No. 14-1004

IN THE

Supreme Court of the United States

VITALII PYSARENKO,

Petitioner,

v.

CARNIVAL CORPORATION,
DBA CARNIVAL CRUISE LINES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The American Association for Justice is a voluntary national bar association whose members primarily represent plaintiffs in personal injury and wrongful death suits, as well as plaintiffs in civil rights, employment rights, and consumer rights actions. Seafarers who are injured while working aboard cruise ships are often represented by members of the American Association for Justice's Admiralty Law Section.

In the American Association for Justice's view, the decision below deprives such workers of the rights Congress intended for seafarers and does so in disregard for clear precedents of this Court. The American Association for Justice also believes that its long history of representing injured seamen and their families will assist this Court in acting on this Petition in favor of protecting the rights of the "wards of the admiralty."

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[1] Pursuant to Supreme Court Rule 37.2(a), all parties consent to the filing of the *amici curiae* brief. Copies of the emails granting consent have been filed with the Clerk. The undersigned further affirms that, pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part and no person or entity other than *Amici*, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. The issues presented in this case are of great importance and are deserving of this Court's attention. Congress and this Court have historically safeguarded the rights of seafarers to enforce their rights under the Seamen's Wage Act and the Jones Act in federal courts. Congress recognized that access to the courts was necessary to enforce the Wage Act, due to the great inequality in bargaining power between shipowners and seamen and the shipowners' broad control over the terms of employment.

Similarly, Congress enacted the Jones Act to expand the remedies afforded to seamen by the general maritime law by providing a negligence cause of action and the right to trial by jury. The federal courts have thus acted as the guardians of the rights seafarers, and as the agents chosen by Congress to enforce those rights.

Congress also recognized that permitting employers to require seamen to accept mandatory arbitration as a condition of employment posed a threat to those rights. For that reason, Congress in 1925 expressly excluded the contracts of employment of seamen from the operation of the Federal Arbitration Act.

The Eleventh Circuit has held that the Act's amendment in 1970 to add chapter 2, implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, reversed that explicit exclusion. The Eleventh Circuit's interpretation lacks any basis in the text of the FAA, in its legislative history, or in the policy of protecting seamen's statutory rights. In fact it creates

the anomalous situation that a U.S. citizen seaman injured on a U.S. vessel may be barred from enforcing his federal rights in federal courts because there exists some "reasonable relation" in the contract to another country. This Court, which has consistently acted to protect the rights of the "wards of the admiralty," should grant the Petition.

2. The historic solicitude for the rights of seamen and their families is neither outdated nor obsolete. The maritime industry, not surprisingly, was one of the first to feel the effects of globalization. Maritime employers can recruit crews from among the most desperate populations in the world. In addition, vessel owners have made wide use of a loophole in international maritime law that allows them to sail under "flags of convenience," registering with nations that promise lax regulation and enforcement. The same inequality of bargaining power that prompted the courts' solicitude for the rights of seafarers continues today.

The problem of abusive arbitration agreements is particularly acute in the cruise industry. Life for the estimated 114,500 workers aboard cruise ships, particularly those who labor below decks, is hard and often dangerous. This competitive and profitable industry, following recent appellate court decisions enforcing arbitration clauses in seamen's employment contracts, has almost universally adopted mandatory arbitration provisions in their standard contracts. The decision below, which precludes accountability for negligently-caused injury, warrants review by this Court.

3. The question presented by Petitioner includes three important federal issues that have not been, but should be decided by this Court.

a. Section 1 of the Federal Arbitration Act expressly provides that "nothing herein" shall apply to the employment contracts of seamen. The court below relied on prior Eleventh Circuit precedent holding that this exception does not apply to chapter 2, which was added to Title 9 in 1970 to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. That construction does not comport with the plain meaning of the statutory text, in which the definitional § 1 applies to all of Title 9. If there is any ambiguity as to the scope of the exception, the heading of § 1 clearly states that the exceptions apply to the entire Title 9.

In addition, 9 U.S.C. § 202 expressly includes the definition of "commercial" used in § 2, which excludes seamen's employment contracts.

