No. _____

In The

Supreme Court of the United States

DAKOTA, MINNESOTA &
EASTERN RAILROAD COMPANY,

Petitioner,

v.

INGRAM BARGE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Rivers and Harbors Act (now 33 U.S.C. §401 et seq.) was adopted by Congress in 1899 to establish a process to approve structures built in navigable waters. The Act requires that all such structures be built and maintained in accordance with design plans reviewed and approved by the Coast Guard or Corps of Engineers. Since the adoption of the Rivers and Harbors Act, federal courts have held that conformity to the approved design plans meets the owner's legal standard of care for the design. See *Monongahela Bridge v. United States*, 216 U.S. 177, 195, 30 S. Ct. 356, 361, 54 L.Ed. 435 (1910) (approval of design has the effect of an Act of Congress and cannot be questioned by a trier of fact in a court case); *Texas and Pacific Ry. Co. v. Angola Transfer Co*., 18 F.2d 18, 19 (5th Cir. 1927) App. 89 (bridge owner's duty of design is to conform to the approved plans, cannot be found negligent if it conforms); *State of Oregon v. Tug Go-Getter*, 468 F.2d 1270, 1273 (9th Cir. 1972) (same). In conflict with these prior decisions, the Eighth Circuit held that a bridge owner has a common law duty of reasonable care regarding its bridge design and can be found negligent, irrespective of compliance with the approved design. See *Dakota, Minnesota & Eastern Railroad Corporation v. Ingram Barge Company*, 918 F.3d 967, 973 (8th Cir. 2019).

The question presented on appeal is: May an owner's preservation of the approved design of a structure in navigable waters which is in compliance with its approved design, constitute negligence in a case involving an allision with the structure?

PARTIES TO THE CASE, CORPORATE DISCLOSURE STATEMENT, AND RELATED PROCEEDINGS

The parties to this case all appear in the case caption. Pursuant to Rule 29.06, petitioner discloses that Dakota, Minnesota & Eastern Railroad Corporation (DM&E) is incorporated under the laws of Delaware. DM&E is a wholly owned, indirect subsidiary of Canadian Pacific Railway Limited (CPRL). CPRL is a Canadian Corporation. Shares of CPRL are publicly traded on the New York and Toronto Stock Exchanges.

Related proceedings are:

Dakota, Minnesota & Eastern Railroad Corporation v. Ingram Barge Company, No. 18-2143, 918 F.3d 967 (8th Cir. 2019), March 21, 2019.

Dakota, Minnesota & Eastern Railroad Corporation v. Ingram Barge Company, Order on Plaintiff's Motion For Award Of Prejudgment Interest, Case No. 2-15-cv-01038, Document No. 72, U.S. District Court, Northern District of Iowa, May 29, 2018.

Dakota, Minnesota & Eastern Railroad Corporation v. Ingram Barge Company, Amended Judgment, Case No. 2-15-cv-01038 Document No. 73, U.S. District Court, Northern District of Iowa, May 28, 2018.

PARTIES TO THE CASE, CORPORATE DISCLOSURE STATEMENT, AND RELATED PROCEEDINGS – Continued

Dakota, Minnesota & Eastern Railroad Corporation v. Ingram Barge Company, 2017 WL 5147160 (N.D. Iowa 2017), Judgment, Case No. 2-15-CV-1038, April 24, 2018.

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BASIS FOR SUPREME COURT JURISDICTION

The opinion of the Eighth Circuit Court of Appeals was entered on March 21, 2019. The Court denied a petition for rehearing and rehearing en banc on April 30, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

U.S. Constitution, Art. 2, Sec. 2, Clause 1

33 U.S.C. §401

33 U.S.C. §403

33 U.S.C. §403a

The constitutional provisions, statutes, and regulations involved are reproduced in the Appendix, App. 59-63.

STATEMENT OF THE CASE AND BASIS FOR TRIAL COURT JURISDICTION

Trial court jurisdiction was based on 28 U.S.C. §1333(1), which provides that district courts have original jurisdiction of any civil case of admiralty or maritime jurisdiction.

This is a property damage case arising from an allision[1] of the tow[2] of a towboat, the M/V Aubrey B Harwell Jr. ("Harwell") with the south protection cell[3] of

[1] An "allision" is contact between a moving vessel and a stationary object. 2 Schoenbaum, *Admiralty and Maritime Law* §14-2 at p. 107 (West Pub. 5th ed. 2011).

[2] The "tow" is the group of barges attached to a towboat.

