No. 18-266

In the

Supreme Court of the United States

FRANCIS & MARY MARION, CHARLES & MARY PICKNEY,
JOHN & ELIZABETH RUTLEDGE, JAMES S. THURMOND, AND
ESSIE MAE WASHINGTON-WILLIAMS,

Petitioners,

v.

SALLY'S SEAFOOD SHACK, INC.,

Respondent.

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

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Brief for Petitioners

Team D
Counsel for Petitioners

Questions Presented

1. The Shipowner's Limitation of Liability Act of 1851(46 U.S.C. §§ 30501-12) is an affirmative defense that allows certain vessel owners to limit their liability after an accident. Today, the owners of a seafood restaurant are trying to transform the Act from a protective instrument to an offensive weapon and limit their liability following an explosion. In the absence of any other basis for admiralty jurisdiction, did the district court err in finding the Act independently creates jurisdiction?

2. 28 U.S.C. § 1292(a)(3) is an exception to the final judgment rule and allows appellate courts to entertain appeals from a district court which determined the rights and liabilities of the parties to an admiralty case. Here, the district court bifurcated the trial: hearing evidence regarding limitation in phase one, and postponing issues of liability and damages to phase two. After hearing phase one, did the Fourth Circuit err in dismissing the appeal when it determined the district court had not fully adjudicated the rights and liabilities of the parties?

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after an accident. Today, the owners of a seafood restaurant are trying to transform the Act from a protective instrument to an offensive weapon and limit their liability following an explosion. In the absence of any other basis for admiralty jurisdiction, did the district court err in finding the Act independently creates jurisdiction?

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Petitioners,

v.

SALLY'S SEAFOOD SHACK, INC.,

Respondent.

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

Brief for Petitioners

To the Honorable Supreme Court of the United States:

Petitioners Francis and Mary Marion, Charles and Mary Pickney, John and Elizabeth Rutledge, along with James S. Thurmond, and Essie Mae Washington-Williams, by counsel, respectfully submit this brief in support of their request that this Court find (1) the Shipowner's Limitation of Liability Act of 1851, 46 U.S.C. §§ 30501–12, and (2) 28 U.S.C. § 1292 federal jurisdiction of petitions for limitation of liability filed under the Act. the Act.

Opinions Below

The judgment of the United States District Court for the District of South Carolina dated March 13, 2017, which grants respondent's petition for limitation without hearing evidence regarding issues of liability or damages is reported and appears as *In re Sally's Seafood Shack, Inc.*, 243 F. Supp. 3d 702 (D.S.C. 2017) and in the Appendix to the Petition for Certiorari, R. at 9a–14a.

On March 22, 2018, claimants filed an interlocutory appeal under § 1292(a)(3) After oral arguments, in a judgment dated May 7, 2018, the United States Court of Appeals for the Fourth Circuit determined the district court independently had admiralty jurisdiction under the Shipowner's Limitation of Liability Act even though it recognized that the traditional requirements for admiralty tort jurisdiction had not been met. On March 22, 2018, claimants filed an interlocutory appeal under § 1292(a)(3). After oral arguments, in a judgment dated May 7, 2018, the United States Court of Appeals for the Fourth Circuit determined the district court independently had admiralty jurisdiction under the Shipowner's Limitation of Liability Act even though it recognized that the traditional requirements for admiralty tort jurisdiction had not been met. R. at 3a. But the Fourth Circuit dismissed the appeal because the district court had not fully "determined the rights and liabilities of the parties" after granting the petition for limitation. R. at 4a–6a. The opinion and judgment are reported and appear as *In re Sally's Seafood Shack, Inc.*, 890 F.3d 1384, 2018 AMC 3333 (4th Cir. 2018) and in the Appendix to the Petition for Certiorari–6a. R. at 1a–6a.

The judgment of the United States Court of Appeals for the Fourth Circuit, dated June 26, 2018, denying the Petition for Rehearing, is unreported but appears in the Appendix to the Petition for Certiorari. R. at 7a–8a. It contains a dissent by Circuit Judge Solomon who would have granted the petition for rehearing and set the case for argument en banc because both issues deepen existing circuit conflicts. *Id*.

Jurisdictional Statement

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1), which allows this Court to review appeals upon a writ of certiorari by any party to a civil case after a judgment or decree. Claimants filed their petition for certiorari on September 4, 2018, and this Court granted the petition on December 3, 2018.

In the lower levels in this case, jurisdiction has been argued to be a determining factor. Petitioners contend that standing alone, the Shipowner's Limitation of Liability Act does not independently create federal admiralty jurisdiction—especially in a factual scenario where all the parties agree that there is no other basis for federal jurisdiction at all. R. at 4a.

While petitioners still contend jurisdiction is improper at the district court level, in the unfortunate event that a district court misapplies the Limitation of Liability Act and wrongly grants a petition for limitation, § 1292(a)(3) clearly allows federal appellate courts to hear interlocutory appeals in certain circumstances.

Constitutional and Statutory Provisions

The allegedly relevant constitutional provision here is the Admiralty Clause, which provides that "judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, § 2, cl. 2.

Statement of the Case

I. Statement of Facts

A. Background

Sally's Seafood Shack was located near the Cooper River in Charleston, South Carolina. R. at 10a. Befitting for a seafood restaurant, Sally's Seafood Shack was in fact a former commercial fishing vessel named *F/V Flamingo*. R. at 9–10a. Located behind a cofferdam, Sally's Seafood Shack provided the panache of a weathered fishing boat, without the peril or liability to the owners of being at sea and exposed to Mother Nature's fury. *Id.*

B. F/V Flamingo

In her glory years, *F/V Flamingo* made hundreds of ocean voyages to the North Atlantic in pursuit of her catch. R. at 10a. For 20 years as a commercial fishing vessel, she provided livelihoods for her crew, and sustenance to the people of the Carolinas. *Id*.

But more recently, her existence has been more mundane. *Id*. In 2008 the *F/V Flamingo* was stripped from her service as a fishing vessel and converted into a restaurant. *Id.* Adding insult to injury, she was renamed Sally's Seafood Shack and landlocked behind a cofferdam. *Id.*

C. Sally's Seafood Shack

Indefinitely moored, she was a stone's throw from the Cooper River and longed for open ocean, but the cofferdam ensured that she would be unable to reach the main portion of the river—even if she could break free from her berth. *Id*. Effectively, her status was relegated to a "boat in a moat"; her navigational capabilities inert. *Id.*

The restaurant staff of Sally's Seafood Shack were press-ganged into service on the *F/V Flamingo*. *Id*. Lacking the care and seafaring expertise of her old crew, the Sally's Seafood Shack's crew—especially in the kitchen—may have given her a sinking feeling. *Id*.

Without the ability to stretch her sea legs, in recent years, Sally's Seafood Shack has devolved into a shell of her former self. As the district court notes, Sally's Seafood Shack operated

in pretty much the same way as any other seafood restaurant would operate. R. at 11a. Although the bulk of the restaurant activity took place on board the former *F/V Flamingo*, the district court was clear that she was (1) no longer engaged in true maritime commerce, (2) permanently and indefinitely moored to shore, and (3) landlocked behind a cofferdam. R. at 11a–13a.

D. The Explosion

On July 17, 2015, numerous friends and families were enjoying dinner at Sally's Seafood Shack. R. at 10a. It was a Friday evening, and Francis and Mary Marion were having dinner at one table in the dining room. *Id*. Sitting nearby were Charles and Mary Pinckney, along with John and Elizabeth Rutledge—on a double date. *Id*. At a third table sat Mr. James Thurmond, enjoying dinner with his daughter, Essia Washington-Williams. *Id*.

Unbeknownst to them, a storm of incompetence was brewing in the kitchen beneath their feet. *Id*. A dishwasher named John Calhoun, who assisted the chef as needed, had been instructed to light the gas range. R. at 14a. As he turned on the gas and was about to light the flame, he received a telephone call on his mobile phone and stepped out of the kitchen. *Id*. While he was on the phone, gas continued to accumulate until something—most likely the pilot light on the other range—triggered an enormous explosion. *Id*.

The explosion ripped a substantial hole in the hull beneath the waterline. *Id*. Almost immediately, Sally's Seafood Shack began to sink. *Id*. Fortunately for Mr. Calhoun, he had stepped out of the kitchen at the time of the explosion and was uninjured. *Id*. Unfortunately, eight restaurant patrons sitting in the dining room were severely injured as a result of the explosion and aftermath. *Id*. Sally's Seafood Shack continued to sink, finally coming to rest at the bottom of her anchorage and submerged beneath twelve feet of water. R. at 10a.

