No. 17-1104

In The
Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP., ET AL.,

Petitioners,

v.

ROBERTA G. DEVRIES, ADMINISTRATRIX OF THE ESTATE OF JOHN B. DEVRIES, DECEASED, AND WIDOW IN HER OWN RIGHT, ET AL.,

Respondents.

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

AMICI CURIAE BRIEF ON BEHALF OF MULTIPLE VETERANS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

CHRISTIAN HARTLEY
Counsel of Record
MAUNE RAICHLE HARTLEY
FRENCH & MUDD, LLC
1015 Locust St.
St. Louis, MO 63101
Phone: (314) 241-2003
chartley@mrhfmlaw.com

Counsel for Amici Curiae

AUGUST 2018

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

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that advocate for the rights and interests of those who served in the United States Navy. These organizations are comprised of U.S. Navy veterans who served aboard submarines, destroyers, aircraft carriers and ships to protect American interests at home and abroad. Many of *Amici's* members were exposed to asbestos-containing equipment during their service. As a result, *Amici* have a significant interest in ensuring maritime law provides access to justice for those veterans who were injured by asbestos-containing products and equipment.

The Retired Enlisted Association ("TREA") is a 501(c)(19) national organization comprised of retired enlisted military men and women from all branches of the U.S. military. TREA has thirty-six active chapters in the United States and Puerto Rico. Military Veterans Advocacy is a non-profit 501(c)(3) organization with over 10,000 followers that works to protect the rights and benefits of current and former military servicemen. The Blue Water Navy Vietnam Veterans Association is a non-profit 501(c)(3) organization comprised of 800 members and 3500 followers that supports veterans of all wars and advocates on behalf of

[1] Pursuant to Supreme Court Rule 37, all parties received timely notice of *Amici's* intent to file and consented to the filing of this brief. *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than *Amici* and their counsel – contributed money intended to fund preparing or submitting the brief.

veterans injured during their service. The Hamilton County Veterans Association is a 501(c)(3) organization with hundreds of members that was created to provide support and advocacy for military personnel and their families.

SUMMARY OF ARGUMENT

For as long as maritime law has existed in the United States, American sailors have relied on it for protection from harm. The Third Circuit, acknowledging admiralty's special solicitude for sailors, correctly recognized a duty on manufacturers whose products – used as intended – harmed American sailors. This Court should reinforce maritime law's protective underpinnings by upholding the opinion below.

Under maritime law, Petitioners[2] had a duty to warn of the foreseeable use of their asbestos-containing products since they knew such use would endanger the lives of U.S. Navy sailors. Petitioners foresaw the asbestos hazard inherent in the routine repair and maintenance of their products. Petitioners specified asbestos use, knew its application was certain, and often installed the initial asbestos components prior to delivery. At the time of Mr. DeVries' service, many of Petitioners' products required asbestos to function as designed in the specific high-temperature, high-pressure systems at issue. It was this routine, intended and

[2] References to "Petitioners" include General Electric Company who filed a separate brief on July 9, 2018.

synergistic *use* of Petitioners' products – including the necessary asbestos wear parts Petitioners knew were dangerous – that triggered Petitioners' duty to warn.

A simple mask could have protected Respondents from the harm caused by asbestos. Mr. DeVries testified he would have worn a mask if he had known using Petitioners' products would kill him. But he did not wear respiratory protection because Petitioners never warned him. The jurisdictional trend across the country holds manufacturers accountable for this negligent failure to warn. In New York, Maryland and numerous other states, U.S. veterans would be entitled to compensation in this case. Refusing Respondents the same redress here would undermine one of maritime law's central concerns: uniformity.

Petitioners attempt to escape their unremarkable duty to warn their products' users by cunningly redefining just what those products are. Instead of the fully functional products they advertised and sold to the Navy, Petitioners seek to narrow this Court's focus to skeletal "bare metal" components. But Petitioners' myopic definition of a "product" conflicts with both traditional notions of product liability law and common sense. Component parts like the foreseen or specified asbestos wear parts constitute part of the overall product, especially when they are necessary for the product's intended use. Moreover, Petitioners were in the best position to warn U.S. sailors of the foreseen hazards of their asbestos-containing products because they manufactured the static, longstanding equipment that synergistically worked with asbestos components

to create those hazards. In fact, many equipment manufacturers (albeit after the timeframe at issue in this case) actually did warn sailors of the hazards of asbestos exposure attendant with the required repair – including Petitioners. *See* App. 4-10; 21-30. Despite all of Petitioners' post-hoc claims of impotence, they cannot dispute that they ultimately *warned* about the hazards of asbestos lurking in their products – just not early enough to save Mr. DeVries and Mr. McAfee.

Affirming the Third Circuit's narrow finding of duty on the part of equipment manufacturers will not lead to Petitioners' dystopian future of rampant liability and superfluous warning. The rule adopted by the court below does not require manufacturers to warn about products that *could potentially* be used *in conjunction* with their goods. Rather, the test requires foreseeability of *actual* use of lethal substances, coupled with some further action beyond mere knowledge of such use. Petitioners' parade of horribles does not withstand scrutiny under this common-sense analysis.

Allowing Petitioners to escape liability for foreseeable harm caused by their product designs would preclude American veterans from obtaining complete relief and provide a concomitant windfall to manufacturers historically held to account by juries assessing those manufacturers' actions. Reversal would eviscerate the tort remedy historically available to these sailors. Despite Petitioners' attempt to rewrite history as it pertains to their culpability and their liability, Petitioners have been active defendants in asbestos

litigation for decades, including in the very type of circumstances before this Court.

Further, neither the asbestos bankruptcy trust system nor the U.S. veterans' benefit system provides adequate compensation for the suffering and death of sailors exposed to asbestos. Other commercial entities and the public fisc need not be required to subsidize tortfeasors' negligent conduct. And neither system provides meaningful compensation to sailors suffering from asbestos-caused lung cancer.

Most importantly, U.S. veterans suffering the consequences of Petitioners' conduct have an interest in utilizing American courts to prevent their brethren sailors from similar harm. Many seaman bring suit to disincentivize future misconduct despite knowing that – like Mr. DeVries and Mr. McAfee – they will likely not live to see their recovery. This last act of service should not be thwarted to assuage commercial interests.

ARGUMENT

I. MARITIME LAW HAS HISTORICALLY PROVIDED SAILORS WITH SPECIAL SOLICITUDE WHICH DEMANDS THE RECOGNITION OF A DUTY ON PETITIONERS IN THIS CASE.

