No. 08-293

In the Supreme Court of the United States

SPLENDID SHIPPING SENDIRIAN BERHARD and M/V HARMONY CONTAINER, *in rem*,

Petitioners,

v.

TRANS-TEC ASIA,

Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

This Court holds that United States courts should enforce freely-negotiated private international agreements, including those agreements' choice of law clauses. This Court also directs United States courts to strictly construe United States statutes according to what Congress has written, not what Congress might have written. No federal circuit has held that Congress with the Commercial Instruments and Maritime Lien Act ("FMLA"), 46 U.S.C. § 31301 *et seq.* intended discrimination against non-United States marine necessaries providers. Neither the plain reading of FMLA nor FMLA's legislative history at all supports that discrimination. Instead, only several lines of *dicta* of an isolated First (1986) Circuit opinion, which the Eleventh Circuit cited without comment in *dicta* six years later (1992), suggests this. Nor has any federal circuit held that private parties cannot incorporate United States law, including FMLA, into their private contractual agreements. Should this Court here nevertheless overturn the Ninth Circuit, which correctly has upheld a freely-negotiated choice of law clause in a private international agreement and which has strictly construed the FMLA to reject discrimination against non-U.S. marine necessaries providers?

PARTIES TO THE PROCEEDING

Petitioner's statement of parties to the proceeding and its Rule 29.6 Disclosure is incorrect. Petitioner Splendid Shipping Sendirian Berhad ("Splendid"), according to the Official Records of the Companies Commission of Malaysia, is 100% owned by Halim Mazmin Berhard, a publicly-traded Malaysian company. The Official Records of the Companies Commission of Malaysia also state that Splendid is a dormant Malaysian corporation. Further, according to Lloyd's Register of Shipping, Splendid no longer owns the M/V HARMONY CONTAINER. Instead, the vessel is owned by Colville Shipping Sendirian Berhad, not a party to these proceedings, and has been renamed the M/V CAP COLVILLE. Colville Shipping Sendirian Berhad is also 100% owned by Halim Mazmin Berhard.

Respondent Trans-Tec Asia is indirectly owned by World Fuel Services, Inc., a publicly-traded, Florida corporation headquartered in Miami Springs, Florida. World Fuel Services, Inc. owns indirectly more than 10% of the stock of respondent Trans-Tec Asia. World Fuel Services, Singapore (Pte) Ltd. owns Trans-Tec Asia; World Fuel Singapore Holding Company II Pte. is the sole shareholder of World Fuel Services, Singapore (Pte) Ltd.; World Fuel Services, Inc. ultimately owns World Fuel Singapore Holding Company II Pte. Petitioner's statement concerning respondent consequently also is incorrect.

RULE 29.6 DISCLOSURE

World Fuel Services, Inc., a publicly-traded, United States (Florida) corporation headquartered in Miami Springs, Florida, owns directly or indirectly more than 10% of the stock of respondent Trans-Tec Asia. World Fuel Services, Singapore (Pte) Ltd. owns Trans-Tec Asia; World Fuel Singapore Holding Company II Pte. is the sole shareholder of World Fuel Services, Singapore (Pte) Ltd.; World Fuel Services, Inc. ultimately owns World Fuel Singapore Holding Company II Pte.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Trans-Tec Asia respectfully requests the Court to deny the petition for writ of *certiorari*.

STATEMENT

This unexceptional case involves the proper application by the United States Court of Appeals for the Ninth Circuit of this Court's *Lauritzen v. Larsen*, 345 U.S. 571 (1953) decision, Malaysian law, and the Ninth Circuit's strict construction of the Commercial Instruments and Maritime Lien Act ("FMLA"), 46 U.S.C. § 31301 *et seq*.

It involves one of many marine fuel ("bunker") sales around the world by a Florida corporation, World Fuel Services, Inc., through its affiliates including respondent Trans-Tec Asia (Trans-Tec), here. It is without dispute that the charterer of the ocean cargo vessel M/V HARMONY CONTAINER, on the authority of then-vessel owner/petitioner Splendid Shipping, contracted with Trans-Tec to provide bunkers to the vessel.

It is without dispute that the sales contract, by operation of Malaysian law, incorporated United States law. It further is without dispute that Trans-Tec did as contracted provide the bunkers to the M/V HARMONY CONTAINER. It finally is without dispute that the officers and crew of the M/V HARMONY CONTAINER, to which Trans-Tec provided the bunkers, were employees of petitioner Splendid. Consistent with the decisions of this

Court, other Courts of Appeal, plain language of the FMLA and the FMLA's legislative history, the Ninth Circuit upheld the parties' United States law choice and held that by operation of United States law, a maritime lien arose when Trans-Tec provided bunkers to the M/V HARMONY CONTAINER on the order of the vessel's charterer.

A. Facts

This case involves $251,850 of marine fuel ("bunkers") which Trans-Tec on February 23, 2003 provided to the M/V HARMONY CONTAINER. The vessel consumed these bunkers sailing across the Pacific to deliver cargo to the United States after unloading at Manzanillo, Mexico. The vessel's charterer, Kien Hung, on the authority of its owner, petitioner Splendid, entered into a contract with Trans-Tec for the bunkers. Splendid's employees, the master and crew of the vessel, received the bunkers when Trans-Tec pursuant to the contract provided the bunkers to the vessel.

