No. 16-26

In the Supreme Court of the United States

BULK JULIANA, LTD., ET AL., PETITIONERS

v.

WORLD FUEL SERVICES (SINGAPORE) PTE, LTD.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a supplier of fuel to a foreign-flagged vessel in a foreign port, pursuant to a contract providing that United States maritime law governs the transaction, may assert a maritime lien against the vessel under 46 U.S.C. 31341 *et seq.*, when the vessel is docked in a United States port.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. This admiralty case concerns maritime liens, a remedial device that is "unique to admiralty law" and intended to "keep ships moving in commerce while preventing them from escaping their debts by sailing away." 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 9-1, at 516 (4th ed. 2004) (Schoenbaum). A maritime lien is a claim on maritime property, such as a vessel, "arising out of services rendered to or injuries caused by that property." *Id.* at 515. The lien "attaches simultaneously with the cause of action and adheres to

the maritime property even through changes of ownership until it is either executed through the *in rem* legal process available in admiralty or is somehow extinguished by operation of law." *Ibid.*

> The theoretical basis of the maritime lien goes to the heart of all that is distinctive about admiralty law: it is a right based upon the legal fiction that the ship is the wrongdoer—the ship itself caused the loss and can be called to the bar to make good the loss.

Ibid.

Before 1910, federal courts recognized and enforced maritime liens at common law under principles of general maritime law. See *Trans-Tec Asia* v. *M/V Harmony Container*, 518 F.3d 1120, 1128 (9th Cir.) (*Trans-Tec*), cert. denied, 555 U.S. 1062 (2008). General maritime law authorized liens based, *inter alia*, on claims under maritime contracts for the provision of "necessaries," such as fuel, to a vessel in a foreign port. See, *e.g.*, *The J.E. Rumbell*, 148 U.S. 1 (1893); *The Kalorama*, 77 U.S. (10 Wall.) 204 (1870). A lien secured the supplier's interest in the value of the necessaries it provided. "Conferring a lien on the vessel to 'materialmen' ensured the continued maintenance of vessels by encouraging suppliers to provide necessaries in foreign ports." *Trans-Tec*, 518 F.3d at 1128.

Federal general maritime law, however, limited the availability of maritime liens in a significant respect. Under the "home port doctrine," *Trans-Tec*, 518 F.3d at 1129, maritime liens were authorized only "for supplies furnished to a vessel in a port of a foreign country or state," but not for "supplies [that] were furnished in the [vessel's] home port or state." *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1, 11 (1920) (*Piedmont*). A "lien on a vessel for the provision

of supplies in a port of the vessel's home state" still "could arise," but "only if there were state legislation to that effect." *Trans-Tec*, 518 F.3d at 1128. "[S]ignificant variance" among state statutes, *ibid.*, led to "much confusion" in this area. *Dampskibsselskabet Dannebrog* v. *Signal Oil & Gas Co. of Cal.*, 310 U.S. 268, 272 (1940) (*Dampskibsselskabet*).

b. In 1910, Congress intervened to "simplify and clarify the rules as to maritime liens," *Dampskibsselskabet*, 310 U.S. at 271-272, by enacting the Act of June 23, 1910, ch. 373, 36 Stat. 604, commonly known as the Federal Maritime Lien Act (FMLA). The FMLA "substitute[d] a single federal statute for" the varying state regimes. *Piedmont*, 254 U.S. at 11. It codified the basic principle of maritime liens, but it eliminated the home-port doctrine that had limited maritime liens to the provision of supplies in a foreign port. See *ibid.* Instead, the FMLA established "simple and comprehensive rules" that granted a maritime lien to "[a]ny person furnishing repairs, supplies, etc., to a vessel[,] whether foreign or domestic," which the supplier could "enforc[e] by suit *in rem*." *Dampskibsselskabet*, 310 U.S. at 272-273. The statute thus effectively put foreign and domestic suppliers of necessaries on equal footing and rendered state maritime-lien laws irrelevant. See *Triton Marine Fuels Ltd., S.A.* v. *M/V Pac. Chukotka*, 575 F.3d 409, 417-418 (4th Cir. 2009) (*Triton*). The FMLA also modified the common-law maritime rules in other respects "intended to operate in aid of those who supply necessaries to ships" and to "restrict[] the rights of [vessel] owners." *Dampskibsselskabet*, 310 U.S. at 273; see S. Rep. No. 831, 61st Cong., 2d Sess. 1-2 (1910).

