No. 16-26

In The
Supreme Court of the United States

BULK JULIANA, LTD., *et al.*,

Petitioners,

v.

WORLD FUEL SERVICES (SINGAPORE) PTE LTD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Fifth Circuit Court of Appeals correct when it joined the Fourth Circuit and Ninth Circuit, the only other circuit courts that have considered the issue, in holding that a contractual choice of law provision applies to a transaction to provide necessaries to a vessel when the vessel's charterer has ordered the necessaries?

RULE 29.6 DISCLOSURE

Respondent, World Fuel Services (Singapore) Pte Ltd is a Singapore corporation and an indirectly and wholly owned subsidiary of World Fuel Services Corporation, a publicly-traded Florida corporation, the global parent corporation of the World Fuel Services Corporation Group of companies.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

1. Relevant Facts 1

2. District Court Proceedings 5

3. Fifth Circuit Proceedings 6

REASONS FOR DENYING CERTIORARI 7

I. There is no circuit split that supports granting certiorari 7

II. The first question presented does not accurately describe the issues in dispute 13

III. The choice-of-law provision does not "create" the lien in this case 15

IV. Vessel owners' property rights are not threatened by the opinion below 19

V. This Court should not grant certiorari on this petition to address the contractual meaning of "General Maritime Law of the United States" 22

VI. The granting of certiorari will create, not remove, uncertainty in the shipping industry..... 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Comar Marine, Corp. v.
Raider Marine Logistics, L.L.C.,
792 F.3d 564 (5th Cir. 2015) 17

Equilease Corp. v. M/V Sampson,
793 F.2d 598 (5th Cir. 1986) 20

Filippou v. Italia Societa Per Azioni Di Navizione,
254 F. Supp. 162 (D. Mass. 1966) 25

Galehead, Inc. v. M/V Anglia,
183 F.3d 1242 (11th Cir. 1999) 14

Goodman v. 1973 26 Foot Trojan Vessel,
Arkansas Registration No. AR1439SN,
859 F.2d 71 (8th Cir. 1988) 18

Gulf Oil Trading Co. v. M/V CARIBE MAR,
757 F.2d 743 (5th Cir. 1985) 21

Hapag-Lloyd Aktiengesellschaft v.
U.S. Oil Trading LLC,
814 F.3d 146 (2d Cir. 2016) 14

In re Eagle Geophysical, Inc.,
256 B.R. 852 (Bankr. D. De. 2001) 25

ING Bank N.V. v. M/V TEMARA,
No. 16-CV-2051 (KBF),
2016 WL 6156320 (S.D.N.Y. Oct. 21, 2016) 7

Itel Containers Int'l Corp. v.
Atlanttrafik Exp. Serv. Ltd.,
982 F.2d 765 (2d Cir. 1992) 17

Lauritzen v. Larsen,
345 U.S. 571 (1953) 8, 9

M/S Bremen v. Zapata Off-Shore Co.,
407 U.S. 1 (1972) 9, 10

Native Vill. of Naknek v. Jones Pac. Mar., LLC,
141 F. Supp. 3d 1157 (W.D. Wash. 2015) 6

Newell v. Norton,
70 U.S. (3 Wall) 257 (1865) 16

O.W. Bunker Malta Ltd. v. MV TROGIR,
602 Fed. Appx. 673 (9th Cir. 2015) 7, 10

O'Brien v. Miller,
168 U.S. 287 (1897) 23

O'Rourke Marine Servs. L.P., L.L.P. v.
M/V COSCO Haifa,
No. 15-CV-2992 (SAS), 2016 WL 1544742
(S.D.N.Y. Apr. 8, 2016) 27-28

Olson v. Bemis Co.,
800 F.3d 296 (7th Cir. 2015) 18

Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.,
254 U.S. 1 (1920) 16

Pierside Terminal Operators, Inc. v. M/V Floridian,
389 F. Supp. 25 (E.D. Va. 1974) 20

Pittsburgh, C. & St. L.R. Co. v. Ramsey,
89 U.S. 322 (1874) 17

Rainbow Line, Inc. v. M/V TEQUILA,
480 F.2d 1024 (2d Cir. 1973) ..... *passim*

Splendid Shipping Sendirian Berhard v. Trans-Tec Asia,
555 U.S. 1062 (2008) 7, 28

The Jefferson,
61 U.S. 393 (1857) 16

Tramp Oil & Marine, Ltd. v. M/V Mermaid I,
805 F.2d 42 (1st Cir. 1986) 11

Trans-Tec Asia v. M/V HARMONY CONTAINER,
518 F.3d 1120 (9th Cir. 2008) ..... *passim*

Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. Camilla,
966 F.2d 613 (11th Cir. 1992) 12

Triton Marine Fuels Ltd., S.A. v. M/V PACIFIC CHUKOTKA,
575 F.3d 409 (4th Cir. 2009) ..... *passim*

Triton Marine Fuels, Ltd. v. M.V PACIFIC CHUKOTKA,
671 F. Supp. 2d 753 (D. Md. 2009) 26

United Pub. Workers of Am. (C.I.O.) v. Mitchell,
330 U.S. 75 (1947) 14

United States v. Austal USA LLC,
815 F. Supp. 2d 948 (E.D. Va. 2011) 25

United States v. Utah, N & C. Stage Co.,
199 U.S. 414 (1905) 23

Veverica v. Drill Barge Buccaneer No. 7,
488 F.2d 880 (5th Cir. 1974) 16

World Fuel Servs. Singapore Pte, Ltd. v. BULK JULIANA M/V,
822 F.3d 766 (5th Cir. 2016) 7

World Fuel Servs. Trading, DMCC v. Hebei Prince Shipping Co.,
783 F.3d 507 (4th Cir. 2015) ..... *passim*

