No. 98-682

In The

Supreme Court of the United States

October Term, 1998

BOUCHARD TRANSPORTATION COMPANY, INC.;
TSACABA SHIPPING COMPANY, INC.;
MARITRANS OPERATING PARTNERS L.P., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURAE* OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The Maritime Law Association of the United States (MLA) respectfully moves for leave to file the attached Brief *Amicus Curiae* in Support of Bouchard Transportation Company, Inc.; Tsacaba Shipping Company, Inc.; Maritrans Operating Partners L.P., Petition for Writ of Certiorari (the "Brief").

The MLA has obtained the consent of counsel for the Petitioners to file its Brief. The MLA has also received the consent of the following parties: The United States, The State of Florida, Marshall Ancar, Evangelisto Anaya, Jr., Robert Hopkins, Michael L. Panagakos, Harry P. Scholer, Continental Insurance Company, Excel Hotels, Inc., Edward P. Rush.

Consent has been denied by counsel for Boca Ciega Hotel, et al. and Ramona M. Updegraff, et al.

NATURE OF MOVANT'S INTEREST

The MLA is a nationwide bar association founded in 1899, with a membership of about 3,600 attorneys, law professors, and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests – shipowners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters, and other maritime claimants and defendants. The MLA has filed *amicus*

briefs in a number of cases in this Court involving questions of maritime law and practice.[1]

The MLA is seeking to file an *amicus* brief because this case has serious implications for the maritime transportation and maritime insurance industries. The decisions of the courts below, despite the unequivocal grant of the right to limitation of liability contained in § 2704 of the Oil Pollution Act of 1990, have made it almost impossible for shipowners to invoke the right granted by the statute. The MLA has adopted the position that a *concursus* procedure, that is, a marshaling of all claims against a shipowner arising from a single incident, is an essential feature of a limitation of liability regime and that a *concursus* is indispensable in implementing limitation of liability under the Oil Pollution Act of 1990. The long-standing and wide-spread experience of the MLA in matters regarding limitation of liability, a process virtually unique to maritime law, should enable it to present important insights in the resolution of the issues raised in the Petition for Certiorari.

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[1] *E.g.*, Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER, 515 U.S.528, 115 S. Ct. 2322 (1995); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043 (1995); McDermott, Inc. v. AmClyde and River Don Castings Ltd., 511 U.S. 202, 114 S. Ct. 1461 (1994). For a listing of other cases, see The MLA Report, Doc. No. 671 at 8862-63 (1987).

The MLA, therefore, respectfully moves for leave to file its brief herein.

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November 23, 1998

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits this Brief[1] as *amicus curiae* in support of the Petition for Writ of Certiorari filed by Bouchard Transportation Company, Inc.; Tsacaba Shipping Company, Inc.; Maritrans Operating Partners L.P., *et al.* ("Petitioners").

INTEREST OF *AMICUS CURIAE*

The MLA is a nationwide bar association founded in 1899, with a membership of about 3,600 attorneys, judges, law professors, and others interested in maritime law. Its attorney members, most of whom are specialists in admiralty law, represent all maritime interests, including shipowners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters, and other maritime claimants and defendants.

The purposes of the MLA are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment

[1] In conformity with Supreme Court Rule 37.6, *amicus curiae* states that no part of this Brief was authored by counsel for a party nor did any person or entity other than *amicus curiae* make any monetary contribution to the preparation or submission of this Brief.

> and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has sponsored a wide-range of legislation dealing with maritime matters during its 99 years of existence, including the Carriage of Goods by Sea Act,[2] the Federal Arbitration Act,[3] and the Foreign Sovereign Immunities Act.[4] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[5]

Specifically, with regard to the issues presented in the Petition for Certiorari, the MLA has adopted the position that *concursus* is an essential feature of a limitation of liability regime and that *concursus* is necessary in

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[2] 46 U.S.C. App. §§ 1300-1315.

[3] 9 U.S.C. §§ 1-5.

[4] 28 U.S.C. §§ 1330, 1602-1611.

