

No. 18-1017

In the Supreme Court of the United States

ANGELEX, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
*Solicitor General
Counsel of Record*

JOSEPH H. HUNT
Assistant Attorney General

CHARLES W. SCARBOROUGH

ANNE MURPHY
Attorneys

*Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

QUESTION PRESENTED

The Act to Prevent Pollution from Ships, 33 U.S.C. 1901 *et seq.*, authorizes the government to withhold a ship's permission to depart from a United States port when the government has reasonable cause to believe that certain environmental crimes have been committed on board the ship. 33 U.S.C. 1908(e). The Act further provides that "[a] ship unreasonably detained or delayed by the Secretary * * * is entitled to compensation for any loss or damage suffered thereby." 33 U.S.C. 1904(h). The question presented is as follows:

Whether the government unreasonably delayed petitioner's ship by keeping the vessel in port in Norfolk, Virginia, until the completion of an environmental-crimes prosecution in which the ship's owner, operator, and chief engineer were the defendants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 907 F.3d 612. The opinion of the district court (Pet. App. 21-71) is reported at 272 F. Supp. 3d 64. A prior opinion of the district court is reported at 123 F. Supp. 3d 66.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2018. The petition for a writ of certiorari was filed on January 31, 2019. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Act to Prevent Pollution from Ships, 33 U.S.C. 1901 *et seq.*, the Secretary of Homeland Security "shall administer and enforce" MARPOL, a multi-lateral international treaty that imposes strict pollution controls on oceangoing vessels and establishes oil-

pollution standards for shipping worldwide. 33 U.S.C. 1903(a); see International Convention for the prevention of pollution from ships, 1973, as modified by the Protocol of 1978, 1340 U.N.T.S. 61 (entered into force Oct. 2, 1983). The Coast Guard has issued regulations implementing the Act. See 33 C.F.R. Pt. 151, Subpt. A.

As relevant here, MARPOL limits oil pollution by prohibiting vessels from discharging dirty bilge water directly into the ocean. “‘Bilge water’ is the mixture of oil and water that accumulates in the ‘bilge’—or bottom—of a ship.” *United States v. Pena*, 684 F.3d 1137, 1142 n.2 (11th Cir. 2012), cert. denied, 568 U.S. 1088 (2013). “A ship must periodically discharge that bilge water so that it does not rise to a level where it endangers the safety of the vessel and its crew.” *Ibid.* MARPOL and the Act’s implementing regulations require vessels to clean their bilge water before discharging it into the sea. See MARPOL, Annex I, Reg. 15, 1340 U.N.T.S. 207-209; 33 C.F.R. 151.10.

To remove the oily content from bilge water, vessels use a filtering device known as an “oily water separator.” *Pena*, 684 F.3d at 1142 (citation omitted). Ships subject to MARPOL must document their use of the oily water separator, together with discharges and transfers of bilge water and other oily substances, in an “Oil Record Book.” MARPOL, Annex I, Reg. 16, 1340 U.N.T.S. 209-210; 33 C.F.R. 151.25; see also MARPOL, Annex I, App. III, 1340 U.N.T.S. 223.

Illegal discharges of dirty bilge water often occur on the open seas, beyond the enforcement jurisdiction of the United States. A vessel that illegally discharges pollutants directly into the ocean ordinarily does not record those discharges in the Oil Record Book. Prosecutions under MARPOL and the Act therefore often

focus on a vessel's failure to maintain an accurate Oil Record Book and its presentation of an inaccurate book when the vessel docks in a United States port. Such actions violate MARPOL and the implementing regulations, MARPOL, Annex I, Reg. 16, 1340 U.N.T.S. 209-210; 33 C.F.R. 151.25, and therefore constitute federal felonies, 33 U.S.C. 1908(a). See *United States v. Jho*, 534 F.3d 398, 401-410 (5th Cir. 2008); see also *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 307-309 (2d Cir. 2009) (per curiam).

b. Absent a defendant's consent, the authority of the United States to prosecute a foreign-flagged vessel depends on the ship's physical presence or commission of crimes in United States ports and navigable waters. 33 U.S.C. 1902(a); see *Wildenhus's Case*, 120 U.S. 1, 11 (1887) ("It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another * * * , it subjects itself to the law of the place to which it goes."). When a ship suspected of violating MARPOL or the Act leaves port, the evidence, potential witnesses, and potential defendants depart as well. See *Watervale Marine Co. v. United States Dep't of Homeland Sec.*, 807 F.3d 325, 329 (D.C. Cir. 2015) ("[I]f the government lacks sufficient evidence to present in court without the ship and its crew, the ship owner's liability disappears.").

