No. _____

In The
Supreme Court of the United States

NATIONAL CASUALTY COMPANY,
Petitioner,
v.
LOCKHEED MARTIN CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Petition involves an action in admiralty for a declaratory judgment to determine the existence or scope of coverage under a policy of marine insurance. The insurer filed a complaint in district court and elected to proceed in admiralty without a jury under Rule 9(h) of the Federal Rules of Civil Procedure. The defendant policyholder filed a counterclaim and demanded a jury trial. The district court struck the jury demand, but the Fourth Circuit granted the defendant's petition for a writ of mandamus and directed the district court on remand to try the case before a jury.

Accordingly, the question presented in this Petition is:

When a plaintiff elects, pursuant to Federal Rule of Civil Procedure 9(h), to proceed in admiralty without a jury on a claim that could also have been brought at law, can the defendant nullify that election and impose a jury trial?

PARTIES TO THE PROCEEDING

The petitioner is National Casualty Company, which was the respondent in the case before the United States Court of Appeals for the Fourth Circuit.

The respondent is Lockheed Martin Corporation, which was the petitioner in the case below.

RULE 29.6 DISCLOSURE

All of the stock of National Casualty Company is owned by Nationwide Mutual Insurance Company, which is not a publicly traded corporation.

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National Casualty Company ("National Casualty") petitions for a Writ of Certiorari to review the Opinion and Judgment issued by the United States Court of Appeals for the Fourth Circuit granting the Petition for Writ of Mandamus of Lockheed Martin Corporation ("Lockheed Martin") and directing the United States District Court for the District of Maryland to try this case before a jury.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported at 415 F.Supp.2d 596 (D. Md. 2006) and is reprinted in the Appendix at 21a. The opinion of the United States Court of Appeals for the Fourth Circuit issued on September 27, 2007 is reported at 503 F.3d 351 (4th Cir. 2007) and is reprinted in the Appendix at 1a. The Order of the United States Court of Appeals for the Fourth Circuit issued on October 23, 2007 denying Petitioner's Petition for Rehearing and Rehearing En Banc is not reported but is reprinted in the Appendix at 42a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its Opinion and Judgment granting a writ of mandamus on September 27, 2007, and entered its Order denying rehearing and rehearing en banc on October 23, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend. VII.

Section 9 of the Judiciary Act of 1789, which was enacted on September 24, 1789, the day before the Seventh Amendment was proposed by Congress, provided:

> *That the district courts* shall have, exclusive of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and *shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction,* including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from

> the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; (a) *saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it*; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. (b) And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. (c) And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. (d) *And the trial of issues in fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.*

Judiciary Act, ch. XX, § 9, 1 Stat. 73, 76-77 (1789) (emphasis added). This provision now is codified at 28 U.S.C. § 1333(1), which reads:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

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

28 U.S.C. § 1333(1).

Rule 9(h) of the Federal Rules of Civil Procedure states:

> **Admiralty and Maritime Claims.** A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

Rule 9(h), Federal Rules of Civil Procedure (2005).

Rule 38(e) of the Federal Rules of Civil Procedure states:

> **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to

> trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 38(e), Federal Rules of Civil Procedure (2005).

INTRODUCTION

This marine insurance coverage dispute raises a pure legal question of admiralty jurisdiction that arises frequently and as to which the circuits are in conflict.

Since 1789, it has been a fundamental principle of admiralty law that, upon the election by a plaintiff to invoke admiralty jurisdiction and its procedures, admiralty and maritime claims will be tried to the court, without a jury. This uniform practice was preserved and continued when the Admiralty Rules were unified with the Federal Rules of Civil Procedure in 1966 by the adoption of Rules 9(h) and 38(e). Pursuant to Rule 9(h), a plaintiff has the right to designate its claim "as an admiralty and maritime claim for the purposes of Rule[] ... 38(e) ... ." The adoption of Rules 9(h) and 38(e) was a recognition that when, prior to 1966, a plaintiff chose to file a claim as to which there was jurisdiction in admiralty and some other basis for federal jurisdiction, the plaintiff had the right to file on the admiralty "side" of federal court. The consequence of this choice was that a jury trial would not be available to either the plaintiff or the defendant, unless Congress had expressly provided otherwise. Rules 9(h) and 38(e) explicitly preserved that practice.

