No. 20-_____

In The
Supreme Court of the United States

PATRICIA LACOURSE,

Petitioner,

v.

PAE WORLDWIDE INCORPORATED,
DEFENSE SUPPORT SERVICES, LLC,
WITNESS 7,
WITNESS 8,
WITNESS 9,
JOHN DOES 1 THROUGH 10, INCLUSIVE,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in extending the federal common law "government contractor defense" established in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) to a government maintenance contract where the contract gave the contractor sole discretion in performing a service and the Court of Appeals found that the contractor exercised that discretion in its contract performance?

2. Did the Court of Appeals err in creating a new standard for a litigant to defeat summary judgment by acknowledging that the facts were disputed but accepting the facts and reasonable inferences proffered by the party moving for summary judgment and refusing to accept those proffered by the non-moving party as required under Rule 56 of the FRCP?

3. Did the Court of Appeals err in extending the Death on the High Seas Act, 46 U.S.C. §§ 30301 *et seq.*, to an aircraft accident with no maritime nexus when the cause of the crash occurred on land, the flight departed from land and was intended to return to the same place without a stop, and where the statute was never intended by Congress to embrace land-based aviation activities?

4. Did the Court of Appeals err in stripping the Plaintiff of her right to a jury trial by legislating from the bench that the Death on the High Seas Act, though unsaid, was meant to deny the parties a jury trial?

RELATED CASES

1) *Patricia LaCourse, et al. v. PAE Wordwide Incorporated, et al.*, Civil Action No. 3:16-cv-00170, U.S. District Court for the Northern District of Florida, Pensacola Division, Judgment Entered on August 29, 2019.

2) *Patricia LaCourse, et al. v. PAE Worldwide Incorporated, et al.,* No. 18-15018, U.S. Court of Appeals for the Eleventh Circuit, Interlocutory Appeal, Dismissed for Lack of Jurisdiction on February 15, 2019.

3) *In Re Patricia LaCourse,* No. 19-10266, U.S. Court of Appeals for the Eleventh Circuit, Petition for Writ of Mandamus, Denied February 13, 2019.

4) *Patricia LaCourse, et al. v. PAE Worldwide Incorporated, et al.,* No. 19-13883, U.S. Court of Appeals for the Eleventh Circuit, Judgment Entered November 17, 2020.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *LaCourse v. PAE Worldwide Incorporated et al.*, 980 F.3d 1350 (11th Cir. 2020). The orders of the United States District Court for the Northern District of Florida were not published, but they are included in the Appendix at App. 30 (Order of Feb. 23, 2018); App. 48 (Order of Oct. 31, 2018); App. 53 (Order of Aug. 29, 2019).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit, affirming the orders of the District Court, was handed down on November 17, 2020 and judgment was entered as a mandate of the Court of Appeals on December 16, 2020. The District Court for the Northern District of Florida had jurisdiction pursuant to 28 U.S.C. § 1332. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article II of the Constitution, which vests the executive power, and the command of the Armed Forces, in the President of the United States, not in the Courts.

This case involves the Seventh Amendment to the U.S. Constitution, which states that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved. . . ."

This case also involves the Death on the High Seas Act, 46 U.S.C. §§ 30301 *et seq*. The provisions at issue in this Petition are:

46 U.S.C. § 30302 which states that "When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative."

46 U.S.C. § 30303 which states that "The recovery in an action under this chapter shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought. The court shall apportion the recovery among those individuals in proportion to the loss each has sustained."

46 U.S.C. § 30308(a) which states that "This chapter does not affect the law of a State regulating the right to recover for death."

The case involves this Honorable Court's interpretation and expansion of the Federal Tort Claims Act, 28 U.S.C. §§ 1346 and 2671 *et seq*. (the "FTCA"),

established in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). This case involves the Eleventh Circuit's interpretation and expansion of the FTCA and the holding of *Boyle* established in *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003).

This case involves the Seventh Amendment to the United States Constitution which guarantees litigants the right to a jury trial in civil cases; the Florida Constitution, Article I, Section 21 which states that "The courts shall be open to every person for redress of any injury. . . ."; and Article I Section 22 which states that "The right of trial by jury shall be secure to all and remain inviolate."

