NO. _____

IN THE
Supreme Court of the United States

STEPHEN K. WALTON, SR.,
Petitioner,

v.

VIRGINIA INTERNATIONAL TERMINALS, LLC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Lance A. Jackson
Counsel of Record
MONTAGNA KLEIN CAMDEN, L.L.P.
425 Monticello Avenue
Norfolk, Virginia 23510
(757) 622-8100
ljackson@montagnalaw.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

QUESTION PRESENTED

Since the founding of our country, the individual States have provided and regulated tort remedies for land-based personal injuries of their citizens. Since 1916 Congress has regulated the cargo-related activities of marine terminal operators, through the Shipping Act. Pursuant to 46 U.S.C. § 40501(f) of the Shipping Act of 1984, 46 U.S.C. § 40101, et seq., a marine terminal operator may issue a schedule of rates pertaining to receiving, delivering, handling or storing property at its terminal, and the schedule is enforceable as an implied contract. In the case below, the respondent marine terminal operator successfully argued that the personal injury action of a longshoreman who was injured on terminal grounds through the respondent's negligence, which was timely filed under Virginia law, was nevertheless time-barred by time limitation provisions in the respondent's schedule of rates, pursuant to the Shipping Act of 1984.

The question presented for review is:

Pursuant to the Shipping Act of 1984, is a marine terminal operator's schedule of rates, which is authorized by the Act to pertain to the receiving, delivering, handling or storing of property at its terminal, enforceable to time-bar a land-based personal injury action which is timely under State law?

PARTIES TO THE PROCEEDING

Petitioner Stephen K. Walton, Sr., was the plaintiff before the Circuit Court of the City of Norfolk and plaintiff-appellant before the Supreme Court of Virginia.

Respondent Virginia International Terminals, LLC, was a defendant before the Circuit Court and defendant-appellee before the Supreme Court of Virginia. Two other parties, Ceres Marine Terminals, Inc., and CP&O, LLC, were named defendants in the lawsuit but were not served with process and did not participate in the proceedings.

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INTRODUCTION

This is a case which affects the personal injury rights of the many thousands of people who work at or visit marine terminals throughout the United States. Notwithstanding that State tort law applies to land-based injuries on a marine terminal, and notwithstanding that the Shipping Act of 1984 does not authorize time limitations on personal injury actions, the Circuit Court of the City of Norfolk held that, pursuant to the Shipping Act, time limitations in the schedule of rates issued by a marine terminal operator, which conflicted with Virginia law, barred the personal injury claim of a business invitee, Walton, against the terminal as untimely. The Supreme Court of Virginia refused Mr. Walton's petition for appeal.

Since 1916 Congress has regulated the operations of marine terminals through the Shipping Act of 1916, and its successor, the Shipping Act of 1984. During that time, this Court has not decided whether the Shipping Act pre-empts the States' traditional right to regulate land-based, personal injury tort law concerning its citizens. Because this case presents an important question of federal law that has not been, but should be, settled by this Court, the petitioner Stephen K. Walton, Sr., respectfully requests that the Court issue a writ of certiorari to review the judgment of the Virginia Supreme Court.

OPINIONS AND ORDERS BELOW

The opinion of the Circuit Court of the City of Norfolk granting the motion for summary judgment of respondent Virginia International Terminals, LLC, and dismissing the petitioner's claim against it, Walton v. Virginia International

Terminals, LLC, et al., No. CL19-2417 (November 12, 2019), appearing in the Petitioner's Appendix at Pet. App. 2-10.

The Order of the Circuit Court of the City of Norfolk granting respondent's motion for summary judgment, entered on November 25, 2019, appearing in the Petitioner's Appendix, Pet. App. 11-12.

The Order of the Supreme Court of Virginia refusing Walton's petition for appeal, Walton v. Virginia International Terminals, LLC, Record No. 200275 (September 11, 2020), appearing in the Petitioner's Appendix at Pet. App. 1.

