No. 23-617

In the
Supreme Court of the United States

LEVIATHAN WHALE WATCHING TOURS, INC.,

Petitioner,

v.

KATHY FOX,

Respondent.

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

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COMPETITION PACKET FOR THE
THIRTY-FIRST ANNUAL JUDGE JOHN R. BROWN
ADMIRALTY MOOT COURT COMPETITION, 2024

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-23206
D.C. No. CV 19-6838

LEVIATHAN WHALE WATCHING TOURS, INC.
Plaintiff-Appellant,

v.

KATHY FOX,
Defendant-Appellee.

Appeal from the Decision of the United States District Court
for the Western District of Washington,
Michele Y. Portia, District Judge, Presiding

Argued and Submitted, March 1, 2022
Seattle, Washington
[Filed May 5, 2023]

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges

HAMMURABI, Circuit Judge:

The Limitation Act, 46 U.S.C. §§ 30501-30, generally permits a vessel owner to limit its liability for claims asserted against it, but one provision restricts the vessel owner's ability to rely on a boilerplate exoneration clause. In this interlocutory appeal, we address the scope of that provision and hold that it applies to a recreational vessel on a voyage involving only a single port. Following our previous decision in *Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026, 1991 AMC 1849 (9th Cir. 1991), we also reaffirm a counterclaimant's right to a jury trial in an admiralty case when the district court has diversity jurisdiction over the counterclaim.

I

The relevant facts and procedural history are adequately set forth in the opinion of the court below. The essential facts can be summarized very briefly. Plaintiff-appellant Leviathan Whale Watching Tours, Inc., a Washington corporation based in Edmonds, Washington, operates whale-watching tours on Puget Sound. Defendant-appellee Kathy Fox, a Texas resident, was seriously injured while on one of those tours aboard the *MV Ishmael*, allegedly as a result of Leviathan's negligence. Leviathan filed the present action in admiralty seeking a declaratory judgment that it was not liable for Ms. Fox's injuries because she had signed a broad waiver and release before the tour. Ms. Fox counterclaimed for damages, asserted diversity jurisdiction, and demanded a jury trial on her counterclaim.

The district court ruled that the waiver and release was invalid under 46 U.S.C. § 30509 (2018) and that Ms. Fox was entitled to a jury trial under *Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026, 1991 AMC 1849 (9th Cir. 1991). The district court certified the first issue for interlocutory appeal under 28 U.S.C. § 1292(b), and we granted Leviathan's motion for permission to appeal.

II

To determine the scope of the Congressional prohibition of exoneration clauses such as the one that Leviathan required Ms. Fox to sign, we start with the statutory text. In relevant part, it provides:

> (a) PROHIBITION. —
>
> (1) In general. — The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting —
>
> (A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or

> (B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction.
>
> (2) VOIDNESS. — A provision described in paragraph (1) is void.

46 U.S.C. § 30509(a) (2018).* This governing language is the result of Congress's 2006 recodification of the portions of Title 46 that had until then been included in an appendix because they had not yet been recodified and enacted as positive law. The previous version, which had substantially the same meaning, was unofficially codified as 46 U.S.C. app. § 183c(a) (2000). That provision was enacted as § 4283B of the Revised Statutes in 1936. *See* 49 Stat. 1480 (1936).

Leviathan argues that Congress intended § 30509 to apply only to the passenger travel by sea on "common carriers" that was typical when the statute was enacted (before commercial air travel became as widespread as it is today). For example, passengers traveling by ocean liner from Southampton to New York (the intended route of the *Titanic*) would be covered under this interpretation. Leviathan concedes that even passengers on the Staten Island Ferry would be covered as they traveled from one New York City borough to another. But Leviathan argues that Congress did not intend to cover recreational boaters who did not plan to travel anywhere, *i.e.*, who planned to finish their voyage at the same place where they started. In those situations, the vessel was not "transporting passengers" but providing a recreational experience. Under Leviathan's theory, the *MV Ishmael* could not be said to have been "transporting" Ms. Fox any more than a roller coaster at an amusement park transports its customers.