The Fourth Circuit's decision in this case nullifies this choice and allows a defendant to force a jury trial in spite of the admiralty plaintiff's election otherwise. The court below follows decisions of the Eighth and Ninth Circuits in direct conflict with the Fifth Circuit's decision in *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978). In so doing, the Fourth Circuit's holding cannot be squared with this Court's decision in *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847), which held that the Seventh Amendment does not apply to admiralty cases, even when there is concurrent jurisdiction with the law side of the court under the "saving-to-suitors" clause.

The issue is one of recurring importance in the federal courts, as evidenced by the vast majority of numerous district court decisions that side with the Fifth Circuit's authoritative *Harrison* opinion. And this petition raises an optimal vehicle for this Court's resolution of the conflict, because it arises out of a petition for a writ of mandamus by the Fourth Circuit on purely legal grounds; it thus raises a pure question of law without any jurisdictional, factual, or other issues that might impede the Court's resolution of the conflict. This Court's review is therefore warranted.

STATEMENT OF THE CASE

In July 2001, a vessel owned by Lockheed Martin, the M/V SEA SLICE, sustained extensive damage to its hull and machinery in normal seas on the Pacific Ocean approximately 130 miles from Honolulu, Hawaii en route to Anchorage, Alaska. National Casualty conducted its investigation to determine whether

coverage existed and the extent of any covered damage to the vessel. With uncertainty because of incomplete information, National Casualty found probable coverage and in July 2003 adjusted the claim and paid the reasonable cost of repairs as required by the policy. Lockheed Martin objected to the amount of the adjustment and performed its own analysis, making demand for additional payment in May 2005. The parties were thereafter unable to agree on the extent of any covered loss.

To expedite resolution of the dispute, on July 22, 2005, National Casualty filed a complaint for declaratory judgment in the United States District Court for the District of Maryland. The complaint alleged that the district court had jurisdiction over the case under both 28 U.S.C. § 1332, as a civil action between citizens of different states, and 28 U.S.C. § 1333, as an admiralty or maritime action. In the complaint, National Casualty notified the district court and Lockheed Martin that it "elects to bring this action as an admiralty or maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure." After National Casualty filed an amended complaint, in which it again invoked Rule 9(h), Lockheed Martin filed an answer in which it admitted that "diversity jurisdiction and admiralty and maritime jurisdiction exist." It also filed a counterclaim demanding a trial by jury.

National Casualty filed a motion to strike Lockheed Martin's demand for jury trial, and on February 17, 2006, the district court granted National Casualty's motion. App. 21a, 41a; *National Casualty Co. v. Lockheed Martin Corp.*, 415 F.Supp.2d 596 (D. Md.

2006). In so ruling, the court noted that the majority of courts addressing the question since 1959 had concluded that "an admiralty plaintiff's right to a bench trial 'trumps' the defendant's right to a jury trial of its counterclaim." App. 36a.

Lockheed Martin thereupon filed a petition for writ of mandamus with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit granted the petition for writ of mandamus and directed "the district court on remand to try the case before a jury." App. 1a, 19a; *In re Lockheed Martin Corp.*, 503 F.3d 351, 360 (4th Cir. 2007). In reaching that conclusion, however, the Fourth Circuit recognized that the Seventh Amendment "applies only to cases *at law*, a category that does not include *maritime* cases," and that "the Seventh Amendment creates no constitutional right to a jury trial of maritime claims." App. 5a (citing *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847) and *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963)) (emphasis by the court). The Fourth Circuit further acknowledged that, "if a plaintiff designates his claim as a Rule 9(h) maritime claim, the saving to suitors clause does not permit a defendant to trump that designation and demand a jury trial" (citing *Waring* at 461) and that "this principle governs simple proceedings—*e.g.*, proceedings where the defendant does not assert any counterclaims or implead third parties ... ." App. 12a.

The Fourth Circuit thus acknowledged that, when a plaintiff designates its claim as a Rule 9(h) maritime claim, the Seventh Amendment is not implicated, and this designation precludes the defendant from obtaining a jury trial when it does not assert any

counterclaims. Nevertheless, the Fourth Circuit proceeded to conclude precisely the opposite: Lockheed Martin was entitled to a jury trial, "even if no counterclaims had been filed." App. 15a.

On October 23, 2007, National Casualty's petition for rehearing en banc or for panel rehearing was denied. App. 42a.

