No. _____

In The
Supreme Court of the United States

LIBERTY MUTUAL INSURANCE CO., D/B/A LIBERTY INTERNATIONAL UNDERWRITERS, AND STARR INDEMNITY & LIABILITY CO.,

Petitioners,

v.

CARRIZO OIL & GAS, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

RICHARD COZAD
MCALPINE & COZAD
365 Canal Street
Suite 2730
New Orleans, Louisiana 70130
(504) 561-0323
rcozad@mcalpinelaw.com

HAROLD K. WATSON
Counsel of Record
ALAN DAVIS
IFIGENEIA XANTHOPOULOU
CHAFFE MCCALL L.L.P.
801 Travis Street
Suite 1910
Houston, Texas 77002
(713) 546-9800
watson@chaffe.com
davis@chaffe.com
xanthopoulou@chaffe.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The federal courts have admiralty jurisdiction under 28 U.S.C. § 1333(1) over a contract dispute if the contract at issue is "maritime." In *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), this Court explained that the maritime status of a contract "'depends upon . . . the nature and character of the contract,' and the true criterion is whether it has 'reference to maritime service or maritime transactions.'" *Id.* at 24 (*quoting North Pacific S.S. Co. v. Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U.S. 119, 125 (1919)). The focus is "on whether the principal objective of a contract is maritime commerce." *Id.* at 25.

The courts of appeals are divided on the proper application of the *Kirby* test for admiralty contract jurisdiction. The Sixth, Ninth, and Eleventh Circuits consider whether the subject matter of the contract is inherently maritime and explicitly reject dispositive reliance on the involvement of a vessel. The Fifth Circuit recognizes that contracts "to provide services to facilitate the drilling or production of oil and gas on navigable waters" are not "inherently maritime," but holds that such a contract is maritime if "a vessel will play a substantial role in the completion of the contract." *In re Larry Doiron, Inc.*, 879 F.3d 568, 573, 576 (5th Cir. 2018) (en banc).

The question presented is:

Is a contract to provide services to oil wells located on fixed platforms in navigable waters within a State a "maritime" contract when a vessel played a substantial role in the performance of the contract?

LIST OF PARTIES

Petitioners Liberty Mutual Insurance Company, doing business as Liberty International Underwriters, and Starr Indemnity & Liability Company were third-party defendants before the district court and appellants in the court of appeals.

Respondent Carrizo Oil & Gas, Incorporated was a third-party defendant/third-party plaintiff in the district court, and the appellee in the court of appeals.

Crescent Energy Services, L.L.C. was the petitioner in the district court and was initially an appellant in the court of appeals, but it was dismissed from the case (*see* App. 5a) and is no longer a party.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Liberty Mutual Insurance Company is a wholly owned subsidiary of Liberty Mutual Holding Company, Inc., which is a mutual insurance company owned by its policyholders. Accordingly, no entity owns 10% or more of the company's stock.

Petitioner Starr Indemnity & Liability Company is a wholly owned subsidiary of Starr Global Financial, Inc., which is wholly owned by Starr Insurance Holdings, Inc., which is wholly owned by Starr Global Holdings AG, which is wholly owned by Starr International Company, Inc. No publicly held company owns 10% or more of Starr Indemnity & Liability Company's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Petitioners Liberty Mutual Insurance Company, doing business as Liberty International Underwriters, and Starr Indemnity & Liability Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

This case asks whether a contract to provide services to oil wells located on fixed platforms—legally characterized as artificial islands, *e.g.*, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 360 (1969)—in navigable waters inside the State of Louisiana is a "maritime" contract governed by general maritime law simply because a vessel played "a substantial role" in the performance of the contract. The Fifth Circuit so held. Three other courts of appeals would have held under their interpretations of this Court's precedents that it was a non-maritime contract governed by Louisiana law.

In *Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.*, 543 U.S. 14, 23, 25 (2004), this Court held that in answering such a question, a court "cannot look to whether a ship or other vessel was involved in the dispute," but rather to "whether the principal objective of a contract is maritime commerce." Since then, the courts of appeals have struggled to apply *Kirby* to determine whether a contract is maritime, and have developed conflicting tests.

In the Sixth, Ninth, and Eleventh Circuits, the courts consider whether the subject matter of the contract is inherently maritime, asking such questions as "whether the contract's '*primary objective*' has an 'essentially maritime nature' and relates to 'maritime commerce,'" or "whether it has reference to maritime service or maritime transactions." All three circuits have rejected any suggestion that the involvement of a vessel should be dispositive, instead holding that a contract is not maritime "[s]imply because [the contract] relates to boats," or that "'we cannot look to whether a ship or other vessel was involved in the dispute.'"

The en banc Fifth Circuit, in contrast, created a test specifically for contracts in the offshore oil-and-gas industry—a context in which the definition of a "maritime" contract frequently arises in the Fifth Circuit—with the suggestion that the test would be "helpful" in other contexts. That test turns on whether "the parties expect that a vessel will play a substantial role in the completion of the contract." *In re Larry Doiron, Inc.*, 879 F.3d 568, 576 (5th Cir. 2018) (en banc).

