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## The “Nature” of Seaman Status After Sanchez

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## The “Nature” of Seaman Status After *Sanchez*

Thomas C. Galligan, Jr.\*

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## INTRODUCTION

In *Sanchez v. Smart Fabricators of Texas, L.L.C.*, the *en banc* United States Court of Appeals for the Fifth Circuit unanimously held that Gilbert Sanchez was not a seaman because he did not have an employment-related connection to a vessel that was substantial in nature.<sup>1</sup> The United States Supreme Court created the nature requirement for seaman status in *Chandris, Inc. v. Latsis*<sup>2</sup> and discussed it further in *Harbor Tug and Barge Co. v. Papai*.<sup>3</sup> In *Papai*, Justice Kennedy said that a worker who did not go to sea and who was not engaged in seagoing activity did not satisfy the nature-of-the-work requirement.<sup>4</sup>

Subsequently, in two cases, the Fifth Circuit did not interpret *Papai*'s "going to sea" language literally but instead determined whether the nature requirement was satisfied by asking whether the worker was exposed to the perils of the sea.<sup>5</sup> Unfortunately, in neither case did the court state which perils of the sea the worker was exposed to or the extent of that exposure.

In *Sanchez*, the Fifth Circuit reconsidered its prior jurisprudence in light of the United States Supreme Court seaman-status jurisprudence and held that a perils-of-the-sea analysis of the nature of a putative seaman's work alone is inadequate.<sup>6</sup> While the court did not totally reject the relevance of exposure to the perils of the sea, the court articulated three additional inquiries a court should take when considering the nature of the work at issue: (1) does the worker owe allegiance to the vessel rather than simply to a shore-based employer, (2) is the work sea-based, or does the work involve seagoing activity, and (3) does the worker's assignment involve a discrete task, or does it include sailing or moving with the vessel from location to location?<sup>7</sup>

While seeking to bring clarity and consistency, I fear the *Sanchez* expanded nature analysis may well bring confusion. Two of the inquiries—allegiance and discrete task—overlap with the test for determining whether a worker has an employment-related connection to a vessel that is substantial in duration. One inquiry, allegiance, will have

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1. *Sanchez v. Smart Fabricators of Tex., L.L.C.*, 997 F.3d 566, 568 (5th Cir. 2021) (*en banc*).

2. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995).

3. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997).

4. *Id.*

5. *In re Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir. 2000); *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927 (5th Cir. 2014).

6. *Sanchez*, 997 F.3d at 574 (*en banc*).

7. *Id.*

little or no predictive value. Another inquiry, sea-based work, could undermine the holding of *McDermott International, Inc. v. Wilander*<sup>8</sup> that in order to qualify as a seaman the worker must merely be doing the work of the vessel, not necessarily aiding in navigation. Courts should be wary not to interpret sea-based work as aiding in navigation. And the sea-based-work inquiry has substantive overlap with the perils-of-the-sea analysis.

Consequently, I would urge other circuits, state courts, and the United States Supreme Court, when analyzing the nature requirement, to not use the additional inquiries that the *en banc Sanchez* court articulated as strict requisites to establishing seaman status but rather to analyze whether the worker was exposed to the perils of the sea for 30% of the worker’s employment on the relevant vessel. But, in doing so, courts should articulate the perils of the sea in light of twenty-first century risks and realities and should clearly and logically state the relevant perils of the sea, how the putative seaman was exposed to them, and the extent of that exposure.

Part I will set out the facts of *Sanchez* and the pre-*en banc* proceedings. Part II will discuss applicable Supreme Court jurisprudence. Part III will provide several possible pre-*Sanchez* interpretations of that jurisprudence. Part IV considers the Fifth Circuit’s pre-*Sanchez* nature jurisprudence. Part V describes the *en banc* court’s decision. Part VI unpacks the opinion, and Part VII offers additional analysis.

## I. SANCHEZ—FACTS AND THE PRE-EN BANC PROCEEDINGS

Gilbert Sanchez was a welder who suffered an injury when he tripped on a pipe welded to a jack-up drilling rig.<sup>9</sup> He sued his employer, Smart Fabricators of Texas, L.L.C. (SmartFab), in state court claiming Jones Act negligence.<sup>10</sup> Sanchez spent 61 of the 67 days he had worked for the defendant working on two different jack-up rigs.<sup>11</sup> He worked on one of the rigs, the Enterprise jack-up barge WFD 350 (WFD 350), for 48 days—72% of his total worktime with SmartFab.<sup>12</sup> The entire time he worked on the WFD 350, it was jacked up and level with the adjacent dock, from which it was separated by only a gangplank, which Sanchez could traverse in two steps.<sup>13</sup> Sanchez never went to sea on the WFD 350.<sup>14</sup>

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8. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337 (1991).

9. *Sanchez*, 997 F.3d at 566–67 (en banc).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

Sanchez also worked on the Enterprise jack-up barge 263 (E 263) for 13 days—19% of his time working for SmartFab.<sup>15</sup> The E 263 was located on the Outer Continental Shelf (OCS).<sup>16</sup> Sanchez’s work on the E 263 involved making repairs so that the rig could begin drilling at a new site.<sup>17</sup> Indeed, Sanchez was aboard the rig when tugboats took it to the new drilling site.<sup>18</sup> Sanchez was injured on the E 263 when he fell.<sup>19</sup>

One might have assumed the issue was simple enough: a jack-up rig is a vessel, Sanchez was doing the work of the vessel per *Wilander*,<sup>20</sup> and he spent more than 30% of his work time on the vessel, thus satisfying the duration prong of the seaman-status test as required by *Chandris*.<sup>21</sup> But was his employment-related connection to the vessel substantial “in nature”?<sup>22</sup> While Sanchez did the work of the vessel and did so for well over 30% of his work time, he did not regularly go to sea. Although he was on a rig on the OCS for 19% of his employment with SmartFab, and he was on that rig when it moved, this was the only relevant instance where Sanchez was on a moving vessel.

The defendant removed the case to federal court, and Sanchez sought to have it remanded because Jones Act claims are not removable.<sup>23</sup> The defendant argued that Sanchez was not a seaman, and the district court agreed, holding Sanchez was not a seaman because he did not go to sea and was not exposed to the perils of the sea.<sup>24</sup> The Fifth Circuit initially affirmed in a panel opinion,<sup>25</sup> but then the court superseded that decision in a second panel opinion. In this 3–0 decision, the court, in an opinion by Judge Davis, reversed the district court.<sup>26</sup>

In the second *Sanchez* panel opinion, the court held that Sanchez was doing the ship’s work and had an employment-related connection to the vessels that was substantial in duration.<sup>27</sup> On the key question of whether

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337 (1991).

21. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995).

22. *See id.* at 347; *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997).

23. *Sanchez*, 997 F.3d at 567 (en banc) (citing 28 U.S.C. § 1445(a)).

24. *Sanchez v. Enter. Offshore Drilling, L.L.C.*, 376 F. Supp. 3d 726, 732 (S.D. Tex. 2019).

25. *Sanchez v. Smart Fabricators of Tex., L.L.C.*, 952 F.3d 620 (5th Cir. 2020) (first panel opinion).

26. *Sanchez v. Smart Fabricators of Tex., L.L.C.*, 970 F.3d 550 (5th Cir. 2020) (second panel opinion).

27. *Id.* at 555.

the employment-related connection was substantial in nature even though Sanchez did not go to sea, Judge Davis said, “Our case law rejects such a narrow reading of the substantial-in-nature requirement.”<sup>28</sup> He pointed to two Fifth Circuit decisions dealing with the nature requirement: *In re Endeavor Marine, Inc.*<sup>29</sup> and *Naquin v. Elevating Boats, L.L.C.*,<sup>30</sup> which I will discuss below. Interestingly, the primary focus of analysis in the second *Sanchez* panel opinion was on Sanchez’s work on the WFD 350, not the E 263. As Judge Davis wrote:

Although Sanchez’s injury occurred on the ENTERPRISE 263, the vast majority of his time with SmartFab was spent on the ENTERPRISE WFD 350. Thus, it becomes critical whether his work aboard that rig was substantial in terms of both its duration and nature. For all 48 days he spent on the ENTERPRISE WFD 350, the rig was jacked up above water, a step away from and adjacent to the shoreside pier. Sanchez only worked day shifts, returning home every evening.<sup>31</sup>

But, he was still, per the court, a seaman under *Endeavor Marine* and *Naquin*.<sup>32</sup> That seemed to be that; but not so fast.

In addition to being the author of the second panel opinion in *Sanchez*, Judge Davis also separately concurred, and the other two members of the panel—Judges Jones and Willett—joined him.<sup>33</sup> In his concurrence, Judge Davis—one of the most respected and accomplished admiralty jurists in the Fifth Circuit, and arguably in all of the nation—said: “I am persuaded that our case law is inconsistent with the teaching of the Supreme Court. It is clear to me that Sanchez was a land-based fitter and welder whose duties did not take him to sea; consequently, he does not qualify as a seaman.”<sup>34</sup> The judge pointed particularly to *Papai* and wrote, quoting Justice Kennedy in part, as follows: “For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee’s connection to the vessel must concentrate on whether the

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28. *Id.* at 554.

29. *In re Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir. 2000).

30. *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927 (5th Cir. 2014).

31. *Sanchez*, 970 F.3d at 552 (second panel opinion).

32. *Id.* at 555.

33. *Id.* (Davis, J., concurring).

34. *Id.*

employee's duties *take him to sea*.”<sup>35</sup> Such an inquiry, the Court explained, is “helpful in distinguishing land-based from sea-based employees.”<sup>36</sup>

The Supreme Court had noted that Papai's “actual duty on the *Pt. Barrow* [the relevant vessel] throughout the employment in question did not include any seagoing activity; he was hired for one day to paint the vessel at dockside and he was not going to sail with the vessel after he finished painting it.”<sup>37</sup> The Court concluded that no percentage of his work “subject[ed] him to the perils of the sea.”<sup>38</sup> After noting what the Supreme Court said in *Papai*, Judge Davis continued and said that *Endeavor Marine* and *Naquin* had improperly applied United States Supreme Court authority, which had serious implications for Gilbert Sanchez's claims.<sup>39</sup>

The defendant predictably moved for rehearing *en banc*. The Court granted the motion, decided to set oral argument, and vacated the second panel opinion.<sup>40</sup> Argument *en banc* occurred on January 18, 2021, and on May 11, 2021, the court issued its opinion, written by Judge Davis, finding that Sanchez was not a seaman because his employment-related connection to a vessel was not substantial in nature.<sup>41</sup> But before discussing the *en banc* opinion, let me review the relevant United States Supreme Court jurisprudence on seaman status, the Fifth Circuit's prior post-*Papai* application of the nature requirement, the interpretation of that jurisprudence, and the potential pre-*Sanchez* possibilities.