STATEMENT OF THE CASE

This case arises from the crash of a U.S. Air Force-owned F-16 aircraft that was being flown by a civilian government worker, Petitioner's decedent Matthew LaCourse. Mr. LaCourse was a retired Air Force Lieutenant Colonel and a career fighter pilot. The aircraft departed Tyndall Air Force Base in Florida just after 8 a.m. on Thursday, November 6, 2014 for a training mission that was supposed to last less than two hours. The aircraft was scheduled to land at Tyndall Air Force Base in Florida before 10 a.m. The training mission took the aircraft and its pilot, Mr. LaCourse, over the Gulf of Mexico where, tragically, the plane crashed more than 12 miles from the Florida shoreline.

The aircraft was maintained in Florida by a civilian government contractor pursuant to a professional services contract between the Respondent, PAE Aviation Technical Services, Inc. ("PAE") and the U.S. government. The terms of the contract made PAE "solely" responsible for its own negligence in the rendering of professional services, including for personal injuries and property damage.

It is undisputed that in the weeks and months before the crash, the ill-fated aircraft suffered from a series of malfunctions that were connected to the aircraft's hydraulic and flight control systems. Upon proper command from the pilot, the aircraft's flight controls are supposed to be moved by the hydraulic systems; the hydraulic and flight control systems are interrelated. Mrs. LaCourse alleged that PAE was negligent in its maintenance, troubleshooting, service and repair of the aircraft and that negligence by PAE in Florida was the actual and proximate cause of the crash and Mr. LaCourse's death.

Mrs. LaCourse filed state law wrongful death claims in Florida state court and she demanded a jury trial. PAE removed the case to the U.S. District Court for the Northern District of Florida on the basis of diversity jurisdiction.

During discovery, PAE moved for partial summary judgment to apply the Death on the High Seas Act (DOHSA) to Mrs. LaCourse's claims based only upon the location of the plane crash and Mr. LaCourse's death in the Gulf of Mexico. On February 23, 2018 the

District Court granted PAE's requested relief and ordered that DOHSA applied to Mrs. LaCourse's claims. (App. 30).

Relying upon the District Court's order applying DOHSA (App. 30), PAE then moved the District Court for an additional order of partial summary judgment to strike Mrs. LaCourse's jury demand and preempt all of her state law claims. The District Court issued an order granting PAE's requested relief on October 31, 2018. (App. 48).

At the close of discovery, PAE moved the District Court for final summary judgment because it claimed that it was protected by the Eleventh Circuit's extension and expansion of this Honorable Court's "government contractor defense" established in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). *Boyle* cloaked civilian manufacturers of government equipment who faced product liability suits with the affirmative defense of *the government made me do it.*

Justice Scalia, writing for the majority of this Honorable Court in *Boyle*, extended sovereign immunity to the civilian contractors who reap enormous benefit from the public's coffers by manufacturing government products. Justice Scalia later lamented that his opinion in *Boyle* and the extension of sovereign immunity to the military-industrial complex was "wrong."[1]

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[1] *See* Gil Seinfeld, *The Good, the Bad, and the Ugly: Reflections of a Counterclerk*, 114 Mich. L. Rev. First Impressions 111, 115 (2016).

The Eleventh Circuit has extended *Boyle's* extension. It is the only court of appeals in the country that expanded *Boyle's* common law affirmative defense to include government service contracts. *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003). The District Court, relying upon *Hudgens*, again granted PAE's requested relief and entered judgment in its favor on August 29, 2019. (App. 53).

On appeal, the Eleventh Circuit acknowledged that Mrs. LaCourse's reading of DOHSA "is exactly right" but that it was bound by its own prior precedent and what this Court "observed" in prior cases. (App. 9). On the subject of the "government contractor defense," the Eleventh Circuit also acknowledged that "the parties vigorously dispute the crash's cause" (App. 5 n.2). Ultimately, the Eleventh Circuit gave no credence to Mrs. LaCourse's experts or the uncontroverted testimony of PAE's own mechanics that they invented procedures (that were not government-approved) to try to fix Mr. LaCourse's aircraft. The Eleventh Circuit affirmed in total. (App. 24). Mrs. La Course's experts included a prominent engineer who designed military and civilian aircraft flight controls; the former Commanding Officer of TOPGUN and an F-16 pilot; the former Commanding Officer of The USS AMERICA in the First Gulf War; and an Air Force veteran F-16 mechanic, to name a few.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's common-law expansion of this Court's common-law expansion of sovereign immunity to private enterprises should be invalidated as a matter of textualism, public policy, and fairness. The Eleventh Circuit's immunization of government service providers from suit for their wrongful acts undermines the plain language and intent of Congress under the FTCA. In this case, the Eleventh Circuit's formulation of the government contractor defense also undermines the will of the Executive, which signed a contract with PAE that specifically made PAE liable for its own negligence in performing aircraft maintenance on the F-16 that Mr. LaCourse was flying. The terms of the contract abrogated the government contractor defense, but the courts below dismissed those terms without analysis and held that, because the Eleventh Circuit has applied the government contractor defense to service contracts, it preempts any later agreement that the Executive Branch made that attempted to contract around that defense.

