No. 18-1017

In the
Supreme Court of the United States

ANGELEX, LTD.,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As this Court recently recounted, the U.S. Constitution protections against excessive fines and government overreach trace their venerable roots back to the Magna Carta and require that economic sanctions "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood." *Timbs v. Indiana*, __ U.S. ___, 139 S.Ct. 682, 687-688 (Feb. 20, 2019) (quoting *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 271, 109 S. Ct. 2909, 106 L.Ed. 2d 219 (1989)(also citing 4 W. Blackstone, Commentaries on the Laws of England 372 (1769) ("[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear . . . ."). *Timbs* confirmed the applicability of the Eighth Amendment's Excessive Fines Clause protection to the States as incorporated by the Due Process Clause protections found in the Fourteenth Amendment. *Id.*

Although this case presents a different statutory starting point, the historical concept of the protection against excessive punishment (without due process) as a shield against the exorbitant sword of the government has been a valued tradition throughout Anglo-American history. *Timbs*, 139 S.Ct. at 689 (citing *Harmelin v. Michigan*, 501 U. S. 957, 979, n. 9, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (opinion of Scalia, J.) ("it makes sense to scrutinize governmental action more closely when the State stands to benefit"); *see also Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1041-42 (8th Cir. 1978)("[I]n

government as in life, a good end does not justify any and every means.").

The government's Brief in Opposition contends that there is no basis for Supreme Court review as there is 'no evidence' that the government unreasonably delayed the M/V ANTONIS G. PAPPADAKIS and that there is no split of authority for this Court to resolve. Br. in Opp. 10-13. The government ignores that the issues presented by this Petition raise critical questions of first impression concerning statutory interpretation, which were (and remain) undefined by Congress in the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. § 1904(h). Moreover, the questions presented are nationally important, which only this Court can definitively resolve.

The government's rationale throughout has been that its delay and detention of the vessel was within the combined statutory maximum of available criminal fines for all potential criminal defendants, and *ipso facto*, were reasonable. Endorsing the government's contention that the end justifies the means in every circumstance would render the statutory remedy afforded to vessel owners under APPS toothless and impermissibly permit unfettered and unreviewable authority upon the Coast Guard to do as it (and only it) sees fit. This Court reject such an overbroad rubber stamp of authority to the government and should grant the Petition to decide the critical questions presented.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT OF AUTHORITY TO BE RESOLVED.

The government's Brief in Opposition contends that there is no split of authority between the D.C. Circuit Court of Appeals and the Fourth Circuit Court of Appeals, because the question presented in the Fourth Circuit did not deal with compensation for unreasonable delay or detention, but whether the district court in Virginia had subject-matter jurisdiction over the emergency petition challenging the detention of the vessel. Br. in Opp. at 13. However, there is and remains a critical legal issue to resolve; namely, the evaluation of the "reasonableness" or "unreasonableness" of the Coast Guard's decision to detain and delay a foreign-flagged Vessel calling at a U.S. port.

As summarized by the Fourth Circuit Court of Appeals, the statutory recovery remedy found at 33 U.S.C. § 1904(h) is the "***critical safeguard to governmental abuses***." *Angelex Ltd. v. United States*, 723 F.3d 500, 508-09 (4th Cir. 2013) (emphasis added)(citing 33 U.S.C. § 1904(h)). The ability to meaningfully pursue the remedy is especially critical given that this present action arises from the same facts and circumstances in which District Judge Doumar for the Eastern District of Virginia indisputably found (without any appeal or challenge to the factual findings) that the Coast Guard's failure to consider, challenge, or rebut the financial records requested and received from

Angelex (and Kassian) demonstrating the inability to post a bond in the amount of $2.5 million dollars was sufficient evidence of the Coast Guard's unreasonable conduct. Specifically, Judge Doumar found the Coast Guard's actions "simply repugnant to the Constitution" and that "***In more than thirty years on the bench, this Court can recall seeing no greater disregard for due process, nor any more egregious abdication of the reasonable exercise of discretion***." *Angelex Ltd. v. United States*, 2013 AMC 1217, 2013 U.S. Dist. LEXIS 65846 (E.D. Va. 2013)(emphasis added).