The Fifth Circuit's decision is wrong on the merits. Both prongs of its test are inconsistent with this Court's precedents. In adopting the first part of its test, the Fifth Circuit relied on a line of its own decisions and overlooked this Court's decision in *Herb's Welding v. Gray*, 470 U.S. 414, 425 (1985), which held that offshore oil-and-gas exploration and development "are not themselves maritime commerce." In adopting the second part of its test, the Fifth Circuit claimed

implicit support from one aspect of this Court's *Kirby* decision, but failed to consider the explicit direction not to "look to whether a ship or other vessel was involved in the dispute," 543 U.S. at 23.

This case provides an ideal vehicle to resolve an important question of maritime law that is frequently litigated. This Court has long recognized the need for uniformity in maritime law, and that is particularly important in the jurisdictional context. The jurisdictional issue here is exceptionally important because it raises fundamental federalism concerns. The Fifth Circuit has in essence denied the State of Louisiana the ability to enforce a state statute in its own territorial waters whenever a vessel is "substantially" involved in the performance of a contract. On a practical level, a decision in this case will directly affect the interpretation of thousands of contracts each year in the oil-and-gas industry, and will influence an even broader range of maritime cases.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-25a) is reported at 896 F.3d 350 (5th Cir. 2018). The opinion of the district court (App. 26a-41a) is not reported but is available at 2016 U.S. Dist. LEXIS 154038 and 2016 WL 6581285 (E.D. La., November 7, 2016).

JURISDICTION

The court of appeals entered its judgment on July 13, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on 28 U.S.C. § 1333(1). Petitioners were brought into the litigation as third-party defendants, and jurisdiction over the third-party complaint was proper under 28 U.S.C. § 1367. After the district court decided all issues of liability on cross-motions for summary judgment, petitioners appealed pursuant to 28 U.S.C. § 1292(a)(3).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN THE CASE

Article III, Section 2 of the United States Constitution provides in relevant part:

> The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.

28 U.S.C. § 1333(1) provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT

1. Facts

Crescent Energy Services, LLC ("Crescent") contracted with respondent Carrizo Oil & Gas, Inc. to "plug and abandon" ("P&A") three oil wells located on fixed platforms—"artificial islands"—in navigable waters in Lafourche Parish, Louisiana. The P&A operation consisted of a number of steps, including filling the wells with water, circulating fluid in the wells, pumping cement into the wells to seal them, cutting the "casing" (pipe) in the wells, and removing the casing.[1] All of these steps are unique to the oil-and-gas industry,[2] and are performed the same way whether a well is located on a platform over water or on land.[3]

Because the three wells were on small fixed platforms located in navigable waters, Crescent also provided a non-self-propelled "quarters barge" to obtain access to the wells, serve as a work platform for the operation, and house the necessary equipment. When the platform associated with a well is large enough to accommodate the P&A equipment, as is typical in the deeper waters above the outer Continental Shelf,

---

[1] P&A Procedures, ROA.3788. "ROA" references are to the Record on Appeal in the Fifth Circuit.

[2] Nutter Deposition, ROA.3389:5-3390:22. Specifically, Procedure Nos. 2, 3, 6, 7, 8, 9, 10, and 11 are wireline operations, ROA.3788, which "are peculiar to the oil and gas industry, not maritime commerce," *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 955 (5th Cir. 1988).

[3] Bowman Deposition, ROA.3430:14-3431:20.

Crescent would place the equipment on the platform and all of the work would take place there.[4] The fixed platforms here were too small to accommodate the equipment, so it remained on the barge. Crescent also provided a cargo barge and a tug to move the barges to and from the area and between the three wells.[5]

The quarters barge was equipped with "spuds" (retractable legs) that could be lowered into the mud to secure the barge and create a stable work platform.[6] Crescent could not perform the P&A work unless the spuds were down, and could not move the barge unless the spuds were up.[7] Thus, during P&A work, the barge was physically incapable of transporting any equipment or personnel over water.[8] The Crescent crew's only work that pertained to the movement of the barge was operating its spuds. During movement of the barge, the Crescent crew were merely passengers.[9]

Of the time that the Crescent crew spent performing the job, no more than 11.06% was devoted to operations unique to performing P&A work on water[10] such as moving the barge or preparing it for movement. The remainder of the time Crescent's personnel devoted

---

[4] Nutter Deposition, ROA.3386:6-3387:14, 3388:19-22.

[5] *See* Turnkey Bid, ROA.3356.

[6] Nutter Deposition, ROA.3383:18-3384:7.

[7] *Id.* (spuds must be down to work).

[8] *Id.*, ROA.3382:9-22 (mission of OB 808 was P&A); ROA.3383:18-3384:7 (spuds must be lifted to move barge).

