No. 18-1224

IN THE

Supreme Court of the United States

NUSTAR ENERGY SERVICES, INC.,

Petitioner,

v.

ING BANK N.V., ET AL.,

Respondents.

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

BRIEF IN OPPOSITION FOR ING BANK N.V. AND O.W. BUNKER USA INC.

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QUESTION PRESENTED

A provision of the Commercial Instruments and Maritime Liens Act, 46 U.S.C. § 31342(a), states that an entity that provides "necessaries to a vessel on the order of the owner or a person authorized by the owner" is entitled to a maritime lien on the vessel. The question presented is:

Whether a subcontractor with no direct connection to an entity authorized to bind a vessel is entitled to a maritime lien against that vessel when the subcontractor delivers necessaries to the vessel on the order of a contractual counterparty that has no authority to bind the vessel.

RULE 29.6 STATEMENT

Respondent ING Bank N.V. is a wholly owned subsidiary of ING Groep N.V., a publicly held corporation (NYSE "ING"). No other publicly held corporation owns ten percent or more of ING Bank N.V.

Respondent O.W. Bunker USA Inc. (O.W. USA) was a Texas corporation with its principal place of business in Houston, Texas at the time of the transactions and occurrences that are the subject of the petition. O.W. USA was a wholly owned subsidiary of O.W. Bunker Holding North America Inc. (O.W. Holding), itself a wholly owned subsidiary of O.W. Bunker & Trading A/S (O.W. A/S). Although neither O.W. USA nor O.W. Holding was publicly traded, O.W. A/S was publicly listed on Nasdaq Copenhagen (Denmark) until a few days before O.W. A/S's November 7, 2014, bankruptcy announcement.

On November 13, 2014, O.W. USA, O.W. Holding, and O.W. Bunker North America Inc. filed voluntary petitions for relief under Title 11 of the United States Code in the United States Bankruptcy Court for the District of Connecticut. Pursuant to the terms of the First Modified Liquidation Plan, which the Bankruptcy Court confirmed on December 15, 2015, O.W. USA's assets—including any rights to payments in connection with the transactions and occurrences that are the subject of the petition—were transferred to the O.W. Bunker USA Inc. Liquidating Trust (the O.W. USA Trust). The O.W. USA Trust continues to participate in this litigation in O.W. USA's name. The O.W. USA Trust has no parent corporation and is not authorized to issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

A provision of the Commercial Instruments and Maritime Liens Act (CIMLA), 42 U.S.C. § 31301 *et seq.*, states that an entity that provides "necessaries" to a vessel on the order of the owner or a person authorized by the owner to bind the vessel is entitled to a maritime lien. 42 U.S.C. § 31342(a). These consolidated cases below involve, *inter alia*, competing liens arising out of the bankruptcy of a group of entities that provided maritime fuel to vessels. In this case—and multiple other cases—an entity authorized to bind a vessel contracted directly with an overseas member of the O.W. Bunker Group for the provision of fuel, that entity contracted with affiliate O.W. USA, and O.W. USA purchased the fuel from a company that physically delivered the fuel to the vessel in the United States. When the O.W. entities declared bankruptcy before they and the physical supplier of fuel (*i.e.*, petitioner) were paid, these cases ensued.

The set-up might sound complicated, but the question presented is not: whether a subcontracting physical supplier with no direct connection to an entity authorized to bind a vessel is entitled to a lien pursuant to CIMLA. Four courts of appeals have recently considered the question (all in the context of the O.W. bankruptcies) and all have agreed on the answer: in this situation, a subcontracting physical supplier of fuel is not entitled to a lien unless it can show that it was in fact acting on the order of an entity authorized to bind the vessel.

We pause to underline how complete the agreement is: in at least one case decided in each of those circuit courts, an entity authorized to bind the vessel contracted directly with an O.W. Bunker Group entity,

that entity subcontracted with O.W. USA, and O.W. USA subcontracted with the physical supplier. And in each case, the court of appeals held that the physical supplier was not entitled to a lien against the ship. There is therefore no doubt that these cases would have been decided the same way in any of the circuits that has addressed the question presented.

In the face of such unanimity among the courts of appeals, this Court's further review is unwarranted to say the least. The settled law applied by all courts of appeals faithfully adheres to the text and purposes of CIMLA, as well as prior case law. And, as even petitioner admits (Pet. 30-31), the question presented is not sufficiently important to arise with any frequency in the future. The Court should therefore deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

The question presented involves the circumstances in which a maritime lien is automatically created by statute pursuant to a provision of the Commercial Instruments and Maritime Liens Act (CIMLA), 46 U.S.C. § 31342.