Maritime law's special solicitude for sailors demands that Petitioners be held liable for their negligent failure to warn U.S. Navy sailors about the lethal

hazards of asbestos exposure incident to the routine, intended use of their products. The Third Circuit's ruling upholds the "humane and liberal character" of admiralty by providing Respondents with a remedy for their injuries. To allow Petitioners to escape liability for the death of Mr. DeVries and Mr. McAfee would disregard centuries of maritime jurisprudence and undermine the protective policy heralded by this Court's prior admiralty cases.

The founders adopted the traditions and laws of admiralty as they existed at the time the Constitution was enacted. *See The Lottawana*, 88 U.S. 558, 565-66 (1874). Even in 1775, in the so-called "Navy of the United Colonies of America," sailors on American ships relied upon maritime law and traditions to provide predictability and protection. *See* Rules for the Regulation of the Navy of the United Colonies of North-America, Nov. 28, 1775, *available at* https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/r/navy-regulations-17751.html. The "overall purposes and designs of admiralty" serve "to protect those men and women who go to sea from the hazards of that endeavor, over which they have little or no control." *Swogger v. Waterman S.S. Corp.*, 518 N.Y.S.2d 715, 720 (N.Y. App. Div. 1987).

Justice Story proclaimed admiralty's bedrock principle of sailor protection nearly two hundred years ago in *Harden v. Grodon*, 11 F.Cas. 480, 485 (D. Me. 1823). Since that time, maritime law has afforded those who brave the treacherous seas "special solicitude" under U.S. law. *Moragne v. States Marine Lines,*

Inc., 398 U.S. 375, 387 (1970). This Court has calculated that the "heightened legal protections" maritime law provides sailors is necessary to offset the special hazards of the sea. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995).

Maritime law has protected sailors from injury caused by the negligence of tortfeasors for well over a century. *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 820 (2001). In negligence cases specifically, the "traditional discretion" and flexibility of maritime law has been contrasted with the "harsh rule" of common law. *Pope & Talbot v. Hawn*, 346 U.S. 406, 408-09 (1953). It follows that a general theory of negligence in admiralty incorporates principles of both product liability and a duty of care, which includes liability imposed for a manufacturer's failure to warn normal product users of harm that is reasonably foreseeable. *East River Steamship Corp.*, 476 U.S. 858, 859 (1986); *Daigle v. Point Landing, Inc.*, 616 F.2d 825, 827 (5th Cir. 1980). This Court has reasoned that "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *Moragne*, 398 U.S. at 387 (quoting Chief Justice Chase in *The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (CC Md. 1865)).

The historic "special solicitude" afforded seamen by this Court's maritime jurisprudence demands reinforcing a manufacturer's duty to warn in this case. Here, it was certainly foreseeable that Petitioners' products would expose Mr. DeVries and Mr.

McAfee to lethal asbestos during routine maintenance. Petitioners sold their products to the Navy for use in high-heat applications where asbestos was necessary for them to properly function. DJA 420.[3] If these manufacturers had simply installed a warning on, or supplied a warning with, their products, Respondents would have worn respiratory protection during the required maintenance and their injuries would have been prevented. JA 326-27.

It is undisputed that Petitioners either specified asbestos wear parts for their machinery or knew asbestos was necessary for their products to work as designed. Buffalo Pumps, for example, specifically designed its pumps to include asbestos components until the early 1980s; its engineering drawings regularly specified asbestos gaskets. DJA 375-404; 406-08. Buffalo's corporate representative testified that suitable non-asbestos replacements for their pumps did not exist until that time. *Id.* Foster Wheeler similarly admits it knew asbestos products were used on its equipment based on *Foster Wheeler-approved* standards and maintained a bound book of insulation standards for its equipment. JA 393-96; DJA 1159-63. Some Petitioners even provided shipbuilders with spare replacement parts. DJA 697. In the DeVries case, for example, Foster Wheeler provided hundreds of replacement gaskets for Mr. DeVries' ship. *Id.* at 1151-53.

---

[3] "DJA" refers to the Joint Appendix filed with the Third Circuit in the *DeVries* appeal (No. 15-1278).

Other Petitioners regularly specified asbestos on their products. Westinghouse specified the asbestos insulation used on its turbines "in the field" and demanded that "[o]nly insulation materials approved by Westinghouse will be permitted on Westinghouse turbines and piping." DJA 643-45.[4] On marine turbines, like those encountered by Mr. DeVries, Westinghouse required that asbestos-containing gaskets be used as replacement parts. DJA 684. Similarly, General Electric admits that before the 1970s, asbestos-containing insulation, packing and gaskets were necessary for its steam turbines to function as designed. *Woo v. General Elec. Co.*, 393 P.3d 869, 877-78 (Wash. Ct. App. 2017). In this regard, the equipment manufacturers, rather than the Navy, were the experts in how their equipment best functioned. The notion that the Navy somehow knew better than the equipment experts what specific material should be used with this equipment is a false one. The Navy's specifications were guided, first and foremost, by the manufacturers' own specifications and uniform business practice to use asbestos in this equipment in high-temperature, high-pressure settings. *See In re New York City Asbestos Litig. (Dummitt)*, 59 N.E.3d 458, 464 (N.Y. 2016) ("In the acknowledgements section [of '*Naval Machinery*,'] the manual stated that 'valuable assistance' in the revision of the manual 'was rendered by the manufacturers named herewith' and that '[m]any of the figures in

[4] From the record, it appears Westinghouse also instructed those workers in the field on the proper way to install asbestos insulation and pipe covering on its turbines. DJA 648-62.

the book were made from illustrations furnished by these manufacturers.' ").

A duty to warn sounding in negligence under maritime law should not turn, as Petitioners advance, on the fortuitous nature of whether Mr. DeVries or Mr. McAfee was the first person to repair this equipment, or the second, or the twentieth; it should turn on whether a danger was attendant to the use of the equipment as designed.

Even more damningly, Petitioners knew of the hazards of asbestos well before Mr. DeVries or Mr. McAfee ever set foot on their respective ships.[5] *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083, n.7 (5th Cir. 1973) (by the mid-1930s hazards of asbestos universally accepted). For the negligible cost of a printed warning, Petitioners could have alerted them to wear respiratory protection, thereby preventing their cancers. If admiralty affords Navy sailors any "solicitude" at all, surely it provides (as tort law does for land-based workers) the right to a basic warning against exposure of lethal substances. *Id.* at 1093 (once asbestos dangers become foreseeable, duty to warn attaches). Maritime's protective underpinnings and heightened protection for U.S. sailors necessitate a remedy here.

