No. 17-___

IN THE

Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP., CBS CORPORATION, AND FOSTER WHEELER LLC,

Petitioners-Defendants,

v.

ROBERTA G. DEVRIES, Administratrix of the Estate of John B. Devries, Deceased, and Widow in her own right,

Respondent.

INGERSOLL RAND COMPANY,

Petitioner-Defendant,

v.

SHIRLEY MCAFEE, Executrix of the Estate of Kenneth McAfee, and Widow in her own right,

Respondent.

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

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(continued from front cover)

QUESTION PRESENTED

Can products-liability defendants be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The respondents, who were the plaintiffs-appellants below, are:

1. Roberta Devries, in her individual capacity and in her capacity as administratrix of the estate of John B. DeVries, and

2. Shirley McAfee, Executrix of the Estate of Kenneth McAfee, Deceased, and Widow in her own right.

The petitioners, all of whom were defendants-appellees below, are:

1. Air & Liquid Systems Corp. is a wholly owned subsidiary of Ampco-Pittsburgh Corporation, a publicly traded corporation. It is the successor-by-merger to Buffalo Pumps, Inc.

2. CBS Corporation is a publicly traded company. National Amusements, Inc. and its wholly owned subsidiary, NAI Entertainment Holdings LLC, are privately held companies, which, in the aggregate, own the majority of the voting stock of CBS Corporation. To CBS Corporation's knowledge, no publicly held corporation owns 10% or more of the voting stock of CBS Corporation.

3. Foster Wheeler LLC is a wholly-owned indirect subsidiary of John Wood Group plc (Scotland), a publicly traded company. No known person or entity currently owns 10% or more of John Wood Group plc's (Scotland) publicly traded common stock.

4. The parent company for Ingersoll Rand Company is Ingersoll Rand PLC, a publicly traded corporation. No other publicly traded corporation owns more than 10 percent of Ingersoll Rand Company stock.

Along with the petitioners, the following parties were listed as either defendants or defendants-appellees on the Third Circuit's docket below. None of the following parties are petitioners in this Court:

1. 20th Century Gove Corp. of Texas
2. Allen Bradley Co.
3. Allen Sherman Hoff
4. American Optical
5. American Optical Corp.
6. AMTICO Division of American Biltrite
7. Aurora Pumps
8. AZRock Industries, Inc.
9. AO SmithCorp.
10. BF Goodrich Co.
11. Baltimore Ennis Land Co. Inc.
12. Bayer Cropscience Inc.
13. Borg Warner Corp.
14. Burnham LLC
15. BW/IP Inc.
16. Carrier Corp.
17. Certain Teed Corp.
18. Cleaver Brooks Inc.
19. Crane Co.

20. Crown Cork & Seal Co., Inc.

21. Federal Mogul Asbestos Personal Injury Trust

22. Gallagher Fluid Seals, Inc.

23. General Electric Co.

24. Goodyear Tire & Rubber Co.

25. Goulds Pumps, Inc.

26. Hajoca Corp.

27. Hampshire Industries, Inc.

28. IMO Industries, Inc.

29. J.A. Sexauer

30. J.H. France Refractories Co.

31. John Crane, Inc.

32. Metropolitan Life Insurance Co.

33. Minnesota Mining & Manufacturing Co.

34. McCord Gasket Co.

35. NOSROC Corporation

36. Oakfabco, Inc.

37. Owens-Illinois, Inc.

38. Parker Hannifin Corp.

39. Pecora Corp.

40. Peerless Industries, Inc.

41. Riley Stoker Corp.

42. Selby Battersby & Co.

43. Sid Harvey Mid Atlantic, Inc.

44. Therman Engineering, Inc.

45. Trane U.S. Inc.

46. Warren Pumps, LLC

47. Weil McClain Division of the Marley Co.

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PETITION FOR A WRIT OF CERTIORARI

This petition asks the Court to resolve an acknowledged circuit split on an important issue of federal law: In maritime-law cases, can a products-liability defendant be held liable for injuries allegedly caused by components that are manufactured, sold, and distributed by third parties, and that are added to the defendant's products post-sale? In the Sixth Circuit, the answer is "no." That answer follows from the principle that tort-law defendants are liable for only the injuries that they cause—they bear no responsibility for injuries that *others* cause. Without even mentioning this foundational tort-law principle, the Third Circuit expressly parted ways with the Sixth Circuit, and held that a defendant may be held liable for injuries caused by the products of a third party. This Court should grant certiorari to restore uniformity to maritime law, and to clarify that maritime-law defendants are not liable for injuries that they do not cause.