In 1971, Congress amended the FMLA to provide even greater protection to necessaries suppliers. Act of

Aug. 10, 1971, Pub. L. No. 92-79, 85 Stat. 285. As originally enacted, the FMLA contained an exception prohibiting a supplier from asserting a maritime lien if the supplier either "knew, or by exercise of reasonable diligence could have ascertained," that the charterer was prohibited under its contract with the vessel owner from incurring a lien. Act of June 23, 1910, ch. 373, § 4, 36 Stat. 605; see *Trans-Tec*, 518 F.3d at 1129. The 1971 amendment eliminated that exception. 85 Stat. 285; see generally H.R. Rep. No. 340, 92d Cong., 1st Sess. (1971). Lower courts have construed that amendment to permit a supplier to obtain a lien without any duty to inquire whether the charterer is prohibited from incurring liens, and to prohibit a lien only if the supplier has actual notice that the charterer is not authorized to bind the vessel (thereby rebutting the charterer's presumed authority to do so). See, *e.g.*, *Belcher Oil Co.* v. *M/V Gardenia*, 766 F.2d 1508, 1512 (11th Cir. 1985); *Gulf Oil Trading Co.* v. *M/V Caribe Mar*, 757 F.2d 743, 746-751 (5th Cir. 1985).

As amended and recodified, the FMLA currently provides that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner has a maritime lien on the vessel" that may be enforced by a "civil action in rem." 46 U.S.C. 31342; see 46 U.S.C. 31301(4) ("necessaries" includes fuel). It further provides that certain persons are "presumed to have authority to procure necessaries for a vessel," including officers and agents of the ship's owner or charterer. 46 U.S.C. 31341(a)(4)(A) and (B).

2. a. Petitioner Bulk Juliana, Ltd. (Owner), a Bermuda corporation, is the immediate owner of a Panamanian-flag oceangoing cargo vessel, petitioner M/V *Bulk Juliana* (Vessel). Pet. App. 23. The courts below

described the Vessel as "beneficially owned by a United States company" and as "operated and managed" by another American company. *Id.* at 2, 22-23.

In August 2012, the Vessel was "time-chartered" by Denmar Chartering & Trading GmbH (Charterer), a German company, Pet. App. 2; D. Ct. Doc. 23-4, at 1-3 (Mar. 25, 2014), meaning that the Charterer hired the Vessel for a specified period, see *Black's Law Dictionary* 285 (10th ed. 2014). The time-charter contract (known as a "charter-party") required the Charterer to purchase fuel (called "bunkers") for the Vessel for the duration of its time charter. See D. Ct. Doc. No. 23-4, at 1, 6. The charter-party prohibited the Charterer from incurring a lien on the Vessel. *Id.* at 12.

b. In November 2012, the Charterer contracted with respondent World Fuel Services (Singapore) Pte. Ltd. (Supplier), a Singapore subsidiary of a Florida corporation, for the delivery of fuel to the Vessel while it was in port in Singapore. Pet. App. 2-3, 23. The Supplier sent the Charterer an email confirming the fuel sale, which stated that the Charterer "is presumed to have authority to bind the [Vessel] with a maritime lien." *Id.* at 3 (capitalization altered).

The confirmation email further stated that the transaction "is governed by and incorporates by reference [the Supplier's] general terms and conditions in effect as of the date" of the confirmation (General Terms). Pet. App. 3 (capitalization altered). The General Terms included a choice-of-law provision stating that "[t]he General Terms and each Transaction shall be governed by the General Maritime Law of the United States," and "[t]he General Maritime Law of the United States shall apply with respect to the existence of a maritime lien, regardless of the country in which [the Supplier] takes

legal action." *Id.* at 5. There is no indication that the Charterer ever inquired about or objected to the General Terms. *Ibid.*

The Supplier (through a subcontractor) thereafter delivered the fuel and issued an invoice to "[the Vessel] and/or her owners/operators and [the Charterer]." Pet. App. 6 (capitalization altered). Payment, however, was "never remitted." *Ibid.*

