Case No. 22-562

IN THE

# Supreme Court of the United States

STEPHEN DOUGLASS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHINGO ALEXANDER DOUGLASS, ET AL.,

*Petitioners,*

v.

NIPPON YUSEN KABUSHIKI KAISHA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF ASSOCIATION OF TRANSPORTATION LAW PROFESSIONALS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE* [1]

The Association of Transportation Law Professionals, Inc. ("ATLP"), a Maryland corporation, files this brief in support of Petitioners. ATLP members include practicing transportation attorneys, government officials, corporate counsel, and industry professionals. ATLP is concerned about the impact of the Fifth Circuit's decision on the uniform exercise of admiralty jurisdiction by federal courts over foreign defendants under the United States Constitution Article III, Section 2, Clause 1 and the Death on the High Seas Act, 46 U.S.C. §§ 30301-30308.

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[1] Pursuant to Supreme Court Rule 37, notice of ATLP's intent to file this *amicus curiae* brief was received by counsel of record for all parties at least ten days prior to the due date of this brief. The undersigned further affirms that no party's counsel authored this brief in whole or in part, and no person or entity, other than ATLP and its counsel, made a monetary contribution to fund the brief's preparation or submission.

## SUMMARY OF ARGUMENT

All cases brought by United States citizens for deaths occurring on the high seas or territorial waters of other nations are now at risk of dismissal if foreign defendants are not "at home" within the meaning of *Daimler AG v. Bauman*, 571 U.S. 117 (2013). But this Court has never held that the "at home" requirement envisioned in *Daimler* applies to admiralty cases.

The United States Constitution Article III, Section 2, Clause 1 confers subject matter jurisdiction over admiralty cases on federal courts, which have applied Federal Rule of Civil Procedure 4(k)(2) to admiralty cases to establish personal jurisdiction over foreign defendants. The Fifth Circuit's decision threatens to restrict the constitutional delegation of admiralty jurisdiction to federal courts over international disputes, disregarding over a century of judicial precedent from this Court.

The Fifth Circuit's decision restricts the ability of federal courts sitting in admiralty to exercise jurisdiction over matters *communis juris* even when the parties are citizens of countries that are signatories to international treaties, such as the Convention for International Regulations for Preventing Collisions at Sea (COLREGS). 28 U.S.T. 3459, T.I.A.S. No. 8587, 1050 U.N.T.S. 16; 33 U.S.C. §§ 1601-1608; s*ee* H.R. Rep. No. 447, 95th Cong., 1st Sess. 1 (1977). Moreover, the decision limits the remedies of U.S. citizens under the Death on the

High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.* (reorganized and restated at 46 U.S.C. §§ 30301-30308), in contravention of clear congressional intent to provide exclusive jurisdiction to federal courts over those claims.

The impact of the Fifth Circuit decision is that no foreign defendant can ever be brought under the jurisdiction of a federal court to respond to a DOHSA claim. Only this Court can provide clarity and reconcile this judicial anomaly.

## ARGUMENT

### A. Admiralty Law Is Deeply Rooted In The Constitution.

Federal courts' authority to hear admiralty cases is rooted in a constitutional mandate. The Constitution provides that the federal judicial power "shall extend . . . to all Cases of admiralty and maritime jurisdiction" including between United States Citizens and "foreign States, Citizens or subjects." U.S. Const., art. III, § 2, cl. 1.[2]

After the Constitution was enacted, the Court rejected the narrower jurisdiction traditionally exercised by English courts over admiralty cases, enabling substantial expansion of admiralty jurisdiction over the following years. In 1820, the Court held that admiralty jurisdiction applies to persons on board a vessel on the high seas:

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[2] Even before the Constitution was put in place, Alexander Hamilton explained in The Federalist Papers the need for a national admiralty power:

> Maritime causes . . . so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are by the present confederation submitted to federal jurisdiction.

The Federalist No. 80.

> The ocean, the high seas, are a common domain; and every ship, private as well as public, is there upon the territory the her sovereign; and amenable to no laws, but the laws of her sovereign, and the law of nations . . . . If the crew had all shipped in England, and been English subjects, they would have been equally entitled to protection, and equally amenable to our laws. If, upon the ocean, or high seas, a foreigner had been murdered, his death would have been equally avenged by our laws. . . . If a foreigner on board this ship, had committed an offence, he would equally have been liable. It is not correct, then, to say, that personal jurisdiction is universal, as to citizens; nor that it does in no case extend to foreigners.

