No. _____

In The
Supreme Court of the United States

CARLOS A. MORALES-VÁZQUEZ,

Petitioner,

v.

ÓPTIMA SEGUROS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL F. STURLEY
Counsel of Record
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1350
msturley@law.utexas.edu

ALBERTO J. CASTAÑER
CASTAÑER & CÍA P.S.C.
MAI Center
771 Cll 1, Suite 204
San Juan, PR 00920
(787) 707-0802
alberto@castanerlaw.com

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

QUESTION PRESENTED

An applicant for marine insurance has an obligation to disclose all facts that are material to the insurer's risk. Under the strict version of the *uberrimae fidei* ("utmost good faith") doctrine applied by the court below, an insurer may declare an insurance policy void after a loss occurs (and thus avoid paying the claim) if the applicant's disclosure was materially inaccurate or any material fact is omitted — even if the mistake or non-disclosure was entirely innocent, had no connection to the loss suffered, and was not relied upon by the insurer when issuing the policy.

The question presented is:

Does the traditional doctrine of *uberrimae fidei* continue to apply in its strict form (as held by the First Circuit in the decision below and also by the Third, Ninth, and Eleventh Circuits), or is the doctrine limited to cases in which the insurer relied on a mistake or omission when issuing the policy (as held by the Second and Eighth Circuits), or is the traditional doctrine no longer part of federal maritime law (as held by the Fifth Circuit), or should the doctrine be modified to limit an insurer's ability to avoid the policy (which would restore uniformity with the law in England)?

LIST OF PARTIES

The caption of the case contains the names of all the parties. The plaintiff in the district court was QBE Seguros. In August 2019, a year after the district court's decision and seven months before the first brief was filed in the court of appeals, respondent Óptima Seguros acquired QBE Seguros and assumed the obligations on the policies that QBE Seguros had issued. In 2012, QBE Seguros had acquired Optima Insurance Company, which had issued the first policy involved in this case.

STATEMENT PURSUANT TO RULE 29.6

Petitioner is a natural person.

RELATED CASES

The following is a list of all proceedings in state and federal trial and appellate courts, including proceedings in this Court, that are directly related to the case in this Court:

- *QBE Seguros v. Morales-Vázquez*, Civil No. 15-2091 (BJM), U.S. District Court for the District of Puerto Rico. Judgment was entered August 7, 2018.
- *QBE Seguros v. Morales-Vázquez*, No. 19-1503, U.S. Court of Appeals for the First Circuit. Judgment was entered January 19, 2021.

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Carlos A. Morales-Vázquez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

INTRODUCTION

The *uberrimae fidei* ("utmost good faith") doctrine originated in 18th-century England and evolved in the 19th century to impose an onerous disclosure requirement on every applicant for insurance. Under the strict form of the doctrine applied by the court below, an insurer may declare an insurance policy void after a loss occurs if the required disclosure was materially inaccurate or any material fact is omitted — even if the mistake or non-disclosure was entirely innocent, had no connection to the loss suffered, and was not relied upon by the insurer when issuing the policy. In other words, the strict doctrine permits an insurer to keep the premium in the typical case when no loss occurs but to escape paying the claim if a loss does occur. The insurer collects the premiums without bearing any risk.

The traditional doctrine has disappeared from insurance law generally, but it lives on in various forms in the law of marine insurance. Four circuits, including the court below, adhere to the strict version of the doctrine. Two circuits relax the doctrine by requiring an insurer, before it is permitted to avoid the policy, to show that it relied on the omission or inaccurate disclosure when issuing the policy. And the Fifth Circuit

has held that the doctrine is no longer an entrenched part of maritime law. In addition to the long-standing and acknowledged inter-circuit conflict, the decision below is inconsistent with general insurance law and in direct conflict with current law in England — the original source of the doctrine and the home of the leading international insurance market.

The Constitution's Admiralty Clause gives this Court the authority to develop the rules of marine insurance "in the manner of a common law court." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489-490 (2008). This Court should exercise that authority here to bring the *uberrimae fidei* doctrine into the 21st century. As the present case demonstrates, the doctrine unfairly penalizes those who believe they have purchased the peace of mind that comes with insurance coverage while giving an unjustified financial windfall to insurers who collect premiums without bearing any risk. The lower court's rationales for maintaining the strict doctrine do not justify a special rule for marine insurance. Legislation modernizing the law in England demonstrates that an applicant's duty to disclose material facts can be enforced without the draconian penalty of cancelling a policy for non-fraudulent mistakes or omissions.

At the very least, basic principles of contract law establish that an insurer should not have the power to avoid its contract under the doctrine of *uberrimae fidei* when it did not rely on the insured's misstatement or omission at the time that it issued the policy.

This case provides an ideal vehicle to resolve a question of fundamental national importance that implicates virtually every maritime transaction. The relevant facts are straightforward and undisputed. The court below decided the case on the single issue raised here. The 4-2-1 inter-circuit conflict on that issue is entrenched and frequently acknowledged; further percolation on the issue would be pointless.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-22a) is reported at 986 F.3d 1. The opinion of the district court (App. 23a-65a) is reported at 2018 AMC 2577 and is also available at 2018 U.S. Dist. LEXIS 133864 and 2018 WL 3763305.