JURISDICTION

The Supreme Court of Virginia issued its final judgment, refusing the petitioner's petition for appeal on September 11, 2020. This Court has jurisdiction to review the order of the Supreme Court of Virginia on a Writ of Certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL, AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are the United States Constitution, Article VI, cl. 2, The Shipping Act of 1984, amended as the Ocean Shipping Reform Act of 1998, 46 U.S.C. § 40101, et seq., and the Code of Virginia of 1950, as amended, Sections 1-200 and Section 8.01-243.

The United States Constitution, Article VI, clause 2, provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof … shall be the supreme law of the land….

The relevant provisions of the Shipping Act of 1984 are 46 U.S.C. §§ 40101, 40307, 40501(f), 41102, and 41301, set forth in the Petitioner's Appendix, Pet. App. 13-20. Code of Virginia Sections 1-200 and Section 8.01-243 appear at Pet. App. 21-22.

STATEMENT OF THE CASE

This is an action for personal injuries brought by longshoreman Stephen K. Walton, Sr., who was injured while working on the grounds of the respondent's marine terminal in Norfolk, Virginia, on March 15, 2017. On March 11, 2017, within two years after his injury, Walton filed a complaint in the Circuit Court of the City of Norfolk against the marine terminal operator, Virginia International Terminals, LLC ("VIT"). (See Complaint at Pet. App. 25-32). VIT is a limited liability company which operates the marine terminal in question under an agreement with the Virginia Port Authority. On July 12, 2017, Walton filed an Amended Complaint against VIT. (See Amended Complaint at Pet. App. 33-47). The gist of the Amended Complaint was that VIT negligently injured Walton, who was employed by another company and was VIT's business invitee, by leaving a trip-and-fall hazard in the path of a terminal walkway where Walton was working at night. (See Amended Complaint, ¶s 4, 8, 15, 20, 24, 25, 31, 37, 40, 46, 58, 60, at Pet. App. 34, 36, 38-40, 42, 44-45). Before filing suit, Walton notified his employer of the accident but did not notify VIT.

The respondent VIT filed a plea in bar and a motion for summary judgment, alleging that Walton's claim was time-barred by time limitation provisions in

Section 207 of VIT's Schedule of Rates. Section 207 of the Schedule of Rates provides in pertinent part:

> USERS must notify VIT in writing of the occurrence of loss, injury, or damage to person or property caused by VIT immediately upon discovery, and in no event more than thirty (30) days from occurrence, or all claims based on the loss, injury, or damage shall be time-barred. If suit (or notice of arbitration if available) based on the occurrence is not filed within one (1) year after the occurrence, the claim shall be time-barred.

(See Pet. App. 71; a complete copy of the Schedule of Rates is at Pet. App. 66-131).

In support of its Plea in Bar and Motion for Summary Judgment, VIT argued that, pursuant to the Shipping Act of 1984, the time limitation provisions in VIT's Schedule of Rates barred Walton's suit. (See VIT's Brief in Support of its Plea in Bar and Demurrer and its Motion for Summary Judgment, pp. 6-9, Pet. App. 53-56). VIT did not argue, nor was any evidence introduced, that a Virginia statute authorized VIT to issue a schedule of rates or tariff concerning its marine terminal. The Shipping Act was the only statute which VIT cited in support of its argument that its Schedule of Rates was controlling.

Walton's Brief in Opposition argued that his suit was timely filed, because Virginia law did not require him to file a notice of accident or claim with VIT before filing suit, and his suit was timely filed within Virginia's two-year statute of limitations for personal injury actions, Virginia Code Section 8.01-243. (Plaintiff's Brief in Opposition to Defendant VIT's Motion for Summary Judgment, pp. 1, 4-9, Pet. App. 135, 138-143). Walton argued that, under Virginia common law, "a tort victim is free of any requirement to notify a tortfeasor or an accident or claim before

filing suit." (Plaintiff's Brief, p. 5, Pet. App. 139). He argued that, "[b]ecause the Shipping Act [did] not pre-empt applicable Virginia law, [his] tort action against VIT [was] not time-barred by VIT's Schedule of Rates." (Plaintiff's Brief, p. 4, Pet. App. 138). The Schedule of Rates did not time bar his claim, he maintained, because the Shipping Act of 1984 does not authorize a marine terminal to impose time limitations in a schedule of rates on state law claims brought by personal injury tort victims. (Plaintiff's Brief, pp. 8-9, Pet. App. 142-143).

