

No. 17-1105

IN THE
Supreme Court of the United States

AMERICAN COMMERCIAL LINES LLC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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May 24, 2018

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**RULE 26 CORPORATE
DISCLOSURE STATEMENT**

The corporate disclosure statement for Petitioner was set forth at page iii of the Petition for Writ of Certiorari and there are no changes to that statement.

**THE FIFTH CIRCUIT COURT OF APPEALS
CORRECTLY HELD THAT “PURSUANT TO”
IN 33 U.S.C. § 2704(C)(1) “CONTEMPLATES
COMPLIANCE OR CONFORMITY” WITH THE
CHARTER CONTRACTS BUT MISAPPLIED THAT
STANDARD TO DRD AND ITS EMPLOYEES**

Even though the Fifth Circuit Court of Appeals determined the “in connection with” language in the exoneration provision of the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 2703(a)(3), was a “capacious” term, it held that “[c]onduct does not automatically occur ‘in connection with’ a contractual relationship by the mere fact that such a relationship exists.” *United States v. American Commercial Lines, L.L.C.*, 875 F.3d 170, 175 (5th Cir. 2017) (citing *Westwood Pharm., Inc. v. Nat’l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992)).

In the same context, the mere existence of a contractual relationship should not deprive ACL of the right to limit its liability. In denying *American Commercial Lines, L.L.C.* (“ACL”) the “general limit of liability,” 33 U.S.C. § 2704(c)(1), under OPA, the Fifth Circuit stated that:

the meaning of § 2704(c)(1)’s “pursuant to” language, which is not defined in the statute, appears to be a matter of first impression. ...[W]e turn to the ordinary meaning of the words. Black’s Law Dictionary defines “pursuant to” as “[i]n compliance with; in accordance with,” “[a]s authorized by,” or “[i]n carrying out.” BLACK’S LAW DICTIONARY 1431 (10th ed. 2014). Webster’s Third similarly defines “pursuant to” as “in the course of carrying out; in conformance to or agreement

with; [or] according to.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1848 (2002). *See also* OXFORD ENGLISH DICTIONARY 887 (2d ed. 1989) (defining “pursuant to” as “following upon, consequent and conformable to, [or] in accordance with.”) Accordingly, and as ACL contends, “pursuant to” has a narrower meaning that “in connection with.” While the latter encompasses any conduct that is logically related to the contractual relationships in the sense that it would not have occurred but for the third party’s contractual relationship with the responsible party, the former contemplates compliance or conformity.

Id. at 177.

Despite the fact that the court of appeals stated that the mere existence of the charters did not establish that the wrongful acts of DRD Towing Company, LLC (“DRD”), John Bavaret and Terry Carver were “in connection with” the charters, that is effectively what the court held in interpreting what was required to satisfy the “pursuant to” requirement of §2704(c)(1). The court of appeals stated that:

...the “pursuant to” language is satisfied if the person who commits the gross negligence, willful misconduct, or regulatory violation does so in the course of carrying out the terms of the contractual relationship with the responsible party.

Id. at 177. DRD was not carrying out the terms of the charters when they committed criminal acts.

It did not matter to the court of appeals that, unknown to ACL which was completely exonerated from liability, pursuant to DRD's illegal business practice, DRD manned the tug with an unqualified operator (John Bavaret) as the relief mate, that Terry Carver, the only properly licensed operator, left the vessel in the command of John Bavaret, or that John Bavaret operated the vessel for well over 12 hours without any relief. All that mattered to the court of appeals was that DRD's crew was in possession of the tug under the charters, even if its operations were in violation of the terms of the charters and the criminal law. Despite the fact that the charters contained identical Compliance with Laws and Regulations clauses (ROA 1196-1121; ROA 1122-1137) which required DRD to comply with all applicable laws and regulations with respect to the manning and operation of the tug MEL OLIVER and that the Fully Found charter contained Performance Standards making DRD solely responsible for properly manning the MEL OLIVER (ROA. 1233, Performance Standard 2 and 3), all that was required by the court of appeals to deny ACL's limitation rights was that the charters existed.

The court of appeals mischaracterized the arguments of ACL when it said that ACL "argues that the specific acts or omissions that cause the spill must be authorized by the contract." *Id.* at 177. If the acts of John Bavaret that resulted in the collision had been performed by a properly licensed operator who was not standing watch more than 12 hours in a 24 hour period, then ACL would concede that it was not entitled to limitation under OPA. The action of a lawful operator performed in a grossly negligent manner would not permit ACL to limit its liability under OPA.

However, under DRD's usual business practices not known to ACL, the MEL OLIVER was under the command of an unqualified/illegal operator who was working more than 12 hours in a 24 hour period and it was those illegal actions which caused the collision.

The illegal acts of DRD, Terry Carver and John Bavaret were not "pursuant to" the terms and conditions of the charters.

CONCLUSION

The courts below erred in denying American Commercial Lines LLC limitation of liability under Section 2704 the Oil Pollution Act of 1990 by holding that the secret, illegal acts of DRD Towing Company, LLC, Terry Carver and John Bavaret which led to the collision between the barge DM-932 and the M/V TINTOMARA were "pursuant to" to the charters between ACL and DRD. Therefore, this Court should grant a writ of certiorari to hear this matter.

Respectfully submitted,

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