No. 17-1105

In the Supreme Court of the United States

AMERICAN COMMERCIAL LINES, LLC, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Oil Pollution Act of 1990 (Act), 33 U.S.C. 2701 *et seq.*, makes a "responsible party" liable for statutory cleanup costs and damages resulting from the discharge of oil into navigable waters. 33 U.S.C. 2702. The Act generally limits a responsible party's liability based on the size of the vessel. See 33 U.S.C. 2704(a). Those liability limits, however, do not apply if the oil spill was "proximately caused by * * * the violation of an applicable Federal safety, construction, or operating regulation by * * * a person acting pursuant to a contractual relationship with the responsible party." 33 U.S.C. 2704(c).

The question presented is whether a contractor who committed regulatory and criminal violations while operating a vessel "act[ed] pursuant to a contractual relationship" with the vessel owner, 33 U.S.C. 2704(c), such that petitioner, the vessel owner, cannot limit its liability as a responsible party under the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 875 F.3d 170. An excerpt of the oral opinion of the district court (Pet. App. 22a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 2017. The petition for a writ of certiorari was filed on February 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

33 U.S.C. 2704 provides, in relevant part:

(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 [an amount based on the gross tonnage of the vessel].

* * * * *

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

STATEMENT

1. Congress enacted the Oil Pollution Act of 1990 (OPA or Act), 33 U.S.C. 2701 *et seq.*, in response to the "unreasonably slow, confused and inadequate response by industry and government" following the Exxon Valdez oil spill that polluted Alaskan waters in 1989. S. Rep. No. 94, 101st Cong., 1st Sess. 2 (1989). The Act sought to place the financial burden of oil spills on industry participants, in part by imposing a strict-liability scheme for cleanup costs. *Id.* at 2-4; see Pet. App. 6a-7a.

To that end, OPA identifies "responsible part[ies]" who must pay for cleaning up an oil spill in the first instance. 33 U.S.C. 2702(a). The "responsible party" for a vessel includes "any person owning, operating, or demise chartering the vessel." 33 U.S.C. 2701(32)(A). "[E]ach responsible party for a vessel or a facility from which oil is discharged * * * is liable for the removal costs and damages" specified in the Act. 33 U.S.C. 2702(a). A responsible party must also establish and maintain evidence of its ability to discharge certain financial obligations that it may incur under the Act. See 33 U.S.C. 2716(a). Thus, OPA both requires a responsible party to pay for cleanup costs or damages that may arise from an oil spill and ensures that the responsible party has the resources available to pay claimants who clean up the spill or who suffer certain other types of damages identified in the statute.

OPA establishes dollar figures that generally limit the overall liability of a responsible party, based on vessel type and tonnage. See 33 U.S.C. 2704(a). The Act also carves out exceptions to those general limits. See 33 U.S.C. 2704(c). As relevant here, the liability limits do not apply if the oil spill was "proximately caused by" the "gross negligence or willful misconduct of," or "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." 33 U.S.C. 2704(c)(1). In those circumstances, the responsible party's liability under OPA is not limited. Pet. App. 7a.

In other circumstances, by contrast, a responsible party may be entitled to a complete defense to liability for cleanup costs and damages. See 33 U.S.C. 2703(a).

As relevant here, to have a complete defense to liability, the responsible party must "establish[], by a preponderance of the evidence, that the discharge * * * and the resulting damages or removal costs were caused solely by * * * an act or omission of a third party," excluding "a third party whose act or omission occurs in connection with any contractual relationship with the responsible party." *Ibid.* To benefit from that third-party defense, the responsible party must also establish that it "exercised due care with respect to the oil concerned" and that it "took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions." 33 U.S.C. 2703(a)(3).

When a responsible party properly invokes the general liability limits or establishes a complete defense to liability (or if no responsible party is identified), OPA authorizes the Oil Spill Liability Trust Fund (Fund), administered by the Coast Guard's National Pollution Funds Center, to cover certain outstanding cleanup costs and damages. See 33 U.S.C. 2712(a). The Fund is supported by environmental taxes on crude oil and certain petroleum products, along with payments received from specified environmental fines and penalties. See generally 26 U.S.C. 9509.

