No. 18-436

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

BRIEF OF RESPONDENT, CARRIZO OIL & GAS, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 29.6

Respondent, Carrizo Oil & Gas., Inc. ("Carrizo"), is a publicly traded corporation. Blackrock, Inc. is the only publicly traded company that owns 10% or more of Carrizo stock. Carrizo has no parent corporation, but is itself the parent of the following nine wholly-owned subsidiary limited liability companies and corporations: Carrizo (Niobrara) LLC, Carrizo (Eagle Fors) LLC, Carrizo (Utica) LLC, Carrizo (Utica) DG LLC, Carrizo (Utica) ROW LLC, Bandelier Pipeline Holding, LLC, CLLR, Inc., Carrizo (Permian) LLC, and Carrizo Marcellus Holding, Inc.

The subsidiary Bandelier Pipeline Holding, LLC is itself the parent of two wholly-owned subsidiaries: Mescalero Pipeline, LLC and Hondo Pipeline, Inc.

The subsidiary Carrizo Marcellus Holding, Inc. is also the parent of two wholly-owned subsidiaries: Carrizo (Marcellus) LLC and Carrizo (Marcellus) WV LLC.

The subsidiary Carrizo (Marcellus) LLC is, finally, the immediate parent of the wholly-owned subsidiary Monument Exploration, LLC.

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STATEMENT OF THE CASE

Respondent Carrizo submits this expanded statement of the facts pursuant to Supreme Court Rule 15(2), so as to elucidate the full undisputed facts on which the district court granted and the Fifth Circuit affirmed summary judgment in Carrizo's favor.

1. The Facts

Carrizo owns and operates a number of oil and gas wells throughout the Gulf south. The three wells at issue were located in the Delta Farms field in the inland waters of Lafourche Parish, Louisiana.[1] They were all surrounded by navigable water and accessible only by vessels.[2] By 2014, the three wells had exhausted their production capabilities and needed to be decommissioned.

As the owner and operator of the wells, Carrizo was obligated by law (LA. REV. STAT. § 30:4 *et seq*.) to restore the site to its pre-drilling condition by decommissioning the wells. Decommissioning is the final stage in the total "life cycle" production of oil and gas, with drilling being the first. Decommissioning involves bleeding fluids from the shafts, filling the shafts with concrete plugs several hundred feet long, and dismantling the platforms to the ocean floor – work described in the industry as "plugging and abandoning" a well,

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[1] ROA.16-31214.1879; ROA.16-31214.1897.

[2] ROA.16-31214.2010.

or "P&A" work for short. *In re Crescent Energy*, 896 F.3d 350, 356 (5th Cir. 2018); App. 12a.

Petitioners' insured, Crescent Energy Services, LLC ("Crescent"), is in the business of decommissioning inland and offshore wells. It had positioned itself in the market for inland "P&A" work by designing and building the OB 808, a "specially designed, special purpose" spud barge,[3] shown in the following color photo taken from Crescent's web page:

The 60' yellow crane has a 30-ton capacity and is permanently attached to the barge.[4] It is shown in its horizontal position lowered from the bow on the left side of the image toward the stern on the right. The OB 808 can navigate to customer sites in navigable water as shallow as "two to four feet in depth," as well as to sites located in the deeper navigable waters of the Gulf of Mexico. The onboard crane allows Crescent to "reach

[3] ROA.16-31214.2011.

[4] ROA.16-31214.1907.

and remove structures and support pilings safely and quickly."[5]

Crescent's marketing profile describes the OB 808 as a "fully self-contained 120' work barge" that can house "up to 12 crew members and 2 company representatives," allowing Crescent's crew to "stay on the job location continuously" to achieve "greater efficiency" in completing its decommissioning work.[6] The OB 808 gives Crescent a "unique tool to serve [its customers] with greater proficiency."[7] The OB 808 is also outfitted with standard P&A equipment stowed and maintained on board, including (1) a Detroit 1500 pump;[8] (2) standard toolbox, tools, and power packs;[9] (3) sand cutter casing and cutter package;[10] (4) hoses, line pipes, ball valves;[11] (5) generators;[12] and (6) wireline equipment.[13] The OB 808 is navigated and propelled by a tug boat.