[9] *Id.*, ROA.3378:21-3379:3.

[10] *See* Daily Service Orders, ROA.3438:1-3495:17; Nutter Deposition, ROA.3391:1-3422:17.

to the project was spent performing work that would have been done in precisely the same manner whether the well was located on land or on the water bottom beneath a fixed platform.[11] Moreover, most of the work related to plugging and abandoning the wells was performed on the fixed platforms rather than on the barge.[12]

Corday Shoulder, a member of the Crescent P&A crew, was injured while working on one of the fixed platforms. This case arises out of his injuries.

The contract between Crescent and respondent contained a provision purporting to require Crescent (1) to indemnify respondent for injury claims by Crescent's employees (such as Mr. Shoulder), even if respondent's own negligence caused the injury; and (2) to have respondent named as an additional insured on the insurance policies that petitioners issued to Crescent.

2. Legal Background

The State of Louisiana heavily regulates the oil-and-gas industry within its borders. Crescent had to obtain permits from the Louisiana Bureau of Land Management to P&A the wells. No federal permits were required.[13]

---

[11] Bowman Deposition, ROA.3430:14-3431:20.

[12] Deposition of Gerald Millender ("Millender Deposition"), ROA.3498:8-22.

[13] Nutter Deposition, ROA.3424:22-3425:17. *See also* Louisiana Bureau of Land Management website, http://www.blm.gov/es/st/en/prog/energy.html.

To protect oilfield service contractors from oil companies' overreaching, the Louisiana Oilfield Anti-Indemnity Act ("LOAIA"), La. R. S. Ann. 9:2780, invalidates provisions in contracts pertaining to oil-and-gas wells that require one party (the "indemnitor") to indemnify the other party (the "indemnitee") for the indemnitee's own negligence. The statute also invalidates any provision that would circumvent the statute's purposes by requiring the indemnitee to be named as an additional insured on the indemnitor's insurance policies. Maritime law generally allows the enforcement of indemnity and additional insured provisions. The enforceability of the indemnity and additional insured provisions in this case accordingly turns on whether the contract between Crescent and respondent is a "maritime" contract governed by federal maritime law.

In *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), this Court held that a through bill of lading calling for sea carriage from Australia to Savannah, Georgia, and land carriage from Savannah to Huntsville, Alabama, was a maritime contract governed by maritime law. The Court explained that "[t]o ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute," since the boundaries of maritime contract jurisdiction are "conceptual rather than spatial." *Id*. at 23. "Instead, the answer 'depends upon . . . the nature and character of the contract,' and the true criterion is whether it has 'reference to maritime service or maritime transactions.'" *Id.* at 24

(quoting *North Pacific S.S. Co. v. Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U.S. 119, 125 (1919)). The *Kirby* Court further clarified that "the 'fundamental interest giving rise to maritime jurisdiction is the protection of maritime *commerce*,'" *id.* at 25 (quoting *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991)) (emphasis added by *Kirby* Court) (some internal quotation marks omitted), and "[t]he conceptual approach vindicates that interest by focusing on whether the principal objective of a contract is maritime commerce," *id.* Finally, addressing the particular contract at issue, the *Kirby* Court stated that "so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract." *Id*. at 27.

Whether a contract is "maritime" is important in determining whether a federal court has admiralty jurisdiction under 28 U.S.C. § 1333(1). But it is also important in determining the choice of governing law, even when a court hears a case on some other jurisdictional basis. As this Court held in *Kirby*, "[w]hen a contract is a maritime one . . . federal [maritime] law controls the contract interpretation." 543 U.S. at 22-23 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961)).

3. Proceedings Below

Crescent, as owner of the quarters barge, petitioned for limitation of or exoneration from liability under the Limitation Act, 46 U.S.C. §§ 30501-12. Mr. Shoulder filed a claim under the Jones Act, 46 U.S.C.

§ 30104, in that proceeding. Crescent then filed a third-party complaint against respondent, tendering respondent as a direct defendant under Fed. R. Civ. P. 14(c).

Respondent filed a claim in the limitation proceeding seeking defense and indemnity against Crescent, and its own third-party complaint seeking insurance coverage from petitioners as an additional insured.[14] Based on the LOAIA, Crescent and petitioners denied liability to respondent.

Petitioners and respondent filed cross-motions for summary judgment on whether the agreement for P&A services was a maritime contract. *See* App. 27a-28a. The district court, granting respondent's motion and denying petitioners' motion, App. 41a, ruled that the agreement was a maritime contract, therefore governed by maritime law, App. 30a-39a, and that maritime law preempted application of LOAIA, App. 39a. Crescent and petitioners appealed to the Fifth Circuit. By agreement between the parties, Crescent was then dismissed from the suit. *See* App. 5a.