3. In 2013, while the Vessel was docked in the Port of New Orleans, the Supplier commenced this *in rem* admiralty suit against the Vessel in the United States District Court for the Eastern District of Louisiana. Pet. App. 24. The Supplier's complaint sought the arrest of the Vessel and recovery of the sum due for the fuel provided, and asserted a lien under the FMLA. *Id.* at 6. After the court issued an arrest warrant, the Owner posted security for the Vessel's release and answered the complaint, arguing as relevant here that the Supplier could not assert a lien under either Singapore law or under the FMLA. *Ibid.*; D. Ct. Doc. 17, at 1-2 (Sept. 13, 2013).[1]

The district court granted partial summary judgment to the Supplier, holding that the Supplier "has a maritime lien against [the Vessel]" under the FMLA. Pet. App. 22. It applied Singapore law to determine whether the fuel contract was validly formed and validly incorporated the Supplier's General Terms, including the choice-of-law provision. *Id.* at 27-28. Based on "the uncontroverted affidavit and testimony" of the Supplier's "Singapore law expert," *id.* at 7, the court held that the contract validly incorporated the choice-of-law provision. *Id.* at 27-31. The court rejected the Owner's

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[1] The complaint also named the Charterer as a defendant, *in personam*, but it had become insolvent and was dismissed. Pet. App. 6.

contentions that the choice-of-law provision incorporated only U.S. maritime common law, but not the FMLA, and that the choice-of-law provision is unenforceable. *Id.* at 31-36.

4. The Owner and the Vessel (collectively, petitioners) appealed. The court of appeals affirmed. Pet. App. 2.

a. The parties did not dispute on appeal that Singapore law governed whether the contract was validly formed and incorporated the General Terms. Pet. App. 9. The court of appeals accordingly deemed it unnecessary to conduct a "preliminary" choice-of-law analysis. *Ibid.* (citing *Lauritzen* v. *Larsen*, 345 U.S. 571, 582 (1953)). It rejected petitioners' contention that, under Singapore law, the contract did not validly incorporate the General Terms' choice-of-law provision. *Id.* at 10-13. The "undisputed testimony from [the Supplier's] expert witness" established that "the General Terms, including the U.S. choice-of-law provision, were valid and enforceable under Singapore law and were validly incorporated into the contract." *Id.* at 10, 13; see generally *id.* at 10-13.

The court of appeals also rejected petitioners' contention that the choice-of-law provision's reference to the "General Maritime Law of the United States" encompassed only U.S. "maritime common law," not the FMLA. Pet. App. 18; see *id.* at 18-21. The court of appeals "agree[d] with the district court" that the Supplier selected U.S. law "because it wanted to secure payments in the form of maritime liens," and the FMLA "provides the exclusive method" for it to do so. *Id.* at 19-20. The court of appeals further reasoned that the General Terms' statement that "[t]he General Maritime law of the United States shall apply with respect to the

existence of a maritime lien," and their "[n]umerous [other] references" to maritime liens, "would make no sense" if the contract did not incorporate the FMLA. *Ibid.*

b. Applying circuit precedent, the court of appeals rejected petitioners' contention that, notwithstanding the choice-of-law provision, the Supplier did not obtain a maritime lien enforceable against the Vessel. Pet. App. 14-17 (citing, *inter alia*, *Liverpool & London S.S. Prot. & Indem. Ass'n* v. *Queen of Leman MV*, 296 F.3d 350 (5th Cir. 2002)). The court rejected petitioners' argument that the choice-of-law provision constituted "an improper attempt to create a maritime lien by contract where none can arise except by operation of law." *Id.* at 17. The Supplier's lien here, the court explained, "did not arise simply as a matter of contract." *Ibid.* Rather, the choice-of-law provision made the fuel-sale contract subject to the FMLA, and therefore "a valid maritime lien was created by operation of U.S. law." *Ibid.*

The court of appeals also rejected petitioners' argument that the choice-of-law provision in a contract between a vessel's charterer and a supplier cannot bind the vessel itself as "a 'third party' stranger to the sale." Pet. App. 14. The court explained that the Charterer had authority to procure necessaries for the Vessel, and charterers are "presumed to have authority to bind the vessel" in doing so. *Ibid.* "This result flows from the application of U.S. maritime law," including circuit precedent and decisions of the Fourth and Ninth Circuits. *Ibid.* "The Second Circuit alone," the court stated, has "arguably" taken a contrary view. *Id.* at 16. The court also observed that "[o]wners of ocean-going vessels are by their nature internationally oriented, so-

phisticated, and fully able to protect themselves contractually in their dealings with time charterers from any perceived unfairness by the possible enforcement of maritime necessaries liens in U.S. ports," and "recognition of freely negotiated contract terms encourages predictability and certainty in the realm of international maritime transactions." *Ibid.* (citation omitted).