On November 12, 2019, the Circuit Court of the City of Norfolk issued an opinion holding that, pursuant to the 46 U.S.C. § 40501(f) of the Shipping Act of 1984, the time limitations in VIT's schedule of rates were enforceable to time-bar Walton's personal injury suit against VIT. (Circuit Court opinion, pp. 1 and 7-9, Pet. App. 2, 8-10). In the trial court's November 25, 2019, order granting VIT's motion for summary judgment, the plaintiff stated his objections to the court's rulings, for reasons stated in his Brief in Opposition. (Order, p. 2, Pet. App. 12).

The petitioner timely filed his Petition for Appeal in the Supreme Court of Virginia on February 21, 2020. In the Petition for Appeal Walton assigned error to the trial court for holding that his claim was time-barred, pursuant to the time limitations stated in VIT's Schedule of Rates, on grounds that the Shipping Act of 1984 does not pre-empt Virginia common law, under which there is no pre-suit notice of claim or injury requirement, nor does the Shipping Act pre-empt the two-year Virginia limitations period for personal injury actions under Virginia Code § 8.01-243(A). (Petition for Appeal, pp. 1-2, Pet. App. 162-163). In the Petition for Appeal

Walton argued that his suit against VIT was timely, because the Shipping Act did not pre-empt Virginia common law, nor did it pre-empt the two-year Virginia limitations period. (Petition for Appeal, pp. 16-21, Pet. App. 177-182). Furthermore, Walton argued that the time limitations in VIT's Schedule of Rates were ineffectual to bar Walton's State law personal injury action, because Congress did not intend through the Shipping Act "to authorize or require marine terminals to impose such time [limitations] on state law personal injury claims through a schedule of rates." (Petition for Appeal, p. 20, Pet. App. 181). In particular, Walton argued that 46 U.S.C. § 40501(f) of the Act did not authorize the personal injury time limitations in VIT's Schedule of Rates. (Petition for Appeal, p. 21, Pet. App. 182).

On September 11, 2020, the Supreme Court of Virginia refused Walton's Petition for Appeal. (Order, Pet. App. 1).

REASONS FOR GRANTING THE WRIT

This case presents a question whether a federal act which applies to the many marine terminals in the United States, the Shipping Act of 1984, pre-empts the traditional right of the States to regulate land-based, personal injury tort remedies for their citizens. The 1984 Act, as amended by the Ocean Shipping Reform Act of 1998, 46 U.S.C. § 40101, et seq., is the sole piece of federal legislation that authorizes a marine terminal to issue a schedule of rates. If the Shipping Act pre-empts State regulation of land-based personal injury tort remedies, by authorizing schedules of rates that supersede State law, or otherwise, then marine terminals throughout the United States may, through their individual schedules of rates, displace the States

from regulating when and how tort victims injured on terminal land within each State can seek remedies for their personal injuries. If not, then the States are free to regulate land-based personal injury tort remedies for their citizens, without being subject to the fiat of an individual terminal operator. Because this case presents an important question of federal law that has not been, but should be, settled by this Court, the petitioner Stephen K. Walton, Sr., respectfully requests that the Court issue a writ of certiorari to review the judgment of the Supreme Court of Virginia.

A MARINE TERMINAL OPERATOR'S SCHEDULE OF RATES IS NOT ENFORCEABLE, BY VIRTUE OF THE SHIPPING ACT OF 1984, TO TIME-BAR A LAND-BASED PERSONAL INJURY ACTION WHICH IS TIMELY UNDER VIRGINIA LAW.

The question presented in this case is: Pursuant to the Shipping Act of 1984, is a marine terminal operator's schedule of rates, which is authorized by the Act to pertain to the receiving, delivering, handling or storing of property at its terminal, enforceable to time-bar a land-based personal injury action which is timely under State law? The short answer is No.