[5] *E.g.*, Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376; Convention on the International Regulations for Prevent Collisions at Sea, 28 U.S.T. 3459, as amended, T.I.A.S. 10672, Oct. 20, 1972, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 (Frank L. Wiswall, Jr. Ed., 7th ed. rev. 1998); *see* 33 C.F.R Ch. 1, Subch. D. Special Note, at 176 (1995); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

implementing limitation of liability under the Oil Pollution Act of 1990.

SUMMARY OF ARGUMENT

The holding of the lower courts has seriously undermined, if not defeated, the right of shipowners to limit their liability under the Oil Pollution Act of 1990 (OPA 90). The lower courts held that shipowners have no right to compel a *concursus* of claims when invoking their right to limited liability under OPA 90. *Concursus* of claims, that is, the marshalling of all claims against a shipowner who has petitioned for limitation, is at the very heart of the right to limitation of liability. In effect, the lower courts have held that there is no procedure for invoking the right to limited liability, notwithstanding that OPA (33 U.S.C. § 2704) specifically confers on shipowners the right to limit their liability.

The decisions of the courts below will have far reaching implications on the oil, maritime shipping and marine insurance industries, because, in the absence of procedures for invoking the right to limit, including the indispensable *concursus* procedure, shipowners face the prospect of unlimited liability. The current situation is similar to that which existed after the enactment of the general Limitation of Liability Act of 1851 (now codified in 46 U.S.C. App. § 183) which gave shipowners the right to limited liability but provided no procedures for implementing the right. This Court, rather than see congressional policy frustrated, formulated procedures, including the right to *concursus*, which made limitation of

liability possible. To effectuate the right to limited liability which Congress conferred in OPA 90, Amicus urges the Court to establish uniform rules of procedure which include a *concursus* proceeding. The absence of uniform procedures will result in the negation of the right to limit, unfairness to shipowners and, in some cases unfairness to claimants, and procedural chaos in the aftermath of oil spills.

ARGUMENT

I. The issues presented to this Court implicate important national and international interests which require a definitive resolution by this Court.

The issues presented in the Petition have far reaching national and international ramifications that implicate the interests of the oil industry, the oil transportation industry, the maritime shipping industry and the marine insurance industry. The foregoing statement is not rhetoric. Petroleum is this country's largest import.[6] In 1997 alone, 3.8 billion barrels of energy related petroleum products were imported, at a value of 69.2 billion dollars.[7] Net oil imports are projected to increase to 11.4 million barrels

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[6] Michael S. Leylveld, *America Ignores Oil Dependency as Reliance on Imports Grows*, JOURNAL OF COMMERCE, Aug. 14, 1998, ‹http://www.joc.com/archive/980814/JC00055.html›.

[7] FOREIGN TRADE DIVISION, BUREAU OF THE CENSUS, REPORT FT 900 (97) (CB-98-104), (1997) ‹http://www.census.gov/foreign-trade/Press-Release/97-press_releases/Final_Revis . . . /exh16.tx›.

per day by the year 2005.[8] In addition, more than 3,300 tankers, each with a capacity of greater than 10,000 dead-weight tons, now serve the world maritime oil trade. Approximately 40 percent of these vessels call each year at U.S. ports.[9]

The Oil Pollution Act of 1990 (hereinafter "OPA 90") applies not only to tankers but also to non-tank vessels that carry oil as fuel. Therefore, virtually every commercial vessel entering U.S. ports or plying U.S. waters is subject to OPA 90, including the OPA 90 liability provisions. OPA 90 requires all vessels with oil on board, either as cargo or fuel, to guarantee that they have the financial wherewithal to pay for removal costs and damages in case of a discharge. Many shipping companies satisfy this requirement by purchasing insurance.

Shipping companies and their insurers have expressed legitimate concern about limitation of liability under OPA 90 and the procedures whereby limitation is to be effected.[10] For them the issue is a simple one: Is there limitation of liability under OPA 90 or not? In reality, this is the issue presented to this Court by the Petition for Certiorari. Amicus agrees with Petitioners'

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[8] ENERGY INFORMATION ADMINISTRATION, DEPARTMENT OF ENERGY, ANNUAL ENERGY OUTLOOK (1996).

[9] REPORT OF THE NATIONAL RESEARCH COUNCIL, DOUBLE-HULL TANKER LEGISLATION: AN ASSESSMENT OF THE OIL POLLUTION ACT OF 1990, at v (1997).

