No. 24-849

IN THE

Supreme Court of the United States

LAURA SMITH, as Duly Appointed Representative of the Estate of Andrea Manfredi, *et al.*,

Petitioners,

v.

THE BOEING CO., *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* LAW PROFESSORS MARTIN DAVIES, ROBERT FORCE, STEVEN F. FRIEDELL, THOMAS C. GALLIGAN, JR., AND THOMAS J. SCHOENBAUM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors of admiralty and maritime law. They seek to help the Court resolve issues of admiralty and federal jurisprudence toward preserving the right to jury trial.

Martin Davies is Niels F. Johnson Chair of Maritime Law at Tulane University. Steven Friedell is Professor of Law at Rutgers University. Robert Force is Niels F. Johnson Chair of Maritime Law, Emeritus at Tulane University. Thomas C. Galligan, Jr. is Dodson & Hooks Endowed Chair of Maritime Law at Louisiana State University. Thomas Schoenbaum is Harold S. Shefelman Professor of Law at the University of Washington.

Amici support Certiorari because the issue implicates the concurrent jurisdiction of state and federal courts envisioned by the Framers. This case provides an ideal opportunity to restore important constitutional principles.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's approach undermines core federalism principles embodied in the Saving-to-Suitors Clause.

The Saving-to-Suitors Clause represents one of the oldest and most important expressions of federalism in American jurisprudence, dating back to the First Judiciary Act of 1789. 1 Cong. Ch. 20, 1 Stat. 73 (1789).

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[1] Rule 37 Statement: No counsel for any party authored this brief in whole or in part. No person or entity, with the following exception, other than *Amici* and their counsel, made monetary contributions to its preparation. Mr. Roland Pritzker, an independent philanthropist concerned to protect Seventh Amendment rights, contributed in part to the cost. Pursuant to Rule 37.2, counsel for both parties received timely notice.

The Seventh Circuit's approach significantly undermines this federalism principle in several specific ways.

A "case-by-case" adjudication of admiralty jurisdiction is unpredictable and lacks clarity. *Sisson v. Ruby*, 497 U.S. 358, 373 (1990) (Scalia, J., concurring) ("The decision seems unfortunate as increasing complication and uncertainty in the law without, apparently, securing any practical gains to compensate for these disadvantages.") (cleaned up). This criticism applies with equal force to the Seventh Circuit's creation of "quasi-exclusive" jurisdiction wherein jury rights depend on the forum rather than the nature of the claim.

A. The historical role of the Saving-to-Suitors Clause in American Federalism

The history of American admiralty law has generally been a story of concurrent jurisdiction. During the Colonial era, the British Crown established separate vice-admiralty courts that exercised mostly concurrent jurisdiction over maritime cases with colonial common-law courts. *See* STEVEN L. SNELL, COURTS OF ADMIRALTY AND THE COMMON LAW: ORIGINS OF THE AMERICAN EXPERIMENT IN CONCURRENT JURISDICTION 149-179 (2007) (demonstrating the wide degree of shared jurisdiction over most maritime claims).

Plaintiffs could choose to file a claim in a vice-admiralty court or in a common law court. *See id.* at 205 ("Perhaps more importantly, these courts had provided the litigants with a choice. A potential plaintiff was able to weigh the alternatives, determining whether the opportunity to cross-examine witnesses in open court and availability of a jury mattered more than the speed of summary civil law procedures....").

After independence, each State established its own admiralty court, primarily to adjudicate prize cases.[2] *See id.* at 215-21. State admiralty courts and common-law courts soon shared jurisdiction over other maritime matters. *Id*.

Desiring uniformity in substantive maritime law, the Founders brought admiralty jurisdiction into the federal courts. *Id*. at 232-71. The Constitution consequently extends the federal judicial power "to all Cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2.

