No. 16-26

IN THE

Supreme Court of the United States

BULK JULIANA LTD. and M/V BULK JULIANA, her engines, tackle, apparel, etc., *in rem*,
Petitioners,

v.

WORLD FUEL SERVICES (SINGAPORE) PTE, LTD.,
Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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INTRODUCTION

The government's reframing of the question presented in its brief (U.S. Br. I) confirms that the four questions presented in the Petition all boil down to one key overarching issue which warrants this Court's review: whether a foreign supplier of fuel to a foreign charterer of a foreign-flag vessel may by contract with the charterer impose a statutory lien against the vessel under the Federal Maritime Lien Act (FMLA). *See* 46 U.S.C. § 31342(a). Under Second Circuit precedent, the answer is clearly no. The Fifth Circuit here, following the positions of the Fourth and Ninth Circuits, holds to the contrary.

Although the government claims there is insufficient confusion among the courts to warrant review, its own brief itself reflects the state of incoherence on this issue. Notably, the government cannot even make up its mind as to why, in its view, the court of appeals was correct. Initially, the government embraces the Fifth Circuit's conclusion that the lien here arises under the statute, not by force of contract alone. *See* U.S. Br. 12 ("[The] maritime lien did not arise simply as a matter of contract, but as a matter of law under the FMLA." (quoting Pet. App. 17)). But just pages later, the government relies on the opposite reasoning—saying that this case turns on the contract language, not statutory construction. U.S. Br. 20 ("[I]t is the … agreement that the FMLA would govern their transaction—not the extraterritorial reach of the statute of its own force—that makes the FMLA's provisions applicable.").

The government, like the Fourth, Fifth, and Ninth Circuits, wrongly views FMLA liens as something foreign parties to a wholly foreign transaction can adopt by contract. In the FMLA, however, Congress codified into statute that *domestic* suppliers have an extraordinary in rem action in federal court to enforce the statutory lien, a right largely unknown to suppliers around the world. Enforcing such an in rem action against a ship requires a warrant of arrest issued by a U.S. District Court, executed against the ship by a U.S. Marshal, pursuant to Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims.

The question here is whether Congress intended to allow foreign parties, which cannot otherwise invoke these statutory lien powers, to do so by adding a choice-of-law clause to their contract. The correct answer is that embraced by the Second Circuit—that the right to a federal maritime lien arises only under federal maritime law, and is not a chattel subject to the contractual bargains of foreign parties conducting foreign transactions. And the proper reading of the statute here is that it extends only to domestic suppliers and does not apply to wholly foreign transactions. The contrary approach is inconsistent with Congressional intent, and serves to make U.S. ports (and U.S. courts) magnets for foreign suppliers seeking to enforce wholly foreign contracts.

This issue, which has divided the largest port circuits, is of great importance and warrants this Court's review.

I. The Question Whether Foreign Parties Can Contract For The Imposition Of An FMLA Lien Merits This Court's Review.

A. The courts of appeals are divided.

The government claims that the Fifth Circuit's decision, which followed Fourth and Ninth Circuit precedents,[1] does not conflict with the Second Circuit's decision in *Rainbow Line, Inc. v. M/V TEQUILA*, 480 F.2d 1024 (2d Cir. 1973). That is incorrect.

In *Rainbow Line*, the Second Circuit held that a contractual choice-of-law clause cannot invoke a maritime lien, for such liens can arise only by operation of federal law. That court made clear that the maritime lien right is a matter of federal maritime law, not contract: "[M]aritime liens arise separately and independently from the agreement of the parties, and rights of third persons cannot be affected by the intent of the parties to the contract." 480 F.2d at 1026. The court expressly rejected the argument that a choice-of-law provision selecting U.S. law can alter when a lien arises under federal law and can be enforced by U.S. courts.

The Second Circuit's analytical approach is fundamentally at odds with that of the Fourth, Fifth, and Ninth Circuits. In the view of the latter courts, all that matters is the choice-of-law clause. *E.g.*, *Trans-*

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[1] *See Triton Marine Fuels Ltd. v. M/V PACIFIC CHUKOTKA*, 575 F.3d 409 (4th Cir. 2009); *Trans-Tec Asia v. M/V HARMONY CONTAINER*, 518 F.3d 1120 (9th Cir. 2008).

