No. 20-1779

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

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The purpose for filing of this action was to obtain a declaratory judgment to establish that Óptima Seguros (hereinafter "Respondent") was entitled to void the Policy issued to Carlos A. Morales-Vázquez (hereinafter "Petitioner") due to his breach of the duty of *uberrimae fidei*, breach of warranty of truthfulness and, consequently, be relieved from the duty to indemnify pursuant to said Policy.

The District Court found that Petitioner had left material information out of his insurance application: "[Petitioner] did not include the fact that he grounded a 40' Riviera Offshore yacht in January 2010 in Fajardo." App. B at 25a, ¶ 5. In addition, the court below found: "[Petitioner] listed only two of the seven vessels that he had owned and operated." *Id.* at 25a-26a, ¶ 6.

The District Court held that Petitioner breached both his duty of *uberrimae fidei*, and the warranty of truthfulness contained in the Policy. *See* App. B at 50a, 54a, and 62a. Furthermore, the District Court concluded that Petitioner's waiver defense was underdeveloped and that he, ultimately, could not prove it. *See id.* at 60a-62a. The District Court also denied Petitioner's affirmative defense of estoppel because he failed to prove that his actions while he procured insurance from Respondent were reasonable. *See id.* at 56a-58a. Consequently, the District Court correctly dismissed Petitioner's claims against Respondent. *See id.* at 65a.

QUESTIONS PRESENTED—Continued

Petitioner appealed all of these issues before the United States Court of Appeals for the First Circuit. However, in its opinion, the First Circuit remarked: "Given our conclusion that the district court did not err in ruling that Morales breached the duty of *uberrimae fidei*, we have no occasion to reach the parties' arguments concerning breach of the warranty of truthfulness, waiver, and estoppel." *See* App. A at 22a. The breach of the warranty of truthfulness was a separate and independently sufficient reason for Respondent to void the policy. *See id.* at 5a.

Petitioner solely presented one question for the consideration of this Court and it concerns strictly the duty of *uberrimae fidei*. Petitioner chose not to present any question related to the issue of breach of warranty of truthfulness.

Thus, Petitioner waived its right to raise as an error in its *Petition for Certiorari* the First Circuit's choice not to consider the issue of the breach of the warranty of truthfulness contained in the policy. Consequently, the District Court's holding that Petitioner breached the warranty of truthfulness, and that Respondent was entitled to void his policy, became final on the day the *Petition for Certiorari* at this Court was filed. *See* App. B at 62a.[1]

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[1] "Consequently, [Petitioner] breached the warranty of truthfulness in the [insurance] Application and policy by failing to disclose his prior loss history and his prior boating experiences.

QUESTIONS PRESENTED—Continued

Therefore, Respondent presents one threshold question and two questions in the alternative:

1. Whether this Court should grant the *Petition for Certiorari* in spite of the fact that Petitioner waived his right to seek appellate review of the District Court's holding that Respondent is entitled to void the policy due to Petitioner's breach of the warranty of truthfulness.

2. If so, whether there is a pressing need for this Court to address the marine insurance doctrine of *uberrimae fidei*.

3. If there is such a need, whether Petitioner's case is the best chance for the Court to address the issue of the application of the doctrine of *uberrimae fidei*.

His breach gives [Respondent] the right to void the policy for [Petitioner's boat]." App. B at 62a.

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Óptima Seguros respectfully requests that the Petition for Writ of Certiorari to review the judgment of the Unites States Court Appeals for the First Circuit be denied.

STATEMENT OF THE CASE

In 2011, Petitioner successfully applied for insurance policy OYP-0000746-00 from Óptima Insurance Co. for a 2005 Riviera yacht, which is a vessel he owned prior to owning the 48' Cavileer yacht object of this litigation. In the insurance application, Petitioner failed to answer the questions that asked him to describe any prior boating history and "any accidents claims or losses in connection with any vessel you have sailed, owned or was under your control." App. B at 24a, ¶ 1.

QBE Seguros was a Puerto Rico corporation authorized by the Puerto Rico Insurance Commissioner's Office to sell ocean marine insurance. It acquired Óptima Insurance Co. in 2012. *Id.* at ¶ 2. QBE Seguros was later acquired by Óptima Seguros in August 2019, through a transaction that was subject to the oversight and approval of the Office of the Commissioner of Insurance of Puerto Rico. As part of said transaction, Óptima Seguros assumed the obligations related to the policies issued by QBE Seguros and it is hereby referred to as Respondent.

On March of 2014, Petitioner again applied for insurance from Respondent, but this time for his 48' Cavileer yacht. *Id.* at ¶ 3. The insurance application

states that the "statements and answers provided [in the application] are warranted by [the applicant] to be true and correct." The insurance application also states, "If incorrect answers are provided (either by error, omission or neglect), I will be in breach of this warranty and the policy, if issued, will be void from inception. I understand I must fill out every question and that no question should remain unanswered. If a question is inapplicable, I am aware that I must write 'N/A' to so indicate. I agree that this declaration shall form the basis of the contract of insurance between me and you. I also agree that if the policy is issued, it was issued by you based upon and in reliance of the truthfulness and completeness of the answers provided herein." The declarations section of the insurance application states, "All questions asked herein request material information which is indispensable for [Respondent's] assessment of the risk subject of this application." App. B at 24a-25a, ¶ 4.

Section 7 of the insurance application asked "Have you had any accidents or losses (even if no insurance claim was filed) in connection with any vessel you have operated, owned or was under your control? If yes please provide full details, including dates and amounts paid." Petitioner checked the box for yes and wrote, "Accident 11 years ago—propeller strike in Las Pelás at Culebra. Propellers were replaced, shaft and rudders rectified." However, Petitioner failed to disclose the fact that he grounded a 40' Riviera Offshore yacht on January of 2010 in Fajardo, Puerto Rico. *See id.* at 25a, ¶ 5.