This bunker sale was part of many transactions between Trans-Tec and its related companies, all ultimately owned by World Fuel Services, Inc., a Florida corporation, and the charterer. Trans-Tec and affiliates before this provided bunkers to the M/V HARMONY CONTAINER and to many other Kien Hung-chartered vessels sailing throughout the many international jurisdictions of the Pacific Ocean, including to the United States' West Coast. Each of these sales was subject to Trans-Tec's and affiliates' terms and conditions, included in a document entitled "The Trans-Tec Services Group of

Companies General Terms and Conditions" ("Terms and Conditions"). The Terms and Conditions stated that "the General Terms shall apply to every sale of marine petroleum products ('Products') entered into between a particular Trans-Tec Group company as seller ('Seller') and any buyer of such Products ('Buyer')." Trans-Tec had provided these Terms and Conditions to the charterer in 2000 (three years before the provision to the M/V HARMONY CONTAINER) and had based its many bunker sales to the charterer throughout those three years, on the Terms and Conditions. Trans-Tec and affiliates relied on the credit of each of these vessels, including the M/V HARMONY CONTAINER, to assure that the charterer paid for the bunkers.

The Terms and Conditions also contained an incorporation and merger clause ("The Confirmation and the General Terms . . . taken together, shall constitute the full agreement . . . ."), and a choice of law clause, which stated:

> Seller shall be entitled to assert its lien or attachment in any country where it finds the vessel. Each Transaction shall be governed by the laws of the United States and the State of Florida, without reference to any conflict of laws rules. The laws of the United States shall apply with respect to the existence of a maritime lien, regardless of the country in which Seller takes legal action.

The M/V HARMONY CONTAINER had many times prior to the bunkers provided here called at United

States ports. When Trans-Tec provided bunkers to the vessel, Trans-Tec by operation of the chosen United States law in return received a maritime lien to secure payment for the bunkers.

In May, 2003, the charterer became insolvent, while the M/V HARMONY CONTAINER was in mid-voyage. A new charterer resumed the voyage and sailed the M/V HARMONY CONTAINER to the U.S. port of Long Beach, California. Upon Trans-Tec's threat to arrest the M/V HARMONY CONTAINER in execution upon Trans-Tec's $251,850 maritime lien for the unpaid bunkers, Splendid Shipping as the vessel's then-owner through its insurer provided security for Trans-Tec's maritime lien. When settlement negotiations between Splendid and Trans-Tec failed, Trans-Tec on Feburary 24, 2004 proceeded *in rem* upon the security, before the United States District Court for the Central District of California. This suit led to the Ninth Circuit's decision upholding Trans-Tec's maritime lien.

B. Statutory and Legal Background

The Commercial Instruments and Maritime Lien Act ("FMLA"), 46 U.S.C. § 31301 *et seq.*, is the present codification of United States maritime lien law. Maritime liens secure suppliers of necessaries for the credit which they advance to ocean-going vessels, for the necessaries which they provide to the vessels. Maritime liens since the founding of the Republic have been a centerpiece of United States maritime law. Maritime liens for the provision of necessaries are common in international maritime

commerce. "Approximately thirty nations," including the United States, "recognize a maritime lien for the provision of necessaries." App. 27 n.10.[1]

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[1] The land analogy is a mechanics lien. The parties contract for the work. No lien arises, however, until the work actually is done and then only against the property worked on. Likewise, first is the agreement to provide the maritime necessaries. Then, the performance of that contract by provision to the vessel on the order of a person presumed to have authority (46 U.S.C. § 31341) as a matter of law gives rise to the maritime lien.

Incorrect, and not based on the case or statutory law, is any blanket statement that maritime liens do not arise by agreement. It is correct that they do not arise by agreement where there is no subsequent provision to the vessel, or where the provider never had the right to rely on the vessel's credit and thereby receive a maritime lien. In *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1 (1920), the appellant attempted to assert a maritime lien by agreement against vessels to which it never had provided necessaries. There was no maritime lien. In *Bominflot, Inc. v. M/V Henrich S*, 465 F.3d 144 (2006), the parties' contract chose English law. English law did not provide for a maritime lien even though the contract otherwise claimed to provide for one. Because English law did not provide for a maritime lien, the provider had no right to rely on the vessel's credit and there was no maritime lien.

The Bird of Paradise, 72 U.S. 545 (1867) involved maritime liens for unpaid freight charges. Although commenting that freight liens "arise[ ] from the usages of commerce, independently of the agreement of the parties, and not from any statutory regulations[,]" this was not a ground of decision. This Court 's comment instead went to the fact that at the time of the opinion (1867) there was no codified United States maritime lien law. Significantly, however, this Court continued that "[p]arties . . . may frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it . . . . [W]here they so agree, the settled rule in this court is, that the law will uphold the agreement and support the lien." *Id.* at 555.

Fuel for vessels, such as the bunkers which Trans-Tec provided here, have always been considered "necessaries." Consequently, the Ninth Circuit's recognition of Trans-Tec's maritime lien involved no extension of any existing maritime lien law. When as here the vessel charterer orders the bunkers, and the provider has them provided to the vessel, there is by operation of law a maritime lien in the supplier's favor for the value of the bunkers. Payment satisfies the lien. If there is no payment, the supplier may arrest the vessel *in rem* in execution on its maritime lien.

Maritime liens are the result of a contract between the necessaries provider to the vessel, and the person "[p]resumed to have authority to procure necessaries for [the] vessel," 46 U.S.C. § 31341(a), which includes the charterer of the M/V HARMONY CONTAINER. The necessaries provider and charterer contract for the provider to provide necessaries to the vessel. When, pursuant to the contract, the provider provides the necessaries to the vessel, the provider receives by operation of law a maritime lien. The security of maritime liens is a critical part of a necessaries provider's decision to extend to vessel charterers credit for the provision of necessaries to vessels. This credit is essential to marine commerce. Vessels often do not earn freights until they deliver their cargos. Marine fuel is necessary to power today's cargo vessels to enable them to deliver cargo and earn freights. Marine fuel providers extend credit relying on maritime liens to assure that they will be paid for their provisions from the voyage income, once the freight is earned and paid.