When Congress codified federal admiralty jurisdiction in the Judiciary Act of 1789, it included a saving-to-suitors clause expressly providing concurrent jurisdiction over most maritime claims. Judiciary Act § 9(a), 1 Stat. 77; *see* SNELL, *supra*, at 307-312. "The intention of the drafters of the Judiciary Act ... was to make clear that admiralty 'suitors' would not be second-class litigants in the United States. Rather admiralty suitors should have full access to common law remedies if they so choose." THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 4:2, at 257 (6th ed. 2018). Today, admiralty jurisdiction lies in 28 U.S.C. § 1333, which states: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

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[2] Prize cases are in rem actions deciding competing claims to vessels and cargo seized in war. *See generally* Theodore M. Cooperstein, *Letters of Marque and Reprisal: the Constitutional Law and Practice of Privateering*, 40 J. MAR. L. & COM. 221 (Apr. 2009).

The Saving-to-Suitors Clause has preserved common law jurisdiction since the First Judiciary Act. 1 Stat. 77 § 9 ("saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."). The Clause preserved concurrent power of state courts over maritime subjects predating the Constitution. The clause preserved "the concurrent remedy which had before existed." *N.J. Steam Nav. Co. v. Merchants' Bank*, 47 U.S (6 How.) 344, 390 (1848) (Story, J.) ("This leaves the concurrent power where it stood at common law."). The Court has consistently protected this aspect of federalism over two centuries.

Today's saving-to-suitors clause of § 1333 makes clear that a plaintiff who can invoke a federal court's admiralty jurisdiction need not do so, if another basis for jurisdiction exists. Under the saving-to-suitors clause, plaintiff may bring a maritime claim: (1) in federal court via admiralty jurisdiction; (2) in federal court, under non-admiralty jurisdiction, if plaintiff satisfies another federal jurisdictional statute basis — diversity jurisdiction,[3] federal question jurisdiction,[4] or multiparty/multiforum jurisdiction;[5] or (3) in state court with jurisdiction. *See* John W. deGravelles, *The Application of State Law in a Maritime Case: A Primer on "The Devil's Own Mess*," 15 LOY. MAR. L.J. 5, 9 (Winter 2016); David W. Robertson, *Admiralty Procedure and Jurisdiction After the 1966 Unification*, 74 MICH. L. REV. 1627, 1628 (1976); *see also*, 14A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3672, at 534-48 & nn.4-11 (4th ed. 2013); SCHOENBAUM, *supra*, § 4:2, at 257;

[3] 28 U.S.C. § 1332.

[4] 28 U.S.C. § 1331.

[5] 28 U.S.C. § 1369.

GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 113, at 37 & n.117 (2d ed. 1975).

"Most admiralty cases . . . are cases of concurrent jurisdiction rather than exclusive jurisdiction." David W. Robertson, *Admiralty and Maritime Litigation in State Courts*, 55 LA. L. REV. 685, 699 (1995). Since 1789, Congress has given federal courts "original" and "exclusive" jurisdiction over all cases of "admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1). This saving-to-suitors clause preserves a plaintiff's right to bring a maritime action in any court of competent jurisdiction. *See Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355, 359-60 (1962) ("Where the suit is *in personam*, it may be brought either in admiralty or, under the saving clause, in an appropriate non-maritime court by ordinary civil action.") (emphasis added; cleaned up); *cf. Madruga v. Super. Ct.*, 346 U.S. 556, 560-61 (1954).

Only four statutes create exclusive admiralty jurisdiction in federal courts. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 4-4, at 239-40 (5th ed. 2011); *see also* SCHOENBAUM, *supra,* § 4:2, at 258-59; David W. ROBERTSON, STEVEN F. FRIEDELL, & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 65 (4th ed. 2020); deGravelles, *supra,* at 8-9 ("Congress, by statute, has conferred exclusive admiralty jurisdiction upon the federal courts in suits under the Limitation of Shipowners' Liability Act, the Ship Mortgage Act, the Suits in Admiralty Act, and the Public Vessels Act, and for actions to foreclose preferred ship mortgages.") (citations omitted). These statutes govern matters within the expertise of admiralty courts – *in rem* actions against vessels and other maritime property and the waiver of sovereign

immunity as to public vessels – warranting admiralty jurisdiction in federal courts.