[3] The south protection cell or pier is the group of pilings, cross-boards, and attendant rip-rap which extend south from the center turntable pier of the Sabula Railroad Bridge.

the Sabula Railroad Bridge[4] (the "Bridge") on April 24, 2015. Plaintiff Dakota, Minnesota & Eastern Railroad Corporation (DM&E) is the owner of the Bridge and its protective structures. Defendant Ingram Barge Company (Ingram) was the operator of the Harwell. DM&E sued for its cost of repairing its bridge protective structure and metal structures. No counterclaim was involved, although Ingram raised DM&E's fault as a defense.[5]

The district court held that Ingram's employees had violated their duty of reasonable care in operating the Harwell, and their negligence was the sole proximate cause of the allision. In the course of its opinion the district court held that the DM&E did not owe a common law duty as owner of the Bridge to modify it to widen the navigation channel for the passage of barge traffic. Ingram appealed.

The Eighth Circuit vacated the judgment, holding that the bridge owner had a maritime common law duty of reasonable care which may be violated if the design is unreasonably obstructive to navigation. The

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[4] The Sabula Railroad Bridge is located at Mile 535.0 on the Upper Mississippi River near Sabula, Iowa and Savanna, Illinois.

[5] The standards of negligence in admiralty are the same regardless of whether it is asserted as an affirmative defense or as a basis for a negligence claim: existence of a duty, and breach of that duty. See 1 Schoenbaum, *Admiralty and Maritime Law* §5-2 (5th Ed. 2011), p. 252; 2 Schoenbaum, *Admiralty and Maritime Law* §14-4 (West Pub. 5th ed. 2011), p. 134. Therefore, this petition does not attempt to distinguish between cases where a duty of reasonable care is asserted as the basis of a claim for damages, versus cases where it is asserted as an affirmative defense.

Eighth Circuit remanded to the trial court for consideration of whether the bridge design breaches a duty of reasonable care; whether such a breach caused the incident; and the percentages of fault to be assigned to the parties under admiralty law's pure comparative fault regime. See *Dakota, Minnesota & Eastern Railroad Corporation v. Ingram Barge Company*, 918 F.3d 967, 973 (8th Cir. 2019).

For convenience of the Court, the most significant cases discussed in this petition are also in the Appendix and cited by Appendix page as well as reported page.

ARGUMENT FOR ALLOWANCE OF THE WRIT

1. The Eighth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court," U.S. Sup. Ct. Rule 10(c), and "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," U.S. Sup. Ct. Rule 10(a). The Rivers and Harbors Act of 1899 (now 33 U.S.C. §401 et seq.) was adopted by Congress to establish a process to approve structures built in navigable waters. The Act requires that all such structures be built and maintained in accordance with design plans reviewed and approved by the Coast Guard or Corps of Engineers. Since the adoption of the Rivers and Harbors Act, federal courts have held that

conformity to the approved design plans meets the owner's legal standard of care for the design. See *Monongahela Bridge v. United States*, 216 U.S. 177, 195, 30 S. Ct. 356, 361, 54 L.Ed. 435 (1910) (approval of design has the effect of an Act of Congress and cannot be questioned by a trier of fact in a court case); *Texas and Pacific Ry. Co. v. Angola Transfer Co.*, 18 F.2d 18, 19 (5th Cir. 1927); App. 89 (bridge owner's duty of design is to conform to the approved plans, cannot be found negligent if it conforms); *State of Oregon v. Tug Go-Getter*, 468 F.2d 1270, 1273 (9th Cir. 1972) (same). In conflict with these prior decisions, the Eighth Circuit held that a bridge owner has a common law duty of reasonable care regarding its bridge design and can be found negligent, irrespective of compliance with the approved design. See *Dakota, Minnesota & Eastern Railroad Corporation v. Ingram Barge Company*, 918 F.3d 967, 973 (8th Cir. 2019).

The Eighth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court," U.S. Sup. Ct. Rule 10(c), and "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," U.S. Sup. Ct. Rule 10(a). A full understanding of the conflicts starts with the history of the Rivers and Harbors Act, 33 U.S.C. §401 et seq.

The history of the Rivers and Harbors Act begins with *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 S. Ct. 811, 31 L.Ed.2d 629 (1888) (App. 64). In

Willamette, the State of Oregon authorized a private corporation to build a bridge over the Willamette River between Portland and East Portland. The plaintiffs sought an injunction to halt construction on the grounds that the bridge was a "nuisance and serious impediment," among other reasons. However, the U.S. Supreme Court held that there is no federal common law "which prohibits obstructions and nuisances in navigable rivers." See 8 S. Ct. at 814-15; App. 72. This Court stated:

> "The power of congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, ***there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced, (a point which we do not undertake to decide) it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states.***"

Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8, 8 S. Ct. 811, 815, 31 L. Ed. 629 (1888) (emphasis added); App. 72.