As will be shown below, the Shipping Act of 1984 does not pre-empt applicable Virginia law concerning land-based personal injury actions, under which the petitioner's suit was timely. Because the Act does not authorize time limitations on land-based personal injury claims brought under State law, and in particular does not authorize such time limitations in a marine terminal operator's schedule of rates, the Act does not pre-empt Virginia law controlling the timeliness of bringing such

claims, and operator's schedule of rates, which derives its legal authority solely from the Act, is not enforceable to bar the petitioner's claim.

A. Under applicable Virginia law, Walton's land-based personal injury suit was timely.

Walton filed his negligence action in the appropriate Virginia State court against marine terminal operator VIT less than two years after his injury. Under Virginia law, filing his action within the statutory two year limit was all Walton had to do to make the action timely.

Because Walton's injuries occurred on terminal grounds (and no ship on navigable waters caused his injuries), Virginia tort law, not federal maritime tort law, applies to his action. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 213 (1971); *Gardner v. Old Dominion Stevedoring Corp.*, 225 Va. 599, 603, 303 S.E.2d 914, 916 (1983). See also *Holland v. Sea-Land Service, Inc.*, 655 F.2d 556, 559 (4th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982)("Congress did not intend that federal maritime law should apply to actions for tort brought by longshoremen injured on land.").

Under the common law of Virginia, a tort victim is free of any requirement to provide a pre-suit notice of injury or claim to a tortfeasor. In the case of *Breeding ex. rel. Breeding v. Hensley*, 258 Va. 207, 215-16, 519 S.E.2d 369, 373 (1999) the Supreme Court of Virginia held that, pursuant to the common law of Virginia, pre-suit notice is not a condition precedent to bringing a tort action against defendants who are not municipalities. The Court held that the Virginia statute making pre-suit notice a condition precedent to bringing a tort action against a municipality was "in derogation of the common law." Id.

The fact the Virginia rule that a tort victim is free to sue a tortfeasor without pre-suit notice is a common law rule does not lessen its importance. Virginia's exercise of its historic police powers, including regulation of personal injury tort remedies, is substantially based on the common law. E.g., *Isbell v. Commercial Inv. Assocs.*, 273 Va. 605, 611, 644 S.E.2d 72, 74 (2007)(landlord tort liability); *Kramer v. Kramer*, 199 Va. 409, 416, 100 S.E.2d 37, 43 (1957)(injured employee has a common law right to bring negligence action against a tortfeasor, unless a statute curtails that right). Virginia Code § 1-200 provides:

> The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.

Pursuant to this statute, the common law rule regarding pre-suit notice is the "rule of decision" in Virginia, except as altered by the Virginia General Assembly. Because the Virginia legislature did not alter this rule concerning the petitioner and VIT, it was the rule of decision in this case, unless displaced by the authority of the Shipping Act.

The applicable Virginia statute of limitations, Virginia Code § 8.01-243(A), requires that "every action for personal injuries", except as provided by another section of the statute or "by other statute," "shall be brought within two years after the cause of action accrues." Filing his action against VIT within the statutory two year limit made Walton's suit timely, unless that statutory limitations period is displaced by the authority of the Shipping Act.

B. The Shipping Act of 1984 does not pre-empt applicable Virginia law, and in particular does not authorize time limitations pertaining to land-based personal injury claims in a marine terminal operator's schedule of rates.

For the reasons discussed below, the Shipping Act of 1984 does not pre-empt applicable Virginia law affecting the timeliness of the petitioner's land-based personal injury action. In particular, the Act does not authorize time limitations pertaining to such actions in a marine terminal operator's schedule of rates.

Pursuant to Article VI of the United States Constitution, the laws of the United States "shall be the supreme Law of the Land; … any Thing in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const., Art. VI, cl. 2. As a result, under the doctrine of pre-emption, "any state law … must yield if it interferes with or is contrary to the federal law." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n.*, 505 U.S. 88, 89 (1992).

A federal statute may by its language expressly pre-empt state law, *Kansas v. Garcia*, 140 S.Ct. 791, 801 (2020); or a federal statute may implicitly pre-empt a state law or rule by conflict pre-emption or by field pre-emption. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376-77 (2015). Congress has found implied conflict pre-emption when 'it is impossible for a private party to comply with both state and federal requirements' or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Oneok*, 575 U.S. at 377; *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002). Field pre-emption occurs when the scope of the federal statute 'indicates that Congress intended to occupy the field exclusively,' *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 630 (2012), leaving 'no

room' for supplementary state regulation. *Kansas*, 140 S.Ct. at 801.