Section 6 of the insurance application required Petitioner to give details of boating experience by providing, in chronological order, a list of boats owned or operated. In answer to the question, Petitioner listed only two of the seven vessels that he had owned and operated. *See* App. B at 25a-26a, ¶ 6. Petitioner's digital signature is on the insurance application. *Id.* at 26a, ¶ 7.

Although Petitioner did report the 2003 propeller strike in the insurance application, the grounding of 2010 was a very different claim. A grounding is a significant loss for this type of insurance and its existence is important in deciding whether to accept the risk or not. *See id.* at 27a, ¶ 14. In short, Petitioner remembered to mention in the insurance application a relatively minor incident that had taken place 11 years before, but failed to disclose a serious grounding, just four years earlier, at night, while he was alone, that resulted in a $65,000.00 salvage expense and a total loss claim. *See* R. 1a-3a.

Respondent issued Petitioner policy OYP-00001077-00 for the period of March 7th, 2014 through March 7th, 2015 to insure the 48' Cavileer yacht. Following an endorsement, Petitioner's yacht was insured for $550,000 by Respondent, and included other coverages, pursuant to all the Policy's terms, conditions, limitations, and exclusions. *See* App. B at 27a-28a, ¶ 16.

On October 24th, 2014, Petitioner's 48' Cavileer vessel, named MAKING WAVES, sustained damages

because of a fire, and he notified Respondent of the damage. *See id.* at 28a, ¶ 17. Petitioner met with Respondent's personnel on several occasions to discuss his claim. Respondent made at least three offers to Petitioner during that period. *See id.* at 29a-30a, ¶¶ 23, 26-27. The last meeting took place on May 7th, 2015, and Petitioner was accompanied by his insurance broker and an engineer. *See* App. B at 28a-29a, ¶¶ 21, 25; 30a, ¶ 30. After Petitioner left the meeting, Respondent's surveyor told Mr. José Soto, Respondent's Vice-President of Claims, and the other personnel from Respondent, that he had heard from a colleague of an alleged prior recent grounding by Petitioner. Mr. Soto told Respondent's independent adjuster to investigate the alleged grounding to determine if it was true. *See id.* at 30a-31a, ¶ 31.

Respondent's independent adjuster sent an email to Mr. Soto on July 10th, 2015 confirming the suspected 2010 grounding. Respondent then contacted its attorneys and summoned Petitioner for an Examination Under Oath. *See id.* at 31a, ¶ 34. Between the May 7 meeting and the independent adjuster's email on July 10, 2015, Respondent continued working on adjusting Petitioner's claim. *See id.* at ¶ 35.

On August 7th, 2015, Respondent examined Petitioner under oath. When questioned by Respondent, Petitioner admitted that he owned or operated five vessels that he did not include in the responses to the insurance application and, more importantly, that he did not disclose the 2010 grounding. *See id.* at 31a-32a, ¶ 36. On August 10th, 2015, Respondent informed

Petitioner that it was rescinding his policy and offered to return the premium. *See id.* at 32a, ¶ 37.

On August 11th, 2015, Respondent filed a complaint for declaratory judgment against Petitioner. On October 28, 2015, Respondent amended its complaint seeking a judgment declaring that Petitioner breached his duty of *uberrimae fidei* and the warranty of truthfulness in the insurance application, thereby excusing Respondent from making any payments to Petitioner pursuant to the Policy. In the alternative, that the policy did not cover all of Petitioner's claimed losses. *See* App. B at 23a. Petitioner counterclaimed alleging breach of contract and damages due to Respondent's purported bad faith adjustment. *See id.* The District Court denied both parties' motions for summary judgment. The case proceeded to a six-day non-jury trial and, after its conclusion, the parties submitted post trial briefs. *See id.* The Opinion and Order was issued on August 7th, 2018. *See id.* at 23a-65a.

Petitioner timely sought appellate review before the United States Court of Appeals for the First Circuit, which affirmed the District Court's Opinion and Order on January 19th, 2021 as to Petitioner's breach of his duty of *uberrimae fidei* and declined the opportunity to review the holding as to Petitioner's breach of the warranty of truthfulness. *See* App. A at 21a-22a.

ARGUMENT

I. Petitioner waived his right to seek appellate review of a separate and independently sufficient ground for Respondent to void the policy.

This Court should not grant the *Petition for Certiorari* because doing so may ultimately result in an exercise in futility.

The appellate jurisdiction of this Court is no different from that of the intermediate appellate courts. It can only exercise appellate review of the issues raised by an appellant or petitioner. This fundamental gatekeeping principle is embodied in Supreme Court Rule 14.1(a). Rule 14.1(a) of this Court reads, in relevant part, as follows:

> 1. A petition for a writ of certiorari shall contain, in the order indicated:
>
> (a) **The questions presented for review**, expressed concisely in relation to the circumstances of the case, without unnecessary detail. . . . **Only the questions set out in the petition, or fairly included therein, will be considered by the Court**.

SUP. CT. R. 14.1(a) [emphasis ours].

The Court has recognized that "Rule 14.1(a) serves two important and related purposes. First, it provides the respondent with notice of the grounds upon which the petitioner is seeking certiorari, and enables the

respondent to sharpen the arguments as to why certiorari should not be granted." *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992). The Court in *Yee* reasoned that "[b]y forcing the petitioner to choose his questions at the outset, Rule 14.1(a) relieves the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions." *Id.* at 536.

The second purpose of Rule 14.1(a) is to assist "the Court in selecting the cases in which certiorari will be granted." *Id.* The Court noted that "Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important, thus enabling us to make efficient use of our resources." *Id.* [emphasis ours].