Finally, 9 U.S.C. § 208 expressly makes all of chapter 1, including § 1, applicable to chapter 2 to the extent that it does not conflict with chapter 2 or the Convention. The Convention applies only to relationships that are "commercial" under the law of the United States, which is defined in § 1 and nowhere else in Title 9. If there exists any ambiguity on this matter, the legislative history makes clear that Congress intended that § 1 supply the definition of "commercial."

b. The Federal Employers Liability Act expressly provides that any contract designed to enable the employer to exempt itself from FELA liability is void. Seamen under the Jones Act are

afforded the same protections as railroad workers under the FELA. In this case, Petitioner's arbitration agreement required that any dispute be arbitrated in Monaco, applying the laws of Panama, which have no provision comparable to the Seamen's Wage Act or the Jones Act. The decision below is contrary both to the statute and to this Court's precedent.

c. This Court has on multiple occasions indicated that agreements to arbitrate disputes regarding federal statutory rights are enforceable, so long as the party has the opportunity to vindicate his or her federal rights in the arbitral forum. This Court has cautioned that it would not hesitate to condemn an agreement where the choice of forum and choice of law provisions operated as a prospective waiver of a party's right to pursue statutory remedies.

This is such a case. Petitioner's employer seeks to enforce a provision that requires arbitration in Monaco under the laws of Panama, which has no remedies comparable to the Seamen's Wage Act or the Jones Act. If enforced, the employment contract would clearly operate as a prospective waiver of Petitioner's federal statutory rights, contrary to this Court's precedents.

Because these important issues should be resolved by this Court, the American Association for Justice asks the Court to grant the Petition for Certiorari.

ARGUMENT

I. Congress and This Court Have Historically and Consistently Shown Special Regard for the Statutory Rights of Seamen.

As Petitioner makes clear, the question presented – whether a cruise line based in the United States may use an arbitration clause in a seaman's contract of employment as a device to exempt itself from all liability under the Jones Act – subsumes three important issues regarding the interplay between the Federal Arbitration Act and the federal statutory rights of seamen. They are: Did Congress exempt seamen's contracts of employment from the scope of the FAA entirely? Pet. 22-30. Did Congress preclude the use of forum selection clauses in such contracts to avoid Jones Act liability? *Id.* at 15-18. Do this Court's precedents preclude the use of choice of law provisions in such contracts as a prospective waiver of seamen's federal statutory rights? *Id.* at 19-20. These are issues decided by the court below which have "not been, but should be settled by this Court." Sup. Ct. R. 10(c).

The importance of these issues cannot be denied. As this Court noted in 1932, "[t]he policy of Congress, as evidenced by its legislation, has been to deal with [seafarers] as a favored class." *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932). Petitioner's cause of action under the Seamen's Wage Act, 46 U.S.C. § 10313, which the court below denied, was established by Congress in 1915. Described as "the Magna Carta of the sea," the Act codified many tenets of American jurisprudence that had been enforced since as early as 1790,

including the right of a seafarer to take his or her employer to court to recover wages owed. *See* Justin Samuel Wales, *Beyond the Sail: The Eleventh Circuit's Thomas Decision and Its Ineffectual Impact on the Life, Work, and Legal Realities of the Cruise Industry's Foreign Employees*, 65 U. Miami L. Rev. 1215, 1224 (2011).

That protection includes the right of access to U.S. courts for foreign, as well as U.S. seamen. As this Court has determined, the statutory text,

> [M]anifests the purpose of Congress to give the benefit of the act to seamen on foreign vessels, and to open the doors of the federal courts to foreign seamen. No such provision was necessary as to American seamen for they had the right independently of this statute to seek redress in the courts of the United States.

Strathearn S.S. Co. v. Dillon, 252 U.S. 348, 354 (1920).

The Fifth Circuit has explained Congress' rationale for granting special statutory access to federal courts to seamen to enforce their wage claims:

> A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer. Moreover, there exists a great inequality in bargaining position between large shipowners and unsophisticated seamen. Shipowners generally control the availability and terms of employment.

Castillo v. Spiliada Maritime Corp., 937 F.2d 240, 243 (5th Cir. 1991).

Congress recognized that there might exist a conflict between the right of a seaman to access to U.S. courts and an arbitration provision inserted into the seaman's contract of employment. In such a case, Congress has directed the courts to favor the rights of the seaman. Thus, for example, where there was a "literal conflict" between the Seamen's Wage Act and a collective bargaining agreement requiring arbitration of a wage dispute, this Court stated emphatically that unless Congress has made clear that the seaman's claim should be barred from court, "we hesitate to . . . shut the courthouse door on him when Congress, since 1790, has said that it is open to members of his class." *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 357 (1971).