II. Statement of Proceedings

A. State Court

Shortly after the explosion, in late July and early August, the eight injured patrons—Francis and Mary Marion, Charles and Mary Pickney, John and Elizabeth Rutledge, along with James S. Thurmond, and Essie Mae Washington-Williams—filed various tort actions against Sally's Seafood Shack, Inc. in state court. R. at 9a.

B. Federal Court

On November 5, 2015, Sally's Seafood Shack, Inc. independently filed a petition for limitation or exoneration in federal court to limit its liability under the Limitation Act, 46 U.S.C. §§ 30501–12. R. at 9a. This petition for limitation under Rule 9(h) is a tactical litigation maneuver, attempting to ensure the claimants do not receive the benefit of state court, or—more importantly—a jury. FED. R. CIV. P. 9(h), 38(e).

The petition for limitation stayed the state court actions under 46 U.S.C. § 30511(c). R. at 9a. Claimants accordingly filed claims under the same terms from state court in the district court's limitation proceedings. *Id.*

The post-incident value of the *F/V Flamingo* was conceded to be less than $1,000, with no pending freight. R. at 10a. Via Supplemental Rule F of the Federal Rule of Civil Procedure and 46 U.S.C. § 30511(b)(1)(A), the owners of Sally's Seafood Shack deposited $1,000 with the district court as security for the petition for limitation and subsequent concursus proceedings. R. at 10a.

The district court bifurcated the trial and heard evidence regarding Sally's Seafood Shack's entitlement to limitation of liability in phase one and postponed issues of liability and damages until phase two. *Id*. At the conclusion of phase one, the district court issued an opinion determining (1) it had admiralty jurisdiction under the Limitation Act and (2) Sally's Seafood Shack was entitled to limit its liability, and thereby granted its petition for limitation. R. at 2a, 14a.

C. Court of Appeals

After phase one, claimants appealed the district court's findings to the Fourth Circuit using § 1292(a)(3), under the reasoning that granting Sally's Seafood Shack's petition for limitation and limiting the owner's potential liability (and therefore the claimant's recovery) under the Act to a trivial amount has effectively "determined the rights and liabilities of the parties." R. at 5a.

The Fourth Circuit dismissed the appeal after determining that (1) the district court had admiralty jurisdiction under the Limitation Act, and (2) the appellate court did not have jurisdiction under § 1292(a)(3) because the district court had not "determine[d] the rights and liabilities of the parties" when it granted Sally's Seafood Shack the right to limit its liability, without deciding whether it had any liability to be limited. R. at 4a.

Claimants filed a petition for rehearing en banc which was subsequently denied. R. at 7a.

D. Supreme Court

This Court granted claimant's petition for certiorari.

Summary of the Argument

I. Federal jurisdiction is not appropriate because the Shipowner's Limitation of Liability Act, standing alone, does not create admiralty jurisdiction, and no other basis for jurisdiction exists.

For decades, the Shipowner's Limitation of Liability Act has not independently conferred admiralty jurisdiction. However, ignoring this precedent here, the district court fulfilled the first part of a concursus proceeding and granted the vessel owner's petition for limitation—independent of any other basis for federal admiralty jurisdiction.

This holding is in flagrant disregard to precedent and flies in the face of numerous district and appellate courts which have held that a proceeding under the Limitation of Liability Act is cognizable in admiralty *only* when the underlying tort has a relationship to traditional maritime activity. Moreover, even if admiralty jurisdiction existed through another route, Sally's Seafood Shack would still be ineligible for limitation because she was not a "seagoing vessel" as required under the Limitation of Liability Act.

II. Even if the Limitation of Liability Act independently provides admiralty jurisdiction, § 1292(a)(3) broadly grants appellate jurisdiction over interlocutory appeals arising from admiralty or maritime cases before final relief is ordered. Numerous circuits have adopted this broad interpretation of § 1292(a)(3).

The Fourth Circuit's narrow interpretation of § 1292(a)(3) in this case is squarely at odds with precedent from its own court. Congress's intent in drafting § 1292(a)(3) is clear, and the revisions to Federal Rule of Civil Procedure 9(h) are demonstrative of further attempts to broaden appellate jurisdiction for certain admiralty cases. The district court's granting of a petition for limitation in this case falls precisely within the purview of § 1292(a)(3).

Argument

Issue 1: The Shipowner's Limitation of Liability Act of 1851 is an affirmative defense that allows certain vessel owners to limit their liability after an accident. Today, the owners of a seafood restaurant are trying to transform the Act from a protective instrument to an offensive weapon and limit their liability following an explosion. In the absence of any other basis for admiralty jurisdiction, did the district court err in finding the Act independently creates jurisdiction?

I. The district court should have dismissed Sally Seafood Shack's petition for limitation because the Limitation of Liability Act does not independently create admiralty jurisdiction, and the parties agree there is no other basis for federal jurisdiction.

Article III of the Constitution grants federal courts jurisdiction over "all cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2, cl. 2. However, this language offers little or no guidance as to what sort of matters actually constitute "admiralty and maritime Jurisdiction", and both Congress and the courts have allocated federal admiralty jurisdiction as necessary.

Historically, in admiralty cases, appellate courts "review the district court's legal conclusions regarding its own subject matter jurisdiction de novo." *See Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 533, 2013 AMC 648, 654 (4th Cir. 2013). In determining subject matter jurisdiction, the court will "review the district court's factual findings with respect to jurisdiction for clear error." *Velasco v. Gov't of Indon*., 370 F.3d 392, 398 (4th Cir. 2004).

A. The Shipowner's Limitation of Liability Act was not created by Congress to protect a seafood restaurant.

It was not until 1848, when this Court decided *N.J. Steam Navigation Co. v. Merchants' Bank of Bos.*, that Congress's attention was directed to the issue of shipowner liability. 47 U.S. 344 (1848). In that case, the owners of a steamboat, which burnt on Long Island Sound, were held liable for about $18,000 in coins, which had been shipped on board the steamer and subsequently lost. *Id*. at 347.

To settle the uneasiness produced among shipowners by this decision, and to put American maritime law on an even keel with that of other seafaring nations, Congress, in 1851, enacted what today is known as the Limitation of Liability Act and incorporated as 46 U.S.C. §§ 30501–12. *See Main v. Williams,* 152 U.S. 122, 128 (1894) (explaining the historical backdrop of the law).

The original purpose of the 1851 Shipowner's Limitation of Liability Act was "to encourage the development of American merchant shipping" by extending a limitation provision similar to those found in other seafaring nations, with the hope that protections be "directed at misfortunes *at sea* where the losses incurred exceed the value of the vessel and the pending freight." *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150–51 (1957) (emphasis added). Ideally, this Act would promote American commercial shipping interests by protecting private investment against potentially staggering financial claims arising out of shipboard disasters at sea. *See In re Porter*, 272 F. Supp. 282, 283–84 (S.D. Tex. 1967).

To accomplish this, the Act provides, in relevant part, that "the liability of the owner of a vessel for any claim, debt, or liability . . . shall not exceed the value of the vessel and pending freight." 46 U.S.C. § 30505(a).

B. The Act is only a defense to be raised in federal court—not a cause of action.

Twenty years after the Shipowner's Act of 1851 was enacted, this Court finally addressed the issue of what procedures should be in place for those vessel owners seeking to invoke the Act's protection when it heard *Norwich Co. v. Wright* in 1871. 80 U.S. 104, 1998 AMC 2061 (1871). There, this Court realized no procedure was in place for invoking the Act, and that the Act itself made no mention of how vessel owners would actually be protected. *Id*. at 123, 1998 AMC at 2072. Rather than waiting for the procedures to be filled in through a series of legislative or lower court decisions, this Court took the extraordinary step of designing comprehensive rules to dictate how a vessel owner could seek limitation under the Act. *Id*. at 125, 1998 AMC at 2074.

The procedures governing Limitation Act proceedings can now be found in Rule F of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. *See* FED. R. CIV. P. SUPPLEMENTAL RULE F. If admiralty jurisdiction independently exists and the statute is properly invoked under Supplemental Rule F, the resulting proceeding is known as a "concursus." *In re Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 755, 1988 AMC 1674, 1679 (2d Cir. 1988).

A concursus is effectively a two-step process. First, a district court sitting in admiralty without a jury determines whether negligence or conditions of unseaworthiness caused the accident. Second, if the court finds either of these to be the case, the court determines whether the owner had privity or knowledge regarding the same. If limitation is granted, the court also decides how the limitation fund should be distributed. *See Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060, 1062–63, 1997 AMC 457, 459-460 (11th Cir. 1996).