But the saving-to-suitors clause in § 1333 requires that admiralty courts share jurisdiction with courts of competent jurisdiction for the vast majority of maritime actions – actions that are *in personam* rather than *in rem*, and actions apart from suits against public vessels or the sovereign. *See* SCHOENBAUM, *supra*, § 4:2, at 257-58 ("Thus, the saving to suitors clause institutes concurrent federal-state jurisdiction over *in personam* admiralty actions, so that an admiralty plaintiff in an *in personam* claim may choose between filing an ordinary civil action or bringing a 'libel' action in admiralty.").

Under the saving-to-suitors clause, a plaintiff in a maritime case has three options of where to file the claim: (1) in federal court, under admiralty jurisdiction; (2) in a state court, with jurisdiction over the claim; or (3) on the "law side" of federal court, if the plaintiff can establish federal jurisdiction on some basis other than admiralty. *See* Robertson, *Admiralty and Maritime Litigation in State Courts, supra*, at 699 (noting that the saving-to-suitors clause gives "the plaintiff in most types of admiralty or maritime cases" these options); s*ee also*, SCHOENBAUM, *supra*, § 4-2, at 257; Steven F. Friedell, *Death at Sea and the Right to Jury Trial,* 48 TUL. MAR. L.J. 165, 166-68 (2024).

B. DOHSA's Saving Clause reflects congressional intent to preserve Federalism

Congress enacted the Death on the High Seas Act (DOHSA) to create a federal wrongful-death action for survivors of decedents caused by "wrongful act, neglect, or default occurring on the high seas." 46 U.S.C. § 30302. Prior to DOHSA's enactment,

considerable confusion governed the courts whether general maritime law recognized an action for a death at sea. DOHSA's enactment settled that issue. In addition to creating a cause of action for wrongful death at sea, DOHSA contains a saving clause that provides "[t]his chapter does not affect the law of a State regulating the right to recover for death." 46 U.S.C. § 30308(a).

The Seventh Circuit approach to this section of DOHSA is novel. It was earlier understood that, if state courts had concurrent jurisdiction to hear DOHSA cases, then federal courts upon removal would hear those cases "as a suit at law with right of trial by jury." *Wilson v. Transocean Airlines,* 121 F. Supp. 85, 94 (N.D. Cal. 1954).

This Court has held this is a jurisdictional saving clause with the same effect as the saving-to-suitors clause in 28 U.S.C. § 1333. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 221-25 (1986). Pursuant to the saving-to-suitors clause of § 1333 and the plain language and statutory history of DOHSA, federal jurisdiction of wrongful death claims under DOHSA is concurrent, not exclusive.

Section 30308(a)'s language preserves state remedies and reflects an intent to maintain the historic balance between federal and state authority in maritime matters. *Tallentire* recognized this provision's "marked similarity" to the Saving-to-Suitors Clause. 477 U.S. at 222-23. DOHSA's own saving clause clearly indicates congressional intent to preserve state court jurisdiction. 46 U.S.C § 30308(a).

The Seventh Circuit's dismissive treatment of this provision in a footnote, Pet. App. 14a & n.4, contravenes congressional intent.

C. Tenth Amendment implications of the decision below

States retain sovereignty over procedural matters in their courts, including jury trials. The Seventh Circuit approach creates a system where federal courts can unilaterally extinguish rights (jury trials) that would otherwise be available in state courts. This development raises Tenth Amendment federalism concerns. The opinion contradicts the principle that there is a "deeply rooted presumption in favor of concurrent state court jurisdiction." *Tafflin v. Leavitt,* 493 U.S. 455, 458 (1990).

States have traditionally retained sovereignty over procedural matters in their courts, including the right to jury trials. States may establish the rules of procedure governing litigation in their own courts. *Johnson v. Fankell*, 520 U.S. 911, 919 (1997) (States "have great latitude to establish the structure and jurisdiction of their own courts"); *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (same). The Seventh Circuit opinion denies States this authority in DOHSA cases.

