45, 46, 53, 58, and 64.) It is well settled however that:

> Statutory construction begins with the plain, commonsense meaning of the words in the statute, 'because it is generally the most reliable indicator of legislative intent and purpose.' [citation.] 'When the language of a statute is clear, we need go no further.'

(*People v. Manzo* (2012) 53 Cal.4th 880, 885 (quoting *People v. Skiles* (2011) 51 Cal.4th 1178, 1185 and *People v. Flores* (2003) 30 Cal.4th 1059, 1063).) There is nothing in the plain, commonsense meaning of the words in 33 U.S.C. Section 902(3)(B) that abrogates Ranger's general maritime rights to sue ABYC in tort. (*Freeze, supra*, 96 Cal.App.4th at 51-52.) That being so, "we need go no further." (*Manzo*, *supra*, 53 Cal.4th at 885.)

If we nonetheless pause to consider the legislative reports, it is only to demonstrate that ABYC and the Court of Appeal

misinterpreted them. To be sure, the 1984 Senate Report recommends that "certain establishments, and their employees, such as clubs, camps, restaurants, museums, retail outlets and marinas" be "exempted" from LHWCA coverage because the Committee believed "these employers lack the necessary nexus to maritime employment and commerce" even when they "operated on or over a navigable water." (Sen. Rep. No. 98-81 at 25 and 29.) In the Committee's view, those employers and their employees were "more aptly covered under appropriate state compensation laws." (*Id.* at 25.) But nothing in that Report recommends or even hints that waterfront club workers like Ranger should be cut off from their rights under general maritime tort law, only that they should look to state law for workers' compensation.

The general maritime tort rights of LHWCA beneficiaries in turn are addressed not in 33 U.S.C. Section 902(3) but in 33 U.S.C. Section 905(b), and that subsection and its legislative history address only those workers "covered" by the LHWCA.[17]

> Both the express language of Section 905(b) and the legislative history of the 1972 amendments support the proposition that the congressional action was aimed at longshoremen and harbor workers covered by the LHWCA. The statute itself must be our polestar, for it is black letter law that we do not search for latent intention if a legislative act is clear. 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.

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[17] Indeed, Section 905(b) limits the scope of the statute to "the event of injury to a person covered under this chapter."

(*Aparicio*, *supra*, 643 F.2d at 1116.) Nor, as we explained on pages 51-53 of our Opening Brief, does that statute or its legislative history manifest any intention to prevent anyone other than workers engaged "to provide shipbuilding, repairing, or breaking services" from suing for vessel owner negligence.

III. ABYC TURNS ITS BACK ON THE RECORD BELOW AND TRIES TO REWRITE THE ISSUE FOR REVIEW

Because "[t]he Court of Appeal's decision was not based upon a choice of law" but on the conclusion that Congress had taken Ranger "out of the realm of judge-made general maritime law" and made State workers' compensation his exclusive remedy, ABYC claims the "discussion in the POB concerning the Supremacy Clause, the reverse-*Erie* doctrine, federal preemption, and the need for national uniformity in general maritime law is an attempt to reframe the issue on review as a 'choice of law' question." (*ROA* at 14.) But it is ABYC who attempts to reframe that issue.

To reboot: "Choice of law questions raised in a maritime context have traditionally been analyzed in jurisdictional terms . . . because as a general rule '(o)nce 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., overruled on other grounds, as recognized in *Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc.* (5th Cir. 1989) 866 F.2d 752.) Under the reverse-*Erie* doctrine, 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 this Court summed up in *Fahey v. Gledhill* (1983) 33 Cal.3d 884:

> The basis of admiralty jurisdiction of the federal courts is article III, section 2 of the United States Constitution, and under the supremacy clause of article VI, the admiralty rules are applicable in state court litigation. State law is inapplicable to a maritime cause of action if it 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.

(*Id.* at 887 (quoting *Intagliata v. Shipowners & Merchants Towboat Co.* (1945) 26 Cal.2d 365, 372) (footnote omitted).)