*United States v. Wiltberger*, 18 U.S. 76, 88 (1820).

More than 50 years later, the Court stated that it was "unquestionable" that the framers of the Constitution did not intend "to place the rules and limits of maritime law under the disposal and regulation of the 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." *The Lottawanna,* 88 U.S. 558, 575 (1874).

The Court has consistently interpreted the

constitutional grant of admiralty jurisdiction to empower federal courts "to continue the development of [admiralty] law." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 361 (1959). As the Fifth Circuit's decision below acknowledges, "Admiralty's broad jurisdiction has been described as extending 'to all acts and torts done upon the high seas, and within the ebb and flow of the sea.' Indeed, in no other context do courts 'have complete jurisdiction over suits . . . between foreigners.'" Pet. App. 28 (quoting 2 Joseph Story, *Commentaries on the Constitution of The United States*, 450, § 1665 (4th ed. 1873)); *Langnes v. Green*, 282 U.S. 531, 544 (1931)). Likewise, the Fifth Circuit's dissent reminds that, "[f]ederal courts hold a unique role in admiralty to define causes of action and to hear cases arising in the world's common areas—the high seas—as the Supreme Court has made clear." Pet. App. 109 (Elrod, J., dissenting); *see also Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20-21 (1963) ("This Court has long recognized its power and responsibility in this area and has exercised that power where necessary to do so."). If the decision below stands, it threatens the exceptional nature of admiralty cases.

## B. The Application Of The "At Home" Requirement Will Have A Deleterious Impact On Admiralty Law.

### 1. Personal Jurisdiction In Admiralty Law Does Not Depend On The "At Home" Requirement.

There is no controversy that federal district courts have subject matter jurisdiction based on any

civil case of admiralty law. *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991) (citing 28 U.S.C. § 1333(1); *Ins. Co. v. Dunham*, 78 U.S. 1, 26 (1871)). There is also no controversy that where subject matter jurisdiction is based on admiralty law, the court's jurisdiction over the parties is national in scope, and therefore the Due Process Clause of the Fifth Amendment, and not the Fourteenth Amendment controls. *Pike v. Clinton Fishpacking, Inc.*, 143 F. Supp. 2d 162, 166 (D. Mass. 2001). "[U]nder the Fifth Amendment, a plaintiff need only show that the defendant has adequate contacts with the United States as a whole, rather than with a particular state." *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 618 (1st Cir. 2001).

By extension, courts have long recognized the applicability of Federal Rule of Civil Procedure 4(k)(2) to admiralty cases to establish personal jurisdiction over foreign defendants. *See, e.g., Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1219 n.24 (11th Cir. 2009); *System Pipe & Supply, Inc. v. M/V Viktor Kurnatovskiy*, 242 F.3d 322, 325 (5th Cir. 2001); *W. Africa Trading & Shipping Co v. London Int'l. Grp.*, 968 F. Supp. 996, 1000 (D.N.J. 1997).

Rule 4(k)(2) is particularly apt to admiralty cases because defendants are often not based in the United States. The Federal Circuit Court observed that:

> Rule 4(k)(2) closed a loophole that existed prior to the 1993 amendments of the Federal Rules of Civil Procedure.

> Before the adoption of Rule 4(k)(2), a non-resident defendant who did not have "minimum contacts" with any individual state sufficient to support exercise of jurisdiction, but did have sufficient contacts with the United States as a whole, could escape jurisdiction in all fifty states. Rule 4(k)(2) was adopted to ensure that federal claims will have a U.S. forum if sufficient national contacts exist.

*Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403, 1414 (Fed. Cir. 2009) (citations omitted).

In evaluating national contacts, the 1993 Amendments to the Federal Rules of Civil Procedure note:

> There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment . . . . [which] requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party.

Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 571-72 (1993) (internal citations omitted).

