

No. ~~_____~~ 09-39 JUL 7 - 2009

In The OFFICE OF THE CLERK
Supreme Court of the United States

—◆—
DUFRENE BOATS, INC.,

Petitioner,

v.

NGA TRINH, INDIVIDUALLY AND ON
BEHALF OF HAO TRAN AND LYNN TRAN,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The Louisiana First Circuit Court Of Appeal**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

In *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), this Court analyzed the conflict between maritime and state remedies for wrongful-death in territorial waters and defined “seafarer” as a threshold determination of whether maritime uniformity and maritime remedies should be paramount over state interests and state remedies. Subsequent federal and state court decisions have developed inconsistent interpretations of “seafarer” which have led to anomalous results. Only this Court can resolve this conflict with a clear definition of “seafarer” to aid the lower courts in determining when maritime uniformity and maritime remedies are paramount over state interests and state remedies. The inconsistent results will continue until this Court answers the question presented:

Whether a person engaged in a maritime trade, who is not a seaman or a longshore worker, is a “seafarer” under *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), which would require application of maritime uniformity and maritime remedies over state interests and state remedies in a maritime wrongful-death case in territorial waters.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption of this Petition.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states it has no parent or publicly held company owning 10% or more of its stock.

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OPINIONS BELOW

The opinion of the Louisiana First Circuit Court of Appeal (App. 1-29) is reported at 6 So.3d 830 (La. App. 1 Cir. 2009). The judgment and opinion of the Louisiana 16th Judicial District Court (App. 38-42) denying petitioner's Motion for Partial Summary Judgment on the non-pecuniary claim is unreported. The judgment and opinion of the 16th Judicial District Court (App. 30-37) on the main demand is unreported. The opinion of the Louisiana Supreme Court (App. 43) denying an Application for Writ of Certiorari is reported at 5 So.3d 166 (La. 2009).



JURISDICTION

The Louisiana First Circuit Court of Appeal's judgment was entered on January 22, 2009. A timely Application for Writ of Certiorari to the Louisiana Supreme Court was denied on April 13, 2009. (App. 43). No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).



CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2 of the U.S. Constitution provides in relevant part:

“[t]he judicial [p]ower [of the United States] shall extend . . . to all [c]ases of admiralty and maritime [j]urisprudence”.

28 U.S.C. §1333 states in pertinent part:

“The District courts shall have original jurisdiction, exclusive of the courts of the states, of:

- (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”



STATEMENT OF THE CASE

Introduction

This case raises important, recurring questions relating to federal maritime law that have not been, but should be, settled by this Court. The Petition addresses the issues of uniformity within the general maritime law and coexistence with state law remedies under the savings-to-suitors clause. Within the context of maritime uniformity and state law applicability is the need for this Court to bring clarity to the term “seafarer”. Many lower federal courts have found persons engaged in a maritime trade who are not seamen or longshore workers “seafarers” according to *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 1999 (1996), and held the principle of maritime uniformity paramount over state interests. However, other courts, like the state court below, have found the

same persons “non-seafarers” and held state interests paramount over maritime uniformity according to *Yamaha, id.* Thus, we have a significant conflict which leaves litigants and their counsel in a quandary as to which set of laws to apply, maritime or state, when determining remedies. Maritime law restricts recovery to pecuniary damages. State law may allow the additional recovery of non-pecuniary damages. The impact of which law applies is significant and why this Court should address and clarify the issues.

The issues set forth in this Petition are also compelling because they impact all self-employed maritime workers in the United States and owners of all vessels calling on American ports and dock facilities. The unresolved issues have created a number of conflicting decisions by both federal and state courts as they grapple with the language discussing the scope of “seafarer” in *Yamaha*. The first scope of seafarer incorporates three distinct groups: seamen, longshore workers **and** persons otherwise engaged in a maritime trade. *Id.*, at 202. The second scope, which the state court below adopted, incorporates just two groups: seamen and longshore workers, and excludes “persons otherwise engaged in a maritime trade.” *Id.*, at 205, n. 2. The conflicting decisions evolving around the coexistence of general maritime law uniformity and state interests, together with the quandary of who is a seafarer under *Yamaha*, have percolated for thirteen years. The time is ripe for this Court to address

the maritime uniformity/state law issue, clarify who is a “seafarer”, and end the conflicting decisions.

A. A Maritime Collision Between Commercial Vessels in Territorial Waters

Thuan Tran (“Tran”) was a self-employed commercial crab fisherman who owned his crab-fishing vessel and was engaged in his profession in Louisiana territorial waters when he met his unfortunate death during a maritime collision between his vessel and a commercial tug boat, owned and operated by petitioner, Dufrene Boats, Inc. (“Dufrene”), and its tow of barges. Respondent, Nga Trinh, the wife of Tran, as personal representative of her husband’s estate, filed suit in the Louisiana 16th Judicial District Court seeking pecuniary and non-pecuniary damages under the Louisiana wrongful-death statute.