The tug-of-war for jurisdiction between federal and state court is not without consequence. In this case, the fact that claimants have first filed their actions in state court should bear significant weight in the analysis. *In re Complaint of Ingoglia*, 723 F. Supp. 512, 514 (C.D. Cal. 1989); *see also* 3 EDWARD V. CATTELL, JR., BENEDICT ON ADMIRALTY § 51 (Joshua S. Force ed., 2012) (discussing the need "to preserve, where possible, the shipowner's rights under the Limitation of Liability Act and the suitor's rights to a common law remedy in the common law courts under the Judiciary Act of 1789").

To potentially force claimants to try negligence claims in federal court rather than in their chosen forum would impermissibly "transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights . . ." *Lake Tankers Corp.*, 354 U.S. at 152.

C. The Act usually protects vessel owners from marine casualties that occur at sea; not non-vessels on non-navigable waters.

To those familiar with maritime history, the Limitation of Liability Act has been invoked in almost every marine mass casualty event that has occurred on the high seas—leaving noteworthy jurisprudence in its wake.

For example, in 1913 the White Star Line filed a petition for limitation in the Southern District of New York after its vessel, *The Titanic*, collided with an iceberg and sank in the frigid North Atlantic—sending more than 1,500 people to their graves. *See The Titanic*, 209 F. 501, 501–02 (S.D.N.Y. 1913). To the dismay of *Titanic* passengers and victims, the White Star Line attempted to invoke the Shipowner's Limitation of Liability Act and limit any recoveries to the meager value of the 14 surviving lifeboats and freight money earned—totaling less than $92,000. *The Titanic*, 209 F. 513 (2d Cir. 1913). Fortunately, the claimants were able to remove their claims and re-file in England, which had a similar Limitation of Liability Act. *See generally* James E. Mercante, *In the Wake of 'The TITANIC': An Unsinkable Law*, 247 N.Y. L.J., no. 70, 2012. Under the English version of the law, the post-casualty value of the asset was based on tonnage, meaning the resulting limitation fund available to *Titanic* claimants was much higher. Merchant Shipping Act 1894, 57 & 58 Vict. c. 60, § 503. Unfortunately, victims of the Sally's Seafood Shack explosion and claimants to the miserly remains of the *F/V Flamingo* (valued at $1,000) do not have a more favorable foreign jurisdiction in which they can remove their claims.

Nearly a century later, in 2010, Transocean sought to invoke the Act following the explosion of its mobile offshore drilling unit, *Deepwater Horizon*, which killed 11 people. *See In re Complaint & Petition of Triton Asset Leasing GmbH*, 719 F. Supp. 2d 753, 755 (S.D. Tex. 2010). Transocean—to the extent that it is held liable for the explosion—sought to limit its liability to $26,764,083, or the purported value of the vessel and its pending freight. *Id*. at 756.

Neither the White Star Line nor Transocean argued that the Limitation Act provides an independent basis for jurisdiction, since admiralty jurisdiction was based on the location of the accident in navigable waters (North Atlantic and Gulf of Mexico, respectively), and the maritime activity involved when the accident occurred (a passenger liner carrying passengers, and mobile offshore drilling unit drilling for oil).

The outer limits of the Limitation of Liability Act are largely uncharted waters. More recently, however, accidents including the sinking of the *El Faro* during Hurricane Joaquin with a loss of all 33 crew aboard, and a "duck boat" that killed 17 tourists on Table Rock Lake in Missouri during a freak rainstorm have thrust the realities of the Limitation Act and its applicability back into the public spotlight. *See* Barbara Liston, *El Faro owner seeks protection from death claims in ship's sinking*, REUTERS (Oct. 31, 2015), http://reut.rs/1N2RRA4; Matthew Haag, *Operators in Fatal Duck Boat Accident Say They Owe Families Nothing, Citing Obscure 1851 Law*, N.Y. TIMES (Oct. 18, 2018), https://nyti.ms/2QZQfRd. Litigation is ongoing in the Table Rock Lake accident, but the owners have nevertheless filed a petition for limitation or exoneration of liability. *See* Verified Complaint for Exoneration from or Limitation of Liability ¶ 1, *In re Branson Duck Vehicles, LLC, et al.*, No. 6:18-cv-03339-MDH (W.D. Mo. Oct. 15, 2018).

Invocation of the Act in the case of a "duck boat" tour operator working on a non-navigable, intrastate body of water seems far removed from Congress's original purpose for the Act—the protection of commercial blue-water and oceangoing shipping. The Limitation Act should not independently provide federal admiralty jurisdiction for commercial brown-water operations or intrastate vessel operators. State courts are the more appropriate forum to hear the various tort actions raised by the victims of an accident.

D. Historically, the Act has not independently created admiralty jurisdiction.

The Limitation of Liability Act— creates a defense—not a cause of action for shipowners. *See* 46 U.S.C. §§ 30501–12. Traditionally, since the right to limitation arises out of a casualty involving a vessel, the jurisdictional basis will be admiralty law and readily apparent based on the facts and location of the accident. *See* 29 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 703.02 (3d ed. 2018). 2018). Standing alone, the Act has not historically created an independent basis for federal jurisdiction—with one notable exception from 1911.

In 1886, this Court found that an early version of the Limitation of Liability Act did not by itself give rise to federal subject matter jurisdiction. *See Ex parte Phenix Ins. Co. of Brooklyn*, 118 U.S. 610, 619, 2001 AMC 595, 599 (1886) ("As the owners of the burned property could not sue originally in the admiralty for their damages, it is impossible to see how, by the present form of proceeding [under the Act], the owner of the steamer can give to the admiralty court jurisdiction to entertain the suits for the damage by a practical removal of them into the admiralty court.").

Twenty-five years later, this Court decided *Richardson v. Harmon*, 222 U.S. 96, 2001 AMC 1207 (1911), which has veered some Limitation Act jurisprudence off-course—running far afoul of *Ex parte Phenix*.

Richardson involved an allision between a steam barge and a bridge resulting in great damage to both barge and bridge. *Richardson*, 222 U.S. at 97, 2001 AMC at 1208. Prior to the Admiralty Jurisdiction Extension Act of 1948 (now 46 U.S.C. § 30101), damage caused by ships to land-based objects was not considered to be within admiralty tort jurisdiction—presenting a massive liability "hole" for shipowners. *Richardson*, 222 U.S. at 106, 2001 AMC at 1212. This Court recognized that and decided in *Richardson* that when a casualty for which limitation liability is sought is non-maritime and otherwise not within admiralty jurisdiction, the Shipowners' Limitation of

Liability Act applies and provides a basis for federal court jurisdiction. *Id*. at 101, 2001 AMC at 1209.

Following *Richardson*, Congress passed the Admiralty Jurisdiction Extension Act of 1948 and patched the hole in admiralty tort jurisdiction. Today, the tort at issue in *Richardson* would clearly be eligible for federal admiralty jurisdiction—and afforded the protections of the Limitation of Liability Act.

E. Nor does the Act provide independent admiralty jurisdiction in this case.

Almost immediately, the facts of the present case depart from *Richardson* because here, the parties (and courts) agree that federal admiralty jurisdiction under the Admiralty Jurisdiction Extension Act is not available in this case. R. at 4a.

Richardson represents the high-water mark for the Limitation of Liability Act and overextends its jurisdiction protections and liability shield to "all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime . . ." 222 U.S. at 106, 2001 AMC at 1212. This decision was based on Congress's presumed intention of benefitting the "ship-owning industry," which it may be assumed meant the protection of vessels engaged in interstate or international trade, not the protection of vessels engaged in voyages on non-navigable waters. 1 STEVEN F. FRIEDELL, BENEDICT ON ADMIRALTY § 225 (Joshua S. Force ed., 2018).

The case at hand is obviously not what Congress had in mind when crafting the Shipowner's Limitation of Liability Act. Sally's Seafood Shack should not be entitled to limitation or exoneration of liability under the Act because she is neither a vessel nor engaged in voyages on navigable waters for the purposes of interstate or international trade.

Today, the holding in *Richardson* is more than a century old, and largely considered to be "a historical anomaly that cannot be fairly reconciled with modern admiralty jurisdiction" because

it "expanded the jurisdictional reach of the Act beyond the then-existing parameters of admiralty jurisdiction in order to effect the amendment's goal of improving the competitive posture of American shipping." *Seven Resorts, Inc. v. Cantlen*, 57 F.3d 771, 773, 1995 AMC 2087, 2090–91 (9th Cir. 1995).

The viability of *Richardson* as an independent basis for jurisdiction has been evaluated by this Court in two fairly recent cases: *Sisson v. Ruby* and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co*.