Significantly, courts have recognized that under Rule 4(k)(2), the exercise of jurisdiction is dependent upon the defendant's national contacts and is measured by reference to the Fifth Amendment. *See, e.g., Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico*, 563 F.3d 1285, 1295-96 (Fed. Cir. 2009); *Dardana Ltd. v. Yuganskneftegaz*, 317 F.3d 202, 207 (2d Cir. 2003); *Submersible Sys., Inc. v. Perforadora Cent., S.A. de C.V.*, 249 F.3d 413, 420 (5th Cir. 2001).

When Rule 4(k)(2) became effective in 1993, courts sitting in admiralty continued to adhere to the traditional minimum contacts analysis. *See, e.g., Oldfield*, 558 F.3d at 1218-24.

But after the Court in *Daimler* was asked to address a question arising under the Fourteenth Amendment in a case that involved foreign plaintiffs suing foreign defendants based on foreign conduct, some courts, including the Fifth and Eleventh Circuits, relied upon the decision for the proposition that the "at home" requirement also applied to admiralty cases, including this one.[3]

In fact, a district court sitting in admiralty observed that: "In the wake of the Supreme Court's decision in *Daimler*, it appears unlikely that general

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[3] *See, e.g., Schulman v. Institute for Shipboard Educ.,* 624 F. App'x 1002, 1005-6 (11th Cir. 2015); *Patterson v. Aker Sols. Inc.*, 826 F.3d 231, 234 (5th Cir. 2016); *Skoglund v. PetroSaudi Oil Servs. (Venezuela) Ltd.*, No. CV 18-386, 2018 WL 6112946, at *5 (E.D. La. Nov. 20, 2018); *Snyder v. Royal Caribbean Cruises Ltd.*, 540 F. Supp. 3d 1175, 1182-3 (S.D. Fla. 2021).

jurisdiction over a foreign defendant could ever be available under 4(k)(2)."[4] *Thompson v. Carnival Corp.*, 174 F. Supp. 3d 1327, 1338 n.9 (S.D. Fl. 2016).

By applying the "at home" requirement to maritime cases, the courts are effectively ignoring the purpose of Rule 4(k)(2) and abandoning the traditional minimum contacts analysis based on a fundamental misunderstanding that *Daimler* applies to admiralty law cases and the Due Process Clause of the Fifth Amendment. Consequently, many courts including the Fifth and Eleventh Circuits, are permitting foreign defendants in admiralty cases to escape jurisdiction from all 50 states—which is exactly what Rule 4(k)(2) was intended to prevent.

If left unaddressed, foreign defendants in admiralty cases—including Respondent in this case—that otherwise have satisfied the traditional minimum contacts will continue to enjoy immunity from suits while reaping the benefits of the American legal system. This offends the "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

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[4] Other courts, however, have apparently disregarded the "at home" requirement to admiralty cases. *See, e.g.*, *Ogden v. GlobalSantaFe Offshore Servs.*, 31 F. Supp. 3d 832, 839 (E.D. La. 2014); *O'Berry v. ENSCO Int'l, LLC*, No. CV 16-3569, 2017 WL 1048029, at *9 (E.D. La. Mar. 20, 2017); *Am. Home Assurance Co. v. M/V One Helsinki*, 546 F. Supp. 3d 90, 94-95 (D. Mass 2021).

### 2. Admiralty Cases Are "Exceptional Cases" Within The Meaning Of *Daimler*.

The Court previously acknowledged that, in exceptional cases, a corporation's operations may be so substantial in a forum that jurisdiction would be warranted even though the forum is not the corporation's formal place of incorporation or principal place of business. *Daimler AG*, 571 U.S. at 139 n.19. Admiralty cases, such as this one, are such "exceptional" cases. Foreign corporations which engage in maritime activity that significantly impacts U.S. marine commerce or U.S. citizens engaged in maritime activities should be held accountable in federal courts, just as if they were "at home" here.

Though it may not have been this Court's intention, the *Daimler* decision has imposed a sea change to admiralty law. The impact is palpable, and this Court should once again be concerned about "the consequences of the inability" to bring suit against foreign defendants, particularly in the context of admiralty law. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 111 (1987).

Justice Sotomayor foresaw the exact issue this case presents: "a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. Court, even if the hotel company has a massive presence in multiple States." *Daimler*, 571 U.S. at 159

(Sotomayor, J., concurring) (referencing *Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264 (11th Cir. 2002)).