REASONS FOR GRANTING THE PETITION

I. A WELL-DEVELOPED CIRCUIT CONFLICT EXISTS ON WHETHER A PLAINTIFF'S ELECTION OF AN ADMIRALTY BENCH TRIAL CAN BE NEGATED BY A DEFENDANT'S REQUEST FOR A JURY TRIAL

A. Petitioner Would Prevail In The Fifth Circuit, Which Holds That A Plaintiff's Admiralty Demand For A Bench Trial Overcomes A Subsequent Request For A Jury Trial By Another Party

The Fourth Circuit below acknowledged that the courts are split on the central issue in this case – whether a defendant may override a plaintiff's election, pursuant to Rule 9(h), to proceed in admiralty without a jury. *See* App. 12a-14a. Indeed, the Fourth Circuit's decision in this case directly conflicts with the decision of the Fifth Circuit in *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978). In *Harrison*, a longshoreman was injured aboard a freighter by exposure to ruptured barrels of a hazardous chemical, and he sued the vessel owner,

designating the action as being within the admiralty jurisdiction of the court under Rule 9(h). The defendant vessel owner then impleaded the plaintiff's stevedore employer, who, in turn, filed a fourth-party complaint against the shipper of the chemical. The fourth-party defendant shipper demanded a jury trial, but the trial court denied the request. After a bench trial, the court entered judgment against the shipper, and the shipper appealed, arguing (among other things) that it had been deprived of its Seventh Amendment right to trial by jury. *Id.* at 985.

The Fifth Circuit rejected that argument and held that, "by electing to proceed under [Rule] 9(h) rather than by invoking diversity jurisdiction, the plaintiff may preclude the defendant from invoking the right to trial by jury which may otherwise exist." *Id.* at 986. As the *Harrison* court explained, allowing a party defendant to force a jury trial by the "simple expedient" of asserting an additional claim "based upon the same set of operative facts which gave rise to the first complaint" would "emasculate the election given to the plaintiff by Rule 9(h)." *Id.* at 987. *Harrison* thus properly recognizes that when the same transaction or occurrence gives rise to a controversy that includes opposing claims by two or more parties that could be brought either in admiralty or at law, the election to proceed with or without a jury rests with the plaintiff under Rule 9(h).

Applying the Fifth Circuit's rule to this case, petitioner would prevail. Under the holding in

Harrison, the Fifth Circuit[1] would give effect to petitioner's election to proceed in admiralty without a jury, notwithstanding respondent's attempts to nullify that choice by demanding a jury for adjudication of the same factual dispute.

B. The Eighth And Ninth Circuits Adhere To The Erroneous Fourth Circuit Rule Below

In addition to the Fourth Circuit below,[2] the Eighth and Ninth Circuits follow the erroneous rule that a defendant can negate a plaintiff's election, pursuant to Rule 9(h), to proceed in admiralty without a jury.

In *Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026, 1032 (9th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992), the

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[1] The Fifth Circuit's preeminence as a maritime court has led the Ninth Circuit to describe it as the "cutwater" of maritime law. *Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 673 (9th Cir. 1997), *cert. denied*, *Polaris Ins. Co. v. Aqua-Marine Constructors, Inc.*, 522 U.S. 933 (1997).

[2] The Fourth Circuit's own confusion on this issue is evidenced by its conflicting earlier decision, albeit arguably in dictum. *See Duty v. East Coast Tender Service, Inc.*, 660 F.2d 933, 940 (4th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982) ("Both the *Harrison* opinion and the Advisory Committee Note, however, make altogether clear that 'a simple statement in his (plaintiff's) pleadings to the effect that the claim is an admiralty or maritime claim' would serve the purpose of making the case a true one in admiralty, and thereby eliminate any possibility of trial by jury."). The decision below squarely places the Fourth Circuit in the same camp as the Eighth and Ninth Circuits.

plaintiff Connecticut Bank & Trust Company, as trustee for Wartsila Marine Industries, Inc., brought an *in rem* action to foreclose on a first preferred mortgage against the S/S MONTEREY ("vessel"). Wilmington Trust, as trustee for the International Organization of Masters, Mates, and Pilots ("Union"), although not named as a defendant in the original complaint, answered the complaint and filed an *in rem* claim against the vessel to foreclose its second preferred mortgage and also asserted counterclaims against Wartsila. Notwithstanding that the Union's claims arose from the same transactions as did the plaintiff's initial complaint, the Union demanded a jury trial on its claims, and as to each claim the Union alleged an independent ground (other than admiralty) for federal jurisdiction. The district court denied the Union's request for a jury trial, and the Union sought a writ of mandamus from the Ninth Circuit.