The Act therefore grants the Coast Guard authority to keep a ship subject to MARPOL in port under two circumstances: (1) if the "ship * * * , its owner, operator, or person in charge is liable for a fine or civil penalty under this section"; or (2) "if reasonable cause exists to believe that the ship, its owner, operator, or person in charge may be subject to a fine or civil penalty under this section." 33 U.S.C. 1908(e). Under either

circumstance, the government “shall refuse or revoke the clearance required by section 60105 of title 46.” *Ibid.* Section 60105 requires a ship to obtain customs clearance before it can leave a port of the United States. 46 U.S.C. 60105.

Under the statutory scheme, “[c]learance may be granted upon the filing of a bond or other surety satisfactory to the Secretary” of Homeland Security. 33 U.S.C. 1908(e). Ships almost always choose to negotiate such security agreements and resume their voyages rather than await trial. Exercising authority delegated by the Secretary, see 33 C.F.R. 151.07, the Coast Guard ordinarily reaches an agreement with the vessel for both a monetary bond and nonmonetary conditions.

Under such an arrangement, the monetary bond secures the payment of any penalties that ultimately may be imposed. Nonmonetary conditions typically include agreements to waive objections to the jurisdiction of the courts of the United States, to provide for the well-being of crewmembers left behind when the ship departs, and to stipulate to the authenticity of certain evidence. See, e.g., *Watervale*, 807 F.3d at 330; *Angelex Ltd. v. United States*, 723 F.3d 500, 503 (4th Cir. 2013). Taken together, such conditions provide an effective substitute for the vessel’s presence, thereby allowing the criminal prosecution to proceed after the ship has left United States waters and ensuring that money is available to pay any resulting fines and penalties. See *Watervale*, 807 F.3d at 325.

The Act also provides an after-the-fact remedy for any ship owner who believes that a departure clearance was unreasonably withheld: “A ship unreasonably de-

tained or delayed by the Secretary acting under the authority of this chapter is entitled to compensation for any loss or damage suffered thereby.” 33 U.S.C. 1904(h).

2. a. This is a suit against the United States for statutory damages under Section 1904(h). Petitioner owned an ocean-going bulk carrier, the *M/V Antonin G. Pappadakis*. Shortly after the ship’s April 2013 arrival in Norfolk, Virginia, inspectors from the United States Coast Guard boarded the *Pappadakis* for a routine Port State Control inspection. See Pet. App. 4. A crewmember passed a note “confiding that the chief engineer was using a ‘magic pipe’—a device designed to covertly dump water containing oil residue—to avoid reporting discharges in the oil record book.” *Ibid.* After further investigation, the Coast Guard sent a letter informing petitioner and the *Pappadakis*’s operator, Kassian Maritime Navigation Agency, Ltd., that the Coast Guard had “‘reasonable grounds’ to believe” that the chief engineer had violated MARPOL and the Act while aboard the *Pappadakis*. *Ibid.*

The government accordingly withheld the vessel’s departure clearance under Section 1908(e), ensuring that the ship would remain in port. Pet. App. 4. Although the Coast Guard and petitioner attempted to negotiate terms that might allow the *Pappadakis* to resume her voyage without impeding the prosecution, they ultimately were unable to reach an agreement, principally because the government demanded at least a \$2.5 million bond in light of Kassian’s prior convictions for similar environmental crimes. See *id.* at 5-6, 16.