Justice Sotomayor's concerns have now become a reality in admiralty law. Multinational corporations, such as Respondent, are presently immune from injuries and deaths of United States citizens that take place on the high seas. Maritime incidents, however, have "a potentially disruptive impact on maritime commerce." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (internal citations omitted). And the collision of two vessels at sea that results in injuries and deaths of U.S. citizens bears even more significant relationship with maritime commerce. *See Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675 (1982) (observing that the "potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion" that a collision between boats on navigable waters "has a significant relationship with maritime commerce.").

## C. Vessel Collisions Are Matters Of International Maritime Law Over Which The Federal Courts Have And Should Exercise Jurisdiction.

### 1. The Maritime Law Of Collision Is *Communis Juris*.

"Modern Anglo-American collision law was developed very largely by Stephen Lushington, judge of the English High Court of Admiralty from 1838 to

1867. During this period collision cases become much more frequent."[5] Maritime collision laws are indisputably well-developed in the federal general maritime law of the United States, international treaties as the supreme law of the land pursuant to Article VI, Clause 2 of the Constitution, and the laws of all other maritime trading nations.

For more than a century, this Court has recognized that certain causes of action in admiralty are "*communis juris*—that is, where they arise under the common law of nations . . . ." *The Belgenland*, 114 U.S. 355, 365 (1885). "'All questions of collision are questions *communis juris*'" and accordingly are matters of international law. *The Belgenland*, 114 U.S. at 367 (quoting *The Johann Friederich,* 1 Wm. Rob. 35). "Both, [salvage and collision] when acted on the high seas, between persons of different nationalities, come within the domain of the general law of nations, or *communis juris*, and are *prima facie* proper subjects of inquiry in any court of admiralty . . . ." *Id.* at 362. Finally, because collision liability is routinely governed by international treaties, this Court acknowledged that an admiralty court is competent to construe treaty stipulations between the United States and the country of a foreign ship. *Id.* at 364.

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[5] Nicholas J. Healy & Joseph C. Sweeney, *The Law of Marine Collision*, at 5 (1st Ed. 1998).

### 2. The District Court Sitting In Admiralty Should Have Applied The Applicable Treaties Between The United States And Japan.

As seafaring nations, the United States and Japan are signatories to certain international conventions which regulate the worldwide shipping industry and impose general uniformity on international shipping to enhance safety and promote world trade. Importantly in this case, both the United States and Japan are signatories to the *Convention for International Regulations for Preventing Collisions at Sea*, Oct. 20, 1972 (the "COLREGS"), 28 U.S.T. 3459, T.I.A.S. No. 8587, 1050 U.N.T.S. 16. In 1975, the Senate consented to the ratification of the Convention. *See* H.R. Rep. No. 447, 95th Cong., 1st Sess. 1 (1977). Shortly thereafter, the United States began implementing the COLREGS through federal legislation and administrative regulations. *See id.*; *see also* 33 U.S.C. §§ 1601-1608; 33 C.F.R § 81. These uniform regulations function as maritime "traffic laws" and govern rules at sea including vessel speed, visibility, look out and pilotage requirements, maneuvering, and collisions. U.S. District Courts have interpreted and applied COLREGS provisions. *See, e.g.*, *Juno SRL v. S/V Endeavour*, 58 F.3d 1, 4 (1st Cir. 1995) ("The history of the COLREGS shows that they were enacted because of the need to establish a code of international rules of the road for maritime traffic throughout the world." (*citing* H.R. Rep. No. 447, 95th Cong., 1st Sess. 1977, 1977 U.S.C.C.A.N. 509)); *Martha's Vineyard Scuba Headquarters, Inc. v.*

*Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065-66 (1st Cir. 1987); *Shell Offshore, Inc. v. Tesla Offshore, L.L.C.*, No. 13–6278, 2015 WL 5714629, at *3-*4 (E.D. La. Sept. 28, 2015).[6]

The United States and Japan are also Member States and participants in the International Maritime Organization ("IMO") and are signatories to the IMO Convention.[7] The IMO is a specialized agency of the United Nations, whose purpose "is the global standard-setting authority for the safety, security and environmental performance of international shipping."[8] Moreover, the United States and Japan ratified the 1974 *International Convention for the Safety of Life at Sea* ("SOLAS"), Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700. SOLAS is considered the most important international treaty covering the safety of cargo and passenger ships.