This Court should also consider the plain language and intent of Congress in crafting DOHSA which, in 1920, created a statutory cause of action to protect mariners killed by negligence committed on ships on the high seas. That was because under Maritime Law, as it then existed, there was no claim for wrongful death at sea; an injured seaman's claim was extinguished upon his death. The mariners' loved ones on land had no recourse or claim for wrongful death. The counter-textual application of DOHSA by the

Eleventh Circuit's binding precedent, aided by counter-textual dicta from this Honorable Court, was done with the panel below articulating and confirming the wrongness of their prior precedent as DOHSA's plain language is "squarely to the contrary" of the Court of Appeals' order in this case. (App. 25). The text and legislative history show that DOHSA was meant to apply only when negligence or another wrongful act occurred on the high seas. Where the alleged negligence occurred on land, it does not matter that the death at issue occurred at sea, per the clear statutory text. DOHSA should not apply.

I. The Orders from the Courts Below Undermined, and Conflicted With, the Will of the Executive by Immunizing PAE when PAE's Contract with the Government Made it Solely Liable for Negligent Maintenance.

In any analysis about the application of the government contractor defense, there must first be a government contract. There was one in this case, and it made PAE exclusively and solely liable for its negligence in performing its professional services to the government – the maintenance of a chronically-broken F-16 aircraft. There is no dispute that the contract at issue was the product of negotiation, that it contained material terms, and that there was bargained-for consideration. There is, therefore, no dispute that it was a valid contract, and it was a fixed-price contract that provided PAE with a sum certain regardless of the amount of maintenance that PAE performed, or didn't

perform. In other words, the contract provided no extra money to PAE for making Mr. LaCourse's chronically broken aircraft airworthy. Mr. LaCourse was the pilot of the aircraft PAE was supposed to be maintaining, he was a government employee, and he was a third-party beneficiary to the contract.

Mrs. LaCourse briefed the contractual issue thoroughly in both of the courts below and the factual record shows that 1) there was *no government oversight* of PAE's aircraft maintenance, per the contract; 2) the contract makes PAE "solely liable" for its faults and negligence as an "independent contractor"; the Government "retains no control over the professional aspects of the services rendered," and 3) PAE "shall be . . . responsible for all injuries to persons or damage to property that occurs as a result of its fault or negligence." (App. 78).

The contract itself was consummated by the Government well *after* this Court established the common-law government contractor defense in *Boyle* and after the Eleventh Circuit extended *Boyle* in *Hudgens*. The contract was for PAE's maintenance services on land in Florida and the contract itself precludes the application of the government contractor defense in this case. (App. 78).

PAE responded to the plain language of the contract by arguing that a defendant cannot, by contract with the government, eliminate its immunity under the government contractor defense, as a matter of

public policy. The District Court agreed. (App. 78). The District Court's sole rationale was

> [i]n light of the purpose of the government contractor defense (to prevent the pass-through of costs) it would make little sense to interpret the contract language as the plaintiff suggests.

(App. 79-80). The District Court ignored the date of the contract, coming as it did *after* the Eleventh Circuit's common-law expansion of the government contractor defense to maintenance contracts. The District Court did not engage in any further analysis or interpretation of the contract. The Court of Appeals relegated its contractual analysis to a footnote and merely parroted the District Court's novel public policy conclusion without any legal citation:

> it would make little sense to interpret the contract language as LaCourse suggests. The far better – and we think obvious – reading is that the quoted text merely allocated liability between PAE and the Air Force, not liability between PAE and a third party.