This Court has stressed the importance of framing the questions presented before it pursuant to the tenets of Rule 14.1(a). The Court remarked: "While '[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein' we ordinarily do not consider questions outside those presented in the petition for certiorari." *Id.* at 535 [emphasis ours]; *see also Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 455 (2007).

In another opinion, the Court cautioned:

> Our faithful application of Rule 14.1(a) thus helps ensure that we are not tempted to engage in ill-considered decisions of questions not presented in the petition. Faithful

> application will also inform those who seek review here that we continue to strongly "disapprove the practice of smuggling additional questions into a case after we grant certiorari."

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 30-34 (1993).

In the case below, the District Court held that Petitioner breached his duty of *uberrimae fidei* ***and*** **the warranty of truthfulness**. *See* App. B at 50a, 54a, and 62a. Petitioner is conscious of this distinction and even mentioned it several times in his petition. *See Pet. for Cert.* at 3,[2] 8, 9, and 30. Furthermore, the District Court concluded that Petitioner's waiver defense was underdeveloped and that he, ultimately, could not prove it. *See id.* at 60a-62a. The District Court also denied Petitioner's affirmative defense of estoppel because he failed to prove that his actions while he procured insurance from Respondent were reasonable. *See id.* at 56a-58a. Consequently, the District Court correctly dismissed Petitioner's claims against Respondent. *See id.* at 65a.

Petitioner appealed all of these issues before the United States Court of Appeals for the First Circuit. However, in its opinion, the First Circuit remarked: "Given our conclusion that the district court did not err in ruling that Morales breached the duty of *uberrimae fidei*, we have no occasion to reach the parties'

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[2] Including the opinion of the District Court under the heading of Opinions Below.

arguments concerning breach of the warranty of truthfulness, waiver, and estoppel." *See* App. A at 22a. The breach of the warranty of truthfulness was a separate and independently sufficient reason for Respondent to void the policy. *See id.* at 5a.

Petitioner solely presented one question for the consideration of this Court and it is strictly limited to the duty of *uberrimae fidei*. Petitioner consciously chose not to present any question related to the issue of breach of warranty of truthfulness. *See Pet. for Cert.* at 9.

The question of whether the District Court erred in holding that Petitioner breached the warranty of truthfulness, or whether the First Circuit erred in not ruling on that issue, is not subsidiary to the Question Presented in the *Petition for Certiorari*. According to a renowned maritime law commentator, "[a] warranty is an undertaking in a contract of insurance. No particular form of words need be used; the creation of a warranty depends upon the parties' intentions as revealed by the contract." 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 19-15 (5th ed. 2011). The duty of *uberrimae fidei* applies to marine insurance policies *ex propio vigore*, whereas the warranty of truthfulness is just another term or condition of the insurance contract and, thus, applies *ex contractu*.

The warranty of truthfulness included in the policy is simply one of the terms of the marine insurance contract. Regardless of the applicability of the doctrine of *uberrimae fidei*, the warranty of truthfulness was

correctly enforced as the law between the parties by the District Court.

Therefore, the unraised question related to the breach of the warranty of truthfulness exists independently and side by side with the Question Presented in the *Petition for Certiorari* and do not encompass each other. *See Yee*, 503 U.S. at 537. The Question Presented involves a doctrine that applies by operation of the current state of the law and the warranty of truthfulness is a contractual issue. There is no way in which the question related to the breach of the warranty of truthfulness may be considered as fairly included in the *Petition for Certiorari*.

Thus, Petitioner waived his right to raise as an issue on appeal the First Circuit's choice not to consider the issue of the breach of the warranty of truthfulness contained in the policy. Consequently, the District Court's holding that Petitioner breached the warranty of truthfulness, and that Respondent was entitled to void his policy, became final on the day the *Petition for Certiorari* at this Court was filed. *See* App. B at 62a.

Assuming, *arguendo*, that this Court grants certiorari and ultimately reverses the judgment of the First Circuit, it could only do so on the grounds of agreeing with Petitioner's argument on the application of the doctrine of *uberrimae fidei*. That was the only question presented before this Court.

However, the holding of the District Court finding that Petitioner breached the warranty of truthfulness

and voiding the policy, became final once the Petitioner filed the *Petition for Certiorari* before this Court.

In short, granting the *Petition for Certiorari* in this case would be an exercise in futility, as well as a waste of the time and resources of this Honorable Court because regardless of the outcome of its decision, Petitioner's insurance claim is forever barred by operation of the warranty of truthfulness, which was an issue not raised for appellate review by Petitioner. *See Yee*, 503 U.S. at 536.

II. There is no pressing need for this Court to address the marine insurance doctrine of *uberrimae fidei* at this moment.

A. The overwhelming authorities recognize *uberrimae fidei* as an entrenched maritime precedent or principle

Contrary to what is asserted by Petitioner, marine insurance law warrants special treatment when compared with general insurance law because it has undergone a distinct and particular historical development. *See Pet for Cert.* at 23. Respondent agrees that "[m]arine [i]nsurance is a difficult complex subject. Yet its importance in maritime affairs cannot be overemphasized. Without exception, it pervades every single sphere of maritime activities and, absent marine insurance protection, maritime commerce could come to stand still." 1 ALEX L. PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 3 (1987).

It is a well-known fact that "[m]odern marine insurance law, although affected by custom and usage in the industry, primarily developed through case law and various treatises of textwriters. This is still true in the United States, although in England the case law up to 1906 was codified in the Marine Insurance Act, 1906. . . . [T]hat act to a very major degree is a "restatement" of English marine insurance law (and to a major extent American marine insurance law) up to 1906. Consequently, the statutory sections of that Act, being based upon decisional law, are highly persuasive in the courts of the United States." *Id.* at 18.