---

[5] General Electric's own doctor inquired of the company: "how do we justify our use [of asbestos] before 1972 when the suggestion that a relationship existed between asbestos and cancer was made in 1935 and confirmed in 1955?" Jan. 23, 1979 letter from W. Taylor, M.D., App. 1-3.

Petitioners and their *amici* argue this Court should stray from the centuries-old foundation of maritime law: the principle that sailors should enjoy special protections. Their argument represents a radical departure from a doctrine that has been consistently recognized and enforced by this Court for decades. No authority provides for such drastic departure. Upending admiralty's central tenet would undermine the reliance thousands of sailors have upon maritime law's concern for their safety – effectively breaking a promise the United States has made to those willing to weather the sea in her service.

Moreover, the fundamental policy reasons why maritime law provided sailors this special solicitude still exist today. Despite the last century's technological advances, sailors at sea are still isolated in a way land-based workers are not. *Pope & Talbot*, 346 U.S. at 424 (citing "cramped quarters, long hours and complete subjection to the will of the master" as traditional maritime conditions). It is still impossible to escape a surface ship or submarine deployed for service in the middle of the ocean. This is purely a matter of geography. And Navy sailors – especially – still have little control over their safety while at sea.[6] Sailors' sleeping

---

[6] Petitioners try to blame the U.S. Navy for Respondents' asbestos exposure in a backdoor attempt to escape liability via the Government Contractor Defense under *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). This issue is not before the Court as it was not ruled on by any lower court in this case. Regardless, the Navy relied upon the thousands of product manufacturers to provide any warning necessary for the safe use of their product. DJA 417-21; 703; 743 (navy specification requiring contractors

quarters are still cramped. Their conditions are still difficult. They still "swab the decks" and spend hours in cramped spaces below deck. The hours are still long and sailors are still estranged from their families for months on end. These dangers have always been inherent in the work of a sailor; the "special solicitude" constructed to counterbalance those dangers must remain intact.

Nor do the other considerations of maritime law outweigh the overarching special solicitude at issue in these cases. In arguing the contrary, Petitioners and their *amici* attempt to evade the straightforward duty owed to Mr. DeVries and Mr. McAfee by littering their briefs with irrelevant references to "profit" and "increase[d] equipment prices." Pet. Br. at 14; Br. of *Amicus Curiae* Prod. Liability Advisory Council, Inc. at 5. They cite language from *East River Steamship* regarding "business behavior" and "increased cost." *See* Pet. Br. at 52; Br. of *Amicus Curiae* Chamber of Commerce of the United States of America, et al., at 3. But the policy determination Petitioners ask this Court to make should not be whitewashed behind corporate jargon and abstract economic models; *East River*

---

provide safety precautions in instruction books). *Holdren v. Buffalo Pumps, Inc.*, 614 F.Supp.2d 129, 145 (D. Mass. 2009) (military specification required manufacturers to prepare technical manuals). Also, Petitioners' argument that the military exercised direct control to prohibit warnings regarding asbestos has been rejected by multiple courts across the country. *Id.* at 146 ("Certainly, [the Navy specifications] do not exclude asbestos warnings on their face."); *Miranda v. Abex Corp.*, 2008 WL 4778886 (S.D.N.Y. 2008).

Steamship was about purely economic losses between corporate entities, not lethal harm to sailors.

Indeed, *East River Steamship* counsels heavily against the policy windfall Petitioners advance here. This Court recognized that if a "product injures only itself the reasons for imposing a tort duty are weak," but that physical injuries bring "overwhelming misfortune" to a victim. 476 U.S. at 871 (citations omitted).

This case concerns – as the Third Circuit recognized – the heightened need for a manufacturer's duty when the injury caused by its products involves not "repair costs and lost profits," but funeral costs and lost lives of U.S. servicemen. The question comes down to this: Is the protection of our Navy sailors worth imposing a duty to warn on the part of product manufacturers when it is foreseeable that their products will expose sailors to a deadly carcinogen during routine repair? The answer can only be an unqualified yes.

II. PETITIONERS HAD A DUTY TO WARN OF THE FORESEEABLE USE OF THEIR ASBESTOS-CONTAINING PRODUCTS WHEN THEY KNEW SUCH USE WOULD EXPOSE U.S. NAVY SAILORS TO ASBESTOS.

Over one hundred years ago, Justice Cardozo held "the presence of a known danger, attendant upon a known use, makes vigilance a duty." *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916). In admiralty, a duty of care – which depends on a defendant's knowledge of risk – may include a failure to warn

the plaintiff of harm that is reasonably foreseeable. *Daigle*, 616 F.2d at 827. Black letter law, whether in admiralty or common law, provides for a duty in this case. *Whelan v. Armstrong Int'l, Inc.*, 2018 WL 3716036, *12 (N.J. Sup. Ct. 2018) (acknowledging "recent trend" to hold manufacturers liable for replacement parts in asbestos litigation).

Maritime law's adoption of Restatement (Second) of Torts § 402A (1965) reiterates the approval of failure-to-warn principles when foreseeable harm would come from regular use of marine products. *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 879 (1997); *Mack v. General Elec. Co.*, 896 F.Supp.2d 333, n. 2 (E.D. Pa. 2012). Specifically, Comment h of § 402A requires a manufacturer to warn when, as here, "he has reason to anticipate that danger may result from a particular use" of its product. Restatement (Second) of Torts § 402A, Cmt h.

Courts applying maritime law have recognized the specific duty at issue here. In *Quirin v. Lorrillard Tobacco Co.*, 17 F.Supp.3d 760 (N.D. Ill. 2014), the plaintiff brought suit against Crane Co. for her husband's exposure to asbestos while he worked on Crane valves during his naval service. *Id.* at 763. Crane sought summary judgment, alleging its valves were "bare metal" that were not pre-insulated. *Id.* at 764, 768-69. But the Northern District of Illinois applied maritime law and denied Crane's motion.

The so-called "bare metal" defense, the court reasoned, will not provide shelter for failing to warn of

foreseeable danger intrinsic in the use and repair of the manufacturer's product:

> a duty may attach where the defendant manufactured a product that, by necessity, contained asbestos components, where the asbestos-containing material was essential to the proper functioning of the defendant's product, and where the asbestos-containing material would necessarily be replaced by other asbestos-containing material, whether supplied by the original manufacturer or someone else.