While this case was pending on appeal, the Fifth Circuit decided *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018) (en banc). In *Doiron*, the en banc court

---

[14] Unlike the limitation of liability proceeding by Crescent and the Jones Act claims of Mr. Shoulder, respondent's contract claims would not have been within the original admiralty jurisdiction if those contracts were not maritime contracts. But the district court had supplemental jurisdiction over those claims pursuant to 28 U.S.C. § 1367.

held that "[o]il and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce," and formulated the following test to determine whether a contract is "maritime":

> First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? The answer to this inquiry will avoid the unnecessary question from *Davis & Sons* as to whether the particular service is inherently maritime. Second, if the answer to the above question is "yes," does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?

879 F.3d at 576 (citing *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990)).

Thereafter, in this case, the Fifth Circuit applied its *Doiron* test and held that the contract for P&A services here was a maritime contract because (1) it concerned the drilling or production of oil and gas on navigable waters, App. 11a-18a, and (2) it anticipated the substantial use of vessels, App. 18a-25a. Since the contract was "maritime," its interpretation was governed by federal maritime law and the State's LOAIA did not apply. App. 25a.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are deeply divided on the proper application of the test for identifying "maritime" contracts that this Court announced in *Kirby*.

At least four circuits have attempted to apply *Kirby* to determine whether a contract is "maritime," and have applied conflicting tests. Three courts of appeals are in direct conflict with the decision of the Fifth Circuit below.

In light of the inter-circuit conflict and the resulting confusion—confusion that only this Court can resolve—the courts of appeals have expressed concern over the lack of clarity in the test for maritime contract jurisdiction. *See*, *e.g.*, *D'Amico Dry, Ltd. v. Primera Mar. (Hellas), Ltd.*, 886 F.3d 216, 223 (2d Cir. 2018) ("The question is clear, but the law is murky."). One circuit court has even complained that "*Kirby* offers very little guidance as to how we are to determine what in fact is the 'primary objective' of a mixed contract." *New Hampshire Insurance Co. v. Home Savings & Loan Co.*, 581 F.3d 420, 424 (6th Cir. 2009). *See also* Phillip Michael Powell, *The Mixed Up Exercise of Admiralty Jurisdiction over Mixed Contracts, Namely Umbrella Insurance Policies Covering Shore-Side and Sea-Side Risks*, 20 OCEAN & COASTAL L.J. 1, 3 (2015) ("[T]he Supreme Court has done the maritime industry a great disservice in its failure to formulate an understandable and applicable set of jurisdictional rules.").

A. At least in the offshore oil-and-gas context, where the issue frequently arises, the Fifth Circuit determines whether a contract is "maritime" by evaluating the extent to which the parties expected a vessel to be involved in the performance of the contract.

In holding that the contract for P&A services was a "maritime" contract, the court below applied the test it had formulated in *Doiron*. While that test is designed for the offshore oil-and-gas industry, the court explicitly declared that it expected the test to "be helpful" in other contexts. In any event, in the Fifth Circuit the question whether a contract is "maritime" frequently arises in the offshore oil-and-gas industry, both because that industry is so important on the Gulf Coast and also because that issue is typically dispositive (as it is here) in determining whether indemnity agreements are enforceable. *See infra* at 28 & n.15.

The *Doiron* test first asks whether the contract at issue is "one to provide services to facilitate the drilling or production of oil and gas on navigable waters." 879 F.3d at 576. The *Doiron* court admitted that "none of these services are inherently maritime," *id.* at 573, but nevertheless found the question valuable because it made it possible to "avoid the unnecessary question" of "whether the particular service is inherently maritime," *id.* at 576. In other words, the Fifth Circuit apparently finds it "unnecessary" to consider whether the subject matter of the contract is "maritime." Indeed, the *Doiron* court did not analyze whether "the

drilling or production of oil and gas on navigable waters" is "maritime commerce" or "commercial maritime activity" as this Court used those terms in *Kirby*. It simply stated that "[o]ur cases have long held that the drilling and production of oil and gas on navigable waters from a vessel is commercial maritime activity," 879 F.3d at 575, with no discussion of whether those earlier cases are consistent with *Kirby*.

Because *Doiron*'s first question will always be answered affirmatively in the offshore oil-and-gas context for which the test is intended, the *Doiron* test in practice turns entirely on its second question: "[D]oes the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?" *Id.* at 576. The *Doiron* court attempted to justify that dispositive second question under *Kirby*, noting that the parties in *Kirby* "obviously expected a vessel to play a major role in transporting the cargo from Australia to Alabama." *Id.*

B. The Sixth, Ninth, and Eleventh Circuits have adopted tests for identifying a maritime contract that are in direct conflict with the Fifth Circuit's test.

Since *Kirby*, the Sixth, Ninth, and Eleventh Circuits have applied this Court's teaching to decide whether particular contracts are "maritime," and the decisions in those circuits are in direct conflict with the Fifth Circuit's decision below.