In response to Carrizo's request, Crescent submitted a "turnkey" bid in which it proposed using its

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[5] See Crescent's webpage at http://www.Crescents.com/inland-structure-removal. The web pages were authenticated in the record at ROA.16-31214.1906.

[6] ROA.16-31214.2003-2005.

[7] ROA.16-31214.2003.

[8] ROA.16-31214.1965.

[9] ROA.16-31214.1966-67.

[10] ROA.16-31214.1967.

[11] ROA.16-31214.1955.

[12] ROA.16-31214.1944; ROA.16-31214.1992.

[13] ROA.16-31214.1986-87; ROA.16-31214.2010-2012, 15-17; ROA.16-31214.02045; ROA.16-31214.2020-2025.

OB 808 barge fleet and tug, crew complement, and equipment to decommission the Delta Farms wells.[14] Crescent's barge fleet included a cargo barge outfitted with onboard tanks to collect well fluids and a frac barge to store dismantled well material, such as well heads, until the stored cargo could be transported to shore at the job's completion.[15]

Carrizo accepted Crescent's bid and in early 2015 they executed a "Master Service Agreement" (MSA) that contained the reciprocal indemnity provisions at issue in this case. Crescent's barge fleet then navigated from Belle Chasse to Larose to begin work. The job lasted approximately 33 days, during which the OB 808 and support barges moved back and forth between the three wells twenty-nine times. All equipment described in the "turnkey bid" was operated on board the OB 808 for the duration of the job, including the Detroit pump operated by Corday Shoulder, the seaman injured on the job, because it was impossible to place or operate equipment on the well platforms. The platforms were all too small and were to be dismantled at job's end anyway.[16] The crew, including Shoulder, all ate, slept, and worked on the OB 808 at the wells for the duration of the job.[17]

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[14] ROA.16-31214.2010, 2013-14; ROA.16-31214.

[15] ROA.16-31214.1676-77; ROA.16-31214.2029-2030, 2032-2034, 2039-2040.

[16] ROA.16.31214.1668-69; ROA.16-31214.2016-17; ROA.16-31214.2046-47.

[17] ROA.16-31214.2042.

The 60' crane on board the vessel was used every hour of every day[18] to perform essential functions of the P&A job. Those functions included removing casing from the wells, moving equipment off the barge, moving material around the deck, holding in place protective shields while the onboard wireline operator performed E-line work,[19] and moving barge hoses into place, such as those Shoulder was using when he was injured.[20]

Mr. Shoulder explained that the P&A work on Carrizo's inland wells differed from work on land-based platforms because "the work is performed between the vessel and the platform." Because it was necessary "to use the crane on the vessel," he acknowledged that the work and the use of the vessels were "intertwined."[21]

2. Proceedings Below

Based on these undisputed facts, the district court determined that the MSA and the "turnkey bid" together formed a maritime contract under the six-factor test enunciated by the late Judge Alvin Rubin in the panel decision issued in *Davis & Sons, Inc. v. Gulf Oil Corporation*, 919 F.2d 313 (5th Cir. 1990). Under the *Davis & Sons* test, the district court held that the indemnity provisions were enforceable under federal maritime law – and not subject to Louisiana's Oilfield

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[18] ROA.16-31214.2036-37, 2045.

[19] ROA.16-31214.3688-3689.

[20] ROA.16-31214.2036, 2037, 2045, 2046.

[21] ROA.16-31214.1690-1691.

Indemnity Act, LA. REV. STAT. § 9:2780. The district court granted summary judgment in Carrizo's favor, recognizing Carrizo's right to indemnity from Crescent Energy for injuries sustained by Crescent's employee.

Davis & Sons had been the law of the Fifth Circuit for 28 years. During that time, this Court never thought that *Davis & Sons* so widely diverged from its own precedents as to warrant review. But mainly as a result of this Court's decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 125 S. Ct. 385 (2004), Judge Eugene Davis issued a concurring opinion in *In re Doiron, Inc.*, 849 F.3d 602 (5th Cir. 2017), in which he recommended that the Fifth Circuit modify the *Davis & Sons* test and adopt a simpler test consistent with *Kirby*.