1. These consolidated cases involve the provision of so-called "necessaries" to maritime vessels. As vessels travel the world, they find themselves in need of supplies and services—including fuel, provisions, and repairs—in foreign ports. Until the early 20th Century, general maritime common law and state laws provided that an entity that supplied "repairs . . . or necessities . . . to a foreign ship, or to a ship in a port of the State to which she does not belong" was entitled to "a lien on the ship itself for [its] security," enforceable in "a suit *in rem*" and in "Admiralty." *The General*

Smith, 17 U.S. (4 Wheat.) 438, 443 (1819). The purpose of a maritime lien is twofold: first, it protects the ship by allowing it to move freely in commerce by contracting on its own account when far from its home port; second, it provides a degree of protection for suppliers of necessaries against the risk that the ship will depart from port before it has paid its bills. *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 8-9 (1920); *see The St. Jago de Cuba*, 22 U.S. (9 Wheat.) 409, 416-417 (1824). Because "[t]he maritime lien is a secret one" and "may operate to the prejudice of prior mortgagees or of purchasers without notice," a maritime lien is "*stricti juris* and will not be extended by construction, analogy or inference." *Piedmont*, 254 U.S. at 12.

Since at least 1910, federal statutes have governed the circumstances in which a lien will secure the provision of necessaries to a ship. *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 271-273 (1940). With minor variations, those laws have provided that such a lien is created *only* when necessaries are supplied "upon the order of the owner . . . of [the] vessel, or of a person by him or them authorized." Liens on Vessels Act, ch. 373, § 1, 36 Stat. 604, 604 (1910); *see ibid.* (providing that such lien is a "maritime lien" enforceable *in rem*). That statutory provision is now codified as part of CIMLA and provides that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner . . . has a maritime lien on the vessel" that is enforceable in an in rem proceeding. 46 U.S.C. § 31342(a)(1)-(2). The "purpose" of such statutes is "to simplify and clarify the rules as to maritime liens as to which there

had been much confusion" under common law. *Dampskibsselskabet*, 310 U.S. at 271-272.

Since 1910, the statutes governing the creation of liens for the provision of necessaries have also specified which persons or entities "are presumed to have authority to procure necessaries for a vessel"—*i.e.*, the persons or entities authorized to place an order that could give rise to a lien on the ship. 46 U.S.C. § 31341; *see* § 2, 36 Stat. 604 (specifying the persons who "shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel"). Under the operative regime, the following persons are presumed to have such authority: the ship's owner; the ship's master; "a person entrusted with the management of the vessel at the port of supply"; or "an officer or agent appointed by" "the owner," "a charterer," "an owner pro hac vice," or "an agreed buyer in possession of the vessel." 46 U.S.C. § 31341(a). No version of the statute has ever included a general contractor as a person presumed to have authority to bind the vessel—and courts since at least 1922 have indicated that, as a general rule, subcontractors do not have maritime liens. *See The Juniata*, 277 F. 438, 440 (D. Md. 1922).

2. The petition arises out of two cases with materially identical facts. These controversies stem from the collapse and subsequent bankruptcies of O.W. Bunker Group and its subsidiaries and affiliates. Pet. App. 5a. O.W. Bunker Group was a global network of affiliated entities involved in supplying "fuel bunkers" (marine fuel) to ships both directly and through subcontractors. *Id.* at 5a, 24a. In a typical situation, a ship owner, charterer, or authorized agent contracts

with an affiliate of the O.W. Bunker Group for the supply of fuel bunkers at the destination port. When the fueling is to take place in the United States, that affiliate (the bunker trader) then subcontracts with O.W. USA, and O.W. USA in turn subcontracts with an unaffiliated subcontractor that sells bunkers to O.W. USA and physically delivers the fuel to the ship.[1] *Id.* at 6a, 26a. In those circumstances, the ship owner, charterer, or authorized agent does not contract directly with the company that physically loads the fuel onto the ship; the physical supplier instead has a contractual relationship with O.W. USA. *Ibid.* The physical supplier invoices O.W. USA for the sale of bunkers to O.W. USA, O.W. USA invoices the O.W. Bunker Group affiliate that serves as general contractor, and that affiliate invoices the ship's owner, charterer, or authorized agent. *Ibid.* That smooth system ground to a halt when O.W. Bunker Group and its subsidiaries and affiliates filed for bankruptcy in 2014. *Id.* at 6a, 24a.