II. The Seventh Circuit's approach contradicts the Original Understanding of Admiralty Jurisdiction.

The Seventh Circuit's approach contradicts the original understanding of how admiralty and common law jurisdiction interact. Multiple Justices of the Court have previously expressed strong concerns about the very type of non-textual, ahistorical approach to admiralty jurisdiction exemplified by the Seventh Circuit decision. The "Court pursues clarity and efficiency in other areas of federal subject-matter jurisdiction, and it should demand no less in admiralty and maritime law." *Jerome Grubart, Inc. v. Great Lakes*

Dredge & Dock Co., 513 U.S. 527, 555 (1995) (Thomas, J., concurring); *id*. at 548 (O'Connor, J., concurring) (Denying "that, having found admiralty jurisdiction over a particular claim against a particular party, a court *must* then exercise admiralty jurisdiction over *all* the claims and parties involved in the case. Rather, the Court should engage in the usual supplemental jurisdiction and impleader inquiries.") (emphasis original).

A. The Colonial and Founding Era understanding of Admiralty Jurisdiction

Members of the Court have emphasized the Court's evaluation of constitutional principles and provisions should focus on the established meaning when the Constitution was adopted. *Sisson*, 497 U.S. at 375 (Scalia, J., concurring). "Vague and obscure rules may permit judicial power to reach beyond its constitutional and statutory limits, or they may discourage judges from hearing disputes properly before them." 513 U.S. at 549 (Thomas, J., concurring). The Seventh Circuit's approach represents precisely this kind of unwarranted expansion.

Historical evidence shows maritime plaintiffs had genuine choice between admiralty and common law forums. Admiralty courts excluded juries, while common law courts used juries. The choice was not merely procedural, but substantive — it gave maritime litigants agency in selecting procedural protections. The Seventh Circuit's hybrid approach contravenes the historical understanding of these distinct jurisdictional realms.

The Framers were particularly concerned with preserving jury trial rights in maritime cases. Many colonial grievances against Britain involved the

expansion of admiralty jurisdiction to deprive colonists of jury trials. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) ("depriving us, in many Cases, of the Benefits of Trial by Jury").

The Saving-to-Suitors Clause was specifically intended to preserve the right to proceed at common law with a jury trial. *DeLovio v. Boit,* 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3,776) (Story, J.) ("There can be no possible question, that the courts of common law have acquired a concurrent jurisdiction.").

B. The development of Maritime Jurisdiction through history

The 1966 unification of federal process preserved substantive distinctions despite procedural consolidation. When the admiralty and law "sides" of federal courts unified in 1966, there was no intent to eliminate the substantive distinctions between admiralty and law. In the creation of Rule 9(h), unification meant to streamline procedure while preserving substantive rights. The Advisory Committee Notes explicitly state that the unification was not intended to eliminate the "classic privilege given by the saving-to-suitors clause." FED. R. CIV. P. 9, *Advisory Comm. Note*.

Non-admiralty courts hearing saving-to-suitors-clause cases must apply the same substantive law that admiralty courts would apply. *See Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 243 (1942). DOHSA claims, wherever filed, call for the substantive law of DOHSA. *Tallentire* made this point clear:

> Stated another way, the "saving to suitors" clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is

> constrained by a so-called "reverse-*Erie*" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

447 U.S. 222-23.

Because DOHSA creates concurrent jurisdiction, under the saving-to-suitors clause a DOHSA plaintiff may choose the forum in which to pursue the claim and thereby select the procedures that will apply. As in *Tallentire*, plaintiff may file a DOHSA claim in a state court with jurisdiction, in which case state procedural rules apply. Or plaintiff may file the DOHSA action in federal court. The federal court will have admiralty jurisdiction over the claim, but if plaintiff satisfies the requirements of a non-admiralty jurisdictional statute, Rule 9(h) permits plaintiff to elect which procedures – law or admiralty – will apply to the claim. If plaintiff files a Rule 9(h) declaration, the special admiralty procedures found in Rules 14(c), 38(e), 82, and the Supplemental Rules will apply to the DOHSA claim. But if plaintiff does not file a Rule 9(h) declaration and a non-admiralty basis for federal jurisdiction exists, the claim will proceed at law and the ordinary Federal Rules of Civil Procedure will apply — including Rule 38(a), which preserves the right to jury trial.