b. Petitioner filed an “emergency petition” in the United States District Court for the Eastern District of Virginia, asking the district court to determine an ap-

appropriate monetary bond for the release of the *Pappadakis*. Pet. App. 5-6. Finding the \$2.5 million bond demand “repugnant to the Constitution” and an “egregious abdication of the reasonable exercise of discretion,” the court ordered the Coast Guard to grant the *Pappadakis* a departure clearance in exchange for certain nonmonetary conditions and a \$1.5 million bond. *Angelex Ltd. v. United States*, 2013 WL 1934490, at *9-*10 (E.D. Va. May 8, 2013), rev’d, 723 F.3d 500 (4th Cir. 2013); see Pet. App. 6.

The government appealed, and the Fourth Circuit stayed and then reversed the district court’s order. The court of appeals held that the district court lacked subject-matter jurisdiction over petitioner’s “emergency petition” under either the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or principles of admiralty law. See *Angelex*, 723 F.3d at 502, 505. The *Pappadakis* remained in port.

c. Meanwhile, a grand jury returned an eight-count indictment charging petitioner, Kassian, and the *Pappadakis*’s chief engineer with conspiracy, three counts of falsification of records, three counts of failing to maintain an accurate Oil Record Book, and obstruction of justice. Indictment at 6-15, *United States v. Kassian Mar. Navigation Agency, Ltd.*, No. 2:13-cr-70 (E.D. Va. May 22, 2013); see Pet. App. 6, 33. The chief engineer was convicted on all counts except conspiracy, and was sentenced to one year of probation. See Judgment at 1-2, *United States v. Katsipis*, No. 2:13-cr-70-3 (E.D. Va. Dec. 13, 2013); Pet. App. 6, 34. Petitioner and Kassian were acquitted. See Pet. App. 6, 34. The Coast Guard then granted the *Pappadakis* a departure clearance, and the ship departed after having spent roughly six months in Norfolk. See *id.* at 6-7, 34.

3. Petitioner filed this suit in the United States District Court for the District of Columbia, seeking damages under Section 1904(h) for the allegedly unreasonable detention and delay of the *Pappadakis*. See Pet. App. 7. The district court granted in part the government's motion to dismiss, holding that petitioner had not plausibly alleged that the Coast Guard's initial decision to withhold the *Pappadakis*'s departure clearance was unreasonable. See 123 F. Supp. 3d at 81-82. Petitioner filed an amended complaint that did not challenge the ship's initial detention, but alleged only that the delay of the vessel had become unreasonable "at some unspecified point in the investigation" of the crimes committed on board. Pet. App. 10. Petitioner's theory was that the government's \$2.5 million bond demand was unreasonable, and that the detention and delay therefore were unreasonable as well.

Following discovery, the district court granted the government's motion for summary judgment. Pet. App. 70-71. The court explained that the government may reasonably set security terms and conditions that will leave it "no worse off when it allows a vessel to sail" than it would be if it withheld departure clearance. *Id.* at 45. Observing that petitioner and Kassian had produced no evidence that they would be unable to satisfy a criminal penalty if one were imposed, *id.* at 47-49, the court concluded that the proposed \$2.5 million bond was reasonable because it was less than the \$3 million maximum penalty that petitioner had faced, *id.* at 60-64. The court further held that the proposed nonmonetary conditions were reasonable because petitioner previously had agreed to those conditions, objecting only to the bond amount. *Id.* at 66-67.

4. The court of appeals affirmed. Pet. App. 1-20. Relying on its previous decision in *Watervale, supra*, the court rejected petitioner's argument that the government lacked legal authority to hold the ship during the criminal trial. The court explained that, when the government "has 'reasonable cause' to believe a ship" has violated the Act, "it may 'hold the ship in port until legal proceedings are completed.'" Pet. App. 10 (quoting *Watervale*, 807 F.3d at 330). A valid grand jury indictment, the court observed, established that reasonable cause. *Id.* at 10-11.

The court of appeals then determined that the government's \$2.5 million bond demand was reasonable. Assuming for the sake of argument "that a detention or delay is unreasonable if the bond demand is excessive or otherwise inappropriate," Pet. App. 11, the court rejected each of petitioner's arguments that the demand here was excessive or otherwise inappropriate. See *id.* at 12-19.