Even if the *MV Ishmael* had been "transporting" Ms. Fox, § 30509(a) still does not apply, Leviathan argues, because it did not transport her "between ports in the United States, or between

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* In December 2022, while this appeal was pending, Congress amended the Limitation Act. In the process, what had been § 30509 was renumbered as § 30527. *See* Pub. L. 117-263, div. K, title CXV, § 11503(a)(3), 136 Stat. 4130 (2022). Although the effective scope of the section was reduced by the new § 30502(b), the language of the new § 30527 is identical to the prior § 30509. We will continue to discuss and cite to § 30509 because that is the statute that was in force at the time of Ms. Fox's injury.

a port in the United States and a port in a foreign country." Her voyage was from Edmonds to Edmonds. Edmonds is only a single "port in the United States"; there was no "port in a foreign country" and no other "port in the United States." Leviathan finds it "nonsensical" to speak of transportation "between ports" when only one port was involved in the journey.

We are not persuaded by Leviathan's arguments. The legislative history makes clear that Congress was responding to maritime disasters such as the fire that destroyed the *General Slocum* on June 15, 1904, in which almost a thousand passengers died when the ship caught fire in New York's East River. *See*, *e.g.*, *Safety of Life and Property at Sea: Hearings on H.R. 9969 Before the House Comm. on Merchant Marine and Fisheries*, 74th Cong., 2d Sess. 23 (1936). That ship was not carrying travelers who wished to go from one port to another port; it was carrying parishioners of St. Mark's Evangelical Lutheran Church on a recreational voyage for the annual church picnic. The *General Slocum* departed from a recreational pier on the Lower East Side, and — but for the fire — it would have returned later that day to the same pier. Moreover, the *General Slocum* was not operating as a "common carrier"; it had been chartered by the church for the day. It is undeniable that Congress intended to cover voyages such as the *General Slocum*'s, notwithstanding that it carried passengers on a recreational voyage involving only one port. For the same reason, § 30509(a) covers the fateful voyage of the *Ishmael*.

III

Leviathan also appeals the district court's order denying its motion to strike Ms. Fox's jury demand. The district court did not certify the jury-trial issue as "a controlling question of law" under § 1292(b), but that does not matter. The Supreme Court in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204-205, 1996 AMC 305, 308-309 (1996), held that a court of appeals hearing an interlocutory appeal under § 1292(b) may exercise jurisdiction over any question that is included within the district court order that contains the controlling question of law identified

by the district court. The court below issued a single order that addressed both the scope of § 30509 and Ms. Fox's jury-trial rights. Although the district court's order certified only the § 30509 issue as "a controlling question of law," the entire order is properly before us, and we may address the jury-trial issue, too.

Even though we are free to address the jury-trial issue, we are constrained in how we may decide that issue. As a three-judge panel, we are just as bound by *Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026, 1991 AMC 1849 (9th Cir. 1991), as was the district court. Presumably Leviathan raised the issue here only to preserve its ability to seek further review in this Court *en banc* or in the Supreme Court. It is, of course, entitled to do so. But we must affirm the district court's order denying Leviathan's motion.

IV

The decision of the district court is affirmed.

It is so ordered.

JUSTINIAN, Circuit Judge, concurring in the judgment in part and dissenting in part:

I regret that I am unable to agree with the decision that the majority has reached in this case. I must respectfully dissent, at least in part.

I

In my view, the plain language of the statute controls. Congress limited the scope of § 30509(a) to vessels transporting passengers "between ports in the United States" or "between a port in the United States and a port in a foreign country." Ms. Fox concedes that no "port in a foreign country" was involved here, so the only question is whether the *MV Ishmael* was "transporting passengers between ports in the United States."

Ms. Fox has made persuasive policy arguments about why the statute *should* apply to any voyage that has a sufficient connection to the United States, but those arguments are properly directed to Congress, not to us. As the Supreme Court has recently reminded us, "'even the most formidable' policy arguments cannot 'overcome' a clear statutory directive." *BP P.L.C. v. Mayor and City Council of Baltimore*, 593 U.S. —, 141 S. Ct. 1532, 1542 (2021) (quoting *Kloeckner v. Solis*, 568 U.S. 41, 56 n.4 (2012)).