The lower courts in this case erred in disregarding the 33 U.S.C. §1904(h) safeguard and erred in finding the bond demand "reasonable" because there *could have been* a criminal fine or penalty in excess of $2,500,000. As set forth in detail in the Petition, this judicially formulated excuse taken to its illogical conclusion would permit the government to ***always*** avoid paying compensation for unreasonable delay and detention to a vessel pursuant to 33 U.S.C. § 1904(h), by claiming that there was a hypothetically justifiable reason or potential crime to be charged warranting an excessive bond without regard for the contemporaneous facts or circumstances, the ownership interest of the asset, the ability to pay, and/or the likely fine which should be imposed. This case merits review because reasonableness of the government's delay of the vessel must be measured under the totality of the circumstances and against the contemporaneous actions of the government at the time they occur (not as an *ex-post-facto*

justification). The lower courts have conflated the timing of when the remedy becomes available ("after-the-fact"), with the review of the of the reasonableness of the conduct by the government at the time it occurred. To permit the lower court's holding to stand, which excuses the unreasonableness of the government's actions in exchange for any asserted prosecutorial interest 'after the fact' turns 33 U.S.C. § 1904(h) on its head and is squarely conflicts with the holdings from the Eastern District of Virginia and Fourth Circuit Court of Appeals. Accordingly, this Court's review is merited and the Petition should be granted.

II. THE QUESTIONS PRESENTED ARE OF FIRST IMPRESSION AND AR OF NATIONAL IMPORTANCE AND SHOULD BE RESOLVED IN THIS CASE.

As discussed in the Petition, the D.C. Circuit Court of Appeal acknowledged that this case is one of first impression. Pet. App. 2. Given the speed with which a bond demand can easily (and quickly) grow to exorbitant amounts applying the government and lower courts' formulaic rationale for setting a bond at $500,000 per hypothetical count for both the vessel owner and operator (regardless of their ownership or lack of ownership interest in the vessel), can (and have) quickly grown to multi-million dollar demands. The government does not dispute that this is a question of first impression brought by a ship owner (i.e. the owner of the vessel) under 33 U.S.C. § 1904(h). Accordingly, this Court is the only one with

the ability to review the government's conduct and reverse the lower courts' untenable and erroneous findings on how to consider what is a reasonable and/or unreasonable delay or detention of a vessel. Should the lower courts' decisions be permitted to stand, it would render meaningless the statutory remedy set out at 33 U.S.C. § 1904(h) and will negatively impact serious national interests, including but not limited to, international shipping trade, transport, and foreign commerce, foreign relations, and international comity.

In sum and substance, the government has requested and has been incorrectly granted unfettered and ostensibly unreviewable authority to ignore the financial conditions of a vessel owner; to ignore the ownership interests of a vessel; to ignore the rights of third parties' including mortgage holders and contractual partners; ignore applicable U.S. law governing the priority of maritime lien(s) on the vessel; and would abdicate the Court's role as a check and balance on agency overreach to the whims of the unreasonable government actor. Such a result flies in the face of the historic protections afforded by the Constitution and the unreasonable taking of property by the government. *See Timbs*, *supra*; *see also Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 356 (C.C.D.S.C. 1808)("The courts will not interfere to prevent the act; because the law authorizes it. ***But as the law did not authorize it for individual oppression, they will give damages to the individual who suffers by the wanton exercise of a legal power***.") (emphasis added); *Sumner v. Philadelphia*, 23 F. Cas. 392, 396

(C.C.E.D. Pa. 1873) (Without Court review and compensation for unreasonable delay, "there would be practically no restraint upon the most arbitrary and unreasonable detentions."); *Sackett v. EPA*, 566 U.S. 120, 133, 132 S. Ct. 1367, 1375, 182 L. Ed. 2d 367, 378 (2012)(Alito, J. concurring opinion) (holding that the Supreme Court has repeatedly rejected agency interpretations of statutes which would lead to an "essentially limitless grant of authority.")(citing *Rapanos* v. *United States*, 547 U.S. 715, 732-739, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (plurality opinion); *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 167-174, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001)).

In this matter, the Coast Guard's insistence on a $2.5 million dollar bond, plus other onerous non-financial terms on Angelex (and Kassian – who had no ownership interest in the vessel), was unreasonable under the facts and circumstances of this case. The record is crystal clear that there was no analysis or contemporaneous consideration by the Coast Guard as to what would be a reasonable amount for a surety bond under 33 U.S.C. 1908(e); what would be reasonable in light of Angelex's financial condition; the ownership interests in the vessel; what would be reasonable to third parties, including but not limited to, the vessel's charterer, the cargo owners, the consignee, and the crew; a likely fine which would be imposed; and what would be reasonable as the investigation evolved and it became clear that there would be no vicarious liability for Angelex (or Kassian).

Regrettably, the lower courts have created an avenue through which the government (acting through the Coast Guard and Customs and Border Protection) can always justify unreasonable demands for the surety bond based on the objective goal of enforcing MARPOL and APPS without regard to the factual specifics of each case and the ability of a vessel owner to post the surety bond demanded or the equity in the vessel to secure a potential judgment where it is encumbered by a preferred ship mortgage with a higher priority lien. Thousands of shipowners are in similar straights. This Court's review is merited and required in the interests of justice.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Dated: April 19, 2019

Respectfully submitted,

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