Similarly, in 1920 Congress enacted the Jones Act, now 46 U.S.C. § 30104, to expand the rights of injured seamen under general maritime law to include the right to choose a judicial forum to pursue a negligence cause of action and the right to trial by jury. *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 416 (2009). Justice Thomas, writing for the Court, emphasized that "this Court has consistently recognized that the Act 'was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it.'" *Id.* at 417 (quoting *The Arizona v. Anelich*, 289 U.S. 110, 123 (1936)).[2]

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[2] Congress has taken other steps to ensure access to the courts to enforce their rights. *See, e.g.*, 28 U.S.C. § 1916 ("In all courts of the United States, seamen may institute and prosecute suits and appeals in their own names and for their own benefit

Congress has expressly provided that a seaman with a claim under the Jones Act "may elect to bring a civil action at law, with the right of trial by jury." 46 U.S.C. § 30104. In addition, Congress conferred on Jones Act seamen the rights and protections afforded to railroad workers under the FELA. *Id.* Thus seamen, including Petitioner, may invoke 45 U.S.C. § 55, under which any contract provision "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. In short, Congress has already determined the proper relationship between the statutory rights of seamen and the arbitral rights of their employers: Arbitration "agreements" must yield to the statutory rights of seamen to bring their claims in federal court.

Congress intended the federal courts guard those rights. In *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971), Justice Douglas noted that "[s]eamen from the start were wards of admiralty." *Id.* at 355. In the 20th Century, "federal courts remain[] as the guardians of seamen, the agencies chosen by Congress, to enforce their rights." *Id.*

When Congress enacted the FAA in 1925, it recognized the potential conflict between the policy of enforcing arbitration agreements and the protection of seafarers' rights in court. Congress removed that

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for wages or salvage or the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security therefor.").

Another example is the 2008 amendment of the Jones Act venue provision to make clear that a seaman may sue his employer "wherever the seaman's employer is doing business." H.R. Rep. No 110-437, 110th Cong., 1st Sess. (2007).

conflict by explicitly exempting the contracts of employment of seamen from the scope of commercial agreements enforeceable under Title 9. *See* 9 U.S.C. § 1 ("[N]othing herein contained shall apply to contracts of employment of seamen . . ."). In 1970, the FAA was amended to add Chapter 2, which implemented the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See* 9 U.S.C. §§ 201-208. The court below, following its prior decision in *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005), interpreted Chapter 2 as standing entirely separate from Chapter 1. In the Eleventh Circuit's view, arbitration agreements subject to enforcement under Chapter 2 were not subject to the limiting language Congress used in § 1 to expressly exclude seamen's employment contracts from enforcement. *Id*. at 1299.

Thus the Eleventh Circuit ignored the remedies Congress granted to seamen, based on no statutory text or legislative history. Nor did the court identify any legitimate policy to be served by depriving U.S. seamen of the right to a judicial forum when proceeding under chapter 2 of the FAA, rather than chapter 1.

In that regard, it is important to recognize that the decision below affects the rights of U.S. citizens as well as foreign seafarers. Plaintiff in this case is a citizen of Ukraine and a permanent resident of the United States. However, 9 U.S.C. § 202 relied upon by the court below also applies to claims by U.S. citizens against citizens of other countries, and to claims by U.S. citizens against U.S. citizens where there exists any "reasonable relation" between the contract and

one or more foreign states. 9 U.S.C. § 202.[3] *See, e.g.*, *Freudensprung v. Offshore Technical Servs., Inc.*, 379 F.3d 327, 339-41 (5th Cir. 2004) (arbitration agreement between U.S. citizen and U.S. employer were subject to Convention Act where plaintiff's injury occurred aboard a derrick barge off the coast of Nigeria).

In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), Justice O'Connor referred to Justice Story's famous characterization of seamen as "wards of the admiralty" as the "animating purpose behind the legal regime governing maritime injuries." *Id.* at 354. In fact, this Court has referred to seamen as "wards of admiralty" in some 24 decisions. David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 La. L. Rev. 463, 479 n.107 (2010). *See also Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990) ("admiralty courts have always shown a

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[3] **§ 202. Agreement or award falling under the Convention**

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

special solicitude for the welfare of seamen and their families"). The American Association for Justice urges the Court to grant review of the Petition in this case in order to maintain that historic concern for those rights.