JURISDICTION

The court of appeals entered its judgment on January 19, 2001, App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Respondent asserted jurisdiction in the district court under 28 U.S.C. § 1333. The First Circuit had appellate jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2, Clause 3 of the United States Constitution (the "Admiralty Clause") provides:

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

STATEMENT

1. Legal Background

In *Carter v. Boehm*, (1766) 3 Burr. 1905, 1910, 97 Eng. Rep. 1162, 1164 (KB), Lord Mansfield announced a "governing principle," which was "applicable to *all* contracts and dealings," that "[g]ood faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary." That dictum is often cited as the origin of a strict *uberrimae fidei* doctrine imposing a heavy disclosure burden on an applicant for insurance, *e.g.*, App. 7a, but the judgment in the case was for the insured and the bulk of the opinion explained why he had disclosed all that was required of him.

Over the course of the 19th century, the doctrine developed in England to permit an insurer to avoid an insurance policy if the applicant's disclosure was materially inaccurate or any material fact was omitted. Those principles were then codified in the Marine Insurance Act 1906, 6 Edw. 7, c. 41, §§ 17-20 (U.K.), App.

66a-68a. Parliament recently amended the 1906 Act to eliminate the strict *uberrimae fidei* doctrine. *See* Consumer Insurance (Disclosure and Representations) Act 2012, c. 6, §§ 2(5)(b), 11(2) (U.K.), App. 70a, 72a; Insurance Act 2015, c. 4, §§ 14(3), 21(2) (U.K.), App. 75a.

In the United States, the *uberrimae fidei* doctrine generally developed along similar lines to contemporary English law in the 19th and early 20th centuries. In *M'Lanahan v. Universal Insurance Co.*, 26 U.S. (1 Pet.) 170, 185 (1828), this Court cited U.S. and English authorities for the proposition that "[t]he contract of insurance" is "a contract *uberrimæ fidei*," and that "the policy is void" if the insured failed to disclose all material facts that were in its power "to communicate by ordinary means." Similarly, in *Sun Mutual Insurance Co. v. Ocean Insurance Co.*, 107 U.S. 485, 510 (1883), this Court declared that "[i]n respect to the duty of disclosing all material facts, . . . [t]he obligation . . . is one *uberrimæ fidei*." Because full disclosure had not been made, the policy was void. Shortly thereafter, in *Phoenix Life Insurance Co. v. Raddin*, 120 U.S. 183, 189 (1887), a life insurance case, this Court noted that "[t]he misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy." And the last time that this Court addressed the issue, in *Stipcich v. Metropolitan Life Insurance Co.*, 277 U.S. 311, 316 (1928), another life insurance case, it explained the doctrine in these terms:

> Insurance policies are traditionally contracts *uberrimae fidei* and a failure by the insured to

> disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option.

General insurance law has evolved considerably since *Stipcich*. As the court below noted, "uberrimae fidei has been scuttled in other areas of insurance law." App. 14a. But many courts continue to recognize the strict doctrine in the context of marine insurance. Thus, marine insurers continue to assert the right to avoid the policy entirely if an insured fails to make a required disclosure.

2. Factual Background

On October 24, 2014, a fire seriously damaged petitioner's 48-foot Cavileer yacht while it was docked in a marina. *See* App. 4a, 28a. Petitioner filed a claim with respondent,[1] the insurance company that had issued a policy on the vessel. Respondent initially offered to pay $63,774.10 on the claim. *Id*. at 4a, 29a. After further investigation, it ultimately increased the offer to $113,406. *Id*. at 30a. While negotiations were continuing, however, respondent learned that petitioner had failed to disclose certain information in his application for insurance. *Id.* at 30a-32a. Those omissions were "material" in the sense that they could possibly have influenced a prudent and intelligent insurer in deciding whether to accept the risk, *see id.* at 40a,

[1] For the sake of simplicity, respondent Óptima Seguros and its predecessors are all referred to as "respondent." *See* List of Parties, *supra* at ii.

whether or not they had any influence on respondent's decision to accept the risk. Respondent therefore asserted a right to avoid the policy entirely, paying petitioner nothing (other than returning his payment of the premium). *Id.* at 32a.

Petitioner had sought insurance coverage for the Cavileer yacht in March 2014 (seven months before the fire) from respondent because respondent already insured his 40-foot Riviera yacht (since 2011). In the 2011 application for the Riviera policy, petitioner had not answered several questions. In particular, he had left blank spaces on the form where he should have described his prior boating experience and where he should have listed all accidents involving his previous vessels. *Id.* at 2a, 24a. Notwithstanding the failure to answer those questions (and others), respondent issued the Riviera policy (and subsequently renewed it each year). *Id.* at 2a, 24a.

In the 2014 application for the Cavileer policy, petitioner again failed to answer several questions and two answers were incomplete. Although he listed a 2003 accident that should have been (but was not) included in the 2011 application for the Riviera policy, the answer to the loss-history question was still incomplete because he did not include a 2010 accident in which he had grounded a yacht. App. 3a, 25a. On the boating-experience question, he listed only two of the seven vessels he had previously owned. App. 3a, 25a-26a. Despite the 2014 omissions and the inconsistencies between the 2011 and 2014 applications, respondent issued the Cavileer policy based on both

applications. App. 4a, 27a-28a. Petitioner paid the premium.