## II. APPLICABLE UNITED STATES SUPREME COURT SEAMAN-STATUS JURISPRUDENCE

After years of silence, the Supreme Court, in a series of decisions between 1991 and 1997, dealt with the requirements for seaman status, trying to come up with a workable test “to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation.”<sup>42</sup>

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35. *Id.* at 556 (quoting *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 555 (1997)) (emphasis added).

36. *Id.* (*Papai*, 520 U.S. at 555).

37. *Papai*, 520 U.S. at 559.

38. *Id.*

39. *Sanchez*, 970 F.3d at 557 (Davis, J., concurring) (second panel opinion).

40. *Sanchez v. Smart Fabricators of Tex., L.L.C.*, 978 F.3d 976 (5th Cir. 2020) (granting motion for rehearing *en banc*).

41. *Sanchez v. Smart Fabricators of Tex., L.L.C.*, 997 F.3d 566 (5th Cir. 2021) (*en banc*).

42. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995).

A. McDermott International, Inc. v. Wilander

In *Wilander*, the Court held that in order to be a seaman, the worker did not have to aid in navigation but had to be engaged in the ship’s work.<sup>43</sup> Thus, a paint foreman on a paint boat could qualify for seaman status. Likewise, a bartender or manicurist on a cruise ship would be able to qualify for seaman status, so long as they had an employment-related connection to a vessel in navigation and performed the work of the vessel.<sup>44</sup> While sound in its logic and adherence to precedent—cooks and others had long been recognized as seamen—the decision was also consistent with lower court decisions recognizing that those who worked on certain special-purpose vessels, such as in the oil and gas industry, could be seamen. If the work of the vessel was oil and gas exploration and extraction, then those engaged in that work might qualify as seamen.<sup>45</sup>

B. Southwest Marine, Inc. v. Gizoni

After *Wilander*, the Court considered the issue of whether someone whose job title was one of the jobs listed in the Longshore and Harbor Workers’ Compensation Act (LHWCA) was precluded from seaman status. In *Southwest Marine, Inc. v. Gizoni*, the plaintiff was a rigging foreman for Southwest Marine, a ship repair facility owner.<sup>46</sup> The defendant owned several floating platforms and barges.<sup>47</sup> Although Gizoni was clearly a ship repairer (one of the covered job titles in the LHWCA), he regularly worked on his employer’s platforms and rode on them when they were being towed to a workplace.<sup>48</sup> He often served as a lookout, gave maneuvering signals, and handled lines to secure the platforms to vessels needing repair.<sup>49</sup> Gizoni suffered “disabling leg and back injuries in a fall when his foot broke through a thin wooden sheet covering a hole in the deck of a platform being used to transport a rudder from the shipyard to a floating drydock.”<sup>50</sup> He received LHWCA benefits and later sued to recover for employer negligence under the Jones Act.<sup>51</sup>

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43. McDermott Int’l, Inc. v. Wilander, 498 U.S. 337, 355 (1991).

44. *Id.*

45. Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).

46. Sw. Marine, Inc. v. Gizoni, 502 U.S. 81 (1991).

47. *Id.* at 83.

48. *Id.* at 84.

49. *Id.*

50. *Id.*

51. *Id.*



Did the fact that Gizoni was a ship repairer, one of the job categories listed in the LHWCA as maritime employment, mean that he was not a seaman? In an opinion by Justice White, the Court said “no.” Even though Gizoni was involved in ship repair, he could still be a “master or member of the crew” of a vessel and thus be excluded from LHWCA coverage and eligible for seaman’s benefits, including a Jones Act claim against his employer.<sup>52</sup> “Because a ship repairman may spend all of his working hours aboard a vessel in furtherance of its mission—even one used exclusively in ship repair work—that worker may qualify as a Jones Act seaman.”<sup>53</sup> Thus, once again, the connection to the vessel and doing the work of the vessel, not job titles, were key. But what kind of connection to a vessel was required?

### C. *Chandris, Inc. v. Latsis*

In *Chandris*, the Court provided guidance on what it meant to have an employment connection to a vessel.<sup>54</sup> Latsis was a marine engineer who suffered a detached retina, which was allegedly negligently treated by a ship’s doctor.<sup>55</sup> Latsis suffered the injury while on his employer’s vessel, traveling to Bermuda in preparation for an upcoming renovation.<sup>56</sup> Later, he was with the ship while it was in drydock in Germany.<sup>57</sup> Latsis’s employer had a fleet of six ships.<sup>58</sup> Latsis claimed he spent 72% of his work time at sea; his employer said it was closer to 10%.<sup>59</sup> The Court, in analyzing the necessary connection to a vessel, generally followed Fifth Circuit jurisprudence. It rejected a voyage test, under which anyone working on a voyage on a ship on the high seas would qualify as a seaman—a “blue water seaman.”<sup>60</sup>

The Court held that in order to be a seaman, the worker had to have an employment connection to a vessel or fleet of vessels under common ownership and control that was substantial in duration and nature.<sup>61</sup> The

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52. *Id.* at 92.

53. *Id.*

54. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995).

55. *Id.* at 350–51.

56. *Id.* at 351.

57. *Id.*

58. *Id.* at 350.

59. *Id.*

60. *Id.* at 363. The rejection of a voyage test prompted a concurrence from Justice Stevens, which Justices Thomas and Breyer joined. *Id.* at 377 (Stevens, J., concurring).

61. *Id.* at 365–66.

Court said that a workable guideline for determining the duration of a putative seaman's employment-related connection to a vessel or fleet of vessels under common ownership or control was that the worker spend at least 30% of his time aboard a ship.<sup>62</sup> Furthermore, the Court, in reviewing the jury instructions and the Second Circuit's opinion, made clear that the employment-related connection to a vessel must be substantial in both duration and nature: "The worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature."<sup>63</sup> But what does a connection of a substantial "nature" mean?

The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.<sup>64</sup>

Thus, exposure to the perils of the sea was critical. Continuing, the Court said:

In defining the prerequisites for Jones Act coverage, we think it preferable to focus upon the essence of what it means to be a seaman and to eschew the temptation to create detailed tests to effectuate the congressional purpose, tests that tend to become ends in and of themselves. The principal formulations employed by the Courts of Appeals—"more or less permanent assignment" or "connection to a vessel that is substantial in terms of its duration and nature"—are simply different ways of getting at the same basic point: The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to "the special hazards and disadvantages to which they who go down to sea in ships are subjected." Indeed, it is difficult to discern major substantive differences in the language of the two phrases. In our view, "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." The

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62. *Id.* at 367, 371.

63. *Id.* at 376, 368.

64. *Id.*

duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.<sup>65</sup>

Clearly then, exposure to the perils of the sea was a crucial part of what it meant to have an employment-related connection to a vessel that was substantial in nature. The phrase is evocative.<sup>66</sup>

Returning to *Chandris* itself, it is important to note that while the Court largely adopted the Fifth Circuit's approach to seaman status from *Offshore Co. v. Robison*,<sup>67</sup> the addition of the "and nature" requirement was not from *Robison*. The *Robison* formulation of the seaman-status test focused on the duration of the putative seaman's relationship with the vessel or fleet of vessels, not the nature of the work.<sup>68</sup>

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65. *Id.* at 369–70 (first quoting *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting); then quoting *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 432 (5th Cir. 1984)).

66. As Professor David W. Robertson wrote years before the Court decided *Chandris*:

Exposure to the 'perils of the sea' and to risks attending the movement of vessels on navigable water are the distinguishing characteristics of a seaman's work. 'Perils of the sea' is what the poet (and lawyer) Wallace Stevens might have called an inherently poetic idea; it resonates with meaning that exceeds our definitional and expository capabilities. We know what is meant by perils of the sea, even though we cannot expect to enumerate all of the possible instances or subcategories. But any list would certainly include the full range of dangers associated with deep water, wind and weather, tides and currents, ocean predators, great distances from shore, relative isolation, and inaccessibility of shore-side facilities for aid and succor.

David W. Robertson, *A New Approach to Determining Seaman Status*, 64 TEX. L. REV. 79, 80 (1985) [hereinafter Robertson, *New Approach*].

67. *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

68. As the *Robison* court said:

[T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to

*Chandris* not only added the nature requirement, but the Court made sure that the employment-related connection to a vessel was substantial in duration *and* nature, not duration *or* nature.<sup>69</sup> The Second Circuit had stated it both ways in its opinion in *Chandris*, but the Supreme Court clearly made duration and nature conjunctive.<sup>70</sup>

The Court in *Chandris* emphasized that the connection is to a vessel or fleet of vessels under common ownership or control.<sup>71</sup> The relationship has a temporal element—duration of 30%—and substantive elements—doing the work of the vessel and substantiality in nature.<sup>72</sup> To this humble reader, the vaguest aspect of the test after *Chandris* was what it took to have a substantial relationship in nature. It definitely related to being exposed to the perils of the sea, but exactly how did the worker have to be exposed to the perils? And, for how long?

#### D. Harbor Tug and Barge Co. v. Papai

The next and most recent seaman-status decision from the Supreme Court was *Papai*. *Papai* got his jobs each day through the Inland Boatman's Union hiring hall in San Francisco.<sup>73</sup> He had been doing so for more than two years before the day of his injury.<sup>74</sup> His work through the hiring hall consisted of maintenance, longshoring, and deckhand work.<sup>75</sup> Most of his assignments were for 3 days or less; the longest was for 40 days.<sup>76</sup> *Papai* claimed that most of his assignments involved deckhand work.<sup>77</sup> Before the day of his injury, he had worked for Harbor Tug & Barge 12 times over two and a half weeks.<sup>78</sup> On the day of the injury, *Papai* was hired for that one day only to paint; it was not anticipated that he would sail with the ship, and he did not do so.<sup>79</sup> He injured his knee when the ladder on which he was working moved and he fell.<sup>80</sup> *Papai* sued,

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the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

*Id.* at 779.

69. *Chandris*, 515 U.S. at 370–71.

70. *Id.*

71. *Id.* at 368.

72. *Id.* at 367.

73. Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 551 (1997).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

claiming that he was a seaman and that the employer was negligent.<sup>81</sup> The district court held Papai was not a seaman.<sup>82</sup> The Ninth Circuit reversed and remanded, concluding that if the work Papai did through the hiring hall would have made him a seaman if he had done it all for one employer, then there was a jury question on seaman status.<sup>83</sup>

The Supreme Court granted *certiorari* to consider the seaman-status issue, and, in the introductory section of his opinion, Justice Kennedy said:

On the question of seaman status, there is an issue of significance beyond the facts of this case. Our statement in an earlier case that a worker may establish seaman status based on the substantiality of his connection to “an identifiable group of . . . vessels” in navigation . . . has been subject to differing interpretations, and we seek to provide clarification.<sup>84</sup>

Thus, one would think that the issue before the Court was what constituted an identifiable group of vessels, i.e., a fleet. Did it require common ownership and control? Or would it include all the vessels that hired out of the hiring hall?