2. Petitioner is a marine transportation company that operates a fleet of tugboats and barges. Pet. App. 2a. In 2007, petitioner entered two maritime contracts with DRD Towing (DRD) for DRD to operate three of petitioner's tugboats. *Id.* at 2a & n.1. First, petitioner signed a "bareboat" charter with DRD, at a rate of $1 per day. *Id.* at 2a. In a "bareboat" charter, the charterer is responsible for navigating and operating the vessel, as well as directing where it travels and what it

carries. See Terence Coghlin et al., *Time Charters* 34 (6th ed. 2008). Second, DRD chartered the tugboats back to petitioner. Pet. App. 2a. Under this second charter, DRD also agreed to crew and operate the tugboats at petitioner's exclusive direction. See *ibid.*; Appellee C.A. ROA 1313. Both charters included a provision requiring the tugboats to be operated in compliance with "all applicable laws and regulations with respect to the registration, licensing, use, manning, maintenance, and operation of the Vessel(s)." Pet. App. 3a (brackets omitted).

In July 2008, petitioner directed DRD to use the M/V MEL OLIVER, one of petitioner's tugboats operated by DRD, see Pet. App. 2a & n.1, to tow a barge to pick up fuel oil from a designated facility in Louisiana. *Id.* at 3a. At the time, the MEL OLIVER's captain had left the vessel, leaving on board an apprentice steersman who was not licensed to operate the tugboat. *Ibid.* Moreover, the steersman had worked more than "36 hours with only short naps, in violation of Coast Guard regulations." *Ibid.* Nonetheless, the steersman took the MEL OLIVER and the barge to the facility that petitioner had designated, loaded the barge with fuel oil, and began the return trip along the Mississippi River. *Id.* at 4a.

In the course of that return journey, the MEL OLIVER "began travelling erratically." Pet. App. 4a. Late at night, it encountered an ocean-going tanker, the M/V TINTOMARA. *Ibid.* Without warning, the MEL OLIVER veered into the TINTOMARA's path. *Ibid.* The TINTOMARA collided with the barge, which broke away from the MEL OLIVER and sank downriver—in the process spilling about 300,000 gallons of oil into the Mississippi River. *Ibid.* After the accident, a MEL

OLIVER crewmember found the steersman unconscious at the helm of the vessel. *Ibid.*

The United States prosecuted DRD and the captain and steersman of the MEL OLIVER under federal safety and environmental laws. Pet. App. 4a. DRD and the steersman each pleaded guilty to one count of violating the Ports and Waterways Safety Act, 33 U.S.C. 1232(b)(1), and one count of violating the Clean Water Act of 1977, 33 U.S.C. 1319(c)(1)(A). Pet. App. 4a. The captain pleaded guilty to one Ports and Waterways Safety Act count. *Id.* at 4a-5a. During the criminal investigation, DRD admitted that it had knowingly violated federal regulations requiring the MEL OLIVER to be manned by a qualified and properly rested crew. See *id.* at 5a.

3. The United States also brought this action against petitioner and DRD, seeking removal costs and damages under OPA.[1] See Pet. App. 47a. Soon thereafter, DRD filed for bankruptcy and dissolved. *Id.* at 5a.

The government alleged that petitioner, as a "responsible party," was strictly liable under OPA for all removal costs incurred after the oil spill. Pet. App. 48a. It further alleged that the spill had been caused by DRD's gross negligence and regulatory violations,

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[1] In addition, the various private parties filed actions to determine their liability for the collision under general maritime law. See generally *Gabarick* v. *Laurin Maritime (Am.) Inc.*, 54 F. Supp. 3d 602, 604 (E.D. La. 2014) (explaining that the district court had consolidated several limitation actions, filed under 46 U.S.C. App. 181 *et seq.*, with an interpleader action filed by DRD's insurer). After trial, the district court held that DRD was solely at fault under general maritime law, and it imposed liability on DRD and the MEL OLIVER *in rem*. See *ibid.*; see also *Gabarick* v. *Laurin Maritime (Am.) Inc.*, 900 F. Supp. 2d 669 (E.D. La. 2012), aff'd, 551 Fed. Appx. 228 (5th Cir.), cert. denied, 134 S. Ct. 2824 (2014).

while DRD was acting pursuant to a contract with petitioner. D. Ct. Doc. 1 (Aug. 22, 2011); see 33 U.S.C. 2704(c). The government moved for summary judgment, requesting a declaration that none of the statutory defenses to liability under OPA were available to petitioner. Pet. App. 48a-49a.