In *Sisson v. Ruby*, a yacht owner attempted to limit his liability after his on-board dryer set ablaze a Lake Michigan marina. 497 U.S. 358, 360, 1990 AMC 1801, 1802 (1990). On appeal, the Seventh Circuit initially held that the Limitation of Liability Act does not provide a basis for admiralty jurisdiction if the purpose is to limit liability for a tort that does not bear any connection to traditional maritime activity. *In re Sisson*, 867 F.2d 341, 349–50, 1989 AMC 609, 625 (7th Cir. 1989), *rev'd on other grounds*, 497 U.S. 358, 1990 AMC 1801 (1990). This holding has been subsequently adopted by *MLC Fishing, Inc. v. Velez*, 667 F.3d 140, 2012 AMC 485 (2d Cir. 2011); *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1989 AMC 1521 (11th Cir. 1989); and *In re American Auto, Inc.*, 1989 AMC 1489 (N.D. Cal. 1989).

After this Court granted the petition for writ of certiorari in *Sisson*, the Department of Justice asked the Court to reconsider *Richardson v. Harmon*. Brief for the United States as Amicus Curiae, *Sisson v. Ruby*, 497 U.S. 358, 1990 AMC 1801 (1990). However, this Court's resulting opinion relegated punted on the f any mer the Act providesas an independent basis for jurisdictn, to a fg only in a footnote that this Court "need not decide which party is correct, for even were we to agree that the Limited Liability Act does not independently provide a basis for this action, § 1331(1) is sufficient to confer jurisdiction." *Sisson*, 497 U.S. at 359 n.1, 1990 AMC at 1802.

The Court then reversed the Seventh Circuit on other grounds, finding that admiralty tort jurisdiction under 28 U.S.C. § 1331 (1) was proper because (1) such a fire has a potentially disruptive impact on maritime commerce because the fire can spread to nearby commercial vessels or render the marina inaccessible, and (2) the general conduct that gave rise to the incident—the storage and maintenance of a boat at a marina on navigable waters—is substantially related to traditional maritime activity. *Id.* at 367, 1990 AMC at 1808. Thus, *Sisson* held that admiralty tort jurisdiction requires both a potential disruption to maritime commerce and a nexus of traditional maritime activity.

Five years later, this Court attempted to clarify the *Sisson* test in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co*. which involved severe damage to the Chicago Loop resulting from allegedly negligent pile driving several months earlier. 513 U.S. 527, 529, 1995 AMC 913, 915 (1995). The pile driving was performed by a crane on a barge that was secured to the bed of the Chicago River. *Id.* at 530, 1995 AMC at 915. These pilings punctured a freight tunnel and caused significant flooding to the underground Chicago Loop. *Id*. at 529, 1995 AMC at 915.

As expected, the owners of the barge filed a motion for exoneration from or limitation of liability under the Act. *Great Lakes Dredge & Dock Co. v. City of Chi.*, 3 F.3d 225, 226, 1993 AMC 2409, 2411 (7th Cir. 1993). The city, joined by one alleged flood victim, filed a motion to dismiss the owner's federal suit for lack of admiralty jurisdiction. *Id*. at 226, 1993 AMC at 2411. The district court granted the motion. *Id*. at 226–27, 1993 AMC at 2411. The United States Court of Appeals for the Seventh Circuit reversed and expressed the view that the district court in fact possessed admiralty jurisdiction over the company's Limitation Act suit. *Id*. at 227, 230, 1993 AMC at 2421.

After hearing the case on appeal, this Court refined the *Sisson* test by determining, first, that when evaluating the effect of the incident, what matters is "whether the incident could be seen

within a class of incidents that posed more than a fanciful risk to commercial shipping." *Grubart*, 513 U.S. at 539, 1995 AMC at 922. Second, the Court found that when determining if the incident shows a substantial connection to traditional maritime activity, the question for the Court is "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." *Id.* at 539–540, 1995 AMC at 922.

In the present case, the parties and courts agree that the *Grubart* requirements for admiralty tort jurisdiction have not been satisfied. R. at 4a. But *Grubart* remains an example of how this Court has again refused to clarify the murky waters around the availability of the Limitation of Liability Act as an independent basis for federal jurisdiction. This Court held that because independent jurisdiction existed under 28 U.S.C. § 1333(1), it "need not consider respondent['s] . . . argument that the [Act] provides an independent basis of federal jurisdiction over the complaint." *Grubart*, 513 U.S. at 543, 1995 AMC at 926 n.5.

While this Court has repeatedly "needed not" answer the question of whether the Act itself provides an independent basis for federal jurisdiction, many courts have answered the question in the negative and generally agree:

F. To invoke the Act as a defense, federal jurisdiction must be found elsewhere.

These district and circuit courts ignore the precedent of *Richardson* and hold that proceedings under the Limitation Act are cognizable in admiralty only when the underlying tort relates to traditional maritime activity. *See, e.g.*, *Seven Resorts, Inc.*, 57 F.3d at 773, 1995 AMC at 2091 (finding that the Limitation Act does not create federal question jurisdiction independent of admiralty jurisdiction because the Limitation Act is a defense, not a cause of action); *Sea Vessel, Inc v. Reyes*, 23 F.3d 345, 347–48 (11th Cir. 1994) (to determine whether a case is cognizable in admiralty, courts must consider whether (1) the event giving rise to the action occurred on navigable

waters and (2) a substantial relationship existed between the activity giving rise to the incident and traditional maritime activity); *Guillory v. Outboard Motor Corp.*, 956 F.2d 114, 115, 1993 AMC 605 (5th Cir. 1992) ("The Limitation of Liability Act does not confer jurisdiction upon federal courts. That must come from our admiralty jurisdiction under U.S. CONST. art. III, § 2 and 28 U.S.C. § 1333(1). Suits lacking any relationship to either navigable waters or traditional maritime activity are without admiralty jurisdiction."); *David Wright Charter Serv. of N. Carolina, Inc. v. Wright*, 925 F.2d 783, 785, 1991 AMC 2927, 2929 (4th Cir. 1991) ("[T]he Limitation Act is not a source of admiralty jurisdiction. Rather it is a procedure that may be invoked when general admiralty and maritime jurisdiction has been established."); *Three Buoys Houseboat Vacations U.S.A. Ltd. v. Marts*, 921 F.2d 775, 779–80, 1991 AMC 1356, 1362–1363 (8th Cir. 1990) ("[T]he [Limitation] Act does not create independent jurisdiction in the federal courts by 'arising under' federal law . . . [t]he Act is really in the nature of a defense."); *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1054, 1989 AMC 1521, 1533 (11th Cir. 1989) ("[A]ppellant may not base admiralty jurisdiction solely upon the Limitation Act, in the absence of a significant relationship between its claim and traditional notions of maritime activity."); *In re Madison Coal & Supply Co.*, 321 F. Supp. 2d 809, 811 (S.D.W.V. 2003), *aff'd sub nom. M/V Drema G. Woods v. Johnson*, 97 Fed. App'x 449, 449 (4th Cir. 2004) ("[T]he Limited Liability Act is not itself a source of admiralty jurisdiction, but rather a procedure that may be invoked when general admiralty and maritime jurisdiction has been established.").

Respondent may point to one recent case from this Court which stated—in dicta—that the Limitation Act on its face granted the jurisdiction. *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 452, 2001 AMC 913, 924 (2001). But that case involved the Jones Act, meaning the court's admiralty jurisdiction was not in question and it is therefore inapplicable in this case.

G. The district court's insinuation that all salvage or limitation claims are ispo facto within federal admiralty jurisdiction is deeply flawed.

Here, the district court attempts to lump all cases with a "maritime subject" into the proverbial boat known as federal admiralty jurisdiction. R. at 12a. The suggestion that "the [c]ourt would recognize its admiralty jurisdiction over a salvage case simply because salvage has long been recognized as a maritime subject; it would not ask whether the particular act of salvage satisfied the *Grubart* criteria" does not hold water. *Id*.

In fact, a district court in Maine has already heard—and dismissed—an identical train of thought. In *Historic Aircraft Recovery Corp. v. Wrecked & Abandoned Voight F4U-1 Corsair Aircraft*, the court was faced with the question of whether competing claims seeking salvage rights and title to a military aircraft submerged in an intrastate body of water fell within the admiralty jurisdiction of the court. 294 F. Supp. 2d 132, 134–35, 2004 AMC 625, 626–27 (D. Me. 2003).