Deciding the scope of a federal statute's pre-emptive effect is guided by determining "the purpose of Congress." *Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct. 1288, 1297 (2016). "In the interest of avoiding unintended encroachment on the authority of the States … a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *CSX Transp. v. Easterwood*, 507 U.S. 658, 663-64 (1993). Relevant to this case, the States have the "traditional authority to provide tort remedies for their own citizens," *Silkwood v. Kerr-Mcgee Corp.*, 464 U.S. 238, 248 (1984), as well as a traditional interest in "local regulation of … harbors, piers, and docks," *South Carolina State Highway Dep't v. Barnwell Bros, Inc.*, 303 U.S. 177, 188 (1938).

Furthermore, analysis of Congress' purpose in a pre-emption context must be grounded 'in the text and structure of the federal statute at issue,' whether the theory of pre-emption is express pre-emption or implied pre-emption. *Kansas*, 140 S.Ct. at 804; *Va. Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1898 (2019). The text and structure of the Shipping Act of 1984, 46 U.S. C. § 40101, et seq., reveal no purpose on the part of Congress to impose time limitations on or otherwise regulate State tort law concerning land-based personal injuries on a marine terminal.

To begin with, the Act does not expressly pre-empt anything having to do with personal injuries. The Shipping Act of 1984 deals with international shipment of goods by water and the agreements and practices that affect the players in the ocean shipping industry, including ocean carriers and marine terminal operators. The Act

does not state that it pre-empts personal injury actions in any way. The Act does not create any remedy for personal injury. The Act and the regulations promulgated thereunder by the Federal Maritime Commission are silent concerning personal injury actions. Neither the Act nor its regulations prescribe any pre-suit notice of injury or claim requirements for personal injury claims, nor do the Act nor its regulations prescribe any limitations period for personal injury claims.

Congress' stated purposes of the Shipping Act of 1984 appear in 46 U.S.C. § 40101. These purposes include "establish[ing] a nondiscriminatory regulatory process for the common carriage of goods by water"; "provid[ing] an efficient and economic transportation system in the ocean commerce of the United States"; encouraging "an economically sound and efficient liner fleet of vessels in the United States"; and "promot[ing] the growth and development of United States exports." In addition, the Shipping Act creates limited exceptions to antitrust laws. 46 U.S.C. § 40307.

The statutory predecessor to the Shipping Act of 1984 is the Shipping Act of 1916. Passage of the 1916 Act was motivated by Congressional desire to regulate ocean commerce, by eliminating discriminatory practices which were stifling competition among carriers, while permitting certain shipping cartel arrangements. *Fed. Maritime Bd. v. Isbrandtsen*, 356 U.S. 481, 490-91 (1958). Marine terminal operators have been regulated under the 1916 Act and the 1984 Act to prevent "discrimination in the provision of terminal facilities." *Placquemines Port Harbor and Terminal Dist. v. Federal Maritime Com.*, 838 F.2d 536, 543 (D.C. Cir. 1988). As one court has summarized: "[T]he [1984] Shipping Act's text, scheme, and legislative

history demonstrate Congress' intent to create a comprehensive, predictable federal framework to ensure efficient and nondiscriminatory international shipping practices." *In re Vehicle Carrier Servs. Antitrust Litig.*, 847 F.3d 71, 82 (3d Cir. 2017), *cert. denied sub. nom. Alban v. Nippon Yusen Kabushiki Kaisha*, 138 S.Ct. 114 (2017).

The 1916 Shipping Act regulated, and the 1984 Act continues to regulate, activities of marine terminal operators concerning "property." To understand Congress' purpose in regulating marine terminal activities, it is helpful to know the role that terminal operators play with respect to such property. 'A marine terminal operator … is responsible for … the delivery and receipt of the ship's cargo, and all movement and handling of that cargo between the point-of-rest and any place on the marine terminal property except to shipside.' *Northeast Terminal Co. v. Caputo*, 432 U.S. 249, 254 n. 4 (1977)(discussing the Longshore and Harbor Workers Compensation Act). "A marine terminal operator provides storage for cargo at the terminal before and after shipment." *Whitcombe v. Stevedoring Servs. of Am.*, 2 F.3d 312, 315 (9th Cir. 1993).