The district court granted the United States' motion. Pet. App. 47a-58a. It first concluded that petitioner was not entitled to invoke the complete defense to liability found in 33 U.S.C. 2703(a)(3). Pet. App. 50a-54a. The court reasoned that DRD had acted "in connection with" a contractual relationship with petitioner because "the charter agreements contemplated that DRD would transport oil on behalf of [petitioner]." *Id.* at 54a. In the alternative, the court reasoned that petitioner had failed to carry its burden to demonstrate that it had exercised due care and had taken precautions against DRD's foreseeable acts or omissions, as required to establish a third-party defense. *Id.* at 56a-57a; see 33 U.S.C. 2703(a)(3).

The district court next concluded that petitioner could not invoke the general liability limits set forth in 33 U.S.C. 2704(a). Pet. App. 54a-56a. The court applied the exception to the liability limits for discharges proximately caused by a third party's gross negligence or federal regulatory violations committed while "acting pursuant to a contractual relationship with the responsible party." 33 U.S.C. 2704(c)(1). The court noted that DRD had committed a variety of federal regulatory violations. Pet. App. 51a. And it reasoned that "the acts of DRD occurred pursuant to the charter agreements with [petitioner]" because DRD had been transporting oil on petitioner's behalf. *Id.* at 54a.

The parties then stipulated to the government's damages, and the district court entered a final judgment that petitioner is liable to the United States for $20 million in cleanup costs and damages. Pet. App. 20a.

4. The court of appeals affirmed. Pet. App. 1a-18a.

The court of appeals first rejected petitioner's contention that it was entitled to a complete defense to liability under 33 U.S.C. 2703(a)(3). Pet. App. 9a-13a. As relevant here, the court next rejected petitioner's contention that it was entitled to benefit from OPA's general liability limits. *Id.* at 13a-17a. The court agreed with the district court that this case falls within the exception "for spills proximately caused by 'gross negligence,' 'willful misconduct,' or federal regulatory violations committed by 'a person acting pursuant to a contractual relationship with the responsible party.'" *Id.* at 13a-14a (quoting 33 U.S.C. 2704(c)(1)).

The court of appeals noted that the construction of the statutory phrase "'pursuant to'" was "a matter of first impression." Pet. App. 14a (citation omitted). The court explained that the phrase "contemplates compliance or conformity" with a contract. *Ibid.* But it rejected petitioner's contention that "the specific acts or omissions that cause the spill must be authorized by the contract." *Ibid.* Rather, the court reasoned, "the 'pursuant to' language is satisfied if the person who commits the gross negligence, willful misconduct, or regulatory violation does so in the course of carrying out the terms of the contractual relationship with the responsible party." *Id.* at 15a. Here, the court found that "there is no dispute" that the oil spill "was caused by DRD's wrongful conduct and regulatory violations, committed in the course of carrying out its contractual obligation to transport [petitioner's] fuel-filled barge." *Id.* at 17a.

As a result, the court determined that petitioner was not entitled to limited liability under OPA but rather was liable for the full measure of the cleanup costs and damages caused by the oil spill. See *ibid.*

ARGUMENT

Petitioner contends (Pet. 7-20) that the court of appeals erred in determining that petitioner was not entitled to limit its liability under OPA. The court, however, correctly concluded that petitioner falls within the exception to OPA's liability limits in 33 U.S.C. 2704(c)(1). And because that question involves a "matter of first impression," Pet. App. 14a; see Pet. 11, the court's decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. OPA precludes the limitation of a responsible party's liability where an oil spill results from the gross negligence, willful misconduct, or federal regulatory violation of "a person acting pursuant to a contractual relationship with the responsible party." 33 U.S.C. 2704(c)(1). The court of appeals properly examined the "ordinary meaning" of the statutory phrase "'pursuant to'" and concluded that it means "'in compliance with; in accordance with.'" Pet. App. 14a (quoting *Black's Law Dictionary* 1431 (10th ed. 2014)) (brackets omitted). Under that ordinary meaning, a third party acts "'pursuant to'" a contract with the responsible party where it "commits the gross negligence, willful misconduct, or regulatory violation * * * in the course of carrying out the terms of the contractual relationship." *Id.* at 15a. Here, petitioner does not contest that DRD's federal regulatory violations occurred in the course of

transporting oil in accordance with petitioner's instructions, which were issued per the parties' contracts. See *id.* at 3a.[2]