Id. at 769-70. Because some, if not all, of Crane's valves needed asbestos-containing components to function properly in the Navy's high-heat applications, the duty to warn attached. *Id.* at 770.

As discussed *supra*, Petitioners in this case foresaw the danger sailors like Mr. DeVries and Mr. McAfee faced during regular, anticipated use of their products in the high-heat applications required on U.S. Navy ships. *Woo*, 393 P.3d at 878-79; DJA 491. Maritime law, via incorporation of the Second Restatement, lays on Petitioners a duty to warn users about this known hazard and prevent the harm that befell Respondents. By failing to discharge that duty, Petitioners contributed to the death of these veterans.[7] The

[7] Petitioners' effort to escape liability for their part in this tragedy by foisting blame upon the Navy or the component part manufacturer is shameful and legally improper. As any first year law student knows, there may be multiple proximate causes of an injury, and multiple parties may be liable for coexistent negligent conduct. *See*, *e.g.*, *Summers v. Tice*, 199 P.2d 1 (Cal. 1948). Any

Third Circuit properly applied well-worn rules of maritime negligence when it found that Respondents' claims must be allowed to proceed to trial.

A. It was the use of Petitioners' fully functional products – including the integral asbestos wear parts – that caused Respondents harm and triggered a duty to warn.

Petitioners attempt to sidestep their common law duty to warn by redefining the product at issue. Instead of the fully functional product they advertised to the Navy, they now rebrand themselves in an attempt to limit their liability, asserting they *only* should be responsible for the skeletal shell – i.e., the "bare metal" parts – inevitably (and at Petitioners' behest) used with consumable asbestos parts. Setting aside for a moment the factual question of whether any Petitioner actually provided mere metal fixtures, Petitioners' myopic definition of what constitutes a "product" conflicts with both traditional notions of product liability law and common sense.

Component parts like those asbestos wear parts foreseen or specified by Petitioners for use with their

---

other entities' failure to warn, if proven, has no bearing on whether Petitioner product manufacturers also had a duty to warn. After all, "the fact that the intervening actor, such as an employer who controls defective machinery, knows of the dangers and merely fails to warn or otherwise protect the plaintiff does not of itself relieve the original actor from liability." *Woodling v. Garret Corp.*, 813 F.2d 543, 556 (2d Cir. 1987).

naval equipment constitute part of the overall product because they were deemed necessary for the product's routine and normal function. Restatement (Second) § 402A, Cmt h; *Quirin*, 17 F.Supp.3d at 769-70. It is unimaginable that Buffalo Pumps advertised a disassembled metal shell to the Navy. It advertised a fully functional pump – which only worked once assembled as Buffalo intended. Similarly, a Westinghouse turbine would have been useless to the Navy unless it could function properly, which required asbestos insulation. Westinghouse's specification of asbestos insulation is an implicit admission that the product was not complete or operational until assembled. DJA 643-45. The fact that the specified assembly took place on the ship instead of at the factory does not lead to the conclusion that the "product" was the fictional amalgam of individually delivered subcomponents.[8] As one judge recognized, the "products from which [plaintiff] inhaled asbestos fibers are properly understood to be the turbines covered with asbestos-containing insulation, as fully functional units." *Chicano v. General Elec., Co.*, 2004 WL 2250990, *3 (E.D. Pa. 2004).

Applying Petitioners' flawed logic to everyday products highlights that logic's absurdity. For example, no one would argue that a refillable ink pen consists of

[8] This is particularly true when a Petitioner provided or sold asbestos-containing component parts to the Navy. Foster Wheeler, for example, provided the *USS Turner* with nearly one thousand replacement gaskets. DJA 1151-53. Westinghouse also sold asbestos-containing replacement parts, such as asbestos gaskets and "ancillary insulation" for its steam and gas turbines to customers. DJA 667-69.

two products: the pen "shell" and the refillable ink required for it to write. No – the product advertised to the customer is a fully functioning ink pen. The purpose of the pen is to write. The manufacturer knows the pen requires ink or it will be useless.

Similarly, the gas in an automobile's tank is not a separate product that can be blamed if the car is negligently designed to explode on impact. While it was technically the gas that caught fire, it was the negligent car design that caused the explosion. The driver purchased a fully functioning automobile, not its separate components. This is true the first time the driver fills up the gas tank and it is true the hundredth time.[9] Nor could the car be labeled as merely a "bare metal" product if it had been originally sold without any gas.

For manufacturers that sold the Navy products containing pre-installed internal asbestos components, Petitioners' position is even more far-fetched. Those Petitioners admit asbestos components were installed during initial manufacture and cannot deny they had a duty to warn the first sailor exposed to their product.[10] Pet. Br. at 9; *Saratoga Fishing*, 520 U.S. at 877

---

[9] Petitioners admit it would be "absurd if a boater could sue the seller of marine gasoline" for boating injuries. Pet. Br. at 20. They fail to explain why U.S. Navy sailors injured by asbestos are not entitled to the same protections as recreational boaters.

[10] Buffalo Pump's corporate representative, for example, testified that its pumps were shipped completely assembled. DJA 407. Foster Wheeler also testified that "there were encapsulated gaskets and tapes on different products that left the factory." JA 395-96.

(maritime product consists of a good "as built and outfitted by its original manufacturer and sold to an initial user.") Petitioners are left, then, with the baseless argument that their duty to warn somehow dissipated upon the product's first *foreseeable* and necessary repair. But they cannot explain why the second sailor working on their product is not protected from the *same* hazard from the *same* product hours later. Tort law does not support such arbitrary line-drawing. *See, e.g.*, Alani Golanski, *When Sellers of "Safe" Products Turn Ostrich in Relation to Dangerous Post-Sale Components*, 39 Sw. L. Rev. 69 (2009).

Finally, even assuming *arguendo* some of the products in this case consist of bare metal shells provided by Petitioners, a duty to warn still attached because the synergistic use of the metal products with the asbestos-containing components is what created the hazard. *Kosmynka v. Polaris Ind., Inc.*, 462 F.3d 74, 81 (2d Cir. 2006) (manufacturers have duty to warn against latent dangers resulting from foreseeable use of their products). It was not until, for example, an asbestos gasket was combined with Petitioners' equipment and the attendant steam that any danger existed. Intact asbestos gaskets release only small amounts of asbestos – however, baked-on gaskets that require scraping release high levels of asbestos for sailors to breathe. *See* J.R. Millette, et al., *Asbestos-Containing Sheet Gaskets and Packing*, *in* Sourcebook on Asbestos Diseases, Vol. 12. Asbestos Health Risks 153-88 (1996). The same is true of the asbestos packing in (and insulation on) Petitioners' products. No hazard existed until the

packing became brittle and friable, or the insulation needed to be torn off of the product for repairs.[11] It was this foreseeable, unavoidable synergistic use of Petitioners' products with replaceable asbestos wear parts that created the hazard in this case and triggered their duty to warn.