The Ninth Circuit concluded that the Union, as a defendant, enjoyed its own option under the "saving-to-suitors" clause, 28 U.S.C. § 1331(1), to identify its claims as proceeding either in admiralty or at law. 934 F.2d at 1032. The Ninth Circuit thus held that the plaintiff's "election to proceed in admiralty does not deprive the [defendant] of a jury trial on the [defendant]'s properly joined claims." *Id.* The Ninth Circuit recognized, however, that as a practical matter this "holding may result in the entire case being tried before a jury." *Id.* Thus, under the *Wilmington Trust* rule, if a plaintiff elects to proceed in admiralty but a defendant asserts claims that "are closely related factually" (*id.*) *and* demands a trial by jury, then plaintiff's Rule 9(h) election will be trumped and given no effect.

Similarly, in *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1041-42 (8th Cir. 1983), the Eighth Circuit held that, even when a plaintiff has elected to proceed in admiralty without a jury pursuant to Rule 9(h), a defendant nonetheless has a right to demand a jury trial on a counterclaim that is within the court's civil jurisdiction. In *Koch Fuels*, the district court tried the plaintiff's admiralty claims without a jury, but granted the defendant's request for a separate jury trial of its counterclaim, notwithstanding that both plaintiff's and defendant's claims arose from the same "alleged agreement to charter a barge for transporting a shipment of oil." *Id.* at 1039. On appeal, the plaintiff argued that the entire case should have been tried without a jury, but the Eighth Circuit affirmed the district court's decision to sever the claims into separate trials. While the Eighth Circuit acknowledged that under traditional admiralty practice and Rule 9(h) the right to elect a jury trial belongs to the plaintiff (*id.* at 1041), the court nonetheless allowed the defendant a jury trial for its claim cognizable at common law, concluding that:

> Where, as here, both parties, using different triers of fact, could prevail on their respective claims without prejudicing the other party or arriving at inconsistent results, a trial judge may separate the claims in the interests of preserving constitutional rights, clarity, or judicial economy.

Id. at 1042. Thus, similar to *Wilmington Trust*, in *Koch Fuels* the defendant was allowed to trump the plaintiff's Rule 9(h) non-jury election and obtain a jury trial.

C. Contrary To The Fourth, Eighth And Ninth Circuits, The Overwhelming Majority Of District Courts Hold That A Defendant *Cannot* Override A Plaintiff's Election To Proceed In Admiralty Without A Jury

In addition to the conflicting decisions between courts of appeals on this issue, many district courts have also considered the issue raised here and have arrived at conflicting results. The overwhelming majority of district courts to consider the issue, however, have agreed with petitioner and the Fifth Circuit in *Harrison* – contrary to the holdings of the Fourth, Eighth and Ninth Circuits – that when a plaintiff elects to proceed in admiralty pursuant to Rule 9(h), and a defendant then files a counterclaim seeking the same relief on the basis of the saving-to-suitors clause and diversity jurisdiction, the defendant is not entitled to a jury trial for its counterclaim. *See, e.g., ING Groep, NV v. Stegall*, 2004 A.M.C. 2992, 2995-98 (D. Colo. 2004); *Windsor Mount Joy Ins. Co. v. Johnson*, 264 F.Supp.2d 158, 162-64 (D. N.J. 2003); *Jefferson Ins. Co. v. Maine Offshore Boats, Inc.*, 2001 A.M.C. 2171, 2172-74 (D. Me. 2001); *Clarendon Amer. Ins. Co. v. Rodriguez*, 1999 A.M.C. 2885, 2886-87 (D. P.R. 1999); *Underwriters at Lloyds, London v. Sundowner Offshore Services*, 1999 WL 90566, *1 (E.D. La. 1999); *St. Paul Fire & Marine Ins. Co. v. Holiday Fair, Inc.*, 1996 WL 148350, *2 (S.D.N.Y. 1996); *Homestead Ins. Co. v. Woodington Corp.*, 1993 A.M.C. 1552, 1554-58 (E.D. Va. 1992); *Royal Insurance Co. of America v. Hansen*, 125 F.R.D. 5, 9 (D. Mass. 1988); *Zurich Ins. Co. v. Banana Services, Inc.*, 1985 A.M.C. 1745 (S.D. Fla. 1984); *Insurance Co. of North America v. Virgilio*, 574 F.Supp. 48 (S.D. Cal. 1983); *Arkwright-*