DISCUSSION

Petitioners principally seek review of the court of appeals' holding that a maritime necessaries lien enforceable against a vessel can arise under the FMLA based on a choice-of-law provision selecting U.S. law. This Court previously denied a petition for a writ of certiorari presenting substantially the same question. See *Trans-Tec Asia* v. *M/V Harmony Container*, 518 F.3d 1120, 1128 (9th Cir.) (*Trans-Tec*), cert. denied, 555 U.S. 1062 (2008). Review remains unwarranted. The court of appeals' holding does not conflict with any precedent of this Court, and it is consistent with the decisions of both other circuits that have directly addressed the same issue.

In their reply brief, petitioners raise an additional question: whether the presumption against extraterritorial application of federal statutes precludes a maritime lien under the FMLA where a "foreign supplier supplies a foreign-flag vessel in a foreign port." Pet. Reply Br. 6. That question was not pressed or passed upon below, and in any event it does not warrant review in this case. Because application of the FMLA here was premised on the choice-of-law provision in the fuel-sale contract, this case does not directly implicate the geographic scope of the FMLA itself. This case also would be an unsuitable vehicle to address broader issues of the FMLA's reach.

I. THE COURT OF APPEALS' HOLDING THAT THE SUPPLIER OBTAINED A LIEN ENFORCEABLE AGAINST THE VESSEL BASED ON A CHOICE-OF-LAW PROVISION DOES NOT MERIT REVIEW

The four questions presented in the petition (at i-ii) and petitioners' primary arguments for review (Pet. 8-27; Pet. Reply Br. 1-6) all concern the court of appeals' holding that the Supplier obtained a maritime lien under the FMLA enforceable against the Vessel based on the fuel-sale contract's choice-of-law clause selecting U.S. law. That decision does not merit review.

A. As this case comes to the Court, there is no dispute that the fuel-sale contract between the Supplier and the Charterer validly incorporated a choice-of-law provision making U.S. law applicable to the contract. The parties did not dispute in the court of appeals that Singapore law governs questions of the fuel-sale contract's formation. Pet. App. 9. Petitioners did argue below that, under Singapore law, the contract did not validly incorporate the choice-of-law provision in the Supplier's General Terms making the agreement subject to U.S. law. *Id.* at 9-10. Both courts below, however, rejected petitioners' position based on the "undisputed testimony" of an expert witness regarding Singapore law. *Id.* at 10; see *id.* at 10-13, 27-31. Petitioners do not seek review of that ruling, and that factbound question of the application of foreign law would not merit this Court's review in any event.

Petitioners do seek review (Pet. 21-27) of whether the choice-of-law provision in the fuel-sale contract incorporated the FMLA. The Supplier's General Terms stated that "[t]he General Terms and each Transaction shall be governed by the General Maritime Law of the United States," Pet. App. 5, and petitioners contend

(Pet. 22) that "general maritime law" refers only to "judge-made common law," not "statutory law." This contention does not merit review. The courts below reasonably construed that language in context to encompass the FMLA. Pet. App. 19-20, 34-36. The Supplier's principal purpose for including the choice-of-law provision, they explained, was to enable the Supplier to obtain a lien under the FMLA, and the General Terms' "numerous references" to liens otherwise "would make no sense." *Id.* at 19-20. Petitioners do not allege that the court of appeals' interpretation of that contractual language conflicts with any other circuit's decision. The question of the correct interpretation of language in a particular contract does not warrant certiorari.

B. Petitioners contend (Pet. 8-21) that, even if the choice-of-law provision encompassed the FMLA as opposed to only common law, the Supplier nevertheless did not obtain a maritime lien under the FMLA enforceable against the Vessel for two reasons. First, they contend (Pet. 8-11) that the Supplier could not obtain a maritime lien based on a choice-of-law provision because maritime liens cannot be created by contract. Second, petitioners argue (Pet. 13-21) that a maritime lien predicated on a contractual choice-of-law provision cannot bind third parties who did not consent to the contract. The court of appeals correctly rejected both arguments, and neither implicates a direct lower-court conflict.