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[6] Notably, the underlying factual dispute between the parties was whether the Respondent's Japanese flagged vessel had a proper lookout. The United States District Court sitting in admiralty should have applied the COLREGS to the facts of the case.

[7] "The IMO Convention entered into force in 1958 . . . ." International Maritime Organization, *History of IMO*, https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx (last visited Dec. 14, 2022).

[8] International Maritime Organization, *Introduction to the International Maritime Organization*, https://www.imo.org/en/About/Pages/Default.aspx (last visited Dec. 14, 2022).

The lower court should have applied COLREGS and other applicable treaty stipulations to the collision between Respondent's Japanese flagged vessel and the United States naval ship. The admiralty court had an interest in interpreting the international laws applicable to this collision, notwithstanding the fact that Respondent is a foreign entity operating a foreign flagged vessel.

### 3. Judicial Precedent Required The District Court To Adjudicate This Dispute.

It is well settled that pursuant to 28 U.S.C. § 1333, "federal district courts have admiralty jurisdiction to entertain actions, *in personam* or *in rem*, arising from collisions on the navigable waters of the United States, the high seas, or the territorial waters of other nations." John Paul Jones, *Collisions*, 8 Benedict on Admiralty, § 9.03, (7th Ed. Rev.). This Court has acknowledged that a suit in admiralty, even between foreigners, is within the jurisdiction of United States District Courts. *The Belgenland*, 114 U.S. at 368-69 (There is "no good reason" why a party injured on the high seas "should ever be denied justice in our courts" even when both parties are "foreigners[.]").[9]

Although *The Belgenland* involved an *in rem* action, the Fifth Circuit in this case incorrectly

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[9] *The Belgenland* involved interpretation of collision liability between two foreign flagged vessels. Here, the dispute is between the personal representatives of U.S. Navy sailors and a Japanese vessel.

limited *The Belgenland's* holding to vessel *in rem* actions. In so doing, the Fifth Circuit ignored long standing and consistent application of the precedent supporting a finding of jurisdiction over international parties for incidents occurring on the high seas. *See, e.g.*, *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1142-43, 1145-46 (5th Cir. 1984), *overruled on other grounds by In re Air Crash Disaster near New Orleans, La. on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987); *Gkiafis v. S.S. Yiosonas*, 387 F.2d 460, 462 (4th Cir. 1967) ("A suit in admiralty between foreigners is within the jurisdiction of the District Courts of the United States. Not only does jurisdiction exist, but it will be exercised 'unless special circumstances exist to show that justice would be better subserved by declining it.'" (quoting *The Belgenland*, 114 U.S. at 367)); *Yee Ying Ching v. M/V Maratha Endeavour*, 301 F. Supp. 809, 809-10 (E.D. Va. 1968). Further, the Fifth Circuit's analysis failed to evaluate or account for the historical backdrop upon which *The Belgenland* was decided or the specific nature of vessel collisions. *See* Pet. App. 28-30.

As Judge Elrod's Dissent portends, if the Fifth Circuit's decision is permitted to stand, federal courts' "ability to hear many cases sounding in admiralty—an area of law in which [federal courts] have long been empowered to adjudicate claims involving far-flung parties aboard vessels in far-flung places on the seven seas" will be vastly curtailed, in contravention of constitutional and statutory doctrines. Pet. App. 109 (Elrod, J.,

dissenting). Accordingly, the district court should have exercised admiralty jurisdiction in this case.

### D. Congress Set Forth A Comprehensive Statutory Scheme For Claims Involving Death On The High Seas Which Invokes Federal Courts' Exclusive Admiralty Jurisdiction.

#### 1. History And Enactment Of The Death On The High Seas Act.

In 1846, England enacted the Lord Campbell's Act, later known as the Fatal Accidents Act, which provided a civil remedy for death caused by negligence. 9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95.[10] In *Davidsson v. Hill*, 2 K.B. 606 (U.K. 1901), Justices Kennedy and Phillimore applied the Fatal Accidents Act 1846 to the death of a foreign seaman on a foreign ship, resulting from a collision with a British ship on the high seas. In doing so, the English court recognized the importance of a cause of action for dependents of a person negligently killed was regarded as a universal principle to be treated as part of the international law maritime.