3. Proceedings Below

Respondent filed the present action in the district court, asserting admiralty jurisdiction under 28 U.S.C. § 1333 and seeking a declaratory judgment that petitioner's marine insurance policy was void *ab initio* and thus did not cover his claimed losses. App. 23a. Citing petitioner's failure to disclose his prior accidents and boating experience in full, respondent invoked the *uberrimae fidei* doctrine and also asserted a breach of warranty based on the same omissions. *Id.* Petitioner counter-claimed to allege a breach of contract. *Id.*

After a bench trial, the district court granted respondent's declaratory judgment and dismissed petitioner's action. *Id.* at 24a, 65a. On the *uberrimae fidei* claim, the district court followed binding circuit precedent to rule that respondent could declare the policy void based on petitioner's failure to disclose the 2010 grounding.[2] *Id.* at 50a. Petitioner's asserted equitable defenses were irrelevant, *id.*, and "the First Circuit's binding precedent does not require actual reliance as part of the analysis," *id.* at 37a. On the warranty claim, the court ruled that respondent could avoid the policy based on both of petitioner's omissions. *Id.* at 51a-54a.

[2] The court considered it unnecessary to discuss whether petitioner's failure to list five of the vessels he had owned also justified avoiding the insurance policy. App. 50a.

The court was unpersuaded by petitioner's estoppel and waiver arguments. *Id.* at 54a-62a.

On appeal, the First Circuit followed circuit precedent to affirm solely on the *uberrimae fidei* doctrine. The court rejected petitioner's argument that it should abandon the doctrine to maintain uniformity between U.S. and British law. *Id.* at 10a-13a. The First Circuit acknowledged that the Eighth Circuit requires an insurer to show actual reliance on the misrepresentation or omission before invoking the doctrine of *uberrimae fidei*, *id.* at 17a-18a, and noted "that the Second Circuit may, indeed, require actual reliance when applying uberrimae fidei," *id.* at 17a. The court of appeals nevertheless adhered to the strict doctrine and held that "a showing of actual reliance is not required; and that [respondent] had no need to show that it actually relied on [petitioner's] omissions in order to prevail under the doctrine of uberrimae fidei." *Id.* at 18a-19a. Because reliance was irrelevant, the court of appeals, "[l]ike the district court," had "no need to reach that fact-bound issue." *Id.* at 19a n.3. And having decided that respondent was entitled to declare the policy void under the *uberrimae fidei* doctrine, the court similarly declined to address the warranty issue. *Id.* at 21a-22a & n.4.

REASONS FOR GRANTING THE PETITION

I. The decision below conflicts with the decisions of other courts of appeals, with the rule applied in the leading international insurance market, and with the modern trend in general insurance law.

This case presents not only a traditional inter-circuit conflict in which the courts of appeals have taken three different approaches on the issue but also two other conflicts that call for this Court's review: an unjustifiable conflict between marine insurance law and general insurance law as well as an unfortunate conflict between U.S. law and British law.

A. The courts of appeals are deeply divided on the proper role (if any) of the doctrine of *uberrimae fidei*.

The uneven evolution of the *uberrimae fidei* doctrine has produced a 4-2-1 circuit conflict in which four courts of appeals adhere to a strict version of the doctrine, two courts of appeals have relaxed the doctrine to require an insurer to show actual reliance (sometimes described as "inducement"), and one court of appeals has decided that the doctrine is no longer an entrenched part of federal maritime law. The present case would have been decided differently if it had arisen in any of the three circuits that no longer apply the strict version of the doctrine.

1. The First, Third, Ninth, and Eleventh Circuits adhere to a strict version of the doctrine of *uberrimae fidei*.

The First Circuit. After years of hesitation,[3] the First Circuit in *Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Services, Inc.*, 778 F.3d 69, 81 (1st Cir. 2015), held "that the doctrine of *uberrimae fidei* is an established rule of maritime law in this Circuit." Applying the doctrine, the court permitted an insurer to avoid a $1.75 million marine insurance policy on a floating drydock because the applicant had obtained the policy without disclosing that the drydock's actual market value was "approximately $700,000 to $800,000." *Id*. at 74.

In the decision below, the First Circuit not only reaffirmed its adherence to the doctrine but also held that an insurer need not show that it relied on the mistake or omission to invoke the doctrine. *See*, *e.g.*, App. 16a (declaring "that the materiality of a false statement or an omission, without more, provides a sufficient ground for voiding such a policy"); *id*. at 18a (holding that "a showing of actual reliance is not required").

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[3] *See Commercial Union Insurance Co. v. Pesante*, 459 F.3d 34, 38 (1st Cir. 2006) (finding it unnecessary to decide "whether *uberrimae fidei* is an established rule of maritime law"); *Windsor Mount Joy Mutual Insurance Co. v. Giragosian*, 57 F.3d 50, 54 n.3 (1st Cir. 1995) ("[I]t is debatable whether the doctrine [of *uberrimae fidei*] can still be deemed an 'entrenched' rule of law.").

The Third Circuit. In *AGF Marine Aviation & Transport v. Cassin*, 544 F.3d 255 (3d Cir. 2008), the Third Circuit applied the doctrine to permit an insurer to avoid a yacht policy because the owner had misrepresented the purchase price of the yacht.[4] The court unequivocally declared that "[t]he doctrine of *uberrimae fidei* imposes a duty of the utmost good faith and requires that parties to an insurance contract disclose all facts material to the risk." *Id*. at 262; *see also id*. at 263 (declaring "that *uberrimae fidei* applies to maritime insurance contracts" and "the doctrine of *uberrimae fidei* is well entrenched").

