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

REPLY BRIEF FOR PETITIONER

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Despite respondents' denials, the circuits are divided on the question presented. Under the rule applied in the Second, Fifth and Ninth Circuits, even though NuStar physically supplied bunkers that were ordered by the vessels' authorized agent, and did so at the vessels' direction, NuStar has no maritime lien because it lacked contractual privity with the vessels or their agent. Instead, bankrupt intermediaries that never saw, touched, or paid for any fuel, and that expected only a small markup for their role, have liens for the full value of the bunkers while NuStar, which physically transferred nearly two million dollars' worth of its own fuel into the vessels at their direction, has none.

But under the Eleventh Circuit's rule, a supplier may still obtain a lien where, as here, the vessel had significant and ongoing involvement with the supplier. In the decisions below, the Second Circuit applied the same logic used in the Fifth Circuit, thereby furthering an "unnecessary circuit split with the Eleventh Circuit." *Valero Mktg. & Supply Co.* v. *M/V Almi Sun, IMO No. 9579535*, 893 F.3d 290, 298 (5th Cir. 2019) (Haynes, J., dissenting). And under the Eleventh Circuit's test, a physical supplier like NuStar possesses a lien. *Id.* at 299-300.

The Court should resolve the conflict on this important question. As respondents do not refute, the privity requirement allows all vessel owners to effectively nullify CIMLA by using affiliated intermediaries to procure necessaries, thereby ensuring that only those intermediaries can obtain liens. As Congress determined in enacting CIMLA, if suppliers lack a predictable lien, maritime commerce will be hindered. The judicial rules governing CIMLA undergird every transaction for maritime necessaries. Yet because the opportunities for this Court's review arise only rarely, uncertainty will reign absent this Court's intervention, engendering the commercial harms that Congress sought to prevent.

I. THE CIRCUITS ARE DIVIDED OVER WHETHER A PHYSICAL SUPPLIER MUST CONTRACT WITH A VESSEL OR ITS AGENT TO POSSESS A STATUTORY LIEN.

Respondents wrongly contend that the Eleventh Circuit's rule is the same as the rule applied below. *See* Opp. 10-17. In fact, the circuits fundamentally disagree as to whether a supplier of necessaries must

contract directly with a vessel or its agent to possess a lien under CIMLA.

1. The statute contains no privity requirement; rather, a party has a lien whenever it has provided necessaries "on the order" of a vessel or its authorized agent. 46 U.S.C. § 31342(a). But in the Second, Fifth, and Ninth Circuits, a supplier that lacks contractual privity with the vessel or its agent will have no lien unless it can satisfy the "sole exception to the rule against the subcontractor lien." *U.S. Oil Trading LLC* v. *M/V VIENNA EXPRESS*, 911 F.3d 652, 662-63 (2d Cir. 2018); *see also Valero*, 893 F.3d at 294; *Bunker Holdings Ltd.* v. *Yang Ming Liberia Corp.*, 906 F.3d 843, 846 (9th Cir. 2018). That exception applies only when an owner has made an intermediary its agent by controlling the subcontractor's selection and/or its performance. *See U.S. Oil Trading*, 911 F.3d at 662-63 ("sole exception" applies "where the general contractor was acting as an agent at the direction of the owner"). Thus, the "exception" is merely one application of those courts' general rule that a supplier must contract directly with a vessel or its agent to possess a statutory lien.

By contrast, under the Eleventh Circuit's rule, a supplier that lacks contractual privity with the vessel or its agent will nonetheless possess a lien if the owner was "sufficiently aware of, and involved in" the supplier's work. *Barcliff, LLC* v. *M/V DEEP BLUE, IMO No. 9215359*, 876 F.3d 1063, 1071 (11th Cir. 2017); *Galehead, Inc.* v. *M/V Anglia*, 183 F.3d 1242, 1245-46 (11th Cir. 1999). In that Circuit, a physical supplier may act "on the order" of an owner regardless of contractual privity, *Galehead*, 183 F.3d at 1245-46, and may have a lien if the owner has "directed, inspected, tested and approved" the supplier's work on

a continuing basis. *Barcliff*, 876 F.3d at 1072 & n.13; *see also Galehead*, 183 F.3d at 1246 (factors in determining lien may include vessel's physical receipt of necessaries from supplier, supplier's provision of a substantial component of order, vessel's communication with supplier, and crew's inspection and acceptance of delivery).