[10] R. Force & J. Gutoff, *Limitation of Liability in Oil Pollution Cases: In Search of Concursus or Procedural Alternatives to Concursus*, 22 TUL. MAR. L.J. 331, 344 n. 36 (1998).

contention that *concursus* lies at the heart of the right to limited liability and that without *concursus* the right to limit may be illusory. The resolution of this issue will have ramifications that extend far beyond this spill. Because the United States imports such gargantuan quantities of oil, the extent of liability of the vessels that bring oil to this country may have a significant impact on the international industries that supply oil to the United States. The issues clearly are not only capable of repetition, they are bound to reoccur. The holding of the courts below establish a rule that applies to all discharges of oil from the smallest to the largest, including incidents such as the Exxon Valdez spill (a pre-OPA 90 spill), which involved expenditures by Exxon said to exceed three billion dollars.

II. The decision of the Court of Appeals is directly contrary to the provisions of OPA 90, specifically 33 U.S.C. § 2704, whereby Congress conferred on shipowners the right to limited liability. The right to limited liability is unenforceable without a *concursus* procedure.

Unless this Court reverses the decision of the Court of Appeals that there is no right to *concursus* in limitation proceedings under OPA 90, the decision by Congress to give vessel owners the right to limit their liability will be thwarted. Section 2704 of OPA 90 (33 U.S.C. § 2704)

unequivocally provides for the right to limited liability.[11] However, OPA 90 is silent with regard to the procedural

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[11] § 2704. Limits on liability

(a) General rule

Except as otherwise provided in this section, the total of the liability of a responsible party under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed –

(1) for a tank vessel, the greater of –

(A) $1,200 per gross ton; or

(B)(i) in the case of a vessel greater than 3,000 gross tons, $10,000,000; or

(ii) in the case of a vessel of 3,000 gross tons or less, $2,000,000;

(2) for any other vessel, $600 per gross ton or $500,000, whichever is greater;

(3) for an offshore facility except a deepwater port, the total of all removal costs plus $75,000,000; and

(4) for any onshore facility and a deepwater port, $350,000,000.

* * *

(c) Exceptions

(1) Acts of responsible party

Subsection (a) of this section does not apply if the incident was proximately caused by –

(A) gross negligence or willful misconduct of, or

(B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party

implementation of this right. It is the position of Amicus that the right of limitation provided for in OPA 90 is illusory without a *concursus* procedure that allows for the assertion and enforcement of the right of limitation.

(except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

(2) Failure or refusal of responsible party

Subsection (a) of this section does not apply if the responsible party fails or refuses –

(A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;

(B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title, as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

(3) OCS facility or vessel

Notwithstanding the limitations established under subsection (a) of this section and the defenses of section 2703 of this title, all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge or substantial threat of a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.

* * *

In *Norwich Co. v. Wright*,[12] this Court created procedures to implement the Limitation of Liability Act of 1851[13] rather than have the Congressional policy underlying that Act frustrated by a lack of procedures. That Act conferred on vessel owners the right to seek "limited liability" in maritime cases. This Court should follow that precedent either by applying Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of Rules of Civil Procedure (hereinafter "Supplemental Rules") or by creating analogous procedures compatible with 33 U.S.C. § 2704, the limitation section of OPA 90.

The courts below[14] were unwilling to recognize that legislation providing for limitation of shipowners' liability, both in the Limitation of Liability Act of 1851 and in § 2704 of OPA 90, was intended to benefit shipowners and not those who have claims against shipowners. As this Court stated in *The Scotland*:

> But it is objected that the appellants [Shipowners] did not properly, and in due time, claim the benefit of the law. Under this head it is strenuously contended that the appellants did not comply with the rules of this court adopted in December Term, 1871. Without adverting to the fact that these rules were not in existence until long after this litigation had been pending, we may say, once for all, that they were not intended to restrict parties claiming the benefit

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[12] Norwich & N.Y. Transp. Co. v. Wright, 80 U.S. 104 (1871).

[13] Now codified at 46 U.S.C. App. § 185.