OPINIONS BELOW

1. ***Air & Liquid Systems Corp., et al, v. DeVries.*** The United States District Court for the Eastern District of Pennsylvania initially awarded summary judgment to the petitioners in a series of unpublished orders, all of which are available on Westlaw at 2014 WL 6746811 (ordering summary judgment for Foster Wheeler LLC), Pet. App. 71a; 2014 WL 6746795 (ordering summary judgment for CBS Corporation), Pet. App. 63a; 2014 WL 6746960 (ordering summary judgment for Buffalo Pumps, Inc.), Pet. App. 79a.

The United States Court of Appeals for the Third Circuit remanded in an unpublished order. Pet. App. 48a. On remand, the District Court again awarded summary judgment, and issued an opinion published at 188 F. Supp. 3d 454. Pet. App. 20a. The Third Circuit reversed, in an opinion published in the Federal Reporter at 873 F.3d 232. Pet. App. 1a.

2. ***Ingersoll Rand Co. v. McAfee.*** The United States District Court for the Eastern District of Pennsylvania awarded summary judgment to Ingersoll Rand in an unpublished order available on Westlaw at 2014 WL 12601085, Pet. App. 55a.

The Third Circuit remanded in an unpublished order. Pet. App. 43a. On remand, the District Court again awarded summary judgment, again in an unpublished order. Pet. App. 18a. On appeal, the Third Circuit consolidated the case with the *DeVries* matter; the opinion in the consolidated cases is published in the Federal Reporter at 873 F.3d 232. Pet. App. 1a.

JURISDICTION

John and Roberta DeVries sued nearly 50 entities in Pennsylvania state court. So too did Kenneth and Shirley McAfee, in a separate action. Both cases were removed to the United States District Court for the Eastern District of Pennsylvania. That court had jurisdiction pursuant to 28 U.S.C. §§ 1333(1) and 1442(a)(1), because both cases arose from injuries that allegedly occurred aboard vessels on navigable waters, and because several defendants stated a colorable federal common-law defense to claims arising from their conduct as contractors for the United States Navy.

After the District Court awarded summary judgment to the petitioners in both cases, Roberta Devries (in her individual capacity, and as administratrix of John's estate) and Shirley McAfee (in her individual capacity, and as executrix of Kenneth's estate) appealed to the Third Circuit. That court had jurisdiction under 28 U.S.C. § 1291. It consolidated the cases in a single appeal, and issued its decision on October 3, 2017. The petitioners moved this Court for an extension of time in which to file their petition for certiorari. *See Air and Liquid Systems Corp., et al. v. DeVries, et al.*, No. 17A625. Justice Alito granted that application, giving the petitioners until January 31, 2018, to file. They have timely filed, and this Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

The Third Circuit issued its opinion below in a consolidated appeal that began as two separate matters: *DeVries v. General Electric Co., et al.*, No. 13-cv-474 (E.D. Pa.), and *McAfee v. 20th Century Glove Corp. of Texas, et al.*, No. 13-cv-6856 (E.D. Pa.). This brief describes these matters separately, before turning to the Third Circuit's decision in the consolidated appeal.

A. The *DeVries* Matter

Sixty years ago, between 1957 and 1960, John B. DeVries served in the Navy aboard the *U.S.S. Turner*. He worked as an engineer. *See* Appendix 88 *DeVries v. Buffalo Pumps*, No. 15-1278 (3d Cir.)

("DJA"). At first, his responsibilities included overseeing work in the *Turner*'s engine and fire rooms, where he did not perform "actual hands-on work with mechanical equipment." DJA 619. Eventually, the Navy promoted him to head of the Engineering Department. DJA 618–19. His official duties in that role were "limited to supervision," but he occasionally "had to show people how to" work on equipment. DJA 619. Some of that equipment was insulated with asbestos, and some of it contained internal components (like gaskets and packing) made with asbestos. According to John DeVries, his work with this equipment exposed him to asbestos dust.