In *United States v. Republic Steel Corp*., 362 U.S. 482, 486, 80 S. Ct. 884, 887 (1960) this Court discussed the origin of the Rivers and Harbors Act, stating:

> "The history of federal control over obstructions to the navigable capacity of our rivers and harbors goes back to Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8, 8 S. Ct. 811, 815, 31 L.Ed. 629, where the Court held 'there is no common law of the United States' which prohibits 'obstructions' in our navigable rivers. Congress acted promptly, forbidding by s 10 of the Rivers and Harbors Act of 1890, 26 Stat. 426, 454, 'the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity' of any waters of the United States."

80 S. Ct. at 485-86. *Accord, National Wildlife Federation v. Alexander*, 613 F.2d 1054, 1060 (D.C. Cir. 1979) (Act was prompted by *Willamette* holding that there is no common law duty as to unreasonable obstruction); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 608 (3d Cir. 1974) (same).

The legislative history of the Rivers and Harbors Act was discussed more recently in *California v. Sierra Club*, 451 U.S. 287, 101 S. Ct. 1775, 68 L.Ed.2d 101 (1981) (App. 91), where this Court held that the Rivers and Harbors Act does not create a private cause of action in favor of aggrieved citizens. See 101 S. Ct. at

1781. In the course of its opinion, this Court cited with approval the *Willamette* holding that there was no federal common maritime law "which prohibits obstructions and nuisances in navigable rivers." In this Court's words, "[a]lthough *Willamette* involved private parties, the clear implication of the Court's opinion was that in the absence of specific legislation no party, including the Federal Government, would be empowered to take any action under federal law with respect to such obstructions." 101 S. Ct. at 1780. In a footnote to the *California v. Sierra Club* opinion, this Court also observed that the legislative and case history of the Rivers and Harbors Act demonstrated that "***there was no federal law which empowered anyone to contest obstructions to navigable rivers***" in the absence of legislation. 101 S. Ct. at 1781, footnote 6 (emphasis added). Obviously, this lack of a common law negligence remedy may be one reason why the plaintiffs in *California v. Sierra Club* contended that they could bring a private action under the Rivers and Harbors Act.

In 1910 this Court decided *Monongahela Bridge v. United States*, 216 U.S. 177, 30 S. Ct. 356, 54 L.Ed. 435 (1910). In *Monongahela*, the Secretary of War had determined that a bridge was an unreasonable obstruction to navigation and ordered it removed. The owners who failed to remove it as ordered were prosecuted. The Supreme Court affirmed a conviction, stating:

> "It was not for the jury to weigh the evidence and determine, according to their judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable

> obstruction. The jury might have differed from the Secretary. That was immaterial; for ***Congress intended by its legislation to give the same force and effect to the decisions of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries.*** * * * Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under an act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be enough time to deal with such cases when they arise."

Monongahela, 216 U.S. at 195, 30 S. Ct. at 361 (emphasis added). In other words, the decision to approve or disapprove the bridge design is delegated by Congress to the agency overseeing bridge construction, whose decision is determinative of whether the bridge design creates an unreasonable hazard.

After *Willamette* and *Monongahela*, federal appellate and district courts have held that compliance by a structure owner with the government-approved plans establishes that the structure owner cannot be found

negligent under maritime common law for the design. For example, in *Texas and Pacific Ry. Co. v. Angola Transfer Co*., 18 F.2d 18 (5th Cir. 1927) (App. 86), a ship owner sued a railroad for damages caused by the sinking of its vessel at a bridge over Old River in Louisiana on May 5, 1912. The vessel and its tow were 72 feet wide, and the passage was 163 feet wide. The vessel came through at an angle and came in contact with a pier of the bridge. At ordinary river stage, the point of contact would have been above water; however, on the day in question, the river stage was at record levels and the point was below water. The bridge was built pursuant to approval of the Secretary of War. In 1910, the Secretary ordered modifications to the bridge, and final approval of the bridge modifications came after the accident. 18 F.2d at 19.

The vessel owner contended:

> "(1) that the construction of the bridge was initially improper, because of the projecting metal caps, and that in view of that condition a smooth bulkhead should have been built across the pier, to fend a vessel off from the cylinders in the event she should rub along the face of the pier in passing through the draw; and (2) that, in the absence of a permanent protecting bulkhead, because of the submergence of the cylinders and their caps, it was the duty of respondent to place some sort of temporary fender around the caps to serve the same purpose. Both of these theories found favor with the district court."

Id. at 19; App. 88. The trial court accepted this argument.

The Fifth Circuit reversed, holding as follows:

> "We are constrained to disagree with the district court. Regarding the first contention, ***it is enough to say that the bridge was built by authority of Congress, according to plans and specifications approved by the Secretary of War. This afforded complete protection to the appellant***. It is immaterial that the final approval came after the accident, as the bridge was a lawful structure, as much before as after official approval."