World Fuel Servs. Trading, DMCC v. M/V HEBEI SHIJIAZHUANG,
12 F. Supp. 3d 792 (E.D. Va. 2014) 24

Yee v. City of Escondido, Cal.,
503 U.S. 519 (1992) 13

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. §§ 31301 *et seq*. 6

46 U.S.C. § 31326(b) 25

46 U.S.C. § 31341 ..... 14, 20

46 U.S.C. § 31341(a)(4)(b) 15

46 U.S.C. § 31341(b) 20

46 U.S.C. § 31342 14

RULES

Sup. Ct. R. 10 24

Sup. Ct. R. 14.a 13

OTHER AUTHORITY

Natalie Kitroeff, *Hanjin Bankruptcy is the Tip of the Iceberg for Flailing Shippers*, Los Angeles Times, September 18, 2016, http://www.latimes.com/business/la-fi-hanjin-shipping-industry-crisis-20160913-snap-story.html 28

OPINIONS BELOW

The Court of Appeals' April 1, 2016 decision is published at 822 F.3d 766. The District Court's Order and Reasons of February 11, 2015 granting Plaintiff's motion for summary judgment is unreported but can be found at 2015 WL 575201.

JURISDICTION

The Court of Appeals rendered its decision on April 1, 2016. Petitioner filed a petition for a writ of certiorari on June 30, 2016. This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Relevant Facts

World Fuel Services (Singapore) Pte Ltd ("Respondent" or "WFS Singapore") is one of a network of international companies that provides fuel oil, commonly referred to as "bunkers" in the maritime industry, to oceangoing vessels throughout the world. Pet. Appx. 2.[1] Each member of this network is wholly owned, directly or indirectly, by a Florida corporation, World Fuel Services Corporation. *Id.*

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[1] Citations to the Fifth Circuit's Opinion and the United States District Court for the Eastern District of Louisiana's Opinion below are in the form "Pet. Appx. __" and reference the Petition for Writ of Certiorari's Appendix in which the opinions were reproduced in their entirety. The Fifth Circuit's Opinion is at Pet. Appx. 1-21, and the District Court's opinion is at Pet. Appx. 22-36.

The M/V BULK JULIANA is a dry bulk cargo vessel sailing under Panamanian registry. *Id*. at 2, 23. Its registered owner is Bulk Juliana Ltd., a Bermudian company, but the vessel is beneficially owned by Phoenix Bulk Carriers US LLC, an American company. *Id*.

The M/V BULK JULIANA was time chartered to Denmar Chartering & Trading GmbH ("Denmar") at all pertinent times. On or about November 7, 2012, Denmar sent an order for bunkers to World Fuel Services Europe, Ltd., which was acting on behalf of WFS Singapore. *Id.* WFS Singapore agreed to the bunker order via email to Denmar and attached a "Bunker Confirmation" memorializing the terms of the transaction. *Id*. at 2-3, 23-24.

The Bunker Confirmation provided:

> ALL SALES ARE ON THE CREDIT OF THE VSL [vessel]. **BUYER IS PRESUMED TO HAVE AUTHORITY TO BIND THE VSL WITH A MARITIME LIEN.** DISCLAIMER STAMPS PLACED BY VSL ON THE BUNKER RECEIPT WILL HAVE NO EFFECT AND DO NOT WAIVE THE SELLER'S LIEN.

Id. at 2-3 (emphasis added).

The Bunker Confirmation further stated that it incorporated World Fuel Services Corporation's Marine Group of Companies "General Terms and Conditions" ("General Terms"):

> THIS CONFIRMATION IS GOVERNED BY AND INCORPORATES BY REFERENCE SELLER'S GENERAL TERMS AND CONDITIONS IN EFFECT AS OF THE DATE THAT CONFIRMATION IS ISSUED. THESE INCORPORATED AND REFERENCED TERMS CAN BE FOUND AT WWW.WFSCORP.COM. ALTERNATIVELY, YOU MAY INFORM US IF YOU REQUIRE A COPY AND SAME WILL BE PROVIDED TO YOU.

Id. at 3.

The General Terms include the following provision:

> **8. CREDIT AND SECURITY**
>
> (a) Products supplied in each Transaction are sold and effected on the credit of the Receiving Vessel, as well as on the promise of the Buyer to pay, **and it is agreed and the Buyer warrants that the Seller will have and may assert a maritime lien against the Receiving Vessel for the amount due for the Products delivered.**

Id. at 4 (emphasis added).

The General Terms also provide that American law governed the contract:

> 17. **LAW AND JURISDICTION:** The General Terms and each Transaction shall be governed by the General Maritime Law of the United States and, in the event that the General Maritime Law of the United States is silent on the disputed issue, the law of the State of Florida, without reference to any conflict of laws rules which may result in the application of the laws of another jurisdiction.

Id. at 23.

On November 13, 2012, WFS Singapore sent a subcontractor to physically deliver the ordered bunkers to the M/V BULK JULIANA at the Port of Singapore. *Id.* at 6. The "Master/Chief Engineer" of the M/V BULK JULIANA signed the Bunker Delivery Notes, and placed the vessel's stamp on each relevant document, which confirmed that the vessel had received the bunkers. *Id.* At no time before delivery of the bunkers was there ever an objection to the terms of the Bunker Confirmation or to the World Fuel General Terms and Conditions. *Id.* at 5.