II. The Rights of Injured Seamen and Their Families, Including Those Who Labor Aboard Cruise Ships, Continue to Require the Special Protection of This Court.

This Court's solicitude for the rights of seamen is hardly obsolete or outdated. The vulnerability of seafarers to abusive and manipulative employment contracts has, in fact, worsened.

The maritime industry was one of the first to feel the effects of globalization. Vessels can hire crew from almost anywhere in the world, including nations whose people desperately seek employment. In addition, an "easily exploitable loophole" in international maritime law allows owners to register their vessels with nations that promise low taxes, lax standards, and few inspections. Shayna Frawley, *The Great Compromise: Labor Unions, Flags of Convenience, and the Rights of Seafarers*, 19 Windsor Rev. of Legal & Soc. Issues 85, 86-91 (2005). This was a recipe for a race to the bottom in terms of working conditions and compliance with regulations that protect worker safety.

> [In the 1980s] shipping companies increasingly took advantage of the possibilities of registering vessels, not with domestic registers (flags), but with international open registers—so-called "flags of convenience."

> Open registers offered employers a range of cost advantages via reduced regulation and enforcement and were particularly attractive to owners in offering the option of recruiting relatively cheap labour on the global seafarer labour market.

Helen Sampson, *Powerful Unions, Vulnerable Workers: The Representation of Seafarers in the Global Labour Market* 3 (2003), *available at* http://portal.anpocs.org/portal/index.php?option=com_docman&task=doc_view&gid=4318&Itemid=316.

The same unequal bargaining power and control by shipowners over the terms of employment, which prompted the courts' solicitude for the rights of seamen, persists. Today "[s]ubstantial numbers of seafarers from all over the world are engaged on temporary, fixed-term contracts, often at low wage rates." *Id.* at 2. Unlike his or her land-based counterpart, a worker at sea cannot leave his place of employment, demand proper safety equipment, or refuse to work under unsafe conditions.

Because of their vulnerable position vis a vis their employers, seafarers "continue to be amongst the most exploited workers in the world." *Id.* at 15. The investigation by the International Commission on Shipping reached an even stronger conclusion: "For thousands of today's international seafarers life at sea is modern slavery and their workplace is a slave ship." Int'l Comm'n on Shipping, *Inquiry Into Ship Safety: Ships, Slaves and Competition* 3 (2000).

The plight of those employed by cruise ships especially warrants the attention of this Court.

The cruise industry is a competitive and highly profitable industry that has experienced massive growth since 1980. Four companies, the largest of which is Carnival Corp., account for 90 percent of the total berths worldwide. *See* Ross A. Klein, *High Seas, Low Pay: Working Conditions on Cruise Ships*, Our Times: Canada's Independent Labour Magazine (Dec. 2001/Jan. 2002), *available at* http://www.cruise junkie.com/ot.html. Carnival itself earned net profits of over $1.2 billion last year. Carnival Corp. & PLC 2014 Annual Report, at 1, *available at* http:// phx.corporate-ir.net/phoenix.zhtml?c=140690&p= irol-reportsannual. Although it is headquartered in Miami, Carnival is incorporated in Panama, and substantially all of Carnival's income is exempt from U.S. taxes. *Id*. at 22.

The problem posed by unfair arbitration clauses "has become especially acute in the cruise industry." Thomas P. White, *Lost at Sea: Rescuing Cruise Line Crewmembers from the Perils of Foreign Arbitration*, 45 U. Miami Inter-Am. L. Rev. 171, 173 (2013). Following the decisions in *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir. 2002), and *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005), upholding the enforcement of such provisions, the cruise industry "has almost universally implemented such clauses in its contracts." *Id.*

Life for those who work below decks aboard cruise ships is arduous. "Often at sea for six to ten months at a time, the employees are contractually obligated to work ten to fourteen hour shifts, seven days a week, for pay so low that critics of the cruise industry's employment practices compare the life of a cruise ship employee to that of a sweatshop employee." Wales, *supra*, 65 U. Miami L. Rev. at 1217.

An investigation by the International Transport Workers Federation (ITF) concluded that, for many of the estimated 114,500 cruise ship employees, "[w]orking conditions and pay on cruise ships can turn out to be as low, and management practices as abusive, as anything they can find in 'sweatshop' factories at home." War on Want and International Transport Workers Federation, *Sweatships* 1 (2002), *available at* http://www.waronwant.org/attachments/Sweatships.pdf. Notably, ITF found instances of fraudulently obtained safety certificates, inadequate safety training, physically strenuous work requirements, and failure to provide safety equipment. *Id.* at 15, 16 & 23.