ABYC not only acknowledged those fundamental principles but framed all its arguments below around them. It asked the trial court to dismiss Ranger's general maritime tort claims on the ground that they "fail[ed] to plead facts sufficient to establish a 'maritime tort' such that federal admiralty jurisdiction applies[.]" (Clerk's Transcript ("CT") at 254; see also *RAB* at 15.) Neither ABYC's Demurrer to the Second Amended Complaint nor the Order sustaining it made any mention of the club-worker exclusion, the 1984 Amendments, or 33 U.S.C. Section 902(3)(B). (CT at 269-274 and 350-357.) The Superior Court accepted ABYC's choice-of-law arguments, misapplied the two-part formula for admiralty tort jurisdiction,[18] and dismissed Ranger's

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[18] (See *Jerome B. Grubart, supra*, 513 U.S. at 534.)

Second Amended Complaint not because it found Congress abrogated Ranger's federal rights, but because it mistakenly concluded that admiralty jurisdiction was lacking. (CT at 356.)

ABYC repeated that argument before the Court of Appeal; its brief made no mention of the club worker exclusion or 33 U.S.C. Section 902(3)(B) and argued only that:

> Plaintiff is a land-based maintenance worker whose accident had no 'potentially disruptive impact on maritime commerce.' The Superior Court therefore correctly concluded that the accident does not come within federal admiralty jurisdiction under the test established by the United States Supreme Court. See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* (1995) 513 U.S. 527, 534.

(Resp. App. Br. at 7-8.) ABYC did not trumpet any of the arguments it is now urging on this Court until the Court of Appeal "affirm[ed] the [trial] court's ruling without deciding about admiralty jurisdiction" and concluded that the club-worker exclusion in 33 U.S.C. Section 902(3)(B) "makes California state workers' compensation law paramount, which means Ranger's exclusive remedy is workers' compensation." (*Ranger*, *supra*, 95 Cal.App.5th at 242-243.) After this Court granted Ranger's petition for review, ABYC harmonized its position with that unexpected conclusion by composing a brand-new set of arguments and rewriting the issue for review. (*RAB* at 12.) To accomplish that sleight of hand, ABYC turned its back on the jurisdictional and choice-of-law issues that defined the parties' dispute from the start and contended that Ranger's "judge-made

general maritime law tort causes of action" are "exclusively" for the LHWCA-covered workers. (*Ibid.*)

IV. ABYC MISCONSTRUES THE SUPREMACY CLAUSE

Although the saving-to-suitors clause gave the States an independent role "in the development of maritime law throughout our history," (*Romero v. International Terminal Operating Co.* (1959) 358 U.S. 354, 374, superseded by statute on other grounds, as stated in *Miles v. Apex Marine Corp.* (1990) 498 U.S. 19), this Court has repeatedly confirmed both that Article VI of the Constitution makes federal maritime law the supreme law of the land and that: "State law is inapplicable to a maritime cause of action if it 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." (*Fahey, supra*, 33 Cal.3d at 887 (citing *Intagliata v. Shipowners & Merchants Tow Boat Co. Limited* (1945) 26 Cal.2d 365, 372).) Relying on *National Pork Producers Council v. Ross* (2023) 598 U.S. 356 (where "out-of-state pork producers" argued that a California law "banning the in-state sale of certain pork products" violated the Commerce Clause in Article I of the Constitution, *id.* at 363) and *Fisher v. University of Tex. at Austin* (2016) 579 U.S. 365 (where college applicants asked "whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause," *id.* at 369), the decision below decried the "*Lochner*-era" conception of admiralty supremacy set forth in *Fahey* and *Intagliata* as "a one-way street" because it "clashes with our deep

national strain of federalism that celebrates states as laboratories of experimentation." (*Ranger*, 95 Cal.App.5th at 248.) In the Court of Appeal's view, that strain of federalism makes "California state workers' compensation law paramount" in this instance. (*Id.* at 243.) ABYC agrees. (*RAB* at 19, 23, and 32.)

But ABYC and the decision below are wrong; nothing in *Fahey, Intagliata,* or the Supremacy Clause celebrates State legislation—least of all State workers' compensation—as laboratories for experimenting with maritime principles that shall reign paramount across the whole country.