As maritime expert Judge John deGravelles stated:

> What is "saved" to the suitor in § 1333 is not only the right to bring most maritime cases in a non-admiralty or "savings clause court" (state court or the law side of federal court), but also the right of the litigants to utilize the procedural differences between the federal court in admiralty and those of the non-admiralty or savings clause court. In other

> words, each of the three courts should apply its own procedural rules regardless of what substantive law is applied.

deGravelles, *supra*, at 9 (citation omitted).

C. DOHSA's text and history in context

The plain language of DOHSA demonstrates Congress's intent that admiralty jurisdiction over DOHSA claims be concurrent, not exclusive. DOHSA provides that "[w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas[,] ... the personal representative of the decedent ***may*** bring a civil action in admiralty against the person or vessel responsible." 46 U.S.C. § 30302 (emphasis added). By using the word "may" rather than "must," Congress signaled its intent to permit maritime plaintiffs to bring their DOHSA claims as admiralty actions or as *in personam* actions in courts of competent jurisdiction. *Cf. Panama R. Co. v. Johnson*, 264 U.S. 375, 383 (1924) (Jones Act language "may, at his election, maintain an action for damages at law," created concurrent jurisdiction, allowing plaintiffs to proceed in either law or admiralty).

DOHSA includes a saving clause that provides, "[t]his chapter does not affect the law of a State regulating the right to recover for death," 46 U.S.C. § 30308(a), and creates a permissive right to proceed in admiralty, but not a compulsory obligation to do so.

The manner in which this Court interprets "statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). When Congress chooses words ambiguous or at odds with the statute's stated

purpose, courts must construe those words to support that purpose, not defeat it. *See Griffin v. Oceanic Contrs., Inc.,* 458 U.S. 564, 571 (1982).

DOHSA contains a permissive clause creating admiralty jurisdiction and a saving clause preserving claimant's rights to pursue other remedies. Congress intended these clauses to preserve concurrent jurisdiction over DOHSA claims. Fair reading of these clauses refutes any reasonable contention that, when enacting DOHSA, Congress intended to override the presumption of concurrent admiralty jurisdiction codified in the saving-to-suitors clause.

Legislative history supports this plain reading of DOHSA. Congress took 20 years to enact DOHSA's remedy for wrongful death on the high seas. The first bill in 1900 "would have allowed suit to recover for wrongful death with a right of jury trial in both the district courts in admiralty and the federal circuit courts." Friedell, *supra,* at 172. The Maritime Law Association ("MLA") objected to jury trials in admiralty, and the bill failed. *Id.* The MLA drafted the next bill in 1913. This bill would have created exclusive admiralty jurisdiction, providing that suits "shall not be maintained in the courts of any State or Territory or in the court of the United States other than in admiralty." *Id*. This attempt at exclusive admiralty jurisdiction failed. In 1915, the Judiciary Committee presented a bill that reversed course and expressly preserved concurrent jurisdiction with a saving clause very similar to the current one.[6] The

[6] "But nothing in this Act shall be construed to abridge the right of suitors in the courts of any State or Territory to a remedy given by the laws of any State or Territory in such cases." 52 Cong. Rec. 1065 (Jan. 6, 1915).

Judiciary Committee Chair explained that for deaths resulting from wrongful acts on the high seas, the saving clause gave plaintiffs the option of (i) suing in federal court based on either admiralty or diversity or (ii) suing in state court where the case might remain or be tried in federal court if removed. A non-jury trial would be mandated only if (i) the plaintiff elected to sue in admiralty or (ii) it was an *in rem* proceeding. *Id.* at 173. Although there were proposed amendments to this saving clause, and the MLA weighed in with proposed wording of its own, none of these proposals objected to the creation of concurrent jurisdiction – or the use of jury trials in non-admiralty courts. *Id.* at 174. This bill also failed.