Marine insurance is a field worthy of distinct treatment and consideration. The Court has been mindful of this and, although it has recognized its historic rule-making function in admiralty matters, has refused to formulate rules that involve policy considerations which Congress is better suited to make. *Id.* at 14.

It must be noted that "[t]he volume of marine insurance litigation in the United States now exceeds that of Great Britain and the Commonwealth nations by a considerable extent." *Id.* at 17.

1. The doctrine of *uberrimae fidei*

Marine insurance policies demand *uberrimae fidei* (the utmost good faith) in that a party may be relieved from its obligations if the other fails to comply with this fundamental principle. *See* Alex L. Parks, *Marine Insurance Principles: Contract Formation and*

Interpretation, III MAR. LAW. 129, 150 (1977); Nicholas J. Healey, *The Hull Policy: Warranties, Representations, Disclosure & Conditions*, XLI TUL. L. REV. 245 (1967) (this is axiomatic). In essence, the principle of *uberrimae fidei* demands that every fact material for the assessment of the risk to be insured has to be disclosed. *See id.* Even though state law considers insurance contracts as good faith contracts, maritime law establishes a standard that goes above and beyond, through the principle of *uberrimae fidei*.

The duty to disclose facts and information is placed upon the insured, and remaining silent, even if innocently, with respect to a material fact, is enough for an insurer to be relieved from its obligations under the policy. *See* Parks, *Marine Insurance*, *supra* at 151. Failure to disclose a material fact known by the insured's agent will be imputed to the insured and the policy will be deemed voidable. The insured's good faith will have little to do with it if, in effect, its agent failed to disclose what should have been disclosed. *See id.*; *see also* PARKS, LAW AND PRACTICE at 222. Further, "**it is the sole responsibility of the assured to complete the insurance application and ensure its accuracy.**" *Sealink, Inc. v. Frenkel & Co.*, 441 F. Supp. 2d 374, 386 (D.P.R. 2006) [emphasis in original].

This Court has stated that the knowledge of the insurer has to be as complete as that of the insured and, if it is not, the insured has the duty to disclose the information. *See Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485 (1882). A failure to disclose that reaches the suppression of a material fact will vice the policy. *See*

Parks, *Marine Insurance*, *supra* at 151. The insured is compelled to disclose every material circumstance known to him, that is, every circumstance that could influence the judgment of a prudent insurer in the assessment of whether to accept the risk or, in deciding the amount of premium under which he will be willing to accept it. *See* Healey, *supra* at 246. *Uberrimae fidei* requires the insured "to place the underwriter in the same situation as himself; to give to him the same means and opportunity of judging of the value of the risks." *State Nat. Ins. Co. v. Anzhela Explorer, L.L.C.*, 812 F. Supp. 2d 1326, 1351 (S.D. Fla. 2011), quoting *Sun Mut.*, 107 U.S. at 510-11.

Uberrimae fidei was a part of federal maritime law since the dawn of the Republic. *See Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing and Marine Servs., Inc.*, 778 F.3d. 69, 80 (1st Cir. 2015), citing *McLanahan v. Universal Ins. Co.*, 26 U.S. 170, 185 (1828). Through the continued and persistent application of this doctrine during all this time, most federal courts, including most recently the First Circuit, have recognized *uberrimae fidei* as an established admiralty rule. *See Catlin*, 778 F.3d at 80-82.

"The practice of underwriters, however, in accepting risks or not making inquiries on particular points cannot affect the duty of the assured to disclose, or be received as evidence of waiver in any particular case. In short, waiver is not to be lightly presumed." PARKS, LAW AND PRACTICE at 226.

2. *Anh Thi Kieu* is an Anomaly

It is important to know how maritime law practitioners view *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 889 (5th Cir. 1991) because, in addition to the lower courts, they are the ones to which guidance provided by the different courts of appeals is addressed to.

In the overwhelming majority view, the doctrine of *uberrimae fidei* has survived *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), as expressly or impliedly "established" or "entrenched" in admiralty to the exclusion of variant state rules. "The conspicuous exception is [*Anh Thi Kieu*], where a panel of the Fifth Circuit, in 1991, distinguished as dicta the statements in three earlier Fifth Circuit cases that the disclosure rule of utmost good faith was established and entrenched in federal maritime law." Graydon S. Staring and George L. Waddell, *Marine Insurance*, 73 TUL. L. REV. 1619, 1651-52 (1999).

In its opinion in *Anh Thi Kieu*, the Fifth Circuit remarked as follows: "no opinion of this Court has ever explicitly authorized the application of the *uberrimae fidei* doctrine to invalidate a marine insurance policy. The *uberrimae fidei* doctrine, in sum, is a rule which this Court has recognized, but never applied. We therefore conclude, albeit with some hesitation, that the *uberrimae fidei* doctrine is not 'entrenched federal precedent.'" *Anh Thi Kieu*, 927 F.2d at 889.

The Fifth Circuit added that even when it had considered the doctrine, "it has not applied the doctrine. Perhaps the doctrine was 'entrenched federal

precedent' at the time of the *Fireman's Fund Insurance Co.*[3] and *Gulfstream Cargo, Ltd.*[4] decisions, but its spotty application in recent years—even in other circuits—suggests that the *uberrimae fidei* doctrine is entrenched no more." *Id.* at 889-90. It must be noted that the Fifth Circuit in *Gulfstream Cargo* remarked that **there is nothing better established in the law of marine insurance than *uberrimae fidei***. *See Gulfstream Cargo*, 409 F.2d at 980.