1. a. Petitioners assert (Pet. 9) that the court of appeals' decision is incorrect because "a maritime lien cannot be created by agreement between the parties." They argue (Pet. 10) that, "but for the contract," Singapore law would apply, and it would not authorize a lien. Assuming arguendo the validity of the no-lien-by-contract

principle that petitioners invoke, their argument is mistaken.

As the court of appeals correctly explained, the Supplier's "maritime lien did not arise simply as a matter of contract, but as a matter of law under the FMLA." Pet. App. 17. The parties to the fuel-sale contract determined in the choice-of-law provision which body of law would apply to their agreement. *Ibid.* That provision "include[d] the FMLA," which "creates authority for a charterer to bind the vessel." *Ibid.* By holding the Supplier's lien enforceable, the decision below merely gave effect to the parties' decision of which law would govern whether and on what terms a maritime lien would arise.

Petitioners' contrary position would effectively mean that parties to a maritime necessaries contract may not select the law governing their agreement. But as this Court explained in upholding a forum-selection clause in a maritime contract, "[t]here are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, * * * should be given full effect," including the need for certainty and predictability. *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972). Those same reasons support enforcing otherwise-valid choice-of-law provisions. Indeed, "[a] contractual provision specifying in advance * * * the law to be applied is * * * an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516 (1974); see *Lauritzen* v. *Larsen*, 345 U.S. 571, 588-589 (1953) ("Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply."). The court of

appeals thus correctly held that "a valid maritime lien was created" not by the parties' contract, but "by operation of U.S. law." Pet. App. 17.[2]

That conclusion does not conflict with any of the decisions of this Court that petitioners cite. Pet. 8-9 (citing *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1 (1920) (*Piedmont*); *The Bird of Paradise*, 72 U.S. (5 Wall.) 545 (1867); *Newell* v. *Norton*, 70 U.S. (3 Wall.) 257 (1866); *Vandewater* v. *Mills*, 60 U.S. (19 How.) 82 (1857)). None of those decisions addressed a choice-of-law provision, and none articulated a rule barring parties to a maritime contract from selecting the law that will govern whether and on what terms a maritime lien may arise. To the contrary, *The Bird of Paradise* stressed that, although "a maritime lien * * * arises from the usages of commerce, independently of the agreement of the parties," the parties "may frame their contract * * * as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it." 72 U.S. (5 Wall.) at 555. Petitioners identify no holding of this Court that prevented the parties from deciding that U.S. law would govern the Supplier's lien, and they offer no other reason why federal courts should decline to recognize the parties' choice of the governing law.[3]

b. Petitioners also assert (Pet. 13-21) that a lien based on a contractual choice-of-law provision cannot

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[2] Petitioners' contention (Pet. 12) that the district court lacked jurisdiction because parties may not create jurisdiction by contract fails for the same reason. The Supplier's maritime lien arose by operation of U.S. law; the district court had jurisdiction on that basis.

[3] The passage petitioners quote (Pet. 9) from *Newell* appeared in the reporter's recitation of the appellant's argument rather than in the Court's opinion. 70 U.S. (3 Wall.) at 262.

bind third parties who did not agree to that contract. But as the court of appeals noted, it is a "fundamental tenet of maritime law that '[c]harterers and their agents are presumed to have authority to bind the vessel by the ordering of necessaries.'" Pet. App. 14 (citation omitted; brackets in original). The FMLA codifies this rule, providing that the "charterer" of a vessel is "presumed to have authority to procure necessaries for [the] vessel." 46 U.S.C. 31341(a).

Petitioners offer nothing to rebut that presumption. Although the Charterer's time-charter contract prohibited it from incurring liens, petitioners do not contend that the Supplier knew of that restriction. The Supplier sent a confirmation email to the Charterer stating that the Charterer "is presumed to have authority to bind the [Vessel] with a maritime lien," and the court of appeals found "no indication in the record" that the Charterer "objected." Pet. App. 3, 5 (capitalization altered).