The Court held that there was no indication the vessels and vessel owners using the hiring hall “were subject to unitary ownership or control in any aspect of their business or operation.”<sup>85</sup> Each was free to hire as it chose.<sup>86</sup> The requisite link for common ownership and control was not established by the mere use of the same hiring hall that drew from the same pool of employees.<sup>87</sup>

Of greater current importance, when discussing the basic issue of seaman status, the Court discussed the nature of the employment.<sup>88</sup> Justice Kennedy wrote:

For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee’s connection to the vessel must concentrate on whether the employee’s duties take him to sea. This will give substance to the inquiry both as to the duration and nature of the employee’s connection to the vessel and be helpful in distinguishing land-based from sea-based

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81. *Id.* at 551–52.

82. *Id.* at 552.

83. *Id.* at 552–53.

84. *Id.* at 550–51 (citing *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995)).

85. *Id.* at 557.

86. *Id.*

87. *Id.*

88. *Id.* at 555.

employees.<sup>89</sup>

This is a somewhat curious statement, subtle perhaps to the point of ambiguity. What did it mean? This is the section of the *Papai* opinion Judge Davis quoted in his concurrence in the second panel opinion in *Sanchez*.<sup>90</sup>

Back to *Papai*; Justice Kennedy continued:

This is not a case where the employee was hired to perform seagoing work during the employment in question, however brief, and we need not consider here the consequences of such an employment. The IBU Deckhands Agreement gives no reason to assume that any particular percentage of *Papai*'s work would be of a seagoing nature, subjecting him to the perils of the sea. In these circumstances, the union agreement does not advance the accuracy of the seaman-status inquiry. . . . Jones Act coverage is confined to seamen, those workers who face regular exposure to the perils of the sea.<sup>91</sup>

So *Papai* reiterated the common-ownership-and-control requirement regarding fleets. The Court also indicated that, under the facts, the relationship or connection to a vessel for analysis is the particular employment relationship between the putative seaman and the employer defendant.<sup>92</sup> While *Chandris* discussed the worker's entire employment history, *Papai* limited the analysis to the entire employment history with the particular employer involved.<sup>93</sup> And, in ignoring the time *Papai* had worked for Harbor Tug before the day in question, it became clear that each discrete employment engagement guided the status determination. Thus, *Papai*'s entire employment history with Harbor Tug, for purposes of the case, was one day.<sup>94</sup> During that day, he would not be engaged in any seagoing activity; he would not go to sea; accordingly, per the Court, he

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89. *Id.*

90. *Sanchez v. Smart Fabricators of Tex., L.L.C.*, 970 F.3d 550, 556 (5th Cir. 2020) (Davis, J., concurring) (second panel opinion).

91. *Papai*, 520 U.S. at 559. The reader will note Justice Kennedy's express reference to the perils of the sea.

92. *Id.* at 559–60.

93. *Id.*

94. *Id.*

would not be exposed to the perils of the sea.<sup>95</sup> Thus, his relationship to the employer's vessel was not substantial in nature.<sup>96</sup>

### III. POSSIBLE INTERPRETATIONS

There were several possible interpretations of the nature requirement and the “going to sea” language under the Supreme Court’s 1990s seaman jurisprudence. First, the Supreme Court could have meant “take him to sea” to literally mean go to sea! That is, in order to be a seaman, a person must have literally gone out on vessels on the sea! Of course, that would mean that brown-water seamen and those working on the nation’s inland navigable waterways could not be seamen. That reading would overturn a significant body of jurisprudence. As the Fifth Circuit noted in *Naquin v. Elevating Boats, L.L.C.*:

[W]e have dozens of cases finding oilfield workers and other ‘brown-water’ workers on drilling barges and other vessels qualified as seamen even though they spent all their work time on these vessels submerged in quiet inland canals and waterways.<sup>97</sup>

One cannot assume that the Supreme Court meant to make such a sea change (pardon the pun). One could also read “take him to sea” as meaning going to sea or onto the navigable waters of the United States. This reading is more consistent with the way the jurisprudence on seaman status developed nationwide and in the Fifth Circuit. And of course a person on inland navigable waters is exposed to the perils of work in a maritime setting—more on that later.<sup>98</sup>

Alternatively, the idea that the employment-related connection to a vessel must be substantial in nature could have related to the type of work being done. That is, the person must have done traditional seaman’s work

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95. *Id.*

96. Justice Stevens, joined by Justices Ginsburg and Breyer, dissented. *Id.* at 560 (Stevens, J., dissenting).

97. *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927, 935 (5th Cir. 2014).

98. See David W. Robertson, *The Supreme Court’s Approach to Determining Seaman Status Discerning the Law Amid Loose Language and Catchphrases*, 34 J. MAR. L. & COMM. 547, 568–69 (2003) [hereinafter Robertson, *Discerning*] (“One cannot sensibly study the Supreme Court’s seaman status jurisprudence without knowing this: Throughout its four post-*Robison* seaman status opinions, the Court consistently uses the word ‘sea’ to include all navigable water. When the justices want to refer to the actual ocean, they say ‘open sea’ or ‘high seas.’”) (first quoting *Chandris, Inc. v. Latsis*, 515 U.S. 347, 351 (1995); then quoting *Papai*, 520 U.S. at 559).

in order to have a connection that was substantial in nature. The problem with this reading is that it is too much like the aid-to-navigation requirement that the Court rejected in *Wilander*. There, the Court adopted Fifth Circuit jurisprudence and held that the worker’s job must further the mission of the vessel and need not aid in navigation. Thus, a job like a bartender on a cruise ship would further the vessel’s mission even though a person on the street would not think of bartending as seafaring work—unless perhaps they were not on the street but on a cruise ship!

Alternatively, the nature requirement could have been read as a worker merely having a sufficiently real connection to a vessel or fleet of vessels under common ownership and control. That is, once one had a sufficient temporal relationship to the vessel and furthered the mission of the vessel, there was a sufficient connection. The late Professor Robertson referred to this as a “vessel connection” test.<sup>99</sup> There is some administrative convenience to such a duration/vessel-mission test. It arguably gets the right answer in the vast number of cases and then avoids the messiness of having to make individual, case-specific determinations about the nature of the seaman’s work. Under such a pure duration test, *Sanchez* would have been a seaman. But under a pure duration test, the nature requirement would be meaningless. If anyone who satisfied the durational requirement and contributed to the function of the vessel was a seaman, then the nature requirement would add nothing. But if that were the case, then why did the *Chandris* court insist that to be a seaman, the employment-related connection had to be substantial in duration *and* nature? Nature must mean something.

Returning to first principles, why are seamen afforded special rights? Why are they “wards of the admiralty”?<sup>100</sup> The historic answer was because seamen faced special risks. What are those special risks? Those associated with the perils of the sea. It thus becomes critical to define the perils of the sea: storms; for the blue-water seaman, distance from home; isolation; dangers inherent in being on or subject to moving vessels; and more. Indeed, one can argue that the just listed perils either arose out of, or were augmented by or related to, the motion of vessels. Storms at sea are particularly dangerous to moving vessels, which can be buoyed about by the wind and the waves. Loneliness and distance from resources and support arise out of the fact that a vessel has traveled away from its home

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99. Robertson, *New Approach*, *supra* note 66, at 97. For another insightful analysis of seaman-status jurisprudence, including the decisions discussed herein, see Kenneth G. Engerrand, *Escape from the Labyrinth: Call for the Admiralty Judges of the Supreme Court to Reconsider Seaman Status*, 40 HOUS. J. INT’L L. 741 (2018).

100. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246 (1942).



port.<sup>101</sup> Whatever the complete articulation of the perils of the sea include, seamen receive special treatment, in part, because they are exposed to the perils of the sea.<sup>102</sup>

As Professor Robertson put it:

In its post-*Wilander* seaman status cases, the Court has consistently used the phrase “perils of the sea” as a term of art to embrace both perils of the open ocean and vessel-movement dangers. There is really no reasoned dispute about the core policy: seamen face special dangers—including deep-sea and open-ocean perils as well as vessel-movement dangers on inland waterways—that demand special protections.<sup>103</sup>

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101. Of course, a seaman is still a seaman if injured when the vessel to which the worker is assigned is not moving.

102. A worker on an offshore platform is subject to some perils of the sea—storms, isolation, being injured by a moving vessel that allides with the platform—but the platform worker lacks the connection to a vessel.

103. Robertson, *Discerning*, *supra* note 98, at 570 (citations omitted). In an earlier piece, Robertson wrote more extensively on the perils of the sea. In Robertson, *New Approach*, *supra* note 66, at 80–81, 82, 84, he wrote:

The sea is obviously a high-risk workplace. So is a vessel in motion on navigable water, even though it may be within sight and hailing distance of land. Vessels in active operation are complex industrial enterprises presenting a range of hazards that differ significantly from those incident to work on land, piers, drydocks, and even vessels that are temporarily out of active marine operation while securely moored or anchored in protected inland water. A worker whose duties frequently take him aboard moving vessels, or who is otherwise significantly exposed to risks generated by moving vessels, confronts seamen’s dangers. Like the perils of the sea, the risks attending the movement of vessels on navigable water are also distinguishing characteristics of the seaman’s work environment.

For the affected workers, these characteristic seamen’s hazards are psychological as well as physical risk factors. In any employment setting, workers cause most of the accidents. ‘Stress and its companion symptoms . . . fatigue, frustration, [and] anxiety . . . erode the watchfulness and alertness that are required to keep a high risk operation working effectively, efficiently, safely, and profitably.’ Seamen work in a distinctive high risk environment that contributes to such stresses.

The seamen’s remedies should be available to all workers who undergo significant exposure to the characteristic seamen’s dangers. However, these remedies are not designed to benefit every worker who comes into contact with vessels or sometimes goes on the water. When the duties of

Of course, under the Supreme Court jurisprudence, a worker on a moored vessel might not have achieved seaman status if the worker was not exposed to the perils of the sea. After all, the perils of the sea arise significantly out of working on a vessel that is moving or could move. But critically, this did not mean that a person was not a seaman if injured when the vessel on which one worked was not moving. That would be a snapshot-status test, which the Supreme Court rejected in *Chandris*. It would also be inconsistent with *Stewart v. Dutra Construction Co.*, wherein the Court held that an instrumentality did not have to be in transit at the moment of the relevant events to be a vessel.<sup>104</sup> But this reading of the jurisprudence would have meant that the worker must be exposed to the perils of the sea—those arising from the motive power of vessels on water—for some portion of their employment in order to satisfy the nature requirement. How long? I would argue that logic should gauge the duration and nature requirements with the same temporal measuring rod. That is, in order to satisfy the nature requirement, the worker would have had to be exposed to the perils of the sea for 30% of their time with the vessel. Thirty percent both matches the durational requirement and would be simple for juries to apply.