To me, the statutory directive here is clear. Any ordinary speaker of the English language would agree that the *MV Ishmael* was not "transporting passengers between ports in the United States." It was taking tourists on a cruise around Puget Sound — traveling from the port of Edmonds, Washington, at the beginning of the cruise, and returning to the port of Edmonds at the end of the cruise. Edmonds is a single port; the statute's use of the plural word "ports" unmistakably contemplates two different ports.

The majority's reliance on the legislative history is also unpersuasive. I can agree that Congress, when it passed the original version of what became § 30509(a), was responding to maritime disasters such as the fire that destroyed the *General Slocum*. But I think that the history of that tragic accident shows that the doomed vessel, on its final voyage, was carrying its passengers from one U.S. port (on Manhattan's Lower East Side) to a different U.S. port (on the north shore of Long Island) where the parishioners of St. Mark's Evangelical Lutheran Church were holding their annual Sunday School picnic. The voyage itself was not recreational; the picnic was the recreational activity to which the parishioners were traveling. If everything had gone according to plan, they would then have taken a second voyage on the *General Slocum* back to Manhattan's Lower East Side. *See*, *e.g.*, *Report of the U.S. Comm'n of Investigation Upon the Disaster to the Steamer "General Slocum"* 6 (1904).

Finally, I am extremely hesitant to make an unprecedented decision that puts us in conflict with one of our sister circuits. Although *Shultz v. Florida Keys Dive Center, Inc.*, 224 F.3d 1269, 1271, 2001 AMC 483 (11th Cir. 2000), is not binding on us, that decision is nevertheless entitled to considerable deference. I would follow it here and hold that § 30509(a) does not apply to the single-port, recreational voyage at issue in this case.

II

Even if I agreed that Ms. Fox is not bound by the waiver and release that she voluntarily signed with full knowledge of its contents, I would still not agree that she is entitled to a jury trial in this admiralty proceeding. The Supreme Court has long recognized that there is no right to a trial by jury in admiralty. *See*, *e.g.*, *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460, 2006 AMC 2646, 2657-58 (1847). The Federal Rules of Civil Procedure preserve that well-established principle. *See* Fed. R. Civ. P. 38(e).

In my view, this Court erred when it held — contrary to the rule followed in most of our sister circuits — that a litigant was entitled to a jury trial on a counterclaim in an admiralty proceeding. *See Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026, 1991 AMC 1849 (9th Cir. 1991). But of course I am bound to follow *Wilmington Trust*. I therefore concur in the judgment on the second issue. For the moment, we must affirm the district court's decision to deny Leviathan's motion to strike Ms. Fox's jury demand.

Today's decision should not end the matter. I encourage my colleagues to rehear this appeal *en banc* so that we may reconsider *Wilmington Trust*. In my view, we should follow the majority rule. *See*, *e.g.*, *St. Paul Fire & Marine Insurance Co. v. Lago Canyon, Inc.*, 561 F.3d 1181, 1186-89, 2009 AMC 2794, 2799-2806 (11th Cir. 2009); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 1979 AMC 824 (5th Cir. 1978); *National Union Fire Insurance Co., P.A. v. Vinardell Power Systems, Inc.*, 2019 U.S. Dist. LEXIS 55590, at *7-8, 2019 WL