1. The Sixth Circuit determines whether a contract is maritime by focusing on "whether the contract's '*primary objective*' has an 'essentially maritime nature' and relates to 'maritime commerce'" rather than on the involvement of a vessel.

In *New Hampshire Insurance Co. v. Home Savings & Loan Co.*, 581 F.3d 420 (6th Cir. 2009), the Sixth Circuit held that a "Yacht Dealer/Marina Operators" general liability policy was not a maritime contract. New Hampshire Insurance Co. insured a yacht dealer and marina operator against loss or damage to its inventory; loss or damage to third-party property while in its custody; personal injury or property damage occurring on its boats or at its marina; and loss or damage to its tools and equipment. The policy also included "Truth in Lending Errors and Omissions Liability Coverage" to insure against any damage due to "the unintentional violation of any Federal or State Consumer Credit Act, or similar statute, law or ordinance." 581 F.3d at 423-424.

When the dealer was sued for breach of contract, fraud, and violation of the Ohio Consumer Sales Practices Act, based on allegations of fraudulent misrepresentations and failing to deliver certain boats with clean title, the dealer made a claim against New Hampshire Insurance Co. under the truth-in-lending provision of the policy. The insurance company sought a declaratory judgment in federal court, asserting admiralty jurisdiction on the theory that the policy was a maritime contract.

The Sixth Circuit held that the contract was not maritime. "After the Court's decision in *Kirby*, there can be no doubt that our inquiry into whether a contractual dispute falls within our maritime jurisdiction must focus on whether the contract's '*primary objective*' has an 'essentially maritime nature' and relates to 'maritime commerce.' " 581 F.3d at 424 (quoting *Kirby*, 543 U.S. at 24-25) (emphasis added by *New Hampshire Insurance* court). The Sixth Circuit's interpretation of *Kirby* stands in stark contrast with the Fifth Circuit's formulation of the *Doiron* test for the express purpose of "avoid[ing] the unnecessary question . . . as to whether the particular service is inherently maritime." 879 F.3d at 576. What the Fifth Circuit considered "unnecessary" the Sixth Circuit considered the essence of its inquiry.

The Sixth Circuit also conflicts with the Fifth Circuit on the question that was dispositive in *Doiron*. Far from holding that a contract is "maritime" because vessels play a substantial role, the Sixth Circuit followed that portion of the *Kirby* opinion that rejected undue reliance on the involvement of vessels. The *New Hampshire Insurance* court explained:

> Simply because this insurance policy relates to boats and a marina does not necessarily imply that it is a "maritime contract." As the Supreme Court explained in *Kirby*, "[t]o ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute. . . ."

581 F.3d at 424 (quoting *Kirby*, 543 U.S. at 23).

In *New Hampshire Insurance*, "the yacht-dealer provisions of the policy . . . relate to boats as objects of commerce—*i.e.*, 'stock for sale'—not as agents of maritime commerce." 581 F.3d at 427. The marina-operations provisions raised a closer question, but the Sixth Circuit ultimately concluded that the "operation of a fixed structure that happens to involve boats," *id.* at 431, does not necessarily imply a sufficient connection with maritime commerce.

The present case would undoubtedly have been decided differently in the Sixth Circuit, where the Fifth Circuit's dispositive factor would have been considered virtually irrelevant, and the focus would instead have been "on whether the contract's 'primary objective' has an 'essentially maritime nature' and relates to 'maritime commerce.' " *Id.* at 424. In view of the Fifth Circuit's recognition in *Doiron* that "none of these services [to facilitate oil-and-gas operations] are inherently maritime," 879 F.3d at 573, the Sixth Circuit logically would have concluded that the contract here was non-maritime under its test. And because the Sixth Circuit "cannot look to whether a ship or other vessel was involved in the dispute," 581 F.3d at 424, the use of vessels for a P&A operation of wells located on fixed platforms would simply be an "operation [on] a fixed structure that happens to involve boats," *id.* at 431.

2. The Ninth Circuit, like the Sixth Circuit, "examine[s] the 'nature and subject-matter' of the contract" rather than "'whether a ship or other vessel was involved in the dispute.'"

In *Sentry Select Insurance Co. v. Royal Insurance Co.*, 481 F.3d 1208 (9th Cir. 2007), the Ninth Circuit held that an excess liability policy that provided coverage in excess of a variety of underlying policies—including a "Marine Employers' Liability" policy—was not a maritime contract. That holding required the court to "examine the 'nature and subject-matter' of the contract," *id*. at 1217 (quoting *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 611 (1991)), and "'the true criterion is whether it has reference to maritime service or maritime transactions,'" *id.* (quoting *Kirby*, 543 U.S. at 24). The *Sentry Select* court explicitly noted that under *Kirby* it "cannot simply ask 'whether a ship or other vessel was involved in the dispute.'" *Id.* at 1218 (quoting *Kirby*, 543 U.S. at 23). The relevant inquiry was "whether the 'principal objective of a contract is maritime commerce.'" *Id.* at 1218-19 (quoting *Kirby*, 543 U.S. at 25). The Ninth Circuit concluded that it was not. "[T]he principal purpose of the policy is to provide umbrella coverage in excess of [the insured's] 'shore-side' insurance policies, not to protect [the insured's] maritime commerce operations." *Id.* at 1219.

