No. 06-1704

IN THE

Supreme Court of the United States

ELIZABETH CARLISLE,

Petitioner,

v.

CARNIVAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a cruise line which provides an onboard physician for its passengers as part of the cruise experience is vicariously liable for the medical negligence of that physician committed on the ship's passengers during the cruise?

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JURISDICTION

The judgment of the Florida Supreme Court was entered on February 15, 2007. A timely motion for rehearing was denied on March 27, 2007 (App., *infra*, 38a). The jurisdiction of this Court is invoked under Article III, § 2 and Article VI, § 2 of the United States Constitution and 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, article III, § 2, and article VI § 2; 28 U.S.C. § 1333.

STATEMENT OF THE CASE

Introduction. This case presents the question of whether a cruise line should be held vicariously liable for the medical negligence of a ship's physician committed on passengers during a cruise. Until recently, most courts followed the majority rule, adopted before the birth of the modern day cruise industry, that cruise lines are not vicariously liable for the medical negligence of a ship's physician on passengers. In the past several years, however, courts and legal scholars have rejected this position and elected instead to follow the rule enunciated in *Nietes v. Am.President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959),

which holds that a cruise line is vicariously liable for the medical negligence of a ship's physician on passengers.[1] Because this issue involves a question of federal maritime law over which courts are presently divided, this Court is the only judicial body capable of resolving the conflict.

Facts. In March, 1997, 14-year-old Elizabeth Carlisle took a cruise onboard the M/S Ecstasy with her parents, Kristopher and Darce. (App. 2a). Prior to the vessel departing the Port of Miami, Elizabeth complained to her parents that she was experiencing abodminal pain, lower back pain, and diarrhea. (App. 2a). Elizabeth was seen several times in the ship's hospital by the ship's physician, Dr. Mauro Neri. (App. 2a). Over the course of several days Dr. Neri repeatedly advised the Carlisles that Elizabeth was suffering from the flu, assured them in response to their questions that she was not suffering from appendicitis, and provided her with antibiotics. (App. 2a). Eventually, the Carlisles left the ship with Elizabeth, who was taken to a land-based emergency room and diagnosed with a ruptured appendix. (App. 2a). As a result of the rupture and a subsequent infection, Elizabeth was rendered sterile. (App. 2a).

Elizabeth's parents sued Carnival for their daughter's injuries. (App. 2a). The complaint alleged that Carnival was vicariously liable for the doctor's failure to properly diagnose Elizabeth's appendicitis because he was Carnival's agent. (App. 2a).[2] Carnival moved for summary judgment, arguing that

1. Still other courts have adopted a third approach to the issue, holding that cruise lines are not vicariously liable for the medical negligence of a ship's doctor, but may nevertheless be liable for the doctor's negligence under a theory of apparent agency.

2. The complaint also alleged liability under a separate theory of apparent agency. Although that issue was raised below, neither the district court of appeal nor the Florida Supreme Court addressed it.

it was not vicariously liable for Dr. Neri's negligence because he was not their agent. (App. 2a). The trial court granted the motion for summary judgment based on the Fifth Circuit's decision in *Barbetta v. S/S/ Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988), which held that a cruise line is not vicariously liable for the medical malpractice of its shipboard physician as a matter of law.

The Florida Third District Court of Appeal rejected Carnival's position that the ship's doctor was not an agent of the cruise line for purposes of respondeat superior and reversed the trial court's decision. (App. 20a-36a). Citing to *Nietes*, as well as general principles of agency which are part of maritime law, the Court noted that the ship's doctor was "a salaried member of the crew, subject to the ship's discipline and the master's orders, and presumably also under the general direction and supervision of the company's chief surgeon . . ." (App. 25a). It also rejected the notion that Carnival was incapable of controlling the actions of the ship's doctor "given the with modern means of communication that exist in today's highly organized, industrial society." (App. 26a).