Tec, 518 F.3d at 1126-27; Pet. App. 16-17. The conflict is stark and fundamental. *See* Mark S. Davis & Jonathan T. Tan, *To Port or Starboard?*, 46 J. Mar. L. & Com. 395, 398 (2015) (discussing this "well-established" conflict); *see also, e.g.*, *Triton*, 575 F.3d at 414 (recognizing the "split of authority among the circuits as to this issue"); 1 Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 9-8 & n.14 (5th ed. 2016) (recognizing the conflict); David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 33 Tul. Mar. L.J. 381, 444-46 (2009) (same); Martin Davies, *Choice of Law and U.S. Maritime Liens*, 83 Tul. L. Rev. 1435, 1456 (2009) (same).

Under the Second Circuit's approach, a court would look at whether the applicable federal law provides a maritime lien in the particular context. In *Rainbow Line* itself, the court of appeals undertook a contacts analysis under *Lauritzen v. Larsen*, 345 U.S. 571 (1953), in determining whether there was a sufficient domestic connection for federal law to apply. 480 F.2d at 1026-27. In the Ninth Circuit, Judge Watford advocated the same approach in arguing that the Ninth Circuit's prevailing rule is misguided. *O.W. Bunker Malta Ltd. v. MV TROGIR*, 602 F. App'x 673, 677 (9th Cir. 2015) (Watford, J., concurring).[2]

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[2] In the present case, a threshold issue would be whether Congress intended the right to supplier liens to apply to foreign parties. The proper reading of the FMLA is that such liens are limited to American suppliers. *Infra* 7-12. But to the extent a broader contacts analysis is relevant in this context, nobody disputes that such an analysis would point to Singapore. *See* Pet.

In contrast, in the Fourth, Fifth, and Ninth Circuits, the contract's choice-of-law provision controls, no matter whether the supplier was foreign or whether the transaction was wholly foreign in nature. Those courts would not even consider the *Lauritzen* factors. Deepening this division is the fact that these courts disagree with the Second Circuit as to whether two parties to a contract can bind and thereby prejudice a non-party through a choice-of-law clause. Reply Br. 2-4.[3] The approaches in the relevant port circuits could not be more different.

The government myopically notes that the Second Circuit did not address these issues in the specific context of a foreign supplier. U.S. Br. 18. True, but *Rainbow Line* establishes a clear overarching rule that federal maritime liens are not bargaining chips for foreign parties to assign, not least where, as here, a third party would be left with the bill. It is no accident that the application of this clear precedent in this particular context has not arisen in the Second Circuit. No foreign supplier in a foreign transaction

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App. 9. And in Singapore, as in most the rest of the world, a supplier would have no such lien. *Id.* at 12.

[3] The government contends (U.S. Br. 13-14, 17-18) that there is no circuit conflict (or error) on this issue because Denmar, as time charterer, had presumptive authority to bind the vessel to a maritime lien for necessaries. That would be true under the FMLA, but not Singapore law, which governed contract formation. As previously explained, and reiterated *infra* 7-12, the FMLA cannot, by its terms, reach this transaction. Regardless, Denmar had no authority to bind Petitioners to a choice-of-law clause. *Cf. EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (a nonparty to a contract could not be bound to an arbitration clause).

would have any incentive to assert an FMLA lien in New York because, under *Rainbow Line,* the supplier could not claim that right by contract alone.[4]

B. The Second Circuit's approach is correct.

The petition cites authorities of this Court supporting the rule that maritime liens arise only by law, not contract. Pet. 8-9 (citing, *inter alia*, *The Bird of Paradise*, 72 U.S. 545, 555 (1866); *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 10-12 (1920)). The government acknowledges those cases, but argues none dealt with a choice-of-law clause electing U.S. law. U.S. Br. 13. The government also suggests Petitioners' position means "parties to a maritime necessaries contract may not select the law governing their agreement." *Id.* at 12. Both arguments are misguided.