(App. 16 n.8). But Mrs. LaCourse believes that the contract needs no interpretation; its language is clear and was quoted directly to the courts below. The Court of Appeals made no attempt to "interpret" the contract, it just dismissed it. The Court's rationale to deny Mr. LaCourse the protection the contract afforded him stripped the Government of the benefits it bargained for when PAE assumed for itself sole liability under the contract. Mrs. LaCourse argued in the Eleventh Circuit:

> As a preliminary matter, the government contractor defense is not applicable here because Defendant/Appellee's contract with the government **specifically** disclaimed that defense. The contract stated that:
>
> 1) there was to be no government oversight of Defendant's maintenance and, in fact, there was none; (Doc. 96-1 at Bates PAE00000356 at ¶ 2.1.1;) (Depo. Reeves 106:12-107:22 Doc 108-6;) (Depo. Young 10:22-11:14 Doc. 108-7;) (Depo. S. Davis 28:11-29:15 Doc. 108-8;)
>
> 2) Defendant is solely liable for its faults and negligence as an "independent contractor;" (Doc. 86-2 at p. 77, ¶ H-21;)
>
> 3) the government "retains no control over the professional aspects of the services rendered," the Defendant is "solely liable" and it "agrees to indemnify the Government." (Doc. 86-3 49 C.F.R. §§ 52.237-7(a));
>
> There would be no reason for that language to be in the contract if the parties anticipated that the government contractor defense would apply. The parties, through an arms length negotiation, excluded the possibility of the government contractor defense in the contract itself. To find otherwise was error.

(Mrs. LaCourse's Initial Eleventh Cir. Brief at p. 41 of 60).

The Court of Appeals also made no assessment whatsoever of the fact that Mr. LaCourse was an Air Force employee and, as the pilot of the ill-fated plane, the *only reason* that the contract even existed was for his benefit. The Court of Appeals ignored the deposition testimony about the contract's terms and their practical application to PAE, and it summarily dismissed Plaintiff's legal argument that the contract was dispositive, without any analysis.

The contract and the deposition testimony show that the Government was not permitted anywhere near the F-16 maintenance that PAE was performing. Under the contract, the Government's quality insurance inspectors were not permitted to inspect PAE's actual work on the aircraft – the bureaucrats were merely allowed to make sure the paperwork was in order. According to deposition testimony of multiple PAE mechanics, the Government's inspectors were not even permitted on the flight line.

Article II of the Constitution vests the President, not the courts, with the executive power, and it vests him or her with authority over the Army and the Navy (and, now, the Air Force and Space Force). The will of the Executive has been undermined, as has its contract with PAE. The third-party beneficiaries of that contract, Mr. LaCourse and now his widow, have been left without recourse. This Honorable Court should grant certiorari.

II. The Eleventh Circuit's Expansion of the Government Contractor Defense to Service Contracts Has Not Been Followed by Any Other Court of Appeals and is Inapplicable in this Case Per the Court of Appeals' Own Holding that PAE had Discretion in Provision of Aircraft Maintenance.

The Eleventh Circuit is the only Circuit Court of Appeals that has expanded this Court's government contractor defense, which applies to government equipment, to maintenance or service contracts. This Court has not examined the Eleventh Circuit's expansion of the government contractor defense to maintenance contracts; the plaintiff in *Hudgens* did not petition for certiorari, and Mrs. LaCourse can find no other case bringing the Eleventh Circuit's common-law expansion before this Court. This is therefore a case of first impression before this Court.

The Eleventh Circuit's *Hudgens* test for the affirmative defense has three prongs: 1) the Government approved reasonably precise maintenance procedures; 2) the contractor's performance of maintenance conformed to the procedures; and 3) the contractor warned the Government about dangers in reliance on the procedures that it knew about. *Hudgens*, 328 F.3d at 1335.

While Mrs. LaCourse always maintained that the contract itself made the government contractor defense inapplicable here, she conceded in the District Court that, *if* the *Hudgens* test were applied, the Air Force's lengthy procedures were "reasonably precise" standards. Mrs. LaCourse argued, with expert support,

that PAE did not meet those standards as a matter of disputed fact. In affirming, the Court of Appeals upended Mrs. LaCourse's argument and held that, because PAE had discretion in how it maintained the aircraft under the Air Force's standards, Mrs. LaCourse's argument failed. (App. 20). The Eleventh Circuit held:

> With respect to AFI 21-101 ¶ 7.1 and TO 1-1-300 [two of the maintenance procedures Mrs. LaCourse cited], it is enough to note that they merely permit, rather than require, impoundment and functional check flights, respectively, under specified circumstances. A government contractor doesn't violate reasonably precise maintenance procedures by taking a course of action – repair, replacement, retesting – that those procedures at least implicitly allow.