On November 15, 2012, WFS Singapore delivered an invoice for the bunkers to "M/V BULK JULIANA AND/OR, HER OWNERS/OPERATORS AND DENMAR." *Id.* at 6. The Bunker Confirmation provides that the cost for the bunkers

must be paid within thirty days from the date of delivery. WFS Singapore has never been paid. *Id.*

2. District Court Proceedings

On August 13, 2013, while the M/V BULK JULIANA was in the Port of New Orleans, WFS Singapore filed suit against the vessel, *in rem*, and Denmar, *in personam*, in the United States District Court for the Eastern District of Louisiana. *Id.* at 24. WFS Singapore asked the court to issue an arrest warrant for the M/V BULK JULIANA. *Id.* Pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, the court issued an arrest warrant. *Id.* at 6, 24. The U.S. Marshals then arrested the M/V BULK JULIANA. *Id.* at 6, 24.

On September 13, 2013, Bulk Juliana Ltd. filed a claim for the vessel, posted security to release it from arrest, and answered WFS Singapore's complaint. *Id.* at 7, 24-25.

The parties filed cross-motions for summary judgment. *Id.* at 7, 25. The District Court enforced the contractually-agreed choice-of-law provision, applied U.S. law, and determined WFS Singapore has a maritime lien against the M/V BULK JULIANA pursuant to the Federal Maritime Lien

Act[2] ("Lien Act"), 42 U.S.C. §§ 31301 *et seq*. Pet. Appx. 34. The District Court ruled that as the time charterer, Denmar had the presumptive authority to bind the vessel and World Fuel Singapore had no duty to investigate this apparent authority. *Id.* at 7-8, 32. It held that when the parties agreed that American law would apply and the ship sailed into American waters, the application of American law would not result in fundamental unfairness to the vessel's owner. *Id.* at 32-33.

3. Fifth Circuit Proceedings

Bulk Juliana Ltd. appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit held that "[a]s a matter of black-letter law under the [Lien Act] . . . Denmar as time charterer had authority to bind the vessel *in rem* for its purchase of bunkers, and the lien is enforceable in U.S. courts." *Id.* at 16. The Fifth Circuit affirmed that the choice-of-law provision was valid and that "the General Maritime Law of the United States" included the Lien Act. *Id.* at 19-20. Further, the court found that even if "the General Maritime Law of the United States is silent on the disputed issue, the law of the State of Florida" included the Lien Act. *Id.* at 20-21.

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[2] Through reincorporation, the relevant statutes are now part of the "Commercial Instruments and Maritime Liens Act" or "CIMLA". However, even after reincorporation, federal courts often use the term "Federal Maritime Lien Act" or "FMLA." *See*, e.g., *Native Vill. of Naknek v. Jones Pac. Mar., LLC*, 141 F. Supp. 3d 1157, 1160 (W.D. Wash. 2015).

Bulk Juliana Ltd. has filed a Petition for Writ of Certiorari seeking review by this Court of the Fifth Circuit's decision.

REASONS FOR DENYING CERTIORARI

I. There is no circuit split that supports granting certiorari.

Petitioner acknowledges that the Fourth Circuit, the Fifth Circuit, and the Ninth Circuit have all held that a bunker supplier can assert a maritime lien in the circumstances presented in this case.[3] Pet. at 13. Indeed, this Court denied certiorari to nearly identical issues in 2008. *Splendid Shipping Sendirian Berhard v. Trans-Tec Asia*, 555 U.S. 1062 (2008). Since 2008, every circuit court to consider the issue has agreed with the Ninth Circuit's 2008 M/V HARMONY decision. No district court cases in other circuits that reach a contrary conclusion have been identified by either party.[4]

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[3] *See World Fuel Servs. Trading, DMCC v. Hebei Prince Shipping Co.*, 783 F.3d 507 (4th Cir. 2015); *Triton Marine Fuels Ltd., S.A. v. M/V PACIFIC CHUKOTKA*, 575 F.3d 409 (4th Cir. 2009); *World Fuel Servs. Singapore Pte Ltd v. BULK JULIANA M/V*, 822 F.3d 766 (5th Cir. 2016); *O.W. Bunker Malta Ltd. v. MV TROGIR*, 602 Fed. Appx. 673 (9th Cir. 2015); *Trans-Tec Asia v. M/V HARMONY CONTAINER*, 518 F.3d 1120 (9th Cir. 2008).

[4] To be sure, some district courts have found that the particular facts of that case did not create a lien, but those district courts did not disagree with the legal conclusions of the cited circuit courts. *See, e.g., ING Bank N.V. v. M/V TEMARA*, No. 16-CV-2051 (KBF), 2016 WL 6156320 (S.D.N.Y. Oct. 21, 2016) (finding the plaintiff held no lien because it did not actually supply the vessel with bunkers). However, such

Against this weight of authority, Appellant can only cite *Rainbow Line, Inc. v. M/V TEQUILA*, 480 F.2d 1024 (2d Cir. 1973). Petitioner argues that *Rainbow Line* creates a circuit split supporting a grant of certiorari. Pet. at 13-18. But the circuit split identified by Petitioner is illusionary. As multiple appellate courts have found, *Rainbow Line* provides limited support for Petitioner's position because it is unreasoned, outdated and distinguishable.

Decided more than forty years ago, *Rainbow Line* concerned the distribution of sales proceeds after a vessel was arrested and sold by the U.S. Marshals Service. 480 F.2d at 1025. As part of the analysis in evaluating the priority of creditors, the Second Circuit was required to determine whether a charterer's claim for breach of a charter party had priority over a secured mortgage on the vessel granted by a subsequent owner. *Id.* The Second Circuit's "first issue" was to determine what law applied to the charterer's claim. *Id.* at 1026. Applying *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953), the Second Circuit concluded that U.S. law would apply because "virtually all of the points of contact in the transactions giving rise to this dispute are with the United States." *Rainbow Line*, 480 F.2d at 1027.