B. State District Court Denies Motion for Partial Summary Judgment Seeking Dismissal of State Remedies

Petitioner filed a Motion for Partial Summary Judgment seeking dismissal of the non-pecuniary damage claim alleging that those damages were not recoverable by Tran’s family since Tran was a person engaged in a maritime trade, crab fishing, at the time of his death. The District Court denied petitioner’s Motion finding that Tran, the commercial fisherman, was a “non-seafarer” as that term is defined in *Yamaha*. App. 38-42.

C. State District Court Awards Non-Pecuniary Damages

After a non-jury trial on the merits, the District Court awarded non-pecuniary damages. App. 30-37.

D. Louisiana Appellate Court Holds Tran Is A Non-Seafarer And State Interests Prime The General Maritime Uniformity Principle

The Louisiana First Circuit Court of Appeal affirmed the District Court's finding that Tran was a "non-seafarer" and award of non-pecuniary damages because state law primed maritime uniformity in this maritime collision between commercial vessels in territorial waters. App. 1-29.

E. The Louisiana Supreme Court Denies Application For A Writ Of Certiorari

Petitioner filed a timely Application for Writ of Certiorari to the Louisiana Supreme Court which was denied on April 13, 2009. App. 43.¹



¹ Respondent's Application for a Writ of Certiorari for other reasons was also denied.

REASONS FOR GRANTING WRIT

I. **A Current Lack Of Uniformity In The General Maritime Law And Inconsistent Interpretations Of “Seafarer” Have Caused Conflicting Decisions Affecting The Entire Maritime Industry**

This case raises issues that have been percolating in the state and federal courts since *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996). Is a self-employed maritime worker who is not a seaman or longshore worker but engaged in a commercial maritime activity at the time of his death a “seafarer”, akin to seamen and longshore workers whose trades also involve a commercial maritime activity? Or, is the same self-employed maritime worker a “non-seafarer”, akin to a recreational boater and recreational fisherman whose trades do not involve a commercial maritime activity? The Louisiana state court below held the self-employed maritime worker, a commercial fisherman, was a non-seafarer. However, the answers to these questions by our federal and state courts have provided inconsistent decisions. For those courts determining the self-employed maritime worker is a person within the scope of “seafarer”, the principle of maritime uniformity controlled and recovery was limited to pecuniary damages as set forth in maritime law. For those courts holding the self-employed maritime worker is not a person within the scope of “seafarer”, the principle of state interests controlled and recovery for non-pecuniary damages, based upon applicable state law, was allowed. The

conflicting decisions will not end until this Court speaks.

Article III, Section 2 of the U.S. Constitution gives the federal courts the authority to develop a substantive body of law applicable to cases within the admiralty and maritime jurisdiction. During the thirteen years since *Yamaha* was decided, our federal and state courts have reached conflicting decisions while attempting to analyze the *Yamaha* decision, in particular the analysis of maritime uniformity co-existing with state interests. Additionally, *Yamaha* introduced the term “seafarer”. One would think the definition is simple to determine. However, the lower courts have had significant difficulty and contrasting views. As a result, uncertainty and inconsistency exist in our federal courts and our state courts which hear cases under the jurisdiction of 28 U.S.C. §1333(1), the savings-to-suitors clause. The ambiguity of “seafarer”, which has created a lack of uniformity in admiralty law, affects every self-employed maritime worker in the United States and every vessel owner whose equipment calls on our ports and dock facilities. The time is ripe for this Court to accept its constitutional duty, review the issues raised in this Petition, provide substantive maritime law which will bring uniformity to the general maritime law and end the inconsistent decisions from our lower federal and state courts.

We must not forget the “constitutionally based principal that federal admiralty law should be a ‘system of law co-extensive with, and operating uniformly

in, the whole country.’” *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970) (*The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)). The maritime uniformity doctrine is designed to promote consistency, and thus predictability, in maritime commerce. From *The Lottawanna*, the earliest expression from this Court of the uniformity concept, through the numerous maritime legislative statutes, such as the Jones Act, 46 U.S.C. §30104, and the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §901, and up to the *Yamaha* decision, a desire for uniformity has been intertwined with the promotion of commerce on our nation’s navigable waterways. See generally, Robert Force, *Post Calhoun Remedies for Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou?*, 21 Tul. Mar. L. J. 7, 37-40 (1996). The *Yamaha* Court noted the driving concern behind *Moragne* was a push for “uniform access by seafarers to the unseaworthiness doctrine.” 516 U.S., at 627, n. 10; see also *Moragne*, 398 U.S., at 396, n. 12. *Moragne* was expressly intended to advance the principle of uniformity. See *Moragne*, 198 U.S., at 401 (“our recognition of a right to recover for wrongful-death under general maritime law will assure uniform vindication of federal policies . . .”). It is counterproductive to the maritime principle of uniformity that a self-employed person involved in a maritime commercial activity is more akin to a recreational boater than to a seaman or longshore worker. It is reasonable to conclude that when non-seafarers are involved, e.g. the recreational boater or recreational fisherman, the likelihood of significant maritime commercial involvement is remote.