In 2012, doctors diagnosed him with lung cancer, allegedly caused by asbestos exposure. He and his wife, Roberta, sued nearly 50 entities that they claimed were responsible for his injuries, seeking relief under theories of negligence and strict liability. These entities included the *DeVries* petitioners—CBS Corporation, Foster Wheeler LLC, and Buffalo Pumps (predecessor in interest to petitioner Air & Liquid Systems Corp.)—all of which manufactured and supplied equipment that the Navy used aboard the *Turner* during John DeVries's service. None of these petitioners, however, manufactured or supplied any of the asbestos-containing insulation, gaskets, or packing alleged to have caused his injuries. Thus, the litigation to date has focused largely on whether defendants in maritime cases can be held liable for injuries caused by third-party components that they neither manufactured, distributed, nor sold.

1. Bath Iron Works built the *Turner* in 1945. DJA 619. The *DeVries* petitioners supplied one or more of the durable parts installed on board the ship: West-

inghouse Electric Corporation (the predecessor-in-interest to petitioner CBS) supplied the Navy with the *Turner*'s generators, blowers, and turbines. *See* DJA 558–59, 605, 607. Foster Wheeler supplied economizers for use inside Babcock & Wilcox boilers. DJA 1151–53. And the ship's pumps came from (among others) Buffalo Pumps. *See* DJA 327, 352–53, 357–63.

At the time, the Navy required equipment suppliers, including the petitioners, to conform their equipment to precise Navy specifications. *See, e.g.*, DJA 485, 487, 494, 940; 1475–76. One such requirement is particularly relevant to this case: Contractors had to supply equipment—including turbines and pumps—in "bare metal" form. That is, contractors had to supply the equipment free of exterior insulation. *See* DJA 490.

As a result of this requirement, the petitioners had no control over the materials the Navy would use to insulate their equipment post-sale. That decision was left to the Navy alone, which decided to insulate the equipment on board the *Turner* with asbestos. It made this decision based on its determination that asbestos "best met the Navy's military requirements" at the time, including "optimum heat retention, low weight, fire resistance, resistance to water damage and insect infestation, and cost-efficiency." DJA 491. And the Navy made this decision notwithstanding the dangers that asbestos posed—dangers that the Navy knew of *decades* earlier, by 1922. *See* DJA 521–29.

The Navy used asbestos for more than insulation. For example, it required asbestos-containing internal components (like consumable gaskets and packing

used to form seals between metal components) in certain equipment. *See, e.g.*, DJA 491, 494, 1540. These asbestos-containing internal components, unlike the insulation, *could be* included with equipment supplied to the Navy. But such internal components wore out and needed to be replaced many times over during a ship's multi-decade lifespan. It is thus uncontested that any asbestos-containing components supplied with the petitioners' equipment had worn out and been replaced "numerous times" before John DeVries began his service in 1957. DJA 1465, 1505.

What is more, none of the petitioners manufactured the replacement parts used aboard the *Turner*, supplied such parts, or did anything else to facilitate their installation. Instead, companies other than the petitioners made and sold the asbestos and asbestos-containing products to which John DeVries was allegedly exposed during his Navy service. And the Navy chose to continue requiring asbestos insulation and asbestos-containing replacement parts into the late 1970s, *see* DJA 492—three decades after petitioners supplied their equipment for use aboard the *Turner*, and at least two decades after the Navy became aware that some non-asbestos thermal insulation was "suitable for use on steam turbines and other machinery," Supplemental Appendix 87 *DeVries*, No. 15-1278.

2. In June 2012, more than 50 years after his service aboard the *Turner*, doctors diagnosed John DeVries with lung cancer. DJA 97. Later that year, he and his wife, Roberta, filed suit against the petitioners and numerous other entities in the Philadelphia Court of Common Pleas. DJA 87. Their complaint alleged that John DeVries had been exposed to

asbestos at every site where he worked during his 55-year career—a career that included, in addition to 3 years of Navy service, 32 years as an engineer for Rohm & Hass, and 20 more as a part-time engineering consultant. The complaint further alleged that this asbestos exposure caused John DeVries's cancer. DJA 87–98. The complaint sought to hold petitioners liable under products-liability theories of strict liability and negligence. Pet. App. 4a.