Under the Shipping Act of 1916, "property", in the context of marine terminal activity, was interpreted to mean "cargo." See *American Export-Isbrandtsen Lines v. Federal Maritime Com.*, 444 F.2d 824, 836 (D.C. Cir. 1970). Under the 1984 Act, "property", in the context of marine terminal activity, is interpreted to mean "cargo." See *Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC*, 2013 FMC LEXIS 1, 58-59 (Fed. Mar. Com. 2013).

The Shipping Act of 1916, 46 U.S.C. § 816, required a marine terminal operator to "establish and enforce …regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property." *California v. United States*, 320 U.S. 577, 584-85 (1944). The Shipping Act of 1984 addresses the authority of a marine terminal operator to issue a schedule of rates in two sections. Pursuant to the Shipping Act of 1984, 46 U.S.C. § 41102(c), subtitled "Practices in Handling Property," a marine terminal operator must:

> establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering **property**.

(Emphasis added). Pursuant to 46 U.S.C. § 40501(f), a marine terminal operator may:

> make available to the public a schedule of rates, regulations and practices, including limitations for cargo loss or damage, pertaining to receiving, delivering, handling, or storing **property** at its marine terminal.

(Emphasis added).

In plain language, Congress limited the authority of each marine terminal operator to issue a schedule of **rates**, **regulations**, and **practices** pertaining to receiving, delivering, handling, or storing **property** (i.e., cargo) at its terminal. On the other hand, the language of the 1984 Act reveals no intent on the part of Congress to regulate personal injury claims for incidents occurring on marine terminal premises. No language in the Act authorizes marine terminal operators to issue rules governing personal injury claims, in a schedule of rates or otherwise.

Further pursuant to 46 U.S.C. § 40501(f), a marine terminal operator's schedule of rates pertaining to receiving, delivering, handling, or storing **property** is

"enforceable by an appropriate court as an implied contract without proof of actual knowledge of the provisions." The plain language of the statute does not authorize a schedule of rates limited to matters pertaining to property---i.e., cargo---to be enforced as an implied contract to time-bar a personal injury claim. As the case of *Crowley Liner Services, Inc. and Trailer Bridge, Inc. v. Puerto Rico Ports Authority*, 2001 FMC LEXIS 7 (Fed. Mar. Com. 2001) explains, when it enacted the enforcement provision to 46 U.S.C. § 40501(f), Congress' purpose was to remedy a long-standing problem of marine terminal operators---collecting unpaid charges for terminal use--- something that had nothing to do with displacing State law regulation of personal injury claims:

> [M]arine terminal operators had to sue in courts **to collect charges from users of their facilities** under some type of contractual or quasi-contractual theory.
>
> * * *
>
> [B]y enacting section 8(f) of the 1984 Act [46 U.S.C. § 40501(f)] … Congress clarified the situation by expressly giving marine terminal operators the right to sue in courts to enforce their "schedules" (formerly called "tariffs").

2001 FMC LEXIS at 82-83. (Emphasis added). The relevant legislative history confirms that Congress' intent in enacting the enforcement provision was to enable marine terminal operators to sue in court to collect charges for their services:

> This new provision is necessary to ensure that the operators of essential marine terminal transportation facilities are promptly **compensated for the services they provide** to waterborne commerce.

S. Rep. 105-61 (Ocean Shipping Reform Act Report of the Committee on Commerce, Science, and Transportation on S. 414, p. 25, Pet App. 221)(1997)(emphasis added).

Congress was careful to limit authorization of marine terminal operator schedules of rates to matters pertaining to property (cargo) on the terminal. Congress was also careful to prescribe time limitations in the 1984 Act, limiting their scope to matters involving violations of the Act. 46 U.S.C. § 41301(a) permits a complainant to file a complaint for a violation of the Shipping Act with the Federal Maritime Commission within three years after the claim accrues. On the other hand, the Act prescribes no time limitation for a claim that does not allege a Shipping Act violation, such as a personal injury action.