The Ninth Circuit's approach aligns with the Sixth Circuit's and differs markedly from the Fifth Circuit's *Doiron* test. The *Sentry Select* court carefully analyzed

the various items covered under the policy, and concluded that most of them were not maritime. The Fifth Circuit, in contrast, simply assumed that offshore oil development (even from a fixed platform in state waters) is maritime commerce on the basis of its own pre-*Kirby* jurisprudence. The dispositive factor under *Doiron* is instead the involvement of a vessel—a factor that the Ninth Circuit explicitly rejected.

The Ninth Circuit's test would have resulted in a different outcome in the present case for the same reason that the Sixth Circuit's test would have resulted in a different outcome. *See supra* at 17. The *Doiron* court's recognition that "none of these services [to facilitate oil-and-gas operations] are inherently maritime," 879 F.3d at 573, would logically have led to the conclusion that the contract here was non-maritime under the Ninth Circuit's test. And because the Ninth Circuit "cannot simply ask 'whether a ship or other vessel was involved in the dispute,'" *Sentry Select*, 481 F.3d at 1218 (quoting *Kirby*, 543 U.S. at 23), the dispositive factor below would have been irrelevant.

3. The Eleventh Circuit, like the Sixth and Ninth Circuits, looks to the "nature and character of the contract" rather than to the involvement of a vessel.

In *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 636 F.3d 1338 (11th Cir. 2011), the court held that a contract to provide

research and data concerning the location of a shipwrecked vessel was maritime. The Eleventh Circuit aligned with the Sixth and Ninth Circuits, both in what it found relevant and what it held to be irrelevant. Applying *Kirby*, the relevant consideration was "whether 'the nature and character of the contract . . . has reference to maritime service or maritime transactions.'" *Id*. at 1340 (quoting *Kirby*, 543 U.S. at 24). And the irrelevant consideration was the Fifth Circuit's dispositive criterion—the involvement of a vessel. *See id*. ("'we cannot look to whether a ship or other vessel was involved in the dispute'") (quoting *Kirby*, 543 U.S. at 23).

For the same reason that this case would have been decided differently in the Sixth and Ninth Circuits, *see supra* at 17, 19, it undoubtedly would have been decided differently in the Eleventh Circuit. The dispositive factor below would have been considered irrelevant, and the focus would instead have been on "whether 'the nature and character of the contract . . . has reference to maritime service or maritime transactions.'" *Id*. at 1340 (quoting *Kirby*, 543 U.S. at 24). And even the *Doiron* court recognized that "none of these services [to facilitate oil-and-gas operations] are inherently maritime." 879 F.3d at 573.

II. The Fifth Circuit erred in deciding that a contract to provide services to oil wells on fixed platforms is a "maritime" contract.

In *Doiron*, the en banc Fifth Circuit went to extreme lengths to insist that its analysis followed *Kirby*, even quoting this Court's admonition that

"we cannot look to whether a ship or other vessel was involved in the dispute," 879 F.3d at 574 (quoting *Kirby*, 543 U.S. at 23), and the statement that "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce," *id*. at 574 (quoting *Kirby*, 543 U.S. at 25). But while the Fifth Circuit quoted *Kirby*'s principles, it did not apply them when formulating its new test for maritime contract jurisdiction in the offshore oil-and-gas context.

A. The first *Doiron* factor is inconsistent with this Court's decision in *Herb's Welding v. Gray*.

The first part of the *Doiron* test asks whether "the contract [is] one to provide services to facilitate the drilling or production of oil and gas on navigable waters." 879 F.3d at 576. Having discussed *Kirby* at length, *see id*. at 574-575, one might have expected the court to discuss how and why under *Kirby* "the drilling or production of oil and gas on navigable waters" is "commercial maritime activity." Instead of conducting any such analysis, however, the Fifth Circuit simply stated that "[o]ur cases have long held that the drilling and production of oil and gas on navigable waters from a vessel is commercial maritime activity," *id.* at 575, without any discussion of whether those cases are consistent with *Kirby.*

The *Doiron* court principally relied on *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981), which held that a worker on a drilling barge was engaged in "maritime employment" under the Longshore and

Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, and on cases that trace their authority back to *Pippen*. The *Pippen* court reasoned that "[s]ince offshore drilling—the discovery, recovery, and sale of oil and natural gas from the sea bottom—is maritime commerce, it follows that the purpose of Pippen's work was to facilitate maritime commerce." 661 F.2d at 384. The *Pippen* court cited no authority for its assertion that "offshore drilling . . . is maritime commerce" and gave no explanation to support it.