Prior to 1920, the federal general maritime law did not provide a cause of action for the death of a person on navigable waters. *See The Harrisburg*,

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[10] "Subsequently, all of the states of the United States enacted wrongful death statutes that resembled Lord Campbell's Act." 2 Benedict on Admiralty § 81a (2022); *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 390 (1970) (discussing state wrongful death statutes).

119 U.S. 199, 213 (1886); *The Alaska*, 130 U.S. 201, 209 (1889). In 1920, Congress enacted the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761 *et seq.* (reorganized and restated at 46 U.S.C. §§ 30301-30308). DOHSA's aim was to provide an "effective wrongful death remedy for survivors of persons killed on the high seas." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 214 (1986). Congress sought to join other maritime nations, like England, to enact a rational, uniform law to claims arising from such incidents on the high seas.[11] H.R. Rep. No. 674, 66th Cong., 2d Sess., 3-4 (1920); *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 398 (1970); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 215 (1996). DOHSA provides the decedent's personal representative the right to maintain an action *in rem* or *in personam.* 46 U.S.C. § 761 (recodified as 46 U.S.C. § 30302) (The action may be

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[11] As Congressman Volstead stated during the March 17, 1920 floor debate:

> The object of this bill is to give a cause of action in case of death resulting from negligence or wrongful act occurring on the high seas. Nearly all countries have modified the old rule which did not allow relief in the case of death under such circumstance. Under what is known as Lord Campbells act, England many years ago authorized recovery in such cases. France, Germany, and other European countries now followed this more enlightened policy and allow dependent partis to recover in case of death of their near relatives upon the high seas.

59 Cong. Rec. 4482-4486 (1920).

maintained "against the vessel, person or corporation which would have been liable if death had not ensued."). DOHSA brought a measure of uniformity and predictability to the law on the high seas and courts should not "rewrit[e] rules that Congress has affirmatively and specifically enacted." *Mobile Oil Corp v. Higgenbotham*, 436 U.S. 618, 625 (1978) *overruled on other grounds by Miles v. Apex*, 498 U.S. 19, 20 (1990).

### 2. The Death On The High Seas Act Was Properly Invoked By Petitioners And The District Court Should Hear The Merits Of Their Claims.

For decades, courts have applied DOHSA whenever death occurs on the high seas, whether caused by negligence or unseaworthiness. *E.g.*, *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 221-30 (1996) (DOHSA claim against airline brought by survivors of passenger killed when airline was shot down over Sea of Japan in Soviet missile attack); *Kuntz v. Windjammer Barefoot Cruises, Ltd.*, 573 F. Supp. 1277, 1282-84 (W.D. Pa. 1983) (cruise company liable for fatal scuba-diving accident on high seas); *Whitaker v. Blidberg–Rothchild Co.*, 195 F. Supp. 420, 421-23 (E.D. Va. 1961) (vessel and its owner liable for death of drowned seaman), or even intentional conduct, *see, e.g.*, *Bowoto v. Chevron Corp.*, No. C 99–02506, 2006 WL 2455761, at *5 (N.D. Cal. Aug. 22, 2006) (DOHSA "clearly" applied to a claim brought on behalf of Nigerian individuals allegedly killed by the Nigerian military because the deaths "occurred [on

an oil drilling platform] off the Nigerian coast and well over one marine league from U.S. shore"). Courts typically do not limit the term "high seas" within the meaning of DOHSA to international waters, but include the territorial waters of a foreign nation as long as they are more than a marine league away from any United States shore. 2 Benedict on Admiralty § 81b (2022).[12]

DOHSA also includes a provision expressly permitting claims under the laws of a foreign country along with, or instead of, DOHSA claims. 46 U.S.C. § 30306 ("When a cause of action exists under the law of a foreign country for death by wrongful act, neglect, or default on the high seas, a civil action in admiralty may be brought in a court of the United States based on the foreign cause of action, without abatement of the amount for which recovery is authorized."). Through this provision, Congress preserved the right to recover under the law of another sovereign nation for whatever measure of damages such law might provide, regardless of any inconsistency with the measure of damages under DOHSA. The complaint in this case alleged that the Japanese wrongful death statute could be applied. 46 U.S.C. § 30306.