In addition, the Court found that *Barbetta* was premised on the "unrealistic suggestion that an ailing cruise passenger at sea has some meaningful opportunity to simply forego treatment by the ship's doctor and demand that the captain fulfill his duty of care in some other fashion." (App. 28a). The Court noted that while the presence of an onboard physician was not required by law, "the practical realities of the competitive cruise industry, and the reasonably anticipated risks of taking a small city of people to sea for days at a time, all but dictate a doctor's presence." (App. 30a).

Carnival moved for rehearing, rehearing en banc, and certification. The district court denied the motion for rehearing, but certified the question of whether a cruise line is vicariously liable for the medical malpractice of its shipboard doctor committed on a ship's passenger as one of great public importance. (App. 1a).

The Florida Supreme Court answered the certified question in the negative. The Court stated that it found "merit in the plaintiff's argument and the reasoning of the district court" because "much has changed in the world in the one hundred years since the earlier courts held ship owners immune from such claims." (App. 17a, 18a). It also acknowledged that since the appellate court's decision other courts had chosen to follow the *Nietes* rule. (App. 17a). However, because *Nietes* was the only case that recognized vicarious liability at the time the appellate court issued its decision, the Florida Supreme Court held that it was obligated to follow *Barbetta.* (App. 18a).

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court's decision raises an issue of federal maritime law over which federal and state courts applying general maritime law are squarely divided. Although a majority of courts have elected to follow the *Barbetta* rule, a growing number of courts have correctly refused to follow *Barbetta* because it is outmoded and does not reflect the realities of modern day cruise line travel.

The conflict is of significance for two reasons: first, because it is at odds with the longstanding principle of maritime uniformity, and second, because the split of authority has created uncertainty among both the cruise line

industry and the millions of passengers – many of whom are United States citizens – that take cruises each year. In addition, the conflict illustrates the widening gap between the way courts feel compelled to rule on this issue and the way they believe they ought to rule. Courts have increasingly voiced their disapproval of the faulty reasoning on which *Barbetta* and its progeny are based. In fact, the Florida Supreme Court expressly stated that it agreed with the reasoning of *Nietes*, but felt bound by the law that existed at the time the appellate court ruled to follow *Barbetta*. Until this Court steps in and overrules *Barbetta*, other courts are likely to act in the same manner, even if, like the Florida Supreme Court, they disagree with the result.

I. GENERAL MARITIME LAW IS DIVIDED ON THE ISSUE OF WHETHER A CRUISE LINE CAN BE HELD VICARIOUSLY LIABLE FOR THE MEDICAL NEGLIGENCE OF A SHIPBOARD DOCTOR ON PASSENGERS.

A. The split over the cruise lines' vicarious liability violates the well-established doctrine of maritime uniformity.

Uniformity and simplicity are basic tenets of federal admiralty law. *Byrd v. Byrd*, 657 F.2d 615, 617 (4th Cir. 1981); *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 648 (5th Cir. 1985)(*citing Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 (1982))(the overriding concern of the maritime law is the federal interest in the need for a uniform development of the law governing the maritime industries). The doctrine of uniformity was created so that passengers and shipowners could know with certainty what rules applied to the vessel and what liabilities could arise, regardless of where the ship happened to be.