The *Anh Thi Kieu* court did not hold that federal maritime law no longer embraces the *uberrimae fidei* doctrine. Rather, it explained that while it did not find cases in that circuit applying the doctrine, it also found no cases expressly rejecting the doctrine. *See id.* at 890.

In a footnote, the Fifth Circuit stated: "It is sufficient to note that if the applicable state insurance law is materially different from the *uberrimae fidei* doctrine—*e.g.*, the state law requires that 'all misrepresentations of the insured, whether or not material, invalidate the policy of insurance' or that 'no misrepresentations of the insured, except those statements that the underwriter could not with due diligence discover were false, invalidate the policy of insurance'—the federal maritime law might be a more appropriate measure of the obligations of the assured." *Id.* at 890n.7.

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[3] *Fireman's Fund Ins. Co. v. Wiburn Boat Co.*, 300 F.2d 631 (5th Cir. 1962).

[4] *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974 (5th Cir. 1969).

The Fifth Circuit's opinion in *Anh Thi Kieu* is not only inconsistent with the majority of the opinions of its sister circuits, but it is also internally inconsistent. On one hand in 1969 it recognized that *uberrimae fidei* was an entrenched federal precedent, but, on the other, the court somehow concluded that it had ceased to be by 1991.

The anomalous nature of *Anh Thi Kieu* has been frequently commented by a myriad of persons involved in the business of marine insurance, such as legal practitioners, scholars and industry members. Respondent hereby provides some examples from the most respected maritime legal publications in order to provide a glimpse into the abundant legal commentary recognizing the anomalous nature of *Anh Thi Kieu*.

A then-judicial clerk at the Fifth Circuit noted that "[i]n *Anh Thi Kieu*, the Fifth Circuit acknowledged that the doctrine of *uberrimae fidei* was established precedent in federal maritime law. However, since both *Wilburn Boat* and *Gulfstream Cargo* were decided on state law grounds, the court held they had dubious precedential value for the application of *uberrimae fidei*. This conclusion misreads the prior case law." John P. Kavanagh, Jr., "*Ask Me No Questions and I'll Tell You No Lies": The Doctrine of Uberrimae Fidei in Marine Insurance Transactions*, 17 TUL. MAR. L.J. 37, 44 (1992).

He added that "Texas law materially differs from the doctrine of *uberrimae fidei*, and the application of Texas law enabled the *Anh Thi Kieu* court to reach a

conclusion that conflicts with federal maritime law. In *The Lottawana*,[5] the Court stated:

> It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

Id. at 45-46.

In a co-authored article, counsel for Petitioner stated:

> Now that the Fifth Circuit is even more isolated in its lonely position, it is natural to wonder whether it will overrule *Anh Thi Kieu* and restore uniformity to maritime law. Every other circuit that has addressed the doctrine of utmost good faith—a total of six—has held that the doctrine is established general maritime law governing marine insurance to the exclusion of state law.

David W. Robertson and Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 40 TUL. MAR. L.J. 343, 411 (2016).

A Houston maritime practitioner remarked: "[i]nitially, it appeared that the notion that *uberrimae fidei*

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[5] 88 U.S. 558, 575 (1874).

is not entrenched federal law might have some traction. Fortunately, however, every court that has actually decided the issue has rejected the Fifth Circuit's position." Harold K. Watson, *A Fifty Year Retrospective on the American Law of Marine Insurance*, 91 TUL. L. REV. 855, 860 (2017). He added: "[t]hus, contrary to the Fifth Circuit's outcome-driven approach in *Anh Thi Kieu*, the Ninth Circuit [in *Certain Underwriters at Lloyds v. Inlet Fisheries Inc.*, 518 F.3d 645, 649-50 (9th Cir. 2008)] refreshingly chose an approach that eschewed bias in favor of either party." *Id.*

A former president of the Maritime Law Association of the United States, and his co-author, commented:

> Both Lloyd's II[6] and Cassin[7] addressed and distinguished the Fifth Circuit's ruling in *Anh Thi Kieu* from their own support of the doctrine as well-settled maritime law, dismissing that decision as an anomaly amongst the circuits. The Ninth Circuit noted, "whatever traction it might have, *Anh Thi Kieu* does not undermine our conclusion that 'no rule of marine insurance is better established than the utmost good faith rule.' "

Warren J. Marwedel and Stephanie A. Espinoza, *Troubled Waters—Admiralty Law: Insurance, Pollution, and Finance Issues: Dagger, Shield, or Double-Edged*

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[6] *Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc.*, 518 F.3d 645 (9th Cir. 2008).

[7] *AGF Marine Aviation & Transport v. Cassin*, 544 F.3d 255 (3d Cir. 2008).

Sword?: The Reciprocal Nature of the Doctrine of Uberrimae Fidei, 83 TUL. L. REV. 1163, 1173 (2009).

The awareness of *Anh Thi Kieu's* **anomalous nature** extends beyond people in the legal business. A marine insurance executive reflected:

> Although a majority of the most recent legal decisions support the doctrine of *uberrimae fidei*, decisions such as *Anh Thi Kieu* and the Poshard[8] case are a cause for concern. Underwriters must be conscious of such decisions when seeking to have a hull or other marine insurance policy voided ab initio based upon breach of the duty of utmost good faith. These decisions threaten to subvert long-established and widely accepted principles that are the essence of marine underwriting and may also lead to confusion in the already complicated process of evaluating marine insurance coverage issues involving *uberrimae fidei*.

Jean E. Knudsen, *The Hull Policy Today: Thoughts from the Claims World*, 75 TUL. L. REV. 1597, 1610 (2001).