Petitioners do not contend that choice-of-law clauses are invalid insofar as they select U.S. rules of decision to govern the relationship between contracting parties. Foreign parties cannot, however, use a choice-of-law clause to create a U.S. maritime lien in

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[4] The government claims *ING Bank N.V. v. M/V VOGE FIESTA*, *appeal docketed*, No. 16-4023 (2d Cir. Dec. 1, 2016), may provide the Second Circuit "the opportunity to clarify its position" on whether a foreign fuel supplier and foreign charterer can use a choice-of-law clause to bind a vessel to an FMLA lien. U.S. Br. 19 & n.6. The district court in that case did not even discuss the statutory issue presented here. *ING Bank N.V. v. M/V TEMARA*, No. 16-cv-95 (KBF), 2016 WL 6156320 (S.D.N.Y. Oct. 21, 2016).

a transaction involving a foreign supplier and a foreign vessel in a foreign port where the law confers no such lien—much less where, as here, the property rights of nonparties to the agreement are at stake. *See supra* 5.

When an FMLA lien attaches to a vessel, the lienholder obtains a powerful statutory right against the world, including the right to arrest and seizure of the ship by a U.S. court and the U.S. Marshals Service. "The entire point of a maritime lien … is to have an impact beyond the immediate parties to a transaction. … It is precisely because liens are most significant when they affect the rights of third parties that they cannot be created by agreement." Robertson & Sturley, *supra*, at 446. The government repeatedly attempts to question this established principle, quoting, for example, *The Bird of Paradise*, 72 U.S. at 555. U.S. Br. 13. But that case merely held that maritime liens may be extended or modified by agreement *once created by law*. 72 U.S. at 555. Extending or modifying an existing lien (or simply affirming its existence) is hardly the same as creating one out of whole cloth by contract. Ultimately, the government confuses a run-of-the-mill choice-of-law issue with the right to contract for a lien (with its powers of arrest and seizure) that may be conferred by law alone.

II. Review Is Warranted On The Question Whether The FMLA Applies To Foreign Suppliers And Wholly Foreign Transactions.

1. The government does not and cannot dispute that both *Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. CAMILLA*, 966 F.2d 613, 617 (11th Cir.

1992), and *Tramp Oil & Marine Ltd. v. M/V MER-MAID I*, 805 F.2d 42, 46 (1st Cir. 1986), hold that the FMLA provides no lien to a foreign supplier supplying a foreign-flag vessel in a foreign port. Reply Br. 7-9. The government tries to avoid this clear conflict with the Fourth, Fifth, and Ninth Circuits by arguing that "application of the FMLA to this dispute based on the contract's choice-of-law provision does not directly implicate the FMLA's geographic scope." U.S. Br. 20. The predicate question, however, is whether Congress intended the extraordinary FMLA lien power to extend to foreign parties and foreign transactions. If, as we have explained, Congress did not so intend, then this Court needs to decide whether parties can nonetheless contract for the U.S. courts and the U.S. Marshals Service to provide a powerful remedy that Congress did not furnish.

The government attempts to evade this key issue by asserting that the question of whether an FMLA lien can arise out of wholly foreign conduct was raised "belatedly." U.S. Br. 22. There was no tardiness, however. The issue was raised even in the district court, where Petitioners emphasized that "the intent of the [FMLA] … was to protect *American* suppliers of goods in *United States* ports." D. Ct. Dkt. 50-1, at 13. Petitioners argued that "[t]here is no basis to suggest that the FMLA was ever intended to protect a Singapore company for the supply of goods to a foreign flag vessel in Singapore" because "U.S. law and policy counsel against extraterritorial application of U.S. law." D. Ct. Dkt. 60, at 5.

Likewise, in the court of appeals, Petitioners reiterated that "the dispositive issue … is what law

should apply when a Singapore bunker supplier uses a Singapore subcontractor to supply bunkers to a Panamanian vessel in Singapore on the order of a German [time] charterer." Pet'rs C.A. Opening Br. 17. The Fifth Circuit rejected the argument that "United States law has no application to this Singapore-centric transaction." *Id.* at 12. Instead, the court agreed with the Ninth Circuit's *Trans-Tec* decision permitting a foreign supplier in a foreign transaction to enforce an "FMLA lien, where the choice of law was adopted in a contract concerning the sale of fuel to a foreign-flagged vessel in a foreign port." Pet. App. 15. The court here held that, where there is a contractual choice of U.S. law, the FMLA provides such a lien without regard to the existence of any U.S. contacts with the transaction: "As a matter of black letter law under the FMLA, based on the parties' valid choice of U.S. law … the lien is enforceable in U.S. courts." *Id.* at 16.