Presently, there are four different views on the issue of whether a cruise line is liable for the medical negligence of a ship's doctor on passengers. The majority of courts have held that a cruise line cannot be held vicariously liable as a matter of law for the medical negligence of the ship's doctor on passengers. *See, e.g., Barbetta*; *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033 (S.D.N.Y. 1969); *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100 (E.D. Pa. 1982). A growing number of courts, however, have rejected the *Barbetta* rule and held that a cruise line is vicariously liable for the medical negligence of a ship's doctor. *See, e.g., Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372 (S.D. Fla. 2004); *Mack v. Royal Caribbean Cruises, Ltd.*, 838 N.E.2d 80, 91 (Ill. App. Ct. 2005), *cert. denied*, 127 S. Ct. 350, 166 L. Ed. 2d 44, 75 USLW 3155 (2006) (finding that federal maritime law is unsettled on the issue of a cruise line's vicarious liability for the negligence of a ship's doctor on passengers and affirming the denial of the ship owner's motion to dismiss in accord with the holdings of *Nietes*, *Huntley* and *Fairley v. Royal Cruise Line, Ltd.*, 1993 A.M.C. 1633 (S.D. Fla. 1993). Among those courts that have upheld *Barbetta*, a number have expressed reservations about the reasoning behind it, but have declined to overrule it as a matter of *stare decisis*. *See, e.g., Carnival Corp. v. Carlisle*, 953 So. 2d 461 (Fla. 2007); *Fairley*, 1993 A.M.C. at 1633. Still another group of courts has declined to overrule *Barbetta*, but has held that a cruise line can be liable for the negligence of its ship's physician on passengers based on other legal theories, such as apparent agency. *See Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1371-72 & n.2 (S.D. Fla. 2005); *Fairley*, 1993 A.M.C. at 1633.[3]

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3. Although The Florida Supreme Court found merit in Carlisle's position, it nevertheless felt compelled to reverse the appellate court's decision because it considered the law regarding (Cont'd)

Because of the lack of consensus among courts on this issue, it is currently impossible for passengers to know with any degree of certainty whether, before embarking on a cruise, they will be able to recover damages if their doctor commits an act of medical negligence.[4] Similarly, as Carnival pointed out in its filings in the courts below, it is impossible under the current state of the law for cruise lines to know definitively what their obligations are to passengers in this area.

B. This Court is the only judicial body capable of resolving the split of authority on this issue.

This Court is the only judicial body capable of resolving the split of authority on this issue. One of the primary purposes of this Court's certiorari jurisdiction is to resolve conflicts among courts concerning the provisions of federal law. *Braxton v. United States*, 500 U.S. 344 (1991).[5] In the case of general

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(Cont'd)

vicarious liability to be settled *at the time the appellate court reached its decision*. (App. 18a-19a). Regardless of whether the Florida Supreme Court was correct in so concluding – which we believe it was not– there is no question that the law was clearly not settled at the time it issued its decision, a fact the court itself concedes. (App. 17a); *Mack*, 838 N.E.2d at 91.

4. Although passengers theoretically have a right to sue the ship's doctor personally, since most cruise line doctors are non-U.S. citizens who have no connection with the United States, obtaining service and jurisdiction over them is virtually impossible. (App. 35a).

5. General maritime law is federal law. *Coastal Fuels Marketing, Inc. v. Florida Exp. Shipping Co., Inc.*, 207 F.3d 1247 (11th Cir. 2000); *La Esperanza de P.R., Inc. v. Perez y Cia de Puerto Rico, Inc.*, 124 F.3d 10 (1st Cir. 1997)(maritime law is an amalgam of traditional common law rules, modifications of those rules, and newly created rules).

maritime law, the Supreme Court is the final arbiter, regardless of whether the question arises in federal or state court. *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001)("Ultimately, the Supreme Court has the final say on any question of federal law, whether it arises in federal or state court . . .").

Unless this Court puts an end to this controversy, courts will continue to come up with inconsistent decisions on a question of federal maritime law effecting potentially every cruise line passenger in the country, or mistakenly conclude, as the Florida Supreme Court did here, that they lack authority to reject *Barbetta*.

II. THE *BARBETTA* RULE IS ANTIQUATED AND NO LONGER REFLECTS THE MODERN DAY REALITIES OF CRUISE LINE TRAVEL.

Furthermore, this Court should overrule *Barbetta* because it is based on flawed and outmoded assumptions regarding the modern day cruise ship industry and the provision of shipboard medical services to passengers.

Although this Court cannot summarily disregard existing law, it has not hesitated on prior occasions to overrule longstanding maritime precedents that have outlived their usefulness. In *Moragne v. States Marine Lines, Inc.*, 389 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970), this Court recognized a claim for wrongful death under general maritime law, overruling more than 80 years of precedent in the process. In explaining its decision to depart from the well-settled rule of law established in *The Harrisburg*, 119 U.S. 199 (1886), which held that there was no claim for wrongful death under general maritime law, the Court noted that *The Harrisburg* had been criticized as "barbarous" for its unjust result, and was based

"on a particular set of factors that had, when [it] was decided, *long since been thrown into discard even in England*, and that had never existed in this country at all."