B. Petitioners had a duty to warn because they were in the best position to prevent the harm and could have easily warned U.S. Navy sailors of the danger.

A central tenet of maritime product liability and negligence law provides those in the best position to prevent the harm bear the duty to warn. *East River Steamship*, 476 U.S. at 866 ("public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health . . . ") (citation omitted). Here, Mr. DeVries testified that by the time he took the packing out of Navy pumps, it had crumbled so much it "didn't have something that you could see writing on." JA 275-76.

Petitioners, in other words, were in the best position to warn about the asbestos exposure that necessarily resulted from routine maintenance of their products. Since the asbestos components wore down or disintegrated when used with this equipment, one of the only conceivable places a warning about this

[11] Mr. DeVries testified that by the time he pulled the packing out of the pumps, it had disintegrated into "particles" he breathed in. JA 275-76.

hazard could be located was on Petitioners' static, longstanding metal devices. *See*, *e.g.*, *In re New York City Asbestos Litig. (Dummitt)*, 50 N.E.3d at 472 (finding the manufacturer of the durable product typically in the best position to warn).

Petitioners and their *amici* argue there was no feasible way to warn sailors of the known asbestos hazards incumbent in the repair of their products. This is demonstrably false. Petitioners regularly supplied Navy sailors with relevant information on their products through castings, stampings or tags directly on the equipment. For example, Buffalo specified its pumps be marked with a plate containing its name, the ship number, the size of the pump, various measurements, pressure limits and other information. DJA 394. Westinghouse turbines similarly had nameplates affixed to the vessel. DJA 687-88. There is no reason this stamped plate could not have included a warning regarding asbestos, or the skull and crossbones required by the Navy for poisons. DJA 419.

Petitioners also could have included asbestos warnings in the instruction manuals they provided the Navy. After all, the entire purpose of such manuals was to inform those working on their equipment how to operate, maintain, and repair it. Sailors regularly consulted these manuals. *See*, *e.g.*, *May v. Air & Liquid Systems Corp.*, 129 A.3d 984, 987-88 (Md. 2015) ("[Machinist mate] testified that he would go to the log room and consult the instruction manuals on any piece of equipment he serviced.") and *Poage v. Crane Co.*, 523 S.W.3d 496, 512 (Mo. Ct. App. 2017) (Navy sailor

testified he had onboard access to manufacturer's equipment manuals for every piece of machinery on ship). Mr. DeVries even testified *in this case* that he was familiar with the equipment manuals and their specifications. JA 261; DJA 1144. This reliance is why the Navy required contractors to include any safety precautions in their manuals. DJA 742-46.

There were numerous ways Petitioners could have warned Mr. DeVries and Mr. McAfee about the hazards lurking in their products. One need not even exhaust the countless ways Petitioners *could* have warned. Rather, one can simply look at how equipment manufacturers eventually *provided* warnings of asbestos hazards – albeit too late for Respondents. Crane Co., for example, supplied sailors with notice its valves likely contained asbestos gaskets and packing in the mid-1980s via a permanent warning tag installed on its product. *See Quirin*, 17 F.Supp.3d at 765. Other equipment manufacturers (including Petitioners) included warnings about asbestos in the manuals provided to the Navy.

Buffalo Pumps, for example, admits that in 1987 – for pumps it sold to the U.S. Navy – it "affixed warning labels to the pumps containing the customer-supplied gaskets prior to shipment." App. 4-10, Buffalo Pumps, Inc.'s Interrogs. Resp. No. 14, *Beauchamp v. Allis-Chalmers Corp. Prod. Liab. Trust*. These warning labels stated "DANGER GASKET MATERIAL CONTAINS ASBESTOS AVOID OPERATIONS TO IT THAT WILL CREATE DUST CANCER AND LUNG DISEASE HAZARD." App. at 9. And Petitioner Foster

Wheeler entered into a contract with the U.S. Navy in 1973 where Foster Wheeler agreed to revise the original manuals it provided to the Navy.[12] App. at 11-20. No later than 1980, Foster Wheeler's Navy manual *included* a warning about the hazards of asbestos, calling asbestos "a major health hazard" and warning against using asbestos replacement gaskets on its equipment. App. at 21-30.

Petitioners' post-hoc claim of impotence rings hollow in light of this evidence; they had every ability to issue a warning that would have reached sailors like Mr. DeVries and Mr. McAfee.

C. Upholding the Third Circuit's narrow finding of duty on the part of equipment manufacturers will not lead to Petitioners' dystopian future of rampant liability and superfluous warnings.

Petitioners and their *amici* attempt a rhetorical sleight-of-hand by claiming that the Third Circuit's ruling will lead to unchecked liability for manufacturers who fail to warn about *any* products used *in conjunction* with theirs. General Electric, for example, argues if this Court finds a duty in this case, syringe manufacturers will have to warn of any drugs their syringes inject, or jam manufacturers will have to warn

---

[12] This contract makes clear the Navy relied on Foster Wheeler to draft its manuals – going so far as to hold Foster Wheeler liable for "correct spelling, grammatical and typographical errors . . . " App. at 20.

of peanut allergies. General Elec.'s Br. at 32 (citations omitted). Petitioners' hyperbolic examples only prove to sharpen the contrast between the Third Circuit's narrow rule – applied solely to ship settings involving high-temperature, high-pressure equipment where the use of asbestos was *inevitable* – and the free-for-all liability straw man they have erected.

The Third Circuit did not determine Petitioners owed users a duty because asbestos components or insulation could *potentially* be used *in conjunction* with their product. Rather, the test requires foreseeability of actual asbestos use *plus* some other evidence of affirmative conduct by Petitioners regarding the use of asbestos, or their knowing failure to warn notwithstanding the practical necessity of the inevitable use of asbestos components with their products. Op. at 240. This other conduct could be specification of asbestos, requirement of asbestos for the proper function of a product, or inclusion of asbestos in the initial design of the product. *Id.* Such a narrow test puts the burden on plaintiffs to provide substantial evidence of concrete action above and beyond manufacture of a product that is foreseeably used in conjunction with a separate, dangerous product. Put differently, the test is not a pure foreseeability test, but a "foreseeability-plus" test that serves to create predictability in the law and confine the duty to very limited circumstances.