The salvage company claimant argued all *in rem* actions and salvage actions fall within the exclusive jurisdiction of federal courts sitting in admiralty. *Id*. at 137, 2004 AMC at 628. The court vehemently disagreed, holding this rule expanded admiralty jurisdiction too far, and refused to support the theory found in some cases and treatises. *Id.* at 137, 2004 AMC at 631; *see, e.g., Am. Dredging Co. v. Miller*, 510 U.S. 443, 446–447, 1994 AMC 913, 916 (1994) ("An *in rem* suit against a vessel is, we have said, distinctively an admiralty proceeding, and is hence within the exclusive province of the federal courts."); *Madruga v. Superior Court of California*, 346 U.S. 556, 560–61, 1954 AMC 405, 409 (1954); *Berry v. M.F. Donovan & Sons, Inc.*, 115 A. 250, 252–53 (Me. 1921); *see* 1 THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 3–2 (3rd ed. 2001) (suggesting that "there is exclusive federal admiralty jurisdiction over actions *in rem* and perhaps salvage") (footnotes omitted).

In determining the salvage company's proposed rule did not fly in this context, the court wisely observed that "[s]uch a broad rule would inevitably lead to federal courts invoking their

admiralty jurisdiction over a bizarre variety of claims that have little or no connection to traditional maritime activity." *Historic Aircraft Recovery Corp.*, 294 F. Supp. 2d. at 138, 2004 AMC at 632. For example:

> [I]f the Court were to accept Plaintiff's syllogism as a basis for asserting admiralty jurisdiction over any and all salvage claims, the Court would similarly open the door to adjudicating potential "salvage claims" brought by a Good Samaritan who assists when the inevitable ice shack, snowmobile or car falls through the ice on a landlocked Maine pond.

Id. at 138 n.4, 2004 AMC at 632 n.4.

After finding that a legal issue of salvage did not *ipso facto* create federal jurisdiction, the court attempted to hunt for jurisdiction elsewhere. *Id*. at 135, 2004 AMC at 633. Much like the analysis under *Grubart*, the court took into consideration (1) the location of the waterway and (2) the item that was the subject of the proposed salvage. *Id*. at 135–36, 2004 AMC at 633.

First, regarding the location of the waterway, the court rightly concluded that an object that is subject to salvage must be located in navigable waters. *Id*. at 135–36, 2004 AMC at 634. This navigability restriction on the scope of admiralty jurisdiction is deeply engrained in admiralty law and outcome determinative. The case law is clear—if there is no navigability, there is no jurisdiction. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 171–72, 172 n.7, 2000 AMC 2495, 2499–2500, 2500 n.7 (1979) (noting that past cases have defined navigability for purposes of defining the limits of admiralty jurisdiction).

Second, because the plane was submerged in a non-navigable intrastate lake, the court correctly declined to exercise admiralty jurisdiction and did not reach the issue of whether the plane itself is eligible to be the subject of a salvage claim. *Historic Aircraft Recovery Corp.*, 294 F. Supp. 2d. at 138, 2004 AMC at 636.

Historic Aircraft Recovery Corp. thus stands for the clear proposition that merely because a legal issue such as salvage or limitation is a "maritime subject" does not automatically or independently create federal admiralty jurisdiction. Apparently, the old real estate "location, location, location" adage—which applies in the context of federal admiralty jurisdiction over torts—also applies to salvage cases.

H. The "genuinely salty flavor" test for jurisdiction does not apply because the Act is not a maritime contract and no maritime contract is at issue in this case.

In another attempt to justify federal admiralty jurisdiction, the district court indicates it "is persuaded that the Limitation Act has a 'genuinely salty flavor.'" R. at 12a. This "salty flavor" test is being overapplied by the district court. The test originates from two prior cases from this Court discussing federal jurisdiction over maritime contracts—and neither case involves the Shipowner's Limitation of Liability Act. *Norfolk S. Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23, 2004 AMC 2705, 2710–2711 (2004) (discussed below); *Kossick v. United Fruit Co.*, 365 U.S. 731, 742, 1961 AMC 833, 842 (1961) (extending admiralty jurisdiction to a dispute arising from a seafarer's employment contract and originating the "genuinely salty flavor" test).

Courts have clear authority to make decisional law for the interpretation of maritime contracts, stemming from the Constitution's grant of admiralty jurisdiction to federal courts. *See* U.S. CONST. art. III, § 2, cl. 2 (providing that the federal judicial power shall extend to "all Cases of admiralty and maritime Jurisdiction"); *see also* 28 U.S.C. § 1333(1) (granting federal district courts original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction"). But interpreting this broad grant of authority has not been smooth sailing. Fully diving into the nuances of admiralty contract jurisdiction is beyond the scope of this brief; however, it is worth skimming the surface to fully understand the district court's analogy.

Generally, a "maritime contract" for purposes of determining admiralty contract jurisdiction under Article III is limited to contracts which (1) concern commerce of the sea, (2) relate to

commerce or to navigation on ***navigable*** waters, or (3) concern maritime employment—specifically, employment that has "reference to maritime service or maritime transactions." *Norfolk*, 543 U.S. at 24, 2004 AMC at 2710–11; *see also CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377, 379, 1982 AMC 2541, 2543–44 (2d Cir. 1982) (overviewing when maritime contracts fall within admiralty jurisdiction).

Again, courts in admiralty have generally required a navigability component to exercise jurisdiction. "To be considered maritime, there must be a direct and substantial link between the contract and the operation of the ship, its navigation, or its management afloat, taking into account the needs of the shipping industry. . . ." 1 STEVEN F. FRIEDELL, BENEDICT ON ADMIRALTY § 182 (Joshua S. Force ed., 2018) (citation omitted).

In the early 2000s, this Court sensed that the case law around admiralty contract jurisdiction was beginning to derail and granted certiorari in *Norfolk Southern Railway v. James N. Kirby, Pty Ltd.* 543 U.S. at 18, 2004 AMC at 2707. *Norfolk* is famously known as a "maritime case about a train wreck" that answered the question whether disputed cargo claims resulting from coverage under a freight forwarder's bill of lading were sufficiently "salty" enough to qualify for admiralty contract jurisdiction. *Id*, at 14, 22, 2004 AMC at 2707, 2710. In the context of a maritime contract, this Court held that it made sense to extend jurisdictional coverage to a bill of lading that encompassed transportation over the sea and land, because "[m]aritime commerce has evolved along with the nature of transportation and is often inseparable from some land-based obligations." *Id.* at 25, 2004 AMC at 2713.

Interestingly, even the Federal Maritime Lien Act is not "salty" enough to provide a separate basis for admiralty jurisdiction. Most lienholders would find this categorically not "sweet" but despite language in the Act to the contrary, courts have interpreted the statute to provide for maritime liens only if admiralty jurisdiction is otherwise established over the claim. *See E.S. Binnings,*

Inc. v. M/V Saudi Riyadh, 815 F.2d 660, 666 (11th Cir. 1987), *abrogated by Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608, 1991 AMC 1817, 1820–21 (1991). *Contra Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 919, 2002 AMC 2248, 2253–54 (9th Cir. 2002) (stating that the existence of a maritime contract is not a prerequisite for invoking admiralty jurisdiction under the Federal Maritime Lien Act).

II. Even if a district court has jurisdiction through another mechanism, the Limitation of Liability Act still does not apply to Sally's Seafood Shack.

So far, we have seen that federal admiralty jurisdiction over both torts and contracts both require a connection to navigable waters. Even if jurisdiction is conferred at this point through § 1331 or some other statutory or common law regime, the owners of Sally's Seafood Shack and *F/V Flamingo* are not entitled to limit their liability under the Act for several reasons.

A. Sally's Seafood Shack was not a vessel for purposes of the Act or the Coast Guard.

The definition of "vessel" is codified in 1 U.S.C. § 3 of the Rules of Construction Act and encompasses "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." This definition applies to every U.S. Code provision that includes the word "vessel," unless the context provides otherwise. 1 U.S.C. § 1.

The 1851 Shipowner's Limitation of Liability Act provides otherwise and limits its applicability "to seagoing vessels and vessels used on lakes or rivers or in inland navigation." 46 U.S.C. § 30502. This substantively changes the analysis required at the district court level. To be eligible for limitation under the Act, the vessel must be either "seagoing" or "used on lakes or rivers or in inland navigation." *Id*. Sally's Seafood Shack is neither.

Citing § 30502, the district court then misapplies a decision from this Court which declined to extend vessel status under 1 U.S.C. § 3 to a houseboat, because a reasonable person would consider it to be practically incapable of carrying people or things on water. *Lozman v. City of Riviera Beach*, 568 U.S. 115, 118, 128, 2013 AMC 1, 2, 11 (2013).

The decision in *Lozman* arose from an initial limitation placed on the 1 U.S.C. § 3 definition of vessels by *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 2005 AMC 609 (2005). A unanimous decision from this Court declined to consider the predominant function of the "vessel," and only required that it merely be "practically capable of being used for transport." *Id*. at 493, 2005 AMC at 620.