C. Procedural History

Trans-Tec on February 23, 2003 provided $251,850 of bunkers to M/V HARMONY CONTAINER. In May, 2003 charterer Kien Hung collapsed. A new charterer took over the voyage of the M/V HARMONY CONTAINER, to Long Beach, California. On May 23, 2003, the vessel arrived at Long Beach and Trans-Tec demanded security against the vessel's arrest on Trans-Tec's maritime lien. Petitioner Splendid Shipping, through its insurer, provided security. Trans-Tec in the next months attempted unsuccessfully to reach settlement with Splendid Shipping. On February 24, 2004 Trans-Tec brought suit in the United States District Court for the Central District of California on the security.

The parties before the District Court engaged in extensive and detailed briefing. Towards the end of this briefing, the District Court reconsidered and withdrew a major part of its prior opinions, applying *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and holding that as a matter of Malaysian law, the parties' contract incorporated United States law including the FMLA. The District Court's final opinion, however, wrongly decided that notwithstanding the FMLA's plain, non-discriminatory language and legislative history, the FMLA instead discriminated against non-U.S. necessaries providers and prohibited parties from freely choosing the controlling law (here, United States law) for their international agreements.

The Ninth Circuit, however, reversed, properly and strictly construing the FMLA and accurately following this Court's precedents. Considering other Circuits deciding similar questions, the Ninth Circuit decided consistently with those other Circuits, upholding (as a matter of Malaysian law) the parties' U.S. law choice and affirming the plain and non-discriminatory language of the FMLA.

THIS COURT SHOULD DENY THE PETITION

I. The Ninth Circuit's Decision Follows this Court's Rulings, Strictly Construes the FMLA, Raises no "Circuit Split," and Decides no Federal Question So Important As to Warrant this Court's Review

The Ninth Circuit's *M/V HARMONY CONTAINER* decision is sound. It follows this Court's precedent, creates no circuit split, and strictly construes the Commercial Instruments and Maritime Lien Act ("FMLA"), 46 U.S.C. § 31301 *et seq*. International maritime commerce has flowed and will continue to flow un-interrupted by the decision.

HARMONY CONTAINER is thoughtful, thorough but otherwise unexceptional. Neither it alone nor any other Court of Appeals decision read with it gives reason for this Court to consider it on *certiorari*. The decision is consistent with this Court's prior rulings. It does not decide a federal question so important as to warrant this Court's review. Petitioner makes no claim that it departed at all from the accepted and usual course of judicial proceedings.

The Ninth Circuit followed this Court's *Lauritzen* decision, choosing Malaysian law.[2] Malaysian law, the Ninth Circuit confirmed, provided the contract formation principles involved. As a matter of Malaysian law, the contract incorporated United States law. Significantly, petitioner now accepts this. United States law, specifically, the FMLA, strictly and properly construed, does not discriminate between United States and foreign necessaries providers. The Ninth Circuit gave FMLA, as a part of the United States law that the contract chose, this proper and strict construction.

The Ninth Circuit recognized that the contract involved international maritime commerce among many jurisdictions, including the United States. Consistent with *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) ("A contractual provision

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[2] Petitioner muddles the Ninth Circuit's express application of *Lauritzen*. *See* Petition at 30. The Ninth Circuit did apply *Lauritzen* and choose foreign law: Malaysian law. As a matter of Malaysian law, specifically, the Malaysian law of contract construction, the Ninth Circuit agreed with the District Court that the contract chose United States law. App. 11-13. That choice was not "irrelevant," Petition at 15, and as a matter of Malaysian law, cannot be "ignored." *Id.* Significantly, petitioner never has raised below nor does its petition, anything in Malaysian law preventing a United States law choice. In fact, the petition (ten pages before the petition changes course to say this should be "ignored") recognizes that the "sales contract for the fuel, concluded through a series of faxes and e-mail messages, incorporated by reference respondent's Standard Terms and Conditions (furnished some three years earlier to the charterer), which contained lien and U.S. choice-of-law provisions." Petition at 5.

specifying in advance . . . the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."), *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972) ("There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect."), and *Lauritzen v. Larsen*, 345 U.S. at 588-89 ("Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply."), the Ninth Circuit therefore applied the United States law choice that the parties had made.

A. There is No "Circuit Split." The Ninth Circuit Strictly and Properly Construed the FMLA, Not to Discriminate Between U.S. and Non-U.S. Necessaries Providers. No Circuit's Decision Has Turned On the Discriminatory Construction that Petitioner Argues. It is Nowhere in the Statutory Language or Legislative History.

Petitioner attempts to conjure a circuit split, but there is none. The conjure requires distorting the Ninth Circuit's and four other (First, Second and Eleventh Circuits, supposedly contrary, but Fifth, supporting) isolated opinions out of hundreds, each plucked from forty-five years of United States maritime law.

Even employing petitioner's caricatures of them, these five isolated opinions across forty-five years of United States maritime precedent, 1973 (2d Circuit), 1986 (1st Circuit), 1992 (11th Circuit), 2002 (5th Circuit) and 2008 (the Ninth Circuit decision here) mix into no boiling caldron of "entrenched conflict," raging controversy or "recurring issue." None individually or together has caused or will cause any profound, world-threatening or even noticeable disruption of maritime commerce. Petitioner does not go beyond its speculation to present any. Lacking that, petitioner only screams out a false alarm where there is neither smoke nor fire.