(App. 20). But the Eleventh Circuit's holding that PAE in fact had discretion in providing its maintenance means that it necessarily fails the first prong of the Eleventh Circuit's own test for the defense – that the Government approved reasonably precise maintenance procedures. *Hudgens*, 328 F.3d at 1335.

The Court of Appeals' reasoning here is circular – Mrs. LaCourse insisted in the first place that, under the contract itself, PAE had discretion in performing maintenance and the government contractor defense does not apply in this case. The Court of Appeals completely skipped the contract analysis and then claimed that Mrs. LaCourse waived the argument that PAE

had discretion in performing the maintenance by conceding that the specifications were "reasonably precise." The Court of Appeals also claimed that Mrs. LaCourse waived the issue of disputed fact – the issue that PAE did not comply with the government's standards – by placing issues of disputed fact in the "fact" section of her brief and not in the "argument" section.

The Court of Appeals' opinion engaged in cherry-picking to prop up the District Court's Order and its own precedent, which is the crux of the problem and the reason this Court should grant certiorari. The Eleventh Circuit in *Hudgens* crafted a common law extension of *Boyle*'s government contractor defense to maintenance contracts.

"The cases in which federal court may engage in common lawmaking are few and far between." *Rodriguez v. Federal Deposit Ins. Corp.*, ___ U.S. ___, 140 S.Ct. 713, 716 (2020) (unanimous decision). This Court has uniformly required the existence of a significant conflict between some federal policy or interest and the use of state law as a precondition for recognition of a federal rule of decision, which are "few and restricted." *O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 512 U.S. 79, 87 (1994). The federal policy at issue in this case was abrogated by the Executive in its contract with PAE and, under the Court of Appeals' own holding, its own formulation of the government contractor defense is inapplicable here where PAE had discretion in its contract performance.

This Honorable Court "took [the *Rodriguez*] case only to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking." 140 S.Ct. at 716. Similarly, this Honorable Court should take this case, and certiorari should be granted.

III. In Holding that the Government Contractor Defense Precluded Mrs. LaCourse's Claims, The Court of Appeals Created a New and Unspecified Summary Judgment Standard, Credited Only PAE's, the Moving Party's Version of Events, and Discounted Mrs. LaCourse's Recitation of Disputed Material Facts.

In reviewing the District Court's grant of summary judgment against Mrs. LaCourse, the Court of Appeals was to review the record *de novo*.

> Credibility determinations, *the weighing of evidence*, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (emphasis added). The Court of Appeals, in reviewing the factual evidence *de novo*, quoted and gave credence to PAE's mechanics who, it is no surprise, blamed the jet's troubles on the day of the crash on

pilot error. (App. 21-22) (quoting PAE mechanics Michael Bogaert and Timothy Davis). The supposed pilot error claimed by PAE's mechanics was that Mr. LaCourse, a career Air Force fighter pilot, improperly flipped a switch in the cockpit and that switch error caused the aircraft's flight controls to fail a preflight check.

But the PAE mechanics' *opinion* testimony about pilot error was unfounded; they were not pilot experts: the mechanics testified further (and that testimony was ignored) that they could not see in the cockpit, they could not see what switches Mr. LaCourse was moving during the preflight checks, and they testified that they were not ever qualified as F-16 pilots.

On the other hand, Mrs. LaCourse's expert, U.S. Navy Captain Frederick Ludwig (retired), was the Commanding Officer of the Navy's Fighter Weapons School ("TOPGUN") and an actual F-16 pilot. Captain Ludwig opined that the test the mechanics *wrongly* blamed Mr. LaCourse for performing incorrectly was "a very simple check and not a hard one to do." Captain Ludwig opined that PAE should have grounded the jet instead of re-testing the flight controls until they worked on the day of the mishap.

The preflight check described here is important, and linked to causation, because it was a final check of the flight controls' responsiveness to pilot commands on the day of the crash. Mrs. LaCourse's experts opined that a flight control malfunction caused this crash. According to Mrs. LaCourse, PAE's mechanics knew for months about this potential failure and they failed to

take the troubleshooting and repair actions that the Air Force required. It is, in fact, undisputed that the ill-fated aircraft failed the preflight flight control check on the day of the crash. PAE blamed the pilot for the failure and Mrs. LaCourse blamed PAE. The Court of Appeals, like the District Court below, gave credence to PAE's testimony and not to that of Mrs. LaCourse's.