The *Doiron* court's reliance on *Pippen* and its progeny is remarkable in view of this Court's subsequent decision in *Herb's Welding v. Gray*, 470 U.S. 414 (1985), that a worker injured on a fixed platform in Louisiana waters was ***not*** engaged in "maritime employment" under the LHWCA. The Fifth Circuit had reached the contrary conclusion in *Herb's Welding* because "[o]ffshore drilling—the discovery, recovery, and sale of oil and natural gas from the sea bottom—is maritime commerce." *Herb's Welding v. Gray*, 703 F.2d 176, 180 (5th Cir. 1983) (citing *Pippen*, 661 F.2d at 384), *rev'd*, 470 U.S. 414 (1985). But this Court reversed, holding that the "exploration and development of the Continental Shelf are not themselves maritime commerce," 470 U.S. at 425, and rejecting "the rationale of the [Fifth Circuit] Court of Appeals . . . that offshore drilling is maritime commerce," *id.* at 421.

B. The second *Doiron* factor is inconsistent with this Court's *Kirby* decision.

The second prong of the *Doiron* test asks whether "the contract provide[s] or . . . the parties expect that a

vessel will play a substantial role in the completion of the contract." 879 F.3d at 576. The Fifth Circuit "f[ou]nd strong support in *Kirby*" for its second prong, "particularly" the statement that "so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract." *Id.* Although it is undoubtedly true that "the parties [in *Kirby*] obviously expected a vessel to play a major role in transporting the cargo from Australia to Alabama," *id.*, the *Doiron* court ignores *Kirby*'s statement that "[t]o ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute," 543 U.S. at 23.

The Sixth, Ninth, and Eleventh Circuits were correct to follow the *Kirby* Court's explicit instruction not to "look to whether a ship or other vessel was involved in the dispute" rather than the ambiguous suggestion that use of a vessel might be relevant because "substantial carriage of goods by sea" requires a vessel. *See supra* at 16-17, 18, 20. *Kirby* involved contracts that dealt at least in part with the carriage of goods by sea, a quintessentially maritime activity, and the statements on which the *Doiron* court relied are focused on the maritime nature of the work, not the fact that a vessel was involved. In *Doiron* (and this case), in contrast, the Fifth Circuit dealt with contracts for providing services in support of offshore oil-and-gas drilling, activities that this Court in *Herb's Welding* held were not maritime commerce and that the Fifth Circuit itself admitted are not inherently maritime.

Nothing in *Kirby* suggests that substantial vessel involvement can transform an inherently non-maritime activity into maritime commerce.

Over a century of lower-court jurisprudence demonstrates that a contract is not "maritime," no matter how "substantial" the use of a vessel in its performance, unless the vessel is used for a maritime activity. *See, e.g.*, *The Richard Winslow*, 71 F. 426 (7th Cir. 1896) (use of a vessel to store corn is not a maritime contract); *In re Hydraulic Steam Dredge*, 80 F. 545 (7th Cir. 1897) (use of a vessel to dredge material from navigable lake to build up land for railroad purposes is not a maritime contract); *R. Maloblocki & Associates, Inc. v. Metropolitan Sanitary District*, 369 F.2d 483, 484 (7th Cir. 1966) (contract for dredging services provided by a vessel where "the primary purpose of the contract . . . was flood control" rather than aiding navigation was not a maritime contract); *Village of Bald Head Island v. United States Army Corps of Engineers*, 714 F.3d 186, 196 (11th Cir. 2013) (contracts "to nourish beach areas with dredged sand and protect them from further erosion . . . are not maritime contracts"). In each of those cases, completion of the contract required substantial use of a vessel, but the courts correctly held that the contracts were not "maritime" because the vessel was not being used in maritime commerce.

III. This case provides an ideal vehicle to resolve a question of fundamental importance in the offshore oil-and-gas industry that also has broad implications throughout maritime law.

The courts of appeals have taken very different approaches when applying this Court's decision in *Kirby*. Some circuits ask whether the subject matter of the contract has a sufficient connection to maritime commerce; the Fifth Circuit described that question as "unnecessary." Some circuits declare that it is largely irrelevant "whether a ship or other vessel was involved in the dispute"; the Fifth Circuit below makes that the dispositive factor in oil-and-gas cases. Those conflicting rules in different regions of the country violate this Court's long-standing principle of maritime-law uniformity. In *Kirby*, for example, this Court emphasized the need for "the uniform meaning of maritime contracts." 543 U.S. at 28. The *Kirby* Court explained that "Article III's grant of admiralty jurisdiction 'must have referred to a system of law coextensive with, and operating uniformly in, the whole country.'" *Id*. (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994)). This emphasis on the need for uniformity in maritime law is relevant not only in the substantive law that governs a case that is properly characterized as "maritime" but also in the jurisdictional requirements that determine whether a case is "maritime." Substantive rules of conduct cannot be uniformly applied without uniform rules to identify the cases in which they properly should be applied.