The petition to this Court properly challenges this holding and rationale regarding the FMLA's geographic reach. Pet. 14-15 ("[W]here the transaction lacks significant contacts with the U.S., the First Circuit and the Eleventh Circuit have refused to enforce maritime liens under the FMLA.").

2. Contrary to the government's arguments, extending FMLA liens to wholly foreign transactions violates the "longstanding principle of American law" that, absent clear congressional expression to the contrary, U.S. statutes are presumed to apply to "domestic conditions," not wholly foreign conduct. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). The rationale for this rule applies fully here. First, the

rule ensures that "the limited resources of United States courts and law enforcement agencies" (like the Marshals Service) are conserved for regulation of "conduct that has a substantial connection to the United States." Br. for the United States As Amicus Curiae Supporting Respondents, *Morrison*, 561 U.S. 247 (No. 08-1191), 2010 WL 719337, at 16. Second, the rule "protect[s] against unintended clashes between our laws and those of other nations." *Id.* at 23 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). This aims to prevent potential international discord, especially where, as here, the law "affords private plaintiffs litigation procedures and remedies that other countries … do not provide." *Id.* at 27.

The government contends that the parties can contract to extend federal law to a foreign transaction. U.S. Br. 20. But, as discussed, that confuses a valid choice-of-law provision addressing the rights of the parties *relative to each other*, with a federal statutory right against the world, such as a maritime lien. As *Morrison* holds, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." 561 U.S. at 255. Thus, whether the FMLA lien powers provided by Congress can be invoked by foreign suppliers regarding a foreign transaction is a question of statutory construction, not contract.

The geographic "focus" of the FMLA, *id.* at 266, is on the "person providing necessaries to a vessel" and, specifically, American suppliers. *See* 46 U.S.C.

§ 31342(a); Reply Br. 7-8.[5] Absent an "affirmative[] and unmistakabl[e] instruct[ion]," *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016), that this "person" can be foreign or that the provision of necessaries can occur abroad for an FMLA lien to attach, the presumption against extraterritoriality holds. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) ("[G]eneric terms like 'any' or 'every' do not rebut the presumption against extraterritoriality.").

When "[t]he probability of incompatibility with the applicable laws of other countries" is "obvious," this Court has said it particularly expects "that if Congress intended such foreign application, it would have addressed the subject of conflicts with foreign laws and procedures." *Morrison*, 561 U.S. at 269. The conflict is obvious here; most countries do *not* recognize a maritime lien for necessaries or permit a charterer to bind a vessel to a lien absent actual authority. Robertson & Sturley, *supra*, at 444. Had Congress intended to provide foreign suppliers, engaging in wholly foreign transactions, the extraordinary right

[5] The government incorrectly suggests (U.S. Br. 3) that the 1910 codification of the FMLA "effectively put foreign and domestic suppliers of necessaries on equal footing." The case cited by the government, which involved an American supplier, demonstrates *not* that foreign and domestic *suppliers* are on the same footing, but that the 1910 Act sought to put foreign and domestic *vessels* on equal footing. *Dampskibsselskabet Dannenbrog v. Signal Oil & Gas Co. of Cal.*, 310 U.S. 268, 271-73 (1940). Moreover, as even the Ninth Circuit acknowledges, the legislative history makes clear that Congress "had American suppliers in mind" when it enacted the FMLA. *Trans-Tec*, 518 F.3d at 1130; *see* Reply Br. 7-9.

to a maritime lien, it would not have done so by silence or inference.

Thus, this Court should grant the petition and hold that the FMLA lien provisions cannot be invoked by foreign suppliers seeking to enforce debts arising from wholly foreign transactions.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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