18 F.2d at 19, App. 89 (emphasis added). In other words, the duty of the bridge owner is just that duty imposed by statute: to comply with the plan submitted when requesting a permit for the bridge, and then to seek permission for and comply with any subsequently approved modifications. If the bridge is in compliance, there is no independent common law duty to modify the design to make it less obstructive or dangerous to navigation.

A more recent case on the duty issue is *State of Oregon v. Tug Go-Getter*, 299 F. Supp. 269 (D. Or. 1969), *aff'd and rev'd on other grounds*, 468 F.2d 1270. In that case, the State of Oregon operated Bullards Bridge, which crosses the Coquille River near Brandon, Oregon. On October 4, 1966, the Tug Go-Getter attempted the passage with one barge, the J. Whitney, in tow. During the attempt, the barge's starboard bow struck the bridge's southeast pier. 299 F. Supp. at 272. The

towboat company claimed that "the State is liable for damages to the J. Whitney because Bullards Bridge was an unreasonable interference with navigation on the date of the collision." 299 F. Supp. at 273. The other defendants also asserted this claim as a defense to the State's claim for damages to its bridge. *Id.*

The district court granted the State of Oregon's motion for summary judgment on the claim of unreasonable obstruction, reasoning as follows:

> "Bullards Bridge was built under authority delegated by the Congress to the Chief of Engineers and the Secretary of the Army. 33 U.S.C. §525 et seq. In order to hold that the bridge unreasonably interferes with navigation because it lacked dolphins or fenders, I must find that its existence was so unreasonable as to be a denial of due process. ***Several cases hold that a bridge built in accordance with Congressional authority cannot be an improper or unreasonable structure, absent arbitrary activity. Texas and Pacific Ry. Co. v. Angola Transfer Co.*, 18 F.2d 18 (5th Cir. 1927). *Gildersleeve v. New York, N.H. & H.R. Co.*, 82 F. 763 (S.D.N.Y.1897). *Monongahela Bridge v. United States*, 216 U.S. 177, 30 S. Ct. 356, 54 L.Ed. 435 (1910)."**
>
> In *Monongahela*, the Secretary of War had determined that a bridge was an unreasonable obstruction to navigation. The owners failing to remove it as ordered, were prosecuted. The Supreme Court affirmed a conviction, stating:

> "***It was not for the jury to weigh the evidence and determine, according to their judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction.*** The jury might have differed from the Secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decisions of the Secretary of War that would have been accorded to direct action by it on the subject. ***It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries.*** * * * Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under an act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be enough time to deal with such cases when they arise. 216 U.S. at 195, 30 S. Ct. at 361."

State of Or. By & Through State Highway Comm'n v. Tug Go-Getter, 299 F. Supp. 269, 273-74 (D. Or. 1969), *aff'd in part, modified in part and rev'd in part*, 468 F.2d 1270 (9th Cir. 1972) (emphasis added).

The District Court of Oregon went on to observe the following:

> "Defendants claim that the State had an obligation to petition the appropriate officials for permission to make changes in the bridge's structure. The State could have done this, but I do not believe the State owed this duty to the defendants. The Chief of Engineers and the Secretary of the Army could have acted without a request, or the defendants themselves could have requested that the changes in the bridge be ordered."

299 F. Supp. at 274. On appeal, the Ninth Circuit increased the damage judgment in favor of the State of Oregon, but was not directly presented with the issue of the legality of the bridge. See *State of Oregon v. Tug Go-Getter*, 468 F.2d 1270, 1273 (9th Cir. 1972). However, in the course of its discussion of the damage issues, the Ninth Circuit approved of the lower court's ruling, stating that "Government approval of the design and specifications of the structure constituted an authoritative determination that in the public interest river traffic could be limited to those vessels that could navigate the river without endangering the bridge." 468 F.2d at 1273.

Contrary to all of these precedents, the Eighth Circuit opinion in this case holds squarely that a bridge owner has a federal common law duty to avoid unreasonably obstructing navigable waters, and that the trier of fact is entitled to determine whether the bridge owner acted unreasonably by not removing and replacing a bridge to widen its channel for navigation. The Eighth Circuit panel held:

"In a comparative fault regime, '[t]he plaintiff's negligence reduces the amount of damages that he can collect, but is not a defense to liability.' Bhd. Shipping Co. v. St. Paul Fire & Marine Ins. Co., 985 F.2d 323, 325 (7th Cir. 1993). 'Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm.' Restatement (Second) of Torts § 463 (Am. Law Inst. 1965). ***If the owner of a bridge fails to adhere to the standard of 'a reasonable person under like circumstances,' and this failure contributes to an allision, the court may reduce the owner's recovery accordingly. S.C. Loveland, Inc. v. E.W. Towing, Inc.*, 608 F.2d 160, 166 (5th Cir. 1979).**