Before beginning its analysis of *Lauritizen*, the court made a passing observation that the charter party's choice-of-law provision that selected U.S. law played no role in the court's analysis. *Id.* at

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factual issues are not present in this case nor challenged on appeal.

1026. The court dedicated only two sentences in the body of the opinion to this conclusion, and an additional sentence in a footnote. *Id.* at 1026 & n.4.

Given its limitations, *Rainbow Line* is a poor case to support a circuit split on choice-of-law issues. First and foremost, the choice-of-law provision in *Rainbow Line* selected the very law that the Court applied. *Id.* at 1026-27. The Second Circuit's decision to avoid the choice-of-law provision was not necessary to its holding; whether the court enforced the provision or not, U.S. law would apply. The irrelevancy of the choice of law provision may explain the dearth of analysis by the Second Circuit.

Moreover, *Rainbow Line* was decided in 1973. This Court had addressed choice-of-forum provisions, which can serve as a choice-of-law provision, in maritime contracts just one year earlier. In the seminal case of *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), this Court embraced the use of choice-of-law provisions and forum selection provisions in maritime contracts. This Court explained that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *Id.* at 15.

In light of the tidal shift in the court's approach to international contractual provisions, it is surprising that the Second Circuit did not even mention the *Bremen* decision. The absence of any citation to *Bremen* underscores the Second Circuit's cursory and non-essential analysis of the choice-of-

law issues. *See M/V PACIFIC CHUKOTKA*, 575 F.3d at 415 (finding the *Rainbow Line* opinion unpersuasive and noting its failure to even reference "the Supreme Court's seminal decision in *Bremen*.").

Further, as the Fourth Circuit has explained, *Rainbow Line* "is also distinguishable on its facts" from a case in which bunker fuel is provided upon the request of a vessel's charterer. *Id.* at 415 n.3. Specifically, the issues in *Rainbow Line* do not address the provision of necessaries and instead address a charter party dispute that did not arise under a statute and had no relation to the Lien Act. At issue in this dispute is the application of the Lien Act and whether a statutorily-created lien exists in light of the underlying circumstances and contractual terms. Nearly identical issues were presented previously to the Fourth and Ninth Circuits which both concluded that a lien existed. *See Hebei Prince Shipping Co.*, 783 F.3d at 510-511; *M/V PACIFIC CHUKOTKA*, 575 F.3d at 411-41; *MV TROGIR*, 602 Fed. Appx. at 675; *M/V HARMONY CONTAINER*, 518 F.3d at 1122. Thus, this dispute presents a distinctly different type of maritime lien than the one involved in the *Rainbow Line* case.

Also importantly, *Rainbow Line* addressed the rights of a party significantly more removed from the transaction than the Petitioner-Claimant in this case. In *Rainbow Line*, the party whose priority was potentially affected by the existence of a lien was a mortgagee of the vessel's subsequent owner. *Rainbow Line*, 480 F.2d at 1025. At issue in the instant case are the respective rights of a supplier who provided necessaries to a vessel upon the order

of a charterer and the contemporaneous vessel owner who had given possession of the vessel to the charterer. These are the same issues that were at stake in the similar cases decided by the Ninth and Fourth Circuits. *See M/V PACIFIC CHUKOTKA*, 575 F.3d at 415 n.3; *M/V HARMONY CONTAINER*, 518 F.3d at 1127. As both the Fourth and Ninth Circuits have acknowledged, the remoteness of the relationship in *Rainbow Line* substantially differentiates the case from the facts presented by a bunker supplier. *Id.*

Apparently aware that *Rainbow Line* does not present a circuit split worthy of resolution by this Court, Petitioner attempts to rely upon two additional cases that never considered the questions presented in this appeal. Petitioner cites to *Tramp Oil & Marine, Ltd. v. M/V Mermaid I*, 805 F.2d 42 (1st Cir. 1986) to support an assertion that the First Circuit has "refused to enforce maritime liens under the [Lien Act]" "where the transaction lacks significant contracts with the U.S." Pet at 14. However, that was not the holding in *Tramp Oil*. The *Tramp Oil* court rejected the existence of the lien for the plaintiff because the plaintiff was an intermediary that neither took the order from the vessel nor provided the bunker fuel as required under the Lien Act. 805 F.2d at 46. There was no choice-of-law provision at issue, nor was there any question about what law should apply to the transaction. The court was presented with a request by the plaintiff to expand the statute to create a new lien or an equitable rule that the lien would transfer between suppliers. *Id.* Congress had not provided for this under the Lien Act. The court's comments

about the purposes of the Lien Act and foreign parties were "merely dicta." *M/V PACIFIC CHUKOTKA*, 575 F.3d at 418 (4th Cir. 2009).

Similarly, Petitioner's citation to *Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. Camilla*, 966 F.2d 613 (11th Cir. 1992) is inapposite. The Eleventh Circuit was quite explicit as to what issue it was deciding: "The question presented in this appeal is whether an English statutory right *in rem* constitutes a maritime lien for purposes of jurisdiction under Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims ('Rule C')." *Id.* at 614. The contract at issue in *Trinidad* did not involve a U.S. choice-of-law provision. To the contrary, the contract provided that "all aspects of the agreement were to be governed by English law." *Id.* Far from agreeing with Petitioner's position in the instant case that choice of law clauses are unenforceable, the Eleventh Circuit held that "[s]uch clauses are enforceable . . . [and thus] English substantive maritime law governs this dispute." *Id.* at 615. (emphasis added). When the plaintiff suggested the Lien Act might apply, the court rejected that proposition because English, not American law, governed the dispute pursuant to the choice of law clause. *Id.* at 617.