Courts and commentators have recognized that the Eleventh Circuit's rule differs from that of other circuits. In *Integral Control Systems Corp.* v. *Consolidated Edison Co. of New York*, 990 F. Supp. 295, 301 (S.D.N.Y. 1998), the court described that rule as "outside the mainstream" and instead focused solely on privity and agency. Likewise, in the *Clearlake* case at issue in this petition, the district court expressly declined to apply the "Eleventh Circuit's multi-factor analysis" in favor of the Second Circuit's approach. App. 44a-45a. Moreover, commentators have recently noted that the Second, Fifth, and Ninth Circuits apply a "'bright-line' rule" that looks solely to contractual privity and contrasted that "majority rule" with the Eleventh Circuit's "significant-and-ongoing involvement exception." John T. Carroll, III & Simon E. Fraser, *Whose Lien Is It, Anyway?*, 38 Am. Bankr. Inst. J. 48, 69 (2019).

Accordingly, the circuits do not merely use different "verbiage" for the same rule. *Cf.* Opp. 13-14. They apply different substantive rules. In the Eleventh Circuit, a physical supplier will possess a lien under CIMLA without having contracted with a vessel or its agent, if the vessel's owner is sufficiently aware of and involved in the supplier's performance. Everywhere else, a physical supplier cannot assert a lien unless it has contracted with an owner or agent.

2. The Eleventh Circuit's rule also leads to the opposite result on the facts of these cases. That rule recognizes that contractual privity is ***one*** way to demonstrate that a supplier has provided necessaries "on the order" of a vessel or its agent, but not the ***only*** way. Although NuStar provided nearly two million dollars of its own fuel, which the vessels specifically ordered and directed NuStar to supply to them, the court below denied NuStar's liens solely because it lacked contractual privity with the vessels or their agent. But under the Eleventh Circuit's rule, the vessels' significant and ongoing involvement with, and direction of, NuStar's provision of the bunkers demonstrates that NuStar acted "on the order" of the vessels.

As Judge Haynes explained in *Valero*, 893 F.3d at 298, under the Eleventh Circuit's rule, an owner's "involvement in directing, testing, and/or inspecting" a supplier's performance satisfies CIMLA's requirements. Thus, the physical supplier in *Valero*—a "materially identical version of this case," *see* Opp. 9-10—would have had a lien under that rule because the vessel owner authorized, inspected, and accepted the supplier's performance. 893 F.3d at 299. The *Valero* majority's refusal to recognize a lien on those facts therefore "create[d] an unnecessary circuit split with the Eleventh Circuit" by rejecting its approach entirely. *Id.* at 298.

Respondents' unwillingness to discuss Judge Haynes's opinion, much less refute it, is telling. Instead, they rely on statements in *Barcliff* that, they claim, amount to a holding that a "one-off transaction," such as supplying bunkers, categorically fails the Eleventh Circuit's test. Opp. 14-15. That argument fails because—as Judge Haynes explained,

893 F.3d at 299-300—it reads equivocal comments in *dicta* to control earlier precedent. *Barcliff* did not apply the relevant exception because the supplier did not preserve the issue. *Barcliff*, 876 F.3d at 1072-73. And the controlling Eleventh Circuit precedent, *Galehead*, held only that a contractor that merely passed a fuel order from an intermediary to a physical supplier, without ***any*** relationship or interaction with the vessel or its agent, had no lien. *Galehead*, 183 F.3d at 1245-46.