Indeed, clear rules are particularly important in the jurisdictional context, and that clarity is impossible when circuits apply different tests to determine which contracts are "maritime." In his separate opinion in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), for example, Justice Thomas explained in detail the importance of having a clear jurisdictional rule. "Vague and obscure rules may permit judicial power to reach beyond its constitutional and statutory limits, or they may discourage judges from hearing disputes properly before them. Such rules waste judges' and litigants' resources better spent on the merits. . . ." *Id*. at 549 (Thomas, J., concurring in the judgment); *see also*, *e.g.*, *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (quoting ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 312 (1950)); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 376 (1959) ("Certainly sound judicial policy does not encourage a situation which necessitates constant adjudication of the boundaries of state and federal competence."). The history of litigation over what constitutes a maritime contract in the context of offshore oil-and-gas operations proves this point; given the number of times the issue has been litigated in the Fifth Circuit, *see infra* at 28 & n.15, it is safe to estimate that parties have spent millions of dollars litigating this issue and judges have spent thousands of hours deciding this issue.

The jurisdictional issue in this case is exceptionally important because it raises fundamental federalism

concerns. Although the question presented on its face is about admiralty jurisdiction, the underlying issue is whether the State of Louisiana will be permitted to enforce its statute implementing the State's policy choices about how one of the State's most valuable resources will be regulated. The Fifth Circuit has in essence prohibited the State from applying its statute in its own territorial waters whenever a vessel is substantially involved in the performance of a contract. Other lower courts are similarly allocating power between the States and the federal judiciary whenever they make a decision about admiralty jurisdiction. This Court should provide more guidance on how that power is allocated.

The issues raised in this case are important not only on a theoretical level but also on a very practical level. Even taking the narrowest view, the precise issue in this case is immensely important to the oil-and-gas industry. Each year, thousands of contracts involving oil companies and their contractors contain indemnity and additional insured provisions, much like the contract provisions at issue here, that may or may not be enforceable, depending on the applicable law. To give just one prominent example, huge sums were allocated under such provisions in the clean-up of the massive oil spill from BP's Macondo Well in 2010. *See*, *e.g.*, *In re Deepwater Horizon*, 470 S.W.3d 452, 456-457 & nn.5-7 (Tex. 2015). And because the issue is so important, it is frequently litigated. Since 1990, over a hundred reported decisions within the Fifth Circuit address whether an oil-and-gas contract is "maritime" in order

to decide whether indemnity provisions are enforceable.[15] It is undoubtedly one of the more frequently litigated maritime-law issues.

But of course the decision in this case will not be limited to the precise issue here. The en banc *Doiron* decision applies at least to every contract in the offshore oil-and-gas industry. Moreover, the *Doiron* court expressly noted that "[i]f an activity in a non-oil and gas sector involves maritime commerce and work from a vessel, we would expect that this test would be helpful in determining whether a contract is maritime." 879 F.3d at 577 n.52. Accordingly, the *Doiron* test is poised to become even more important as future courts apply it in other contexts. This case and *Doiron* will add to the confusion that already exists in several circuits unless this Court resolves the inter-circuit conflict and provides more guidance on how to determine whether a contract is a maritime contract for purposes of admiralty contract jurisdiction.

This case provides an ideal vehicle to resolve this important issue. The case presents only a single, focused question on undisputed facts, and resolving that question will be dispositive. If the contract at issue

---

[15] Prior to its decision in *Doiron*, the Fifth Circuit applied a six-point test announced in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990), to determine whether a contract for services in the offshore oil-and-gas industry was a maritime contract. In the 28 years between that decision and *Doiron*, the Fifth Circuit addressed this issue over 20 times in reported decisions, and the district courts in the Fifth Circuit addressed this issue over 80 times in reported decisions. Presumably those reported decisions represent only the tip of the iceberg.

here is "maritime," as the Fifth Circuit held below, then the statute that the State of Louisiana enacted to regulate its oil-and-gas industry will be unenforceable in its territorial waters, maritime law will govern the contract, and final judgment will be entered for respondent. Alternatively, if the contract at issue here is not "maritime," then the State's policy choice will be respected, its statute will apply, and final judgment will be entered for petitioners. The lower courts have had fourteen years to apply *Kirby*; no further percolation is needed. This Court should now resolve the inter-circuit conflict and clarify the standard for admiralty contract jurisdiction.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD COZAD
MCALPINE & COZAD
365 Canal Street
Suite 2730
New Orleans, Louisiana 70130
(504) 561-0323
rcozad@mcalpinelaw.com

HAROLD K. WATSON
Counsel of Record
ALAN DAVIS
IFIGENEIA XANTHOPOULOU
CHAFFE MCCALL L.L.P.
801 Travis Street
Suite 1910
Houston, Texas 77002
(713) 546-9800
watson@chaffe.com
davis@chaffe.com
xanthopoulou@chaffe.com