Boston Manufacturers Mutual Ins. Co. v. Bauer Dredging Co., 74 F.R.D. 461, 462 (S.D. Tex. 1977); *Insurance Co. of the State of Pennsylvania v. Amaral*, 44 F.R.D. 45, 47 (S.D. Tex. 1968); *contra, Continental Ins. Co. v. Industry Terminal & Salvage Co.*, 2006 A.M.C. 630 (W.D. Pa. 2005); *Sphere Drake Ins. PLC v. J. Shree Corp.*, 184 F.R.D. 258 (S.D.N.Y. 1999).

This Court's guidance therefore is urgently needed in view of the deep conflict among the courts of appeals and district courts on this important and recurring issue.

II. THE FOURTH CIRCUIT'S RULE IS INCONSISTENT WITH THIS COURT'S PRECEDENT AND THE FEDERAL RULES

A. The Fourth Circuit's Decision Directly Conflicts With This Court's Decision In *Waring v. Clarke*

In *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847), this Court held that the Seventh Amendment does not apply to admiralty cases, even when there is concurrent jurisdiction with the law side of the court under the "saving-to-suitors" clause.[3] In *Waring*, two

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[3] Now codified at 28 U.S.C. § 1333(1), the saving-to-suitors clause provides that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of ... [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

vessels had collided on the Mississippi River. The defendant challenged the admiralty jurisdiction of the federal courts on two grounds, one of which was that the saving-to-suitors clause took away from admiralty jurisdiction cases in which common law courts were competent to give a remedy in a trial by jury. *Id.* at 458.

In rejecting that argument, this Court noted there was nothing in the Constitution from which it could be inferred that suits in admiralty, being civil causes rather than common law causes, were ever to be tried to a jury:

> [T]here is no provision, as the constitution originally was, from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the constitution knew was the mode of trial of issues of fact in the admiralty. We confess, then, we cannot see how they are to be embraced in the seventh amendment of the constitution, providing that in suits at common law the trial by jury should be preserved.

Id. at 460. The *Waring* Court noted that suits in admiralty were constitutionally distinct from suits at common law, and therefore the mode of trial in admiralty actions cannot be controlled by the Seventh Amendment, which only preserves jury trials in common law cases:

> Now by what rule of interpretation or by what course of reasoning can such a provision [the Seventh Amendment] be converted into an

> inhibition upon the mode of trial of suits [in admiralty] which are not exclusively suits at common law ...?

Id. The Court concluded that the adoption of the Seventh Amendment "was done with reference to suits at common law alone." *Id.* Thus, *Waring* confirmed that the Seventh Amendment did not change the rule that trials in admiralty are strictly non-jury (unless the right to a jury was established by Congress).[4]

The *Waring* Court also rejected the argument that the saving-to-suitors clause provided the defendant a right to a jury trial in an admiralty case:

> In respect to the [saving-to-suitors] clause ... saving is for the benefit of suitors, plaintiff and defendant, when the plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them. It certainly could not have been intended more for the benefit of the defendant than for the plaintiff, which would be the case if he could at his will force the plaintiff into a common law court ... .

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[4] Congress specifically provided for jury trials in the Great Lakes Act, codified at 28 U.S.C. § 1873, and the Jones Act, now codified at 46 U.S.C. § 30104.

Id. at 460-61. The saving-to-suitors clause therefore does not enable a defendant to force a trial by jury when the plaintiff has sued in admiralty.

Although the Fourth Circuit below cited *Waring* and correctly stated that "if a plaintiff designates his claim as a Rule 9(h) maritime claim, the saving-to-suitors clause does not permit a defendant to trump that designation and demand a jury trial" (App. 12a),[5] it held that, because this case filed in admiralty seeks a declaratory judgment, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), "requires a jury trial in this case, even if no counterclaims had been filed." App. 15a.

In so holding, the Fourth Circuit decision directly conflicts with *Waring*. In a declaratory judgment action filed in admiralty in the Fourth Circuit for which there is also diversity jurisdiction, all that a defendant has to do is to demand a jury trial and, contrary to *Waring*, it will thereby "force the plaintiff into a common law court" (46 U.S. at 461), and the Seventh Amendment will "be converted into an inhibition upon the mode of trial in suits which are not exclusively suits at common law." *Id.* at 460. *Waring* precludes that result.