It is uncontroversial that a party lacking ***both*** a contract with a vessel or its agent ***and*** any direct involvement with that vessel, its port agent, or its crew has no lien. Crucially, however, the Eleventh Circuit in *Galehead* reached that result by distinguishing this scenario from one in which a vessel "physically receive[s] bunkers" from a supplier, and its owner or agent "communicate[s] with," "inspect[s]," and "ratif[ies]" the supplier's work, *id.* at 1246, which are the precise facts of these cases, *see* App. 29a-31a. Notably, the only other fueling case *Galehead* cited made clear that a physical supplier ***would*** have a lien under those very facts. *See Tramp Oil & Marine, Ltd.* v. *M/V Mermaid I*, 805 F.2d 42, 44-45 (1st Cir. 1986) (cited in *Galehead*, 876 F.3d at 1246); Pet. 18 n.9. [1] Because *Barcliff* reaffirmed

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[1] By contrast, respondents cite *Cianbro Corp.* v. *George H. Dean, Inc.*, 596 F.3d 10, 16 (1st Cir. 2010), which unsurprisingly denied a lien where "[t]here [were] no facts in the record that would support a conclusion that the owner of the Vessels * * * had any dealings or communications with [the claimant] of any nature whatsoever * * *." This Court's pre-statutory decision in *The Roanoke*, 189 U.S. 185 (1903), is similar. There, the Court held that the common law did not grant a lien to a repair subcontractor (and preempted an inconsistent state statute) where "[n]either the owner nor master nor other officers of the

Galehead without applying it to the facts at issue here, 876 F.3d at 1072-73, *Galehead*'s focus on physical supply, coordination, inspection, and ratification remains the law in the Eleventh Circuit.

Moreover, the vessels' significant and ongoing involvement with NuStar's provision of bunkers would plainly result in a lien under the Eleventh Circuit's test. As the district court recognized, both Clearlake and NYK, the vessels' charterers, knew that NuStar would physically supply their vessels before delivery occurred, and their port agents coordinated with NuStar for delivery. App. 30a-31a. The vessels' engineers or masters accepted NuStar's delivery of the fuel that the vessels ordered and signed bunker receipts. App. 31a. These are precisely the facts that would lead to a lien under the Eleventh Circuit's test. *See Valero*, 893 F.3d at 298-99 (Haynes, J., dissenting); *Galehead*, 183 F.3d at 1246.

It is therefore irrelevant that the OW intermediaries are not parties with presumed authority to act on the vessels' behalf. *See* 46 U.S.C. § 31341; Opp. 4, 22. It is undisputed that authorized agents of the vessels—NYK Trading and Tarcona; the vessels' chief engineers; and the vessels' port agents—ordered the bunkers NuStar provided, directed NuStar to provide them, and accepted NuStar's delivery. App. 29a-31a. CIMLA requires nothing more.

NuStar does ***not*** argue that it is entitled to a lien merely because it provided fuel to the vessels with the vessels' awareness. *Cf.* Opp. 9; App. 10a. Instead, NuStar acted "on the order" of the vessels or their

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vessel had given an order for the material and labor set forth in the libel, which were furnished upon the order of a contractor * * *." *Id.* at 194-95.

agent because, *inter alia*, the vessels' agents ordered the precise bunkers that NuStar provided, knew that NuStar would be the supplier, expressly directed NuStar to provide the bunkers, and acknowledged that NuStar had done so. On these facts, any complaints about "secret" liens, Opp. 3, ring hollow. Although an intermediary that has no contract or other dealings with a vessel or its agents will have no lien, it was no secret in these cases that NuStar was providing necessaries to the vessels on their order.

II. THE QUESTION PRESENTED IS IMPORTANT AND SHOULD BE DECIDED NOW.

A. The Decision Below Will Effectively Nullify CIMLA's Protections For Physical Suppliers.

The Court should also grant certiorari because, as Congress determined, the question presented is important to maritime commerce. The artificial privity requirement imposed below will allow vessels to effectively nullify the statutory lien that Congress enacted to protect suppliers, like NuStar, that physically provide their own valuable necessaries to vessels whose owners are often beyond domestic legal process. *See* Pet. 17-22. Today, vessels often do not contract directly with physical suppliers. *See Valero*, 893 F.3d at 293. Under the rule applied below, therefore, such suppliers will ***never*** be assured of a lien because they cannot realistically scrutinize a chain of intermediate contractual relationships to which they are not privy to determine whether the entity they contracted with was the vessel's legal agent. That rule contradicts Congress's desire for clear and certain protections for American suppliers.