After principal briefing had been completed in Petitioner's appeal in this case, but before oral argument was scheduled, the Fifth Circuit granted rehearing *en banc* in *Doiron*, as Judge Davis had recommended, and issued a unanimous decision that replaced the six-factor test in *Davis & Sons* with a "simpler, more straightforward method for determining whether a contract is maritime." *In re Doiron, Inc.*, 879 F.3d 568, 574 (5th Cir. 2018) (*en banc*) ("*Doiron*").

The *en banc* court reasoned that the *Davis & Sons* test included factors that were irrelevant under *Kirby's* conceptual analysis, "such as whether the service work itself is inherently maritime and whether the injury occurred following a maritime tort." *Doiron*

thus adopted the following test, comprised of two questions:

> First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?
>
> 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?

Doiron, 879 F.3d at 576. In the court's view, the new test is more consistent with *Kirby's* focus on a conceptual, rather than spatial, analysis of the contract and "the expectations of the parties," regardless of whether the "service work has a more or less salty flavor than other service work when neither type is inherently salty." *Doiron*, 879 F.3d at 576-77.

Under the new test, the *en banc* court determined that the contract in *Doiron* was not a maritime contract because neither party had anticipated the need or use of a vessel in performing the work when the contract was entered:

> In early 2011, Apache issued an oral work order directing STS to perform "flow-back" services on a gas well in navigable waters in Louisiana in order to remove obstructions hampering the well's flow. A stationary production platform provided the only access to the gas well. **The work order did not require a vessel, and neither Apache nor**

> **STS anticipated that a vessel would be necessary to perform the job.**

Doiron, 879 F.3d at 570 (emphasis added). The vessel involved in *Doiron* was contracted through a third party as an afterthought to the work order contract, when the work crew determined after the job had started that heavy equipment would be needed to complete the job and a crane would be needed "to lift the equipment into place." *Id.*

In contrast to the factual setting in *Doiron*, where the parties did not contemplate using any vessel for the work when they executed the contract, the Fifth Circuit panel determined in this case that the contract was a maritime contract under the new test because Carrizo and Crescent anticipated the substantial use of vessels, the OB 808 barge fleet, on navigable waters in performing the work.

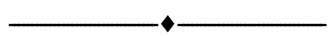
The panel concluded first that decommissioning three wells in Louisiana's territorial inland waters constituted part of the "total life cycle of oil and gas drilling." *Crescent Energy*, 896 F.3d at 357; App. 13a. That P&A work facilitated the drilling or production of oil and gas on navigable waters and thus constituted maritime commerce. *Id*., 896 F.3d at 357; App 13a. Second, to perform the P&A work ordered by the contract, Carrizo and Crescent both anticipated the substantial use of a fleet of vessels that included the OB 808 and its crew. The OB 808 was in fact the reason Carrizo gave Crescent the contract, and the contract called for

the "work [to] be done by permanent members" of the OB 808 aboard the vessel.

The panel's conclusion that the contract was a maritime contract bears quoting:

> In conclusion, this contract anticipated the constant and substantial use of multiple vessels. It was known that the OB 808 would be necessary as a work platform; that essential equipment would need to remain on that vessel, including a crane; that the most important component of the work, the wireline operation, would be substantially controlled from the barge; and that other incidental uses of the vessel would exist such as for crew quarters. This vessel and the other two vessels were expected to perform an important role, indeed, a substantial one, under the Crescent and Carrizo contract. It was a maritime contract.

Crescent Energy, 896 F.3d at 361-62; App. 24a-25a.



REASONS FOR DENYING THE PETITION

There are no "compelling reasons" under Rule 10 for granting the petition for certiorari in this case.

1. There is no direct conflict in the Circuits.

Rule 10 states that a petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a

properly stated rule of law." Petitioners are understandably displeased with the panel's determination that the contract was maritime, controlled by federal and not state law, but that determination rested on undisputed facts specific to the case and affects only the contractual indemnity rights of the parties to that contract in that litigation based on those facts.

Petitioners attempt to make a case for writ review, presumably under Rule 10(a), by asserting, in Part I of the petition, that a "deep division" and a "direct conflict" exists between the Fifth Circuit's *Doiron* test, and three decisions in the Sixth, Ninth, and Eleventh Circuits. They attribute this purported conflict to "confusion" engendered by a "lack of clarity" in *Kirby* itself over how courts are to apply *Kirby's* "primary objective" test for determining when a contract is maritime.