Petitioners' contention (Pet. 13, 18-21) that the decision below permits infringement of a vessel owner's rights similarly disregards a basic premise of maritime law. "In the case of a maritime lien, the vessel itself is viewed as the obligor, regardless of whether the vessel's owner is also obligated." *Triton Marine Fuels Ltd., S.A.* v. *M/V Pac. Chukotka*, 575 F.3d 409, 414 (4th Cir. 2009) (*Triton*). That premise lies at "the heart of all that is distinctive about admiralty law": the notion "that the ship is the wrongdoer * * * and can be called to the bar" in an *in rem* proceeding "to make good the loss." Schoenbaum § 9-1, at 515. Petitioners' argument "ignores the fact that this case involves an *in rem* action asserting a maritime lien against the Vessel, rather than an *in personam* claim against" the Owner. *Triton*, 575 F.3d at 413.

2. Petitioners contend (Pet. 13) that the courts of appeals are divided on whether a maritime lien (1) can arise based on a contractual choice-of-law provision selecting U.S. law and (2) can bind a nonparty to the contract. The decision below, however, does not implicate any square circuit conflict.

a. As petitioners acknowledge (Pet. 13 & n.1), the Fifth Circuit's decision here accords with decisions of the Fourth and Ninth Circuits. Both of those courts have held that a supplier that provided necessaries to a vessel in a foreign port obtained a lien enforceable against the vessels under the FMLA, based on a choice-of-law provision selecting U.S. law. In *Trans-Tec*, the Ninth Circuit held that a Singapore-based supplier that provided fuel in South Korea to a Malaysian vessel obtained a maritime lien under the FMLA based on a choice-of-law provision in the fuel contract that selected U.S. law. 518 F.3d at 1123-1133. In reaching that holding, the Ninth Circuit expressly "agree[d] with the Fifth Circuit's holding" in *Liverpool & London Steamship Protection & Indemnity Ass'n* v. *Queen of Leman MV*, 296 F.3d 350 (5th Cir. 2002), *Trans-Tec*, 518 F.3d at 1127, which the decision below followed as binding precedent, Pet. App. 14-17.

After this Court denied review in *Trans-Tec*, see 555 U.S. 1062 (2008) (No. 08-293), the Fourth Circuit reached the same conclusion in *Triton*, *supra*. Agreeing with the reasoning of both the Fifth and Ninth Circuits, *Triton* held that a Canadian fuel supplier obtained a maritime lien under the FMLA for fuel it supplied to a non-U.S. vessel in a Ukrainian port based on a choice-of-law provision in the supplier's contract with the charterer selecting U.S. law. See 575 F.3d at 413-419. The

Fourth Circuit specifically rejected the arguments petitioners press here that permitting a supplier to assert a lien under the FMLA based on a choice-of-law provision amounts to an improper attempt to create a maritime lien by contract and improperly infringes the rights of the vessel owner. See *id.* at 413-414, 416.

b. Petitioners contend (Pet. 13-14) that the Fourth, Fifth, and Ninth Circuits' decisions conflict with *Rainbow Line, Inc.* v. *M/V Tequila*, 480 F.2d 1024 (2d Cir. 1973). Although lower courts have described the cases above as "in tension" with *Rainbow Line*, *Trans-Tec*, 518 F.3d at 1127, there is no direct conflict that warrants this Court's review.[4]

In *Rainbow Line*, a vessel's charterer claimed that the vessel's former owner had breached the time-charter contract by "prematurely withdr[awing] the vessel from service." 480 F.2d at 1025. After the breach, the former owner sold the vessel to a new owner, who mortgaged the ship but then defaulted. *Ibid.* The ship was subsequently arrested in a U.S. port, and the charterer, the mortgagee, and other creditors asserted claims. *Ibid.* The charterer asserted a lien under the FMLA, but the mortgagee objected, arguing that English law (which prohibited liens for breach of a charter-party) governed and that enforcing a lien against the mortgagee—which

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[4] Petitioners also cite two earlier Fifth Circuit decisions. Pet. 15-17 (citing *Gulf Trading & Transp. Co.* v. *The Vessel Hoegh Shield*, 658 F.2d 363 (1981), cert. denied, 457 U.S. 1119 (1982), and *Arochem Corp.* v. *Wilomi, Inc.*, 962 F.2d 496 (1992)). Any inconsistency among the decisions of the Fifth Circuit is a matter for that court, not this Court, to address. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, as the court of appeals explained, both cases are inapposite because neither involved a choice-of-law provision. Pet. App. 17 n.3.

was unaware of the lien—would be unjust. See *id.* at 1026-1028. The Second Circuit rejected the mortgagee's objections, holding that U.S. maritime law governed and entitled the charterer to a lien. See *ibid.*