Now, would a 30% nature requirement have required that the worker be on a moving vessel for 30% of the worker’s employment with the employer? Not necessarily. But how can that be? As Professor Robertson noted, the perils of the sea include being “significantly exposed to risks generated by moving vessels.”<sup>105</sup> Thus, the worker on a vessel that was not in motion may still have been exposed to the perils of the sea because the worker was subject to risks posed by other moving vessels. The longshore worker on a dock or the platform worker are subject to risks posed by

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ship repairmen, longshoremen, and similarly situated inshore workers take them aboard a vessel, the ship is typically out of the water or at rest in calm inland water, securely moored or anchored. Such amphibious inshore workers, who do not confront the perils of the sea and who are seldom involved with vessel movement, face significant work-place hazards, but they are not subjected to the same physical and psychological risks that characterize the seaman’s environment.

The governmental policy at stake in the seaman status jurisprudence is assuring the protection of the benevolent seamen’s remedies to those workers who confront the characteristic seamen’s dangers, while confining other maritime and amphibious workers to alternative remedial systems.

104. *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 495 (2005).

105. Robertson, *New Approach*, *supra* note 66, at 80.

vessels on adjacent waters. But the longshore worker on a dock and the platform worker are not on vessels. Interestingly, a platform worker injured as result of an allision of a vessel with a dock or platform on which the worker is employed can sue the vessel in admiralty under the Admiralty Extension Act.<sup>106</sup> Thus, while longshoreman and platform workers are not seamen, those workers still get some of the benefits of admiralty.

Accordingly, in order to be a seaman under my proposed reading of the Supreme Court's 1990s jurisprudence—before *Sanchez*—a worker would have had to: (1) do the work of the vessel and (2) have an employment-related connection to a vessel or fleet of vessels under common ownership and control that was substantial in (a) duration and (b) nature. To be substantial in duration, the worker would have had to spend about 30% or more of his work time with the relevant vessel or fleet of vessels, absent reassignment. To be substantial in nature, the worker would have had to be exposed to the perils of the sea for about 30% or more of his employment with the relevant employer. And the perils of the sea, whatever else they include, also arise out of the dangers associated with vessels in motion.

That was the Galligan reading before *Sanchez*.

#### IV. THE NATURE OF THE BEAST IN THE FIFTH CIRCUIT AND LOUISIANA—SELECTED DECISIONS

But what did the lower courts do with the nature requirement and *Papai*'s “going to sea” language?<sup>107</sup> Notably, what did the Fifth Circuit do? The Fifth Circuit first considered the question in *Endeavor Marine, Inc.*<sup>108</sup> Kevin Baye was a crane operator who worked on a derrick barge, the FRANK L.<sup>109</sup> Normally, he did not board the barge until it was moored

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106. 46 U.S.C. § 30101.

107. *See, e.g., In re Complaint of Buchanan Marine, L.P.*, 874 F.3d 356 (2d Cir. 2017) (plaintiff was not a seaman; he did not engage in sea-based activities, never operated a vessel, and worked on barges only when secured to the dock); *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997) (barge crane operator assigned to the barge for a specific project was not a seaman); *Delange v. Dutra Const. Co., Inc.*, 183 F.3d 916 (9th Cir. 1999) (reasonable juror could find that a “carpenter” was a seaman when his work involved crewman and deckhand duties). These cases are cited in the *en banc Sanchez* opinion. 997 F.3d 564 (5th Cir. 2021) (*en banc*).

108. *In re Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir. 2000).

109. *Id.* at 289.

or about to be moored.<sup>110</sup> He was injured while helping moor the barge to a vessel in the Mississippi River, waiting to pass a mooring line to deck hands aboard the vessel.<sup>111</sup> Then, the stern mooring cable of a nearby derrick barge snagged on the hull of the FRANK L; the line snapped and popped up onto the deck, striking Baye in the leg.<sup>112</sup> Baye sued his employer, claiming he was a seaman.<sup>113</sup> The district court held that Baye was not a seaman because, under the language in *Papai*, the “linchpin” for seaman status was whether the worker’s duties carried him to sea, and Baye did not go to sea.<sup>114</sup>

The court reversed in a *per curiam* opinion, noting that the inquiry under *Chandris* was status-based.<sup>115</sup> The key was the connection to a vessel or fleet of vessels.<sup>116</sup> But what about the nature requirement? What about not taking the worker to sea? The court held that the Supreme Court in *Papai* did not intend to make going to sea the “singular rule for determining seaman status.”<sup>117</sup> The court stated that Justice Kennedy had noted that going to sea was “helpful” in determining seaman status.<sup>118</sup> The reader infers that to the court, being “helpful” did not mean required. The Fifth Circuit also said:

[W]hen read in context, the “going to sea” passage in [*Papai*] is a shorthand way of saying that the employee’s connection to the vessel regularly exposes him “to the perils of the sea.” In other words, we do not think that the [*Papai*] Court intended to articulate a new and specific test for seaman status.<sup>119</sup>

So in *Endeavor Marine*, going to sea was not a critical, required element. Rather the key was exposure to the perils of the sea. But what are those perils, and was Baye exposed to them? The court did not explain why Baye was exposed to the perils of the sea, to what perils he was exposed, or how he was so exposed, although it concluded that he was in fact so exposed.

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 290.

115. *Id.* at 291.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* (citing *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554–55 (1997)).

The Fifth Circuit revisited the question of “going to sea” in *Naquin v. Elevating Boats, L.L.C.*<sup>120</sup> Naquin worked for Elevating Boats, L.L.C. (EBI) at a vessel repair facility at defendant’s shipyard.<sup>121</sup> EBI maintained a fleet of specialty-lift boats and marine cranes.<sup>122</sup> Naquin maintained and repaired the lift-boats.<sup>123</sup> Naquin usually worked on the vessels when they were moored, jacked up, or docked.<sup>124</sup> He spent 70% of his work time on the vessels.<sup>125</sup> Two to three times per week, he would do his work while the vessel was moving, and he would go on test runs.<sup>126</sup> He was injured when he was operating a crane, the crane collapsed, and he jumped from the crane house.<sup>127</sup> He sued under the Jones Act, claiming that he was a seaman and that his employer was negligent.<sup>128</sup> The jury found that Naquin was a seaman and awarded damages.<sup>129</sup> The Fifth Circuit, in an opinion by Judge Davis, affirmed.<sup>130</sup>

The court considered whether Naquin had the requisite employment-related connection to a vessel that was substantial in duration and nature.<sup>131</sup> The court noted that ship repair was classic seaman’s work, but EBI argued that Naquin’s duties did not regularly expose him to the perils of the sea.<sup>132</sup> To support its contention, EBI pointed out that Naquin did not sleep on the vessels; he usually worked on them when they were docked; and he almost never was on the vessels on the sea, as opposed to the canal area where he was injured.<sup>133</sup> The court was not swayed. Judge Davis said: “[C]ourts have consistently rejected the categorical assertion that workers who spend their time aboard vessels near the shore do not face maritime perils. While these near-shore workers may face fewer risks, they still remain exposed to the perils of a maritime work environment.”<sup>134</sup>

The court discussed *Endeavor Marine* and saw no reason to deviate from its reasoning, concluding that Naquin’s connection to the vessels he

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120. *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927 (5th Cir. 2014).

121. *Id.* at 930.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 931.

128. *Id.*

129. *Id.*

130. *Id.* at 930.

131. *Id.* at 934.

132. *Id.*

133. *Id.*

134. *Id.*

repaired was substantial in nature.<sup>135</sup> Once again, it was not explicit which perils of the sea threatened Naquin. Thus, the stage was set for *Sanchez*.

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135. *Id.* at 935. In between *Endeavor Marine* and *Naquin*, the Louisiana Supreme Court decided *Richard v. Mike Hooks, Inc.*, 799 So. 2d 462 (La. 2001). Richard worked for Mike Hooks, Inc. as a tacker and welder's helper. He worked at a dockside yard that was used to repair defendant's vessels, which it used in its dredging operations.

Richard's duties included picking up scrap iron, unhooking pipe, loading barges, and fabricating items to be used on the vessels. In addition, Richard spent in excess of thirty percent of his time performing direct repair and maintenance to Hooks's vessels including changing out decks, replacing pipes, changing out cables, replacing mufflers and, occasionally, repairing engines.

The vessels that Richard worked aboard were dockside, he was never more than a gangplank's distance from shore while working, and some of the vessels being repaired were partially on land. Richard was not hired as part of the dredging crew that performed repairs on vessels during the dredging operations. He did not eat or sleep on defendant's vessels, nor did he keep watch over them. Richard never worked aboard any dredge during its primary operations, nor did he work on any dredge being moved over navigable water in pursuit of its mission. Richard's only time spent on a moving vessel was once every month or so when he was required to ride in a small boat to assist in moving dredge pipe along a canal adjacent to Hooks's yard. This latter assignment lasted, on average, about forty-five minutes to two hours in duration.

*Id.* at 464.

He was injured while working on land, unloading pipe from a truck when the boom of a crane fell on his right arm. He sued, claiming he was a seaman and entitled to recover under the Jones Act. The Louisiana Supreme Court, in an opinion by Chief Justice Calogero, first found that Richard's work contributed to the mission of the vessel. *Id.* at 466. Turning to the substantial-employment-relationship requirement, the court of appeal had concluded that Richard's work was "of a seagoing nature that exposed him to the perils of the sea." *Id.* Richard's expert had stated that Richard faced the perils of the sea because he faced "hazards of cargo operations, ship's cranes/booms, slippery decks, sinking vessel, fire hazards, etc." *Id.* The Louisiana Supreme Court disagreed. While Richard spent 30% of his time working on vessels and may have been exposed to some perils, that "does not automatically qualify him as a seaman." *Id.* The Chief noted:

all of the vessels on which plaintiff worked were dockside; he was never more than a gangplank's distance from shore when working on the vessels; some of the vessels were partially on land while being repaired; he never slept on the vessels; he did not eat on the vessels; he did not keep watch on vessels overnight; he was not a member of Hooks's dredge crew that performed welding on dredges in operation; he never worked on a vessel while it was performing its primary mission; he took

V. *SANCHEZ EN BANC*

The facts of *Sanchez* are set forth in Part I, so I will proceed straight to the *en banc* decision. The court, in an opinion by Judge Davis, re-examined its jurisprudence, reversed the panel opinion holding that *Sanchez* was a seaman, and attempted to provide clarity for how one should determine whether a putative seaman's connection to a vessel was substantial in nature.<sup>136</sup> In doing so it rejected exposure to the perils of the sea as the sole or primary test to determine nature.