Put simply, there is no split among the circuit courts on the issues presented in this case. Three circuit courts—the Fourth, the Fifth, and the Ninth—have considered the precise issues in this case and all three circuit courts are in agreement. No circuit court presented with this scenario has ruled differently. Where a supplier provides

necessaries to a vessel upon an order of a charterer with apparent authority, and the supply agreement contains a U.S. choice-of-law provision, U.S. law, including the Lien Act, applies. Petitioner's attempt to create the appearance of a conflict by relying upon the inapposite cases of *Rainbow Line, Tramp Oil* and *Trinidad* does not undermine the unanimity.[5] Unless and until a circuit court squarely confronts the issues and reaches a contrary conclusion, a Writ of Certiorari cannot be justified based upon a split among the circuits on the questions presented in the Petition.

II. The first question presented does not accurately describe the issues in dispute.

Supreme Court Rule 14.a instructs that the issues presented by the Petition must be concisely stated. As this Court has noted, the Rule has as its purpose to constrain the issues before the Court and to provide important information to both the Respondent and the Court. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535-36 (1992). Inherent in Rule 14.a is the requirement that the Question Presented accurately describe the issues in dispute based on the facts before the Court. This Court is constitutionally constrained to decide actual cases and controversies; the Court may not give

[5] Petitioner's suggestion that there is a "tension" between the Fifth Circuit's opinion in this case and previous Fifth Circuit opinions is not well taken. Pet. at 15-17. The Fifth Circuit has rejected that idea. Pet. App. at 17 n.3. Even assuming *arguendo* that such a "tension" existed, the Fifth Circuit itself, sitting *en banc*, is the appropriate venue to resolve any such "tension."

advisory opinions on hypothetical facts. *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947).

Certiorari would be inappropriate in this case because the first Question Presented describes facts that are not supported by the record in this case or the decision of the courts below. The first Question Presented asks that the Court consider whether parties "who have no actual or apparent authority to bind the vessel" can create a maritime lien. Pet. at i. But this case does not present that issue because the Lien Act states, and the District Court and Fifth Circuit both found, that a vessel's charterer has apparent authority to bind the vessel.

The Lien Act specifically provides that a charterer is presumed to have authority to procure necessaries for a vessel. 46 U.S.C. § 31341; see also *Galehead, Inc. v. M/V Anglia*, 183 F.3d 1242, 1245 (11th Cir. 1999) ("A charterer is authorized under the statute to bind a vessel for necessaries."). There is no dispute that the bunker fuel provided in this case was a "necessary" within the meaning of the Act. *See, e.g., Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC*, 814 F.3d 146, 151 (2d Cir. 2016) ("For the purposes of § 31342, bunkers are 'necessaries.'").

The District Court and Fifth Circuit both concluded that the bunkers were ordered by Denmar, and that is not challenged on appeal. *See* Pet. Appx. at 2. Denmar was the charterer of the vessel. *Id.* As charterer, Denmar had the presumptive and apparent authority to bind the

vessel *in rem* for its purchase of bunkers. *See* 46 U.S.C. § 31341(a)(4)(b). As the Fifth Circuit explained in its opinion below, "Denmar as time charterer had authority to bind the vessel *in rem* for its purchase of bunkers." Pet. Appx. 16. Petitioner's attempt to claim that the question presented is whether a party who has "no actual or apparent authority to bind the vessel" can create a maritime lien misstates the relevant issues.

Accordingly, this case does not actually present the question which Petitioner seeks the Court to answer, and thus certiorari is unnecessary.

III. The choice-of-law provision does not "create" the lien in this case.

Petitioner argues that the choice of law provision in the WFS Terms improperly "creates" by contract the maritime lien at issue in this case, and for that reason it is invalid. Petitioner cites as the principal support for its argument a law review article, while candidly conceding that three federal circuit courts have considered and rejected the argument. Pet. 10-11, 13. In identifying the choice of law clause as the operative agent in the contract that creates the lien for necessaries, Petitioner overlooks the fact that even long before passage of the Lien Act, the determinative factor for a maritime lien was the *nature* of the contract – the determinative factor was that it must be a contract to provide necessaries to a ship.

Although Congress has chosen to alter its terms and requirements, the maritime lien for

necessaries has existed for hundreds of years. *See, e.g., The Jefferson*, 61 U.S. 393, 400 (1857). The lien was created as a "necessary incident" to the operation of vessels. *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 9 (1920). The very purpose of a ship is to move from place to place and the ship is "peculiarly subject to vicissitudes which would compel abandonment of vessel or voyage, unless repairs and supplies were promptly furnished." *Id.* The maritime lien allows supplies and other necessaries to be provided where contemporaneous payment is not made. *Veverica v. Drill Barge Buccaneer No. 7*, 488 F.2d 880, 883 (5th Cir. 1974).

It is against this backdrop that Petitioner argues that a maritime lien "cannot be created by agreement." Pet. at 9. In support of this assertion, Petitioner quotes from *Newell v. Norton*, 70 U.S. (3 Wall) 257 (1865). But, Petitioner's assertion is rejected by the very language it cites. *Newell* itself focuses on the contract. A maritime lien is created "from the nature and object of the contract." *Id.* at 262. Contrary to Petitioner's argument, the agreement between the vessel's representative and the supplier of necessaries always "creates" the lien as Petitioner uses the word "create."

The terms and the nature of the contract always control whether a maritime lien arises. A lien is created when the terms of the contract fit within the universe of contracts for which U.S. maritime law recognizes liens. For example, if the contract does not specify that the necessaries supplied are for a specific vessel, no lien attaches.