1440383, at *4 (S.D. Fla. Apr. 1, 2019); *Great Lakes Reinsurance (UK) PLC v. Unplugged, LLC*, 2018 U.S. Dist. LEXIS 249371, 2018 WL 11482221 (M.D. Fla. Sept. 19, 2018); *Carnival Corp. v. Stankovic*, 2016 U.S. Dist. LEXIS 191595, 2016 WL 9274718 (S.D. Fla. Dec. 12, 2016); *American Steamship Owners Mutual Protection and Indemnity Association, Inc. v. Lafarge North America, Inc.*, 2008 U.S. Dist. LEXIS 58458, 2008 WL 2980919 (S.D.N.Y. Aug. 1, 2008); *ING Groep, NV v. Stegall*, 2004 AMC 2992, 2995-98 (D. Colo. 2004); *Windsor Mount Joy Insurance Co. v. Johnson*, 264 F. Supp. 2d 158, 162-164, 2003 AMC 2174, 2178-82 (D. N.J. 2003); *Jefferson Insurance Co. v. Maine Offshore Boats, Inc.*, 2001 AMC 2171, 2172-74 (D. Me. 2001); *Clarendon American Insurance Co. v. Rodriguez*, 1999 AMC 2885, 2886-87 (D. P.R. 1999); *Underwriters at Lloyd's, London v. Sundowner Offshore Services*, 1999 U.S. Dist. LEXIS 2085, at *1-2, 1999 WL 90566, at *1 (E.D. La. Feb. 8, 1999); *St. Paul Fire & Marine Insurance Co. v. Holiday Fair, Inc.*, 1996 U.S. Dist. LEXIS 3931, 1996 WL 148350 (S.D.N.Y. Apr. 1, 1996); *Homestead Insurance Co. v. Woodington Corp.*, 1993 AMC 1552, 1554-58 (E.D. Va. 1992); *Royal Insurance Co. of America v. Hansen*, 125 F.R.D. 5, 9 (D. Mass. 1988); *Zurich Insurance Co. v. Banana Services, Inc.*, 1985 AMC 1745 (S.D. Fla. 1984); *Insurance Co. of North America v. Virgilio*, 574 F. Supp. 48 (S.D. Cal. 1983); *Arkwright-Boston Manufacturers Mutual Insurance Co. v. Bauer Dredging Co.*, 74 F.R.D. 461, 462, 1978 AMC 208, 209 (S.D. Tex. 1977); *Insurance Co. of State of Pennsylvania v. Amaral*, 44 F.R.D. 45, 47 (S.D. Tex. 1968).

III

I respectfully dissent from the majority's decision to affirm the district court's denial of Leviathan's motion for summary judgment. On the jury-trial issue, circuit precedent compels me to concur in the judgment, but I urge my colleagues to reconsider that precedent *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-23206
D.C. No. CV 19-6838

LEVIATHAN WHALE WATCHING TOURS, INC.
Plaintiff-Appellant,

v.

KATHY FOX,
Defendant-Appellee.

Appeal from the Decision of the United States District Court
for the Western District of Washington,
Michele Y. Portia, District Judge, Presiding

June 12, 2023

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

JUSTINIAN, Circuit Judge, dissenting:

For the reasons expressed in my opinion dissenting from the panel's decision, I would grant the petition for rehearing and set the case for argument *en banc*.

United States District Court
for the Western District of Washington

LEVIATHAN WHALE WATCHING TOURS, INC.,
Plaintiff,

v.

KATHY FOX,
Defendant.

No. CV 19-6838

June 1, 2020

PORTIA, J.:

On September 29, 2019, defendant Kathy Fox, a 35-year-old Texas resident vacationing in the Seattle area, was seriously injured while a passenger on the *MV Ishmael*, a vessel owned and operated by plaintiff Leviathan Whale Watching Tours, Inc., a Washington corporation based in Edmonds, Washington. On October 3, 2019, Leviathan — invoking this Court's admiralty jurisdiction under 28 U.S.C. § 1333(1) and designating its claim "as an admiralty or maritime claim" under Fed. R. Civ. P. 9(h) — preemptively brought the present suit for a declaratory judgment that it is not liable for Fox's injuries based on a waiver and release signed by Fox.[1] On November 4, 2019, Fox filed an answer and asserted a counterclaim demanding $50 million in damages for her injuries. Invoking diversity jurisdiction over her counterclaim, Fox demanded a jury trial.

On January 10, 2020, Leviathan moved for summary judgment, arguing that it is entitled to a declaration of non-liability because Fox is contractually bound by a waiver clause that excuses

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[1] The Declaratory Judgment Act provides in pertinent part: "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

Leviathan from all liability for negligence. Fox opposes the motion, arguing that the waiver clause is invalid under 46 U.S.C. § 30509. Leviathan's motion also asks, in the alternative, for this Court to strike Fox's jury demand on the ground that this is an action in admiralty, and Fox has no right to a jury trial in admiralty. Fox also opposes that request. She argues that because she asserted an *in personam* counterclaim, the parties are diverse, and the amount-in-controversy requirement is satisfied, her counterclaim is pending on the law side under 28 U.S.C. § 1332 and the saving-to-suitors clause of 28 U.S.C. § 1333(1). She therefore has a Seventh Amendment right to a jury trial on her counterclaim.