The bill that became DOHSA emerged after the MLA changed course to propose a bill providing a remedy only for deaths outside state waters and "limit[ing] its application to the Admiralty Court." *Id.* The saving provision in this proposed bill read, "That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act as to causes of action accruing within the territorial limits of any State." *Id*. MLA sought to limit the scope of the saving clause to those wrongful deaths occurring in state territorial waters. This bill was introduced in 1915, but languished in Congress during the First World War. *Id.*

Congress enacted DOHSA in 1920. Congress made a crucial amendment to the saving clause, striking the phrase "as to causes of action accruing within the territorial limits of any State." *Id*. at 175. The enacted statute thus read: "That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act."

Id. Congressman Mann, who introduced the successful amendment, argued that the amended bill

> would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not. In other words, if a man had [a] cause of action and could get service, he could sue in a State court and not be required to bring suit in the Federal court.

Id.

The *Tallentire* Court examined this history in close detail and expressly held that DOHSA's saving clause was intended to "serve as a jurisdictional saving clause, ensuring that state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and, under DOHSA, for accidents occurring more than one marine league from shore." 477 U.S. at 221. If this saving clause preserves concurrent state court jurisdiction, then Congress did not subject DOHSA cases to exclusive admiralty jurisdiction. When admiralty jurisdiction is not exclusive, plaintiffs retain options under the saving-to-suitors clause, including proceeding in federal court under the civil rules, or on removal to federal court, invoking a non-admiralty basis of jurisdiction.

No evidence shows Congress intended to create a novel hybrid jurisdictional scheme.

III. The decision invites jurisdictional manipulation and forum-shopping.

The Seventh Circuit incentivized defendants to remove cases to federal court to eliminate jury trial rights.

The right to a trial by jury is a procedural right determined by a plaintiff's choice of forum, not a substantive right preempted by DOHSA. The Advisory Committee's Notes to Rule 9(h) state that Rule 9(h) declaration will "provide some device for preserving the [pre-merger] power of the pleader to determine" whether admiralty or civil law procedures will apply to his or her claim and thereby preserve the right to a jury trial if desired. The Note further provides:

> Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. § 1333) or by equivalent statutory provisions.... One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute....

FED. R. CIV. P. 9(h), *Advisory Committee Note*, 39 F.R.D. 69, 75–76 (1966). In addition, Rule 38(a) emphasizes the importance of the jury-trial right in a federal civil action by providing that "[t]he right of trial by jury as declared by the Seventh Amendment to the constitution – or as provided by federal statute – is preserved to the parties inviolate." FED.R. CIV. P. 38(a).

A. The new strategic advantage of removal

Defendants wielding the Seventh Circuit opinion can now eliminate jury trial rights through removal. The decision below incentivizes defendants to remove DOHSA cases to avoid jury trial.[7] This contradicts the well-settled canon that removal jurisdiction should not become a vehicle for strategic forum-shopping. *Breuer v. Jim's Concrete of Brevard, Inc.,* 538 U.S. 691, 696-97 (2003); *Ferens v. John Deere Co.*, 494 U.S. 516, 527-28 (1990).

Boeing demanded a jury trial before changing course to a bench trial. Pet. App. 75a. This tactic illustrates the gamesmanship of the Seventh Circuit's rule. Manipulation contradicts the principle that forum procedural differences should not determine substantive outcomes. *Hanna v. Plumer,* 380 U.S. 460, 467-68 (1965).

B. The one-way ratchet problem

The Seventh Circuit created asymmetry: Plaintiffs who choose state court find their jury trial rights eliminated through removal; defendants preferring bench trials guarantee it through removal.

This one-way ratchet contradicts the principle that courts should guard against forum manipulation that harasses the defendant or creates "inappropriate disruption." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508 (1947). The Court has repeatedly rejected such rules creating substantive inequities.