But there has been no decision rendered by any sister circuit since *Doiron* was decided in January, 2018, that even remotely, let alone directly, conflicts with *Doiron's* test for determining when a contract that requires the substantial use of a vessel and her crew in decommissioning oil and gas wells in navigable inland waters is maritime.

The only case cited in the petition, on page 12, that was decided after *Doiron* is the Second Circuit's decision in *D'Amico Dry, Ltd. v. Primera Maritime (Hellas), Ltd.*, 886 F.3d 216 (2d Cir. 2018). Petitioners cite *D'Amico* as evidence of "inter-circuit" confusion over *Kirby*, but that case dealt with a freight forward agreement that the Second Circuit held was a maritime

contract, reversing the district court for having "conceived of its maritime contract jurisdiction too narrowly." *Id*., 886 F.3d at 222. The Second Circuit reached its conclusion based largely on *Kirby's* explanation that a proper "conceptual" analysis of a maritime contract turns on the "nature and character of the contract" and whether the contract has "'reference to maritime service or maritime transactions.'" *D'Amico*, 886 F.3d at 223 (quoting *Kirby*, 543 U.S. at 24, 125 S. Ct. 385). There is nothing confusing or inconsistent about *D'Amico's* application or explication of *Kirby*, including the observation, widely shared by many courts in many decisions, that "[t]he boundaries of admiralty jurisdiction over contracts – as opposed to torts or crimes – being conceptual rather than spatial, have always been difficult to draw." *Kossick v. United Fruit Co*., 365 U.S. 731, 735 (1961).

Kirby certainly did not create the difficulty and can hardly be faulted for failing to eliminate it in every case. Confusion over how to draw the line between maritime and non-maritime contracts is not tantamount to a direct conflict in the circuits, and no direct conflict in the circuits exists in any event.

The three decisions from the Sixth, Ninth, and Eleventh Circuits that Petitioners argue are in "direct conflict" with the Fifth Circuit were all decided before *Doiron*, and none involved contracts for oil and gas production by vessels on navigable waters.

The Sixth Circuit's decision in *New Hampshire Ins. Co. v. Home Savings & Loan Co*., 581 F.3d 320 (6th

Cir. 2009), discussed on page 15 of their petition, dealt with a general liability policy on a yacht dealership and marina, not a contract for oil & gas drilling and production performed by a fleet of vessels on navigable waters. The Sixth Circuit issued a long and well-researched decision, ultimately concluding that the insurance policy was not a maritime contract, based on cases involving "wharves and dry-docks rather than the operation of a marina" that suggested a "conceptual distinction between a contract relating to a particular vessel involved in a commercial operation as opposed to the overarching operation of a fixed structure that happens to involve boats." *Id.*, 581 F.3d at 431.

The Fifth Circuit had already distinguished *Home Savings* in *St. Paul Fire & Marine Ins. Co. v. Board of Com'rs of the Port of New Orleans*, 418 Fed. Appx. 305 (5th Cir. 2011). The Fifth Circuit held in that case that the primary object of a bumbershoot policy was maritime commerce because it provided excess coverage over other marine policies that insured the operations of the Port of New Orleans and its fourteen vessels that the Port owned and operated to carry out the Port's obligations to regulate the commerce and traffic of the port. The bumbershoot policy was therefore a maritime contract. *Home Savings* provides no support for Petitioners' argument that *Doiron* conflicts with existing precedent of this Court or any other circuit courts of appeal.

The Ninth Circuit's decision in *Sentry Select Ins. Co. v. Royal Ins. Co. of America*, 481 F.3d 129 (6th

Cir. 2007), likewise involved the question whether an insurance policy with an MEL (Marine Coverage Endorsement) was a maritime contract; it did not involve a contract for P&A work by a vessel and her crew on navigable waters. The Ninth Circuit held that the policy was not a maritime contract because "the 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*. 481 F.3d at 1219.