When non-seafarers are killed in territorial waters, maritime interests are not paramount. It is reasonable to conclude from *Yamaha* that state interests outweigh the need for maritime uniformity in such a context. (See, *Yamaha*, 516 U.S., at 211, n. 8, “The federal cast of admiralty law, we have observed, means that ‘state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the states a wide scope.’ *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959)”). However, when a person who is engaged in maritime commerce, e.g. a self-employed commercial fisherman, is killed in territorial waters, it is reasonable to conclude from *Yamaha* the implication of uniformity in federal maritime law is paramount and should control over state interests. *Id.* Today, as a result of the different interpretations of “seafarer” in the *Yamaha* decision, our federal and state courts are not co-extensive, nor are they operating uniformly. Therefore, review by this Court is warranted.

II. The Decision Below Reflects Widespread Uncertainty Over The Application Of The Maritime Principle Of Uniformity And The Term “Seafarer” Introduced In *Yamaha* Which This Court Alone Can Dispel

Supreme Court Rule 10 states that “a Writ of Certiorari is not a matter of right, but judicial discretion.” Rule 10 further states that a Petition’s character may be looked upon with favor if “a state court

. . . has decided an important question of federal law that has not been, but should be, settled by this Court or decided an important federal question in a way that conflicts with relevant decisions of this Court.” Supreme Court Rule 10(c). This case squarely presents issues within the parameters of Rule 10(c) because the *Yamaha* decision “unnecessarily open[ed] a proverbial Pandora’s Box of issues that must ultimately be resolved by this Court.” Hugo Coeella, *The Secret Dissent in Yamaha Motor Corp., U.S.A. v. Calhoun – Never Before Published!*, 71 Tul. L. Rev. 203, 210 (1996). This Petition addresses issues opened by *Yamaha* which must be resolved by this Court. Moreover, the Louisiana First Circuit Court of Appeal emphasized below that state courts are not required to follow the lower federal courts. Rather, “state courts are bound only by decisions of the U.S. Supreme Court”. *Trinh v. Dufrene Boats, Inc.*, 6 So.3d 830, 842 (La. App. 1 Cir. 2009), *cert. denied*, 5 So.3d 166 (La. 2009). The court below correctly recognized that this Court alone can dispel the widespread uncertainty.

A. This Court’s Precedents And Statutory Authority Support Uniformity In Maritime Wrongful-Death Causes Of Action

Maritime death actions may be brought under both the general maritime law and statute. Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 6(1-3) at 425-441 (4th Ed. 2004). The circumstances of each case will give rise to different remedies. *Id.*

There are four primary theories of recovery:

- (1) The Jones Act, 46 U.S.C. §30104 *et seq.*, covers seamen in the course of employment and incorporates wrongful death provisions of the Federal Employer's Liability Act (FELA), 45 U.S.C. §51-60. The Jones Act provides a right of action against the seaman's employer for recovery of pecuniary damages for injury or death. An employer/employee relationship is required. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 394 (1970).
- (2) The Death on the High Seas Act (DOHSA), 46 U.S.C. §3301 *et seq.*, provides a wrongful death action to the beneficiaries of any person, seaman or non-seaman, when the death is caused by a wrongful act occurring on the high seas. The damages are limited to pecuniary loss. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 620 (1978).
- (3) The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901 *et seq.*, allows longshoremen and other qualifying maritime workers to bring an action under general maritime law for deaths caused by negligence of others. 33 U.S.C. §901-950.
- (4) The non-statutory remedy provided under the general maritime law, which allows a common law recovery to individuals killed in maritime cases and who are not

Jones Act seamen or longshoremen under the LHWCA and who are not subject of DOHSA due to the location of the death. *See Moragne*, 398 U.S., at 409. An action “lie[s] under general maritime law for death caused by violation of maritime duties”.

The history of maritime wrongful-death claims begins with *The Harrisburg*, 119 U.S. 199 (1886), where the Supreme Court established the rule that the general maritime law did not afford a cause of action for wrongful-death. *Id.*, at 199. This ruling stemmed from the English common-law belief that the law did not allow recovery for injuries resulting in death. *See, Yamaha*, 516 U.S., at 206. Later, the Supreme Court held in *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), that “when admiralty adopts a state’s right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating state has attached.” *Yamaha*, at 209 (quoting *The Tungus v. Skovgaard*, 358 U.S. 588, 592 (1959)). Therefore, a seafarer would be precluded under a state’s wrongful-death statute from recovering under the generous liability standard that the unseaworthiness doctrine provides because that doctrine is not recognized in most state wrongful-death statutes. *See, Moragne*, 398 U.S. 375, 377 (1970).