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[12] *See Howard v. Crystal Cruises*, 41 F.3d 527, 529-30 (9th Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995) (territorial waters of Mexico); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 892-94 (5th Cir. 1984) (English Channel).

Since the passage of DOHSA, Congress expanded the scope of DOHSA's applicability to provide for remedies to those involved in airplane accidents, in which death occurs on the high seas. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 114 Stat. 61, 131, amending 46 U.S.C. §§ 761-762 (recodified as 46 U.S.C. §§ 30301-30308); *see also Offshore Logistics*, 477 U.S. at 218; *Exec. Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 264, 268 (1972). Similarly, England has expanded the Fatal Accidents Act to include other maritime perils, including deep sea and offshore mining operations. *See* Deep Sea Mining Act, 1981, c.53 (U.K.).

Here, Petitioners sought redress for the deaths of the decedents under DOHSA, and the federal district court should hear the merits of their claims. 46 U.S.C. § 30302. The purpose of DOHSA was to codify and provide a maritime cause of action for parties—here United States' citizens. *See Miles*, 498 U.S. at 24 ("The Jones Act and DOHSA established a policy in favor of maritime wrongful death recovery."). The circumstances of this case fall squarely within the ambit of DOHSA. *See LaCourse v. PAE Worldwide Incorp.*, 980 F.3d 1350, 1357-58 (11th Cir. 2020) ("Where a death occurs on the high seas, DOHSA applies, full stop."). Since enactment of DOHSA, Congress has sought to expand, not limit recovery under the act. It cannot be that absent a principal place of business or a company sufficiently "at home" in the United States, a century of precedent and congressional action are rendered ineffective or null.

Perplexingly, if the Fifth Circuit's ruling stands, it may be easier to obtain recourse against foreign sovereigns in U.S. courts than foreign-headquartered corporations with extensive ties to the U.S. For example, courts have recognized that DOHSA claims may be pursued against foreign sovereigns under certain circumstances for deaths occurring on the high seas. *See, e.g.*, *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 559, 563 (E.D. Va. 2007) (holding DOHSA may be invoked against a foreign state under § 1605(a)(7) of the Foreign Sovereign Immunities Act, and that Sudan was liable to plaintiffs under DOHSA for the wrongful deaths of the seventeen sailors killed aboard a U.S. warship in the Port of Aden, Yemen). Here, the district court should have allowed Petitioners to pursue recourse against international corporations doing extensive business in the United States.

The Fifth Circuit's decision strips courts of jurisdiction provided under the Constitution and explicitly expanded by Congress. The Fifth Circuit's ruling, if allowed to stand, will "redirect United States citizen-plaintiffs—asserting United States federal law claims and invoking United State federal law service of process—offshore, often to countries with far less developed legal systems than Japan." Pet. App. 124 (Higginson, J., dissenting).

### 3. Most Of The Corporate Shipowners Involved In Global Maritime Commerce Are Not "At Home" In The United States.

It is difficult to overstate the impact this decision will have on the ability of those harmed in accidents occurring on the high seas to seek recourse in United States' courts. Today, at least eighty percent of global cargo is transported on the high seas, implicating trillions of dollars of economic activity.[13] Most corporate shipowners of other maritime nations are likely not "at home" in the United States under the *Daimler* test. If the Fifth Circuit's decision is permitted to stand, American and foreign citizens will be unable to avail themselves of U.S. courts when accidents involving foreign corporate shipowners and U.S. ships inevitably occur on the high seas.

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[13] United Nations Conference on Trade & Develop., *Review of Maritime Transport*, https://unctad.org/topic/transport-and-trade-logistics/review-of-maritime-transport (last visited Nov. 23, 2022); International Monetary Fund Blog, Yan Carrière-Swallow, et al., *How Soaring Shipping Costs Raise Prices Around the World*, https://www.imf.org/en/Blogs/Articles/2022/03/28/how-soaring-shipping-costs-raise-prices-around-the-world (last visited Nov. 23, 2022).