The Eleventh Circuit's decision in *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 636 F.3d 1338 (11th Cir. 2011) involved an oral agreement to share research data on the location of sunken vessels in exchange for a share of the salvage. The Eleventh Circuit determined under the facts of that case that the oral agreement was a maritime contract because it was analogous to salvage contracts "long held to be cognizable in admiralty" *Id*., 636 F.3d at 134. *Odyssey Marine's* ruling in no way represents a "direct conflict" with the Fifth Circuit's ruling that the "turnkey" contract here, which specifically called for the use of a vessel and her crew on navigable waters, was a maritime contract.

2. *Doiron's* test does not conflict with *Kirby*.

Part II of the petition reveals that Petitioners' real complaint lies not so much with the panel's specific determination in this case, but with *Doiron's* new test, which they argue is inconsistent with *Kirby's* "primary

objective" test. It must be mentioned that this Court has already declined to review the *Doiron* test in the very case that prompted the Fifth Circuit to adopt it. The losing party in *Doiron* petitioned this Court for a writ of certiorari. That writ petition was promptly denied. *Larry Doiron, Inc. v. Specialty Rental Tools & Supply, L.L.P.*, 138 S.Ct. 2033, 201 L.Ed.2d 280 (Mem.) (2018).

It is a difficult argument, given that the Fifth Circuit unanimously adopted the new test *en banc* for the express purpose of bringing its case law governing oil and gas production from vessels on navigable waters in line with *Kirby.* To give the argument any credence, one would have to conclude that the *en banc* Court got *Kirby* not only wrong, but unanimously wrong.

It is useful to re-examine what *Kirby* precisely held, mindful of the late Prof. Black's observation that, in the field of cases attempting to define maritime contracts, the "attempt to project some 'principle' is best left alone. There is about as much 'principle' as there is in a list of irregular verbs." Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Colum. L. Rev. 259, 264 (1950) (footnote omitted).

Kirby involved two "through" bills of lading contracts, "in which cargo owners can contract for transportation across oceans and to inland destinations in a single transaction." *Kirby*, 543 U.S. at 25-26. The contracts required the shipment of Kirby's goods by sea from Australia to Georgia and by rail from Georgia to Alabama. Both bills of lading contained a limitation of

liability clause for damage to the cargo *en route* and a Himalaya clause that extended the liability limitation to "other downstream parties." *Kirby*, 543 U.S. at 20-21. The second bill of lading also extended the limitation of liability provision "beyond the tackles" to include the land leg of the journey. *Id*., 543 U.S. at 21.

The sea leg was uneventful, but the land leg resulted in cargo damage, prompting the question of whether Norfolk, the rail carrier, was entitled to the protection of the liability limitation in either of the two bills of lading. The district court said yes, but a divided panel of the Eleventh Circuit reversed, ruling in favor of Kirby. Both parties had presumed the dispute was governed by federal law, but in response to Norfolk's petition for certiorari, Kirby changed its position and argued that the contracts were not maritime contracts governed by federal law after all and were thus subject to state (Georgia) agency and tort law.

Kirby's change of position led the Court to examine the law governing maritime contracts in the specific context of intermodal transportation contracts for intercontinental shipping. The Court found that some federal courts had utilized an inappropriate "spatial" analysis in determining when those types of contracts were maritime: They had held "that admiralty jurisdiction does not extend to contracts which require maritime and nonmaritime transportation, unless the nonmaritime transportation is merely incidental – and that long-distance land travel is not incidental." *Kirby*, 543 U.S. at 26. *Kirby* rejected that "spatial" approach:

> [T]o the extent that these lower court decisions fashion a rule for identifying maritime contracts that depends solely on geography, they are inconsistent with the conceptual approach our precedent requires. Conceptually, 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. Its character as a maritime contract is not defeated simply because it also provides for some land carriage. Geography, then, is useful in a conceptual inquiry only in a limited sense: If a bill's *sea* components are insubstantial, then the bill is not a maritime contract.

Id., at 27 (citation omitted). *Kirby* affirmed that the proper conceptual analysis focuses the inquiry "on whether the principal objective of a contract is maritime commerce." *Kirby*, 543 U.S. at 25. Under that analysis, *Kirby* determined that the bills of lading were maritime contracts because the "primary objective [of the contracts was] to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States." *Id*., at 24. The principal purpose of the contracts was therefore to promote maritime commerce.