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[7] This concern is not hypothetical; rather it is exactly what Boeing did in the *Chandra* case (consolidated below with this case). The *Chandra* plaintiffs filed in State court. Boeing removed to federal court under 28 U.S.C. § 1369. The district court ruled plaintiffs lost their jury-trial right, and the Seventh Circuit affirmed.

"In exercising in personam jurisdiction ... a state court may adopt such remedies, and ... attach to them such incidents, as it sees fit so long as it does not attempt to make changes in the substantive maritime law." *American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994). "A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 445 (2001). A saving-clause court's remedy is procedural, not substantive, as long as it does not "work[] material prejudice to the characteristic features of the general maritime law or interfere[] with the proper harmony and uniformity of that law." 510 U.S. at 447 (cleaned up).

The Court emphasized that "[u]niformity of process (beyond the rudimentary elements of procedural fairness) is assuredly not what the law of admiralty seeks to achieve, since it is supposed to apply in all the courts of the world." 510 U.S. at 453. Procedural rules are "those whose official purposes are confined to securing the fairness or efficiency of the litigation process." David W. Robertson, *The Applicability of State Law in Maritime Cases*, 21 TUL. MAR. L.J. 81, 85 (1996); *see also* 510 U.S. at 458 (Souter, J., concurring) ("[H]ow a given rule is characterized for purposes of determining whether federal maritime law pre-empts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce.").

The right to jury trial is a rule of fairness; it neither disrupts the free flow of maritime commerce, nor does it interfere with the uniformity of admiralty law. It falls on the procedural side of the substance/procedure divide. *See Lewis & Clark*, 531 U.S. at 454-55 ("[T]he [saving-to-suitors] clause extends to all means other

than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. Trial by jury is an obvious, but not exclusive, example of the remedies available to suitors.") (cleaned up); *see also Curcuru v. Rose's Oil Serv., Inc.*, 802 N.E.2d 1032, 1038 (Mass. 2004) ("Use of the remedy of a jury trial does not undermine or conflict with DOHSA or with substantive Federal maritime law.").

C. Practical consequences for administration of justice

Forum manipulation creates efficiency concerns that should interest the Court. Incentivizing removal to eliminate jury trial rights creates judicial inefficiencies. Manipulative jurisdictional practices "would undermine the clarity and ease of administration" of jurisdictional rules. *Holmes Grp., Inc. v. Voronado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002).

That jury availability now turns on removal status imperils uniformity in maritime law. This contradicts the Court's holding that "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce" through uniform rules. *Norfolk S. Ry. Co. v. Kirby,* 543 U.S. 14, 25 (2004).

The decision undermines the principle that procedural rules should not determine substantive outcomes. There is no reason to believe that Congress intended to limit the applicability of the Seventh Amendment right to a trial by jury when it enacted DOHSA. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (citation omitted). When Congress

has intended to abrogate the right to a jury trial in an admiralty action, it has done so directly and expressly. *E.g.*, 46 U.S.C. § 30903(b) ("A claim against the United States or a federally-owned corporation under this section shall be tried without a jury.").

IV. The Seventh Amendment implications of the decision below warrant this Court's review.

A. The Seventh Amendment's historical test

Jury trial rights existed for maritime matters in 1791 when pursued as common law claims. The Court applies a historical test to determine when jury trial rights attach. In *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 42 (1989), the Court held that the Seventh Amendment preserves jury trial rights that existed in 1791. The historical evidence shows that maritime plaintiffs could obtain jury trials by pursuing common law remedies. SNELL, *supra*, 149-79; SCHOENBAUM, *supra* § 4:2, at 257.

The Seventh Circuit eliminated this historical choice. This approach contradicts the historical test established in *Granfinanciera*.

B. Application of the Seventh Amendment to diversity jurisdiction

Where "legal rights are to be ascertained and determined," the Seventh Amendment "preserve[s] the right to jury trial as it existed in 1791." *Curtis v. Loether,* 415 U.S. 189, 193 (1974); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-48 (1830) (Story, J.). When plaintiffs invoke diversity jurisdiction for DOHSA claims, they are asserting precisely such "legal rights" that would traditionally entitle them to jury trials.