Leviathan's motion is now ripe for decision. For the reasons explained below, this Court denies the motion in full. The waiver clause is invalid under 46 U.S.C. § 30509. Under binding circuit precedent, Fox is entitled to a jury trial on her counterclaim.

I

The relevant facts are undisputed. On Sunday, September 29, 2019, the *MV Ishmael*, a 65-foot cruiser,[2] departed its dock in Edmonds for a four-hour whale-watching tour in Puget Sound. It carried 35 tourists, one of whom was Fox, on the 15-seat vessel. The *Ishmael* had a small, heated cabin, but advertised outside standing viewing decks on two levels with space for every passenger along the railings for viewing sea lions, humpback whales, and orca whales.

Leviathan's procedures called for a mandatory safety presentation before leaving on the whale-watching tour. That presentation covered the inherent risks, dangers, and hazards of outdoor recreational activities, including those over water, and how to access and use the life-

[2] It is undisputed that the *Ishmael* qualifies as a "vessel" under 1 U.S.C. § 3. *See generally Lozman v. City of Riviera Beach*, 568 U.S. 115, 2019 AMC 1 (2019); *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 2005 AMC 609 (2005). Moreover, the parties also agree that it is a "seagoing vessel" under 46 U.S.C. § 30502.

jackets. Procedures also called for all passengers to sign a waiver and release of liability at the dock before departure. Fox signed Leviathan's waiver and release of liability.

The terms of the lengthy and detailed waiver and release specifically covered bodily injury and death associated with the whale-watching tour and covered harm from the negligence of the Leviathan interests. More specifically, the waiver and release declared:

> I hereby assume all risks and dangers and all responsibility for any losses and damages, including personal injury and/or death, whether caused in whole or part by the negligence or other substandard conduct of the owners, agents, officers, or employees of Leviathan Whale Watching Tours, Inc.
>
> **LEVIATHAN WHALE WATCHING TOURS, INC. IS RELEASED FROM ANY LIABILITY.**
>
> I, on behalf of myself, my personal representatives, and my heirs hereby voluntarily agree to release, waive, discharge, hold harmless, defend, and indemnify Leviathan Whale Watching Tours, Inc. and its owners, agents, officers, and employees from any and all claims, actions, or losses for bodily injury, property damage, wrongful death, loss of services, or otherwise which may arise out of my participation in Leviathan Whale Watching Tours, Inc.'s activities, specifically including my participation onboard its vessel the *MV Ishmael*. I specifically understand that I am releasing, discharging, and waiving any claims or actions that I may have presently or in the future for the negligent acts or other conduct by the owners, agents, officers, or employees of Leviathan Whale Watching Tours, Inc.
>
> **I HAVE READ THE ABOVE WAIVER AND RELEASE AND BY SIGNING BELOW I AGREE TO ALL THE TERMS THEREIN. I UNDERSTAND THAT IF I DO NOT AGREE TO THE TERMS SET FORTH IN THIS AGREEMENT THAT I WILL NOT BE ALLOWED TO PARTICIPATE IN LEVIATHAN WHALE WATCHING TOURS, INC.'S ACTIVITIES AND PROGRAMS. BECAUSE I WANT TO PARTICIPATE IN THOSE ACTIVITIES, IT IS MY INTENTION TO EXEMPT AND RELIEVE LEVIATHAN WHALE WATCHING TOURS, INC. FROM LIABILITY FOR PERSONAL INJURY, PROPERTY DAMAGE, OR WRONGFUL DEATH CAUSED BY NEGLIGENCE OR ANY OTHER CAUSE.**

Before the *Ishmael* left the dock at noon, the vessel's crew checked the anticipated weather conditions in Puget Sound and found them "acceptable." Two weeks earlier, the vessel's weather

radio had become inoperative. Because the September weather had been wonderful, the supply official kept forgetting to have the receiver repaired.

At 2:00 p.m., the weather service issued a notice to all Puget Sound mariners that a substantial "pop up" thunderstorm was moving through the area and steps should be taken to secure all personnel and equipment. Because the vessel's weather radio was inoperative, the *Ishmael* did not receive that weather warning.