"In its comparative fault analysis, the district court concluded that DM&E could not be assigned any share of fault because it had no legal duty to remove or alter the lawfully permitted Bridge. ***But the owner of a lawful bridge may be found comparatively negligent for an allision even absent an affirmative legal duty to alter the bridge's configuration*, *as illustrated by the Seventh Circuit's decision in M/V Morgan*.** In that case, the court examined an allision between a tugboat and a bridge that resulted in damage to the bridge's electrical cabling. 375 F.3d at 570. The court concluded that the tugboat operators had failed to rebut the Oregon

presumption and were liable for negligence. *Id.* at 573–78. Nonetheless, and even though the bridge was in compliance with its permit, the court affirmed the district court's equal apportionment of damages between the parties based on the bridge owner's failure to replace a wooden fender that previously protected the cabling. *Id.* at 578–79. It follows from M/V Morgan that a negligent bridge owner may face reduced damages from an allision under admiralty's comparative fault regime, as the Seventh Circuit has held in a previous case dealing with an allision with the Sabula Bridge. See I&M Rail Link, 198 F.3d at 1016 (remanding to the district court to determine whether the Bridge's design 'bear[s] some responsibility' for allision). It also follows that ***a finding of comparative negligence does not necessarily require the bridge owner to have violated a specific legal duty owed to others imposed by statute or regulation. All that is required is a finding that the bridge owner was negligent and that this 'negligence . . . contribute[d] to the loss.' 1 Admiralty and Maritime Law § 5:7 (6th ed. 2018)***.

"DM&E argues that California v. Sierra Club, 451 U.S. 287 (1981), stands for the proposition that a lawfully permitted bridge's obstruction to navigation cannot constitute negligence. We disagree. Sierra Club simply concluded that Section 10 of the Rivers and Harbors Appropriation Act, which prohibits the creation of any obstruction to navigable waters not authorized by Congress, did not establish a private right of action. See *id.* at 292–97. This

> holding does not immunize a bridge from its own comparative fault when an allision occurs. Since Sierra Club, we have held that '***the trier of fact should determine whether' a lawful bridge's obstruction to navigation is unreasonable and a contributing cause of an allision, Kirby Inland Marine, 296 F.3d at 676, as has the Seventh Circuit specifically with regard to the Sabula Bridge, I&M Rail Link, 198 F.3d at 1016. If the district court so concludes, it may reduce the bridge owner's recovery based upon the bridge's comparative fault***."

Dakota, Minnesota & Eastern Railroad Corporation v. Ingram Barge Company, 918 F.3d 967, 973 (8th Cir. 2019) (emphasis added).

The Eighth Circuit's holding that the bridge owner has a common law duty to avoid unreasonable obstruction of navigable water, directly contradicts the U.S. Supreme Court's holding in *Willamette Iron Bridge Co. v. Hatch* that no such common law duty exists. The Eighth Circuit's holding contradicts this Court's holding in *Monongahela Bridge v. United States* that the trier of fact cannot re-determine the reasonableness of a design approved by federal authorities. The Eighth Circuit's holding contradicts the Fifth Circuit's holding in *Texas and Pacific Ry. Co. v. Angola Transfer Co*. The holding also contradicts the U.S. Supreme Court's view of the legislative history of the Rivers and Harbors Act and the significance of *Willamette Iron Bridge Co. v. Hatch*, as explained in *United States v. Republic Steel Corp.* and *California v. Sierra Club*. Finally, the Eighth Circuit opinion contradicts a district court's holding in

State of Oregon v. Tug Go-Getter, *supra*, which was discussed with approval by the Ninth Circuit in *State of Oregon v. Tug Go-Getter*, 468 F.2d 1270, 1273 (9th Cir. 1972).

Not only did the Eighth Circuit ignore this Court's opinions and the opinions of other circuit courts, its reasoning is illogical. One obvious logical problem is the straw man fallacy, where the panel refuted an argument about *California v. Sierra Club* that DM&E did not make. The panel argued that DM&E was citing *California v. Sierra Club* as directly controlling authority on whether it can be found negligent under maritime common law for obstructing a river, and said that this was not the holding of the case. However, DM&E argued *California v. Sierra Club* in just the way it has in this petition, as part of a discussion of *Willamette Iron Bridge Co. v. Hatch* and its progeny. Nonetheless, while defeating the straw man, the Eighth Circuit panel did not discuss *Willamette Iron Bridge Co. v. Hatch*, which was the subject of DM&E's quotations from *California v. Sierra Club.* The panel also failed to consider or discuss the other precedents which were presented to the Eighth Circuit just like the presentation in this petition.