After reviewing the decisions below and the Supreme Court's 1990s seaman jurisprudence, the court turned to *Naquin* and *Endeavor Marine*, in that order. The court summarily overruled *Naquin* in one paragraph because all of the plaintiff's work was performed "on or near the dock, and we erred in analyzing [the case] . . . based solely on the 'perils of the sea' test . . . ."<sup>137</sup> Turning to *Endeavor Marine*, the court said that it could not say that the plaintiff was not a seaman because he was permanently assigned to the same barge; the barge moved, and plaintiff moved with the barge.<sup>138</sup> But the *Sanchez* court did not endorse the reasoning of the *Endeavor Marine* court because it relied on the "perils of the sea" as its primary test for determining the nature of the employment connection to a vessel.<sup>139</sup> In reference to *Naquin*, *Endeavor Marine*, and the "perils of the sea" test, the court said that while the perils of the sea "is one of the considerations in the calculus, it is not the sole or even the primary test."<sup>140</sup>

In the next section of its opinion, the court articulated the "following additional inquiries" relevant to the nature decision:

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his orders from a land-based foreman; he was only aboard small moving vessels once every month, for short durations, where he assisted in moving dredge pipe along a canal adjacent to Hooks's yard; and his repair duties did not take him to sea. While none of these individual facts alone prohibit an employee from attaining seaman status, a consideration of them together shows that Richard was a land-based employee, not a seaman.

*Id.* at 467. *See also* Gage v. Canal Barge Co., Inc., 431 F. Supp. 3d 754, 770 (M.D. La. 2020) (relying on *Naquin* and noting that "the perils of a maritime work environment" or "maritime perils" may more accurately capture the nature requirement than "perils of the sea").

136. *Sanchez v. Smart Fabricators of Tex., L.L.C.*, 997 F.3d 566 (5th Cir. 2021) (*en banc*).

137. *Id.* at 573.

138. *Id.*

139. *Id.*

140. *Id.*

- (1) Does the worker owe his allegiance to the vessel, rather than simply to a shoreside employer?
- (2) Is the work sea-based or [does it] involve seagoing activity?
- (3) (a) Is the worker’s assignment to a vessel limited to performance of a discrete task after which the worker’s connection to the vessel ends, or (b) Does the worker’s assignment include sailing with the vessel from port to port or location to location?<sup>141</sup>

The court referred to these as “more definitive inquiries set forth by the Supreme Court.”<sup>142</sup> The first question comes from language in *Wilander* and *Chandris*.<sup>143</sup> The second is clearly derived from *Papai*’s “going to sea” and “seagoing activity” language.<sup>144</sup> The third also seems to be derived from *Papai*, in which Justice Kennedy referred to the putative seaman’s “discrete engagements” that were “transitory or sporadic” connections to a vessel.<sup>145</sup> It also emanates from *Chandris* where the Court referred to a “transitory or sporadic” connection to a vessel and to a “land-based worker who happens to be working on the vessel at a given time.”<sup>146</sup> After setting forth the additional inquiries, the court reiterated that “[s]imply asking whether the worker was subject to the ‘perils of the sea’ is not enough to resolve the nature element.”<sup>147</sup>

The court then considered the facts before it. It said that Sanchez was doing the work of the vessel; thus, he satisfied *Wilander*.<sup>148</sup> He also had an employment-related connection to a vessel or fleet of vessels that was substantial in duration since he spent more than 90% of his employment with SmartFab working on jack-up rigs, which are vessels.<sup>149</sup> Therefore, the “question narrow[ed] to determine whether Sanchez spent at least 30 percent of his time aboard these two vessels doing work that satisfies the nature prong of that test.”<sup>150</sup> Clearly, Judge Davis tied the nature requirement to the 30% duration requirement, which is consistent with the possible reading of Supreme Court jurisprudence I outlined above.

Judge Davis then turned to answering the narrowed question, and he broke the analysis down into two parts: Sanchez’s work on the WFD 350

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141. *Id.* at 574.

142. *Id.*

143. *Id.* at n.65.

144. *Id.* at 571–72.

145. *Id.* at 572.

146. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368, 370 (1995).

147. *Sanchez*, 997 F.3d at 574 (en banc).

148. *Id.*

149. *Id.*

150. *Id.* at 575.



and his work on the E 263. The reader will recall that 72% of Sanchez's work with SmartFab was on the WFD 350. The court said that the work on the WFD 350 was not "sea-based" and did not involve any "seagoing activity" as per *Papai*.<sup>151</sup> Sanchez did not go to sea with the WFD 350, and he was not going to sail with the vessel after he finished his work.<sup>152</sup> The *Sanchez* court drew the appropriate parallels between *Papai* and Sanchez's work on the WFD 350. Thus, while it did not expressly say so, it is apparent that Sanchez's work on the WFD 350 did not satisfy the second of the articulated guidelines—that the work was sea-based or involved seagoing activity.

The court then analyzed Sanchez's work on the E 263. The E 263 was located on the OCS and was moved while Sanchez was on it.<sup>153</sup> Sanchez spent 19% of his employment time with SmartFab on the E263.<sup>154</sup> Critically, one might conclude that any analysis of Sanchez's work on the E 263 was unnecessary since, even if he established that the nature of his work on the E 263 was sea-based, it was only 19% of his work, and he could not establish seaman status at 19% under the holding of *Chandris*, which as noted, required that a worker spend 30% of his time working on the relevant vessels.<sup>155</sup> If that is the case, then, arguably, anything said about the work on the E 263 is unnecessary to the decision and dictum. But the court did discuss Sanchez's work on the E 263, and it would be reckless to ignore what an *en banc* court said based on fine points of what is and what is not dictum.

Judge Davis indicated that Sanchez's work on the E 263 involved "discrete repairs . . . for a specific reason": to prepare the rig to be able to drill at its new location.<sup>156</sup> There was no evidence Sanchez would remain on the E 263 after the crew completed their repair work.<sup>157</sup> Even though located on the OCS, and arguably satisfying the sea-based-work second additional inquiry, Sanchez's work on the E 263 was a "discrete, individual job."<sup>158</sup> When the job was over, Sanchez would have no further connection with the vessel. Thus, while not clearly tied to the first and third additional nature inquiries, the analysis seems to say that Sanchez did not have a sufficient allegiance to the E 263—the first additional inquiry—

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151. *Id.*

152. *Id.*

153. *Id.* at 576.

154. *Id.*

155. The reader will recall that the second panel opinion focused on the work on the WFD 350. See *supra* text accompanying note 31.

156. *Sanchez*, 997 F.3d at 575 (en banc).

157. *Id.*

158. *Id.* at 576.

and the job was a discrete assignment—the third additional inquiry. The importance of the third inquiry seems more critical to me than the first, which is really only inferred.

Interestingly, as to workers on rigs in general, the court said:

Our case law reveals generally that two types of workers are found on drilling rigs. First, we have the drilling crew, who conduct the drilling operations (and workers who support that activity) and stay with the vessel when it moves from one drilling location to another. These workers are the members of the crew of the vessel and are seamen. The second group are specialized transient workers, usually employed by contractors. These workers are engaged to do specific discrete short-term jobs. Discrete transient jobs are like the work done by longshoremen when a vessel calls in port. As stated in *Papai*, these workers have only a “transitory or sporadic” connection to a vessel or group of vessels and do not qualify for seaman status. Sanchez, as a transitory worker, falls into the second group, and thus does not satisfy the nature test.<sup>159</sup>

Thus, Judge Davis drew a distinction between the oil rig worker who stayed with the vessel and the worker whose job was transient. As Judge Davis said in the second paragraph of the opinion, Sanchez’s relevant work was “two discrete short-term transient repair jobs on two vessels,” and he was not engaged in sea-based work.<sup>160</sup> Thus Sanchez did not satisfy the nature requirement and was not a seaman. The *en banc Sanchez* decision was unanimous, with Judge Dennis concurring and encouraging courts in “more challenging” cases to consult Professor Robertson’s work.<sup>161</sup>

## VI. SANCHEZ UNPACKED

In the years since the Supreme Court decided *Chandris* and *Papai*, there has been understandable confusion concerning what it means to require a putative seaman to have an employment-related connection to a vessel in navigation that is substantial in nature. The *Chandris* Court adopted the nature requirement but did not define it, although it did refer to the special risks that seamen face—the perils of the sea. While there was not clarity after *Chandris*, there was also not confusion. After *Papai*,

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159. *Id.* (citing *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 559–60 (1997)).

160. *Id.* at 566.

161. *Id.* at 576 (Dennis, J., concurring).

if there was not outright confusion, there was greater uncertainty arising out of Justice Kennedy's "take him to sea" language and his references to sea-based and seagoing activities. Post-*Papai*, did the worker have to sail with the ship? The Fifth Circuit in *Endeavor Marine* and *Naquin* relied primarily on a perils-of-the-sea test and concluded that because the workers at issue faced the perils of the sea, they satisfied the nature requirement. But in neither case did the court expressly state which perils of the sea the workers faced, how they faced those perils, or for how long. In *Sanchez*, the *en banc* Fifth Circuit attempted to give meaning to the nature requirement in light of *Papai* and its own unsatisfactory and rather conclusory post-*Papai* reliance on a broad perils-of-the-sea test to satisfy that nature requirement. Let me now parse and discuss the test that *Sanchez* articulated.

*A. Exposure to the Perils of the Sea Is Relevant, but It Is Not Enough*

First, in overruling *Naquin* as well as disavowing the reasoning of *Endeavor Marine*, the court eschewed sole or even primary reliance on a perils-of-the-sea test to determine whether a putative seaman's employment-related connection to a vessel is substantial in nature: "Simply asking whether the worker was subject to the 'perils of the sea' is not enough to resolve the nature element."<sup>162</sup> I daresay that, properly framed and applied, a perils-of-the-sea test is exactly how to define the nature requirement. I will explain later.<sup>163</sup>

In any event, the Fifth Circuit in *Sanchez* rejected a pure perils-of-the-sea nature test. But it did not totally jettison an analysis of perils of the sea in determining nature. Instead, it said that a perils-of-the-sea test was not an "adequate test" and thus articulated its "additional inquiries."<sup>164</sup> The key word is *additional*. In perhaps the first case interpreting and applying *Sanchez*—ironically, the case is [Victoria] *Sanchez v. American Pollution Control Corp.*—Judge Barbier of the Eastern District of Louisiana, in denying a motion for summary judgment that a worker was not a seaman, noted that perils of the sea is still a factor although a "minor consideration."<sup>165</sup> As support for the statement that exposure to the perils of the sea is now a minor consideration, Judge Barbier noted that the *en banc Sanchez* decision pointed out, as *Chandris* had, that seaman status and seaman's risk are not co-extensive. In addition, while Judge Barbier

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162. *Id.* at 574.