The opinion in *Anh Thi Kieu* is widely discussed topic within legal academia. A marine insurance survey conducted by the Tulane Maritime Law Journal noted:

> The Fifth Circuit's determination that the doctrine of *uberrimae fidei* is not entrenched

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[8] *La Reunion Francaise, S.A. v. Poshard*, No. EV 98-17-C-Y/H (S.D. Ind. Sept. 17, 1999).

> federal precedent is questionable at best. Considering the number of cases which have followed the doctrine and state insurance statutes themselves, which recognize that marine insurance is governed by *uberrimae fidei*, one must conclude that the federal maritime *uberrimae fidei* doctrine should govern this area of the law. The very existence of the decision of the Fifth Circuit in *Anh Thi Kieu* demonstrates the need for federal legislation in this area.

Robert Bocko et al., *Marine Insurance Survey: A Comparison of United States Law to the Marine Insurance Act of 1906*, 20 TUL. MAR. L.J. 5, 19 (1995).

One of the leading admiralty law commentators remarked that "[i]n ruling that the doctrine of good faith is not 'entrenched' marine insurance law, courts strangely disregard over two hundred years of English and American precedents as well as prior case law in the circuits themselves." Thomas J. Schoenbaum, *The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law*, 29 J. MAR. L. & COM. 1, 10-11 (1998).

A law professor stated:

> If we take *uberrimae fidei* just by its name, there may be little doubt that it is well established in American Admiralty law. With the famous exception of the *Anh Thi Kieu* secession by the Fifth Circuit, all the cases that dealt with utmost good faith have acknowledged the rule using all possible words, such

> as: "well established and entrenched principle of Admiralty law," "long standing federal maritime doctrine," even "[n]othing is better established in the law of maritime insurance."

Attilio M. Costabel, "*Utmost Good Faith" in Marine Insurance: A Message on the State of the Dis-Union*, 48 J. MAR. L. & COM. 1, 16 (2017).

As reflected by the previous examples, the anomalous nature of *Anh Thi Kieu* is well known to maritime practitioners, legal scholars, people involved in the marine insurance industry, including marine insurance brokers and their clients.

Federal courts have issued a plethora of opinions addressing the doctrine of *uberrimae fidei*. Most courts of appeals have held that the doctrine of *uberrimae fidei* is a federally entrenched maritime precedent, including the Fifth Circuit in *Gulfstream Cargo*. *See Catlin*, 778 F.3d at 80-82; *see also Knight v. United States Fire Ins. Co.*, 804 F.2d 9, 13 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987); *East Coast Tender Serv., Inc. v. Robert T. Winzinger, Inc.*, 759 F.2d 280, 284n.3 (3d Cir. 1985); *Certain Underwriters at Lloyd's v. Montford*, 52 F.3d 219, 222n.1 (9th Cir. 1995) (admiralty and California law are "materially the same"); *Crowley Marine Servs., Inc. v. Hunt*, 1995 AMC 2562, 2568 (W.D. Wash. 1995) ("Here, there is an entrenched doctrine of admiralty law that no court has held gives way to state laws, namely, the doctrine of *uberrimae fidei*"), *aff'd without opinion*, 99 F.3d 1145 (9th Cir. 1996); *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984)

("The general rule of marine insurance, requiring full disclosure, is well settled in this circuit, and as a clear rule of maritime law it is the controlling federal rule even in the face of contrary state authority.").

This is not an instance of people not knowing how the current state of the law affects them. Thus, there is no pressing need for the guidance of this Honorable Court in this matter.

B. This Court has already ruled that materiality is the only requirement for an insurer to void the policy for breach of *uberrimae fidei*

This Court recognized since 1828 an important particularity of insurance contracts in its opinion in *McLanahan*. The Court stated:

> The contract of insurance has been said to be a contract *uberrimae fidei*, and the principles which govern it, are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any facts, material to the risk which he does not disclose; and that no known loss had occurred, which by reasonable diligence might have been communicated to him. If a party, having secret information of a loss, procures insurance, without disclosing it, it is a manifest fraud, which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same information

> for the purpose of misleading the underwriter, it is no less a fraud[.]

26 U.S. at 185.

This Court added:

> And **even if there be no intentional fraud**, still the underwriter has a right to a disclosure of all material facts, which it was in the power of the party to communicate by ordinary means; and **the omission is fatal to the insurance**. . . . If he omits so to do, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, **the policy is void**.

Id. [emphasis ours]

The materiality of the concealed or misrepresented facts was the only element that triggered a breach of the duty of *uberrimae fidei*. The Court even discarded intent to defraud as requisite to void a policy due to the concealment or misrepresentation of material facts.

The *McLanahan* Court remarked: "It is admitted, that a concealment, to be fatal to the insurance, must be of facts material to the risk; and, certainly, of this doctrine, there cannot at this time be any legal doubt." *Id.* at 188.

The Court stressed again the element of the materiality of the facts:

> In the case of the *Maryland Insurance Company vs. Ruden's Administrators*, (6 Cranch, 338,) this Court expressed the opinion, that "it was well established, that **the operation of any concealment on the policy, depend on its materiality to the risk**, and that this materiality is a subject for the consideration of a jury."

McLanahan, 26 U.S. at 191 [emphasis ours].[9]

Fifty-five years later, this Court issued its opinion in *Sun Mutual*. At the time of the loss, the vessel owner and master of the vessel had insurance on two concurrent charters and his primage (personal fees) during one voyage. The fact was known to the primary underwriter, but it was not communicated to its reinsurer, who issued the corresponding policy without that knowledge. That knowledge was material and important to the reinsurance underwriter and was likely to influence his judgment in accepting the risk. The concealment, whether intentional or inadvertent, voided the policy. *See* 107 U.S. at 509-10.