First, the court of appeals rejected petitioner's contention that the government should determine the amount of bond based upon whatever fine "the district court is likely to impose." Pet. App. 12. The court observed that no one could accurately predict at the beginning of a criminal investigation, when bond negotiations take place, "what fines or penalties a court might impose at some point in the future after trial." *Ibid.* (citation omitted). The court approved the Coast Guard's practice of looking to statutory maximum penalties as a "perfectly reasonable" starting point for bond negotiations. *Ibid.*

Second, the court of appeals rejected petitioner's argument that, because Kassian did not own the ship, Kassian's potential liability should be excluded from

any bond calculation. Pet. App. 12-13. The court explained that the Act imposes in rem liability on the ship for “*any* fine imposed” for an oil record book violation, including fines imposed on the operator under Section 1908(a). *Id.* at 13 (citation omitted). The court observed that “[t]he statute therefore puts the ship on the hook for Kassian’s share” of any fines or penalties. *Ibid.*

Third, the court of appeals held that the government had not acted unreasonably when it refused to lower the bond for petitioner and Kassian based on their unsupported assertions that they lacked the financial resources to post the requested bond. Pet. App. 14. The court found it unnecessary to decide whether the government has any legal obligation to consider a vessel owner’s or operator’s ability to pay, see *id.* at 13-14, because petitioner had presented no evidence of its purported inability to pay. In particular, petitioner had not filed in the district court any of “the financial documents that it supposedly sent the Coast Guard” during bond negotiations. *Id.* at 14. The court of appeals “independently scoured the record” for such financial documents “and, like the district court, * * * c[a]me up empty.” *Ibid.*

Fourth, the court of appeals rejected petitioner’s contention that the Coast Guard had acted unreasonably by insisting on a \$2.5 million bond in this case after accepting a lower bond for a different ship a few weeks earlier. The court agreed with the government that Kassian, having “pled guilty to an oil record book violation in the past,” could reasonably be required to post a higher bond. Pet. App. 16.

Fifth, the court of appeals determined that what is “reasonable” under the Act does not depend on the agency’s decisionmaking process, but rather on what

agency officials “actually did in light of the information with which they can reasonably be charged.” Pet. App. 16-17. The court thus concluded that petitioner’s objections to the Coast Guard’s process for establishing an appropriate bond amount were not relevant to deciding whether the *Pappadakis* had been unreasonably delayed. *Id.* at 18.

The court of appeals also held that petitioner had not shown that the proposed nonmonetary conditions had contributed to an unreasonable delay or caused it loss or damage. Petitioner previously had accepted all of the nonmonetary conditions when it agreed, in principle, to a \$1.5 million bond. Pet. App. 18-19. While acknowledging petitioner’s contention that the cost of complying with the nonmonetary conditions was one reason it had rejected the proposed \$2.5 million bond, the court emphasized that petitioner had “made no specific argument regarding (much less produced any evidence of) the compliance cost” associated with the nonmonetary conditions. *Id.* at 19. The court therefore concluded that “the record contains no evidence to support a finding that the Coast Guard acted unreasonably in demanding that [petitioner] and Kassian post a \$2.5 million bond, or that the other nonmonetary assurances resulted in any additional loss or damage to [petitioner].” *Ibid.*

ARGUMENT

Petitioner contends (Pet. 19-34) that the government’s \$2.5 million bond demand was excessive and thus resulted in the vessel’s being “unreasonably detained or delayed” under 33 U.S.C. 1904(h). The court of appeals correctly rejected that factbound challenge, and its decision does not conflict with any decision of this Court

or another court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 21-25) that, in finding the \$2.5 million bond reasonable based on the possibility that petitioner might owe up to \$3 million in fines, the court of appeals “conflated the timing of when the remedy [under Section 1904(h)] becomes available (‘after-the-fact’), with the review of the * * * reasonableness of the conduct by the government at the time it occurred.” Pet. 25. Contrary to petitioner’s assertion (Pet. 21), the court below did not rely on a “hypothetical, after-the-fact justification.” Instead, it evaluated petitioner’s challenge based on “what a reasonable contemporaneous observer might have concluded” from the information that was before the Coast Guard at the time of the bond negotiations. Pet. App. 15. The court correctly held that petitioner had failed to identify any record evidence indicating that, at the time the government set the demand, petitioner could not afford the bond or the costs of complying with the nonmonetary conditions. *Id.* at 13-15, 18-19.