163. *See infra* text accompanying notes 208–213.

164. *Sanchez*, 997 F.3d at 574 (*en banc*).

165. *Sanchez v. Am. Pollution Control Corp.*, No. 12-CV-00164, 2021 WL 2368643 (E.D. La. June 4, 2021).

did not expressly state this, the *en banc Sanchez* court did not analyze whether Gilbert Sanchez was exposed to the perils of the sea when it analyzed his work on both the WFD 350 and the E 263.<sup>166</sup>

Let me conclude this portion of the discussion with a restatement of the basic point: under the *en banc Sanchez* decision, an analysis of whether a worker is exposed to the perils of the sea is still relevant in determining whether the worker’s employment-related connection to a vessel is substantial in nature, and I am not convinced that the relevance of exposure to the perils of the sea is now a minor consideration, but it is clear that now, in the Fifth Circuit, there must be more.

### *B. The Allegiance Inquiry*

There are additional considerations, and the first one is whether the worker owes “allegiance to the vessel, rather than simply to a shoreside employer.”<sup>167</sup> As noted, the allegiance inquiry seems to come from language in *Wilander* and *Chandris*, but what does it mean? The *en banc Sanchez* court did not expressly discuss the allegiance inquiry in its analysis. One senses that the allegiance inquiry’s relationship to nature is via a sort of subjective consideration of fealty or connection. To have a relationship that is substantial in nature requires a serious connection to a vessel or fleet of vessels. If we imagine a blue-water seaman who works on one vessel owned by the worker’s employer, the relevance is clear. In such a case the vessel and the employer are essentially one and allegiance is owed to both. Since they are essentially one and the same, the question answers itself.

What about an employer who owns or controls multiple vessels? The answer should not change. The employee can owe allegiance to the employer as well as the vessels. Thus, in *Meaux v. Cooper Consolidated, L.L.C.*, plaintiff worked as a flagger and utility man and contributed to the cargo-handling function of Cooper’s crane barges and to the barges’ mission of loading and unloading vessels moored midstream in the Mississippi River.<sup>168</sup> Meaux was assigned exclusively to defendant’s crane barges, even when he was on board the vessels to be loaded and unloaded.<sup>169</sup> Judge Ash had earlier ruled that Meaux was a seaman, but the

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166. Perhaps that perils-of-the-sea analysis was unnecessary in the *en banc Sanchez* opinion because the second panel opinion, in holding Sanchez was a seaman, had implicitly held that he was exposed to the perils of the sea.

167. *Sanchez*, 997 F.3d at 574 (en banc).

168. *Meaux v. Cooper Consol., L.L.C.*, No. 19-10628, 2021 WL 2635469 (E.D. La. June 25, 2021).

169. *Id.* at \*1.

defendant moved for reconsideration in light of *Sanchez*.<sup>170</sup> Defendant argued that Meaux owed his “allegiance to Cooper, a shoreside employer, not to a vessel, because he reported to the job site at which Cooper needed him, regardless of which crane barge may have been there.”<sup>171</sup> In rejecting that argument, the court said that Meaux owed allegiance to the crane barges, an identifiable fleet of vessels under common ownership, “because all his work was done in the service of those vessels as a member of their crews assisting in their cargo-handling mission.”<sup>172</sup> The fact that defendant had shoreside facilities to which Meaux reported on his way to the barges did “not negate the fact that Cooper was a vessel owner and Meaux worked on its vessels.”<sup>173</sup>

But what about the worker on a vessel whose employer is different from the vessel owner?<sup>174</sup> For instance, on a cruise ship, the spa staff typically work for a shore-based company, not the cruise line. But they are doing the work of the vessel—providing a vacation experience to cruisers. And they may well have a relationship with the vessel or other vessels owned and/or controlled by the same cruise line that is substantial in duration. When one analyzes the nature of their work, one must ask the allegiance question—to whom do they owe allegiance?—the shoreside employer or the vessel? But how is the court supposed to make that decision? Must the worker make a pledge? Take an oath? Submit to hypnosis? A lie detector test?

Happily, as Judge Barbier noted in *Victoria Sanchez*, the *Chandris* allegiance language stated that a worker had to owe his allegiance to a vessel and “not solely” to a land-based employer.<sup>175</sup> The *en banc Sanchez* court provided that a worker had to owe his allegiance to a vessel “rather than simply to a shoreside employer,” a slightly different wording than *Chandris*.<sup>176</sup> The “rather than simply” language means that a worker may owe allegiance to both a shoreside employer and a vessel on which they work. Indeed, *Victoria Sanchez* was employed by American Pollution Control Corp. (AMPOL) but worked on the NO GAS II, a shrimp boat that was part of the Deepwater Horizon Vessels of Opportunity program under

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170. *Id.*

171. *Id.* at \*2.

172. *Id.* at \*3.

173. *Id.*

174. Note that the way the question is asked contemplates a different entity owning the vessel than the employer. This is a recurring fact pattern and also seems to inform the third additional inquiry.

175. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 359 (1995).

176. *Sanchez v. Smart Fabricators of Tex., L.L.C.*, 997 F.3d 566, 574 (5th Cir. 2021) (*en banc*).

which local fishing vessels were engaged as part of the response.<sup>177</sup> Victoria Sanchez spent eleven to twelve hours per day on the vessel deploying and retrieving boom.<sup>178</sup> The court noted that while she no doubt owed allegiance to her employer—who paid her—she also took orders from the captain of the boat.<sup>179</sup> The captain’s assistant taught her how to do her job, and she helped to clean the vessel.<sup>180</sup> “Thus, the current evidence shows that [Victoria] Sanchez did not owe her allegiance ‘solely’ or ‘simply’ to AMPOL, indicating that her connection to the NO GAS II was substantial in nature.”<sup>181</sup>

So allegiance can be divided, and that is not fatal to a finding that the worker’s connection to the vessel is substantial in nature. That said, does the allegiance question really add much to the analysis, especially if allegiance can be to multiple entities? It clearly makes sense that an employee can owe allegiance to both an employer and a vessel, but that basic reality undermines the importance of the inquiry. It is doubtful many will be denied seaman status based on the allegiance inquiry. And finally, allegiance seems more directly, logically, and quantifiably tied to the duration requirement than to the nature requirement. The best way to objectively measure allegiance would seem to be time spent with the vessel or fleet of vessels, and that relates to duration not (or at least more than) nature.

### C. The Sea-Based-Work or Seagoing-Activity Inquiry

Turning to the second additional inquiry: “[i]s the work sea-based or [does it] involve seagoing activity?”<sup>182</sup> Again, as noted, the inquiry derives from Justice Kennedy’s *Papai* language about “going to sea” and “seagoing activity.” To begin, the Fifth Circuit, like the Supreme Court, used the word “sea,” but it once again bears emphasis that the court does not mean “sea” as in “high seas.” This is both consistent with prior jurisprudence and is obvious from the *en banc* opinion itself. In concluding that the perils-of-the-sea test alone was inadequate to define the nature requirement, the court said:

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177. *Sanchez v. Am. Pollution Control Corp.*, No. 12-CV-00164, 2021 WL 2368643 (E.D. La. June 4, 2021).

178. *Id.* at \*1.

179. *Id.* at \*7.

180. *Id.*

181. *Id.*

182. *Sanchez v. Smart Fabricators of Tex., L.L.C.*, 997 F.3d 566, 574 (5th Cir. 2021) (*en banc*).

Simply asking whether the worker was subject to the “perils of the sea” is not enough to resolve the nature element. Consider the captain and crew of a ferry boat or of an inland tug working in a calm river or bay, or the drilling crew on a drilling barge working in a quiet canal. No one would question whether those workers are seamen. Yet, their risk from the perils of the sea is minimal.<sup>183</sup>

So clearly, Judge Davis believes that the brown-water seaman on a calm river or bay or on a quiet canal is still a seaman. That has not changed. While their work is not literally sea-based or seagoing, it is maritime based and on the navigable waters of the United States. Thus, as Professor Robertson pointed out and I noted above: the word “sea” in these opinions really means “navigable waters.” One might even call them “maritime or navigable-waters based,” rather than “sea-based,” although the phrase lacks the literary flair of “sea-based.”<sup>184</sup>

As I proceed, let me offer a word of caution about the sea-based-work inquiry. Lawyers and judges should be careful not to undermine the *Wilander* decision when analyzing the nature requirement’s sea-based-work inquiry. *Wilander* held that in order to be a seaman, a worker did not have to aid in navigation; the worker merely needed to be doing the work of the vessel.<sup>185</sup> Courts must resist the temptation to import an aid-to-navigation requirement through the back door of the sea-based-work inquiry. I can imagine a lawyer arguing that a cocktail server on a cruise ship was not engaged in seagoing activity because serving drinks is not seagoing activity. But the server is doing the work of the vessel. So the sea-based-work or seagoing-activity nature inquiry should be whether the worker is doing the work of the vessel in a sea-based or navigable-water-based environment.

One important question that the court does not answer directly in *Sanchez* is whether sea-based or seagoing activity requires motion. Must the worker, to be engaged in sea-based work or seagoing activity, be present when the vessel moves? That is, does being engaged in a sea-based activity mean moving for 30% of a worker’s time on a vessel? Justice Kennedy’s “going to sea” language would seem to require that the putative seaman be present when the vessel actually moves. *Sanchez* is not so clear. In analyzing the third additional nature inquiry—whether the task is

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183. *Id.*

184. *See also* *Gage v. Canal Barge, Inc.*, 431 F. Supp. 3d 754, 770 (M.D. La. 2020) (relying on *Naquin* and noting that “the perils of a maritime work environment” or “maritime perils” may more accurately capture the nature requirement than “perils of the sea”).

185. *Id.* at 576.

discrete—the court, as quoted above, referred to two groups of workers on drilling rigs.<sup>186</sup> The first group—those who are seamen—“stay with the vessel when it moves from one drilling location to another.”<sup>187</sup> Is it enough to stay assigned to the rig and follow it to its new location, or must the worker actually be on board when it moves? That is, can the worker follow it after it moves, or must the worker actually move with the vessel? It would seem that the rig worker who is on the rig on the sea is engaged in sea-based activity whether they are with the rig when it physically moves or not. And even if the worker is on the rig when it moves, it would not be for 30% of the worker’s employment term. They are subject to the perils of the sea, including risks posed by other moving vessels.<sup>188</sup> Of course, the worker who is on the rig when it is jacked up two steps away from the dock, like Gilbert Sanchez when he was working on the WFD 350, is not engaged in sea-based activity.