> The most likely reason that the English rule was adopted in this country without much question is simply that it had the blessing of age. That was the thrust of this Court's opinion in *Brame*, as well as many of the lower court opinions. Such nearly automatic adoption seems at odds with the general principle, widely accepted during the early years of our Nation, that while 'our ancestors brought with them [the] general principles [of the common law] and claimed it as their birthright; ... they brought with them and adopted only that portion which was applicable to their situation."

389 U.S. at 381, 386, 90 S. Ct. 1778, 1781, 26 L. Ed. 2d at 345, 348 (emphasis added); *accord*, *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 576 94 S. Ct. 806, 810 39 L. Ed. 2d 9, 16 (1974)(noting that "*Moragne* reflected dissatisfaction with this state of the law that illogically and unjustifiably deprived the dependents of many maritime death victims of an adequate remedy for their losses").

Five years later, this Court reversed another longstanding precedent in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975), when it eliminated the doctrine of divided damages from admiralty law. As in *Moragne*, the Court in *Reliable Transfer* found the doctrine of divided damages to be "shrouded in the mists of history" and in need of re-examination. 421 U.S. at 402, 95 S. Ct. at 1711, 44 L. Ed. 2d at 257. And, as in *Moragne* and in this case, the Court took issue with the "validity of

[the rule's] underpinnings" and "the propriety of its present application." 421 U.S. at 402 n.4, 95 S. Ct. at 1711 n.4, 44 L. Ed. 2d at 257 n.4.

> The rule of divided damages in admiralty has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit. *The reasons that originally led to the Court's adoption of the rule have long since disappeared.* The rule has been repeatedly criticized by experienced federal judges who have correctly pointed out that the result it works has too often been precisely the opposite of what the Court sought to achieve in The Schooner Catharine - the "just and equitable" allocation of damages.

421 U.S. at 402 n.4, 411, 95 S. Ct. at 1711 n.4, 1715, 44 L. Ed. 2d at 257 n.4, 261 (emphasis added).

Like the cases on which these outmoded maritime doctrines were based, the majority of cases on which *Barbetta* rests were decided long before the advent of modern day passenger cruising. *See The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918); *The Great Northern*, 251 F. 826 (9th Cir. 1918); *Branch v. Compagnie Generale Transatlantique*, 11 F. Supp. 832 (S.D.N.Y. 1935); *Churchill v. United Fruit Co.*, 294 F. 400 (D. Mass. 1923); *The Napolitan Prince*, 134 F. 159 (E.D.N.Y. 1904); *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272, 28 N.E. 266, 267 (1891); *Laubheim v. Maatschappy*, 107 N.Y. 228, 13 N.E. 781 (1887). A few date back more than a century, long before cruise lines became "floating hotels" offering a wide range of services to passengers, including twenty four hour medical care. *See* Bob Dickinson and Andy Vladimir, *Selling the Sea: An Inside*

Look at the Cruise Industry, John Wiley & Sons, Inc., at 210; *Costa Crociere v. Family Hotel Serv., Inc.*, 939 F. Supp. 1538, 1557 (S.D. Fla. 1996) (noting that "drastic changes have occurred in the maritime industry" since the adoption of seamen as wards of admiralty").[6]

And like the cases on which these doctrines were founded, the *Barbetta* line of cases rests on the shakiest of legal "fictions." (App. 28a); *Nietes*, 181 F. Supp. at 220. Chief among them is the *Barbetta* court's finding that passengers are free to contract with the ship's doctor for any medical services they may require. While a passenger is *technically* free to decline onboard medical treatment, if he is at sea and in medical distress, he *realistically* does not have any "meaningful" alternative other than to seek medical care onboard the vessel. *See Carlisle*, 864 So. 2d at 4; *see also Huntley*, 307 F. Supp. 2d at 1372 ("a cruise passenger at sea and in medical distress does not have any meaningful choice but to seek treatment from the ship's doctor"); *Fairley*, at 1993 AMC at 1639 ("if a passenger is ill, and port is distant, the ship's doctor is the passenger's only resort, since evacuation by air rescue is expensive, possible and appropriate only for emergencies.")