Although the *AGF* court did not explicitly address the reliance issue, it stated a strict rule suggesting that reliance would be irrelevant:

> A party's intent to conceal, or lack thereof, is irrelevant to the *uberrimae fidei* analysis. . . . The only thing that matters is the existence of a material misrepresentation.

Id. at 262.

The Ninth Circuit. The issue has arisen frequently in the Ninth Circuit, which has consistently recognized and applied the strict version of the doctrine. The strongest statement is in *Certain Underwriters at*

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[4] In *East Coast Tender Service, Inc. v. Robert T. Winzinger, Inc.*, 759 F.2d 280, 284 n.3 (3d Cir. 1985), the Third Circuit had previously declared "that in the maritime context a boat owner must meet its duty of *uberrimae fidae*," but because the owner's "behavior [wa]s consistent with the notion of 'utmost good faith'" the court did not need to apply the doctrine.

Lloyd's v. Inlet Fisheries Inc., 518 F.3d 645, 650-654 (9th Cir. 2008), in which the court held that a marine insurance policy was voidable because the policy-holder had failed to disclose information about prior losses, the condition of its vessels, and its pending bankruptcy. The Ninth Circuit acknowledged that its decision conflicted with the Fifth Circuit and explained at length why it reached a different result. *Id*. at 652-654. It concluded "that the longstanding federal maritime doctrine of *uberrimae fidei* . . . applies to marine insurance contracts." *Id*. at 654.

The Ninth Circuit had recognized the *uberrimae fidei* doctrine before *Inlet Fisheries*. *See*, *e.g.*, *Cigna Property & Casualty Insurance Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 420 & n.3 (9th Cir. 1998). And the court has continued to reaffirm the doctrine since *Inlet Fisheries*. *See*, *e.g.*, *New Hampshire Insurance Co. v. C'Est Moi, Inc.*, 519 F.3d 937, 938 (9th Cir. 2008) (quoting *Inlet Fisheries*, 518 F.3d at 654); *SW Traders LLC v. United Specialty Insurance Co.*, 409 Fed. App'x 96, 97 (9th Cir. 2010) (mem.) ("*Uberrimae fidei* is a longstanding federal maritime doctrine that applies to marine insurance contracts.").

The Eleventh Circuit. The issue has also arisen frequently in the Eleventh Circuit, which has consistently recognized and applied the strict version of the doctrine. In *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984), which continues to be regularly cited, the court recognized that the doctrine of *uberrimae fidei* is "well settled in this circuit."

In *HIH Marine Services, Inc. v. Fraser*, 211 F.3d 1359, 1362 (11th Cir. 2000), the court applied the doctrine to hold a marine insurance policy void with respect to coverage of a yacht because the policy-holder had failed to disclose that a proposed chartering contract was unexecuted and that it did not have possession of the yacht. The court explained that "[i]t is well-settled that the marine insurance doctrine of *uberrimae fidei* is the controlling law of this circuit." *Id*.

The Eleventh Circuit has regularly reaffirmed the doctrine. *See*, *e.g.*, *Quintero v. Geico Marine Insurance Co.*, 983 F.3d 1264, 1270-71 (11th Cir. 2020) (quoting *HIH*, 211 F.3d at 1362, and *Steelmet*, 747 F.2d at 695); *AIG Centennial Insurance Co. v. O'Neill*, 782 F.3d 1296, 1302-03 (11th Cir. 2015) ("The age-old marine-insurance doctrine of *uberrimae fidei* . . . provides 'the controlling federal rule even in the face of contrary state authority.'") (quoting *Steelmet*, 747 F.2d at 695); *Markel American Insurance Co. v. Nordarse*, 297 Fed. App'x 852, 853 (11th Cir. 2008) (per curiam) (citing *HIH*, 211 F.3d at 1362, 1364); *Transamerica Leasing, Inc. v. Institute of London Underwriters*, 267 F.3d 1303, 1308 (11th Cir. 2001) (per curiam) ("The doctrine of uberrimae fidei applies to this maritime case.").

2. The Second and Eighth Circuits limit the doctrine of *uberrimae fidei* to cases in which the insurer actually relied on the insured's non-disclosure of a material fact.

Although the Second and Eighth Circuits recognize the *uberrimae fidei* doctrine, they have moved beyond the strict version that is still applied in the First, Third, Ninth, and Eleventh Circuits to hold that a policy is not voidable unless the insurer shows that it actually relied on the insured's non-disclosure of a material fact. The court below, when expressly rejecting this requirement, App. 18a-19a & n.3, acknowledged its conflict with the Second and Eighth Circuits, *id*. at 17a-18a. If the present case had arisen in one of those circuits, petitioner would have been entitled to a remand to permit the district court to determine whether the omissions in petitioner's insurance applications had in fact induced respondent to issue the policy.

The Second Circuit. The facts in *Puritan Insurance Co. v. Eagle Steamship Co., S.A.*, 779 F.2d 866 (2d Cir. 1985), are similar to the present case. Insurers sought a declaratory judgment that a marine insurance policy was void because the shipowners had failed to disclose two prior losses when they applied for insurance. The district court held that the insurers were liable on the policy because they had not relied on the information in the application when deciding to accept the risk. *Id*. at 870.

