No. 18-436

# In The
# Supreme Court of the United States

LIBERTY MUTUAL INSURANCE COMPANY, DBA 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**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS IN SUPPORT OF PETITIONERS

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## MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS

Pursuant to this Court's Rule 37.2(b), the American Institute of Marine Underwriters (AIMU) respectfully requests leave of the Court to file the attached brief *amicus curiae* in support of the petition for certiorari filed by Petitioners Liberty Mutual Insurance Company, doing business as Liberty International Underwriters, and Starr Indemnity & Liability Company. AIMU timely notified counsel of record for all parties of its intent to file an *amicus* brief in this case pursuant to Rule 37.2(a). Petitioners granted consent, but Respondent Carrizo Oil & Gas, Incorporated denied consent, necessitating this motion.

AIMU was founded in 1898 as a not-for-profit trade group representing ocean marine insurers in the United States. AIMU's members provide critical support for the United States offshore energy industry. Without the insurance underwritten by AIMU's members, the entities involved in the United States offshore energy industry, such as Crescent Energy Services, LLC, would simply be unable to operate.

AIMU works in conjunction with the United States government and international groups to improve safety in the maritime industry (including offshore energy) and to monitor and ameliorate the legal environment for the marine insurance industry and the broader maritime industry generally. AIMU is the forum for action on important and timely issues that

affect U.S. marine insurers and the maritime community at large.

This case presents such an issue. Determination of whether a contract is maritime (and thus subject to federal admiralty law, as opposed to state law) is of great importance to AIMU's members. Without a clear test for making such a determination (such as that articulated by the Sixth, Ninth, and Eleventh Circuits), AIMU's members may not be able to appropriately and efficiently underwrite the risks associated with the offshore energy industry. The test articulated by the Fifth Circuit in *Doiron* simply does not provide underwriters with sufficient clarity and certainty to underwrite those risks.

AIMU therefore has a keen interest in the outcome of this case, and the brief it seeks to file as *amicus curiae* will assist the Court by bringing to its attention the significant impact of this case on marine insurers, who, in turn, play a vital role in the maritime and offshore energy industries. AIMU respectfully submits that the motion should be granted.

Respectfully submitted,

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## QUESTION PRESENTED

Does the mere anticipation of the involvement of a vessel in a contract for services to an oil well located on a fixed platform within the navigable waters of a State require a finding that the contract is "maritime?"

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## BRIEF OF *AMICUS CURIAE* THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS

The American Institute of Marine Underwriters (AIMU) respectfully submits this brief as *amicus curiae* in support of Petitioners Liberty Mutual Insurance Company, doing business as Liberty International Underwriters, and Starr Indemnity & Liability Company, urging the Court to grant review.

## INTEREST OF *AMICUS CURIAE*

The American Institute of Marine Underwriters (AIMU) is a not-for-profit trade association representing the United States ocean marine insurance industry as an advocate, promoter, source of information, and center for education.[1] *See* www.aimu.org. AIMU represents 44 insurance and reinsurance companies licensed to write ocean marine business in the United States, including offshore energy risks. In 2017, AIMU's member companies underwrote the vast majority of ocean marine insurance business in the United States, with total premiums written in excess of $2.5 billion.

[1] Counsel for *amicus curiae* AIMU authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. (While petitioners are members of AIMU, they did not contribute to the costs of preparing or filing this brief.) The parties were timely notified of AIMU's intent to file this brief. Petitioners gave consent to the filing; Respondent did not.

AIMU appears as an *amicus curiae* on a very limited basis, and only in cases of keen importance to its members. The last *amicus* brief filed by AIMU with this Court was in 2008 (*Nat'l Cas. Co. v. Lockheed Martin Corp.*, 553 U.S. 1017 (2008)), and it has submitted only three other *amicus* briefs (two to Circuit Courts of Appeals and one to the Texas Supreme Court) since that time.

AIMU has a substantial interest in this matter because its members negotiate, underwrite, and provide the coverage for United States offshore energy risks, including the types of policies that will be affected by this case. If the Court does not hear this case, then AIMU's members' ability to adequately assess and underwrite risks in the United States offshore energy industry will be compromised. AIMU has no financial interest in the outcome of this matter and has paid all of the fees and costs for preparation of this brief.

## SUMMARY OF ARGUMENT

This case presents an issue of great importance to *amicus* AIMU, whose members insure many of the participants in the United States offshore energy industry. Without a clearer test for determining whether the contracts entered into by those participants are maritime or not (and therefore whether the indemnity provisions in those contracts are enforceable), AIMU's members cannot efficiently and effectively underwrite the risks arising in the offshore energy industry.

AIMU's members' insureds include myriad contractors and subcontractors working in the offshore energy industry. Those insureds enter into myriad contracts for services, most of which include indemnity provisions. Under the test enunciated by the Fifth Circuit in *Doiron* (*In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018) (en banc)), there is now less clarity over whether such contracts are maritime or not (and thus whether the indemnity provisions are enforceable), leaving AIMU's members without critical information for underwriting purposes.