The Ninth Circuit properly followed this Court's precedent and strictly construed the Commercial Instruments and Maritime Lien Act ("FMLA"), 46 U.S.C. § 31301 *et seq*. For all that petitioner rails about "strict construction," the petition instead urges that this Court depart from strict construction and precedent and read into the FMLA discrimination against non-U.S. necessaries providers which is nowhere in the statute or legislative history.

"It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great Northern Ry. Co.*, 343 U.S. 562, 575 (1952). "Our analysis begins with the language of the statute." *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004). The FMLA states unambiguously as follows:

> a person [***not just an American person, any person***] providing necessaries to a vessel [***not just in the U.S. but***

> ***anywhere that U.S. law applies***] on the order of the owner or a person authorized by the owner–
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action *in rem* to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.

46 U.S.C. § 31342 (emphasis added). Consequently, the Ninth Circuit properly recognized that "[t]he statute imposes no restriction on the nationality or other identity of the supplier or the vessel, and no geographic restriction on the place of provision of the necessaries." (App. 22). The Ninth Circuit's opinion thoroughly considers the question (App. 22-31). It relies on the plain reading of the FMLA, what Congress wrote. It cuts through the (relatively few) "tangles" of other, lower court caselaw misreading the FMLA's plain, non-discriminatory language and confirms as hollow petitioner's effort to more "tangle" that web by infecting the FMLA with nationality discrimination.[3]

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[3] Petitioner "overlooks" that World Fuel Services, Inc., a Florida corporation, is the ultimate owner of Trans-Tec Asia. Trans-Tec disclosed this fact throughout the case, including prior disclosure to this Court and to the Ninth Circuit. *See Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970) (considering the Jones Act; "the facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts . . . with the United States.").

The Ninth Circuit also observed correctly, considering all of the Court of Appeals decisions that petitioner insists (and had insisted to the Ninth Circuit) "conflict," that *HARMONY CONTAINER* raises no circuit conflict. The Ninth Circuit addressed *Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. Camilla*, 966 F.2d 613 (11th Cir. 1992) and *Tramp Oil & Marine, Ltd. v. M/V Mermaid I*, 805 F.2d 42 (1st Cir. 1986)[4] as follows:

> Both the district court and Splendid rely on an Eleventh Circuit case, *Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. Camilla*, 966 F.2d 613 (11th Cir. 1992), as the foundation for their conclusion that the FMLA does not apply to this transaction. The most telling aspect of Trinidad is that the

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Footnote Continued

The Ninth Circuit further noted that "Splendid also has forgotten the crucial fact that this transaction was not "completely foreign." The subject of this *in rem* action is the vessel Harmony. Between October 2002 and March 2003, the Harmony transported $ 48.9 million in goods to and from Long Beach, California. That the Harmony was docked at Long Beach at the time that Trans-Tec filed suit was not mere happenstance: Long Beach was a regular stop on the Harmony's route. These contacts with the United States, along with the parties' express agreement to apply United States maritime lien law, put to rest any fears that an American court is unilaterally imposing the FMLA on other nations." (App. 27-28)

[4] *Tramp Oil* also involved no question of supposed "extraterritorial" application of U.S. law or foreign law. The vessel received the bunkers at Savannah, Georgia.

court acknowledged that the FMLA was not even in play: "§ 31342 is not even applicable to this case because, as we have already held, English law governs." *Id.* at 617. . . . Having already determined that United States law was not applicable, the court's commentary--without any analysis-on § 31342 could hardly be less persuasive. One can argue about what is or is not dictum, but it seems to us that a clearer case than this one cannot be found. Not only did the court recognize that United States law did not apply, but it did not even analyze § 31342, the statute at issue here.

The two cases cited as authority in *Trinidad* do not bolster its stray commentary. The plaintiff in *Tramp* was an English fuel broker that hired an American supplier to provide oil to a vessel. 805 F.2d at 44. Tramp paid the supplier, but *Tramp* was never paid, so it sought a maritime lien against the vessel. The First Circuit stated that under the FMLA, a supplier would be entitled to a maritime lien for providing fuel to the vessel. *Id.* However, because it was the intermediary that was unpaid, and not the fuel supplier, the FMLA did not apply to give the broker the "suppliers' rights to the lien": "We therefore think it unnecessary to protect American suppliers, and unfair

to the vessel, to extend the availability of a maritime lien directly to an intermediate broker unknown to the vessel." *Id.* at 44, 46. The location and nationality of the supplier were not at issue. Instead, the lack of a relationship between the vessel and the intermediate broker meant that the broker could not obtain a maritime lien for merely arranging the provision of fuel to the vessel. *Id.* at 46 (noting that extending the suppliers' lien to intermediate brokers "could radically change the presuppositions of maritime commerce"). *Tramp* thus sheds no light here.

* * *

We are left with the firm conclusion that *Trinidad* is a house of cards that quickly tumbles with even the gentlest examination. Here, where the contract specified that "the laws of the United States" were to determine the existence of a maritime lien, our reliance on the plain language of the United States statute, rather than a case applying English law, comports with predictable judicial reasoning.

App. 29-31. In summary, the Ninth Circuit correctly concluded that neither of these cases (two of only three that petitioner insists constitute the "circuit split") vary from the Ninth Circuit's decision.[5] Both turned on other grounds. Their comments that the FMLA discriminates against foreign maritime necessaries suppliers, are only *dicta*. *Trinidad*, in fact, is "double *dicta*," with no examination copying *Tramp's dicta* and simply citing to it. *Trinidad*, 966 F.2d at 617.