In short, neither the statutory language nor the legislative history evinces any Congressional intent to regulate State law personal injury claims against marine terminal operators, by authorizing terminal operators to impose special time limitations on such actions through a schedule of rates, or otherwise. Thus, the Shipping Act does not make it impossible for a marine terminal, like VIT, to comply with the Act and to issue a schedule of rates "pertaining to receiving, delivering, handling, or storing property at its marine terminal" that does not infringe on Virginia's regulation of personal injury tort remedies for its citizens, including the Virginia common law rule and two year limitations period at issue here.

Nor do the Virginia common law rule and the Virginia two year limitations period for personal injury actions stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in the Act. Again, the Act authorizes a marine terminal to issue a schedule of rates "pertaining to receiving, delivering, handling, or storing property at its marine terminal" only. The Act does

not authorize the schedule of rates to regulate personal injury actions. Moreover, the only time limitation provision in the Act, set forth in 46 U.S.C. § 41301(a), is limited to violations of the Act, not State law personal injury actions. Congress was evidently satisfied that a uniform time limitation restricted to Shipping Act violations was satisfactory to fulfill its purposes and objectives in the Act. Conversely, the absence of statutory language concerning time limitations for any claim that is not a Shipping Act violation indicates that Congress did not see the varying time limitation rules of each State for personal injury actions as an obstacle to fulfilling the purposes and objectives of the Act.

Neither the language of the Shipping Act, nor its legislative history, as discussed above, indicate that Congress intended through the Act to pre-empt the field of personal injury tort liability of marine terminal operators.

The Court has found field pre-emption only in "rare cases." *Kansas*, 140 S.Ct. at 801. The Court did find field pre-emption in the field of interstate carrier liability. Because the Interstate Commerce Act was "among the most pervasive and comprehensive federal regulatory schemes," it gave rise to "recurring pre-emption questions." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). For example, in *Gooch v. Oregon S.L.R. Co.*, 258 U.S. 22, 24 (1922), the Court upheld notice of claim provisions for a passenger's personal injuries in a railroad tariff, citing the case of *St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird*, 243 U.S. 592 (1917). In *Starbird*, *supra*, the Court held that, through the Interstate Commerce Act and the Carmack Amendment, Congress intended to occupy fully the

field of "liability of the carrier in interstate transportation." 243 U.S. at 595, *citing* *Adams Express Company v. Croninger*, 226 U.S. 491 (1912). In *Adams Express*, *supra*, the Court explained that, pursuant to the Interstate Commerce Act and the Carmack Amendment, on the subject of interstate carrier liability:

> Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it.
>
> * * *
>
> [W]hen Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist.

226 U.S. at 505-06.

While it is clear from the language of the statute and case law decided by this Court that the Interstate Commerce Act was intended by Congress to pre-empt the field of interstate carrier liability, including personal injury liability, there is no evidence, textual or otherwise, that Congress intended, through the Shipping Act of 1984, to pre-empt the field of marine terminal liability for land-based injuries on terminal premises. The plain language of the 1984 Shipping Act authorizes marine terminal operators to issue a schedule of rates "pertaining to receiving, delivering, handling, or storing **property** at its marine terminal," but not other matters. 46 U.S.C. § 40501(f). (Emphasis added). No court has held that, through the 1984 Act, Congress has pre-empted the field of marine terminal liability for workplace injuries. After Congress afforded workers' compensation remedies for workers injured on marine terminals through another statute, the Longshore & Harbor Workers' Compensation

Act, 33 U.S.C. § 901, et seq., this Court held that States can also afford workers' compensation remedies for such workers under State legislation. *Sun Ship Co. v. Pennsylvania*, 447 U.S. 715 (1980). In *Sun Ship*, *supra*, the Court noted that State regulation of worker injuries occurring ashore is particularly appropriate. 447 U.S. at 720. No court has held that, through the Act, Congress has pre-empted the field of marine terminal tort liability for personal injuries on terminal premises.