Petitioners do not contend that the result in *Rainbow Line* is in conflict with the decision below and *Trans-Tec* and *Triton*. They rely instead on a single sentence in the Second Circuit's opinion rejecting the charterer's argument that U.S. law applied "because it was so intended by the parties to the charter." *Rainbow Line*, 480 F.2d at 1026. The court stated that "maritime liens arise separately and independently from the agreement of the parties, and rights of third persons cannot be affected by the intent of the parties to the contract." *Ibid.* The court nevertheless agreed that U.S. maritime law governed based on "the principles of *Lauritzen*," which addressed the application of the Merchant Marine Act, 1920 (Jones Act), ch. 250, 41 Stat. 988. 480 F.2d at 1026-1027. It rejected the mortgagee's argument that this reasoning led to an unjust result, explaining that "a sophisticated ship mortgagee is well able to devise adequate protection for itself against priority liens." *Id.* at 1028.

Rainbow Line does not squarely conflict with the decision below, *Trans-Tec*, or *Triton*. Its one-sentence statement that maritime liens arise separately from contracts and cannot affect third parties was not necessary to the result the court reached. Moreover, to the extent the Second Circuit suggested that a choice-of-law provision cannot bind third parties, it did not address the circumstance presented here and in *Trans-Tec* and *Triton*, where a supplier provides necessaries to a charterer that is presumed to have authority to bind the vessel itself. The decision below and *Triton* each

held that the choice-of-law provision and the resulting lien were enforceable against the vessel *in rem* on that basis, Pet. App. 14-16; 575 F.3d at 413-414. *Trans-Tec* involved the same scenario. 518 F.3d at 1122-1124. In *Rainbow Line*, the owner breached the charter-party; the court did not question the owner's authority to bind its own vessel. See 480 F.2d at 1025-1026. In context, the Second Circuit's statement that the charter-party could not "affect[]" the "rights of third persons," *id.* at 1026, most naturally refers to the rights of the mortgagee who objected to the lien, not to the vessel. In any event, *Rainbow Line* had no occasion to consider whether a charterer's consent to a choice-of-law provision could bind the vessel and support an action by the supplier *in rem*.

It is far from clear that the Second Circuit would extend its statement in *Rainbow Line* to bar a supplier from asserting a maritime necessaries lien against a vessel based on a choice-of-law provision in the supplier's contract with the charterer. None of the authorities the Second Circuit cited would support that outcome. See 480 F.2d at 1026 (citing *Piedmont*, 254 U.S. at 10; *The Bird of Paradise*, 72 U.S. (5 Wall.) at 555; Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 9-1, at 481-482 (1957)). The Second Circuit also did not address this Court's then-recent decision in *The Bremen*, endorsing forum-selection clauses in maritime contracts, and it did not have the benefit of later cases upholding choice-of-law provisions in international agreements, see, *e.g.*, *Scherk*, 417 U.S. at 516. We are not aware of any subsequent Second Circuit decision construing *Rainbow Line* to hold that a maritime lien could not attach in the context presented by this

case.[5] Pending litigation in the Second Circuit, however, may provide that court the opportunity to clarify its position on this issue.[6] Absent clearer indication that the Second Circuit would reach a different result here, this Court's review is unwarranted.

II. PETITIONERS' CONTENTION THAT THE DECISION BELOW IMPROPERLY GIVES EXTRATERRITORIAL EFFECT TO THE FMLA DOES NOT MERIT REVIEW

In their reply brief, petitioners assert (at 6-10) that the decision below improperly construes the FMLA to have extraterritorial effect. "[E]ven assuming * * * that a contractual choice-of-law provision can create an FMLA lien," they argue, the presumption against extraterritorial application of federal statutes precludes applying the FMLA to what they describe as a "foreign transaction with no meaningful connection to the United States." Pet. Reply Br. 6. Petitioners did not press this alternative argument below, see generally Pet. C.A. Br. 17-44; Pet. C.A. Reply Br. 1-24, and the courts below did not address it. That alone strongly counsels against granting review on this issue. See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("Ordinarily, this Court does not decide questions not raised or resolved

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[5] The Second Circuit apparently has cited *Rainbow Line* only twice, and neither decision read *Rainbow Line* in a way that would conflict with the decision below. See *Blue Whale Corp.* v. *Grand China Shipping Dev. Co.*, 722 F.3d 488, 499 & n.11 (2d Cir. 2013); *State Trading Corp. of India, Ltd.* v. *Assuranceforeningen Skuld*, 921 F.2d 409, 416-417 (2d Cir. 1990).