In the first of these consolidated cases—the Clearlake action—charterer Clearlake, acting through an authorized agent, placed orders with O.W. Switzerland for the delivery of fuel bunkers to two ships. Pet. App. 6a. O.W. Switzerland then issued purchase orders to its affiliate O.W. USA, which in turn issued purchase orders to petitioner NuStar to supply fuel in Houston, TX. *Id.* at 6a, 30a. O.W. USA did not act as

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[1] One of these consolidated cases—the NYK Line case—involves one fewer link in the contractual chain because NYK Trading, which was authorized to bind the vessel, contracted directly with O.W. USA instead of with a foreign affiliate. *See* p. 6, *infra*; Pet. App. 50a-51a. That difference does not affect the legal questions presented in the two cases.

an agent of the ships, and NuStar did not contract directly with any entity authorized to bind the ships. *Id.* at 30a. NuStar delivered the bunkers to the ships, but before NuStar was paid—and before O.W. Switzerland or O.W. USA had been paid for their part in the chain of transactions—members of the O.W. Bunker Group filed for bankruptcy. *Id.* at 6a-7a. Meanwhile, as part of the financing facility provided to the O.W. Bunker Group for its working capital, O.W. Switzerland had assigned to respondent ING Bank all its rights in respect of its fuel supply receivables, including liens arising from the transactions at issue here. *Id.* at 58a-59a, 61a.

The second of these consolidated cases—the NYK Line case—presents a materially identical fact pattern, except for the identities of some of the parties. In that case, charterer NYK Line placed its order for fuel bunkers with its affiliate NYK Trading Corporation. Pet. App. 18a. NYK Trading then placed its order with O.W. USA, which in turn placed its order with NuStar, which then physically supplied the bunkers to the ship in question. *Ibid.* As with the first case, NuStar had a contractual relationship with O.W. USA, but had no contractual relationship with the charterer or with any other entity with authority to bind the ship. *Ibid.*

3. In the wake of O.W. Bunker Group's collapse, various ship owners and charterers were confronted with competing lien claims associated with the provision of bunker fuels by O.W. Bunker Group entities. Pet. App. 24a-25a. In order to resolve those competing claims—as relevant here, asserted by ING Bank (as assignee of O.W. Switzerland) in the Clearlake case, by O.W. USA in the NYK Line case, and by NuStar in both cases—the ship owners and charterers together

initiated these interpleader actions to resolve the competing claims. *Id.* at 24a-26a. These are among 24 such interpleader actions initiated by various ship owners and charterers that were customers of O.W. Bunker Group entities in the United States District Court for the Southern District of New York. *Id.* at 25a. These two cases were among several test cases chosen to resolve significant legal issues common to the 24 cases. *Ibid.*

In these cases, the district court granted summary judgment to ING Bank in the Clearlake case and to O.W. USA in the NYK Line case, holding that each held a valid maritime lien on the ships that had contracted for the fuel bunkers and that NuStar had no such lien.[2] Pet. App. 7a-8a, 17a, 35a-59a. The court identified the central question as whether NuStar had provided necessaries to the ships "on the order of the owner or a person authorized by the owner." *Id.* at 35a-36a (quoting 46 U.S.C. § 31342(a)). The court concluded that subcontractors such as NuStar are generally not entitled to a lien because they "deal with a contractor or a middle-man" and therefore "lack a direct connection to the vessel" or to "any of the parties authorized by Section 31341(a)" to bind the vessel. *Id.* at 39a. Because NuStar had sold the marine fuel to and acted at the direction of O.W. USA, which did not have authority to encumber the vessels, it was not entitled to a lien under CIMLA. *Id.* at 40a-41a.

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[2] The district court declined at the time to rule on whether liens held by O.W. Switzerland were properly assigned to ING Bank. Pet. App. 50a n.16.

The district court also rejected NuStar's alternative argument that it should be viewed as having a direct (enough) relationship with entities authorized to bind the ships (Vessel Interests) because NuStar was identified as the supplier in the order confirmations the owners or charterers received and because NuStar worked directly with port agents for the ships to arrange delivery of the bunkers. Pet. App. 42a-49a. The court acknowledged that a subcontractor may be viewed in some circumstances as acting on the order of an entity authorized to bind the ship when a Vessel Interest "requires a contractor to use a specific subcontractor," demonstrating that "the contractor engaged the subcontractor with actual authority from the vessel, creating a direct link between the vessel and the subcontractor." *Id.* at 43a. But the undisputed evidence in these cases established that, although the Vessel Interests were aware that NuStar would be the physical supplier, they were "indifferent to the identity of the suppliers." *Id.* at 45a-46a. The court also rejected NuStar's argument that its interactions with port agents were sufficient to create a direct relationship with the Vessel Interests. *Id.* at 47a-48a (noting that "the record evidence is that port agents do not normally purchase bunkers on behalf of the vessels" but make "logistical arrangements" coordinating a vessel's anticipated time of arrival and a scheduled time for refueling).