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6. Between 1970-1995, passenger cruises became the fastest-growing segment of the entire travel and tourism industry in the United States–outpacing hotels, restaurants and theme parks. Dickinson and Vladimir, *Selling the Sea: An Inside Look At the Cruise Industry*, at 37; Ross A. Klein, *Cruise Ship Blues: The Underside of the Cruise Industry*, New Society Publishers, (2002) at 2. In addition, the composition of cruise line passengers has also changed. Passengers are no longer "older empty-nesters, with relatively simple tastes," but "everyman." Dickinson and Vladimir, *Selling the Sea: An Inside Look At the Cruise Industry*, at 62. Consequently, "the ship's product delivery ... of necessity is more diverse and complex." *Id.*

Indeed, the notion that ill passengers such as Carlisle are free to accept or decline shipboard medical services is as disingenuous as the claim that ship's doctors are "independent contractors" rather than agents of the cruise line. Ship's doctors are no different from any other ship's officers. They are subject to ship's discipline under general maritime law, as well as the lawful commands of the captain. *See Norris, The Law of Maritime Personal Injuries* 4th ed. § 3:10 (1990). When they are sick or injured, they are entitled to all of the remedies available to other crewmembers under the Jones Act and maritime law, including maintenance and cure and the warranty of seaworthiness. *Id.*

Moreover, cruise lines do exercise an element of control over the doctor-patient relationship, such as the selection of medical personnel, the hours of operation of the infirmary, and the procedures for the operation of the ship's hospital. *Carlisle*, 864 So. 2d at 5. Furthermore, with the advent of modern technology, cruise line shoreside medical personnel have the ability to monitor and communicate with the ship's physician while he is on board the vessel in a way that they did not back when the "*Barbetta* rule" was first decided. *Nietes*, 188 F. Supp. at 220; *see also Klein* at 78 (noting that advent of "telemedical" satellite hook-ups from ship to shore onboard cruise ships). The notion that ship's physicians are wholly "independent" from the cruise line by simply labeling them independent contractors on fine print in a passenger ticket is pure fiction.

Barbetta also rests on the false assumption that the ship's physician is provided for the convenience of the ship's passengers, rather than as an economical alternative to fulfilling its duty of reasonable care to its passengers. Under maritime law, a cruise line has a duty to provide reasonable

medical care to passengers under the circumstances. *See Fairley*, 1993 AMC at 1639. While fulfillment of this duty does not legally require cruise lines to provide an infirmary or shipboard medical staff to passengers, *realistically* they have no other alternative unless they wish to divert their vessels every time a passenger becomes ill and requires medical treatment — something no modern day cruise line could possibly do if it wished to stay in business. *See* (App. 30a) ("The fallacy of the notion that the acutely ill passenger at sea has sifted through a series of options and ultimately chosen to use the ship's doctor underscores the fiction of the familiar incantation that the physician is on board merely for the "convenience of the passenger."); *accord Huntley*, 307 F. Supp. 2d at 1372 ("[w]here the cruise line has made an economic decision — that it is the most cost-effective for the cruise line and most attractive to prospective passengers for it to employ a shipboard doctor with a well-equipped shipboard infirmary in order to discharge its duty to provide reasonable medical attention under the circumstances — it is not unreasonable to require the cruise line to bear the costs of such decision"); *Fairley*, 1993 AMC at 1639. Indeed, because the employment of a doctor aboard a ship is a beneficial substitute for the shipowner's otherwise more costly duty to sick passengers, there is a legitimate reason to impose liability on a cruise line for the negligence of its doctors. *See* (App. 30a); *Fairley*, 1997 AMC at 1639 ("where the cruise line has reaped the benefits of carrying a doctor aboard its vessels, there may be circumstances where it should be required to bear its consequences.")