Notably, neither *Stewart* nor *Lozman* give any clarity whatsoever to the definition of a "vessel" for the purposes of the Limitation of Liability Act. Both cases merely attempt to refine the traditional definition under 1 U.S.C. § 3. *Stewart* defined a "vessel" for the purposes of § 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b). *Stewart*, 543 U.S. at 484, 2005 AMC at 609, while *Lozman* defined a "vessel" for the purposes of a Florida marine sanitation statute, *see City of Riviera Beach v. Unnamed Gray*, 649 F.3d 1259, 1262–63, 2011 AMC 2891, 2893 (11th Cir. 2011).

Under Coast Guard regulations today, a "boat in a moat" is unlikely to be certified as a vessel after an initial inspection. Craft Routinely Operated Dockside, 74 Fed. Reg. 21,814–16 (May 11, 2009). A 2009 Coast Guard policy notice states that "determination of whether any specific craft is or will be a vessel as defined in 1 U.S.C. 3 and interpreted by the Supreme Court in Stewart will be made by the cognizant Coast Guard Officer in Charge, Marine Inspection (OCMI)." *Id.* at 21815. The notice states that the OCMI will look to the "totality of the circumstances" when performing the evaluation, but it provides that the officer should begin by asking whether "the craft [is] surrounded by a cofferdam, land or other structure, such that although floating, it is in a 'moat' with no practical access to navigable water." *Id*.

It is apparent from the Coast Guard's own regulations and numerous appellate and district courts that Sally's Seafood Shack is not a vessel, and her owners should not be entitled to limit their liability.

B. She was permanently moored, in non-navigable waters, and not covered under the Act.

According to the district court in this case, Sally's Seafood Shack was "indefinitely moored to the shore" and located behind a cofferdam. R. at 11a. Following the holding of *Stewart*, which expanded the definition of "vessel", multiple courts have still found that permanently or indefinitely moored casino ships are not "vessels" for the purposes of the Limitation of Liability Act.

The Fifth Circuit in *In re Silver Slipper Casino Venture LLC v. Does* affirmed a district court dismissal of an owner's petition for limitation after its permanently moored, casino-based barge broke free from her moorings during Hurricane Katrina and crashed into a hotel. 264 F. App'x 363, 364–65, 2008 AMC 909, 910–11 (5th Cir. 2008); *see also In re Grand Casino*, 2007 AMC 962, 963–967780 F. Supp. 974 (S.D. Miss. 2007).

Furthermore, looking beyond her permanent moorings, the Fifth Circuit has also held that riverboat casinos situated behind a cofferdam are not "vessels" for the purpose of the 1 U.S.C. § 3. *See Dunklin v. La. Riverboat Gaming P'ship*, No. 00-31455, 2001 WL 650209, at *1 (5th Cir. 2001) (per curiam). Crafts like Sally's Seafood Shack and riverboat casinos that are located behind a cofferdam, with no access to navigable waterways have been colorfully described as a "boat in a moat." R. at 10a (quoting David. W. Roberts and Michael F. Sturley, *Vessel Status in Maritime Law: Does* Lozman *Set a New Course?*, 44 J. MAR. L. & COM. 393, 475 (2013)).

The first paragraph of the district court's conclusions of law in this case correctly finds that "[b]ecause the *F/V Flamingo*'s berth was surrounded by a cofferdam, that portion of the river did not constitute navigable waters for purposes of establishing jurisdiction." R. at 11a (internal quotation marks omitted).

Although the Act itself is not clear on whether it applies to casualties involving vessels that are not operating non-navigable waters, such as cofferdams, or land-locked or intrastate lakes and rivers, case law has continued to hold that the Act applies only to casualties occurring on waters

considered "navigable" for purposes of admiralty jurisdiction. *See In re Keller*, 149 F. Supp. 513, 514–16, 1963 AMC 2067, 2069 (D. Minn. 1956) (denying admiralty jurisdiction for a boating accident in Canada on a lake connected to Lake Superior by non-navigable river); *In re Dickenson*, 780 F. Supp. 974, 975–76, 1992 AMC 1660, 1661–63 (E.D.N.Y. 1992) (denying admiralty jurisdiction when the claim concerned a boat that caught fire on a drydock fifty feet from the water and the Limitation Act did not provide an independent basis for admiralty jurisdiction); *Seven Resorts, Inc.*, 57 F.3d at 774, 1995 AMC at 2091–92 (denying that the Limitation Act provides a broader basis for jurisdiction than admiralty jurisdiction and finding no admiralty jurisdiction because the lake where the incident occurred was not navigable).

C. Congress did not intend for owners of vessels on non-navigable waters to be able to limit their liability.

After hearing a case involving a collision of two houseboats on the intrastate and landlocked Lake of the Ozarks, the Eighth Circuit took a roundabout approach in denying a petition for limitation. *In re Three Buoys Houseboat Vacations U.S.A., Ltd.*, 689 F. Supp. 958, 959, 964 (E.D. Mo. 1988), *aff'd sub nom. Three Buoys Houseboat Vacations U.S.A., Ltd. v. Morts*, 878 F.2d 1096, 1989 AMC 2058 (8th Cir. 1989), *vacated*, 497 U.S. 1020 (1990). In that case, the owner of one of the houseboats (who was engaged in the business of chartering houseboats) filed a petition for limitation in federal court. 689 F. Supp. at 959–60, 960 n.2.

The district court made three rulings: (1) the Lake of the Ozarks is not navigable for the purposes of admiralty jurisdiction; (2) despite not having *admiralty* jurisdiction, it had federal question or commerce clause jurisdiction to hear a limitation action under 28 U.S.C. §§ 1331 and 1337; and finally (3) Congress did not intend that owners of vessels on non-navigable waters should be able to limit liability. 689 F. Supp. at 962–64. Thus, the court ruled it did not have jurisdiction and dismissed the houseboat owner's petition for limitation. *Id*. at 964.

The Eighth Circuit agreed with the district court's dismissal on appeal and concluded that federal courts lack subject matter jurisdiction over limitation actions arising from injuries on non-navigable waters. 878 F.2d at 1103. Subsequently, this Court vacated the decision in light of *Sisson*. 497 U.S. at 1020. On remand, the court of appeals again affirmed the dismissal of the limitation action for the same reasons given in its earlier opinion. *Three Buoys Houseboat Vacations U.S.A., Ltd. v. Morts*, 921 F.2d 775, 779–80, 1991 AMC 1356, 1360 (8th Cir. 1990).

The conclusion cast out from the Eighth Circuit that the Limitation of Liability Act is not an independent source of federal jurisdiction has been accordingly followed in *David Wright Charter Service v. Wright*, 925 F.2d 783, 785 (4th Cir. 1991), see also *Seven Resorts, Inc.*, 57 F.3d at 774 (explaining that admiralty jurisdiction generally "requires a connection to navigable waters"); *Guillory v. Outboard Motor Corp.*, 956 F.2d 114, 115 (5th Cir. 1992) (finding suits lacking any relationship to either navigable waters or traditional maritime activity are without admiralty jurisdiction); *In re Fields*, 967 F. Supp. 969, 974–75 (M.D. Tenn. 1997) (even in cases where admiralty jurisdiction is invoked via a contract which is traditionally "maritime" in nature, the facts must still involve a "connection" to navigable waters for admiralty jurisdiction to exist).

Even if a district court finds jurisdiction through some other means, a vessel owner must be in navigable waters to limit liability. Sally's Seafood Shack was also landlocked behind a cofferdam in non-navigable waters, and accordingly should *not* be entitled to limit their liability.

Holding otherwise would expand the borders of admiralty jurisdiction too far. According to world-renowned oceanographer and discoverer of the *Titanic* and *Bismarck*, Dr. Robert Ballard, more than 50% of the United States is underwater, and presumably, a majority of that falls within federal admiralty jurisdiction. *See* Robert Ballard, *Exploring the ocean's hidden worlds*, YOUTUBE (May 21, 2008), https://youtu.be/qHU8G6icwsY. Extending admiralty jurisdiction in this context would be akin to applying general space law concepts to NASA facilities, located on *terra firma*.

Issue 2: Under § 1292(a)(3), appellate courts may entertain appeals from a district court which determine the rights and liabilities of the parties to an admiralty case. Here, the district court bifurcated the trial: hearing evidence regarding limitation in phase one, and postponing issues of liability and damages to phase two. After hearing phase one, did the Fourth Circuit err in dismissing the appeal when it determined the district court had not fully adjudicated the rights and liabilities of the parties?

I. Even if the Limitation of Liability Act independently provides admiralty jurisdiction, § 1292(a)(3) provides for broad appellate jurisdiction of interlocutory appeals in admiralty cases.