Moragne recognized a general maritime wrongful-death action. *Id.*, at 393. Thereafter, in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the

Supreme Court held that under the general maritime law a seaman could not recover non-pecuniary damages. Since non-pecuniary damages were not included in FELA, which was incorporated by Congress into the Jones Act, the Court indicated that Congress intended to include only pecuniary losses under the Jones Act as well. *Id.*, at 32. Thus, the *Miles* Court held that non-pecuniary damages were not available to a seaman under the general maritime law. *Id.*, at 33.

B. The Unpredictability After *Yamaha* Is Recurring And Of Great Practical Importance

While on vacation with her family, teenager Natalie Calhoun was killed when the jet-ski she was riding slammed into an anchored vessel in Puerto Rico's territorial waters. *Yamaha*, 516 U.S., at 201. Back home in Pennsylvania, her parents brought a wrongful-death suit against Yamaha, the manufacturer of the jet-ski, alleging defective manufacturing. *Id.*, at 201-202. The question presented to this Court was "does the federal maritime claim for wrongful-death recognized in *Moragne* supply the exclusive remedy in cases involving the deaths of nonseafarers in territorial waters?" *Id.*, at 205. The Court noted that "with admiralty jurisdiction . . . comes the application of substantive admiralty law." *Id.*, at 206, quoting, *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986). However, admiralty jurisdiction "does not result in the automatic displacement of state law." *Id.*, quoting

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 545 (1995). Unfortunately, the admiralty case law had not set forth a clear analysis of what to do when the co-extensive system is threatened. *Yamaha*, 516 U.S., at 210, n. 8. The ultimate conclusion by the *Yamaha* court was that *Moragne* did not displace the state-law remedies for non-seafarers killed in territorial waters. *Yamaha*, 516 U.S., at 214. Thus, non-seafarers killed in territorial waters may recover non-pecuniary damages if allowed by the applicable state wrongful-death statute. Seafarers are limited to general maritime law remedies.

The use of the term “seafarers” as a class who are limited to exclusive maritime law remedies and use of the term “non-seafarers” as a class who can avail themselves of state-law remedies have fueled the forces which either seek to expand or seek to constrict plaintiffs’ rights.

In a footnote, the Supreme Court stated:

“By ‘non-seafarers’ we mean persons who are neither seamen covered by the Jones Act, nor longshore workers covered by the Longshore and Harbor Workers’ Compensation Act.” *Id.*, at 205, n. 2.

Yet, earlier in the main body of the opinion, in the all important paragraph setting forth the *Yamaha* holding, the court gave a different interpretation:

Traditionally, state remedies have been applied in accident cases of this order – maritime wrongful-death cases in which no

federal statute specifies the appropriate relief **and** the decedent was not a seaman, longshore worker, **or person otherwise engaged in a maritime trade**. (Emphasis added.) We hold . . . that state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful-death action recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *Id.*, at 202.

Whether a maritime worker is a “seafarer” or a “non-seafarer” depends upon how the Supreme Court intended the terms to be defined. The problem federal courts and state courts have faced is trying to determine the intent of this Court as to the scope of “seafarer”. Does “seafarer” include only seamen and longshore workers? Does “seafarer” also include “persons otherwise engaged in a maritime trade”? The lower federal courts and state courts are not consistent. The Louisiana courts below decided that a self-employed commercial fisherman was not a “seafarer”. Other courts have reached the opposite conclusion under near identical facts. This is why a person engaged in a maritime trade who is not a Jones Act seaman or a longshore worker and a commercial vessel operator do not know if the maritime worker is a “seafarer” or a “non-seafarer”. The Supreme Court needs to provide guidance as to its intent in *Yamaha* to clarify the scope of “seafarer”. Today uncertainty reigns throughout the federal and state courts; and, litigants are forced to literally roll the dice as to which category a court will apply.

C. The Decision Below Reflects Widespread Inconsistency Interpreting *Yamaha*

Since *Yamaha* has created so much uncertainty for litigants and the courts, it is not surprising courts have rendered inconsistent, conflicting decisions. Cited below are cases which establish a lack of uniformity and predictability in our federal and state court systems when addressing the question of whether *Yamaha* establishes an exclusive maritime remedy for wrongful-death of persons who are not seamen or longshore workers, but who are engaged in a maritime trade in territorial waters.²

In three federal district court decisions involving the death or injury of self-employed commercial fishermen in territorial waters, and relied upon by