The Eighth Circuit panel also misconstrued other precedent it cited in reaching its decision. First, the panel cited a Fifth Circuit opinion, arguing that "If the owner of a bridge fails to adhere to the standard of 'a reasonable person under like circumstances,' and this failure contributes to an allision, the court may reduce the owner's recovery accordingly. *S.C. Loveland, Inc. v.*

E.W. Towing, Inc., 608 F.2d 160, 166 (5th Cir. 1979)." But the *S.C. Loveland* case did not involve a claim that the bridge owner was negligent because the bridge design unreasonably interfered with navigation. Rather, the case involved a barge moored above the bridge for several days while it continued to drift toward the bridge and a likely allision. *Id*. at 163. The court found the bridge owner was negligent, not because of an unreasonable structure design, but because the bridge owner, being aware for days of the hazard posed by the drifting barge, did not take reasonable steps to have the barge removed before it hit the bridge. *Id.* at 164. Not only are the facts of *S.C. Loveland* inapposite to the present case, the panel below ignored precedent from the same circuit that DM&E cited and discussed, *Texas and Pacific Ry. Co. v. Angola Transfer Co.*, whose facts and holding directly address the unreasonable design issue.

Second, the panel misquoted a previous Eighth Circuit decision in stating that "[s]ince *Sierra Club*, we have held that '***the trier of fact should determine whether***' a lawful bridge's obstruction to navigation is unreasonable and a contributing cause of an allision, *Kirby Inland Marine*, 296 F.3d at 676. . . ." (emphasis added). However, the phrase quoted from *Union Pacific R. Co. v. Kirby Inland Marine, Inc. of Mississippi*, 296 F.3d 671, 676 (8th Cir. 2002), that "the trier of fact should determine whether," is taken out of context. That phrase appears just once in the *Kirby Inland Marine* decision, in the following paragraph:

> "We now address Appellees' assertion that we should affirm the district court's judgment because the Coast Guard's declaration that the bridge is an unreasonable obstruction to navigation rebuts the *Oregon* presumption and shifts the burden of proof back to the bridge owner. In order to affirm the district court's judgment, we would have to conclude, as a matter of law, that the Coast Guard's Order to Alter rebuts the *Oregon* presumption. ***Because we believe the trier of fact should determine whether the Oregon presumption is rebutted*** by the Coast Guard's Order to Alter, we cannot affirm the district court's legal conclusion that the *Oregon* rule does not apply."

Id.[6] (emphasis added). Thus, the quoted phrase does not relate to the question of unreasonable obstruction to navigation by the bridge owner, but instead relates to rebuttal of the *Oregon* presumption of the tow operator's fault for its pilot's actions. In fact, *Kirby Inland Marine* never discussed a common law duty to refrain from interfering with navigation, instead dealing with whether a finding of "unreasonable obstruction" under *a statute*—the Truman-Hobbs Act—raised a presumption of negligence.

Third, the Eighth Circuit panel reasoned that "the owner of a lawful bridge may be found comparatively

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[6] The reference is to *The Oregon*, 158 U.S. 186, 187, 192-93 (1895), in which this Court held that the allision of a moving vessel with a stationary object raises a presumption of fault against the moving vessel.

negligent for an allision ***even absent an affirmative legal duty to alter the bridge's configuration***, as illustrated by the Seventh Circuit's decision in *M/V Morgan.*"[7] *Dakota, Minnesota & Eastern Railroad Corporation v. Ingram Barge Company*, 918 F.3d 967, 973 (8th Cir. 2019) (emphasis added). Here again, the case cited does not bear the weight placed on it.

In *City of Chicago vs. M/V Morgan*, 375 F.3d 563 (7th Cir. 2004), the Seventh Circuit heard an appeal from the district court opinion, which is published at 248 F. Supp. 2d 759 (E.D. Ill. 2003). The district court entered findings that the Coast Guard design drawing file showed fenders and timberwalers covering the cable slot at issue (¶28); the fender and timberwalers had existed since construction (¶29); the fender or timberwaler covering the cable slot had been missing since at least 1994 (¶30); the city as informed by several inspections that the covers were missing (¶31-32). The district court then stated:

> "The Court also finds that the City was negligent (although not in violation of a permit) in its maintenance of the timberwalers over the

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[7] On its face, this assertion violates the fundamental principle, taught in every first year Torts class, that negligence requires the existence of a duty and the breach of that duty. See 74 Am. Jur. 2d Torts §7 ("The basic elements necessary to state a tort claim are duty, breach of duty, causation between the breach of the duty and the injury, and actual damage"); 74 Am. Jur. 2d Torts §10 ("tort liability depends on both the existence and the violation of a duty. . . . No responsibility exists under the law of torts unless the person against whom relief is sought owed a duty to the other party.")