Mrs. LaCourse also elicited expert testimony from U.S. Navy Captain Kent Ewing (retired), who is currently a pilot, and who was a squadron maintenance officer and a quality assurance officer. Captain Ewing commanded multiple fighter squadrons, and he was the commanding officer of the aircraft carrier USS AMERICA (CV-66). Captain Ewing opined that, under the regulations, the troubled aircraft should have been impounded (i.e. – grounded) by PAE if it were acting as a reasonable maintenance outfit.

It seems anomalous that the two learned courts below could weigh disputed facts and side with PAE when the law requires otherwise. However, the Air Force itself had its thumb on the scale. In reaching their opinions, the courts below credited the Air Force's unsubstantiated opinions, which black letter law prohibited them from considering. 10 U.S.C. § 2254(d); *Chapman v. U.S.*, 194 F.2d 974 (5th Cir. 1952). For example, the District Court adopted the Air Force's conclusions from its Aircraft Investigation Board ("AIB") and incorporated those directly into its Order. (App. 66-67). The Court of Appeals credited the Air Force's witnesses' opinions that PAE's maintenance conformed to Air Force specifications. (App. 18-19). In the briefing,

Mrs. LaCourse objected and moved to strike PAE's presentation of these inadmissible and unfounded Air Force opinions to no avail.

In addition to the law, the facts of this case show that the Air Force's investigation here was unreliable. The Air Force left most of the critical parts of the aircraft's wreckage on the seabed in the Gulf of Mexico. The service's conclusions were threadbare at best. Just before Mr. LaCourse's crash, the Department of Defense Inspector General sharply criticized the Air Force's aircraft mishap investigation methods, procedures, factual assertions and conclusions. (Dept. of Defense Insp. Gen'l Rpt. No. DODIG-2013-041, Feb. 6, 2013). Plaintiffs flight controls expert, Dr. Kibbee, pointed out that the Air Force's cursory investigation, which was aided by the aircraft manufacturer, totally misread the flight data recorder aboard the F-16, and he demonstrated that Mr. LaCourse was desperately moving controls to counter his fatal descent and that the controls did not respond to those efforts.

The testimony and issues of disputed facts were raised squarely and in detail on appeal, Mrs. LaCourse believes appropriately, in the "fact" section of her appellate brief with multiple deposition testimony quotations and citations to the record. The Court of Appeals held that Mrs. LaCourse's citation to disputed material facts was waived because they were not contained within in the "argument" section of her brief.

This Court should grant certiorari to review the standard that the Court of Appeals has now created by

ignoring the plain language of Rule 56, which requires a Court to give deference to the material evidence of disputed facts provided by the non-moving party.

IV. The Death on the High Seas Act was Never Intended by Congress to Embrace Land-Based Negligence or Acts With No Maritime Nexus.

The Death on the High Seas Act, 46 U.S.C. § 30302, applies "[w]hen the death of an individual *is caused by wrongful act, neglect, or default occurring on the high seas*. . . ." (emphasis added).

Mrs. LaCourse and the panel below agree that DOHSA has been wrongly interpreted to say that it applies *when the death of an individual on the high seas* is caused by wrongful act, neglect or default. . . . As the panel pointed out, the robust legislative history of DOHSA and the plain language of Congress are both clear on this point, but the case law is counter-textual. Despite the plain statutory text, two members of the panel below nonetheless ruled against Mrs. LaCourse's interpretation; they were constrained, they said, by their own precedent and this Court's dicta in *Offshore Logistics v. Tallentire*, 477 U.S. 207, 218 (1986).

This Court in *Offshore Logistics* addressed the factual situation where two helicopter passengers, the plaintiff's decedents, were killed when the defendant's helicopter crashed more than 30 miles into the Gulf of Mexico. The case had a single issue presented:

> whether the Death on the High Seas Act (DOHSA), 41 Stat. 537, 46 U.S.C. § 761 *et seq.*, provides the exclusive remedy by which respondents may recover against petitioner for the wrongful death of their husbands, or whether they may also recover the measure of damages provided by the Louisiana wrongful death statute, La.Civ.Code Ann., Art. 2315 (West Supp.1986), applying either of its own force or as surrogate federal law under the Outer Continental Shelf Lands Act (OCSLA).