Petitioners next argue that finding a duty on the part of manufacturers to warn about the hazards of their asbestos products will lead to an overabundance of warnings – to the point that none would be heeded.

But there can be no excessive warning when what is at stake is the ultimate injury of death. At issue is not a paper cut; it is the loss of life. It is well-settled, in this regard, that the more severe the potential injury, the more crucial the need for a warning. *Wolfe v. Ford Motor Co.*, 376 N.E.2d 143, 146 (D. Mass. 1978) (forcefulness of warning must be commensurate with the danger involved). The Navy standards relied on the same principle.

Moreover, withholding vital health information from sailors would be akin to treating our military men and women as children, unable to make measured decisions concerning their own safety. Petitioners are in no position to determine what warnings sailors would or would not have followed to protect themselves.[13] Indeed, the common law heeding presumption guards against this self-serving, post-hoc assumption. *Poage*, 523 S.W.3d at 512 (heeding presumption applied to Navy veteran's asbestos action). Such paternalistic conjecture has no place in American jurisprudence and certainly cannot govern the duty owed by product manufacturers to the men and women of the armed services.

[13] Mr. DeVries testified that he would have made sure he and his workers wore protective masks if there had been warnings about asbestos exposure on Petitioners' products. JA 326-27.

III. MARITIME LAW COMPELS THE ADOPTION OF THE NATIONAL TREND RECOGNIZING A DUTY TO WARN AGAINST FORESEEABLE ASBESTOS EXPOSURE INCUMBENT IN THE ROUTINE AND NECESSARY REPAIR OF MANUFACTURERS' PRODUCTS.

The national trend in state and federal courts is to impose liability on equipment manufacturers who failed to warn of the foreseeable asbestos hazards attendant with the repair of their products. *Whelan*, 2018 WL 3716036 at *12 ("The recent trend, however, appears skewed towards the imposition of liability on manufacturers even where the worker's exposure was to replacement parts . . . "). Courts sitting in admiralty have recognized that the majority view under state law rejects the so-called "bare metal" defense. *Chesher v. 3M Co.*, 234 F.Supp.3d 693, 708 (D.S.C. 2017). This Court long ago recognized maritime law's goal of uniformity among the states. *The Lottawanna*, 88 U.S. at 566. Admiralty is accordingly an "amalgam" of state and federal common law. *East River Steamship*, 476 U.S. at 864-65. This deference to federal and state jurisprudence compels the recognition of a narrow duty sounding in negligence here.

New York recognized a duty on equipment manufacturers to warn about the inherent dangers of foreseeable asbestos exposure upon repair of their products in *In re New York City Asbestos Litig. (Dummitt)*, 59 N.E.3d 458 (N.Y. 2016). In *Dummitt*, a Navy boiler technician brought suit against Crane Co. and other equipment manufacturers for asbestos exposure

he sustained during repair and use of their allegedly bare metal valves and products. *Id.* at 464-65. Like Mr. DeVries, Mr. Dummitt consulted manufacturer-provided manuals for the equipment he worked on. *Id.* Crane's valves "could not function as intended in a high-pressure, high-temperature steam pipe system without asbestos-based gaskets, packing and insulation." *Id.* at 480. Like here, it was the synergistic use of these asbestos components with Crane's product that caused the hazardous asbestos exposure. *Id.* at 483. The New York court therefore held that an equipment manufacturer has a duty to warn of the danger arising from the reasonably foreseeable use of its product in combination with a third-party product which, "as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended." *Id.* at 463. This "foreseeability-plus" duty provides both predictability in its application and an inherent limit in the scope of a manufacturer's liability in these scenarios. Significantly, just as is at issue here, the *Dummitt* duty sounded in negligence rather than true strict products liability.

Maryland similarly recognized an equipment manufacturer's duty to warn when routine maintenance of its product exposed sailors to asbestos. In *May v. Air & Liquid Systems Corp.*, 129 A.3d 984, 986 (Md. 2015), the widow of Philip May, a naval machinist, brought suit against the manufacturers of heavy-duty pumps that required asbestos-containing replacement parts. Mr. May testified that he would consult the instruction manuals for the equipment he serviced and

that he was provided no warning about asbestos exposure from the defendants' pumps. *Id.* at 986-87. The Maryland court determined the "product" at issue was not the expendable component parts, but was the complete and functional pumps. *Id.* at 1000. The court held that equipment manufacturers have a duty to warn in the limited circumstances when "(1) a manufacturer's product contains asbestos components, and no safer material is available; (2) asbestos is a critical part of the pump sold by the manufacturer; (3) periodic maintenance involving handling asbestos gaskets and packing is required; and (4) the manufacturer knows or should know of the risks from exposure to asbestos." *Id.* at 994. Like *Dummitt*, this "foreseeability-plus" duty provides both predictability in its application and an inherent limit in the scope of a manufacturer's liability.

In striking contrast, the state law upon which Petitioners rely was decided upon true strict liability principles rather than negligence. *Braaten v. Saberhagen Holdings*, 198 P.3d 493, n.6 (Wash. 2008) (contrasting Washington's *pure* strict liability approach with other jurisdictions "that apply a more negligent-like approach to failure-to-warn claims"). And even in those states, courts have retreated from such a harsh, absolute rule by subsequently imposing a duty on equipment manufacturers in asbestos litigation. As the doctrinal underpinnings of this component part liability has evolved, even these states allow for failure-to-warn liability when the seller specified asbestos components. For example, Petitioners and their *amici*

cling tight to *Simonetta* and *Braaten*, two early "bare metal" asbestos cases out of Washington. Pet.'s Br. at 29, citing *Braaten*, 198 P.3d 493, and General Elec. Br. at 21, citing *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008). But they surreptitiously omit the Washington Supreme Court's *en banc* opinion clarifying that *Simonetta* and *Braaten* did not alter the common law rule to warn of foreseeable asbestos exposure. *Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069, 1076 (Wash. 2012) ("Critically, for present purposes, the products involved in the *Simonetta* and *Braaten* cases did not require that asbestos be used in conjunction with their products, nor were they specifically designed to be used with asbestos."); *see also Woo*, 393 P.3d 869. Similarly, the California Supreme Court's opinion in *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012), has been tempered by subsequent opinions interpreting *O'Neil* to allow replacement part liability in certain cases. *Willis v. Buffalo Pumps, Inc.*, 34 F.Supp.3d 1117, 1123 (S.D. Cal. 2014).