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[5] The late Judge Widener seemed to feel otherwise, however. During the oral argument Judge Widener said: "The court in the Waring case described almost to a T the proposition that we have here and came [out] on the opposite side. I have yet to see some explanation from someone why the Waring case does not control this case."

B. The Fourth Circuit's Rule Cannot Be Squared With The Federal Rules

The Fourth Circuit's opinion allows a defendant in a declaratory judgment action in admiralty to eviscerate a plaintiff's right to a non-jury trial under Rule 9(h) and Rule 38(e) of the Federal Rules of Civil Procedure, contrary to the intent of those rules and historical admiralty practice and procedures.

For more than two hundred years, this Court has repeatedly recognized that, when a plaintiff files its complaint based on admiralty jurisdiction, jury trials are not available, unless Congress provides otherwise. *See, e.g., United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796) (as it was "a cause of Admiralty and Maritime Jurisdiction ... no jury was necessary"); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55 n.10 (1989) ("Civil causes of action in admiralty, however, are not suits at common law for Seventh Amendment purposes, and thus no constitutional right to a jury trial attaches."). That practice was not changed by the unification in 1966 of the Admiralty Rules with the Rules of Civil Procedure, resulting in Rules 9(h) and 38(e).

That year, pursuant to authority delegated by Congress (28 U.S.C. § 2072), this Court prescribed rules of practice and procedure for the federal courts that resulted in Rules 9(h) and 38(e) of the Federal Rules of Civil Procedure. Rule 9(h) states:

> **Admiralty and Maritime Claims.** A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction

> that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims.

Rule 9(h), Federal Rules of Civil Procedure (2005). Rule 38(e) provides:

> **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 38(e), Federal Rules of Civil Procedure (2005). By "these rules," Rule 38(e) is referring to Rule 38(a)-(d); Rule 38(a) provides:

> **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 38(a), Federal Rules of Civil Procedure.

The Advisory Committee's Notes to Rule 9(h) inform the analysis of the intent of this rule as to "historically maritime procedures":

> Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. ...

> It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. ... The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear. ...
>
> [T]he preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

Rule 9, Federal Rules of Civil Procedure, Advisory Committee Note – 1966 Amendment. 39 F.R.D. 69, 75-76 (1966).

The rules proposed by the Advisory Committee, including Rules 9(h) and 38(e), were approved by this Court without alteration.[6] Rules 9(h) and 38(e) were prepared and approved by this Court, pursuant to the Court's delegated authority to adopt procedural rules that do not "abridge, enlarge or modify any substantive

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[6] *Order of February 28, 1966*, 86 S.Ct. 173, 39 F.R.D. 213 (1966).

right." 28 U.S.C. § 2072. Thus, the adoption of these rules preserved the historical maritime right and practice of trying cases filed on the admiralty "side" of a federal court without a jury. The Fourth Circuit's decision in this declaratory judgment action conflicts with this important and historical admiralty right and practice, and this Court should grant this petition for writ of certiorari, so that it may review that decision.

C. The Fourth Circuit's Reliance On *Beacon Theatres* Is Misplaced

The Fourth Circuit's reliance on *Beacon Theatres* is fundamentally misplaced, as *Beacon Theatres* involves neither the federal court's admiralty jurisdiction nor the plaintiff's election under Rule 9(h) to proceed in admiralty without a jury trial, both of which control whether a defendant has the right to a jury trial in this case.

In *Beacon Theatres*, Fox West Coast Theatres was notified by Beacon Theatres that Fox was operating its theater in violation of the Sherman Antitrust Act by exercising preferential contract rights to show first-run movies to the exclusion of Beacon. To resolve the dispute, Fox filed a declaratory judgment action for a declaration that it was not operating in violation of the antitrust laws and sought injunctive relief against Beacon. Beacon counterclaimed for treble damages and demanded a jury trial. The district court rejected Beacon's jury demand on the ground that the proceeding was equitable in nature, and the Ninth Circuit denied mandamus. This Court granted certiorari and reversed, holding that the Declaratory Judgment Act and applicable Federal Rules of Civil

Procedure were intended to preserve each party's right to a jury trial. 359 U.S. at 504.

Critical to this Court's decision, however, was that any right to jury trial was preserved by the Declaratory Judgment Act and the Federal Rules, citing Rule 38(a) that "the right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved ... inviolate." *Id.* at 510. Since the Federal Rules expressly preserved Beacon's Seventh Amendment right to a jury trial, the district court could not preclude a jury trial on the issues in that case.