Kirby is properly understood as re-affirming principles, long recognized by this Court, that govern the proper characterization of contracts as maritime, as articulated in the following passage:

> [W]e cannot look to whether a ship or other vessel was involved in the dispute, ***as we would***

> ***in a putative maritime tort case***. . . . Nor can we simply look to the place of the contract's formation or performance. 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."

Kirby, 543 U.S. at 24 (quoting *N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125, 39 S.Ct. 221, 63 L.Ed. 510 (1919)) (emphasis added). The genesis of this principle can be traced as far back as Justice Story's pronouncement in *DeLovio v. Boit*, 7 F. Cas. 418, 444, 2 Gall. 398 (C.C.D. Mass. 1815), that the broad reach of admiralty jurisdiction:

> extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea.

All these cases recognize the difficulty in drawing clear boundaries between maritime and non-maritime contracts.

It was not *Kirby*, but *Kossick* that commented that "[p]recedent and usage are helpful insofar as they exclude or include certain common types of contract." *Kossick*, 365 U.S. at 735. It was *Kossick* that observed that the

> principle by reference to which the cases are supposed to fall on one side of the line or the other is an exceedingly broad one. "The only question is whether the transaction relates to

> ships and vessels, masters and mariners, as the agents of commerce."

Kossick, 365 U.S. at 736 (1961) (quoting 1 Benedict on Admiralty, 131 (6th ed., A.W. Knauth, 1940) (footnote omitted)). Or, as the Second Circuit put it, "[t]here are few objects – perhaps none – more essentially related to maritime commerce than vessels." *Folksamerica Reinsurance Co. v. Clean Water of New York Inc.*, 413 F.3d 307, 323 (2d Cir. 2005), quoting *Sirius Ins. Co. (UK) Ltd. v. Collins*, 16 F.3d 34, 36 (2d Cir. 1994).

In formulating its new test, the *en banc* court in *Doiron* did not misunderstand or misapply these principles governing maritime contracts that *Kirby* reaffirmed.

a. *Doiron's* first question is not inconsistent with *Herb's Welding v. Gray.*

Petitioners engage in rhetorical legerdemain on page 21 of their petition. They assert that *Doiron* "principally relied on *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981)" as support for its statement that "[o]ur cases have long held that drilling . . . on navigable waters from a vessel is commercial maritime activity." *Doiron*, 879 F.3d at 575.

Doiron did not "principally rely" on *Pippen*. *Pippen* is not cited anywhere in the body of the opinion; it appears only in a list of cases cited in a footnote. *Doiron*, 879 F.3d at 575, n. 46. *Doiron* relies instead, as does the panel decision here, on *Theriot v. Bay Drilling*

Corp., 783 F.2d 527 (5th Cir. 1986), which is cited in the body of both decisions. *See Doiron*, 879 F.3d at 575; *Crescent Energy*, 896 F.3d at 355. Petitioners ignore *Theriot*, but seize upon *Pippen*, in a clumsy effort to give credence to their argument that under *Herb's Welding v. Gray*, 470 U.S. 414 (1985), offshore drilling is not in fact maritime commerce and the first question in *Doiron's* test is therefore inconsistent with *Kirby*.

The argument is a straw. *Herb's Welding* had nothing whatsoever to do with the proper characterization of a maritime contract. Neither did *Pippen*. Both were claims for compensation benefits under 1972 Amendments to the Longshoremen and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq*., that extended benefits to workers engaged in "maritime employment" who were injured on adjoining piers or docks, in addition to loading and unloading vessels.

Gray was a welder assigned to one of Herb's Welding contracts to provide welding services on wells located in Louisiana's territorial waters. Gray worked exclusively on the well platforms and his work had no involvement with docks, piers or a vessel. Nor did his work have anything to do with loading or unloading vessels or the maintenance of equipment used in those tasks. Gray was injured while working on the platform. This Court held that Gray was not engaged in "maritime employment" within the meaning of that term in the LHWCA and was thus relegated to benefits under state law.