> cable slot. Specifically, if the timberwalers had been ***properly maintained,*** the damages to the cables would likely have been mitigated or avoided. The City had several years of notice of the deficiency and ***breached a duty to maintain the walers in a reasonable fashion***. It was reasonably foreseeable, given the configuration of the cable slot and its exposure to the water, that a vessel or perhaps large debris, could strike the cables without the timberwaler. The City's negligence was a proximate cause of the damages from the allision."

City of Chicago v. M/V Morgan, 248 F. Supp. 2d 759, 775 (N.D. Ill. 2003), *aff'd,* 375 F.3d 563 (7th Cir. 2004) (emphasis added).

The City of Chicago did not appeal the district court's holding that there was a legal duty to reasonably maintain the original protective cover design over the bridge cables. The sole appellant was the M/V Morgan, which of course did not challenge that holding. For this reason, the *M/V Morgan* Seventh Circuit opinion never discusses the district court's holding that a legal duty existed. Because the issue was never appealed, it follows that the Seventh Circuit's *M/V Morgan* opinion, cited by the Eighth Circuit in this case, *cannot* stand for the proposition that fault may be apportioned to a bridge owner under federal maritime common law.

That leaves the district court opinion to consider. The district court in *M/V Morgan* held that there is a duty of reasonable maintenance which was violated by not replacing the missing covers on the cables. This

holding could easily have been couched in terms of a violation of 33 U.S.C. §401's obligation to maintain the bridge in accordance with the originally approved plans, which included the covers. Regardless, it is clear that the duty of reasonable maintenance discussed in the district court opinion in *M/V Morgan*, is *not* a duty to destroy a serviceable bridge and build a new one with a wider channel for river traffic. A duty of reasonable maintenance of an existing design is very different from, and much more limited than, a duty to redesign and replace an entire structure, which is what is at issue in the present case.

Fourth, the Eighth Circuit panel cited *I&M Rail Link, LLC v. Northstar Navigation, Inc*., 198 F.3d 1012, 1016 (7th Cir. 2000) in which the issue on appeal was whether to sustain a trial court's summary judgment order against the vessel owner, based on the *Oregon* rule. The Seventh Circuit held that "If the Coast Guard may find the Sabula Bridge an unreasonable obstruction based on the cost and accident data, then so may the trier of fact in admiralty, where Learned Hand's famous *Carroll Towing* formula for negligence originated. Findings in the Coast Guard's report are more than adequate to overcome *The Oregon*'s presumption." *Id.* at 1015.

However, in its prior *Kirby Inland Marine* decision, the Eighth Circuit discussed its view of the *I&M Rail Link* holding:

> "In our view, the *I&M Rail Link* case stands for the proposition that a defendant can

attempt to *rebut* the *Oregon* presumption by presenting evidence that the Coast Guard labeled the bridge an 'unreasonable obstruction to navigation.' Under *I&M Rail Link*, a Coast Guard Order to Alter is not conclusive evidence of negligence, but merely another piece of evidence which the *trier of fact* may consider in determining fault in a negligence action. *See I&M Rail Link*, 198 F.3d at 1016 ('Although the Coast Guard's findings may well be conclusive for some purposes . . . the question remains whether the shortcomings of the bridge cause this accident.'). Our interpretation is shared by the lower court which, on remand, tried the case in accordance with the Seventh Circuit's opinion. *See I&M Rail Link v. Northstar Navigation*, No. 98-C-50359, 2001 WL 460028, at *4 (N.D. Ill. April 27, 2001) ('It is true the Seventh Circuit referred to the previous accidents at the Sabula Bridge included in the Coast Guard's reports, and said the trier of fact may find the Sabula Bridge an unreasonable obstruction based on the Coast Guard's cost and accident data. . . . *But it did so in the context of explaining its holding on a rather narrow issue: that this evidence could be used to rebut the presumption of The Oregon. . . .*') (emphasis added). To the extent that the *I&M Rail Link* case can be interpreted to hold that a Coast Guard's Order to Alter rebuts and overcomes the *Oregon* presumption, as a matter of law, we respectfully disagree."

Union Pacific R. Co. v. Kirby Inland Marine, Inc. of Mississippi, 296 F.3d 671, 677-78 (8th Cir. 2002). The *Kirby Inland Marine* decision was binding on the panel that heard this case. See *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.").

In summary, none of the precedents cited by the Eighth Circuit support its view that there is a federal maritime common law duty of reasonable care which would require an owner to redesign and replace a bridge to provide a wider passage for vessels. All relevant precedent, all traceable to this Court's holding in *Willamette*, is that compliance with the plans approved by the government is sufficient as a matter of law to show that the bridge owner is not negligent in using its existing design.