V. ABYC MISCONCEIVES THE REVERSE-*ERIE* DOCTRINE, MISTATES THE PRINCIPLE OF UNIFORMITY, AND MISREADS THE DICTATES OF *STARE DECISIS*

The reverse-*Erie* doctrine requires that: "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 371 (quoting *The Lottawanna*, (1874) 88 U.S. 558, 575).) The Answering Brief argues that a federal district court in Los Angeles would be bound to apply *Normile v. Maritime Co. of the Philippines*, (9th Cir. 1981) 643 F.2d 1380, and that Ranger would be unable to claim unseaworthiness against ABYC. (*RAB* at 54.) Objecting to the *Freeze* court's decision to follow the Fifth Circuit's meticulous

reasoning in *Green* instead of the Ninth Circuit's reasoning in *Normile*, (see 96 Cal.App.4th at 51-52), ABYC protests that *Freeze* creates a non-uniform application of maritime law. (*RAB* at 54.) But that argument misstates the uniformity principle and misreads the doctrine of *stare decisis*.

As the Ninth Circuit itself observed:

> This ability to develop different interpretations of the law among the circuits is considered a strength of our system. It allows experimentation with different approaches to the same legal problem, so that when the Supreme Court eventually reviews the issue it has the benefit of 'percolation' within the lower courts.

(*Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155, 1173.) The saving-to-suitors clause made state courts part of that process, (*Romero*, *supra*, 358 U.S. at 374), and as the Second District Court of Appeal stated in *Baptiste v. Superior Court* (1980) 106 Cal.App.3d 87:

> The California courts have recognized that, in the area of maritime torts, their task has been that of ascertaining and applying appropriate legal principles derived from the considerable body of federal maritime law that has developed in the United States. As with any body of law, conflicts and confusing signals may exist within it; it remains the task of the reviewing court to explicate and determine the issues presented.

(*Id.* at 94 (citations omitted).) When a California state court is called upon to interpret and apply such signals, only the "[d]ecisions of the United States Supreme Court are binding.

Lower federal court decisions are not." (*Black v. Dept. of Mental Health* (2000) 83 Cal.App.4th 739, 747.)

> Thus, in the absence of a controlling United States Supreme Court opinion, we make an independent determination of federal law. Where the federal circuits are in conflict, the decisions of the Ninth Circuit are entitled to no greater weight than those of other circuits.

(*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 782-782 (quoting *Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 520, fn.8).) That is specifically true when a state court interprets and applies federal maritime law. (*Wagner v. Apex Marine Ship Mgmt. Corp.* (2000) 83 Cal.App.4th 1444, 1451.)

"Any rule which would require the state courts to follow in all cases the decisions of one or more lower federal courts would be undesirable, as it would have the effect of binding the state courts where neither the reasoning nor the number of federal cases is found persuasive." (*Rohr Aircraft Corp. v. County of San Diego* (1959) 51 Cal.2d 759, 764-765, overruled on other grounds, *Rohr Aircraft Corp. v. San Diego County* (1960) 362 U.S. 628.)[19] That is the situation here. The U.S. Supreme Court has never

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[19] *Keith v. SS Goldstone* (1978) 81 Cal.App.3d 699, 704 and *Prohoroff v. Kawasaki Kisen Kaisha, Ltd.* (1989) 90 Cal.App.3d 640, 644-645 each suggest that when considering inter-circuit conflicts, California state courts should look to the rules applied in the Ninth Circuit. Such *dicta* run counter to this Court's holding in *Rohr,* 51 Cal.2d at 764-765, and to the Second District's intervening decision in *Ovitz v. Shulman* (2005) 133 Cal.App.4th 830, 848 ("Decisions by the Ninth Circuit have no greater persuasive force on California courts than those of other circuits."). This Court should take the opportunity to correct *Keith* and *Prohoroff*.

considered the question at bar, and the *Freeze* court declined to follow *Normile* because the Ninth Circuit's opinion is neither binding nor persuasive. (See *Freeze*, 96 Cal.App.4th at 51.) For all the reasons we discussed on pages 47-51 of our Opening Brief, the same may be said of the Eleventh Circuit's widely criticized opinion in *Brockington v. Certified Elec., Inc.* (11th Cir. 1990) 903 F.2d 1523. The principle of uniformity does not shackle developing maritime jurisprudence to authorities that are neither binding nor persuasive. We therefore respectfully urge this Court to make an independent determination of federal maritime law by affirming *Freeze* and following the Fifth Circuit's persuasive jurisprudence.