The Court noted that there was no difference as to the duty of disclosing all material facts between

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[9] The correct quote of Chief Justice Marshall reads as follows: "It is well settled that the operation of any concealment on the policy depends on its materiality to the risk, and this court has decided that this materiality is a subject for the consideration of a jury." *Maryland Ins. Co. Ruden's Adm'r*, 10 U.S. (6 Cranch) 338, 340 (1810).

reinsurance and primary insurance cases: "The obligation in both cases is one *uberrimae fidei*. The duty of communication, indeed, is independent of the intention, and is violated by the fact of concealment even where there is no design to deceive." *Id.* at 510.

Four years later, the Court restated the requirement of materiality in a life insurance case. *See Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U.S. 183, 189 (1887) ("The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy.").

In *Stipcich v. Metropolitan Life Ins. Co.*, 277 U.S. 311 (1928), another life insurance case, this Court restated that "[i]nsurance 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." *Id.* at 316. The Court added that the doctrine of *uberrimae fidei* applied "with added force . . . as to changes materially affecting the risk which come to the knowledge of the insured after the application and before delivery of the policy." *Id.* at 316.

Petitioner asserts that an insurer has to actually rely on the misrepresentation of an insured to issue a policy, in order to void it due to that misrepresentation.

For this proposition, Petitioner seeks support from the Eighth Circuit opinion in *St. Paul Fire & Marine Ins. Co. v. Abhe & Svoboda, Inc.*, 798 F.3d 715 (8th Cir. 2015). Unlike the instant case, *Abhe* involved a motion for summary judgment. *See id.* at 717. The court in

Abhe reversed the judgment and remanded the case after it found that there were issues of fact as to actual reliance and materiality. *See id.* at 723. In order to explain its rationale that actual reliance is required to void a policy pursuant to *uberrimae fidei*, the court found support in opinions unrelated to marine insurance. *See id.* at 721.

The *Abhe* court recognized that "most circuits have not explicitly recognized reliance as a distinct element of the *uberrimae fidei* defense." *Abhe*, 798 F.3d at 721. It should be noted that the *Abhe* court refers to *uberrimae fidei* as a mere defense of the insurer rather than as a duty of the insured. *See* Parks, *Marine Insurance* at 151. That is why it erroneously focuses on reliance when that concept is not generally regarded as a requisite for the doctrine of *uberrimae fidei*.

Actual reliance is a concept foreign to the principle of *uberrimae fidei*. *Uberrimae fidei* only requires materiality. Under the doctrine of *uberrimae fidei*, "when the marine insured fails to disclose to the marine insurer all circumstances known to it and unknown to the insurer which 'materially affect the insurer's risk,' the insurer may void the marine insurance policy at its option." *Catlin*, 778 F.3d at 83.

As reflected in the previously discussed opinions, this Court has already held that materiality is the crucial element to establish a breach of the insured's duty of *uberrimae fidei* and most court of appeals have rejected actual reliance as an additional element to be

considered in order to void a policy for breach of *uberrimae fidei*.

Thus, there is no pressing need for the guidance of this Honorable Court in this matter.

C. There is no mandate for federal courts to follow an act of the British Parliament

Petitioner argues that despite the fact that a majority of the courts of appeals have declared the principle of *uberrimae fidei* as an entrenched maritime federal precedent, relatively recent amendments to the British Marine Insurance Act of 1906 (hereinafter "MIA"), are reason enough for this Honorable Court to discard *uberrimae fidei* in order to keep uniformity with British marine insurance law. Essentially, Petitioner's flawed argument is one of comity.

The MIA is almost in its entirety a codification of the common law of marine insurance. PARKS, LAW AND PRACTICE at 16.

American maritime law is unequivocally tied to English maritime law due to well-known historical circumstances. However, American maritime law has developed independently based on the unique American national and constitutional experience.

1. Comity is not binding

Petitioner cites *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 442-43 (1953) and *Standard Oil Co. v. United*

States, 340 U.S. 54, 59 (1950) for the proposition that this Court has purportedly held that federal courts must seek uniformity and harmony between American and English marine insurance law.

Unfortunately for Petitioner, that is not correct. In a case where an insurance provision originating in England was being construed, this Court acknowledged that uniformity was desirable but added in no uncertain terms: "**But this does not mean that American courts must follow House of Lords' decisions automatically. Actually our practice is no more than to accord respect to established doctrines of English maritime law**." *Standard Oil*, 340 U.S. at 59 [emphasis ours]; *see also* PARKS, LAW AND PRACTICE at 12.

In short, this Court refers to comity between American and English courts. Comity is not binding. As the Court declared:

> Comity is not a rule of law, but one of practice, convenience, and expediency. **It is something more than mere courtesy**, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. **But its obligation is not imperative**.

Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900) [emphasis ours].

Thus, it is nothing short of preposterous for Petitioner to invite this Court to disregard the supreme

Law of the Land based on the amendment of an act of the British parliament. Comity does not mean that federal courts must simply follow English law. Comity is based on reciprocity. Thus, English courts should afford a similar degree of deference to American law:

> Comity is not a one-way street. If great weight is to be given by the United States courts to English decisions in the field of marine insurance then, by the same token, American decisions on marine insurance ought to be given careful consideration by the English and [British] Commonwealth courts.

See PARKS, LAW AND PRACTICE at 16.

This is not idle speculation, as English courts have actually declared the desirability of following American decisions, since the 19th century:

> [A]lthough American decisions are not binding on us in this country, I have always found those on insurance law to be based on sound reasoning and to be such as ought to be carefully considered by us and with earnest desire to endeavor to agree with them.