See Dampskibsselskabet Dannebrog v. *Signal Oil & Gas Co.*, 310 U.S. 268, 272 (1940).

Worse, that rule allows vessel owners to insulate themselves from all liens merely by procuring necessaries through affiliates. By contracting with a bona fide affiliate that is not an agent, owners can ensure that all liens in all cases will be granted only to their own affiliates. *See* Pet. 20-21. By contrast, the Eleventh Circuit's test prevents owners from hiding behind intermediaries where, as here, a supplier has physically provided necessaries that the vessel ordered and did so at the direction of the vessel or its agents.

Far from refuting this point, ING ignores it entirely. But as these cases demonstrate, the threat of such conduct is plain. In the *Nippon Kaisha* case below, NYK ordered bunkers for its vessel through its sister company, NYK Trading, under a bulk purchase and sale agreement that gave NYK Trading freedom to choose suppliers from a pre-approved list. *See* Pet. 21; App. 30a. Although NYK elected not to contest that NYK Trading had acted as its agent, App. 50a n.17, there is no reason it could not have done so. And in the future, all vessel owners could simply choose to structure their transactions so that their affiliated entities are not acting as agents. Thus, under the rule applied below, they will always be able to avoid liens where the vessel interests (rather than an unaffiliated intermediary) do not pay. In this manner, they will be able to effectively nullify the statute.

Nor would NuStar's position multiply liens without limit. *Cf.* Opp. 19-22. NuStar does not argue that all parties in a contractual chain will possess a lien; rather, only those parties that satisfy CIMLA's elements will. A physical supplier will have a lien if,

as here, it provided fuel ordered by a vessel, and did so at the direction of the vessel or its agent. Similarly, an intermediary that contracted directly with a vessel may also have a non-conflicting lien for its legitimate expectancy value—here, the relatively small markup the OW entities expected for facilitating the transactions. But as *Galehead* directly held, other intermediaries that had no contacts or relationship with the vessel would have no liens.

B. The Court Should Intervene Now.

NuStar does not "admit[]" that "the question presented is not sufficiently important to arise with any frequency in the future." Opp. 2; *see also id.* at 18. The question is of surpassing importance because judicial interpretations of CIMLA's requirements will underlie every transaction for maritime necessaries. Yet because most transactions are not litigated, the question presented will only rarely come to this Court. Thus, if this Court denies review now, physical suppliers will be without their promised lien protections indefinitely.

It is no answer to argue that physical suppliers like NuStar should demand "additional contractual protections" from their counterparties. Opp. 23; App. 57a. Congress enacted and amended the statutory lien precisely so that suppliers can rely on the credit of the vessels they serve ***without*** having to negotiate costly security arrangements or scrutinize a web of private contractual arrangements to attempt to resolve abstruse questions of agency law. *See* Pet. 22-24, 27-30. Nor could NuStar necessarily have demanded that its counterparty, OW USA, "assign" its maritime lien rights to NuStar, *see* Opp. 23; App. 57a, because under one of the decisions below OW

USA had no such rights; the lien belonged to its foreign affiliate, OW Switzerland.

Respondents wrongly contend that CIMLA was intended to protect only intermediaries in privity with vessels and not physical suppliers like NuStar. Opp. 19-22. NuStar transferred nearly two million dollars of its own fuel into the vessels and never received a cent. Yet under the decision below, NuStar has no lien while the OW entities—bankrupt intermediaries that never touched or paid for any fuel and expected only a small markup—have liens for the full value of the fuel that NuStar provided. And in the future, vessels can use their own affiliated intermediaries to ensure that no external liens will ever attach. The Congress that enacted CIMLA to protect American suppliers could not have intended these results. The Court should grant certiorari, resolve the conflict in the circuits, and restore the lien protections Congress enacted.

CONCLUSION

The Court should grant the petition and reverse the judgments.

Respectfully submitted,

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July 9, 2019