The Fifth Circuit has long been recognized as "the leading circuit on admiralty law." (See, e.g., *Papai v. Harbor Tug & Barge Co.* (9th Cir. 1995) 67 F.3d 203, 209 (Poole, J., dissenting), rev'd on other grounds by 520 U.S. 548 (1997).) The *Freeze* court adopted the Fifth Circuit's analysis because that analysis was more thorough and compelling than any other. (See *Freeze*, *supra*, 96 Cal. App. 4th at 51-53; compare *Green*, *supra*, 144 F.3d. at 334-342 and *Aparicio*, *supra*, 643 F.2d at 1117-1119 with *Normile, supra*, 643 F.2d at 1382-1383 and *Brockington, supra*, 903 F.2d at 1427-1428.) The Alaska Supreme Court agreed: "*Normile* has not been widely followed, even within the Ninth Circuit. The Fifth Circuit's case law is more supportive of the continued viability of unseaworthiness claims and, in our view, is better reasoned." (*Cavin v. State* (Ak. 2000) 3 Pac.3d 323, 331-332.)

VI. ABYC MISUSES THE *DICTA* IT CITES FROM *BATTERTON* AND *MILES*

Like the decision below, ABYC misconstrues the *dicta* in *Miles* and *Batterton* that: "When exercising its inherent common-law authority, 'an admiralty court should look primarily to these legislative enactments for policy guidance.'" (*RAB* at 27 (quoting *Batterton, supra*, 588 U.S. 358).) That *dicta* is sometimes referred to as the *Miles* "principle of uniformity." (See, e.g., *Atl. Sounding Co. v. Townsend* (2009) 557 U.S. 404, 426 (Alito, J., dissenting).) According to ABYC and the decision below, the *Miles* principal of uniformity calls upon courts "to anchor the law of admiralty in the legitimacy of the electoral process." (95 Cal.App.5th at 247 (citing *Batterton*, 139 S.Ct. 2284).) But as we explained on pages 43-46 of our Opening Brief, that is a spectacular overstatement. *Miles* merely "teaches that if a form of relief is not available on a statutory claim, we should be reluctant to permit such relief on a similar claim brought under general maritime law." (*Atl. Sounding*, *supra*, 557 U.S. at 426 (Alito, J., dissenting).) The *Miles* Court did not allow the mother of a murdered seaman to bring a general maritime claim for the loss of his society, (498 U.S. at 37), and the *Batterton* Court refused to let an injured dredge hand bring a general maritime claim for punitive damages, (588 U.S. at 371-372), because neither form of relief was available under the Jones Act. (46 U.S.C. § 30104.) Congress had embedded explicit limits on both plaintiffs' recovery in a statute that was directly applicable to their claims.

That is not the situation here. No one contends that the Jones Act applies to Ranger's claims, and when Congress excluded waterfront club workers from LHWCA coverage, it placed no limit on their general maritime tort rights. For its part, the California Legislature lacks the constitutional authority to deprive anyone of their general maritime tort remedies or "interfere[] with the proper harmony and uniformity of that law in its international and interstate relations."[20] (*Fahey*, *supra*, 33 Cal.3d at 887.)

ABYC is distorting and distending the narrow *dicta* from *Miles* and *Batterton*.

VII. ABYC MISAPPLIES THE TEST FOR ADMIRALTY TORT JURISDICTION

Citing *Foremost Insurance Co. v. Richardson* (1982) 457 U.S. 668, *Sisson v. Ruby* (1990) 497 U.S. 358, and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* (1995) 513 U.S. 527, ABYC turns to a jurisdictional issue the decision below dismissed as "supernumerary" and "irrelevant," (*Ranger*, 95 Cal. App. 5th at 242), and argues in closing "that the existence of maritime jurisdiction is not only far from given under the alleged facts," but also that "the Superior Court's ruling that such jurisdiction is absent was well founded in the law." (*RAB* at 56.) ABYC rests those arguments on the potential-disruption-of-

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[20] Indeed, the Supreme Court emphasized this point regarding federal supremacy in *Haywood v. Drown*: "although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." (*Haywood v. Drown* (2009) 556 U.S. 729, 736.)

maritime-commerce ("PDMC") factor for invoking admiralty jurisdiction and the trial court's conclusion that Ranger "did not allege an injury of the type that could disrupt commerce." (CT at 356.) ABYC's closing arguments and the trial court's findings are erroneous.