Moreover, adjudications concerning tariff time limitations under the Shipping Act of 1916 and Shipping Act of 1984 do not support the conclusion that Congress intended to authorize marine terminal operators to impose time limitations in a schedule of rates that shorten time for bringing State law personal injury actions against terminal operators. Under the 1916 Shipping Act, it was held that tariff provisions which imposed a notice of claim or other time limitation provision shorter than the two-year limitation period provided in the Act for bringing actions for violation of the Act were invalid. *Kraft Foods v. Federal Maritime Com.*, 538 F.2d 445, 446 (D.C. Cir. 1976). In the case of *Federal Commerce & Navigation Co. v. Calumet Harbor Terminals, Inc.*, 542 F.2d 437, 441 (7th Cir. 1976), the court held that the 1916 Act did not authorize notice of claim or shortened time to sue provisions in a marine terminal tariff. Under the 1984 Act, the Federal Maritime Commission has held that a marine terminal schedule of rates cannot impose shorter time limitations for violations of the Shipping Act than those embodied in the Act itself. *International Shipping Agency, Inc. v. The Puerto Rico Ports Authority*, 2004 FMC LEXIS 11, *58 (Fed. Mar. Com. 2004).

All the reasons stated above lead to the conclusion that the Shipping Act of 1984 does not pre-empt traditional State regulation of land-based personal injury torts, and that, in particular, the Act does not authorize a marine terminal operator to impose time limitations on such torts, through a schedule of rates, that conflict with State law.

C. Because the Shipping Act of 1984 does not authorize the schedule of rates of a marine terminal operator to impose time limitations on land-based personal injury claims, those limitations are not enforceable, and Walton's personal injury claim against VIT is timely.

For the reasons discussed in Section B of the Argument, the Shipping Act of 1984 does not pre-empt State law regulation of land-based personal injury remedies. The Act and, in particular 46 U.S.C. § 40501(f), limits the authority of a marine terminal operator to issue a schedule of rates "pertaining to receiving, delivering, handling, or storing property [i.e., cargo] at its terminal." Neither § 40501(f), nor any other part of the 1984 Act, authorizes a marine terminal to issue a schedule of rates imposing time limitations on land-based personal injury claims.

Because the time limitation provisions in VIT's Schedule of Rates are not authorized by the 1984 Act, with respect to land-based personal injury actions, those provisions are unenforceable to bar Walton's action against VIT. It is well-settled that the provisions of a tariff made without statutory authorization are unenforceable. *Southern Pacific Co. v. United States*, 272 U.S. 445, 447 (1926); *Greyhound Corp. v. United States*, 124 Ct. Cl. 758, 769 (1953). In other words, a provision in a tariff that is not authorized or required by the statute authorizing the

filing of the tariff is "entirely ineffectual." *Burlington Northern Railroad Company v. M.C. Terminals, Inc.*, 1992 FMC LEXIS 27, 81 (Fed. Mar. Com. 1992).

Pursuant to this rule, courts have repeatedly held that time limitations in a tariff that are not authorized by the federal statute from which the tariff is derived are unenforceable. E.g., *Bernard v. U.S. Aircoach*, 117 F.Supp. 140-42 (S.D. Cal. 1953); *Toman v. Mid-Continental Airlines, Inc.*, 107 F.Supp. 345, 346 (W.D. Mo. 1952); *Thomas v. American Airlines, Inc.*, 104 F.Supp. 650 (E.D. Ark. 1952); *Crowell v. Eastern Air Lines, Inc.*, 240 N.C. 20, 27-28, 81 S.E.2d 178, 184 (1954).

Because the time limitation provisions of VIT's Schedule of Rates are unenforceable with respect to Walton's personal injury claim, Virginia law controls, and Walton's suit against VIT is not time-barred. Under the common law of Virginia, Walton was not required to file any pre-suit notice of claim against VIT. Under Virginia Code § 8.01-243(A), his negligence action filed within two years of the incident causing his injuries was timely.

CONCLUSION

For all the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Lance A. Jackson

Lance A. Jackson, Esq.
Montagna Klein Camden, L.L.P.
425 Monticello Avenue
Norfolk, Virginia 23510
Telephone: (757) 622-8100
Email: ljackson@montagnalaw.com
Counsel for Petitioner