The Second Circuit, affirming that judgment, recognized that the *uberrimae fidei* doctrine was "well established" in marine insurance cases and that the doctrine required a party seeking insurance "to disclose all circumstances known to him which materially affect the risk." *Id*. But that was not enough for the insurer to prevail: "The principle of *uberrimae fidei* does not require the voiding of the contract unless the undisclosed facts were material *and relied upon*." *Id*. at 871 (emphasis added). Because the district court found that the insurers had not relied on the incomplete information, they were not entitled to avoid the policy. *Id*. at 872.

In the years since *Puritan*, the Second Circuit has repeatedly reaffirmed the reliance requirement.[5] In *Fireman's Fund Insurance Co. v. Great American Insurance Co. of New York*, 822 F.3d 620 (2d Cir. 2016), for example, the court quoted the relevant language from *Puritan*, *id*. at 634; explained how materiality and reliance are distinct elements, "both of which must be proven for the doctrine to apply," *id*. at 638; and explained at length how the reliance requirement had been satisfied, *id*. at 638-640. *See also*, *e.g.*, *Atlantic Specialty Insurance Co. v. Coastal Environmental Group Inc.*, 945 F.3d 53, 66 (2d Cir. 2019) (following

[5] The Second Circuit has also recognized the *uberrimae fidei* doctrine without discussing reliance in cases in which it appears that the insurer actually relied on the insured's non-disclosure or the insured did not raise the issue. *See*, *e.g.*, *St. Paul Fire & Marine Insurance Co. v. Matrix Posh, LLC*, 507 Fed. App'x 94, 95 (2d Cir. 2013) (mem.); *Commercial Union v. Lord*, 224 Fed. App'x 41, 43 (2d Cir. 2007) (mem.).

Puritan); *Federal Insurance Co. v. Keybank N.A.*, 340 Fed. App'x 5, 7 (2d Cir. 2009) (quoting *Puritan*, 779 F.2d at 871).

The Eighth Circuit. In *St. Paul Fire & Marine Insurance Co. v. Abhe & Svoboda, Inc.*, 798 F.3d 715, 719-722 (8th Cir. 2015), the Eighth Circuit followed the Second Circuit in recognizing the reliance requirement. An insurer sought a declaratory judgment that an insurance policy on a barge was void because the insured when it applied for coverage had failed to disclose a survey report. The Eighth Circuit held that the policy was not voidable unless the insurer could show that the non-disclosure induced it to enter the policy. Several factors influenced that result. First, a party to a contract generally may not rescind the contract under circumstances of this sort without proving reliance. *Id.* at 720 (citing RESTATEMENT (SECOND) OF CONTRACTS § 164 cmt. c (AM. L. INST. 1981); 27 RICHARD A. LORD, WILLISTON ON CONTRACTS § 69:32 (4th ed. 2014)). The court could "discern no reason why the requirement of causation should be removed in the context of marine insurance contracts." *Id.* Second, the contrary rule "would create a moral hazard on the part of marine insurers." *Id.* When an insurer was aware of a misrepresentation or omission, it could issue the policy and collect the premium — avoiding the policy if a loss occurred. *Id.* at 720-721. Third, insurers are required to demonstrate reliance before avoiding a policy in other insurance contexts. *Id.* at 721. Finally, some courts have effectively required reliance by applying a subjective standard for materiality. *Id.* at 721-722.

"These decisions are consistent in substance with our conclusion, but we think clarity is enhanced by preserving actual reliance and objective materiality as distinct elements." *Id*. at 722.

3. The Fifth Circuit has rejected the strict application of the doctrine of *uberrimae fidei* in marine insurance cases.

Although the Fifth Circuit once recognized the *uberrimae fidei* doctrine, in *Albany Insurance Co. v. Anh Thi Kieu*, 927 F.2d 882, 890 (5th Cir. 1991), the court held that the "doctrine is entrenched no more." The insurer of a shrimping vessel sought to avoid the policy on the ground that the owner's application for insurance had misrepresented the identity of the vessel's captain, its loss history, and its purchase price. *Id*. at 885. The Fifth Circuit decided under *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955), to apply Texas law, which did not permit the insurer to avoid the policy. The court reasoned that this Court's application of the *uberrimae fidei* doctrine in the 19th and early 20th centuries had been "as a 'traditional' aspect of insurance law in general," *id*. at 888, and its own prior recognition of the doctrine had been dicta, *id*. at 888-890. The court concluded its discussion of the issue with the suggestion that the *uberrimae fidei* doctrine might still apply in some cases, but the accompanying footnote made clear that the strict doctrine as applied in other circuits was not the law in the Fifth Circuit. *Id*. at 890 & n.7.

The appellant in *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236, 241 (5th Cir. 2009), invited the Fifth Circuit to "overrule [*Anh Thi*] *Kieu* because it was wrongly decided and stands alone among the circuits which have considered that issue." The court declined that invitation, even though it acknowledged the inter-circuit conflict. *Id*. at 241 & n.10.

Courts of appeals in other circuits have routinely acknowledged the inter-circuit conflict. *See*, *e.g.*, App. 8a n.1; *Catlin*, 778 F.3d at 80-81 & n.13; *New York Marine & General Insurance Co. v. Continental Cement Co., LLC*, 761 F.3d 830, 839 (8th Cir. 2014); *AGF*, 544 F.3d at 263; *Inlet Fisheries*, 518 F.3d at 652-653.