The *Meaux* court considered an aspect of the motion issue. There, the reader will recall, plaintiff worked on and from crane barges that were used in the loading and unloading of vessels anchored midstream in the Mississippi River.<sup>189</sup> Defendant argued that Meaux’s work was not sea-based but merely loading and unloading ships, i.e., longshoring.<sup>190</sup> Judge Ash noted that the issue was “close” but held that the work was indeed sea-based.<sup>191</sup> He wrote:

What is different here is that Meaux performed this work on or from a crane barge alongside cargo vessels moored or anchored midstream in the Mississippi River. Neither the barges nor the cargo vessels were dockside merely a gangplank from shore. Rather Meaux had to take a crew boat or, as he did on at least one occasion, ride the crane barge to the location of the cargo vessels being loaded or unloaded. This Court thinks this separation from the safety of land, even if not all that far, taken together with the fact that all of Meaux’s work was performed aboard vessels midstream in a dangerous river, is enough of a distinction to make Meaux’s work a sea-based activity. Indeed, the midstream

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186. *Id.*

187. *Id.*

188. The risks other moving vessels pose may be greater for a worker on a rig than a fixed platform, but that is a technical, factual question upon which I will not opine.

189. *Meaux v. Cooper Consol., L.L.C.*, No. 19-10628, 2021 WL 2635469, at \*3 (E.D. La. June 25, 2021).

190. *Id.*

191. *Id.*



location of Meaux's work makes this case distinguishable from *Naquin* and *Endeavor Marine* where the plaintiffs' work was performed on or near the dock. . . . Here, Meaux's work was never performed on or near a dock but was done entirely from vessels moored or anchored midstream.<sup>192</sup>

Clearly, the risks posed by other vessels in navigation are greater mid-stream than they are at the dock, and Judge Ash seems to recognize that fact. Meaux was more than a step or two away from the dock. Someone doing work on vessels mid-stream in the Mississippi is exposed to the perils of the sea from unintended motion and from other vessels to a greater extent than one doing the same work on a dock or on a vessel moored to a dock. Critically, Gilbert Sanchez was no more exposed to the perils of the sea when he was on the WFD 350 than any other worker on a dock. Meaux was in a much different position.

#### *D. The Discrete-Task Inquiry*

The third additional inquiry asks: "(a) Is the worker's assignment to a vessel limited to performance of a discrete task after which the worker's connection to the vessel ends, or (b) Does the worker's assignment include sailing with the vessel from port to port or location to location?"<sup>193</sup> The third additional inquiry comes from *Papai* and, arguably, *Chandris*, where the worker at issue was performing a discrete assignment on a transient basis. Here again, the *Sanchez* court seems to be getting at the connection to the relevant vessel. Is the worker truly a part of the crew of that vessel, or is the worker on the vessel to perform discrete repairs? Is it contemplated that the worker will stay with the vessel after the repairs are complete?

One will recall that Sanchez's work on the E 263 was on the OCS, arguably satisfying the sea-based-work second additional inquiry requirement. He even travelled with the rig, a vessel, if that was necessary. But it was not contemplated that he would remain on the rig after the repairs were complete. He would move on.

Let me return to Judge Davis's paragraph about the two groups of rig workers, which I quoted in full earlier and, in part, several paragraphs ago. The second group of rig workers are not seamen.

The second group are specialized transient workers, usually

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192. *Id.*

193. *Sanchez v. Smart Fabricators of Tex., L.L.C.*, 997 F.3d 566, 574 (5th Cir. 2021) (en banc).

employed by contractors. These workers are engaged to do specific discrete short-term jobs. Discrete transient jobs are like the work done by longshoremen when a vessel calls in port. As stated in *Papai*, these workers have only a "transitory or sporadic" connection to a vessel or group of vessels and do not qualify for seaman status. Sanchez, as a transitory worker, falls into the second group, and thus does not satisfy the nature test.<sup>194</sup>

This second group are not, in conception, sufficiently related to the vessel. They do discrete jobs on a short-term basis and move on.<sup>195</sup> Their connection to the vessel is transitory. There is one very interesting clause in the first line quoted above: "usually employed by contractors."<sup>196</sup> Certainly, that was the case with Gilbert Sanchez, but what does it mean? The spa employee on the cruise ship is employed by a contractor, but we have not questioned his or her seaman status.

Let us consider a number of hypotheticals to see how this third additional inquiry might play out in practice. Let us begin with a worker, Roddy Roustabout, who is hired by PumpAlot, Inc., which immediately assigned Roustabout to a rig it owned on the OCS. Roustabout goes out to the rig and works there over a three-month period—ten days on, ten days off—and then Roustabout is injured on the rig. The rig never moved the entire time that Roustabout was on the rig. PumpAlot attests that there was no anticipation Roustabout's assignment would change and that if the rig moved, Roustabout would move with the rig, even though that never happened. Is Roustabout in the court's first group even though Roustabout never moved with the vessel? I think the answer should be yes. There is nothing sporadic about the connection to the rig. It is not transient; it is happenstance that the rig was not moved before the worker suffered injury.

What about a hairdresser, Terry Perry, who is an employee of Beauty Loves Travel (BLT). BLT contracts with Renaissance Cruise Line (RCL) to provide hairdressers on RCL cruise ships. Perry works on three different

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194. *Id.* at 576.

195. In *Meaux*, the court found that the worker's tasks were not discrete. Judge Ash said:

The entirety of Meaux's work for the Cooper crane barges, whether as a flagger or utility man, entailed assisting the barges in their cargo-handling operations. Meaux was not a specialized transient worker engaged to do specific discrete short-term jobs. Instead, he worked full-time on or from the crane barges to which he was assigned helping them to load and unload cargo vessels moored or anchored in the river.

*Meaux*, 2021 WL 2635469, at \*3.

196. *Id.*

RCL cruises over the course of Perry's employment, spending more than 30% of the total BLT employment time on RCL ships. Perry is injured on Perry's third cruise with RCL and claims seaman status. The evidence is that there was not necessarily any expectation that Perry would return to a particular RCL ship but every expectation she would be assigned to some RCL cruise ship. How does Perry fare under the third additional inquiry? I would argue that while there may not have been any clear expectation Perry would return to any one RCL ship, so she did not move with any one ship as the first group of Judge Davis's rig workers do, there was every expectation she would return to the fleet, and thus she moved with a fleet that is under common ownership and control.

Now, let us change the facts ever so slightly. Assume Big Oil (BO) has a number of rigs in the Gulf. Big Oil hires Great Repairs (GR) to do maintenance work on the rigs. GR workers are assigned to BO rigs as needed, but GR workers only work on BO rigs. GR workers are sent out to do particular jobs, but all of the jobs are for BO. Lynn Lyle, a GR welder, is injured on a BO rig. Is Lyle in Judge Davis's first group or the second group? Lyle works for another employer. His jobs are discrete, but they are all for BO. But Lyle's connection to BO rigs seems substantial. If BO hired its own repair people and Lyle worked for BO, would that change it?<sup>197</sup> If the anticipation is that Lyle would continue to work on BO rigs, even if employed by GR, I think Lyle may belong in the first group. And recall that in *Chandris*, Justice O'Connor distinguished a crew member from a land-based employee who happened to be on a vessel at a given time.<sup>198</sup>

Was Gilbert Sanchez that different from Lyle? He worked for SmartFab but spent 61 of his 67 days of employment on Enterprise rigs. Yet Judge Davis stated that his employment on the E 263 was a discrete individual job, and once the work was done, he would have no more connection with the vessel.<sup>199</sup> And, of course, Sanchez's work on the WFD 350 was not sea-based because the rig was moored next to the dock the entire time he worked on it. One wonders if the results would be different if Sanchez had only worked on the E 263 and proved that it was expected he would continue to work on Enterprise rigs on the OCS. And would it have been different if he had been able to prove that he spent more than 30% of his time in the past on Enterprise rigs on the OCS?

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197. The facts were analogous in *Chandris*. He was a marine engineer, but he was not assigned to any one vessel, and he was on one of his employer's vessel for a particular purpose related to anticipated vessel repairs. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 350–51 (1995).

198. *Id.* at 370.

199. *Sanchez*, 997 F.3d at 576 (en banc).

Finally, as it relates to the third additional inquiry—the discrete-job analysis—it seems to overlap with the durational requirement, much as the allegiance inquiry does. Is a connection to a vessel substantial or is it discrete? Isn't that a question of the durational connection? If a worker spends over 30% of her employment on a vessel or fleet of vessels under common ownership or control, then she can satisfy the *Chandris* duration requirement. But per the *en banc Sanchez* analysis, even a worker potentially satisfying the *Chandris* duration test may find their connection to the vessel discrete and therefore not substantial in nature. Who knows? Perhaps Adam would have liked another bite at the apple as well, but he was already gone.

#### *E. Multi-Factor or Elemental*

One last analytical question about the *en banc Sanchez* additional inquiries: do they contemplate a multi-factor test, or must a putative seaman clear all four hurdles or elements for their employment connection to a vessel to be substantial in nature? Judge Barbier in *Victoria Sanchez* noted that the Fifth Circuit did not supply an answer to that question and thus analyzed all four inquiries, finding each sufficiently present to raise a factual question for trial concerning the nature of Victoria Sanchez's connection to the relevant vessel.<sup>200</sup> Judge Ash also analyzed all four in *Meaux*.<sup>201</sup>

Notably, the *en banc Sanchez* court did not expressly articulate or apply all four inquiries when analyzing Gilbert Sanchez's relationships to the WFD 350 and the E 263. In fact, it seems the court found that the failure to satisfy one inquiry—the seagoing nature of the work—was fatal to Sanchez's seaman claims vis-à-vis the WFD 350. And the failure to satisfy another of the inquiries—the non-discrete nature of the assignment—vis-à-vis the E 263 was fatal. Thus, if the failure to satisfy only one of the inquiries is fatal to satisfying the nature requirement, then perhaps all four inquiries must be satisfactorily answered to establish nature. If the inquiries establish a multi-factor test, one would have expected the court to analyze all four inquiries regarding Gilbert Sanchez's employment.

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200. *Sanchez v. Am. Pollution Control Corp.*, No. 12-CV-00164, 2021 WL 2368643, at \*8 (E.D. La. June 4, 2021).

201. *Meaux*, 2021 WL 2635469.