First, although the *Latham B* was moored at a private yacht club and not itself engaged in commercial activity when Ranger was injured, that does not relieve ABYC from its general maritime duty to provide safe access to and from that vessel. As the Court in *Sisson* admonished:

> Although we recognized that protecting commercial shipping is at the heart of admiralty jurisdiction, we also noted that that interest 'cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct.'

(497 U.S. at 362 (quoting *Foremost*, *supra*, 457 U.S. at 674-675 (emphasis original)).) ABYC is a vessel owner and operator.

Second, the Answering Brief pays no more than lip service to the notion that a court applying the PDMC factor must view the "'incident at an intermediate level of possible generality.'" (*RAB* at 60 (quoting *Grubart*, *supra*, 513 U.S. at 538).) That view does not focus on "the 'particular facts of the incident,'" but on their "potential effects" in the abstract. (*Grubart,* 513 U.S. at 538 (quoting *Sisson*, *supra*, 497 U.S. at 363).) The Answering Brief does not employ the proper level of abstraction when it tries to pass the incident at bar off as a "slip-and-fall on ABYC's vessel[.]"

(*RAB* at 64.) In *Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, for example—a lodestar decision from the Second District Court of Appeal—a weekend sailor was "caught . . . unawares" on the foredeck of the sail boat *Angela* as that vessel was casting off from a private marina in Long Beach Harbor, "trapping his finger in the dockline and cutting it off." (*Id.* at 561.) Viewing the "general character" of that incident in the abstract, the *Barber* court had no difficulty finding that:

> [It] poses a potential hazard to commercial maritime activity. While Barber lost a finger as a result of the incident, another crewman or passenger could have just as easily entangled a hand or arm or even been dragged overboard, thus requiring rescue efforts which would have impeded commercial activities at the dock. Had the dock lines remained attached to the boat . . . it is easy to imagine damage being done to the ship or the dock, also disrupting maritime commerce. These potential disruptions would only be magnified had the *Angela* been engaged in commerce at the time.

(*Id*. at 568 (citation omitted).)

The same may be said of Ranger's injury. That injury not only invoked the uniform tort duties owed by all vessel owners, but it also interrupted whatever voyage the *Latham B* was about to begin. What is more, had Ranger fallen overboard, or had the *Latham B* drifted away from the dock hoist, it is easy to imagine rescue-and-salvage efforts being required or property damage being incurred that could have further disrupted maritime commerce. (See, e.g., *Sisson*, *supra*, 497 U.S. at 362 (holding that "a fire that began on a noncommercial vessel at a marina located on a navigable waterway" could "spread to nearby commercial

vessels or make the marina inaccessible to such vessels").) The authorities ABYC cites for the contrary proposition—*Tandon v. Captain's Cove Marina of Bridgeport* (2d Cir. 2014) 752 F.3d 239, *Hargus v. Ferocious & Impetuous, LLC* (3rd Cir. 2016) 840 F.3d 133, *H2O Houseboat Vacations v. Hernandez* (9th Cir. 1996) 103 F.3d 914, *Endrody v. M/Y Anomaly* (W.D.Wa. 2006) 2006 U.S. Dist. LEXIS 106265, and *Boudwin v. Hastings Bay Marina, Inc.* (E.D.Ark. 2008) 2008 U.S. Dist. LEXIS 53078—are neither binding nor persuasive and easy to distinguish on their facts.