B. The decision below conflicts with the rule currently applied in England, the leading international insurance market.

This Court has long recognized the value of maintaining uniformity with the law in England on issues of marine insurance. Not only is U.S. law in the field derived from English law but London has long been, and continues to be, the leading international insurance market. In *Queen Insurance Co. of America v. Globe & Rutgers Fire Insurance Co.*, 263 U.S. 487, 493 (1924), Justice Holmes noted that "[t]here are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business. . . ." Even when this Court has ultimately decided not to follow English precedent, it has still

"emphasized the desirability of uniformity in decisions here and in England in interpretation and enforcement of marine insurance contracts." *Standard Oil Co. of New Jersey v. United States*, 340 U.S. 54, 59 (1950). *See also Calmar Steamship Corp. v. Scott*, 345 U.S. 427, 442-443 (1953) (quoting *Queen Insurance*, 263 U.S. at 493).

At one time, the strict U.S. *uberrimae fidei* doctrine was broadly consistent with the law in England. Section 17 of the Marine Insurance Act 1906 (as originally enacted) explicitly provided that "[a] contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party." App. 66a. Sections 18(1) and 20(1) likewise gave the insurer the option to avoid the contract based on a material omission or misrepresentation. App. 66a, 68a. But the law in England — like the rest of U.S. insurance law — has progressed, and the draconian option to avoid the contract for every breach, regardless of severity, no longer exists.

The Consumer Insurance (Disclosure and Representations) Act 2012, App. 69a-74a, amended the 1906 Act for "consumer insurance contracts," such as petitioner's contract with respondent. Under section 4(1)(b), App. 71a, an insurer has no remedy for a misrepresentation unless it can show reliance (as in the Second and Eighth Circuits). When an insurer can show reliance, its available remedies are detailed in Schedule 1 to the Act. App. 73a-74a. Avoiding the

contract is an option only for a deliberate or reckless misrepresentation.

The Insurance Act 2015, App. 74a-75a, extended those modifications to all marine insurance contracts. Section 17 of the 1906 Act, as amended, now provides simply that "[a] contract of marine insurance is a contract based upon the utmost good faith," with no provision for avoiding the contract, App. 69a, and sections 18 to 20 have been repealed entirely, App. 75a. Applicants for insurance still have disclosure duties and insurers still have appropriate remedies when those duties are breached, but insurers can no longer avoid the contract entirely for an innocent breach on which it did not rely.

To be sure, U.S. courts are not bound by British law. But if U.S. law is to follow a fundamentally different rule of marine insurance than the leading international market, this Court should be the one to make that decision.

C. The decision below conflicts with the rule currently followed in insurance law generally.

When this Court last applied the *uberrimae fidei* doctrine almost a century ago, it was in a pre-*Erie* diversity case addressing a life insurance policy. *Stipcich*, 277 U.S. at 316. The doctrine then was not unique to marine insurance but was part of general insurance law. Indeed, *Carter v. Boehm*, the seminal case frequently cited for the origin of the doctrine, *e.g.*, App. 7a,

not only arose in the context of general insurance law[6] but Lord Mansfield expressly declared that "[t]he governing principle is applicable to *all* contracts and dealings." 3 Burr. at 1910, 97 Eng. Rep. at 1164.

This Court twice recognized the *uberrimae fidei* doctrine in marine insurance cases in the 19th century, *Sun Mutual*, 107 U.S. at 510, and *M'Lanahan*, 26 U.S. (1 Pet.) at 185, but there is no indication in either case that the Court applied anything other than general insurance law. Indeed, the first authority cited in *Sun Mutual* after mentioning the *uberrimae fidei* doctrine — *New York Bowery Fire Insurance Co. v. New York Fire Insurance Co.*, 17 Wend. 359 (N.Y. Sup. Ct. 1837) — was (as the caption suggests) a fire insurance decision. And just four years after *Sun Mutual*, this Court mentioned the doctrine in a life insurance case. *Phoenix Life Insurance*, 120 U.S. at 189. *Cf. Wilburn Boat*, 348 U.S. at 315 (noting that although *Hazard's Administrator v. New England Marine Insurance Co.*, 33 U.S. (8 Pet.) 557 (1834), was a marine insurance case, "there is not the slightest indication" that the Court applied a rule unique to maritime law).

General insurance law has evolved considerably since *Stipcich*. As the court below noted, "uberrimae fidei has been scuttled in other areas of insurance law." App. 14a. The First Circuit had previously explained that "the doctrine of *uberrimae fidei* . . . in modern

[6] The policy in *Carter v. Boehm* insured against the risk that Fort Marlborough, "really but a factory or settlement for trade" in Sumatra (present-day Indonesia), 3 Burr. at 1912, 97 Eng. Rep. at 1165, would be captured by a foreign enemy.