The *Beacon Theatres* principle counsels preserving jury trial rights when both admiralty and non-

admiralty bases co-exist. When both legal and equitable claims are present, jury trial rights must be preserved. 359 U.S. at 510-11. When both admiralty and non-admiralty bases for jurisdiction exist, the Seventh Amendment also counsels preserving jury trial rights.

Constitutional avoidance canons suggest interpreting DOHSA to preserve jury trial rights. Courts should interpret statutes to "avoid serious constitutional doubts." *Jennings v. Rodríguez*, 583 U.S. 281, 296 (2018), The Seventh Circuit's interpretation raises constitutional doubts when eliminating jury trial rights within the protection of the Seventh Amendment.

Maritime plaintiffs at law in saving-clause cases are entitled to jury trial, regardless of non-DOHSA claims. When DOHSA applies, it preempts other forms of wrongful-death claims. *See Dooley v. Korean Air Lines Co.*, *Ltd.,* 524 U.S. 116, 123 (1998); *Tallentire*, 477 U.S. at 227. But DOHSA preemption is substantive, not procedural. Both DOHSA § 7[8] and 28 U.S.C. § 1333 permit DOHSA plaintiffs to elect procedures governing their DOHSA claim by their choice of forum. "Although not intended to function as a substantive law saving clause, [DOHSA] § 7 incidentally ensured that state courts exercising concurrent jurisdiction could, as under the 'saving to suitors' clause, apply such state remedies as are not inconsistent with substantive federal law." 477 U.S. at 224.

Jury trials are compatible with maritime claims. "While ... the Seventh Amendment does not require jury trials in admiralty cases, neither that Amendment nor any other provision of the Constitution forbids them. Nor does any statute of Congress, or Rule of Procedure, Civil or Admiralty, forbid jury trials in

[8] Codified at 46 U.S.C. § 30308(a).

maritime cases." *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 (1963). Maritime law is a complicated amalgam of statutory and common law rights that apply to different actors in different circumstances. But the saving-to-suitors clause in 28 U.S.C. § 1333 is a constant. And in applying the saving-to-suitors clause in other maritime contexts, the Court permits maritime plaintiffs choice of forum, to preserve procedural remedies of that forum — including the right to jury trial.

For example, a plaintiff who brings a maritime claim as an *in personam* claim at law is entitled to a jury trial on that claim. *Ellerman*, 369 U.S. at 359-60 (1962) ("[A] suit for breach of a maritime contract, while it may be brought in admiralty, may also be pursued in an ordinary civil action, since ... it is a suit in personam. ... This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury. ... [T]rial by jury is part of the remedy."). *Ellerman* held the Seventh Amendment applies to claims that could be heard in admiralty if a plaintiff instead elects to proceed at law under the saving-to-suitors clause. *See In re Lockheed Martin Corp.*, 503 F.3d 351, 356 (4th Cir. 2007) ("*Ellerman* makes it clear that the Seventh Amendment applies to admiralty claims that are tried 'at law' by way of the saving-to-suitors clause."); *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054 (9th Cir.1997) ("The difference between [proceeding in admiralty or at law] is mostly procedural; of greatest significance is that there is no right to jury trial if general admiralty jurisdiction is invoked, while it is preserved for claims based in diversity or brought in state court."); *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1041 (8th Cir. 1983) ("An admiralty claim that is also cognizable as a civil claim, however, may

be brought as an ordinary civil action. In these cases, the right to trial by jury attaches.").

The dispute in *Ellerman* raised a contract issue suitable for a jury. Similarly, DOHSA claims raise tort issues bearing no federal maritime interest and no warrant for the procedures of admiralty — especially denial of the jury trial right.

CONCLUSION

The Court should grant certiorari to restore uniformity, prevent jurisdictional manipulation, and protect constitutionally guaranteed rights.

Respectfully submitted,

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