² There is a plethora of commentary on the maritime uniformity issue following *Yamaha*. See, e.g., Lizabeth L. Burrell, *Uniformity of Maritime Law and the Supreme Court: Till Death Do Us Part*, 25 Tul. Mar. L. J. 153 (2000); Christopher P. Graham, *Yamaha Motor Corp. v Calhoun: The Court Refuses to Drown State Wrongful-Death Remedies for Nonseamen*, 19 Hous. J. Int'l L. 519 (1997); W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 Tul. L. Rev. 1355 (2001); Louis G. Spencer, *In re Goose Creek Trawlers, Inc.: Wards of the Court? With Friends Like These, Who Needs Enemies? Exploring the Nature of the Yamaha Exception*, 22 Tul. Mar. L. J. 693 (1998); Anthony D'Alto, *Deciphering the Applicable Substantive Law to Apply to Maritime Wrongful Death and Personal Injury Cases in the Wake of Yamaha Motor Corp. v. Calhoun*, 34 New Eng. L. Rev. 981 (2000); Robert Force, *Post Calhoun Remedies for Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou?*, 21 Tul. Mar. L. J. 7 (1996).

petitioner in the case below, the courts all held a self-employed commercial fisherman was a “seafarer” because he was a person engaged in a maritime trade. *In re Goose Creek Trawlers, Inc.*, 972 F. Supp. 946 (E.D.N.C. 1997); *In re Complaint of Stone Energy Corp.*, 2003 WL 21730621 (E.D. La. 2003); and, *Savoie v. Chevron Texaco*, 2005 WL 2036740 (E.D. La. 2005).

In re Goose Creek Trawlers, Inc., 972 F. Supp. 946 (E.D.N.C. 1997) is illustrative for critical analysis. The F/V HALEY CLARK, a seventy-five foot fishing vessel, owned by Goose Creek Trawlers (“Goose Creek”), collided with the F/V LITTLE FELLOW, owned and operated by Bruce Spain, a self-employed commercial shrimper. *Id.*, at 947. The LITTLE FELLOW sank and Spain died. *Id.* Goose Creek filed a Complaint for exoneration or limitation of liability; and, subsequently, Spain’s estate filed a counterclaim for wrongful-death asserting causes of action under general maritime law and North Carolina’s wrongful-death and survival statute. *Id.* The district court found federal maritime uniformity paramount and limited the decedent’s representative to pecuniary damages, the exclusive general maritime law remedy. *Id.*, at 950. The court addressed an issue presented in this Petition: whether a self-employed commercial fisherman is a “seafarer” for purposes of determining relief in a commercial maritime casualty in territorial waters. When conducting its analysis, the *Goose Creek* court observed there was no employer/employee relationship between Spain and Goose Creek;

therefore, the statutory remedies of the Jones Act were not applicable. *Id.*, at 948. The court also noted that the Death on the High Seas Act (DOHSA) was not applicable because the accident occurred in North Carolina waters. *Id.* Finally, the LHWCA did not apply to Spain because he was not a longshoreman or other enumerated worker. *Id.* The court next turned to *Yamaha*, and recognized that “traditionally, state remedies have been applied in accident cases of this order – maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade.” *Id.*, at 950. The Court focused on Spain’s trade as a commercial fisherman and found the decedent was a “person otherwise engaged in a maritime trade.” *Id.* As a result, it did not matter that Spain fell outside the scope of the Jones Act and the LWHCA because “the plain defining language in *Yamaha* prevents [Spain] from benefitting under the narrow exception for non-seafarers.” *Id.* Spain was prohibited from recovering non-pecuniary damages because the case was governed by *Miles* which required the court to comply with the “constitutionally based principle that federal admiralty law should be a ‘system of law coextensive with, and operating uniformly in, the whole country.’” *Id.*, quoting *Miles*, 498 U.S. 27 (1990).

Two district courts in the Fifth Circuit interpreted *Yamaha* consistently with the Fourth Circuit *Goose Creek* district court. In *In re Complaint of Stone*

Energy Corp., 2003 WL 21730621 (E.D. La. 2003), Ryan Robin, a commercial crabber, died as a result of an allision between his crab-fishing boat and a tug in Barataria Bay (Louisiana waters). Robin was engaged in commercial crabbing at the time of the casualty. The court found that Robin was “engaged in the maritime trade” of crab fishing. Therefore, following the U.S. Supreme Court precedent in *Moragne*, *Miles* and *Yamaha*, the court held that non-pecuniary damages were not available to Mrs. Robin and her children.

In *Savoie v. Chevron Texaco*, 2005 WL 2036740 (E.D. La. 2005), the court was asked to dismiss the non-pecuniary damage claims brought by the wife and children of a self-employed fisherman who was injured while trawling for shrimp in Bayou Terrebonne (Louisiana waters). The fisherman’s nets hung up on a piling, and he alleged property and personal injury damages. The fisherman’s wife, on her own behalf and on behalf of their minor children, sought recovery for loss of consortium, service, society and support: all non-pecuniary damages. Following removal, defendants brought a Motion for Partial Summary Judgment seeking dismissal of the non-pecuniary damage claim. The court determined that, even though he was self-employed, the plaintiff’s occupation as a commercial fisherman categorized him as a “seafarer” who was “engaged in a maritime trade” under the definition set forth in *Yamaha*. Accordingly, the fisherman’s wife and her children

were precluded from recovering non-pecuniary damages.