[14] Bouchard Transp. Co., Inc. v. Updegraff, 147 F.3d 1344, 1350 (11th Cir. 1998), petition for cert. filed, ___ U.S.L.W. ___ (U.S. No. 98-682, 1998).

> of the law, but to aid them. *Some form of proceeding was necessary to enable ship-owners to bring into concourse the various parties claiming damages against them for injuries sustained by mishaps to the ship or cargo, where they were entitled, or conceived themselves entitled, to the law of limited responsibility, and where they were subjected or liable to actions for damages at the suit of the parties thus injured. The rules referred to were adopted for the purpose of formulating a proceeding that would give full protection to the ship-owners in such a case.*[15] [emphasis added]

Although a *concursus* procedure may afford claimants a more equitable opportunity to share in a limitation fund that is inadequate to satisfy all claims, the *concursus* procedure is intended primarily to assure that a shipowner's liability does not exceed the legislatively mandated limit. In other words, *concursus* prevents limited liability from being defeated through multiple law suits, which might be brought in a number of different courts.

The courts below further undermined § 2704 of OPA 90 by concluding that limitation of liability in OPA 90 was not really a limitation of liability provision because all claimants could recover their full damages from the Oil Spill Liability Trust Fund.[16] However, it can also be said that limited liability under the Limitation Act of 1851 does not truly provide for limited liability because claimants may recover their full damages from third parties

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[15] *The Scotland*, 105 U.S. 24, 33 (1881).

[16] *Bouchard*, 147 F.3d at 1350.

who are not protected by the limitation statute. Limitation of liability must be looked at not from the perspective of claimants, but from the perspective of shipowners who are the intended beneficiaries of the limitation legislation. It is of no concern that claimants may have other avenues of redress. The crucial issue is whether shipowners' liability, in reality, is limited to the amounts specified in § 2704, not whether claimants may recover in full from third parties, such as the Fund. Furthermore, the conclusion reached by the lower courts may not reflect the realities of some situations. For example, often the largest claimant in an oil spill case is the United States. While it is true that agencies of the United States may present claims to the Fund, as a practical matter, recovery from the Fund is nothing more than taking money out of one Governmental pocket and putting it into another Governmental pocket. In other words, the Government is simply collecting removal costs or damages from itself. With respect to the public fisc, if the United States does not recover from the responsible party or its guarantor, in actuality, it will not be reimbursed for its removal expenditures or compensated for its damages. Likewise, there is some question as to whether state trustees may recover from the Fund for natural resource damage.[17]

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[17] *Compare* Payments Authorized Under Section 1012 of the Oil Pollution Act of 1990, 21 Op. Off. Legal Counsel – (Sept. 25, 1997) *with* Matter of U.S. Coast Guard – Oil Spill Liability Trust Fund, 1995 WL 632510 (C.G.) (Oct. 30, 1995). Although the matter may have been resolved within the Executive Branch, neither Congress nor the courts have weighed in on this issue.

Additionally, as the Court of Appeals acknowledged, recovery against the Fund is limited to one billion dollars per incident, and, therefore, the liability of the Fund is not unlimited. The fact that recovery against the Fund is limited was dismissed by the Court of Appeals because there had been no suggestion that costs and damages in the incident in question would exceed that amount. This is not the issue the Court of Appeals should have addressed. The more cogent issue to be addressed is whether or not all of the claims that have been or might be filed against Petitioners in this case may, in the absence of some procedure such as *concursus*, result in liability in excess of the limits established in § 2704.

Either OPA 90 provides true limitation of liability for shipowners or it does not. Either *concursus* is a necessary ingredient of limitation of liability or it is not. As suggested below, there must be uniform procedures to assure that shipowners' right to limit can be effectuated. The holding of the Court of Appeals is not fact specific. It does not hold simply that there is no need for *concursus* in this case, but that there is no need for *concursus* in any case under OPA 90 in which the right of limitation is implicated.[18] The decision also overlooks the fact that

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[18] Admittedly, under the Limitation Act of 1851 and Supplemental Rule F, the courts have recognized some exceptions to the *concursus* requirement in situations where it is clear that the shipowner's liability cannot exceed the limitation amount. There may also be exceptions under OPA 90. That issue, however, is not before this Court.

removal costs and damages which emanate from the discharge of oil in some cases may exceed one billion dollars. This is not idle speculation. The Exxon Valdez spill cost Exxon in excess of three billion dollars.