Cory v. Burr, 9 A.B.D. 463, (on appeal, (1883) 8 App. Cas. 393, H.L.), *quoted in* PARKS, LAW AND PRACTICE at 16. This makes now more sense than ever since "[t]he volume of marine insurance litigation in the United States now exceeds that of Great Britain and the Commonwealth nations by a considerable extent." *Id.*

Hence, this Honorable Court should decline Petitioner's invitation to disregard *stare decisis* on the basis of a misguided and misinterpreted notion of comity.

2. Comity is according respect to established doctrines of English maritime law

As previously stated, the MIA is, almost in its entirety, "a codification of the 'common law' of marine insurance." PARKS, LAW AND PRACTICE at 16. The MIA "was not passed to create new maritime law on marine insurance. Rather, it was an attempt to accurately reflect the marine insurance law in the courts of the United Kingdom, and elsewhere within the international maritime community." Edward V. Cattell, Jr., *An American Marine Insurance Act: An Idea Whose Time Has Come*, 20 TUL. MAR. L.J. 1 (1995). However, the MIA has not been enacted by Congress as part of the organic law of the United States. *See* PARKS, LAW AND PRACTICE at 16.

Uberrimae fidei was a part of federal maritime law since the early days of the Republic. *See McLanahan*, 26 U.S. at 185. Through the continued and persistent application of this doctrine during all this time, most federal courts, including most recently the First Circuit, have recognized *uberrimae fidei* as an established admiralty rule. *See Catlin*, 778 F.3d at 80-82.

Petitioner argues that the recent amendments to the MIA require that this Court revisit the issue of the applicability of the doctrine of *uberrimae fidei* in the

United States. The problem with Petitioner's rationale is that it fails to distinguish between the long-existing maritime common law, as originally codified in the MIA in 1906, and certain amendments thereto that the British parliament enacted within the past few years. It is the former to which this Court referred to when it counseled for harmony between American and English marine insurance law.

The principle of *uberrimae fidei* is codified in Section 18 of the MIA. *See* Shannon S. Sanfilippo, *Marine Insurance Survey; A Comparison of United States Law to the Marine Insurance Act of 1906*, 20 TUL. MAR. L.J. 5, 21 (1995). Certainly, federal courts do not rely on the MIA because it is the law in the United Kingdom. To the extent federal courts follow or rely on the MIA to support their reasoning and issue their decisions, they do so because the MIA represents a codification of the existing maritime law at the time it was enacted.

The British parliament did not create the principle of *uberrimae fidei*. *See* Cattell, 20 TUL. MAR. L.J. at 1. It was already a long-standing principle when it was codified in the MIA in 1906. This long-standing principle, among others, was adopted as "the supreme Law of the Land" when the Supreme Court was created and granted power over "all Cases of admiralty and maritime Jurisdiction." U.S. Const. arts. VI and III, § 2.

Thus, even though American courts may "accord respect to established doctrines of English maritime law," such as *uberrimae fidei*, they are not required to

do so with respect to acts of the British parliament. *Standard Oil*, 340 U.S. at 59.

In short, this Court has never held, or even counseled federal courts, that amendments to the MIA enacted between 2012 and 2015, more than a century after the MIA'a enactment, have to be followed by federal courts in order to keep harmony with English insurance law. It should not do so now.

Petitioner invites this Court to disregard a principle of federal maritime law that has been around since the origins of the Republic, merely because a foreign nation restrained that principle several centuries after it began applying it and more than one hundred years after it codified it.

III. Petitioner's case is not the best chance for the Court to address the issue of the application of the doctrine of *uberrimae fidei*.

Undeniably, this Court has the authority to develop admiralty and maritime law pursuant to the Admiralty Clause of the Constitution of the United States. *See* Admiralty Clause, U.S. Const. art. III, Sec. 2, Cl. 3. However, this is not the most suitable case to exercise that prerogative.

The First Circuit referred to this case as a "poster child for the continuing relevance of the [*uberrimae fidei*] doctrine." App. A at 15a. That is because, for all effective purposes, Petitioner admits that he breached *uberrimae fidei* pursuant to the current state of the law.

See Pet. for Cert. at 25 ("Petitioner admits that he failed to disclose certain facts in his insurance application.").

On August 7th, 2015, Respondent examined Petitioner under oath. When questioned by Respondent, Petitioner admitted that he owned or operated five vessels that he did not include in the insurance application and that he did not disclose the 2010 grounding. *See id.* at 31a-32a, ¶ 36.

First of all, in this case, Petitioner did not merely forget or overlook including material information in his insurance application. Although Petitioner did report a propeller strike which occurred on 2003, the 2010 grounding was a very different claim. A grounding is a significant loss for this type of insurance and its existence is important in deciding whether to accept the risk or not. *See id.* at 27a, ¶ 14. In short, Petitioner remembered to mention in the insurance application a relatively minor incident that had taken place 11 years before, but failed to disclose a serious grounding, just four years earlier, at night, while he was alone, that resulted in a $65,000.00 salvage invoice and a constructive total loss of the vessel. *See* R. 1a-3a.

Second, and perhaps most important, Petitioner is a sophisticated businessman that decided to play the system. Even though Respondent made several payment offers related to his claim, before learning of his misrepresentations, Petitioner admitted at trial that he was not interested in repairing his boat. He was only interested in having Respondent declare his boat a constructive total loss so that he could buy a new one. He successfully did the same thing with a previous

claim concerning another boat and another insurer. He admitted that he intended to use "the same playbook" with Respondent. *See id.* at R. 3a.

Contrary to what is asserted in the *Petition for Certiorari*, this case was never about someone who was unfairly penalized while believing that he had "purchased the peace of mind that comes with insurance coverage." *See Pet. for Cert.* at 2. In short, this case is not the "ideal vehicle to resolve a question of fundamental importance that implicates virtually every maritime transaction." *Id.* at 3.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED on September 21st, 2021.

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