In *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050 (9th Cir. 1997), the Ninth Circuit held that a self-employed marine surveyor was a seafarer. *Id.*, at 1060. In *Ghotra*, the self-employed marine surveyor “satisfied the status and situs tests for coverage under the LHWCA,” despite the absence of a “master-servant” relationship. *Id.*, at 1059. The Ninth Circuit found a seafarer to be any one of the three *Yamaha* categories: “[*Yamaha*] held that *Moragne* does not preempt application of the state wrongful death remedies in accident cases where the decedent is not a seaman, longshore worker or person otherwise engaged in a maritime trade.” *Id.*, at 1058.

In other cases where non-seafarer status was much clearer, the courts have applied *Yamaha* to allow incorporation of state-law remedies. In *American Dredging v. Lambert*, 81 F.3d 127 (11th Cir. 1996), and in *Florida Power & Light Co. v. Polackwich*, 677 So.2d 880 (Fla. App. 2 Dist. 1996), the courts held that Florida law governed the wrongful-death of recreational sailors and motor boaters. The rationale given in both decisions is an axiomatic corollary from *Yamaha*. The *Florida Power & Light* court found that *Yamaha* holds that in a maritime wrongful-death case not otherwise governed by federal statute, if the decedent is not a seaman, longshore worker, or other maritime tradesperson, state wrongful-death remedies serve as the damages for the federal claim. *Id.*, at 882. By making this statement, the *Florida Power &*

Light court included *Yamaha's* third class, persons engaged in a maritime trade, within the scope of persons who are "seafarers".

Other courts have interpreted *Yamaha* as setting forth a more restrictive view of who is a seafarer. In *Juno Marine Agency, Inc. v. Taibl*, 761 So.2d 373 (Fla. App. 3 Dist. 2000), Taibl, a maritime worker by trade, answered a distress call from a nearby ship to which he had no employment relationship. He died after entering the other ship's tank filled with carbon dioxide. The state court allowed supplementation of maritime remedies by the Florida law of wrongful-death because Taibl "died on Florida territorial waters in an accident neither covered by the Jones Act, the Longshoremen and Harbor Workers' Compensation Act, nor Death on the High Seas Act." *Id.*, at 374. The Florida Third District Court of Appeal, like the Louisiana First Circuit Court of Appeal in the instant case, accepted the more restrictive reading of "seafarer" by excluding from the class of seafarers "persons otherwise engaged in a maritime trade."

Yamaha, and the difficulty weighing the desire to maintain general maritime uniformity while at the same time addressing the merits of state interests, has also caused conflicting decisions in maritime cases involving passengers, persons like self-employed maritime workers who are not seamen or longshoremen.

The Eleventh Circuit held that *Miles* applies in a case where the injured party is a non-seafarer

passenger. In *In re Amtrack "Sunset Limited" Train Crash*, 121 F.3d 1421 (11th Cir. 1997), the Eleventh Circuit relied on the general maritime uniformity principle and held maritime remedies exclusive. This case involved a train that derailed into Bayou Cavot (Alabama waters) near Mobile, Alabama after a tow hit a railroad bridge. More than 100 suits for personal injury and death were filed by the railroad passengers. The federal district court ruled punitive damages under Alabama law were available. *Id.*, at 1424. The Eleventh Circuit refused to assume "that the holding in *Yamaha* embodies an unspoken rule that state interests must always trump competing admiralty principles when the two collide in state territorial waters." *Id.*, at 1425. Rather, "conflicts of this type must be resolved with a healthy regard for the needs of a uniform maritime law." *Id.* The Eleventh Circuit believed the *Yamaha* court was "intent on protecting the state interests that were present in that particular case (a product liability action resulting from a recreational boating accident in territorial waters)," but added the Supreme Court

was not concerned with overruling bedrock admiralty principles recognized in *Southern Pacific Co. v. Jensen*, where the Court held that state law must yield 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 1424-25 (quoting *Southern*

Pacific Co. v. Jenson, 244 U.S. 205, 216 (1917)).

With this understanding of *Yamaha*, the Eleventh Circuit held that “the actors in this case are entitled to the application of a body of laws – maritime laws – that have been fitted over the years for just these types of situations.” *Id.*, at 1426-27. Therefore, despite the fact that the railroad passengers were not seamen, longshore workers, or persons otherwise engaged in a maritime trade, the Eleventh Circuit crafted substantive maritime law to hold that maritime uniformity was paramount and controlled over state interests.