The Ninth Circuit also addressed *Rainbow Line, Inc. v. M/V Tequila*, 480 F.2d 1024, 1027 (2d Cir. 1973). This is the other Court of Appeals decision which petitioner misstates here (and before the Ninth Circuit) conflicts with *HARMONY CONTAINER*. *Rainbow Line* raises no conflict, either. The Ninth Circuit discusses *Rainbow Line* with the Fifth Circuit's *Queen of Leman* opinion, which petitioner admits supports the Ninth Circuit.

> That this transaction involved multiple foreign points of contact does not dissuade us from recognizing the

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[5] *Trinidad* is not the landmark decision that petitioner makes it out to be. In the 16 intervening years since the 1992 Trinidad decision, no Court of Appeals ever has relied on *Trinidad* for the proposition, for which petitioner cites it here.

Even within the Eleventh Circuit, the district court in *Galehead, Inc. v. M/V Anglia*, 15 F. Supp. 2d 1304, 1307 (1998), *affirmed in part and vacated in part by, remanded by, in part, Galehead, Inc. v. M/V Anglia*, 183 F.3d 1242 (11th Cir. Fla. 1999) commented that *Trinidad* was "without substantial analysis." On appeal, the Eleventh Circuit issued its *Galehead* opinion conspicuously ignoring *Trinidad*.

parties' agreed-upon law and jurisdiction. In *Liverpool & London S.S. Protection & Indemnity Association v. Queen of Leman MV*, 296 F.3d 350 (5th Cir. 2002), the Fifth Circuit upheld a maritime lien asserted by an English insurer against a vessel whose insurance premiums had gone unpaid. Even though the insurance contract was governed by English law, the court honored a provision in the contract that the insurer could "enforce its right of lien in any jurisdiction in accordance with local law in such jurisdiction." *Id.* at 353. By bringing suit in the Eastern District of Louisiana, the insurer was entitled to seek a maritime lien under the FMLA, as United States law was the "local law." The Fifth Circuit declared that "there is nothing absurd about applying the law of the jurisdiction into which the ship sails, as the ship's presence in the jurisdiction represents a substantial contact." *Id.* at 354.

Queen of Leman thus counsels that where foreign parties have specified that they want United States law to determine the existence of a maritime lien in a transaction involving multiple foreign points of contact, and the ship has sailed into the United States, it is reasonable to uphold the choice of American law. That a maritime lien

might exist on the vessel under United States law, but would not exist under Malaysian law, was a consequence obviously contemplated by the contracting parties, and because the Harmony sailed into a United States port, results in no fundamental unfairness.

We agree with the Fifth Circuit's holding in *Queen of Leman*, but recognize that it is in tension with the Second Circuit's view in *Rainbow Line, Inc. v. M/V Tequila*, 480 F.2d 1024 (2d Cir. 1973). There, the court refused to apply a United States choice of law clause to decide whether a charterer was entitled to a maritime lien because application of United States law would have adversely affected the rights of a third-party creditor. *Id.* at 1026. Rather than apply the charter's choice of law clause, the Second Circuit conducted a *Lauritzen* analysis to determine which country's law governed the existence of a maritime lien. *Id.* at 1026-27. It is worth noting that the adversely affected party involved in *Rainbow Line* was a third-party lender to a subsequent owner of the vessel, an entity far removed from the original parties to the charter. For the reasons previously stated, we prefer the Fifth Circuit's rule in *Queen of Leman*.

Significantly, just as the Ninth Circuit did in *HARMONY CONTAINER*, the Second Circuit in *Rainbow Line* did not initially accept that United States law controlled the contract. Instead, it undertook a *Lauritzen* analysis. After that analysis, the Second Circuit concluded that United States law controlled, and thus did not have to turn to the question of contract construction; either way, its result would have been the same. The Ninth Circuit in *HARMONY CONTAINER* and Second Circuit in *Rainbow Line* do not conflict. Each court did the same thing. The only difference was, that the Ninth Circuit needed to take the next step to determine whether under the law (Malaysian) it found after *Lauritzen* analysis, the controlling law principles of contract construction recognized the incorporation of United States law into the contract. They did.[6]

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[6] Petitioner's citation (Petition at 17-18) of but two District of Maryland U.S. District Court decisions, out of the supposed forty-five years of (non-existent)"deeply entrenched" conflict and "confusion," and none from other Districts (much less other circuits) further confirms that there is neither the "trench" nor "confusion" petitioner imagines. The District Court decided *Triton Marine Fuels, Ltd. S.A. v. M/V CHUKOTKA*, 504 F. Supp. 2d 68 (D. Md. 2007) six months before and without the benefit of the Ninth Circuit's *M/V HARMONY CONTAINER* decision. *Loginter, S.A. v. M/V NOBILITY*, 177 F. Supp. 2d 411 (D. Md. 2001) neither involved "confusion" nor a contractual choice of law clause; instead, the District Court simply applied *Lauritzen* to hold that Polish law applied, and that as a matter of Polish law (Poland being among the international jurisdictions recognizing maritime liens) there was a maritime lien.

Petitioner's citation of but two varying Canadian decisions, both also decided before the *M/V HARMONY CONTAINER*, even more vividly shows petitioner's imagination. (Petition at 19-20) One decision predicts the Ninth Circuit's decision, one decides otherwise, however, of all of the hundreds of world

The plain and unambiguous meaning and strict construction of the FMLA ends petitioner's speculation, and the FMLA's legislative history drives the final stake through it. *Trinidad's* and *Tramp Oil's* unresearched *dicta* imply that Congress with its 1971 amendments to the FMLA changed 200 years of United States maritime lien law and for the first time, limited maritime liens under that Act to American necessaries providers. Congress did no such thing.