2. The Eighth Circuit opinion impacts a significant number of lawsuits and claims involving allisions with structures in navigable waters.

Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §401 et seq.) governing the erection of bridges and dams states in pertinent part that:

> "It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable rivers, or other navigable water of the United States until the consent of Congress to the building of such

> structures shall have been obtained and until the plans for (1) the bridge or causeway shall have been submitted to and approved by the Secretary of the department in which the Coast Guard is operating, or (2) the dam or dike shall have been submitted to and approved by the Chief of Engineers and Secretary of the Army. . . . When plans for any bridge or other structure have been approved by the Secretary of the department in which the Coast Guard is operating or by the Chief of Engineers and Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless modification of said plans has previously been submitted to and received the approval of the Secretary of the department in which the Coast Guard is operating or the Chief of Engineers and the Secretary of the Army."

33 U.S.C. §401. 33 U.S.C. §403 imposes similar requirements for other structures erected in navigable waters:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers

> and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

Thus, every structure built in navigable waters in the United States requires submission and approval of design plans under the Rivers and Harbors Act. These structures include not only bridges, but also wharfs, piers, dolphins, booms, weirs, breakwater structures, bulkheads, jetties, and any other structures. See 33 U.S.C. §403. Because of admiralty law's pure comparative fault regime in maritime collision and allision cases,[8] the Eighth Circuit's holding implies that any owner of a government-approved structure in navigable waters could be found liable for property damage or personal injury arising from an allision, if a judge or jury can be convinced that the government-approved design is unreasonably dangerous.

Moreover, a party found to have a percentage of fault in an admiralty case is jointly and severally liable for all damages, having only a right to contribution or

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[8] See *U.S. v. Reliable Transfer Co.*, 421 U.S. 397, 95 S. Ct. 1708 (1975).

indemnity from its fellow tortfeasors. See 1 Schoenbaum, *Admiralty and Maritime Law* §5-19 (5th Ed. 2011). The common law legal duty imposed by the Eighth Circuit exposes all structure owners—both government and private—to liability for damage to persons, barges and cargo whenever a vessel strikes a structure in navigable waters.

A significant number of maritime allision cases are filed in federal courts each year. A Westlaw search using the search string of "allision & DA(aft 01-01-2000)%'summary judgment'%'motion in limine'% 'motion to dismiss'"[9] against the database of reported federal district court cases since January 1, 2000, yields 228 decisions.[10] This number should be fairly representative of the number of allision cases tried in that time. Judicial statistics from the federal courts indicate that in 2000, just 1.7% of filed cases reached trial, but in the last ten years the number is about 1%.[11] The numerical range of between 1% and 1.7% of cases tried since January 1, 2000, implies a range of 13,411 to 22,800 filed allision cases in federal court in the last 19 years, based on the rate of 228 final

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[9] The search terms and database used include only trial court decisions and exclude any such decisions where the terms after the% symbol appear in the opinion, i.e., any case where a summary judgment, motion in limine, or motion to dismiss is referenced in the opinion.

[10] As of May 9, 2019.

[11] See https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables, Table 4.10 U.S. District Courts—Civil Cases Terminated, by Action Taken, During the 12-month periods ending June 30, 1990, and September 30, 1995 through 2018.

decisions issued in that period. The rate of filing is therefore between 705 and 1,200-per year. Many other claims may have been resolved without filing suit. Thus, there are a significant number of claims implicated by the Eighth Circuit's holding.

CONCLUSION

This case affects the legal exposure of every owner of any structure erected in navigable waters of the United States: every dam, every bridge, every wharf, every pier, every dolphin, every boom, every weir, every breakwater, every bulkhead, and every jetty. Every such structure requires submission of design plans and approval of the design by either the U.S. Coast Guard or the Army Corps of Engineers. See 33 U.S.C. §§401, 403. These statutes also impose a continuing duty to maintain the structure in accordance with the approved design. To alter the design, the structure owner must seek permission.

Since the *Willamette* decision in 1888, the law has been that the government-approved design establishes the owner's standard of care for the design, because there is no common law duty of reasonable care in admiralty law as to the design of a water structure. The Eighth Circuit's opinion exposes every structure owner to potential claims and defenses of whether the structure design is "reasonable." Whether this broad standard of care has been violated in a particular case, is limited only by the imagination of the experts hired by

vessel owners to testify about the design. The placement of the structure, its components, and its overall design are now in question in every allision case.

The petition for writ of certiorari should be granted and the Eighth Circuit Court of Appeals reversed.

Respectfully submitted,

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