Other decisions across the country, even those within the same circuit, are inconsistent. In *Friedman v. Cunard Line Ltd.*, 996 F. Supp. 303 (S.D.N.Y. 1998), husband and wife filed suit under the general maritime law against a cruise ship operator seeking non-pecuniary damages following the wife’s shipboard injury. Defendant moved for summary judgment seeking dismissal of the non-pecuniary damages. The court granted the motion by finding that supplementation of the general maritime law with state remedies would disrupt general maritime uniformity. *Id.*, at 312. Also, if a shipboard incident involved both ships’ crew and passengers, with both seeking non-pecuniary damages, the court reasoned it would be anomalous to allow the passengers a remedy not available to the families of seamen on board the same vessel. On the other hand, in *Saunders v. Cunard Line*

Ltd., 1995 WL 329323 (S.D.N.Y. 1995), a pre-*Yamaha* decision, the court reached the opposite result.

Another district court in the Second Circuit held punitive damages under general maritime law, or under state law as a supplement to federal remedies, were not available to a passenger assaulted by a crewman. *O'Hara v. Celebrity Cruises, Inc.*, 979 F. Supp. 254 (S.D.N.Y. 1997). The holding was based upon the policy of promoting uniformity even though the case did not fall within the purview of the Jones Act or the Death on the High Seas Act. The court reasoned that the matter involved the kind of maritime conduct those statutory provisions rejected. The court noted *Yamaha* left unanswered the question whether punitive damages, as opposed to some other kind of damages, were available.

On the other hand, an opposite decision was rendered in *Silivanch v. Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241 (S.D.N.Y. 2001), appeal dismissed, 333 F.3d 355 (2d Cir. 2003) (on procedural grounds), in which punitive damages were awarded.

Fifth Circuit district courts have also rendered inconsistent decisions post-*Yamaha*. In *In re Diamond B. Marine Services*, 2000 WL 805235 (E.D. La. 2000), loss of society and punitive damages were not recoverable for injury or death of passengers. However, a different result was reached in *In re Plaquemine Towing Corp.*, 190 F. Supp. 2d 889 (M.D. La. 2002). The court held that *Miles* did not apply to non-seamen ferry boat passengers. Additionally, the court relied

on *Yamaha* when it held that “due to the fact that the ferryboat passengers in this case are not seamen and are not covered by any of Congress’ maritime statutes, under *Yamaha* their spouses’ claims for loss of consortium are governed by general maritime law and supplemented by any applicable Louisiana state law.” *Id.*, at 893.

A Fourth Circuit district court held that a passenger could pursue damages for loss of society and punitive damages. *Hester v. Cottrell Contracting Corp.*, 2001 WL 1764200 (E.D.N.C. 2001).

* * *

The cases cited illustrate inconsistency applying *Yamaha* and the general maritime uniformity/applicability of state law analysis in our federal and state courts. The inconsistency involves not only different theories determining when the general maritime policy of uniformity is paramount or subservient to the applicability of state law remedies, but also involves two different interpretations of who is a seafarer.

This Court noted in *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), that the lack of guidance from the Supreme Court “has led the lower courts to a ‘myriad of standards and lack of uniformity.’” *Id.*, at 353 (quoting Kenneth G. Engerrand & Jeffrey R. Bale, *Seamen Status Reconsidered*, 24 S. Tex. L. J. 431, 494 (1983)). Today, as proven by the inconsistent federal and state decisions rendered since *Yamaha*, our maritime jurisprudence is a myriad of

standards and represents a lack of maritime uniformity. The time is ripe for this Court to address the uncertainty created by *Yamaha* and end the conflicting decisions which have a dramatic impact on all maritime workers and vessel owners.

D. Hypothetical Anomalies Exemplify The Problems Created By *Yamaha*

Assume for argument sake that self-employed commercial fishermen, maritime workers who are not seamen or longshore workers, are excluded from the class of persons deemed “seafarers” in *Yamaha* as the court below held. Consider the following hypotheticals which create anomalies.

Hypothetical #1:

A self-employed commercial fisherman and his deckhand employee are killed in territorial waters while aboard the self-employed fisherman’s personally owned fishing vessel. The deckhand, as an employee of the self-employed commercial fisherman working on a vessel in navigation, is a Jones Act seaman, and thus a “seafarer”. His personal representative is precluded from recovering state remedies. On the other hand, the self-employed commercial fisherman is not a Jones Act seaman or longshore worker, and thus his personal representative is able to recover state law remedies.

Hypothetical #2:

Two commercial fishing vessels, each with a single crew member, collide in territorial waters causing the death of the commercial fisherman on each vessel. Vessel A is owned and operated by ABC Fishing Boat Company, which employed decedent number one. Vessel B is owned and operated by decedent number two, a self-employed commercial fisherman engaged in his trade at the time of his death. Based upon the hypothetical, decedent number one is a Jones Act seaman and his personal representative is subject to exclusive general maritime law remedies. On the other hand, decedent number two's personal representative may recover state wrongful-death remedies since decedent number two is a non-seafarer.