FMLA's legislative history makes clear that the 1971 amendments' purpose was to eliminate the requirement under the previous FMLA version that necessaries providers actively inquire whether a vessel's charter contained a no-lien clause (and whether therefore, the charterer was without authority to bind the vessel with a maritime lien):

> The purpose of the bill, H.R. 6239, is to protect terminal operators, ship chandlers, ship repairers, stevedores and other suppliers who in good faith furnish necessaries to a vessel. At the present time, a "prohibition of lien" clause in a charter party and the Ship

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Footnote Continued

maritime jurisdictions over the supposed forty-five years of "conflict," this is all that petitioner can point to: two decisions from Canada, a country which like the United States has an active court system considering each year many cases involving maritime law. Simply, the sheer lack of both international decisions, and domestic decisions, evidencing any of the "conflict" that petitioner attempts to conjure, decisively confirms there is none.

> Mortgage Act preclude a supplier from acquiring a lien on a vessel for necessaries furnished to the vessel. The bill would amend the Ship Mortgage Act to permit a supplier to acquire such a lien despite a "prohibition of lien" clause in a charter party.
>
> * * *
>
> Your Committee wishes to emphasize that H.R. 6239 makes no change in maritime lien law, the priority of maritime liens, or in the accepted definition of necessaries. . . .

H. Rep. No. 92-340, 92nd Cong., 1st Sess., at 1, 3, *reprinted in* 1971 U.S. Code Cong. & Ad. News 1363, 1365.

The legislative history explains the rationale for the amendment. U.S. necessaries providers had lost millions of dollars when they provided necessaries to foreign vessels, which they then failed to pay for. The providers then could not arrest because of charter party lien prohibition clauses which they did not know about. U.S. Code Cong. & Ad. News at 1365. Although the legislative history discusses the benefits of removing the "no lien clause" inquiry requirement from the FMLA, that legislative history says nothing about limiting FMLA recovery to American necessaries providers thereby changing the character of U.S. maritime lien law.

In fact it is clear, that Congress' 1971 intent was to change no part of the existing maritime lien law, excepting what had been necessaries providers' inquiry duties to find charter party no-lien clauses. *See Atlantic & Gulf Stevedores, Inc. v. M/V Grand Loyalty*, 608 F.2d 197, 201 (5th Cir. 1979)(discussing legislative history, 1971 amendments).

The present FMLA is part of the Ship Mortgage Act of 1988, and once again, Congress with this revision made no indication to limit maritime lien law or change it in any material way. The House Report (which was the only report prepared on the Act) contains an extensive definitions section, meticulously defining that:

> The word "shall" is used in the mandatory and imperative sense.
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> * * *
>
> When a right is conferred, the words "is entitled" or their equivalent is used.

H. Rep. No. 100-918, 100th Cong., 2d Sess., at 14, *reprinted in* 1988 U.S. Code Cong. & Ad. News 6104, 6107. Focusing on what became FMLA § 31342, the report continues that:

> Section 31342 provides that any authorized person providing necessaries for a vessel has a maritime lien on the vessel and may bring a civil action *in rem* in admiralty to enforce the lien, and is not required to allege or prove

> that credit was given to the vessel. "Providing" has been substituted for "furnishing" for consistency with other laws. This section makes no substantive change to law.

1988 U.S. Code Cong. & Ad. News at 6141. Had Congress sought clearly to limit the FMLA's benefits to Americans, and discriminate against non-Americans, it surely could have done so here, but did not. The legislative history repeats that applying United States law, "any person," not just any American person, providing necessaries to a vessel has a maritime lien on the vessel.

B. There is No "Extraterritoriality" Concern Here Because the Contract, As a Matter of Malaysian Law, Chose United States Law. Nevertheless, this Court Always Has Recognized United States Maritime Lien Law to be Applicable Extraterritorially.

"The mere recognition by the courts of one State that parties by their conduct have subjected themselves to certain obligations arising under the law of another State is not to be deemed an extra-territorial application of the law of the State creating the obligation." *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 158 (1932). Consequently, the Ninth Circuit decided correctly as follows:

> [R]ecognizing a maritime lien on the Harmony does not interfere with Malaysian law, which we applied at the outset to incorporate the United States

> choice of law provision, or the law of any other nation implicated in this transaction. This case presents no extraterritorial "problem" of the ilk that has troubled the Supreme Court because here the parties chose United States law to control their transaction, and the vessel sailed to a United States port. . . . Our conclusion does not curb the sovereignty of any other nation, or another country's ability to regulate its maritime affairs. In fact, recognition of freely negotiated contract terms encourages predictability and certainty in the realm of international maritime transactions.

Significantly, petitioner raises no "circuit split" on this point. Petitioner tries to raise a mistake of law,[7] however, the mistake is not with the Ninth Circuit. Nevertheless, the Ninth Circuit also highlighted correctly as follows, that this Court always has recognized United States maritime lien law to operate extraterritorially:

> Throughout the nineteenth century, the Court recognized that maritime liens could arise for the provision of necessaries in "foreign ports," or ports that were not the vessel's home port, in

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[7] "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." Supreme Court Rule 10, "Considerations Governing Review on *Certiorari*."

order to keep the vessel fit for sail. *See, e.g., The St. Jago de Cuba*, 22 U.S. (9 Wheat.) 409, 416-18, 6 L. Ed. 122 (1824) (stating that the "consideration that controls every other" is that "[t]he vessel must get on"); *The Gen. Smith*, 17 U.S. (4 Wheat.) 438, 443, 4 L. Ed. 609 (1819). Conferring a lien on the vessel to "material-men" ensured the continued maintenance of vessels by encouraging suppliers to provide necessaries in foreign ports. *See The J.E. Rumbell*, 148 U.S. 1, 9, 13 S. Ct. 498, 37 L. Ed. 345 (1893) (observing that maritime liens for necessaries furnished "to keep a vessel fit for sea" took precedence over all other claims except seamen's wages or salvage).