At 2:30 p.m., a gale force wind arose to the stern of the *Ishmael*, accompanied by lightning, thunder, and heavy rain. The master sounded the warning horn, sped up the engines, and tried to turn the vessel out of the storm's path. A wind-driven wave struck the port quarter of the *Ishmael*, causing passengers on the deck viewing areas to fall. Fox, who had been standing at a rail on the top deck, was thrown off-balance and fell to the lower deck, sustaining serious injuries. Her back was broken at L5-S1, rendering her paraplegic.

II

On its face, Leviathan's waiver and release of liability, which Fox signed, disposes of the present case. But Fox argues that it is invalid under 46 U.S.C. § 30509(a)(1)(A), which was originally enacted in 1936 as 46 U.S.C. § 183c(a). It provides:

> The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting . . . the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents . . . .

Leviathan argues that § 30509 does not apply to the present situation for two related reasons. First, it argues that Congress intended the statute to apply to vessels transporting travelers, not those engaged in merely recreational activities. Second, Leviathan notes that the *Ishmael* was not "transporting passengers between ports"; it was carrying tourists from the port of Edmonds, around

Puget Sound, and back to the same port. For the statute to apply, the voyage must involve two separate ports.

No binding authority constrains this Court's decision. Neither the Supreme Court nor the Ninth Circuit has ever addressed this issue. Moreover, district court decisions and decisions from other circuits are conflicting. On its first argument, Leviathan relies heavily on decisions holding "that operators of inherently risky marine recreational activities may contract to disclaim liability for their own negligence." *Brozyna v. Niagara Gorge Jetboating, Ltd.*, 2011 U.S. Dist. LEXIS 111546, at *11, 2011 WL 4553100, at *4 (W.D.N.Y. Sept. 28, 2011) (collecting cases). *See also*, *e.g.*, *Jerome v. Water Sports Adventure Rentals & Equipment, Inc.*, 2013 U.S. Dist. LEXIS 52968, at *23-25, 2013 WL 1499046, at *7 (D.V.I. Apr. 12, 2013).

Fox cites decisions noting that "[t]he 'statute contains no exceptions regarding the type of activity — whether recreational, ultra-hazardous, or otherwise — in which the passenger is partaking.'" *In re Royal Caribbean Cruises*, 991 F. Supp. 2d 1171, 1176, 2013 AMC 708, 712-714 (S.D. Fla. 2013) (quoting *Johnson v. Royal Caribbean Cruises, Ltd.*, 449 Fed. App'x 846, 848-849 (11th Cir. 2011)).

On its second argument, Leviathan relies primarily on *Shultz v. Florida Keys Dive Center, Inc.*, 224 F.3d 1269, 1271, 2001 AMC 483 (11th Cir. 2000), which held that a dive boat that "departed the port of Tavernier in the Florida Keys, brought the divers to the location of the dive, and after the dive returned them to Tavernier . . . was not a 'vessel transporting passengers between ports of the United States or between any such port and a foreign port.'" *Id*. at 1271, 2001 AMC at 484 (quoting 46 U.S.C. app. § 183c(a) (recodified at 46 U.S.C. § 30509)). *See also*, *e.g.*, *Olivelli v. Sappo Corp.*, 225 F. Supp. 2d 109, 119, 2003 AMC 101, 113-115 (D.P.R. 2002).

Fox counters with decisions such as *Courtney v. Pacific Adventures*, 5 F. Supp. 2d 874, 1998 AMC 2857 (D. Haw. 1998), which explicitly reject the two-port requirement:

> Tropical [the vessel owner] argues that Section 183c should not apply because Courtney and Jensen [the passengers] hired the "Kai Nalu" [the vessel] to transport them to and from the same port, and Section 183c applies to transportation between ports. Section 183c, however, is not so limited. The provision stating "between ports of the United States or between any such port and a foreign port" means that there must be a nexus between the voyage and the United States. The terms of 183c do not limit its application to voyages between different ports of the United States, and the Court finds no reason to impose such a distinction.

Id. at 879, 1998 AMC at 2861-63. *See also*, *e.g.*, *Hambrook v. Smith*, 2015 AMC 2156 (D. Haw. 2015).