4. NuStar appealed, and the Second Circuit affirmed both cases. Pet. App. 1a-13a; *id.* at 14a-20a. Relying on its recent decision in *U.S. Oil Trading LLC v. M/V Vienna Express*, 911 F.3d 652 (2d Cir. 2018) (*USOT*), the court reaffirmed that a subcontractor is not entitled to a lien under CIMLA. Pet. App. 9a, 18a-

19a. The court also affirmed the district court's holdings that NuStar was not entitled to rely on "the exception to the general rule against a subcontractor's entitlement to a maritime lien" when the subcontractor can show "'that an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance.'" *Id.* at 9a (quoting *USOT*, 911 F.3d at 663) (emphasis omitted); *id.* at 19a. The court found no indication in the record that the Vessel Interests directed the use of NuStar as a physical supplier and held that the Vessel Interests' "mere[] awareness" that NuStar would physically supply the fuel was insufficient to show that an authorized entity controlled or directed the selection of NuStar as subcontractor. *Id.* at 12a-13a, 19a.

NuStar did not seek rehearing en banc.

THE PETITION SHOULD BE DENIED

The question presented in the petition for a writ of certiorari is not the subject of a circuit conflict. Far from it. Every court of appeals to consider the question has held that a physical supplier of necessaries to a ship is not entitled to a lien pursuant to the Commercial Instruments and Maritime Liens Act (CIMLA), 42 U.S.C. § 31301 *et seq.*, when the physical supplier is a subcontractor that has no direct relationship with an entity authorized to bind the ship. The unanimity among the courts of appeals is even more stark: each of the four circuits petitioner points to has decided the question presented on facts that are materially *identical* to those presented here. There is no doubt that these consolidated cases would have been decided in exactly the same way in the Fifth, Ninth, and Eleventh Circuits as they were in the Second—

because each of those circuits has already decided a materially identical version of these cases. In addition, no circuit conflict is likely to develop, for two reasons. First, as petitioner notes (Pet. 12), "[e]ach of the nation's principal maritime circuits" has already spoken. And second, the question presented is not important enough to warrant this Court's review because, as petitioner also points out (Pet. 30-31), it is unlikely to arise with any frequency in the future in light of the unique nature of the O.W Bunker Group's bankruptcies.

I. The Decision Below Does Not Implicate Any Conflict In The Circuits.

Petitioner errs in contending (Pet. 11-17) that courts of appeals are divided about whether a physical supplier of necessaries to ships is entitled to a maritime lien when it is a subcontractor with no direct relationship to an entity authorized to bind the ship. Every court of appeals to consider the issue has held as a general matter that a subcontracting physical supplier of necessaries is not entitled to a maritime lien because it is not acting on the order of an entity authorized to bind the vessel. Each circuit *also* agrees that a subcontracting physical supplier may be treated as acting on the order of an entity authorized to bind the vessel for purposes of CIMLA when such an authorized entity controls either the selection of the subcontractor or its performance. And no circuit has found that that narrow application of CIMLA is triggered when the subcontractor supplied fuel bunkers to the vessel on the order of a person without authority to bind the vessel to a lien. This Court's review is therefore manifestly unwarranted.

Petitioner contends (Pet. 11-17) that the Second, Fifth, and Ninth Circuit's treatment of a subcontracting physical supplier's right to a lien under CIMLA conflicts with the Eleventh Circuit's. Petitioner is wrong.

1. The Second, Fifth, Ninth, and Eleventh Circuits—in petitioner's words (Pet. 12), "[e]ach of the nation's principal maritime circuits"—agree that, as a general rule, a subcontractor that physically supplies necessaries to a ship is not entitled to a maritime lien under CIMLA unless it is acting on the order of an entity authorized to bind the ship. That rule is lifted directly from the text of CIMLA, which provides that a maritime lien arises *only* when "a person provid[es] necessaries to a vessel on the order of the owner or a person authorized by the owner." 46 U.S.C. § 31342(a).[3]

The Eleventh Circuit has held, for example, that, "[w]here the owner directs a general contractor to provide necessaries to its vessel, a subcontractor retained by the general contractor to perform the work or provide the supplies is generally not entitled to a maritime lien." *Barcliff, LLC v. M/V Deep Blue*, 876 F.3d 1063, 1071 (11th Cir. 2017). That court has explained that, "absent facts indicating the owner has designated the general contractor as its agent to procure necessaries on its behalf, a general contractor does not have the authority to bind the ship." *Ibid.* Rather, a "subcontractor is merely a contractual counterparty of