A. § 1292(a)(3) is an admiralty-specific statutory exception to the otherwise strict "final judgment rule" of § 1291.

Congress granted federal appellate courts the ability to hear appeals from district courts by enacting 28 U.S.C. § 1291. *See* 4 ROBERT FORCE, BENEDICT ON ADMIRALTY § 5.02 (Joshua S. Force ed., 2018). A descendant of the Judiciary Act of 1789, "the First Congress established the principle that only 'final judgments and decrees' of the federal district courts may be reviewed on appeal." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (quoting the Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84 (codified as amended at 28 U.S.C. § 1652 (1982)).

Known today as the "final judgment rule," this Court has traditionally "interpreted § 1291 to mean that an appeal ordinarily will not lie until after final judgment has been entered in a case." *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 203 (1999). "Nevertheless, Congress recognized that there are some circumstances in which a blind adherence to finality as the ultimate arbiter of efficiency or the proper administration of justice would be misplaced." *Evergreen Int'l (USA) Corp. v. Std. Warehouse*, 33 F.3d 420, 423, 1995 AMC 635, 639 (4th Cir. 1994). Wisely, Congress enacted 28 U.S.C. § 1292, "which provides for interlocutory appeals in a specified group of cases." *Evergreen*, 33 F.3d at 424, 1995 AMC at 639.

The statute provides appellate review in this case, stating that **"courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory decrees of such district courts or the**

judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.” 28 U.S.C. § 1292(a)(3) (emphasis added).

“The original and still central purpose of § 1292(a)(3) is to allow the determination of liability to be appealed before relief is ordered.” *Deering v. Nat’l Maint. & Repair, Inc.*, 627 F.3d 1039, 1042, 2011 AMC 1, 4 (7th Cir. 2010). A procedural mechanism like this is necessary because admiralty trials are traditionally bifurcated:

> First, there would be a trial before the court on the issue of liability. If there were a finding of liability, then there would then be a separate hearing before a special master to ascertain damages. These damages hearings were often both lengthy and costly. Congress intended 28 U.S.C. § 1292(a)(3) to permit parties to appeal the finding of liability on the merits, before undergoing the long, burdensome, and perhaps unnecessary damages proceeding.

*City of Fort Madison, Iowa v. Emerald Lad*y, 990 F.2d 1086, 1089, 1993 AMC 2091, 2094–95 (8th Cir. 1993) (citation omitted); *see also Evergreen*, 33 F.3d at 423, 1995 AMC at 640 (commenting on *City of Fort Madison*’s explanation of § 1292(a)(3) and stating “[t]his understanding of the statute’s purpose is universal.”).

Here, in accordance with traditional admiralty trials, the district court similarly bifurcated the proceedings and heard evidence regarding the respondent’s entitlement to limitation of liability in phase one and postponed the final issues of liability and damages until phase two. R. at 9a.

In fact, the district court determined both liability and damages when it granted the petition for limitation after finding that “the explosion that sank the *Flamingo* was caused solely by the negligence of John Calhoun.” R. at 13a–14a. The court found further, “[n]o ‘design or neglect of the owner,’ nor any ‘privity or knowledge of the owner,’ was in any way responsible for the incident. [Sally’s Seafood Shack] is accordingly entitled to limit its liability.” *Id*. (citations omitted). As a result, the petition for limitation was granted. *Id.* at 14a.

A granted petition for limitation becomes an affirmative defense that the vessel owner can assert in state court—destroying any potential for claimants to recover beyond the $1,000 currently in the limitation fund. R. at 15a.

B. The district court fully determined the rights and liabilities of the parties in this case.

This determination of liability is precisely the type of issue contemplated for interlocutory appeal via § 1292(a)(3) before final relief is ordered. By granting Sally Seafood Shack's petition for limitation, the district court destroyed the claimants' potential for any recovery in state or federal court beyond the $1,000 limitation fund—and they accordingly appealed. R. at 3a.

On appeal, the Fourth Circuit agrees that "[a]s a practical matter, it is abundantly clear that the district court has determined that Sally's Seafood Shack will not bear any liability for the claimants' injuries," but still declines to exercise appellate jurisdiction. R. at 5a.

The determining factor in evaluating if a case is eligible for interlocutory appeal is whether a district court's decree is merely procedural, or if it substantively determines the rights and liabilities of the parties. In this case, the district court's granting of the petition for limitation and accompanying conclusions of law has literally determined the claimants' right to recovery, while simultaneously limiting Sally's Seafood Shack's liability to a "trivial amount." R. at 5a, 14a.

Nevertheless, the circuits have differed in their interpretations of the exact scope of interlocutory appeals under § 1292(a)(3). Historically, most courts agreed that the statute should be strictly construed—but disagreed as to how strictly.

The Fourth Circuits claim in this case that "courts generally proclaim a 'strict construction' approach to § 1292(a)(3)" is no longer correct. R. at 5a. As the Fourth Circuit has previously identified, courts have recently moved away from a narrow understanding of the exception—and are now in favor of more broadly allowing interlocutory appeals. *See Evergreen*, 33 F.3d at 424 n.1,

1995 AMC at 640 n.1. In short, courts "often yield to the temptation to ignore such proclamations when a strong enough practical case for hearing an interlocutory appeal is presented." *Id*.

Next, the Fourth Circuit's opinion identifies a circuit split between the Ninth and Fifth Circuits involving appellate jurisdiction over limitation actions resulting from Carriage of Goods by Sea Act (COGSA) claims. 46 U.S.C. § 1304(5); R. at 5a; *compare Carman Tool & Abrasive, Inc. v. Evergreen Lines*, 871 F.2d 897, 898, 1989 AMC 913, 914 (9th Cir. 1989) (broadly construing § 1292(a)(3) and exercising appellate jurisdiction over district court's determination that carrier's liability was limited by COGSA § 4(5)); *with Bucher-Guyer AG v. M/V Incontrans Spirit*, 868 F.2d 734, 735 (5th Cir. 1989) (per curiam) (narrowly construing § 1292(a)(3) and denying appellate jurisdiction over the applicability of the $500 limitation on damages under COGSA § 4(5)).

Regardless, before declining to exercise jurisdiction, the Fourth Circuit recognized (1) "[i]f we could approach the issue afresh, we would probably agree with the Ninth Circuit" and (2) its broader interpretation of § 1292(a)(3). R. at 5a.

While the underlying justification for declining to exercise appellate jurisdiction in this case is still foggy, the logic purportedly stems again from their 1994 case, *Evergreen*. *See* R. at 6a.

C. The Fourth Circuit misapplied its own precedent.

In *Evergreen*, a shipper sought compensation for damages sustained when two drums of chemicals leaked inside a shipping container during loading at the port of Los Angeles. 33 F.3d at 422, 1995 AMC at 636. As a result of the leak, authorities closed the port for over a day, causing waves of trade disruptions up and down the western seaboard. *Id*. at 422, 1995 AMC at 636. The shipper then filed suit in the district court and the defendants moved for summary judgment based on a cutoff date contained in the arbitration agreement. *Id*. at 422, 1995 AMC at 636. The district court granted summary judgment in favor of two of the defendants while denying summary judgment to a third defendant. Although the claims against two defendants had been resolved, the claim

against the third defendant was still pending, meaning the case had not actually been finally resolved. *Id.* at 425, 1995 AMC at 642.

While recognizing the case involving the two defendants who had been dismissed had been resolved, the Fourth Circuit rejected the interlocutory appeal under § 1292(a)(3) of a grant of summary judgment because it involved a "pure question of general contract interpretation." *Id*. at 425, 1995 AMC at 642. The court also emphasized neither the issue on appeal, nor the case as a whole had a "distinctly maritime air." *Id*. at 425, 1995 AMC at 642.

This presumably raises the question whether an interlocutory appeal would be available for a "saltier" set of facts—such as the appeal of fully resolved limitation proceeding arising from an accident at a permanently-moored-former-fishing-boat-turned-seafood-restaurant like Sally's Seafood Shack. Fortunately for Sally's Seafood Shack claimants, the Fourth Circuit acknowledged in *Evergreen* that courts have in fact allowed interlocutory appeals in certain circumstances:

> Over time, however, this narrow scenario that justified the initial enactment of the provision has fallen into desuetude, while parties have attempted to use the provision to support interlocutory appeals in many situations that do not supply the same logical justification for an exception to the finality rule. While in many instances courts have read the provision narrowly and declined to find jurisdiction, *in many other instances courts have read the statute more broadly* and found jurisdiction in situations far different from that giving rise to the provision in the first place.

Id. at 424, 1995 AMC at 640 (emphasis added).