See, e.g., Itel Containers Int'l Corp. v. Atlanttrafik Exp. Serv. Ltd., 982 F.2d 765 (2d Cir. 1992) (denying validity of lien because the containers supplied were not "designated for use on any particular ship."). A contractual arrangement that specifies the vessel creates a lien; a contract that does not specify the vessel does not. But the specification of the vessel does not "create" the lien.

Petitioner is seeking to stretch a tangentially-related doctrine to cover this case. Courts do sometimes use language to the effect that liens cannot be created merely by consent or contract. But that axiom means only that the inclusion of a provision that a contracting party "shall have a maritime lien on the Vessel" does not create a lien where maritime law has not found provision of the specific good or service to create such a lien. *See, e.g., Comar Marine, Corp. v. Raider Marine Logistics, L.L.C.*, 792 F.3d 564, 571 (5th Cir. 2015) (finding that the breach of a management agreement does not create a lien despite language in the agreement seeking to create a lien). But, the cases do not indicate that parties cannot choose what country's lien law applies to their contract.

The situation is analogous to the judicial adage that parties cannot create subject-matter jurisdiction in a federal court by agreement. *See, e.g., Pittsburgh, C. & St. L.R. Co. v. Ramsey*, 89 U.S. 322, 325 (1874). But, of course, parties can, create subject-matter jurisdiction <u>through</u> an agreement. Maritime law presents a concise example of the distinction. It is the existence of a maritime contract and the nature of its terms that create subject

matter jurisdiction in countless admiralty cases. *See, e.g., Goodman v. 1973 26 Foot Trojan Vessel, Arkansas Registration No. AR1439SN*, 859 F.2d 71, 72 (8th Cir. 1988) ("A contract dispute falls within admiralty jurisdiction if the subject matter of the contract is maritime"). This is also the case with certain labor contracts. *See, e.g., Olson v. Bemis Co.*, 800 F.3d 296, 300 (7th Cir. 2015). But for the existence of the contract and its terms, no jurisdiction would exist in these cases. But, it is not fair to say that the contract or consent "creates" the jurisdiction. The jurisdiction exists because the contract's terms bring the suit within the court's jurisdictional boundaries.

In a similar way, the parties in this case did not create the lien at issue in this case through contract—Congress created the lien. The requirements to create the lien are not provided by the parties, they are provided by the Lien Act. In this case, a fuel supplier owned by a U.S. company provided fuel to a vessel that was beneficially owned by a U.S. company, and the contractual terms selected the predictability and certainty of U.S. law to govern the transaction. That the choice-of-law provision must be in the contract before the Lien Act applies no more "creates" a maritime lien than a provision in the contract specifying the specific vessel for which a necessary is supplied "creates" the lien.

The lien in this case was created by statute, not contract, and because the transaction meets the requirements of the Lien Act, a lien against the vessel was incurred. Each of the circuit courts that

have considered the issue have determined that the Lien Act, and not the parties' choice-of-law provision, creates the lien. *See, e.g., Hebei Prince Shipping Co.*, 783 F.3d at 509; *M/V PACIFIC CHUKOTKA*, 575 F.3d at 416. No Writ of Certiorari needs to be granted to address these issues.

IV. Vessel owners' property rights are not threatened by the opinion below.

Petitioner suggests that the decision below threatens its property rights in the vessel, and its substantial property interest justifies this Court granting certiorari. The argument is flawed both legally and equitably.

First and foremost, as even Petitioner admits, plaintiff did not seek a judgment against the Petitioner; the claim asserted was against the vessel M/V Bulk Juliana herself. Pet. at 19 n.2 ("[M]aritime law treats the vessel as a separate person liable, *in rem*, for its debts . . . ").

> The maritime lien is a lien on a vessel and only indirectly, inasmuch as it conflicts with the owner's rights in the vessel, is it connected with the owner. The maritime lien is a proprietary interest or right in the steamer itself, and not a cause of action or demand for a personal judgment against its owner.

Pierside Terminal Operators, Inc. v. M/V Floridian, 389 F. Supp. 25, 26 (E.D. Va. 1974). Instead, "[t]he maritime lien concept thus somewhat personifies a vessel as an entity with potential liabilities independent and apart from the personal liability of its owner." *Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 602 (5th Cir. 1986).

Of course, a vessel cannot literally act. Instead, just as with a corporation, some set of humans must act on its behalf. Petitioner's argument suggests that only the owner should be able to act on behalf of the vessel and incur liens. But allowing a non-owner to create liability against the vessel is the very purpose of portions of the Lien Act. 46 U.S.C. § 31341 is specifically intended to allow non-owners to incur a lien against a third party's property. Importantly, however, no maritime lien arises from the actions of an individual who has unlawful possession of the vessel. *See* 46 U.S.C. § 31341(b). Only those individuals to whom the owner has voluntarily given possession of the vessel can incur liens under the Lien Act.

The superficial appeal of the argument that a property right of the Petitioner has been lost without its consent cannot be sustained after a review of the law. Specifically, in the context of this case, the charterer is, by act of Congress – the Lien Act – empowered to enter into contracts that create a lien on property of Petitioner. The vessel owner's consent is not required. This is no surprise to any vessel owner.

But, the Petitioner's suggestion that a vessel owner is a helpless victim deprived of its property is untrue. As the Court below explained:

> Owners of ocean-going vessels are by their nature internationally oriented, sophisticated, and fully able to protect themselves contractually in their dealings with time charterers from any perceived unfairness by the possible enforcement of maritime necessaries liens in U.S. ports.

Pet. Appx. at 16.