Here, however, petitioner expressly has invoked the right to a non-jury trial by electing to proceed in admiralty under Rule 9(h), and in that jurisdictional status neither the Seventh Amendment nor any statute provides respondent with a right to a jury trial. The purpose of Rule 38(e) was to make it clear that no new jury rights were created by the unification of the Admiralty Rules with the Federal Rules of Civil Procedure – that the traditional admiralty practice of non-jury trials was preserved. Consequently, the Seventh Amendment does not come into play in this case, and *Beacon Theatres* is simply inapplicable.

The Fourth Circuit below relied heavily on its interpretation of *Beacon Theatres* to the effect that "the Seventh Amendment right to a jury trial must be preserved 'wherever possible.'" App. 14a. But that statement does not apply in the admiralty context, as this Court has confirmed that *Beacon Theatres* did not alter the rule set forth in *Waring*. *See Fitzgerald v.*

United States Lines Co., 374 U.S. 16, 20 (1963) ("the Seventh Amendment does not require jury trials in admiralty cases") (citing *Waring*); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 334 (1979) (*Beacon Theatres* "enunciated no more than a general prudential rule"); *Granfinanciera v. Nordberg*, 492 U.S. 33, 55 n.10 (1989) ("Civil causes of action in admiralty, however, are not suits at common law for Seventh Amendment purposes, and thus no constitutional right to a jury trial attaches. *Waring v. Clarke*, 5 How. 441, 460 (1847)").

Moreover, in *Beacon Theatres* this Court stated that its decision was "consistent" with the Declaratory Judgment Act's plan to effect substantial procedural reform "while retaining a distinction between jury and non-jury issues and leaving substantive rights unchanged." 359 U.S. at 508-09. This is consistent with the district court's decision in this case, noting that the majority line of cases does not apply *Beacon Theatres* in the admiralty context:

> [N]early half a century has passed since the Supreme Court handed down *Beacon Theatres*. If *Beacon Theatres* applied to admiralty suits, the Court's silence on this question appears inexplicable, especially in light of the numerous decisions that have held to the contrary.

App. at 38a; *National Casualty Co. v. Lockheed Martin Corp.*, 415 F. Supp.2d 596, 606 (D. Md. 2006).[7]

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[7] *See, e.g., ING Groep, NV v. Stegall*, 2004 A.M.C. 2992, 2995-98 (D. Colo. 2004); *Windsor Mount Joy Ins. Co. v. Johnson*, 264

The mere fact that National Casualty filed a declaratory judgment action to resolve this marine insurance dispute does not deprive it of its right to a non-jury trial by electing to proceed as an admiralty or maritime claim within the meaning of Rule 9(h) and to avail itself of the procedural and substantive rights admiralty practice entails. Thus, *Beacon Theatres* does not strip a plaintiff of its right to a non-jury trial in an admiralty case.

F.Supp.2d 158, 162-64 (D. N.J. 2003); *Jefferson Ins. Co. v. Maine Offshore Boats, Inc.*, 2001 A.M.C. 2171, 2172-74 (D. Me. 2001); *Clarendon Amer. Ins. Co. v. Rodriguez*, 1999 A.M.C. 2885, 2886-87 (D. P.R. 1999); *Underwriters at Lloyds, London v. Sundowner Offshore Services*, 1999 WL 90566, *1 (E.D. La. 1999); *St. Paul Fire & Marine Ins. Co. v. Holiday Fair, Inc.*, 1996 WL 148350, *2 (S.D.N.Y. 1996); *Homestead Ins. Co. v. Woodington Corp.*, 1993 A.M.C. 1552, 1554-58 (E.D. Va. 1992); *Royal Insurance Co. of America v. Hansen*, 125 F.R.D. 5, 9 (D. Mass. 1988); *Zurich Ins. Co. v. Banana Services, Inc.*, 1985 A.M.C. 1745 (S.D. Fla. 1984); *Arkwright-Boston Manufacturers Mutual Ins. Co. v. Bauer Dredging Co.*, 74 F.R.D. 461, 462 (S.D. Tex. 1977); *Insurance Co. of the State of Pennsylvania v. Amaral*, 44 F.R.D. 45, 47 (S.D. Tex. 1968). *See also Norwalk Cove Marina, Inc. v. S/V ODYSSEUS*, 100 F.Supp.2d 113, 114 (D. Conn. 2000) (the contrary approach set forth in *Wilmington Trust v. United States District Court*, 934 F.2d 1026 (9th Cir. 1991) "remains to date a minority position"), *aff'd on other grounds*, 64 Fed. Appx. 319 (2d Cir. 2003) (unpublished opinion).