This case also presents the Court with an opportunity to address a split among the Circuits with respect to the test for determining whether a contract in the United States offshore energy industry is maritime or not. AIMU therefore supports the petition for a writ of certiorari.

## ARGUMENT

The United States offshore energy industry relies on the members of AIMU to insure its assets and potential liabilities. Without insurance of those assets and potential liabilities, the offshore energy industry simply would not be able to continue to operate safely (if at all).

The potential liabilities insured by AIMU's members include indemnity obligations assumed in most service contracts used in the industry. It is therefore vital for AIMU's members to be able to assess the

enforceability of the indemnity obligations. This case affects whether certain types of offshore energy contracts are governed by maritime law or state law, and the enforceability of indemnity provisions in those contracts turns on what law governs.

The stability of an insurance market such as the one provided by the members of AIMU depends heavily on its underwriters' ability to anticipate and calculate potential risks; and a stable insurance market is vital for the continued safe and efficient operation of the United States offshore energy industry. But under the test enunciated in *Doiron* (*In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018) (en banc)) and applied by the Fifth Circuit in this case, there is substantial uncertainty surrounding whether a contract for services in the offshore energy industry is a maritime contract (and therefore subject to federal maritime law, which permits enforcement of indemnity obligations) or not (and therefore subject to state law, which may preclude enforcement of indemnity obligations). This issue has led to an enormous amount of litigation in the past, and *Doiron* will only serve to increase the uncertainty in the future. From AIMU's perspective, this uncertainty will have a significant impact on its members' underwriting decisions and, therefore, on the efficient and effective insurance of risks in the United States offshore energy industry.

Prior to the Fifth Circuit's decision in *Doiron*, the courts looked first to whether the particular type of service provided for in the contract had previously been analyzed as maritime, and there was accordingly

some degree of certainty with respect to many types of service contracts. For example, drilling contracts and contracts for casing services typically had been held to be maritime contracts (*see*, *e.g.*, *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332 & n. 1 (5th Cir. 1981); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986)), whereas contracts for wireline services had been held to be non-maritime in nature (*see*, *e.g.*, *Thurmond v. Delta Well Surveyors*, 836 F.2d 952 (5th Cir. 1988); *Domingue v. Ocean Drilling and Exploration Company*, 923 F.2d 393 (5th Cir. 1991)). Thus, underwriters insuring the parties to such contracts had a clear understanding about whether a particular insured was providing services under a maritime contract, and if so whether the indemnity provisions in such a contract would be enforceable. The underwriters would therefore have a clear idea of the degree of risk that was being assumed. When AIMU's members underwrite policies covering these risks for insureds whose insured interests include joint venture participation and therefore potential liability under other service contracts, the insurers must be able to rely on policy wording and customary market practices to limit their liability to that expressed in the insuring agreement.

That will not be possible under the test enunciated in *Doiron*, however, because the question of whether a contract for services in the offshore energy industry is a maritime contract will be determined by whether the parties anticipate that the contract will require "substantial involvement of a vessel." At the time an

underwriting decision is made, an underwriter will have no idea which of the innumerable contracts its insured may enter into in the future will require "substantial use of a vessel." Accordingly, the underwriters will not be able to effectively analyze the degree of risk being assumed by a particular insured.

In addition, the risk of responding to claims for contractual indemnity and claims for coverage as an additional insured is the principal risk assumed by AIMU members underwriting marine commercial general liability insurance coverages. The direct liability to injured employees is typically insured by an employers' liability insurer or a protection & indemnity (P&I) insurer, whereas general liability insurance coverages typically exclude coverage for claims by an insured's own employees. Coverage for contractual indemnity and coverage for additional insureds, on the other hand, typically fall within general liability insurance coverage.

The uncertainty regarding the enforceability of indemnity and additional insured provisions resulting from the Fifth Circuit's decision in *Doiron* and the resulting split among Circuits therefore impacts the members of AIMU and the offshore energy industry in general. This is true not only in terms of increased claims costs, but also in terms of allocation of premiums. While the Louisiana Oilfield Anti-Indemnity Act prohibits enforcement of indemnity provisions and additional insured provisions, it is possible to avoid the prohibition against additional insured provisions if the additional insured pays a premium for this coverage. A

rule that provides greater certainty regarding the enforceability of these provisions would enable underwriters to determine which segments of the industry will need to take this approach if the insured's customers are going to receive the protection they want, and to charge a direct premium to the customers seeking additional insured coverage.

This would place the cost of accidents in the industry on the party (and its insurer) who should be paying, which is the purpose behind the Louisiana statute. The statute was passed to ensure that oilfield contractors could obtain affordable insurance coverage, and shifting some of that cost to the oil companies would help ensure the viability of the United States ocean marine insurance industry's customer base.

Given the uncertainty in the law in the wake of *Doiron* and the resulting Circuit split, with respect to the test for determining whether maritime law or state law governs the types of offshore energy contracts that are at issue in this case, maritime insurers cannot adequately assess and underwrite the risks involved in those contracts, and provide appropriately priced coverage to the maritime and offshore energy industries. It is therefore important for the Court to hear this case and resolve the Circuit split.

## CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: November 2, 2018

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