[6] In *ING Bank N.V.* v. *M/V Voge Fiesta*, appeal pending, No. 16-4023 (2d Cir. docketed Dec. 1, 2016), the assignee of a fuel supplier seeks to enforce a lien against a vessel based on a choice-of-law provision in a contract with a charterer. See Appellant's Br. at 19-25, *ING Bank N.V.*, *supra* (No. 16-4023).

in the lower courts.") (brackets and citation omitted). In any event, it does not merit review in this case.

Although this Court has cautioned against construing statutes to apply extraterritorially absent a "clear indication" of congressional intent, *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010), application of the FMLA to this dispute based on the contract's choice-of-law provision does not directly implicate the FMLA's geographic scope. If the choice-of-law provision is valid and enforceable against the Vessel, as the courts below held, it is the Supplier's and Charterer's agreement that the FMLA would govern their transaction—not the extraterritorial reach of the statute of its own force—that makes the FMLA's provisions applicable in these circumstances. This case, like *Trans-Tec*, thus "presents no extraterritorial problem of the ilk that has troubled [this] Court because here the parties chose United States law to control their transaction, and the vessel sailed to a United States port." 518 F.3d at 1131 (internal quotation marks omitted).

Even if the decision below did implicate the FMLA's geographic scope, at a minimum, the fact that the contracting parties chose to make their agreement subject to the FMLA might affect the extraterritoriality analysis. In the maritime context, the contracting parties' voluntary selection of U.S. law—perhaps in combination with other possible links to the United States, including the facts that the Vessel was arrested in a U.S. port, that it apparently was beneficially owned, operated, and managed by U.S. companies, and that the Supplier's parent company is a Florida corporation, see Pet. App. 2—might resolve potential extraterritoriality concerns. See *Triton*, 575 F.3d at 419 ("The parties'

agreement to apply United States law to their transaction, when considered along with the contacts between the transaction and the United States, puts to rest any fears that an American court is unilaterally imposing the FMLA on other nations.") (brackets and internal quotation marks omitted); cf. *Lauritzen*, 345 U.S. at 582-592 (analyzing "connecting factors" to various jurisdictions in determining whether Jones Act should apply to tort claim arising in foreign harbor). The fact that the FMLA applies because of the choice-of-law provision would also reduce the prospect of interference with foreign law. "[O]ther countries have options, if desired, to address this circumstance," such as "prohibit[ing] contracting parties from choosing United States or foreign maritime lien law in their contracts," or "requir[ing] charterers to inform suppliers of existing no-lien clauses in the charter-party." *Trans-Tec*, 518 F.3d at 1131 n.10.

Contrary to petitioners' assertion (Pet. Reply Br. 7-9), there is no circuit conflict on this issue. The Fourth and Ninth Circuits have squarely rejected similar extraterritoriality arguments. *Triton*, 575 F.3d at 418-419; *Trans-Tec*, 518 F.3d at 1131-1132. Petitioners cite (Pet. Reply Br. 7-9) *Trinidad Foundry & Fabricating, Ltd.* v. *M/V K.A.S. Camilla*, 966 F.2d 613 (11th Cir. 1992) (*Trinidad*), and *Tramp Oil & Marine, Ltd.* v. *M/V "Mermaid I"*, 805 F.2d 42 (1st Cir. 1986) (*Tramp Oil*), but neither establishes a conflict. Neither case addressed a choice-of-law provision that selected U.S. law. In *Trinidad*, the choice-of-law clause selected English law, and the court of appeals upheld that clause. 966 F.2d at 615, 617. And in *Tramp Oil*, it was undisputed that the FMLA applied. See 805 F.2d at 44. The court held that the plaintiff, an intermediate fuel broker,

could not assert a lien for the unrelated reason that the plaintiff neither took a fuel order from the vessel's charterer nor supplied fuel to the vessel. *Id.* at 45-46.

Even if the additional issue petitioners belatedly raise merited review, this case would not provide a suitable vehicle to address it. The absence of any ruling or a developed record regarding facts that may be relevant to any analysis of the FMLA's geographic scope, or its application to the circumstances here, could frustrate this Court's review and inhibit its ability to provide clear, concrete guidance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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