VII. ADDITIONAL REFLECTIONS ON *SANCHEZ*

The *en banc Sanchez* decision rearticulating the Fifth Circuit's test for determining whether a putative seaman's employment-related connection to a vessel is substantial in nature is arguably the most significant of that court's seaman-status decisions since *Robison*. The unanimous opinion reflects a noble effort to bring Fifth Circuit jurisprudence in line with Supreme Court seaman-status jurisprudence, especially perhaps the "take him to sea" and "seagoing activity" language in *Papai*. Unfortunately, the Supreme Court's language was rather vague and confusing, and efforts to make sense of it, as lower courts must do, will undoubtedly lead to more confusion. That is what the *en banc Sanchez* decision may well do. Time will tell. Undoubtedly, the opinion will cause litigation concerning the meaning and application of the four inquiries. As noted, that has already begun.<sup>202</sup> Change is in the air, but before I discuss that change further, let me note what has not changed.

Despite all the talk about going to sea, sea-based work, and seagoing activity, the status of many brown-water seamen will not change. This is clear from Judge Davis's statement that no one questions that "the captain and crew of a ferry boat or of an inland tug working in a calm river or bay, or the drilling crew on a drilling barge working on a quiet canal" are seamen.<sup>203</sup> And it is apparent that those who serve on the crews of jack-up rigs and other multi-purpose vessels are seamen under *Sanchez*. They are in that first group of workers Judge Davis referred to when discussing the third additional inquiry, discreteness. These workers who "stay with the vessel when it moves from one drilling location to another . . . are the members of the crew of the vessel and are seamen."<sup>204</sup> The real target of *Sanchez*'s additional inquiries are the second group of workers on drilling rigs: "transient workers, usually employed by contractors[,] . . . engaged to do specific discrete short-term jobs . . . [who] have only a 'transitory or sporadic' connection to a vessel . . . and do not qualify for seaman status."<sup>205</sup> But the language and application may go beyond the target. William Tell's son was luckier.

The *en banc Sanchez* court took a single inquiry regarding the nature of the employment—whether the worker is sufficiently exposed to the perils of the sea—and turned it into four inquiries. That will necessarily make life more complex. As noted in the previous section, the court

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202. See, e.g., *Sanchez*, 2021 WL 2368643; *Meaux*, 2021 WL 2635469.

203. *Sanchez*, 997 F.3d at 574 (en banc).

204. *Id.* at 576.

205. *Id.*

derived its three additional inquiries from language in Supreme Court jurisprudence.

But two of the inquiries—allegiance and the discrete-assignment inquiry—overlap with the durational requirement. The most quantifiable objective manifestation of allegiance is time; that is one of the reasons we celebrate lengthy anniversaries for birthdays, marriage, employment, etc. Additionally, time on an assignment or with a vessel is the most objective way to decide if an assignment is discrete and transient or ongoing. Time is the key to the durational requirement. The overlap of the two nature questions with the durational requirement befores; it does not clarify. The inquiries are relevant, but to me they are relevant to the durational requirement, not nature.

Moreover, the allegiance inquiry does not promise to have much decisional weight. In single-employer cases, it is essentially irrelevant. In two-employer cases it promises to add little. Either the worker will have dual allegiance to the shore-based employer and to the vessel, as in *Victoria Sanchez*, or the discreteness question will be decisive because a decision that a particular employment assignment is transient or sporadic will answer the allegiance question as well.

The second additional inquiry concerning whether the work is sea-based or involves seagoing activity may also prove troublesome. First, to reiterate what I said above: the inquiry should not undermine *Wilander's* holding that a worker does not have to aid in navigation to attain seaman status as long as the worker is doing the work of the vessel. Moving on, we know the worker must then be doing the work of the vessel on navigable water. What more? It is unclear. Certainly, it seems in order to satisfy the nature element, the worker—even on a rig—must be away from the dock for a significant period—30%. Recall that Gilbert Sanchez's work on the WFD 350 was only a step or two from the dock, and the court said that did not involve seagoing activity. We may infer that the work on the E 263 was sea-based because, as the court said, "it was located on the OCS."<sup>206</sup> And I am confident that if the work were not sea-based, the court would have said so as it did with Sanchez's work on the WFD 350. I am also struck that the sea-based or seagoing-activity inquiry does have substantive content that goes beyond the geographical. It is the relationship of sea-based work and seagoing activities to the risks that work poses—risks associated with the perils of the sea.

Thus, let me circle back around and recall what the Court counseled in *Chandris*: "[W]e think it preferable to focus upon the essence of what it means to be a seaman and to eschew the temptation to create detailed

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206. *Id.*

tests to effectuate the congressional purpose, tests that tend to become ends in and of themselves.”<sup>207</sup>

I fear that the *en banc Sanchez* court may not have eschewed the temptation and has created a more detailed test for nature than is necessary. Focusing on exposure to the perils of the sea focuses on the “essence of what it means to be a seaman.”<sup>208</sup> Indeed two sentences after the above quoted language, the *Chandris* Court noted the special hazards that seamen face—i.e., the perils of the sea.

Of course, the *Sanchez* court said that relying solely on an analysis of whether or not the putative seaman was exposed to the perils of the sea to determine the nature of the employment was “not enough”;<sup>209</sup> it was “not adequate.”<sup>210</sup> But, why not? There seem to be two reasons. First because seamen and non-seamen may face similar perils.<sup>211</sup> Yes, but the non-seaman would not satisfy either the doing-the-work-of-the-vessel or the duration requirements. Being exposed to the perils of the sea is not enough in and of itself to make one a seaman. The second reason the court jettisoned a pure perils-of-the-sea test returns us to the ferry boat or tug on a calm river or bay or the drilling crew in a quiet canal. Judge Davis stated that they are seamen even though “their risk from the perils of the sea is minimal.”<sup>212</sup> Minimal may understate it, but clearly the hypothetical workers on calm inland waters do not face the perils of the sea in the same way as the worker on the high or open seas far from home. But the inland waterway workers do face the perils of a maritime working environment including the motion of vessels.<sup>213</sup> Working on a vessel away from a dock

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207. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995).

208. *Id.* at 347, 369.

209. *Sanchez*, 997 F.3d at 574 (en banc).

210. *Id.*

211. *Id.*

212. *Id.*

213. The court also said that some commentators were critical of its nature jurisprudence. In *Sanchez*, it said, “Much of the scholarship addressing seaman status emphasizes that ‘perils of the sea’ alone is a problematic test for making the land-based and sea-based distinction.” *Sanchez*, 997 F.3d at 573 n.63 (en banc). See, e.g., Matthew H. Frederick, *Adrift in the Harbor: Ambiguous-Amphibious Controversies and Seamen’s Access to Workers’ Compensation Benefits*, 81 TEX. L. REV. 1671, 1704 (2003). One can read that article as more critical of the court’s failure to articulate the relevant perils of the sea. Likewise, Timothy M. O’Hara, Comment, *Naquin v. Elevating Boats, LLC: The Fifth Circuit’s Improper Expansion of Jones Act “Seaman Status” Qualification*, 36 PACE L. REV. 263, 286 (2015), also cited by the court, proposes retaining a meaningful role for the perils-of-the-sea test. *Sanchez*, 997 F.3d 568 n.12 (en banc). See also L. Taylor Coley, *The “Perils of the Sea”—Man Status Question:*

increases the perils of the sea posed by motion on water either by the vessel on which work is occurring or from other vessels nearby.

As I have indicated, I believe that exposure to the perils of the sea for 30% or more of one's employment should satisfy the nature requirement. But I also believe that courts must examine and rearticulate what those perils are and then determine whether the relevant worker is subject to them. Those perils have changed since Dana wrote *Two Years Before the Mast*<sup>214</sup> and Melville penned *Moby Dick*.<sup>215</sup> Courts should undertake a twenty-first century reexamination of today's perils of the sea, articulate them, and apply them. I imagine many will be similar to the historic perils: storms, isolation, distance from sophisticated medical care, risks posed by the motion of vessels, and more. But is it riskier to be on a rig than a platform? What about the dangers of capping a well while preparing to move to the next assignment? Are there heightened risks of chemical exposure and accompanying damage when ships are carrying dangerous chemical cargos and workers are so close to them? Answers will depend on the testimony of maritime engineers, medical professionals, and scientists. But it is time for that discussion to occur. It is certainly riskier to be away from a dock than to be connected to it as Gilbert Sanchez was on the WFD 350.

I daresay that the perceived problem was not so much with the perils-of-the-sea test but its application. The courts in both *Endeavor Marine* and *Naquin* articulated the perils-of-the-sea test but never applied it. The courts did not say which perils of the sea the workers were exposed to or why or for how long. Quite simply, without that analysis, one cannot say the workers were exposed to the perils of the sea.

#### CONCLUSION

The United States Supreme Court's requirement that in order to be a seaman a worker must have an employment-related connection to a vessel or fleet of vessels under common ownership and control that is substantial in both duration *and* nature is clear. What has been less clear is what the nature requirement means. Justice Kennedy in *Papai* indicated that a substantial connection in nature meant "going to sea." The United States Fifth Circuit has not interpreted the phrase literally, and that is wise given the many seamen who ply inland on brown water, rather than the deep blue

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*The Fifth Circuit Falls Behind FELA's Advancements in Remedies in Favor of the Continued Confusion Surrounding the Seaman Definition*, 39 TUL. MAR. L. J. 371, 380–81 (2014) (contending Naquin was not exposed to the perils of the sea).

214. RICHARD HENRY DANA, JR., *TWO YEARS BEFORE THE MAST* (1840).

215. HERMAN MELVILLE, *MOBY DICK* (1851).



sea. But nature still means something. I propose that it means being exposed to the perils of the sea, critically including, as per the late Professor David Robertson, being exposed to the risks generated by other vessels, while on a vessel. Thus, in order to be a seaman—to have an employment-related connection to a vessel that is substantial in nature—a worker must be exposed to the perils of the sea away from the dock for 30% or more of the worker’s employment with the relevant employer. The 30% requirement is consistent with the applicable rule for determining if a worker’s connection to a vessel or group of vessels under common ownership and control is substantial in duration.

The Fifth Circuit *en banc* in *Sanchez* jettisoned the perils-of-the-sea test as the sole or primary determinant of nature. Instead, it articulated three additional inquiries derived from language in the Supreme Court’s jurisprudence. The additional inquiries promise to add confusion. Two of them clearly overlap with the durational requirement, and one of them has the potential to undermine the holding in *Wilander*.

Should the United States Supreme Court decide to consider the nature requirement again—and perhaps it should soon do so—it should not add additional inquiries to the nature question other than asking whether the worker is sufficiently exposed to the perils of the sea. Rather, it should clearly state that courts and litigants must articulate the relevant perils of the sea to which the putative seaman is allegedly exposed, explain why those alleged perils are relevant, and explain why exposure to them satisfies the nature requirement.