These hypothetical anomalies highlight the inconsistencies in our current state of maritime law involving the death of persons engaged in a maritime trade in territorial waters. Because the problems stem from different interpretations of this Court's *Yamaha* decision, additional litigation in the lower courts is most unlikely to lead to further clarity. Without a definitive resolution from this Court, maritime workers and vessel owners will continue to grapple with the uncertainty which will fuel further inconsistent rulings.

III. The Decision Below Is In Conflict With Federal Decisions and Erroneously Concludes State Interests Are Paramount Over Maritime Uniformity

The Louisiana First Circuit Court of Appeal failed to recognize that maritime uniformity is paramount over state interests in a commercial maritime collision case involving persons who are engaged in a maritime trade.

1. *Yamaha* did not dispel the principle of maritime uniformity applicable for persons who are engaged in a maritime trade but are not seamen or longshore workers, as the Louisiana First Circuit concluded in *Trinh*, 6 So.3d at 841-42. The First Circuit surmised that use of the term persons otherwise engaged in a maritime trade “closely parallels the language in Section 902 [of the LHWCA] and supports a conclusion that the Supreme Court did not intend the holdings in *Yamaha’s* opinion to extend to general maritime wrongful-death actions of decedents such as Thuan.” *Id.*, at 841. This statement by the court below reflects sheer conjecture as to this Court’s intent. Moreover, the conjecture continued when the Louisiana First Circuit found noteworthy that “seafarer” was utilized just twice in *Yamaha*, and that this Court utilized “seafarer” only in reference to employees falling under the scope of the Jones Act and LHWCA, as another reason to trump maritime uniformity in favor of state interests. *Id.* The Louisiana First Circuit found nothing in *Yamaha* to suggest this Court intended the language in

Yamaha's second paragraph, which set forth the case's holding, to extend the maritime tort recovery scheme beyond seamen and longshoremen.³ As a result, the First Circuit incorrectly concluded "*Yamaha* [did] not create a general maritime rule clearly applicable to the instant matter." *Id.*

2. The Louisiana First Circuit Court of Appeal erred by failing to follow the precedent of three federal decisions directly on point.⁴ Those three decisions discussed above dealt with self-employed commercial fishermen engaged in their maritime trade at the time of the casualty in territorial waters. The federal cases all cited *Yamaha* as holding that a commercial fisherman engaged in a maritime trade is a seafarer. These cases, involving commercial maritime workers, are different from those involving recreational boaters and recreational fishermen who are not engaged in a commercial maritime trade. The court below erred by failing to recognize the difference and interpret the clear intent of *Yamaha*.

³ The Louisiana court's creativity caused a misinterpretation of the phrase, "**or** person otherwise engaged in a maritime trade" which unequivocally sets forth a third class of seafarer status (emphasis added).

⁴ See, e.g., *In re Goose Creek Trawlers, Inc.*, 972 F. Supp. 946 (E.D.N.C. 1997) (self-employed commercial shrimper held a seafarer under *Yamaha*); *In re Complaint of Stone Energy Corp.*, 2003 WL 21730621 (E.D. La. 2003) (self-employed commercial crabber held a seafarer under *Yamaha*); and, *Savoie v. Chevron Texaco*, 2005 WL 2036740 (E.D. La. 2005) (self-employed commercial fisherman held a seafarer under *Yamaha*).

3. Near the end of its discussion on the non-pecuniary issue, the Louisiana First Circuit indirectly admitted the *Yamaha* decision created uncertainties over the scope of seafarer which reflect the recurring problems on which this Petition is based. In its decision, the First Circuit said:

Until such time as Congress or the United States Supreme Court sees fit to address this situation, we see no reason to find the *Miles* damages uniformity principle precludes a Louisiana state court from supplementing general maritime law with Louisiana law that allows for the recovery of non-pecuniary damages in a wrongful death action of a decedent such as Thuan. . . . Accordingly, we find that the *Miles* damages uniformity principle is not applicable in this matter. *Id.*, at 843-44.

By this statement, the Louisiana First Circuit recognized it was speculating *Yamaha's* intent not only in regard to the analysis of maritime uniformity, but also in regard to whether a person engaged in a maritime trade is a seafarer. The First Circuit's creativity eschews the long-standing maritime principle of uniformity recognized by this Court in commercial maritime actions like this one. The Louisiana First Circuit invited this Court to clarify the scope of seafarer for all courts, both federal and state, as well as all litigants, both plaintiffs and defendants, and announce whether a person engaged in a maritime trade, who is not a seaman or a longshore worker, is a "seafarer" under *Yamaha*, which would require

application of maritime uniformity and maritime remedies over state interests and state remedies in a maritime wrongful-death case in territorial waters.



CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 2009