This Court should grant the Petition to preclude the use of mandatory arbitration provisions by cruise ship employers to avoid accountability for negligently-caused injuries or deaths.

III. The Petition in This Case Presents Issues That Should Be Resolved by This Court.

The Eleventh Circuit decision in this case is based on three important questions of federal law that have not been, but should be, settled by this Court, or have been decided by the Eleventh Circuit "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

A. The court below erred in holding that the arbitration agreement in Petitioner's contract of employment was enforceable under the FAA in disregard for the FAA's express exemption for the contracts of employment of seamen.

Section 2 of the FAA provides, "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction" shall be enforced as any other contract. 9 U.S.C. § 2. Section 1, the general definitional section, provides:

> **§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title**
>
> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, . . . but *nothing herein contained shall apply to contracts of employment of seamen*, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1 (emphasis added).

The Eleventh Circuit in its short per curiam affirmance, did not address the applicability of the FAA to the arbitration provision in Petitioner's employment contract. The district court, for its part, relied almost entirely on the prior Eleventh Circuit decision in *Bautista*, which held that "crewmembers' arbitration provisions constitute commercial legal relationships within the meaning of the Convention Act." 396 F.3d at 1300. This basic question of statutory construction warrants this Court's review.

The court in *Bautista* acknowledged that § 1 removes seamen's employment contracts from the scope of the FAA. However, the court stated that Title 9 should not "be considered a single statute," but rather as separate laws, each of which "has a specific context and purpose." *Id*. at 1297. The plain statutory language, however, indicates that Congress intended to exclude seamen's contracts of employment from "commercial" relationships under 9 U.S.C. § 202 as well as under § 1 and § 2. *See* fn. 2, *supra*.

First, neither Chapter 2 nor Chapter 3 contains a definitional section. Thus the general definitional section, including the proviso that "nothing herein contained shall apply to contracts of employment of seamen" applies to all of Title 9, not merely Chapter 1 of that title. To the extent that "herein" is ambiguous, the heading for § 1 makes it clear that the exception for seamen's contracts applies to all of Title 9.

Second, 9 U.S.C. § 202 expressly adopts the definition of "commercial" set out in § 2, which does not extend to seamen's employment contracts. It is true that § 202's coverage is inclusive, and thus may embrace legal relationships beyond those encompassed by § 2. However, § 202 cannot sensibly

be construed as rejecting *sub silentio* the exception that Congress had so explicitly adopted for seamen's contracts. *See Bautista*, 396 F.3d at 1298. If Congress had so intended, it would have said so directly. Instead, the Eleventh Circuit's reading creates the unlikely result that a U.S. court could be deprived of jurisdiction over a suit between a U.S. citizen seafarer and a U.S. employer for an injury on a U.S. based vessel simply because the contract "envisages performance" abroad or has some other "relation with one or more foreign states." 9 U.S.C. § 202. It is unlikely that Congress would have made such a fundamental change without comment.

Third, § 208 of the Convention specifically provides that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208. As the eminent admiralty jurist Judge John R. Brown stated, this residual provision "incorporates all of the Convention into Chapter 1 of Title 9." *Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co.*, 767 F.2d 1140, 1146 (5th Cir. 1985).

There is no conflict between Chapter 1 and Chapter 2 or the Convention. The U.S. accession specifically declares, "The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 1970 WL 104417, reproduced at Pet. App. 55. Section 1 is not inconsistent with the Convention, but rather makes clear that the definition of "commercial" under the "national law of the United

States" excludes the employment contracts of seamen. To the extent that the question is at all ambiguous, as Petitioner points out, that ambiguity is conclusively resolved by the testimony of Mr. Richard Kearney, chief architect of Chapter 2, who stated that "the definition of commerce contained in section 1 of the original Arbitration Act is the national law definition for the purposes of the declaration. S. Rep. No. 91-702, at 6 (1970). *See* Pet. 28-29.

This Court has instructed that whether Congress intended to preclude waiver of statutory rights in an arbitration clause "will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and [the statute's] underlying purposes." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *see also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 675 (2012) (Sotomajor, J., concurring).

The court below did not examine those sources of statutory meaning, warranting this Court's review.