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[3] The First and Fourth Circuits also agree with that general proposition, *Cianbro Corp. v. George H. Dean, Inc.*, 596 F.3d 10, 16-18 (1st Cir. 2010); *S.C. State Ports Auth. v. M/V Tyson Lykes*, 67 F.3d 59, 61 (4th Cir. 1995), extending the unanimity to cover every coastal jurisdiction in the continental United States except New Jersey, Pennsylvania, and Delaware (because the Third Circuit has apparently not yet opined on the question).

the general contractor; it has no relationship with the owner." *Ibid.* The Ninth Circuit agrees, explaining that "subcontractors [a]re not entitled to a maritime lien because they ha[ve] contractual relationships only with the general contractors, and in most cases 'a general contractor does not have the authority to bind a vessel.'" *Bunker Holdings Ltd. v. Yang Ming Liber. Corp.*, 906 F.3d 843, 846 (9th Cir. 2018) (quoting *Port of Portland v. M/V Paralla*, 892 F.2d 825, 828 (9th Cir. 1989)). The Second and Fifth Circuits agree as well. Pet. App. 10a; *U.S. Oil Trading LLC v. M/V Vienna Express*, 911 F.3d 652, 662 (2d Cir. 2018) (*USOT*) ("'[T]here is a considerable body of law . . . that a subcontractor cannot assert a maritime lien.'") (quoting Pet. App. 39a) (ellipses in original); *Valero Mktg. & Supply Co. v. M/V Almi Sun*, 893 F.3d 290, 293 (5th Cir. 2018) ("Typically, 'the general contractor supplying necessaries on the order of an entity with authority to bind the vessel has a maritime lien'; however, 'subcontractors hired by those general contractors are generally not entitled to assert a lien on their own behalf.'") (quoting *Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV*, 199 F.3d 220, 229 (5th Cir. 1999)).

2. Each of those circuits also agrees that a subcontractor may assert a maritime lien in certain narrow circumstances where the subcontractor is best viewed as acting on the order of an entity authorized to bind the ship, even if a general contractor plays an intermediary role. All circuits agree that those circumstances arise when the subcontractor can show "that an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance." *USOT*, 911 F.3d at 663 (2d Cir.) (internal

quotation marks omitted); *see* Pet. App. 9a (2d Cir.); *Valero Mktg. & Supply Co.*, 893 F.3d at 293 (5th Cir.); *Bunker Holdings*, 906 F.3d at 846 (9th Cir.); *Barcliff*, 876 F.3d at 1071 (11th Cir.). That interpretation of CIMLA is also consistent with its language because in those situations either the general contractor will act as an authorized agent of an entity authorized to bind the ship or such an authorized entity's control over the subcontractor's performance will ensure that the provision of necessaries is on the order of that entity. *See Bunker Holdings*, 906 F.3d at 846; *Barcliff*, 876 F.3d at 1071; *Port of Portland*, 892 F.2d at 828.

Petitioner's primary contention (Pet. 15-17) is that the Eleventh Circuit "applies a different rule" than the Second, Fifth, and Ninth Circuits in determining whether a subcontracting physical supplier is entitled to a lien under CIMLA. That is not so. As explained, like every other circuit to consider the issue, the Eleventh Circuit has adopted the general rule that a subcontractor is not entitled to a maritime lien when it acts at the direction of a general contractor. *Barcliff*, 876 F.3d at 1071. And, like every other circuit to consider the issue, the Eleventh Circuit has recognized that a subcontractor will, in certain circumstances, be recognized as acting on the order of an entity authorized to bind the vessel—and might in those narrow circumstances be entitled to a lien. *Ibid.* So far, so good.

Petitioner correctly explains (Pet. 13-15) that the Second, Fifth, and Ninth Circuits recognize such a situation *only* when an authorized entity controls the selection of the contractor and/or its performance. But petitioner errs in arguing (Pet. 15-17) that the Elev-

enth Circuit employs a different analysis because it examines whether the vessel owner was "sufficiently aware of, and involved in," the physical supplier's work. *Barcliff*, 876 F.3d at 1071 (internal quotation marks omitted). That contention is mystifying. Examining whether an owner had "significant and ongoing involvement" (Pet. 15) with the physical supplier is another way of asking whether the owner controlled the physical supplier's selection and/or performance. Different courts may use slightly different verbiage to describe the same inquiry without creating a circuit conflict. With respect to the question presented, the substance of each circuit's interpretation of CIMLA is the same: a subcontractor is entitled to a lien only when it is acting on the order of an entity authorized to bind the vessel. Indeed, the Fifth Circuit has expressly rejected the argument that its holdings conflict with those of the Eleventh Circuit. *Valero Mktg. & Supply Co.*, 893 F.3d at 296 (holding that "a review of the facts and holding in *Barcliff* dispel any notion that we create a circuit split"). Underscoring the absence of a conflict, the Second, Fifth, and Ninth Circuits have each relied on *Barcliff* in holding that a physical supplier that delivers bunkers to a vessel on the order of an entity not authorized to bind the vessel under CIMLA is not entitled to a maritime lien. *See ING Bank N.V. v. M/V Temara*, 892 F.3d 511, 520 (2d Cir. 2018); *Valero Mktg. & Supply Co.*, 893 F.3d at 296-297 (5th Cir.); *Bunker Holdings*, 906 F.3d at 847 (9th Cir.).