In the absence of binding authority, this Court prefers to follow the lead of other district courts within this circuit, particularly the District of Hawaii, which has extensive experience in dealing with recreational voyages that depart from and return to the same port. This Court therefore rules that the waiver clause is invalid under 46 U.S.C. § 30509, and Fox may accordingly proceed with her negligence counterclaim. Leviathan's motion for summary judgment is denied.

In view of the absence of binding authority and the conflict of decisions in the rest of the country, this Court considers the present issue appropriate for interlocutory review under 28 U.S.C. § 1292(b). If the Ninth Circuit were to disagree with this Court's decision, then the waiver and release would be valid, Fox could not proceed with her counterclaim, Leviathan would be entitled to its declaratory judgment, and this litigation would terminate. To quote the relevant statutory language, the applicability of § 30509 is "a controlling question of law as to which there is substantial ground for difference of opinion." § 1292(b). Moreover, "an immediate appeal from [this] order may materially advance the ultimate termination of the litigation." *Id*. This Court therefore certifies the question for interlocutory review.

III

If Fox proceeds in this Court with her counterclaim (either because the Ninth Circuit affirms this order or because it does not hear an interlocutory appeal), the next issue is how the

case will be heard. Fox has demanded a jury trial on her counterclaim. Leviathan, insisting that the entire case should be tried to the bench, has moved to strike the jury demand.[3] This issue raises complicated questions on which the courts of appeals are deeply divided, but it is an easy question for this Court to answer. The Ninth Circuit has already ruled that a plaintiff's election to proceed in admiralty does not deprive a defendant of the right to a jury trial on counterclaims when an alternative source of jurisdiction exists. *See Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026, 1991 AMC 1849 (9th Cir. 1991). That decision is binding on this Court. Leviathan's motion to strike Fox's jury demand is denied.

Because the Ninth Circuit has already decided the jury-trial issue, it is no longer a question "as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). This Court therefore declines to certify this question for interlocutory appeal.

IV

In conclusion, Leviathan's motion for summary judgment is denied, and its alternative motion to strike Fox's jury demand is denied. The case will be scheduled for a jury trial, but all proceedings will be stayed pending the resolution of any interlocutory appeal.

[3] Leviathan made this motion in the alternative. If this Court had granted its motion for summary judgment based on the waiver and release, the motion to strike the jury demand would have been moot.

Selected Chronology of the Case[*]

Sept. 29, 2019	Kathy Fox is injured as a passenger on the *MV Ishmael*, which is owned and operated by Leviathan Whale Watching Tours, Inc.
Oct. 3, 2019	Leviathan, asserting admiralty jurisdiction, files a declaratory judgment action against Fox seeking a declaration of non-liability for Fox's injuries.
Nov. 4, 2019	Fox, asserting diversity jurisdiction, counterclaims for personal-injury damages and demands a jury trial.
Jan. 10, 2020	Leviathan files a pre-trial motion (1) for summary judgment, arguing that the waiver clause in its contract with Fox bars her counterclaim, and (2) in the alternative, to strike Fox's jury demand.
Jun. 1, 2020	District court denies Leviathan's motion and rules that (1) the waiver clause is invalid under 46 U.S.C. § 30509, and (2) Fox is entitled to a jury trial on her counterclaim. District court also finds that the waiver issue raises a controlling question of law and certifies the order for interlocutory appeal under 28 U.S.C. § 1292(b).
Jun. 10, 2020	Leviathan files petition for interlocutory appeal.
Sept. 24, 2020	Court of appeals grants Leviathan's petition for interlocutory appeal.
Mar. 1, 2022	Oral argument in the court of appeals.
May 5, 2023	Court of appeals files opinion affirming the district court's pre-trial order and remanding for a jury trial on Fox's counterclaim.
May 12, 2023	Leviathan files petition for rehearing.
Jun. 12, 2023	Court of appeals denies petition for rehearing.
Sept. 11, 2023	Leviathan files petition for certiorari presenting two issues: (1) whether the waiver clause is valid under 46 U.S.C. § 30509 (2018), and (2) whether Fox is entitled to a jury trial on her counterclaim.
Dec. 4, 2023	Supreme Court grants Leviathan's petition for certiorari.

[*] This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.