B. The court below disregarded the statutory command of Congress that any contract provision "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by [the Jones Act] shall to that extent be void."

The Federal Employers Liability Act provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability

> created by this chapter, shall to that extent be void.

45 U.S.C. § 55.

Congress' purpose in enacting this section was to "prevent[] employers from restricting FELA rights as a condition of employment." *Sea-Land Service, Inc. v. Sellan*, 231 F.3d 848, 851 (11th Cir. 2000). Congress conferred upon seamen the same legal protections granted to railroad workers by the FELA. 46 U.S.C. § 30104. *See Kernan v. Am. Dredging Co.*, 355 U.S. 426, 439 (1958) (The Jones Act "expressly provides for seamen the cause of action—and consequently the entire judicially developed doctrine of liability—granted to railroad workers by the FELA."). The arbitration agreement in Petitioner's contract of employment as a seaman was therefore void.

This Court held in *Boyd v. Grand Trunk Western Railroad Co.*, 338 U.S. 263 (1949), that the right of an FELA plaintiff to select the forum in which to initiate suit under the FELA is a substantial right. *Id.* at 265. The *Boyd* Court invalidated two forum-selection provisions under which Alexander Boyd agreed to sue Grand Trunk, if at all, in either the county or district in which he was injured or in which he resided at the time of his accident. *Id.* at 263-64. This Court held that FELA § 55 proscribed the execution of any covenant limiting the right of an FELA plaintiff to sue in a forum permitted by § 56. *Id.* at 265. "Any other result," the Court stated, "would be inconsistent with *Duncan v. Thompson*, [315 U.S. 1 (1942) which] reviewed the legislative history and concluded that Congress wanted [Section 55] to have the full effect that its comprehensive phraseology implies." *Id.* at 265 (internal quotation omitted).

In this case, the arbitration clause requires arbitration in Monaco applying the law of Panama, which "has no remedies comparable to the Jones Act or the Seamen's Wage Act." Pet. 6. The result is contrary to both federal statute and this Court's precedent.

C. The court below erred in upholding the forum selection and choice of law provisions of the arbitration agreement which operated as a prospective waiver of Petitioner's federal statutory rights.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), a Japanese car maker sued its Puerto Rican distributor over a dispute related to their sales agreement and sought enforcement of the agreement's arbitration clause. In its counterclaim, the distributor alleged antitrust violations under the Sherman Act, 15 U.S.C. §§ 1 *et seq*. This Court saw no objection to enforcing the parties' agreement to arbitrate their rights under federal statutes so long as the arbitral forum would recognize and protect those federal statutory rights. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id*. at 628. The Court was confident that, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [federal] statute will continue to serve both its remedial and deterrent function." *Id*. at 637.

The *Mitsubishi* Court found it unnecessary to "consider now the effect of an arbitral tribunal's

failure to take cognizance of the statutory cause of action." *Id.* at 637 n.19.

> We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, *we would have little hesitation in condemning the agreement as against public policy*.

Id. (emphasis added).

Ten years later, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), where an arbitration clause required the parties to submit their dispute to arbitration in Japan, the Court determined that plaintiff's objection, based on its rights under the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300 *et seq.*, was "premature" because it was "not established" what law the arbitrators would apply. *Id.* at 540. Nevertheless, Justice Kennedy, for the Court, restated the cautionary reservation expressed in *Mitsubishi* in a maritime context. The Court declared that, if there were "no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy.'" *Id.* at 540 (quoting *Mitsubishi*, at 637 n.19).

This Court has consistently adhered to the principle that arbitration agreements are unenforceable where they are used to deny claimants their federal statutory remedies. *See American Exp.*

Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2310-11 (2013) ("[T]he exception [to enforcement of an arbitration clause] finds its origin in the desire to prevent prospective waiver of a party's right to pursue statutory remedies[.] That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights.") (internal citations omitted); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) ("[A] substantive waiver of federally protected civil rights will not be upheld"); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90, 92 (2000) ("[C]laims arising under a statute designed to further important social policies may be arbitrated . . . so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum") (internal quotations omitted).

The proper resolution of these issues affects basic rights of thousands of seamen, most notably those who labor aboard cruise ships and who serve millions of American vacationers. Those important issues warrant the attention of this Court.

CONCLUSION

For the foregoing reasons, amicus the American Association for Justice asks this Court to grant the Petition.

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