Offshore Logistics, 477 U.S. at 209. Consistent with the statute, this Court's reading of DOHSA is that

> DOHSA is intended to provide a maritime remedy for deaths stemming from wrongful acts or omissions "occurring on the high seas."

Id. at 217. Later in its opinion, this Court flipped the script and said

> admiralty jurisdiction is expressly provided under DOHSA where the accidental deaths occurred beyond a marine league from shore.

Offshore Logistics, 477 U.S. at 218. The Court of Appeals in this case seized this Court's comment as a holding of the Court. (*See* App. 9-10). But this Court's comment, and the Court of Appeals' opinion, wrongfully conflates admiralty jurisdiction and DOHSA application.

A maritime claim can be brought to federal court by invoking *either* diversity jurisdiction or admiralty jurisdiction. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 359 (1962). Mrs. LaCourse's

case does not involve admiralty jurisdiction; after all, "the plaintiff is the master of the complaint." *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987). Mrs. LaCourse's Complaint made state-law claims that were filed in Florida State Court and removed on the basis of diversity jurisdiction.

On the subject of jurisdiction (and not DOHSA application) DOHSA contains a savings clause, 46 U.S.C. § 30308, and the Court of Appeals acknowledged this Court's comment that the savings clause

> acts as a jurisdictional savings clause, and not as a guarantee of the applicability of state substantive law to wrongful deaths on the high seas, the conclusion that the state statutes are pre-empted by DOHSA where it applies is inevitable.

(App. 15) (citing and quoting *Offshore Logistics*, 477 U.S. at 232). As far as jurisdiction is concerned, Mrs. LaCourse is in federal court on diversity, not admiralty, jurisdiction. Admiralty jurisdiction is not at issue here because, as this Court noted, claims subject to DOHSA may be heard in state court. But, as far as DOHSA application itself, both the statute and this Court state that

> DOHSA is intended to provide a maritime remedy for deaths *stemming from wrongful acts or omissions occurring on the high seas*.

Offshore Logistics, 477 U.S. at 217 (emphasis added).

In *Offshore Logistics* this Court contradicted itself about whether DOHSA applies counter-textually to all deaths on the high seas, 477 U.S. at 232, or, consistent with the statute's text, it applies only to deaths stemming from wrongful acts occurring on the high seas, 477 U.S. at 217.

For the factual scenario in *Offshore Logistics*, the conflation of the statute's text was not determinative because in that case the negligent helicopter operation and the deaths at issue all occurred on the high seas. The distinction is that here Mrs. LaCourse's husband *was* the aircraft operator, and she sued PAE for negligent maintenance that occurred on land.

Citing *Offshore Logistics*, the Court of Appeals held that DOHSA "preempts all other wrongful-death claims under state or general maritime law" in Mrs. LaCourse's case. (App. 16). This Court has consistently held that when a federal statute is susceptible to more than one plausible reading, courts should accept the reading that disfavors preemption. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (citation omitted). The same should be true for *Offshore Logistics* itself which, due to the Court's conflation of the statutory language in its opinion, was interpreted counter-textually to favor preemption in this case and in others. For example, this Court's dicta, in a footnote, states that the Death on the High Seas Act could become applicable to flights over water. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 274 n.26 (1972). However, there was no analysis of DOHSA in that decision, where the question presented was

> whether the petitioner's suit for property damage to the aircraft, allegedly caused by respondent's negligence, lies within **federal admiralty jurisdiction.**

Executive Jet, 409 U.S. at 250 (emphasis added). DOHSA, a maritime statute, does not confer **admiralty jurisdiction** because it contains a savings clause specifically preserving state jurisdiction, though it is often confused by the courts, including this Court. 46 U.S.C. § 30308(a) ("This chapter does not affect the law of a State regulating the right to recover for death."); *Offshore Logistics*, 477 U.S. at 232 ("DOHSA actions are clearly within the competence of state courts to adjudicate"). But this Court's comments elsewhere cannot be reconciled with DOHSA's plain text. *See, e.g., Offshore Logistics,* 477 U.S. at 218 ("Here admiralty jurisdiction is expressly provided under DOHSA. . . ."); *Mobil Oil Corp. v Higginbotham,* 436 U.S. 618, 620 (1978) (DOHSA creates "a remedy in admiralty for wrongful deaths more than three miles from shore").