American jurisprudence is extant only in the context of maritime insurance," *Catlin*, 778 F.3d at 75, and "virtually the sole remaining vestige of the doctrine is in maritime insurance law," *Windsor Mount Joy Mutual Insurance Co. v. Giragosian*, 57 F.3d 50, 54 n.3 (1st Cir. 1995). Other courts of appeals have made substantially the same observation. *See*, *e.g.*, *Inlet Fisheries*, 518 F.3d at 646 ("Today, *uberrimae fidei* has been displaced in most insurance contexts."); *Anh Thi Kieu*, 927 F.2d at 888 ("Today, the sole remaining substantial vestige of the doctrine is in marine insurance law."). Marine insurance law is no longer consistent with general insurance law. To the extent that marine insurance continues to recognize a strict doctrine of *uberrimae fidei*, it now stands in direct (and frequently acknowledged) conflict with the rules that apply in the rest of insurance law.

Maritime law often differs from other branches of law for sensible reasons, but it appears that the primary explanation for the longevity of the *uberrimae fidei* doctrine in the law of marine insurance is simply inertia. While general insurance law has been free to evolve to meet changing conditions, this Court has not addressed the doctrine in almost a century and lower federal courts have usually felt bound by often-outdated precedent.[7] As a result, the law of marine insurance — at least in the First, Third, Ninth, and Eleventh Circuits, and to a lesser extent in the Second

[7] In *Puritan*, for example, the court followed a decision from the 1930s. 779 F.2d at 870 (following *Btesh v. Royal Insurance Co., Ltd., of Liverpool*, 49 F.2d 720, 721 (2d Cir. 1931)).

and Eighth Circuits — is now in clear and direct conflict with general insurance law.

II. This Court should reverse the judgment below.

Because marine insurance is within this Court's admiralty jurisdiction, *e.g.*, *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1 (1871), and Congress has not addressed the subject, the Constitution's Admiralty Clause gives this Court the authority to develop the rules of marine insurance "in the manner of a common law court." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489-490 (2008).[8] *See also*, *e.g.*, *Dutra Group v. Batterton*, 139 S. Ct. 2275, 2278 (2019) (quoting *Exxon Shipping*); *Air & Liquid Systems Corp. v. DeVries*, 139 S. Ct. 986, 992 (2019) ("When a federal court decides a maritime case, it acts as a federal 'common law court,' much as state courts do in state common-law cases."). This Court should exercise that authority here to bring the *uberrimae fidei* doctrine into the 21st century.

[8] Alternatively, this Court could follow the analysis developed in *Wilburn Boat*, 348 U.S. at 314-321, and decide that the issue should be left to state law. Now that the *uberrimae fidei* doctrine "has been scuttled in other areas of insurance law," App. 14a, that would generally have the practical effect of eliminating the strict doctrine but would not achieve uniformity.

A. *Uberrimae fidei* in its strict form is an outdated doctrine that has no application in the modern world.

Petitioner admits that he failed to disclose certain facts in his insurance application. No evidence demonstrates that petitioner sought to conceal them, that respondent actually relied on their omission, or that they had any connection to the fire that damaged the vessel. Allowing respondent to avoid the policy unjustifiably imposes a draconian penalty on petitioner and gives respondent a windfall for which it did not bargain.

None of the rationales for maintaining the strict doctrine that the court below asserted justify a special rule for marine insurance. Just as "a marine insurer and its insured do not have equal access to the information needed to make underwriting decisions and to set premiums," App. 13a, so a property insurer will know less about covered buildings than their owners do, a life insurer will know less about its policy-holders' health, and liability insurers will know less about their policy-holders' exposures. "[T]he asymmetry in the availability of information," App. 14a, is an issue throughout the insurance industry. Many types of insurance are "often needed at a moment's notice." *Id*. For example, new and used car purchasers typically need — and obtain — automobile insurance as soon as they make their purchases. Many insurers cover distant risks. *Cf*. *id*. ("[I]nsurers are frequently located far away from the vessel that they are asked to insure."). Just as "the calculation of marine insurance

premiums must take into account not only the vessel's history and particularities but also the maritime experiences of the owner and/or operator," *id*., so, too, the calculation of property insurance premiums must consider the characteristics of the building, the use to which it is put, and the experience of the owner or tenant in occupation. "Time is frequently critical to the issuance of marine insurance policies," *id*., but the same is true for many other kinds of insurance. If all those other forms of insurance can thrive without a strict *uberrimae fidei* doctrine, marine insurance could, too. The London marine insurance market did not collapse after Parliament passed the Consumer Insurance (Disclosure and Representations) Act 2012, App. 69a-74a, or the Insurance Act 2015, App. 74a-75a.

The recent legislation modernizing British law, *see supra* at 20-21, also demonstrates that an applicant's duty to disclose material facts can be enforced without the draconian penalty of cancelling a policy for nonfraudulent omissions. Under the Consumer Insurance (Disclosure and Representations) Act 2012, c. 6, sch 1, ¶¶ 6-8 (U.K.), App. 74a, the policy can be adjusted to reflect the terms on which the insurer would have accepted the risk if full disclosure had been made. If a properly informed insurer would have charged a higher premium, for example, the insured's recovery can be reduced proportionately.[9]

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[9] A hypothetical in the context of this case illustrates how that approach would work. If petitioner's full disclosure would have resulted in respondent's charging a 10% higher premium, then petitioner could recover only 90.9% (100/110) of his loss. *See*

Whatever conditions may once have justified a strict *uberrimae fidei* doctrine in the 19th and early 20th centuries, it is no longer needed today. It unfairly penalizes those who believe they have purchased insurance while giving a windfall to insurers who collect premiums without bearing any risk. The rest of the insurance world — and even the most important international market for marine insurance — have recognized the need to bring *uberrimae fidei* into the 21st century. It is time for this Court to do likewise as the Constitutional steward of maritime law.