The result in *H2O Houseboat Vacations*, for example, was clearly gerrymandered. The owner of a rented houseboat petitioned for relief under the Limitation Act, 46 U.S.C. §§ 30501 *et seq.*, from the claims of a family poisoned by carbon monoxide fumes while vacationing aboard that houseboat on the navigable waters of Lake Havasu. (*H2O Houseboat*, *supra*, 103 F.3d at 915.) After the district court dismissed that petition for lack of admiralty jurisdiction, the Ninth Circuit affirmed on the ground that "carbon monoxide fumes inside a contained space within a houseboat tied to the shore . . . had no potential to disrupt maritime commerce." (*Id.* at 916.) But as the Ninth Circuit itself has observed, the Limitation Act is a disfavored anachronism that "could profit from modern legislative attention." (*Esta Later Charters, Inc. v. Ignacio* (9th Cir. 1989) 875 F.2d 234, 239.) The clearest explanation of the problem can be found in a dissenting opinion that the Ninth Circuit itself subsequently endorsed:

> One of the many unfortunate consequences of the Limitation of Liability Act is that it leads courts to contort the law to avoid unjust results. . . . Although

> Congress has acknowledged our suggestion that the [Limitation Act] be repealed, see S. Rep. No. 94, 101st Cong., 1st Sess. at 4 (1989) (citing *Esta Later*), the statute remains on the books, a sad reminder of the power of legislative inertia. Until Congress sees fit to decommission the Act, we're bound to apply it. Incongruous as we may find its outmoded assumptions, we will do more harm than good by gerrymandering our admiralty jurisdiction in an effort to avoid the statute's plain import.

(*Delta Country Ventures, Inc. v. Magana* (9th Circ. 1993) 986 F.2d 1260, 1266-67 (Kozinski, J., dissenting).)[21] *H2O Houseboat Vacations* is a prime example of gerrymandering admiralty jurisdiction in an effort to avoid the Limitation Act.

The decisions in *Tandon* (involving an incident in which two "recreational visitors" got in a "fistfight" upon a dock, 752 F.3d at 250, 252), *Hargus* (involving an incident in which a captain standing on shore threw a coffee cup at another passenger standing aboard an anchored vessel, 840 F.3d at 136-137), *Endrody* (involving an incident in which the defendant trespassed aboard a berthed vessel while trying to tie up his own, 2006 U.S. Dist. LEXIS 106265 at **5-7) and *Boudwin* (involving an incident in which a potential buyer fell into an open hatch aboard a pleasure boat moored at a sales dock) won't help ABYC either.

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[21] In *Taghadomi v. United States* (9th Cir. 2005) 401 F.3d 1080, 1087, the Ninth Circuit—citing Judge Kozinski's dissent with approval—recognized that the majority opinion in *Delta Country Ventures* was "flatly inconsistent" with *Grubart* and was "no longer good law."

Each is factually distinguishable, and none of them allege a uniform tort duty owed by a vessel owner "to all who are on board for purposes not inimical to his legitimate interests[.]" (*Kermarec*, *supra*, 358 U.S. at 632.) As the United States Supreme Court noted in *Grubart*, *supra*, the jurisdictional test evolved from a pure locality test so that lawsuits would not "require admiralty courts to adjudicate tort disputes between colliding swimmers," (*id.*, 513 U.S. at 533) or a "fistfight on a dock" (*Tandon*, *supra*, 752 F.3d at 249) or "throwing an object like a coffee cup from land at an individual standing on an anchored vessel." (*Hargus*, *supra*, 940 F.3d at 138.) Ranger's case is different. It alleges a vessel owner's failure to provide safe ingress and egress, a maritime tort recognized at all levels of decision. (*The Admiral Peoples* (1935) 295 U.S. 649, 650-651; *Schuering v. Traylor Bros., Inc.* (2007) 476 F.3d 781, 789-791; *Romero Reyes v. Marine Enterprises, Inc.* (1974) 494 F.2d 866, 869; *Sherfy v. Barge Marin Horizon, No. 651632* (1999) 76 F.Supp.2d 1054, 1056 (ingress/egress duty "non-delegable").) In other words, it alleges conduct where there is a clear federal interest in maintaining uniformity of law, because as stated in *Foremost,* the federal interest in protecting maritime commerce can be fully vindicated only if all operators of vessels on navigable waters—not just individuals actually engaged in commercial maritime activity—are subject to uniform rules of conduct. (*Foremost*, *supra*, 457 U.S. 668.)

CONCLUSION

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

DATED: April 22, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1))

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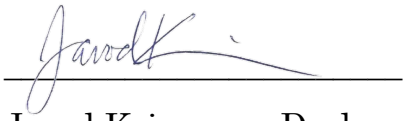

Jarod Krissman, Declarant

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Donna M. Vizcarrondo, Declarant

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