Moreover, as the court of appeals reasoned, it would make little sense to construe the term "'pursuant to'" so narrowly as to require that "the specific acts or omissions that cause the spill must be authorized by the contract." Pet. App. 14a. If that were true, a third party would act "pursuant to a contractual relationship with the responsible party" only if the two parties had adopted the "rare contract indeed that specifically contemplated gross negligence, willful misconduct, or the violation of federal safety regulations." *Id.* at 15a. As a result, Section 2704(c)(1) would become a nullity, or close to it. Petitioner now appears to acknowledge (Pet. 12) as much.

b. Instead, petitioner contends (Pet. 13-15) that DRD's misconduct could not have occurred "'pursuant to'" DRD's contract with petitioner because DRD's misconduct was criminal and "[c]riminal conduct is never pursuant to a legal contract" (Pet. 13). The court of appeals properly rejected that contention, which lacks any

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[2] Petitioner asserts (Pet. 10) that the National Pollution Funds Center has construed Section 2704 differently. It relies on (*ibid.*) an unrelated case, *In re Frescati Shipping Co.*, No. 05-cv-305, 2016 WL 4035994 (E.D. Pa. July 25, 2016), aff'd in part, vacated in part, and rev'd in part, 886 F.3d 291 (3d Cir. 2018). But that case did not involve the construction of Section 2704(c)(1) or any attempt to limit an owner's liability in light of a contractor's misconduct. Instead, the owner of an oil tanker sued a charterer, bringing a contract claim for breach of a "safe berth warranty" and a tort claim for negligence. See *id.* at *2-*4. Whether the charterer had engaged in gross negligence, willful misconduct, or regulatory violations "pursuant to" a contract with the tanker's owner was not at issue. See *id.* at *4.

basis in the statutory text or in the common law of agency. Pet. App. 15a-16a.

As the court of appeals pointed out, there may be "considerable overlap" between the criminal wrongdoing that causes an oil spill and the gross negligence, willful misconduct, or regulatory violations addressed in Section 2704(c)(1). Pet. App. 15a. Here, for example, DRD and the captain and steersman of the MEL OLIVER were criminally charged with violating the Ports and Waterways Safety Act, 33 U.S.C. 1232(b)(1), which (among other things) requires that hazardous conditions be reported to the Coast Guard, see 33 C.F.R. 160.216; and with violating the Clean Water Act, 33 U.S.C. 1319(c)(1)(A), which (among other things) prohibits the negligent discharge of oil, see 33 U.S.C. 1321(b)(3). See Pet. App. 4a-5a. In other words, the criminal charges stemmed from the same sort of noncompliance with federal regulations that lifts the limitation of liability under Section 2704(c)(1). Accordingly, Congress, in the text of OPA, did not seek to "distinguish between the negligent acts that would lift the general limits on liability and the criminal acts that would not." *Id.* at 15a. Indeed, as the court observed, petitioner offers "no reason to think that Congress intended to lift the limits on liability for spills caused by conduct that is forbidden by federal regulation but to reimpose those limits for spills caused by conduct considered so dangerous or risky that it is also subject to criminal penalties." *Id.* at 16a.

In response, petitioner cites (Pet. 13-15) several decisions discussing the *respondeat superior* doctrine, to illustrate the supposed rule that a principal is not vicariously liable for the unlawful acts of its agents. Those decisions do not undercut the court of appeals' analysis.

First, the *respondeat superior* doctrine applies where an employer's liability is "a creature of the common law of agency." Pet. App. 17a. OPA, by contrast, creates a strict-liability scheme under which the "liability of a responsible party for oil spills caused by the negligence or misconduct of a third party * * * is a creature of statute." *Ibid.* Although petitioner suggests in passing (Pet. 20) that OPA's savings clause, 33 U.S.C. 2751(e), preserves the applicability of the *respondeat superior* doctrine, the savings clause does not apply here. The savings clause preserves admiralty and maritime law "[e]xcept as otherwise provided in this Act," *ibid.*, and OPA expressly creates a carefully calibrated liability scheme that supersedes common-law agency principles.