### E. Additional Practical Considerations Militate In Favor Of Federal Court's Exercise Of Jurisdiction In This Case.

#### 1. Actions Against The Government For Death On The High Seas.

Following enactment of the Federal Tort Claims Act ("FTCA"), an individual could pursue an action against the U.S. government for wrongful death on the high seas. *E.g.*, *United States v. Gavagan,* 280 F.2d 319, 321 (5th Cir. 1960) (holding United States liable under DOHSA through the FTCA for deaths resulting from negligent rescue efforts on the high seas); *Blumenthal v. United States,* 189 F. Supp. 439, 446-47 (E.D. Pa. 1960) ("In the same manner as a private person is liable under the Death on the High Seas Act, so, too, is the Government under the Federal Tort Claims Act."); *Moran v. United States,* 102 F. Supp. 275, 279 (D. Conn. 1951).

Subsequently, Congress enacted the Suits in Admiralty Act ("SIA"), 46 U.S.C. § 30901, *et seq.*, and The Public Vessels Act ("PVA"), 46 U.S.C. § 31101, *et seq.*, which operate as a waiver of sovereign immunity by the United States in cases to which they apply. The SIA provides a waiver of federal sovereign immunity for admiralty claims arising from the use of government-owned ships as merchant vessels, and the PVA deals with claims for damage caused by public vessels, such as warships, Coast Guard vessels, and other ships not involved in the merchant trade. The 1960 amendment to the SIA

extended jurisdiction under the SIA "to the full range of admiralty cases which might have been maintained had a private person or property been involved rather than the Government or its agents and employees or property." S. Rep. No. 92-1079, 92d Cong. (2d Sess.1972); *Bearce v. United States*, 614 F.2d 556, 558 (7th Cir. 1980); *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 142–45 (5th Cir. 1971). This includes claims brought under DOHSA. *E.g., Williams v. United States*, 711 F.2d 893, 897 (9th Cir. 1983)("[A] DOHSA suit against the United States mandates a pleading of the [SIA.]"); *Roberts v. United States*, 498 F.2d 520, 526 (9th Cir. 1974) ("[T]he Suits in Admiralty Act, as amended, encompasses aviation wrongful death actions against the United States arising under the general maritime law or under the Death on the High Seas.").

### 2. Limitations On Remedies For Servicemen And The Fifth Circuit Decision Threaten To Destroy The Underlying Purpose Of DOHSA.

While most individuals may pursue an action against the government for death or injury occurring on the high seas, active-duty military personnel may not. *See* 28 U.S.C. § 2680(j) (FTCA exception for claims arising out of combatant activities during time of war); *Feres v. United States*, 340 U.S. 135, 146 (1950) (holding that the federal government "is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service") (the "*Feres* Doctrine").

Military personnel are generally barred under the *Feres* doctrine from pursuing actions against the U.S. government for tortious injuries resulting from duty on the high seas, whether brought under the FTCA, the SIA, or the PVA. *See Blakey v. U.S.S. Iowa*, 991 F.2d 148, 151–52 (4th Cir. 1993); *Miller v. United States*, 42 F.3d 297, 300 (5th Cir. 1995) ("The *Feres* doctrine applies with equal force to bar actions by service members under the Suits in Admiralty Act and the Public Vessels Act."); *Bon v. United States*, 802 F.2d 1092, 1094 n.2 (9th Cir. 1986); *Potts v. United States*, 723 F.2d 20, 22 (6th Cir. 1983) ("The rationale supporting the ruling in *Feres* limiting the waiver of sovereign immunity applies with equal force in the context of governmental liability in admiralty."); *Hillier v. S. Tow. Co.*, 714 F.2d 714, 721, 724 (7th Cir. 1983) ("[S]ervicemen on active duty have never been allowed to bring tort suits against the government under the Suits in Admiralty Act either. . . . [A]s the government has never had a tort duty to its sailors, an indemnity action based on the theory that the government was the primary or active tortfeasor in an accident to a sailor has no basis in admiralty law . . . ."); *De Bardeleben Marine Corp.*, 451 F.2d at 142-43.

The Fifth Circuit decision eliminates one of Petitioners' few remaining avenues for recourse—the lower court's ability to hear active duty service members' claims against Respondent, as a private entity. Accordingly, the Fifth Circuit incorrectly declined jurisdiction and its judgment should be reversed.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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