The opinion of the Court of Appeals has to some extent deleted § 2704 from OPA 90 because OPA 90 contains absolutely no procedures for effecting limitation of liability. OPA 90 creates substantive rights to recover removal costs and damages and provides some procedures for claimants to implement those rights. OPA 90 creates a Fund and provides procedures whereby claimants may submit claims to the Fund. OPA 90 also creates the right of shipowners to limited liability. The creation of the right to limited liability represents a Congressional determination that shipowners shall not be exposed to unlimited liability except as specifically provided in the Act. But OPA 90, in contrast to providing procedures for asserting claims against responsible parties and the Fund, contains no procedure whereby shipowners may invoke the right to limited liability as specified in the Act. How do shipowners claim the right to limited liability? What procedures in OPA 90 protect vessel owners from being held liable in amounts that exceed the limitation amount provided in the Act? There are none. If a shipowner is subjected to two lawsuits in different courts arising from the same incident, and in each it is held liable up the limitation amount provided in § 2704, the shipowner will have been subjected to liability that is twice the amount established by Congress in § 2704 of OPA 90. Ultimately, a single court must be empowered to implement the limitation rights provided by OPA 90.

The Court of Appeals supported its conclusion by adopting the approach followed in *In re Metlife Capital Corp.*,[19] which found fundamental "conflicts" between the provisions of OPA 90 and the procedures in Supplemental Rule F. As Professors Force & Gutoff have demonstrated in discussing the *In re Metlife Capital Corp.* case, those "conflicts" are no different than those that presently exist under the Limitation Act of 1851 and the various claims subject to limitation thereunder.[20] They state:

> Many of the justifications for the court's conclusion simply do not bear scrutiny. Contrary to the suggestion of the court, Rule F requires that the person filing a limitation petition must do so within six months of having received notice of a claim. The Rule then leaves it to the discretion of the limitation court to set the time in which claims may be made against the limitation fund. There is absolutely no reason why a court would not take into account the time needed to complete removal activities or to formulate and implement a plan for restoration of natural resources. Likewise, the Oil Spill Liability Trust Fund could file a contingent claim in any situation where it appears that it may have a right to do so. The importance of the only time limit specified in Rule F is that it would require a responsible party to act promptly to invoke the right of limitation. It in no way impinges on

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[19] 132 F.3d 818, 1998 A.M.C. 635 (1st Cir. 1997) (*The Emily S*), *cert. denied by* Bunker Group, Inc. v. U.S., 118 S. Ct. 2367, 141 L.Ed.2d 736 (1998).

[20] Force & Gutoff, *supra* note 9, at 363-64.

the discretion of the trial judge to allow claimants a fair and realistic opportunity to present and prove their claims.

The limitation period analysis would, if carried to its logical conclusion, completely eviscerate both Supplemental Rule F and the Limitation Act in non-OPA 90 cases. If the position of the court were valid, the Act of 1851, itself, would conflict with later legislation. Congress by statute has provided for a three year statute of limitations for personal injury claims. But personal injury claims are subject to limitation. Thus, there very well may be situations where a personal injury plaintiff may have to file a claim in a limitation proceeding prior to the expiration of the three years in order to assure a share in the distribution of the limitation fund. The same may be said as to COGSA claims where there is a one year limitation period. In the event of a collision that results in cargo damage and personal injury there is nothing to prevent a vessel owner from filing for limitation of liability two weeks after the incident. . . .

More significantly, virtually every claim for damages that may be brought as an admiralty claim in federal court may also be brought in a state court under the "saving to suitors" provision of 28 U.S.C § 1333. These claims are no different than OPA 90 claims where a party who has incurred removal costs or sustained damages may sue in federal or state court. But just as ordinary "admiralty" claims brought in state court are subject to the exclusive jurisdiction of a federal *limitation* court so could OPA 90 claims brought in state court be made subject to the

> exclusive jurisdiction of a federal *limitation* court. [Footnotes omitted]

The same analysis disposes of other so-called conflicts between OPA 90 and Supplemental Rule F. Whenever a ship owner invokes its right to limit, the limitation proceeding may have some effect on the usual procedural rules applicable to the underlying claims. This would be the case with respect to venue, etc. Furthermore, in the case at bar, the injunctions and motions entered in the district court accommodated the claims presentment provisions of OPA 90. The Appendix to the Petition for Certiorari reveals that district courts can easily tailor Supplemental Rule F to the provisions of OPA 90.