If there were a real circuit conflict, one would expect petitioner to identify even one case that would have been decided differently in two different circuits. But petitioner cannot do that. The best it can muster is to suggest (Pet. 17) that these cases would have been

decided in its favor if they had arisen in the Eleventh Circuit. That suggestion is disingenuous to say the least. Materially identical facts were at issue in *Barcliff*: the ship's owner placed an order with an O.W. Bunker Group affiliate, which placed an order with O.W. USA, which placed an order with the physical supplier. 876 F.3d at 1065-1066. And that court held that the physical supplier (the entity in the exact same position as petitioner) was not entitled to a lien. *Id.* at 1071-1072. Petitioner's suggestion (Pet. 16) that the Eleventh Circuit failed to recognize a lien because the physical supplier waived its right to argue that it should be treated as acting on the order of the owner ignores a critical part of that opinion: in setting forth the applicable law, the Eleventh Circuit explained that a "subcontractor would not receive a lien" in "cases involving a one-off transaction" such as "fuel provision." 876 F.3d at 1072 (citing *Galehead, Inc. v. M/V Anglia*, 183 F.3d 1242, 1246 (11th Cir. 1999) (per curiam)). Because the Eleventh Circuit has already held that a subcontractor that provides fuel bunkers to a vessel is not entitled to a lien, these consolidated cases do not implicate a circuit conflict.[4]

It is worth emphasizing, moreover, that every circuit petitioner cites for the alleged circuit conflict has examined whether a subcontractor *of O.W. USA* is entitled to a lien because it physically supplied fuel bunkers to a vessel. And every circuit has applied the same legal rules to reach the same conclusion. *M/V*

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[4] Although petitioner purports (Pet. 15-16) to find support in other decisions from the Eleventh Circuit, the Eleventh Circuit itself held in *Barcliff* that they were plainly distinguishable because, *inter alia*, they involved "extensive maintenance" and repair work over an "extended period of time." 876 F.3d at 1072.

Temara, 892 F.3d 511 (2d Cir.); *O'Rourke Marine Servs. L.P. v. M/V COSCO HAIFA*, 730 F. App'x 89 (2d Cir. 2018); *Chemoil Adani Pvt. Ltd. v. M/V Mar. King*, 742 F. App'x 529 (2d Cir. 2018); *Aegean Bunkering (USA) LLC v. M/T Amazon*, 730 F. App'x 87 (2d Cir. 2018); *Valero Mktg. & Supply Co.*, 893 F.3d 290 (5th Cir.); *NuStar Energy Servs. v. M/V COSCO Auckland*, 760 F. App'x 245 (5th Cir. 2019); *Bunker Holdings*, 906 F.3d 843 (9th Cir.); *Barcliff*, 876 F.3d 1063 (11th Cir.). In other words, no imagination is required to determine whether these cases implicate a circuit conflict—because a materially identical version of these cases have already been decided the same way in every relevant circuit.[5]

Even outside the context of the O.W. Bunker Group's collapse, petitioner cannot identify *even one* court of appeals that has ever held that a physical supplier of fuel bunkers is entitled to a lien when it is a subcontractor but has no direct contractual relationship with the ship's owner or agent. Petitioner's suggestion (Pet. 18 & n.9) to the contrary is wrong. In *Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky*, 869 F.2d 473 (9th Cir. 1988), the Ninth Circuit recognized that a subcontracting provider of bunker fuels had a lien, but only because one of the parties had admitted that the physical provider was acting on the order of a sub-charterer, an entity authorized to bind the vessel under the precursor to CIMLA. *Id.* at 477; *see Bunker Holdings*, 906 F.3d at 846 (explaining basis of

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[5] In *USOT*, the Second Circuit remanded the case for the district court to determine whether the physical supplier should be viewed as acting on the order of the owner because the owner did (or did not) direct the selection of the physical supplier. 911 F.3d at 666.