In addition, cruise lines also benefit from providing passengers with a shipboard physician, "since the presence of a qualified physician on board, with a well-equipped and well-staffed infirmary, is an enticement to purchase the

ticket." *Fairley*, at 1993 AMC 1639; *Carlisle*, 864 So. 2d 1. And while cruise lines are not *technically* required to provide quality medical care to passengers, in today's competitive cruise line industry, they need to do so if they wish to remain in business. *Carlisle*, 864 So. 2d at 5; *see also* Dickinson and Andy Vladimir, *Selling the Sea: An Inside Look at the Cruise Industry*, at 78 ("Legally there are no American or international requirements concerning the level of cruise-ship medicine. However, *since lines are in the hospitality business, it makes eminent sense to provide necessary and adequate medical care.*")(emphasis added). To the extent that cruise lines benefit economically from providing medical services to passengers, there is no reason why they should not be required to assume responsibility for their human costs of those services. *See Fairley*, 1993 AMC at 1639.

Furthermore, allowing the Florida Supreme Court decision to stand would have the anomalous effect of shielding cruise lines from liability for the malpractice of shipboard physicians committed on passengers, while continuing to hold them vicariously liable for negligence committed on crewmembers. *See Michael Compagno, Malpractice on the Love Boat: Barbetta v S/S Bermuda Star*, 14 Tul. Mar. L.J. at 390-391. This result seems particularly absurd where, as here, the vessel owner agrees to indemnify the doctor for all malpractice claims, regardless of who brings them. *See DeZon v. Am. President Lines, Ltd.*, 318 U.S. 660, 87 L. Ed. 1065, 63 S. Ct. 814 (1943). There is simply no logical justification for allowing a crewmember to recover damages from a shipowner for the malpractice of its physician while leaving a passenger injured *by that same physician* without any legal recourse. *Id.*

The biggest problem with *Barbetta*, however, is that in many cases, such as this one, it leaves an injured plaintiff without any viable legal remedy. Although passengers such as Carlisle *theoretically* have an action against cruise line doctors who commit medical malpractice, *realistically* that action is only as good as their ability to serve those physicians with process and exercise jurisdiction over them. Many ship's doctors live abroad and have no connection to the United States or the forum where plaintiffs are required to sue. *See* Dickinson and Vladimir, *Sailing the Sea: An Inside Look at the Cruise Industry* at 78. As a result, it is often a practical impossibility to serve them with process within the time required by the Rules of Civil Procedure or obtain personal jurisdiction over them. (App. 35a n.4); *Elmlund v. Mottershead*, 750 So. 2d 736 (Fla. Dist. Ct. App. 2000).

Whatever logical basis the *Barbetta* rule may at one time have had, there is no question that like the last clear chance rule and the doctrine of divided damages, it has outlived its usefulness.

III. THIS CASE RAISES A SIGNIFICANT ISSUE OF FEDERAL MARITIME LAW THAT EFFECTS CRUISE LINE PASSENGERS NATIONWIDE.

Finally, this Court should grant the petition in this case because the issue of whether a cruise line is vicariously liable for the medical negligence of a ship's physician on passengers has widespread ramifications for passengers considering cruise line travel. Although the cruise lines claim that they overtly disclose to passengers that shipboard doctors are "independent contractors" in their passenger tickets — disclosures which typically are sandwiched among pages of fine print in a multi-page agreement — most passengers

onboard cruise ships assume that the term "ship's doctor" means what it says. Many of those passengers are elderly or have special medical needs. If the Florida Supreme Court's decision and the *Barbetta* line of cases are allowed to stand, those passengers will be left without a viable legal remedy, solely because the lower courts are bound by precedent to adhere to an antiquated rule that most modern judges agree makes no practical sense.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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