III. The decisions of the courts below undermine the goal of uniformity in maritime law and dilute or eviscerate the right of shipowners to limit their liability under OPA 90.

Uniformity in maritime law requires that a uniform procedure be applied in oil pollution cases, including *concursus* as the linchpin of limited liability. Congress made it clear that it was not removing oil pollution cases from the realm of maritime jurisdiction and maritime law.[21] This Court has consistently opted for uniformity in maritime law, particularly where congressional legislation is applicable.[22] Congress has determined that shipowners have the right to limited liability under OPA 90,

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[21] OPA § 2751(e). *See* 33 U.S.C. § 2751(e).

[22] *See, e.g.*, Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990); *cf.*, Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 210-11 (1996).

and it is urged upon this Court that the right should be enforced according to a uniform procedure. The holding of the Court of Appeals that there is no right to *concursus* under OPA 90 is premised on the assumption that Congress, by specifying the procedures for bringing "claims," omitted any reference to *concursus*. Although OPA 90 does not expressly provide for *concursus*, it is fair to assume that Congress was aware that *concursus* had become an indispensable ingredient for making limitation statutes work. If Congress had wanted to eliminate *concursus* in limitation proceedings under the Act, it could have said so.

As was the case in the Limitation Act of 1851, OPA 90 specifies no procedures for effecting limitation under the Act. Just as it was necessary for this Court to promulgate rules for uniform procedures to be applied in limitation proceedings under the Limitation Act of 1851, it is now necessary for this Court to establish uniform procedures to be applied to limitation proceedings under OPA 90. This could be done readily by the application of Supplemental Rule F. Failure to establish a uniform procedure whereby shipowners can invoke their right to limit their liability means not only that chaos will reign in the litigation that inevitably follows major spills, but that this free-for-all approach to litigation will undermine the right of limitation of liability. In cases where multiple claims are filed in multiple courts, the right to limitation created in § 2704 of OPA 90 may be compromised or even lost.

This Court has again and again taken the lead in establishing procedures to be used in admiralty cases, first in the promulgation of the Admiralty Rules and later through the promulgation of the Supplemental Rules. The

creation of these various uniform rules has had the effect not only of making the enforcement of rights viable, but also the creation of these uniform procedures has resulted in procedural reliability, predictability and stability. Furthermore, the application of a uniform rule, such as Supplemental Rule F, is essential to achieve fundamental fairness. Without such a procedure, shipowners may be treated unfairly by being subjected to liability in excess of the statutorily established limitation amount. Conversely, claimants who win the race to the courthouse may preclude subsequent claimants from recovery. A *concursus* procedure which provides notice to all claimants and gives all claimants an opportunity to present their claims in a single proceeding assures not only that shipowners will not be liable in excess of the limitation amount, but that all claimants will have a fair opportunity to share in the limitation fund.

CONCLUSION

This case has serious implications for all industries that are directly and indirectly involved in bringing oil to United States or otherwise involved in the transportation of oil in United States waters. Despite the unequivocal grant of the right to limited liability in OPA 90, the decisions of the lower courts have made it almost impossible for shipowners to invoke that right. The right to limited liability is dependent on the availability of procedures whereby the right can be effectuated. A key procedural component of the right to limitation of liability is a *concursus* of claims where the party seeking to limit its liability establishes a limitation fund according to

the formula specified by Congress which then is available to satisfy all claims arising from the incident in question. The lower courts have concluded that there are no such procedures available for limitation of liability under OPA 90. The absence of such procedures seriously damages the right to limitation of liability expressly created by the Act. This case provides this Court with a critical and unique opportunity to establish uniform procedures implementing the limitation of liability provisions of OPA 90, and therefore Petitioners' writ should be granted.

Respectfully submitted,

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November 23, 1998

*Counsel wishes to acknowledge the assistance of Professor Robert Force in the preparation of this Brief.