Herb's Welding was admittedly influenced by the Court's earlier decision in *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969) (both decisions were written by Justice White). *Rodrigue* held that two workers killed on fixed platforms on the Outer Continental Shelf ("OCS") were not entitled to death benefits under DOHSA ("Death on the High Seas Act"), 46 U.S.C. § 761 *et seq*., because tort injuries on fixed platforms located on the OCS are governed by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq*. ("OCSLA"). OCSLA mandates application of the law of adjacent states, as surrogate federal law, within OCSLA's territorial reach, unless federal maritime law applies of its own force. *Rodrigue* held that DOHSA, applicable to deaths on the high seas, did not apply of its own force because OCSLA defines fixed platforms as artificial islands, not vessels. In the Court's view, accidental deaths on such structures under OCSLA "had no more connection with the ordinary stuff of admiralty than do accidents on piers." *Id*., 395 U.S. at 360.

Herb's Welding employed similar reasoning to conclude that Gray's work on the platform, though not located on the OCS, was nonetheless insufficiently related to maritime activity to warrant coverage under the LHWCA. (The four dissenting judges strongly disagreed with that reasoning.) *Herb's Welding* thus overruled earlier cases that had extended LHWCA benefits to platform workers.

But those overruled cases did not include *Pippen*, because *Pippen* involved a wireline worker injured while working on a drilling barge, not a fixed platform.

Herb's Welding recognized the difference between fixed platforms and floating rigs, based on the line of cases, principally in the Fifth Circuit, that treated floating rigs as vessels, thus entitling workers employed on them to "the same remedies as workers on ships." *Id*., 470 U.S. at 416, n. 2. In cases involving floating rigs, like the drilling barge in *Pippen*, the Court noted that "[i]f permanently attached to the vessel as crewmembers, they are regarded as seamen; if not, they are covered by the LHWCA because they are employed on navigable waters." *Id.*; *see also Boudreaux v. American Workover, Inc*., 680 F.2d 1034 (5th Cir. 1982) (*en banc*) (held, worker injured while performing extraction work aboard a drilling vessel in state territorial waters is engaged in "maritime employment" within the meaning of the 1972 amendments to LHWCA), *cert. den'd, sub. nom. A.W.I., Inc., v. American Insurance Co.*, 459 U.S. 1170 (1983).

On the basis of that difference between fixed and floating rigs, the Fifth Circuit distinguished *Herb's Welding* in *Theriot v. Bay Drilling Corp*., 783 F.2d 527 (5th Cir. 1986), a case decided the next year that did involve a maritime contract. *Theriot* held that a contract between the owner and a drilling contractor was a maritime contract, governed by maritime law, because the contract called for the use of a submersible drilling barge to drill and complete a well located on the OCS:

> Our view that the production of oil and gas from a vessel in navigable waters is a maritime activity is not affected by the recent

> Supreme Court case of *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985) The Supreme Court did not hold therein that oil and gas production from a vessel can no longer be termed maritime commerce, but held instead that not every worker performing a task in oil and gas production from fixed platforms is engaged in maritime employment for purposes of the 1972 amendments to the LHWCA.
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> * * *
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> Apparently a welder aboard a vessel would be engaged in maritime employment under the LHWCA. In sum, the Court's holding must be read in the context of the opinion, tied as it is to the question of coverage under the LHWCA for non-vessel workers.

Theriot, 783 F.2d at 539, n. 11.

Herb's Welding provides no support for Petitioners' argument that drilling and production of oil and gas on navigable waters from vessels is not maritime commerce. The contract at issue here did not concern work on a fixed platform. It concerned work to P&A a well and dismantle the platform, through the substantial use of a vessel and her crew. The first question under *Doiron's* new test is not inconsistent with *Kirby*.

b. *Doiron's* second question is not inconsistent with *Kirby*.

Petitioners misunderstand *Kirby's* admonition that "we cannot look to whether a ship or other vessel was

involved in the dispute." *Kirby*, 543 U.S. at 24. Their argument on page 23 omits from that quoted passage the rest of the sentence, emphasized in bold, "[w]e cannot look to whether a ship or other vessel was involved in the dispute, **as we would in a putative maritime tort case**." *Kirby*, 543 U.S. at 24.

The omission of the clause in bold changes the meaning of the entire passage, which is intended to refocus the inquiry away from the vessel's spatial role in the dispute. Based on the elliptical quotation, Petitioners' argument suggests that the vessel's role in the performance of the contract is to be ignored altogether when analyzing the "nature and character of the contract." *Kirby* holds precisely the opposite: It is the substantial use of a vessel that renders the contract maritime, whether or not contract performance also involves non-maritime activity.