Historically this Court has refused to utilize its admiralty powers to create a rule that is disfavored in numerous states. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990). It should likewise refuse to do so here. Courts across the country hold equipment manufacturers responsible in negligence when they specified, foresaw or required asbestos components in their products. *See*, *e.g.*, *Poage*, 523 S.W.3d 496; *McKenzie v. A.W. Chesterton Co.*, 373 P.3d 150 (Or. Ct. App. 2016); *Chesher*, 234 F.Supp.3d 693. Sailors in New York, Maryland and states across the country would rightly be entitled to

recover under the facts in this case. It defies logic for Petitioners to be shielded from liability for identical conduct here.

IV. ALLOWING PETITIONERS TO ESCAPE LIABILITY FOR THEIR ASBESTOS-CONTAINING PRODUCTS WOULD PRECLUDE U.S. SAILORS FROM OBTAINING COMPLETE REDRESS FOR THEIR WRONGFULLY-CAUSED INJURIES.

A reversal in this case would be a windfall for manufacturers of dangerous products that injured U.S. sailors for decades. But more importantly, it would unjustifiably withhold from America's veterans their opportunity to seek justice in America's courts. Petitioners and their *amici* offer up alternative compensation schemes as a salve for the wound a reversal would inflict on countless veterans. But neither the bankruptcy trust system nor the veteran's benefits structure provides substantive redress for these sailors. Precluding historically available tort actions against negligent product manufacturers undermines a fundamental reason many injured sailors opt to bring suit: to deter negligent conduct and, hopefully, prevent their brethren sailors from suffering a similarly avoidable tragedy.

A. Precluding claims against Petitioners would eviscerate the tort remedy veterans have had against negligent equipment manufacturers for decades.

Petitioners attempt to rewrite the history of asbestos litigation, casting equipment manufacturers as "peripheral" defendants only recently roped into asbestos litigation by plaintiffs searching for a "deeper pocket." Pet. Br. at 24; General Elec.'s Br. at 42-43. This long-peddled trope is neither relevant nor true. Petitioners have been active litigants in asbestos litigation for decades. Their liability is not new. Reversing the Third District's opinion would only serve to cut off injured veterans from a historically available remedy. This Court should not shift the burden of Petitioners' misconduct onto veterans who served their country.

Westinghouse has been defending Navy asbestos cases since the 1970s. *Piccirelli v. Johns-Manville Sales Corp.*, 128 A.D.2d 762 (N.Y. App. Div. 1987) (1979 asbestos action brought by Brooklyn Navy Yard worker). Foster Wheeler defended asbestos cases brought by Navy veterans as early as 1986. *In re Hawaii Fed. Asbestos Cases*, 665 F.Supp. 1454 (D. Haw. 1986) and *Kaiser v. Armstrong World Ind., Inc.*, 678 F.Supp. 29 (D.P.R. 1987). General Electric, likewise, has actively defended asbestos cases since at least the mid-1980s. *Wible v. Keene Corp.*, 1987 WL 15833 (E.D. Pa. 1987) (asbestos action including General Electric Co. and Westinghouse Electric Co. as product defendants). General Electric's claims that it could "not possibly have anticipated" its current asbestos liability is

particularly dubious in light of its procurement of insurance covering asbestos injuries in these exact circumstances. General Elec.'s Br. at 41; *Appalachian Ins. Co. v. General Elec. Co.*, 863 N.E.2d 994, 996 (N.Y. 2007) (dispute over General Electric's asbestos insurance coverage after asbestos claims "substantially increased" in 1991, with New York court avowing that the typical asbestos suit against General Electric was based on its failure to warn about the use of its turbines with asbestos insulation that had been manufactured by others). Consequently, contrary to Petitioners' assertion, they have already incorporated the cost of the liability at issue here into their insurance coverage model.

Petitioners would like this Court to believe that upholding the decision below would open up a "new" theory of liability for defendants heretofore untouched by asbestos litigation. A simple search of historical asbestos cases proves that assertion untrue. In fact, if this Court were to preclude asbestos actions against Petitioners in this case, it would drastically curtail currently available remedies for injured U.S. veterans.

B. Neither the asbestos bankruptcy trust system nor the VA benefits system provides adequate compensation for the preventable suffering and death of those veterans exposed to Petitioners' asbestos.

Petitioners paint the asbestos bankruptcy trust system as a metaphorical jackpot available to anyone injured by asbestos. But those familiar with the trust system's bureaucratic mire know asbestos victims often go uncompensated, and *always* end up undercompensated. Petitioners' attempt to shift all costs stemming from their negligent conduct onto the U.S. Department of Veterans Affairs ("VA") is similarly misplaced. The U.S. public should not be required to foot the bill for conduct juries have repeatedly found tortious. Moreover, the pittance provided by the VA fails to near the reimbursement owed to Respondents for the loss of their husbands.

Asbestos bankruptcy trusts create trust distribution procedures ("TDP's") that entitle those injured by asbestos to recover pursuant to certain criteria. TDP's incorporate restrictions on eligibility, caps on the amount of recovery, and evidentiary hurdles that many veterans cannot meet. For example, the Owens Corning/Fibreboard Asbestos Personal Injury Trust holds the liability for exposure to asbestos-containing Kaylo insulation, commonly used on U.S. Navy ships. *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684, 686 (Wash. Ct. App. 1997); *see also* DJA 645 (Westinghouse specification for Kaylo insulation on turbines). Owens

Corning's TDP provides a schedule of recovery based on "disease levels" and medical/exposure criteria, then limits the amount recoverable in each case to a percentage of the payment determined. *See* Owens Corning/Fibreboard Asbestos Personal Injury Trust Distribution Procedures, pp. 3, 6 (Dec. 2, 2015), *available at* http://www.ocfbasbestostrust.com/wp-content/uploads/2015/12/OC-FB.-Amended-TDP.12.2.2015-C0463534x9DB18.pdf.

Per the Owens Corning TDP, someone who suffers from asbestos-caused lung cancer is scheduled to receive a mere $4,440 – but *only* if he can provide evidence of "significant occupational exposure" to asbestos.[14] *Id.* at pp. 31-32. While this seems straightforward, the TDP defines "significant occupational exposure" to require at least five years of occupational asbestos exposure. *Id.* at 50. But many Navy enlistments are limited to four years. Mr. DeVries, for example, testified he had no asbestos exposure outside of a naval career that only spanned 1957 to 1960. JA 262-67. Based upon the information available from the record, then, Mr. DeVries is unlikely to have recovered *any* compensation from the Owens Corning trust for his exposure to

[14] Per the TDP, the payment for the scheduled $40,000 available to Lung Cancer 1 sufferers is reduced by the 11.1% "Payment Percentage" calculation for claims against the OC Sub-Account. § 4.2 of Owens Corning TDP at p. 17; Notice of Current Payment Percentage, Aug. 8, 2017, *available at* http://www.ocfbasbestostrust.com/wp-content/uploads/2017/08/OC-FB.-OC-Subaccount-Notice-C0616366x9DB18.pdf.