III. THE PETITION RAISES AN IMPORTANT AND RECURRING ISSUE

A. This Petition Concerns Issues Of National Importance

This Court in 1874 explained the reasons for and the importance of the principle of uniformity of maritime law:

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the *rules and limits of maritime law* under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a *commercial character* affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. 558, 575 (1874) (emphasis added); *see also, Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.*, 543 U.S. 14, 28 (2004) (quoting *The Lottawanna*). Certainly, the important question of the availability of a jury trial in admiralty is the sort of "rule and limit of maritime law" as to which there must be "uniformity and consistency," although the uniformity in this case is derived from Rules 9(h) and 38(e). *See, e.g., La Vengeance, supra*; *Waring, supra*; *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 360

(1962); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). Marine insurance claims have long comprised an important "subject of a commercial character" within admiralty jurisprudence. *See, e.g., De Lovio v. Boit*, 7 Fed. Cas. 418, 444 (Cir. Ct. Mass. 1815) (Story, J.); *New England Mut. Marine Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 30-31 (1871); *Sun Mutual Ins. Co. v. Ocean Insurance*, 107 U.S. 485 (1883).

Marine insurers underwrite marine risks in many areas of the United States, and a uniform rule concerning the right to ascertain the existence and scope of coverage in non-jury declaratory judgment cases, as opposed to conflicting rights to non-jury trials among the circuits, would promote the uniformity of maritime law and commerce in the nation. Thus, this Court should review the Fourth Circuit's decision and establish a uniform rule applicable to all federal courts.

B. The Insurer's Right To A Non-Jury Trial In Admiralty Is A Recurring Issue

The declaratory judgment action is a common and well-established method of determining the rights of the parties under an insurance contract. *See, e.g., Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1276 (10th Cir. 1989) (a judicial declaration of coverage "clarifies the parties' legal relations and affords relief from the uncertainty surrounding [the insurer's] obligations"); *Windsor Mount Joy Ins. Co. v. Johnson*, 264 F.Supp.2d 158, 164 (D. N.J. 2003) ("An insurer's action for a judgment

declaring that it need not provide coverage under a policy 'is a normal and orderly procedure.'") (internal citation omitted).

As set forth in Part I, above, numerous courts, both trial and appellate, have issued rulings on the right to a jury trial in a marine insurer's declaratory judgment action. Given the well-established and orderly mechanism in place to ascertain the rights of the parties to an insurance contract and to afford relief from uncertainty, marine insurers will continue to seek declaratory judgments in the federal courts, and the issue whether they are entitled to non-jury trials will continue to recur.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLUTION OF THE CONFLICT

A. Review Of The Fourth Circuit's Writ Of Mandamus Presents The Issue In Its Purest And Simplest Form

In *Beacon Theatres*, this Court granted certiorari to resolve the dispute whether the defendant had a right to a jury trial. That case, like this one, arose when the trial court struck the defendant's jury demand, and that ruling was appealed in a petition for writ of mandamus. Although a writ of mandamus was denied in *Beacon Theatres* and granted by the Fourth Circuit below, the context is identical: whether the defendant had the right to try its case before a jury.

Trial has not yet been scheduled in the district court below. Therefore, certiorari to review the writ of mandamus issued by the Fourth Circuit presents the

ideal opportunity to resolve the conflict among the lower courts on a pure issue of law.

B. There Are No Other Jurisdictional Or Procedural Impediments To This Court's Resolution Of The Issue

In the district court, both parties agreed, and the district court has ruled, that both admiralty and diversity jurisdiction exist, and it is undisputed that National Casualty invoked admiralty jurisdiction and its associated procedures by electing to proceed under Rule 9(h). In addition, trial has not yet occurred or been scheduled, and only the ruling of the Fourth Circuit reversing the district court's order striking Lockheed Martin's jury demand is at issue in this appeal. Because the only issue in this case, with its procedural posture, is whether National Casualty may proceed with its action without a jury, there are no impediments to this Court resolving whether a defendant has the right to impose a jury trial on a plaintiff in a declaratory judgment action in admiralty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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