decision). In *Tramp Oil & Marine, Ltd. v. M/V Mermaid I*, 805 F.2d 42 (1st Cir. 1986), the court denied a subcontractor's lien claim (for making an advance to the vessel) after finding, *inter alia*, that the party from which subcontractor took its order was not an agent of the charterer, and thus did not have "the requisite management authority to order an advance." *Id.* at 45-46. The court had no occasion to consider whether the physical supplier would have a lien (because the physical supplier had already been paid by the intermediary, *id.* at 44)—but it surely would not, based on the reasons for denying a lien to the intermediary. And petitioner's reliance on the Fifth Circuit's decision in *Belcher Co. of Alabama, Inc. v. M/V Maratha Mariner*, 724 F.2d 1161 (5th Cir. 1984), is equally disingenuous. That case decided a jurisdictional question not relevant here. *Id.* at 1164-1166. Although the court noted in passing that, "when [the physical supplier] supplied fuel to the [vessel], a maritime lien *may have* arisen by operation of law," *id.* at 1163 (emphasis added), it certainly did not hold that such a lien attached in that case—or in any case involving a subcontracting physical supplier of bunker fuels.

Perhaps it is theoretically possible that two circuits will disagree in the future about whether two similarly situated subcontracting physical suppliers should be treated as acting on the order of an entity authorized to bind a vessel. But petitioner has identified no such conflict that exists *now* and we are aware of none. To the contrary, every physical supplier similarly situated to petitioner has been found *not* to be entitled to a lien. In light of the unanimity among courts of appeals, this Court's review is unwarranted.

II. The Question Presented Does Not Warrant This Court's Consideration.

Petitioner's further arguments in favor of review must also be rejected.

First, the question presented is not sufficiently important to warrant this Court's review. Petitioner itself concedes (Pet. 31) that case law on the question presented is unlikely to develop further "in either the near or long term" because "[t]he vast majority of bunker transactions do not lead to litigation." Although petitioner argues that the Court should grant the petition *because* "it is unlikely that future cases will come before this Court presenting these issues," *ibid.*, that is a further reason to *deny* the petition. Courts of appeals have already unanimously adopted the correct approach to the question presented. And because even petitioner concedes that the question is not important enough to arise with any frequency in the future, there is nothing for the Court to do here but deny the petition.

Second, petitioner's contention (Pet. 18) that the decision below creates uncertainty in the industry about whether physical providers of necessaries will or will not be entitled to a maritime lien does not hold water in light of the unanimity among the courts of appeals about the rules governing whether and when a subcontractor is entitled to a lien under CIMLA. In fact, courts have long held that third-party subcontractors do not enjoy the rights that petitioner now seeks to assert. As early as 1922, a federal court rejected a subcontractor's attempt to assert a maritime lien after the general contractor filed for bankruptcy. *The Juniata*, 277 F. 438, 440 (D. Md. 1922). The court

explained that no lien existed because "the subcontractor extended credit to the contractor, and never thought of seeking to hold any one else liable until bankruptcy intervened." *Ibid.* Echoing the current state of the law, the court explained that the "cases in which a so-called subcontractor has been held entitled to a lien or to a right in the nature of a lien against the ship" were distinguishable because all were "cases in which, upon the facts, it was possible reasonably to hold that he was not a subcontractor at all, but had an agreement with the owner, made through the contractor as the owner's agent, and as has been pointed out, that was not the case here." *Ibid.*; *accord The Roanoke*, 189 U.S. 185, 195-196 (1903) (striking down a state law that provided a maritime lien to all subcontractors, noting "a general consensus of opinion in the state courts and in the inferior Federal courts that labor and materials furnished to a contractor do not constitute a lien up on the vessel"). Far from creating uncertainty, the decision below (and other recent decisions) merely confirm the settled rules governing maritime liens. Indeed, if the decision below truly had the unsettling effects petitioner claims, one might have expected to see *amicus* support for the petition from one of the many industry sectors that physically provides necessaries to vessels. But none is forthcoming.

Third, the legal rule applied in these cases—and in every other circuit case raising the same question—faithfully adheres to the text and purposes of CIMLA.

CIMLA limits lien rights to physical suppliers acting on the order of an entity authorized to bind the vessel. Because a maritime lien is "*stricti juris* and will not be extended by construction, analogy or inference," *Piedmont & Georges Creek Coal Co. v. Seaboard*

Fisheries Co., 254 U.S. 1, 12 (1920), courts must strictly adhere to statutory limits on such liens. That is precisely what the courts of appeals have done, prohibiting the assertion of liens by subcontractors that act on the order of a general contractor and permitting the assertion of liens by subcontractors that are in fact acting on the order of an entity authorized to bind the vessel.