Kaylo insulation utilized to insulate Petitioners' equipment.

Navy veterans are forced to jump through similar bureaucratic hoops for almost every other asbestos trust. The Manville Personal Injury Settlement Trust, which holds liability for Johns Manville insulation, is another commonly cited source of purported reparations for veterans disabled by asbestos. Manville Personal Injury Settlement Trust Distribution Process (Jan. 2012), *available at* http://www.claimsres.com/wp-content/uploads/2016/11/2002-TDPJanuary-2012-Revision.pdf. Currently, a lung cancer diagnosis has a scheduled value of $0 for the Manville Trust – meaning both Mr. DeVries and Mr. McAfee likely received *no compensation* for their exposure to Johns Manville insulation on Petitioners' products during their service in the Navy. *Id.* at 9. Even if a veteran is able to prove he has lung cancer *and* another underlying asbestos-related nonmalignant disease *and* was exposed to asbestos for longer than five years, he is entitled to a mere $4,845, hardly the "jackpot" Petitioners claim.[15] Bankruptcy trusts provide little, if any, remedy to veterans injured by asbestos. Certainly, the underlying goal of tort law – to make the plaintiff whole – is not

[15] *Id.* at 9, 12. Per the TDP, the payment for the scheduled $95,000 available to Lung Cancer (Two) sufferers who can prove another nonmalignant disease and five years of exposure is reduced by the 5.1% "*pro rata* payment percentage" calculation for claims against the trust. Trust *Pro Rata* Announcement (Nov. 8, 2016) *available at* http://www.claimsres.com/wp-content/uploads/2016/11/Pro-rata-announcement-Nov-2016.pdf.

met by the trust system alone, particularly where the solvent manufacturers are joint tortfeasors.

The VA compensation system similarly fails to provide sufficient recompense to families of veterans killed by asbestos products. For widows of veterans like Respondents, the basic monthly rate for their spouses' death is $1,283.11. 38 U.S.C. § 1311(a)(1), *available at* https://benefits.va.gov/Compensation/current_rates_dic.asp. That amount in no way accounts for the pain and suffering that results from asbestos-related cancer in the last months of life.[16] Petitioners' argument that little over $15,000 a year (paid by the U.S. government, not product manufacturers) is sufficient compensation for the preventable death of a loved one amounts to throwing coins on the graves of injured sailors. This Court should refuse to allow Petitioners to shift the liability for their negligent decisions onto the government.

---

[16] One Texas judge described his experience of presiding over a Texas asbestos docket as follows: " . . . a person that is diagnosed with mesothelioma typically has a year to live, and essentially over the course of the year, they suffocate to death. I have seen day-in-the-life films ad nauseum on mesothelioma cases, and I have nightmares from having seen those day-in-the-life films." Hon. Mark Davidson, et al., *Asbestos Bankruptcy Trusts and Their Impact on the Tort System*, 7 J.L. Econ. & Pol'y 281, 293 (2010).

C. Neither the VA nor the bankruptcy trust system fulfills the foundational product liability tenet of deterrence that can only be provided by the civil justice system.

Asking an asbestos-afflicted veteran why he opted to spend the last few months of his life sitting for depositions with corporate defense attorneys leads to two typical answers: 1. he wants to ensure his family is financially able to bear the inevitable loss, and 2. he wants to protect current sailors from experiencing the preventable devastation of negligent corporate conduct. The civil justice system – with its ability to award punitive damages – is the only means of obtaining both objectives.

Punitive damages are available in maritime common law. *See*, *e.g.*, *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 411 (2009) and *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). This Court instructed that punitive damages in maritime law are "aimed not at compensation but principally at retribution and deterring harmful conduct." *Exxon Shipping*, 554 U.S. at 492. Indeed, punitive damages have been deemed particularly important in maritime common law actions because general maritime law limits the availability of some compensatory damages, such as purely economic loss or purely emotional distress. *Id.* at 519-20 (Stevens, J., concurring in part and dissenting in part) ("Under maritime law, then, more than in the land-tort context, punitive damages may serve to compensate for certain sorts of intangible injuries not recoverable under the rubric of compensation.") Indeed, when

faced with the argument that compensatory damages suffice for those injured at sea, Justice Thomas reasoned "[t]he laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator . . . " *Atlantic Sounding*, 557 U.S. at 424.

In this case, Petitioners once again seek to narrow the available damages in admiralty by offloading the bill for their conduct onto both the Navy and bankrupt entities. But this ignores sailors' longstanding ability to recover punitive damages under historical maritime law and, in doing so, undermines the very purpose of punitive damages recognized by this Court. Worse still, hewing to Petitioners' reasoning would obliterate the protective deterrent effect that current litigation has against future harmful conduct against Navy sailors.

CONCLUSION

Maritime law provides special solicitude for sailors. This must also be true for those like Mr. DeVries and Mr. McAfee who took to the high seas in service of their country. The nationwide trend permitting plaintiffs to seek recovery against equipment manufacturers provides injured veterans a remedy against those who failed to warn about asbestos exposure from the inevitable, foreseeable use of their products. The Third Circuit's opinion simply maintained this uniformity.

Many veterans sue defendants like Petitioners despite knowing they will likely not live to see any

recovery. Their purpose is often to ensure the negligent conduct of defendants is brought to light and current sailors are not subject to similar disregard. This Court should not silence these sailors in their last act of service to their fellow seamen.

For these reasons, *Amici* urge the Court to affirm the Third Circuit's decision.

Respectfully submitted,

CHRISTIAN HARTLEY
Counsel of Record
MAUNE RAICHLE HARTLEY
FRENCH & MUDD, LLC
1015 Locust St.
St. Louis, MO 63101
Phone: (314) 241-2003
chartley@mrhfmlaw.com

Attorney for Amici Curiae

The Retired Enlisted Association
Military Veterans Advocacy
The Blue Water Navy
Vietnam Veterans Association
The Hamilton County
Veterans Association

AUGUST 2018