If an owner were genuinely concerned about its "property right" in the vessel, it could take "any number of steps, including requiring the charterer to post a bond, demanding a letter of credit or even possibly procuring some sort of insurance, in order to protect its interest in the Vessel from the effects of a maritime lien . . . ." *M/V PACIFIC CHUKOTKA*, 575 F.3d at 416 n.4. Beyond those steps, a vessel owner can also take the easy step of informing fuel suppliers that no lien can be taken against the vessel. *See M/V HARMONY CONTAINER*, 518 F.3d at 1131 n.10. Indeed, the Fifth Circuit has specifically rejected a bunker supplier's right to a maritime lien when the owner had taken the cursory step of sending a letter to a fuel supplier indicating that the vessel could not be encumbered. *See Gulf Oil Trading Co. v. M/V CARIBE MAR*, 757 F.2d 743, 746-49 (5th Cir. 1985). Petitioner took none of these steps to protect its "property right."

Petitioner's loss is caused by a lack of self-protection and diligence, not from a deprivation of its rights.

Allowing a maritime lien in these circumstances presents no great threat to the owners of vessels. Maritime liens are levied against the vessel itself, and vessel owners are sophisticated parties that can protect their property interest in a myriad of ways.

V. This Court should not grant certiorari on this petition to address the contractual meaning of "General Maritime Law of the United States."

Petitioner contends that this Court should grant its petition to provide guidance on whether the term "General Maritime Law of the United States" is limited to judge-made law or whether the term includes the statutory provisions of the U.S. Code. Two circuit courts have now considered this exact choice-of-law provision in the context of specific bunker supply contacts, and both agree the provision includes the Lien Act. *See* Pet. Appx. at 18-21; *Hebei Prince Shipping Co.*, 783 F.3d at 519-21. No circuit court has disagreed.

Even if there were value in reevaluating the abstract meaning of the term "General Maritime Law of the United States" this case provides a poor vehicle to reach the issue. In this case, the phrase is a specific contractual term in a particular contract, so granting a Writ of Certiorari on this matter would not provide this Court the opportunity to address the abstract

meaning of this term. In addition, the Fifth Circuit correctly defined the term, and then proceeded to provide an alternative ground for affirmance that Petitioner does not challenge on appeal.

The meaning of contractual language is based on more than the bare technical definition of the language alone; it is informed by the broader context of the entire contract. *U.S. v. Utah, N & C. Stage Co.*, 199 U.S. 414, 423 (1905) (""The elementary canon of interpretation is not that particular words may be isolatedly considered, but that the whole contract must be brought into view, and interpreted with reference to the nature of the obligations between the parties, and the intention which they had manifested in forming them."' (citing *O'Brien v. Miller*, 168 U.S. 287, 296-97 (1897)).

The term "General Maritime Law of the United States" appears in Paragraph 17 of the relevant Terms and Conditions. Pet. Appx. at 23. The provision provides in relevant part that:

> The General Terms and each Transaction shall be governed by the General Maritime Law of the United States and, in the event that the General Maritime Law of the United States is silent on the disputed issue, the law of the State of Florida, without reference to any conflict of laws rules which may result in the application of the laws of another jurisdiction.

Id.

Petitioner's request would require this Court to undergo an analysis of this particular contract's use of the term, "General Maritime Law of the United States" as opposed to an analysis of the term's meaning generally. It is unlikely that the meaning of this particular contract provision in the context of one company's terms and conditions justifies such an analysis by this Court.[6] *See* Sup. Ct. R. 10. ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

Moreover, there is no error in the Fifth Circuit's decision. As noted by the Fifth Circuit, the term must include the Lien Act because to hold otherwise would be ignoring the other provisions of the contract and bunker confirmation that indicate a maritime lien would be created. The bunker confirmation email stated that the buyer had the ability to bind the M/V BULK JULIANA with a maritime lien. Pet. Appx. at 3. Further, as noted by the Fifth Circuit, Paragraph 8(d) of the General Terms provides that a charterer may bind the registered owner of the vessel to pay for necessaries, and the only way in which a charterer can bind a

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[6] Judge Mark Davis of the United States District Court for the Eastern District of Virginia has already undertaken an extremely detailed analysis of this exact contractual term, tracing the history of the term, the interplay of the term and the statutory law of the United States, and the term's meaning within the contract. *See World Fuel Servs. Trading, DMCC v. M/V HEBEI SHIJIAZHUANG*, 12 F. Supp. 3d 792, 805–08 (E.D. Va. 2014), *aff'd on other grounds in Hebei Prince Shipping Co.*, 783 F.3d at 521.

vessel for the purchase of necessaries is through a maritime lien. *Id.* at 4, 20. As discussed above, courts properly define contract terms with reference to the entire contract and seek to avoid any definitions that would render other provisions meaningless. If the choice-of-law provision was selecting only the portion of U.S. law unrelated to maritime liens, the references in the contract to a maritime lien would be meaningless.

Further, including statutory law in the term "General Maritime Law of the United States" is consistent with several courts' use of that phrase. *See*, *e.g.*, *United States v. Austal USA LLC*, 815 F. Supp. 2d 948, 956-57 (E.D. Va. 2011) (considering 46 U.S.C. § 31326(b) when the contract called for the application of the "general maritime laws of the United States of America"); *Filippou v. Italia Societa Per Azioni Di Navizione*, 254 F. Supp. 162, 163 (D. Mass. 1966) (describing "the general maritime law of the United States" as "including the Jones Act."). If courts use the phrase expansively to include statutes, a contract may certainly do so as well.

The two cases Petitioner relies upon are both inapposite for the same reason. *In re Eagle Geophysical, Inc.* 256 B.R. 852 (Bankr. D. Del. 2001) involved an analysis by a bankruptcy court of a claim of lien by a claimant which could not satisfy the requirements of the Lien Act. Instead, it sought to assert a lien under the general maritime law. That court correctly observed that the Lien Act was the result of Congress codifying the common law maritime liens into a statute. The claimant could

not satisfy the statutory requirements. The claimant attempted to argue that a lien existed outside of the Lien Act, but the court rejected that assertion.