The current regime also enforces the dual purposes of CIMLA (and its statutory and common-law predecessors) of permitting vessels to travel in commerce and providing a measure of security to entities that supply necessaries to foreign vessels. Vessels are able to obtain necessaries on their own credit because their contractual counterparties are assured of a lien. Those direct contractual suppliers—which bear the risk that the vessel will run out on its bill, leaving the contract suppliers with nothing but an obligation to pay the subcontractor—are protected because the lien arises as a matter of law. But a subcontractor like petitioner has no need for such a lien because its contractual counterparty is *not* a foreign vessel that may sail away before satisfying its debt. To the contrary, petitioner was well suited to—and did—assess the creditworthiness of its contractual counterparty (O.W. USA). Petitioner knew that O.W. USA was not a vessel owner with which petitioner interacted only sporadically but was instead a trader with whom petitioner had dealt repeatedly. Pet. App. 57a. Petitioner's contractual counterparty was a domestic corporation—and petitioner has and had all the usual recourse against a domestic corporation that defaults on its debts. Petitioner now faces the unfortunate situa-

tion that its contractual counterparty has filed a bankruptcy. But that is an inherent risk of doing business that was not heightened or affected in any way by the maritime nature of petitioner's business deal.

In contrast, petitioner's view of CIMLA would *undermine* its purposes by creating a material risk that multiple liens would be asserted against a vessel for the same supply of necessaries—as happened in these cases and in the other cases arising out of O.W. Bunker's collapse. As noted, the purpose of CIMLA and its predecessor statutes is "to simplify and clarify the rules as to maritime liens as to which there had been much confusion" under common law. *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 271-272 (1940). Under petitioner's preferred rule, every party in the contracting chain could assert a maritime lien and invoke the corresponding right of arresting the vessel. Such a regime would be both unworkable and manifestly unfair. A vessel that uses a general contractor to purchase fuel bunkers does not owe the full payment to *every* party in the contracting chain—but under petitioner's regime, a vessel would face the prospect of having to post a bond to each party if one or more of them failed to fulfill *its* contractual duty of payment. This Court has previously rejected such a system, describing a state law that provided every contractor and general contractor with a maritime lien as "obnoxious to the general maritime law." *The Roanoke*, 189 U.S. at 196. "The injustice of permitting such claims" by subcontractors, the Court explained, "is plainly apparent" when subcontractors could assert liens even though "the contractor has been paid the full amount of his bill [and] before notice of the claim of the sub-contractor is received," *id.* at

195-196, risking double payment by ship owners or charterers.

Even if the right to assert a lien were limited to the physical provider of necessaries (and denied to the general contractor that took orders from the vessel's owner), moreover, the purposes of CIMLA would be severely undermined. In such a situation, the ship owner's direct counterparty would be left with the very risk CIMLA and its predecessors is intended to eliminate: the risk that it will fulfill its end of the bargain only to see its security for payment sail out to sea. Petitioner offers no solution to these obvious problems with its preferred legal regime.

Petitioner further errs in arguing (Pet. 27-30) that Congress's 1971 amendments to CIMLA's predecessor were intended to protect third-party subcontractor liens like the one petitioner would assert. The problem Congress confronted in 1971 was the practice of ship owners' including a "prohibition of lien" clause in their contracts with charterers. H.R. Rep. No. 92-340, at 2 (1971). Such a clause purported to void any maritime lien that might arise from the provision of necessaries through a contract with a charterer. *Ibid.* Congress amended the statute to clarify that a charterer is an entity presumed to have authority to bind the vessel and lifted from physical providers the duty to ascertain whether a no-lien clause was present in the vessel's charter contract. *See Gulf Oil Trading Co. v. M/V Caribe Mar*, 757 F.2d 743, 747-748 (5th Cir. 1985) (discussing history of 1971 amendments). Nothing in the 1971 amendments—or any other amendment or statute—provided that general contractors are presumed to have authority to bind a vessel.

Finally, the rule petitioner advocates is unnecessary to protect third-party subcontractors. Subcontracting physical suppliers such as petitioner already have sufficient means available to protect their financial interests. As the district court explained, even in these cases, "[a]dditional contractual protections were available to the" petitioner, which "could have demanded an assignment of O.W.'s rights against the charterers" or "could have insisted that the Vessel Interests become parties to the supply contracts." Pet. App. 57a. After opting not to sell directly to the vessels and instead extending credit to O.W. USA, petitioner now finds itself with an unsecured debt against an insolvent contractual counterparty. Although that is unfortunate, it is not uncommon in commercial settings and provides no basis for rewriting the strict rules governing maritime liens. Petitioner may now pursue its unsecured claim in the bankruptcy proceedings of O.W. USA (petitioner's contractual counterparty); it may not circumvent those proceedings, to the detriment of other creditors, by asserting a maritime lien.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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