B. At the very least, an insurer should not have the power to avoid its contract under the doctrine of *uberrimae fidei* without proof of reliance on the insured's misstatement or omission.

To allow an insurer to avoid an insurance policy based on a misrepresentation or omission on which it never relied violates a basic principle of contract law. Section 164(1) of the current *Restatement of Contracts* states the general rule as follows:

> If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.

Consumer Insurance (Disclosure and Representations) Act 2012, c. 6, sch 1, ¶¶ 7-8 (U.K.), App. 74a

RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. L. INST. 1981). Comment a elaborates, explaining that "[t]hree requirements must be met." *Id*., cmt. a. (1) The misrepresentation must be either fraudulent or material. (2) "[T]he misrepresentation must have induced the recipient to make the contract." (3) The reliance must have been justified. *Id*. Comment c provides further detail on that second requirement:

> No legal effect flows from either a non-fraudulent or a fraudulent misrepresentation unless it induces action by the recipient, that is, unless he manifests his assent to the contract in reliance on it.

Id., cmt. c. This Court should follow these basic principles set forth in the *Restatement*, much as it has looked to the *Restatements* in formulating other aspects of maritime law. *See*, *e.g.*, *CITGO Asphalt Refining Co. v. Frescati Shipping Co., Ltd.*, 140 S. Ct. 1081, 1089-90 (2020); *Air & Liquid Systems Corp. v. DeVries*, 139 S. Ct. 986, 993-994 (2019); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 208-217 (1994).

Distinguished scholars have specifically endorsed the reliance requirement in the marine insurance context. As Professor Schoenbaum explains:

> Many of the [U.S.] cases considering and applying utmost good faith . . . take a flawed approach by considering only materiality without requiring inducement as well. Only

> the Second and Eighth Circuits require inducement in addition to materiality. Inducement is a crucial factor that should not be ignored by the courts.

2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 19:14 at 480 (6th ed. 2018) (Practitioner Treatise Series).

Even before the Insurance Act 2015, App. 74a-75a, and the Consumer Insurance (Disclosure and Representations) Act 2012, App. 69a-74a, British law recognized substantially the same reliance requirement that the Second and Eighth Circuits apply. *See*, *e.g.*, *Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd.*, [1995] 1 AC 501 (HL) 549 (Lord Mustill) (appeal taken from Eng.) ("[T]here is to be implied in the [Marine Insurance] Act of 1906 a qualification that a material misrepresentation will not entitle the underwriter to avoid the policy unless the misrepresentation induced the making of the contract, using 'induced' in the sense in which it is used in the general law of contract."); *Assicurazioni Generali SpA v. Arab Insurance Group (B.S.C.)*, [2002] EWCA (Civ) 1642 [62] (Clarke, L.J.), [2003] 1 All ER (Comm) 140, 158 ("In order to be entitled to avoid a contract of insurance or reinsurance, an insurer or reinsurer must prove on the balance of probabilities that he was induced to enter into the contract by a material non-disclosure or by a material misrepresentation.").

III. This case provides an ideal vehicle to resolve a question of fundamental national importance.

The present case offers this Court the perfect vehicle to modernize the *uberrimae fidei* doctrine "in the manner of a common law court." *Exxon Shipping*, 554 U.S. at 489-490.

The relevant facts are straightforward and undisputed. Petitioner admits that he did not disclose the facts at issue and does not question that his omission meets the legal standard for materiality.

The court below decided the case solely on the *uberrimae fidei* doctrine.[10] Because that is the only issue in the case, this Court can answer the Question Presented without being side-tracked by other issues.

The 4-2-1 inter-circuit conflict is entrenched. The Second Circuit has recognized the reliance requirement for at least 35 years, *Puritan*, 779 F.2d at 871, and it has regularly reaffirmed that requirement. The Eighth Circuit more recently followed the Second Circuit to solidify that conflict. On a more fundamental issue, the Fifth Circuit has been in conflict on whether *uberrimae fidei* is still part of federal maritime law for over 30 years and has expressly rejected the invitation to overrule *Anh Thi Kieu*. Further percolation on the issue would be pointless.

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[10] Because respondent prevailed on the *uberrimae fidei* issue, the court below declined to address the warranty issue. App. 21a-22a & n.4.

The importance of the issue is well-illustrated by the number of reported cases in the courts of appeals. Of course the reported appellate cases represent only the tip of the iceberg. Not only is the *uberrimae fidei* doctrine a hotly litigated issue in many cases but it is also a potential issue in every maritime dispute in which insurance is involved (since every contract of insurance is subject to disclosure obligations) — and that includes the overwhelming majority of maritime disputes. As Professors Gilmore and Black explain in the preeminent treatise in the field, "[b]ecause all important possibilities of marine loss or liability are normally insured against, insurance is tied in *de facto* with a very high proportion of marine litigation. . . ." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 2-1, at 53 (2d ed. 1975).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL F. STURLEY
Counsel of Record
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1350
msturley@law.utexas.edu

ALBERTO J. CASTAÑER
CASTAÑER & CÍA P.S.C.
MAI Center
771 Cll 1, Suite 204
San Juan, PR 00920
(787) 707-0802
alberto@castanerlaw.com

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