This Court should grant certiorari to correct the counter-textual interpretations of DOHSA that have sprung from *Offshore Logistics* and other precedential cases.

V. The Application of the Death on the High Seas Act Does not Strip a Plaintiff's Right to a Jury Trial.

In response to PAE's second motion for partial summary judgment, the District Court held that

because it previously applied DOHSA to this case, the application of DOHSA strips Mrs. LaCourse of her right to a jury trial. (App. 52). Because the Court of Appeals affirmed judgment on the government contractor defense, it did not reach this issue. (App. 8 n.4).

The plain language of DOHSA itself is silent about jury trials, but it affords the plaintiff the choice of proceeding in admiralty or diversity (or in state court) and the choice of proceeding *in personam* or *in rem*. 46 U.S.C. § 30302 (the plaintiff *may* bring a proceeding in admiralty against the person *or* vessel responsible).

Although Congress placed the option for a plaintiff to *elect* federal jurisdiction under DOHSA in admiralty, that is not enough to establish that it intended that jury trials would not be available for DOHSA claims. *In re Korean Air Disaster of Sept. 1, 1983*, 704 F. Supp. 1135, 1153 (D.D.C. 1988). That is because federal jurisdiction is not required for DOHSA claims. *Offshore Logistics*, 477 U.S. at 232 ("DOHSA actions are clearly within the competence of state courts to adjudicate").

In Florida, a jury trial is a fundamental right which is held "inviolate." Fla. Const. Art. I § 22. State courts across the country have held that DOHSA cases are entitled to jury trials. *See*, *e.g.*, *Curcuru v. Rose's Oil Service, Inc.*, 802 N.E.2d 1032, 1037 (Mass. 2004); *Bertrand v. Air Logistics, Inc.*, 820 So.2d 1228 (La. Ct. App. 2002).

Federal courts have also held that DOHSA does not preclude a jury trial. *In re Korean Air Disaster*, 704

F. Supp. 1135 (DOHSA claims brought by diversity plaintiffs may be tried to a jury); *Hill v. Majestic Blue Fisheries, LLC*, Case No 11-00034, 2015 WL 3961421 at *1-2 (D. Guam June 30, 2015), affirmed, 692 F. Appx. 871 (9th Cir. 2017) (Memorandum) (Plaintiff's DOHSA, Jones Act and general maritime claims tried to a jury); *Snyder v. Whittaker Corp.*, 839 F.2d 1085 (5th Cir. 1988) (affirming jury award in DOHSA case). The right of trial by jury as declared by the Seventh Amendment – or as provided by a federal statute – is preserved to the parties inviolate. Fed. Rule Civ. P. 38(a). A court's ability to deny a jury trial is "very narrowly limited and must, wherever possible, be exercised to preserve [a] jury trial." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959).

This Court has stated that while the Seventh Amendment does not require jury trials in admiralty cases, it does not forbid them and nor does any other statute or Rule of Procedure. *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20-21 (1963).

The express language of DOHSA is silent about jury trials. However, even if Congress intended to deny jury trials in cases where DOHSA applies, Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-52 (1989).

This Court should grant certiorari to clarify that the application of DOHSA to a claim does not preempt the claimant's right to a jury trial.

CONCLUSION

This Court should grant Certiorari. The courts below have usurped the Executive's power to control the armed forces and to enter into binding contracts on behalf of the government. Despite the Executive's clear intent to hold PAE accountable for its negligence, the courts below have shielded PAE with a legal defense that the Executive bargained around and that PAE agreed to forego in its government contract.

In the process of shielding PAE, the courts below implicitly crafted a new summary judgment standard in violation of the Rules of Civil Procedure and longstanding black letter law.

This Court should also grant Certiorari to clear up the confusion created by the contradictory wording contained in *Offshore Logistics* and the counter-textual interpretations of DOHSA that have sprung from *Offshore Logistics'* and *Mobile Oil*'s conflation of Admiralty Jurisdiction with DOHSA's statutory construct, which permits adjudication in state courts and in federal court via Diversity Jurisdiction.

The Court should confirm the intent of Congress in crafting DOHSA: land-based negligence resulting in death at sea is not subject to the statute's limitations.

Finally, this Court should grant Certiorari to clarify that, if DOHSA applies, the statute's application does not strip the claimant's right to a jury trial.

Respectfully submitted,

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