Second, even if petitioner could invoke the *respondeat superior* doctrine, a principal's liability for the acts of its agents does not turn solely on whether those acts are criminal. Rather, the overarching principle remains that "[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment." Restatement (Third) of Agency § 2.04 (2006). The decisions on which petitioner relies (Pet. 13-15) involved criminal conduct that "fell beyond the scope of [the employees'] employment" (Pet. 15). See, *e.g.*, *Palestina* v. *Fernandez*, 701 F.2d 438, 440 (5th Cir. 1983) (holding that boat owner was not liable for damages from collision where employee took boat "for a pleasure ride after working hours"). Petitioner does not attempt to show that the criminal conduct at issue here—*i.e.*, regulatory violations stemming from the improper manning of a vessel that was operating at petitioner's direction, see Pet. App. 3a-4a—falls outside the scope of DRD's contractual relationship with petitioner.

2. Petitioner asserts (Pet. 16-20) that this Court's review is necessary to address a conflict in the circuits on the question whether the "mere existence" of a contractual relationship means that any subsequent behavior occurs "pursuant to" that contract. No such conflict exists.

a. As an initial matter, the court of appeals did not adopt a "mere existence" rule. Petitioner relies on (Pet. 16) a purported "premise of the District Court's decision" and a purported "argument of the United States." But petitioner seeks review of the court of appeals' decision, and that decision nowhere suggests that the mere existence of a contract suffices. Rather, the court explained that the phrase "'pursuant to'" in Section 2704(c)(1) "has a narrower meaning than 'in connection with'" in Section 2703(a)(3). Pet. App. 14a. The court then determined that the former requires not just "conduct that is logically related to the contractual relationships" but also conduct that takes place in "compliance or conformity" with the contracts. *Ibid.*

Indeed, *no* court or party has advocated the "mere existence" standard that petitioner criticizes. The district court determined that Section 2704(c)(1) had been satisfied because "the charter agreements contemplated that DRD would transport oil on behalf of [petitioner]" and "DRD's activities while transporting that oil * * * ultimately caused the discharge." Pet. App. 54a. And in its court of appeals brief, the government expressly "agree[d]" with petitioner "that the 'mere existence' of any contractual relationship is insufficient." Gov't C.A. Br. 28.

b. In any event, no circuit conflict on the question presented exists. The court of appeals noted that its

construction of "'pursuant to'" in Section 2704(c)(1) "appears to be a matter of first impression." Pet. App. 14a. Petitioner acknowledges (Pet. 7, 11) the same. And petitioner does not cite any decision of another court of appeals that addresses the relevant statutory language.

Petitioner instead asserts a conflict (Pet. 17-20) between the court of appeals' decision here and a Second Circuit decision construing the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(b)(3). See *Westwood Pharm., Inc.* v. *National Fuel Gas Distribution Corp.*, 964 F.2d 85, 89-90 (2d Cir. 1992). But CERCLA is a different statute, under which the limitation on third-party liability does not necessarily track OPA's. In addition, although the court of appeals disagreed with the Second Circuit's *Westwood* decision, that disagreement related to the "in connection with" language in Section 2703, not the "pursuant to" language in Section 2704. See Pet. App. 11a-12a.[3] Petitioner, however, has expressly disclaimed its reliance on Section 2703, and instead "is only seeking review" of the court of appeals' holding with respect to Section 2704. Pet. 11 n.5; see Pet. i. The court of appeals correctly addressed these two statutory provisions separately, considering relevant differences in the text and purpose of each provision. See Pet. App. 9a-13a (Section 2703); *id.* at 13a-17a (Section 2704). As a result, any divergence about the meaning of the phrase "in connection with" in Section 2703 does not involve the question presented here.

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[3] Although the court of appeals "decline[d] to adopt" the Second Circuit's construction of the "'in connection with'" language in CERCLA, it also noted that the Second Circuit's "test is met here factually in light of the parties' contract to transport oil." Pet. App. 12a (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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