In other words, it is not valid, in a conceptual analysis, as lower courts were wont to do, to slice up a contract's maritime and non-maritime obligations, based on the spatial nature of the work involved, or the location where the work is performed, or even whether the work is "inherently" maritime or not. The same cargo that can be transported over land by rail can be transported over navigable water by ship. The same oil and gas well that can be decommissioned on land by a crane truck can be decommissioned by a crane barge and her crew when the well is located in navigable waters. What makes the contract maritime is the substantial use of a vessel and her crew in the

performance of the contract as the agents of commerce.

The Fifth Circuit has long focused upon special purpose vessels in offshore oil and gas production and found the use of those vessels on navigable waters well suited to maritime law, dating as far back as *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959). In this case, Carrizo hired the OB 808 with its crew whose mission was to P&A three wells in navigable waters, in fulfillment of Carrizo's obligation to restore the site to its pre-drilled condition. The contract can thus be likened to a time or voyage charter – a form of contract for hire – in which the vessel owner (Crescent) agreed to charter (lease) its vessel and crew for a certain project, all the while maintaining operational control of the vessel and its crew. *See, e.g.*, *Chembulk Trading LLC v. Chemex, Ltd*., 393 F.3d 550, 552, ns. 1, 2 (5th Cir. 2004); *see also Gaspard v. Diamond M. Drilling Co*., 593 F.2d 605 (5th Cir. 1979); *Etheridge v. Sub Sea Intern, Inc*., 806 F.Supp. 598 (E.D. La.1992). Contracts for the hire of special purpose vessels and the crews that perform the work, in both state and federal navigable waters, are universally held to be maritime contracts traditionally and consistently governed by maritime law.

CONCLUSION

Doiron's test is fully consistent with the principles articulated and re-affirmed in *Kirby*. *Doiron's* test was formulated to assist district courts in determining when a particular type of contract – to provide services that facilitate the drilling or production of oil and gas on navigable waters – is a maritime contract. *Doiron* instructs courts to focus the inquiry on the primary object of those contracts by asking, first, is the contract related to drilling or production of oil and gas in navigable waters, and second, does the contract require or anticipate the substantial use of a vessel in performing the work. If the answer to both questions is yes, the contract is a maritime contract.

Petitioners would no doubt prefer that this Court issue a categorical rule that all contracts related to offshore oil and gas production are non-maritime contracts, regardless of the need or use of vessels and their crew in carrying out the work on navigable waters, because oil and gas exploration is not 18th or 19th century "traditional" maritime activity. But such a categorical rule would upend centuries of precedential case law and would itself be inconsistent with *Kirby*.

Kirby recognized that what "may once have seemed natural to think that only contracts embodying commercial obligations between the "tackles" (*i.e.*, from port to port) have maritime objectives, the shore is now an artificial place to draw a line." *Kirby*, 543 U.S. at 394. *Kirby* recognized that "[m]aritime commerce has evolved along with the nature of transportation and is

often inseparable from some land-based obligations." The "international transportation industry 'clearly has moved into a new era – the age of multimodalism.'" *Id*., quoting 1 Schoenbaum 589 (4th ed. 2004). "The cause is technological change." *Id.*

The Constitution does not define "maritime commerce" or "maritime transaction" for purposes of admiralty jurisdiction. Shipping has been a part of human commerce since Egypt and Phoenicia first began trading in the Mediterranean 5,000 years ago. It is easy to see why shipping constitutes "traditional" maritime activity. Offshore oil and gas exploration is a relatively new activity, not traditionally maritime and certainly unknown to the Founders. But, as men of the Enlightenment, with a grasp of history and a vision of future progress, the Founders did not mean to cabin "maritime commerce" to only those economic activities prevalent in their day. Offshore oil and gas production has been the driving economic activity for meeting energy needs of this country and the world for well over a century. Vessels needed for that activity and contracts for their use surely must count as "maritime commerce" and "maritime transactions" within the sweep of admiralty jurisdiction the Constitution grants to federal courts. That has certainly been the view of the Fifth Circuit for the last 70 years. *Doiron's* test reflects that reality.

The petition for certiorari should be denied.

Respectfully submitted,

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