* * *

Before 1910, when the FMLA was first enacted, an odd distinction existed in the American law of maritime liens: a maritime lien arose for the provision of necessaries in a port in a foreign country or foreign state, but no lien arose if necessaries were supplied in the vessel's home port. *The Roanoke*, 189 U.S. 185, 193-94, 23 S. Ct. 491, 47 L. Ed. 770 (1903); *The Gen. Smith*, 17 U.S. at 443.

* * *

> Hardly any area of law could be viewed as more extraterritorial than admiralty law. It is well settled that the admiralty jurisdiction of United States courts extends to the high seas: "The traditional domain of admiralty jurisdiction is, of course, the sea . . . ." SCHOENBAUM § 3-3. Save for inland navigable waters, ports, and a few other locations, admiralty jurisdiction by definition extends beyond United States territorial boundaries. Tethering United States maritime lien law to situations involving only American-flagged vessels, American suppliers, or American ports would threaten the ability of foreign vessels to move freely from port to port without the fear of going without necessaries. *See The St. Jago de Cuba*, 22 U.S. at 416 (stating that "the consideration that controls every other" is that "[t]he vessel must get on").

This Court consistently has held, throughout the last approximately 200 years, that United States maritime lien law, which the FMLA codified, operates extraterritorially.[8] "[W]e understand the

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[8] Petitioner's discussion of *Lauritzen* on the question of application of the Jones Act (Petition at 21-24) and insistence of some "affirmative statement Congressional intent" (*id.* At 24-25, citing opinions entirely outside of the maritime law, and maritime lien subject matter) consequently has no application in the context of the 200 years of United States maritime lien law. Before Congress codified it in the last part of the 20th Century, United States maritime lien law, as this Court's

rule to be that, where necessary supplies are furnished to a ship in a foreign port, and they are received by the master, and used by him in the service of the ship, a maritime lien results, unless it shall appear that the furnisher of supplies did not rely upon the ship, but trusted solely to the personal credit of the owner; and the burden of proof in such a case to defeat the lien lies upon the ship and her claimants." *THE GENERAL SMITH*, 17 U.S. 438, 443 (1819). "For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty." *The J. E. Rumbell*, 148 U.S. 1 (1893). About one hundred years later, this Court in *Exxon Corp. v. Cent. Gulf Lines*, 500 U.S. 603, 612-13 (1991) similarly wrote as follows:

> There remains the question whether admiralty jurisdiction extends to Exxon's claim regarding the delivery of fuel in Jeddah. We conclude that it does. . . . In this case, the only difference between the New York delivery over which the District Court asserted jurisdiction . . . and the Jeddah delivery was that, in Jeddah . . . . We express no view on whether Exxon is entitled to a maritime lien under the

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Footnote Continued

decisions confirm, applied outside of the United States and as confirmed *supra*, Congress has stated explicitly that it never intended by codification to change United States maritime lien law.

> Federal Maritime Lien Act. That issue is not before us, and we leave it to be decided on remand.

On remand, the United States District Court for the Southern District of New York as follows (with no further appeal) found that Exxon had a maritime lien for its Jeddah bunkers delivery:

> Upon remand, the only remaining issue in the instant case is whether Exxon is entitled to a lien on the Hooper for amounts claimed due.
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> * * *
>
> As the Supreme Court noted in its Opinion, "the only difference between the New York Delivery . . . and the Jeddah delivery was that, in Jeddah, Exxon bought the fuels from a third party and had the third party deliver them to the Hooper." 111 S. Ct. at 2077 . . . The Court thus finds that Exxon did furnish bunkers to the Hooper within the meaning of the [U.S. Maritime] Lien Act.

Exxon Corp. v. Central Gulf Lines, 780 F. Supp. 191, 192-93, 195-95 (S.D.N.Y. 1991).

C. The Contract Chooses United States Law. Operation of that United States Law, Upon Trans-Tec's Provision of Bunkers to the M/V HARMONY CONTAINER, Gave Rise to the Maritime Lien.

Petitioner's final misstatement is that the contract's United States law choice created a maritime lien. It did not. Instead, by operation of United States law, which the parties freely chose, the maritime lien arose under the FMLA, 46 U.S.C. § 31342 when Trans-Tec provided bunkers to the M/V HARMONY CONTAINER "on the order of the owner or a person authorized by the owner . . . ." There is no dispute that the charterer of the M/V HARMONY CONTAINER was anything other than an entity which the owner (petitioner) had authorized to order the bunkers for the vessel. Bunkers (fuel), unquestionably, were maritime necessaries, inseparable from the vessel's operation. Significantly, as well, petitioner was no stranger to the transaction. Splendid's charter expressly required the charterer to order bunkers for the vessel. The vessel was under time charter from Splendid to the charterer. Under standard time charter operation, Splendid employed the master and crew. Splendid's master and crew received the bunkers when they arrived at the vessel, for Trans-Tec's provision of those bunkers to the vessel.