Likewise, Petitioner cites *Triton Marine Fuels, Ltd. v. M.V PACIFIC CHUKOTKA*, 671 F. Supp. 2d 753 (D. Md. 2009)[7] in which a party was seeking a lien beyond that provided for under the Lien Act. The court said nothing about whether the Lien Act was part of the general maritime law; it simply held that the plaintiff's rights were limited to the Lien Act, and that there was no additional lien under the general maritime law available to the plaintiff.

Even if the contractual term "General Maritime Law of the United States" did not include statutory law, the Lien Act would still apply under the contract. The Fifth Circuit provided an alternate basis for its ruling, which Petitioner did not challenge on appeal. Pet. Appx. at 21.

The choice-of-law provision provides that Florida law shall apply if an issue of law is not addressed by the general maritime law. *Id.* at 21 n.4. The Fourth Circuit considered this exact choice-of-law provision in *Hebei Prince Shipping Co.*, 783 F.3d at 519-21 and explained that even assuming *arguendo* that the "General Maritime Law of the United States" did not include the Lien Act, Florida

[7] This was the district court decision, on remand, after the Fourth Circuit found that the bunker supplier was entitled to a lien under the Lien Act in *Triton Marine Fuels Ltd., S.A. v. M/V PACIFIC CHUKOTKA*, 575 F.3d 409 (4th Cir. 2009).

law would still govern the dispute. The court explained that "Florida law must be deemed to include United States law - by case law or by statute" and that "[a] choice-of-law provision directing us to the laws of Florida thus encompasses federal statutory law, including the [Lien Act]." *Id.* at 521. The Fifth Circuit noted that its decision in this case was consistent with this holding. Pet. Appx. at 21.

Thus, a writ of certiorari is unnecessary because a determination of the meaning of a particular contractual provision does not justify this Court's time and attention, the provision has been interpreted consistently by the lower courts, and because Petitioner has failed to appeal the alternative basis for affirmance.

VI. The granting of certiorari will create, not remove, uncertainty in the shipping industry.

Respondent agrees with Petitioner's assertion that "[i]t is no exaggeration to say that the U.S. and world economies largely depend on the ocean shipping industry." Pet. at 27. Respondent also agrees that "[t]he global maritime lien system is a central part of the equation." Pet. at 28.

And the global shipping industry is in a state of financial distress. One of the largest maritime fuel providers, O.W. Bunkers, collapsed and declared bankruptcy in 2014. *See O'Rourke Marine Servs. L.P., L.L.P. v. M/V COSCO Haifa*, No. 15-CV-2992 (SAS), 2016 WL 1544742, at *1 (S.D.N.Y. Apr. 8,

2016). The world's seventh largest shipping company declared bankruptcy just months ago. *See* Natalie Kitroeff, *Hanjin Bankruptcy is the Tip of the Iceberg for Flailing Shippers*, Los Angeles Times, September 18, 2016, http://www.latimes.com/business/la-fi-hanjin-shipping-industry-crisis-20160913-snap-story.html. There are fears that other shippers are also destined for bankruptcy in the coming months. *Id.*

Amidst this financial turmoil, Petitioner requests this Court grant certiorari to create predictability in the supply of necessaries and maritime liens under the Lien Act. Pet. at 28. But there is no uncertainty in the present system—the decision below of the Fifth Circuit is consistent with the previous decisions of the Ninth and the Fourth Circuits. Over the course of the past eight years since the Ninth Circuit decided *M/V HARMONY CONTAINER* in 2008, ship owners, charterers, and bunker suppliers have known that their transactions created a maritime lien against vessels. This belief was reinforced when this Court denied certiorari in 2008 to that Ninth Circuit case. *See Splendid Shipping Sendirian Berhard v. Trans-Tec Asia*, 555 U.S. at 1062. Since 2008, every court has followed that Ninth Circuit decision.

All participants in the marine shipping industry have been able to operate with certainty; they have been able to structure their relationships and transactions knowing that their contractual arrangements will be recognized. Fuel suppliers have known that supplies could be provided to vessels without contemporaneously collecting

payment because they were guaranteed by the credit of the supplied vessel. Owners could structure their agreements with charterers with knowledge that charterers might incur liens against the vessel. Vessel mortgagees have known of the risk of fuel-related liens.

Far from creating certainty, granting certiorari would create uncertainty. The potential effect of a grant of certiorari on new transactions while this case is pending before this Court is disconcerting. Regardless of how the Court eventually should rule, the mere grant of certiorari would create the uncertainty Appellant claims to condemn.

If this Court were to grant certiorari on this petition, the uncertainty about maritime liens could lead to substantial changes in the ocean shipping industry. Any sophisticated supplier of necessaries would have to reevaluate the credit risk of supplying critical supplies like fuel, food, and water to international vessels without contemporaneous payment. Providing such supplies would carry additional risk of default and non-payment that is currently absent from the market. Without assurance that the supplies were on the credit of the vessel, there would be increased uncertainty about whether charterers could obtain the supplies needed to continue to operate the vessels. Such a potential credit freeze would inject the uncertainty that Petitioner would want to avoid if its concerns about "certainty" in the international shipping market were genuine.

A grant of certiorari would not eliminate uncertainty; it would spawn uncertainty because it threatens to disrupt the current credit structure in the international shipping industry.

CONCLUSION

For the reasons outlined above, this Court should deny the Petition seeking a Writ of Certiorari in this case.

Respectfully submitted,

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