Petitioner’s remaining challenges to the court of appeals’ ruling (Pet. 27-34) are similarly unavailing. Petitioner asserts that the government “fail[ed] * * * to conduct *any* analysis of the financial ability of [petitioner] to post a bond in the amount of \$2.5 million,” Pet. 27, and “fail[ed] to consider the vessel’s mortgage or priority of liens,” Pet. 30 (capitalization and emphasis omitted). But the Coast Guard “has no discovery tools to compel the production of relevant information” from foreign corporations during Section 1908(e) negotiations, and petitioner “did not provide information concerning the financial wherewithal of its parent organizations to which capital could be effectively channeled.”

Pet. App. 62 n.14. Accordingly, the court did not err in rejecting petitioner's challenges on these grounds.

When a defendant moves for summary judgment, moreover, the plaintiff can defeat the motion only by "mak[ing] a showing sufficient to establish the existence of an element essential to [its] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986). Even if a vessel owner's ability to pay a proposed bond is relevant to the determination whether a delay is "unreasonable" under Section 1904(h), petitioner neither offered nor identified any record evidence that it lacked the ability to post the bond or was otherwise in dire financial condition. See Pet. App. 13-15, 18-19, 61 n.14. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims." *Celotex*, 477 U.S. at 323-324. Because petitioner offered no facts to support its principal claim here, the district court correctly granted the government's summary-judgment motion.

2. One section heading in the petition asserts that certiorari is warranted to resolve a conflict between the D.C. Circuit and the Fourth Circuit. Pet. 19. The text that follows that heading, however, identifies no such conflict. See Pet. 19-26. Indeed, petitioner refers with apparent approval (see Pet. 26) to the D.C. Circuit's observation that, before its decision in this case, "no circuit" had "considered the contours of [the Section 1904(h)] cause of action." Pet. App. 2.

The only Fourth Circuit decision that petitioner cites (Pet. 21) is the earlier decision arising out of the same detention and prosecution of the *Pappadakis* that led to the dispute here. See *Angelex Ltd. v. United States*,

723 F.3d 500 (2013). The question presented in that earlier appeal was whether the district court in Virginia had subject-matter jurisdiction over petitioner’s “emergency petition” to compel the government to offer a more favorable security agreement. *Id.* at 501-502. In ruling that the Virginia court lacked jurisdiction, the Fourth Circuit analyzed the text of 33 U.S.C. 1908(e) and 5 U.S.C. 701, along with this Court’s admiralty-jurisdiction precedents. 723 F.3d at 505-510.

The D.C. Circuit decision that is the subject of the certiorari petition does not conflict with that Fourth Circuit ruling. The Fourth Circuit pointedly did *not* address the question presented here: whether the government had “unreasonably detained or delayed” the *Papadakis* under 33 U.S.C. 1904(h). Compare *Angelex*, 723 F.3d at 508-509 (observing that petitioner could bring a *future* suit under Section 1904(h) to resolve that question), with Pet. App. 2-20 (resolving that question). Conversely, the D.C. Circuit did not question the Fourth Circuit’s conclusion that Section 1904(h)’s after-the-fact remedy provides the appropriate avenue for redressing an allegedly unreasonable detention. It simply held that petitioner had failed to establish an unreasonable detention here. Because the Fourth and D.C. Circuits addressed different legal issues, petitioner’s claim of a circuit conflict is baseless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOSEPH H. HUNT
Assistant Attorney General

CHARLES W. SCARBOROUGH
ANNE MURPHY
Attorneys

APRIL 2019