The Ninth Circuit astutely observed that within the world system of maritime commerce, not only private shipowners but countries objecting to choices of law clauses such as that here, have a range of options to address an objection to maritime liens

which arise by operation of that chosen law. These are very simple answers to the non-existent catastrophe that petitioner imagines, as follows:

> Given that approximately thirty nations recognize a maritime lien for the provision of necessaries, other countries have options, if desired, to address this circumstance. For example, a country could simply prohibit contracting parties from choosing United States or foreign maritime lien law in their contracts. Alternatively, national law could require charterers to inform suppliers of existing no-lien clauses in the charter-party. And, in the private arena, ship owners could take steps to give suppliers notice of the no-lien provisions, thus effecting actual notice of the provisions and preventing charterers from burdening the ship with maritime liens. *See* 46 U.S.C. § 31341 (stating that charterers are only presumed to have authority to bind the vessel).

App. 27 n.10. Significantly, no Malaysian law presented to the Ninth Circuit (or District Court) prohibited the contract's incorporation of U.S. law; in fact, Malaysian law permits and recognizes that incorporation and U.S. law choice. It also was entirely within Splendid's power, particularly because its employees operated the M/V HARMONY CONTAINER, to give a "no lien" notice to all bunker

providers, including Trans-Tec. Splendid also could have required the charterer to give that notice and then confirm to Splendid that the charterer had given the notice. This is not difficult; the notice could be by fax, *see Stevens Shipping & Terminal Co. v. Japan Rainbow II MV*, 334 F.3d 439, 443-44 (5th Cir. 2003), e-mail, telephone call, or any other means to give the provider notice that the charterer was (contrary to the presumption) not authorized to incur maritime liens against the vessel.

Trans-Tec was Kien Hung's major bunkers provider. Trans-Tec's identity was not a secret, including, to Splendid's employees aboard the vessel. Despite the fact that the charter did have a "no lien" provision, petitioner never required Kien Hung to give Trans-Tec notice of that and there was no "no lien" notice here, and for calculated reason.[9] If there were notice, the necessaries provider would be reluctant, or might not at all, extend credit to the charterer and vessel. Without that credit, the charterer could not earn freights by operating the vessel and delivering cargo, and the owner would not receive charter hire, paid from the vessel's income. Ship owners such as Splendid, do not require charterers to send "no lien" notices, even though it is well known that maritime liens are commonplace (as the Ninth Circuit commented, in about thirty international jurisdictions), because the owners

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[9] The record contains no evidence of any mortgage on the vessel. There would be nothing preventing the mortgage holder or any other entity holding a security interest against the vessel, however, from requiring as a condition of its credit extension (or continuing that), that the vessel charterer and/or owner give a "no lien" notice to necessaries providers.

want charterers to receive credit from necessaries providers and thereby be able to pay charter hire. In fact, there is no better place than Splendid's own charter party to confirm the commonplace nature of maritime liens and Splendid's knowledge that they were possible: the charter party recognizes this, "prohibit[ing] the charterer from binding the Vessel with any maritime liens." (Petition at 4 n.1). The charterer nevertheless breached the charter party, bound the vessel with a maritime lien, and that breach is properly a matter between the petitioner and charterer.

Consequently, it here is incorrect to say the shipowner plays no part in the provision of necessaries to its vessel, particularly as here where its crew run the ship under charter. It is only in situations like this one when the charterer has failed, that an owner complains that there should be no maritime lien against the vessel, and that consequently, there should be no payment to the necessaries provider which provided fuel for the vessel and enabled the owner to receive any charter hire that the owner ever could have received.

The necessaries contract here itself does not create a maritime lien. Rather, the contract chose which country's law applied to determine the contractual relationship between the supplier and customer. It was the operation of that chosen law, upon Trans-Tec's provision of bunkers to the vessel, that gave rise to the maritime lien. The operation of the chosen United States law includes not only the FMLA but the larger body of United States law, all

of which controls the contract. This Court explained as follows in *The Bird of Paradise*, 72 U.S. at 555:

> Parties, however, may frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it, or they may so frame their contract as to exclude it altogether. They may agree that the goods, when the ship arrives at the port of destination, shall be deposited in the warehouse of the consignee or owner, and that the transfer and deposit shall not be regarded as the waiver of the lien; and where they so agree, the settled rule in this court is, that the law will uphold the agreement and support the lien.

Nothing in the FMLA says that parties to a private international contract cannot choose United States law as they did here, which includes the FMLA and its operation. As the Ninth Circuit correctly observed, there is no FMLA "carve out" from the compelling rule of this Court that "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 12-13. "A contractual provision specifying in advance . . . the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business

transaction." *Scherk v. Alberto-Culver Co.*, 417 U.S. at 516.

The M/V HARMONY CONTAINER, one of many of charterer Kien Hung's vessels to which Trans-Tec and affiliates sold bunkers, delivered cargo, and took on necessaries including bunkers as it powered back and forth across the Pacific Ocean through a range of national jurisdictions, some even overlapping. The vessel required bunkers at multiple and varied places. Now to require Trans-Tec, or any other marine necessaries provider to guess at each bunkers provision the controlling law, rather than allowing the provider and customer to agree on it as a matter of their contract, would significantly disrupt the international business of fueling vessels. Petitioner itself candidly recognizes the following, that:

> The global maritime lien system is a central part of the equation. . . Suppliers, insurers, repairers, and everyone else who operates in the industry will base their prices, in part, on whether they can obtain a maritime lien to secure payment, and what they must do to enforce it.

Petition at 27. Holding other than what the Ninth Circuit did will constrict unnecessarily bunker and other necessaries providers' extension of marine credit, essential to and a "central part of" the operation of international cargo vessels. The FMLA, 200 years of United States maritime lien law and

this Court's precedent fully supports the Ninth Circuit's *HARMONY CONTAINER* decision.

CONCLUSION

This Court should deny the petition.

Respectfully Submitted,

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