In the present case, Circuit Judge Solomon of the Fourth Circuit—who concurred only in the judgment—agrees with petitioners that *Evergreen* is "readily distinguishable, and believe[s] that it leaves us free to reach a sensible result that is indeed more consistent with the policy goals that motivated the enactment of § 1292(a)(3)." R. at 4a.

His position is correct—the Fourth Circuit's reliance on *Evergreen* is misplaced, and the facts are procedurally and substantively distinguishable. In this case, the question regarding the

applicability of the Shipowner's Limitation of Liability Act is significantly saltier than the appeal in *Evergreen*, which resulted from a fairly bland summary judgment over an arbitration action.

Further distinguishing the cases, the summary judgment in *Evergreen* was only granted to two of the three of the defendants. 33 F.3d at 421. Here, however, the district court's decree was final and thus applicable to *all* claimants. R. at 14a.

Moreover, the Fourth Circuit's subsequent opinion in *R.M.S. Titanic Inc. v. Wreck and Abandoned Vessel*, 435 F.3d 521, 2006 AMC 305 (4th Cir. 2006) is a better anchor for the interlocutory appellate jurisdiction analysis in the Fourth Circuit than *Evergreen*. Sadly, this decision appears to have been lost at sea—much like the actual wreck of the *Titanic*—when the Fourth Circuit was deciding the current case before this Court today.

In *R.M.S. Titanic, Inc.*, the Fourth Circuit was presented with the question of whether the district court determined the "rights and liabilities" of R.M.S. Titanic, Inc. ("RMST") when the court (1) asserted *in rem* jurisdiction over the 1987 artifacts and denied comity to a 1993 French Administrator's decision over the remains, and (2) held that RMST is barred from seeking title to artifacts under the law of finds. *Id.* at 525–26, 2006 AMC at 309.

The Fourth Circuit found the case was ripe for appeal and held:

> On the question whether the district court's ruling falls within the traditional profile of cases anticipated in § 1292(a)(3)'s enactment, we agree with the *amicus* that this is not the prototypical case in which liability and damages are bifurcated. But the district court's order does amount to a ruling on all "liability" issues, leaving open only the *amount* of RMST's salvage award . . . . These rulings effectively bifurcated this salvage proceeding in a manner that is closely analogous to the "special circumstances' justifying the exception stated in 1292(a)(3).

Id. at 527, 2006 AMC at 310–11.

The "special circumstances" referenced by the Fourth Circuit in *R.M.S. Titanic, Inc.* are abundant when practicing within the borders of federal admiralty jurisdiction. For instance, special

pleading requirements exist under Federal Rule of Civil Procedure 9(h) in a district court's admiralty docket.

Here, even if the owners of Sally's Seafood Shack did not designate 9(h) in their initial petition for limitation or complaint, the rule still states that "a claim cognizable only in the admiralty and maritime jurisdiction is an admiralty claim for those purposes, whether or not so designated." FED. R. CIV. P. 9(h). Because the Limitation of Liability Act must be plead under Federal Rule of Civil Procedure 9(h), 9(h)(2) also applies—extending appellate jurisdiction over interlocutory appeals to any "case that includes an admiralty or maritime claim." FED. R. CIV. P. 9(h)(2).

More simply put, if admiralty jurisdiction is available to a plaintiff, then interlocutory appellate jurisdiction over claims arising from the case must be available to either party.

Rule 9(h)(2) seems to indicate that accessing the unique *in rem* procedural mechanisms available under federal admiralty jurisdiction also grants a broad right to interlocutory appeals for all cases containing an admiralty or maritime claim.

D. A broader view of § 1292(a)(3) is more appropriate in this case.

The First, Sixth, and Ninth Circuits have interpreted § 1292(a)(3) more broadly than the Fourth Circuit in this case. *See* 4 ROBERT FORCE, BENEDICT ON ADMIRALTY § 5.06 (Joshua S. Force ed., 2018).

For example, the First Circuit has broadened the horizons for interlocutory admiralty appeals for decades: "[t]he statute is not limited . . . but, rather, applies to any decree finally determining the liability of one of the parties, even if it leaves open an issue which may, ultimately preclude recovery by a particular plaintiff." *In re S.S. Tropic Breeze*, 456 F.2d 137, 139, 1972 AMC 1622, 1624 (1st Cir. 1972) (citing *Republic of France v. United States*, 290 F.2d 395, 397–98 n.4, 1961 AMC 1082, 1085 n.4 (5th Cir. 1961)); *Rice Growers Ass'n v. Rederiaktiebolaget Frode*, 171

F.2d 662, 663, 1949 AMC 316, 317 (9th Cir. 1948)); *see also Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked, & Abandoned Steam Vessel*, 833 F.2d 1059, 1064, 1988 AMC 1109, 1113 (1st Cir. 1987) ("For an interlocutory order to be appealable under 28 U.S.C. § 1292(a)(3), it need not address all of the rights and liabilities at issue in the litigation. It suffices that the order conclusively lashes down the merits of some particular claim or defense."). Here, the court conclusively "lashed down" the merits of both a claim, as well as a defense when it granted the vessel owner's petition for limitation. R. at 14a.

The Sixth Circuit has similarly had deep respect for the Act. Recently, the court heard the appeal of a summary judgment which granted all plaintiff's counterclaims stemming from the location and salvage of *S.S. Central America*, and her cargo of gold—worth $1,219,189 when she was lost in 1857. *See Williamson v. Recovery Ltd. Partnership*, 731 F.3d 608, 611, 2014 AMC 330, 333 (6th Cir. 2013). There, the court rightfully rejected a narrow interpretation of the statute and looked to the language of § 1292(a)(3) which "announces a rather broad exception to the final-judgment rule—the term 'admiralty cases' appears to sweep up any claim presented in a case in which admiralty jurisdiction has been invoked." *Id*. at 618, 2014 AMC at 341–42. Zeroing in on the statute, the court found that "[c]ontextual exegesis notwithstanding, it is axiomatic that the clearest evidence of congressional intent is the plain language of statute itself." *Id.* at 618, 2014 AMC at 343.

The court further looked to the revisionary history of 9(h)(2) which was expanded in 1997 to allow the appeal of non-admiralty claims within admiralty cases. As indicated by the advisory committee notes, "[t]he statute applies to admiralty 'cases,' and may itself provide for appeal from an order that disposes of a nonadmiralty claim that is joined in a single case with an admiralty claim." FED. R. CIV. P. 9(h) advisory committee's note to 1997 amendment.

E. This Court should adopt the simple test from the Ninth Circuit

As the Fourth Circuit notes here, "[i]f we could approach the issue afresh, we would probably agree with the Ninth Circuit." R. at 5a. Luckily for this Court, the Ninth Circuit has recently espoused another broad interpretation of § 1292(a)(3) and granted appellate jurisdiction.

In the past several months, the Ninth Circuit has addressed its appellate jurisdiction in a case where the district court dismissed an *in rem* claim against a vessel because of procedural deficiencies. *Barnes v. Sea Hawaii Rafting LLC*, 889 F.3d 517, 524, 2018 AMC 939, 941–42 (9th Cir. 2018).

That holding, standing alone, would not ordinarily be appealable because it is not a decision on the merits. *Id.* at 528, 2018 AMC at 948. The Ninth Circuit noted, however, that "[t]he district court concluded that its dismissal order effectively 'foreclose[d] the only forum in which Barnes may bring his admiralty claims against the [vessel].'" *Id*. at 528, 2018 AMC at 948–49. Thus, notwithstanding that the district court's order was based on procedural grounds, it affect[ed] Barnes substantive rights and is the proper subject of an interlocutory appeal . . . . *Id*. at 528, 2018 AMC at 949.

In this case, the Fourth Circuit found it was "abundantly clear that the district court has determined that Sally's Seafood Shack will not bear any real liability for the claimants' injuries." R. at 5a. This Court should disregard the complicated analysis for appellate jurisdiction under § 1292(a)(3) and adopt the simple test used by the Ninth Circuit.

It is not necessary to determine whether a decision was procedural or substantive—all that should be necessary for interlocutory appeals of admiralty cases is the stifling of a substantive right. Clearly the district court in this case suffocated the substantive rights of Sally's Seafood Shack claimants, and the Fourth Circuit erred in dismissing the appeal for lack of jurisdiction.

Conclusion

The appeal should be dismissed because the district court did not have admiralty jurisdiction, thus making 28 U.S.C. § 1292(a)(3) unavailable. Finally, this Court should dismiss the petition and definitively hold that the Limitation of Liability Act is a defense and does not independently create federal admiralty jurisdiction.

Respectfully submitted,

Counsel for Petitioners

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