After CBS removed the case to federal court, DJA 102–17, the DeVrieses voluntarily dismissed their claims against some defendants. The District Court dismissed the vast majority of other defendants, whose summary-judgment motions the DeVrieses chose not to oppose. This left only those defendants, like the *DeVries* petitioners, that had supplied equipment for the *Turner* during its construction, but that *did not* make, distribute, sell, or otherwise supply the asbestos and asbestos-containing parts alleged to have caused John DeVries's injuries.

Each of the *DeVries* petitioners moved for summary judgment under what some courts have called the "bare-metal rule." Under that rule, companies that manufacture and sell equipment are not liable for injuries caused by third-party asbestos added to their equipment after it leaves their control. The rule is sometimes called the "bare-metal defense." That, however, is a misnomer: The bare-metal rule is not an affirmative defense, but rather an application of the principle that plaintiffs must prove causation in order to succeed on a tort claim.

The District Court granted the petitioners' motions. As an initial matter, it held that the claims against the petitioners were governed by maritime

law, since each sought relief for injuries allegedly caused by shipboard exposure to asbestos. Pet. App. 66a, 74a, 81a. And maritime law, the court held, recognizes the bare-metal rule. Pet. App. 67a, 74a, 82a. In reaching this conclusion, the District Court relied on its earlier decision in *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012). *Conner* reasoned that the bare-metal rule is but a specific application of the basic tort-law principle that defendants are not liable for injuries caused by third parties' products—a principle that maritime law incorporates. *See id.* Since there was no evidence that any of the petitioners manufactured, sold, or otherwise had any involvement with the distribution of the asbestos alleged to have contributed to John DeVries's cancer, the District Court awarded summary judgment to each. Pet. App. 69a–70a, 77a–78a, 85a–87a.

3. John DeVries died from lung cancer before the District Court entered summary judgment. But Roberta DeVries—acting on her own behalf and now on behalf of John DeVries's estate—appealed to the Third Circuit. Her brief argued that the bare-metal rule does not apply in maritime law. According to her, plaintiffs in asbestos suits arising under the federal courts' admiralty jurisdiction need not prove that the defendant's product caused plaintiff's harm; instead, defendants can be held liable so long as it was foreseeable that their product would be used in conjunction with the alleged injury-causing product. Because the District Court held otherwise, she argued that the Third Circuit should reverse it.

Rather than address the bare-metal rule's applicability in maritime law, the Third Circuit remanded

the case so that the District Court could clarify the scope of its ruling. The Third Circuit said that it could not "determine whether the District Court considered the negligence claim." Pet. App. 45a. It asked the District Court to expressly address the bare-metal rule's application to negligence claims.

On remand, the District Court confirmed that it had previously considered the negligence claims before awarding the petitioners summary judgment. Pet. App. 22a. Emphasizing the importance of uniformity and predictability in maritime law, the District Court explained that maritime law does not impose liability for harms caused by third parties' products. Pet. App 29a. A plaintiff accordingly cannot prevail without establishing that a defendant manufactured or supplied the product that caused his injuries. Pet. App 29a–30a. This rule applies equally to strict liability and negligence claims. Pet. App 33a–34a. The District Court accordingly reaffirmed summary judgment for Defendants on all claims. Pet. App 22a, 42a. Roberta DeVries again appealed to the Third Circuit.

B. The *McAfee* Matter.

Kenneth McAfee served aboard the *U.S.S. Wanamassa* in the late 1970s. In the early-to-mid 1980s, he served aboard the *U.S.S. Commodore*. *See* Joint Appendix 68, 107, *McAfee v. Ingersoll Rand Company*, No. 15-2667 (3d Cir.) ("MJA"). Ingersoll manufactured and supplied compressors that the Navy used on those ships during McAfee's service. The Navy required Ingersoll to conform the equipment it manufactured to the Navy's precise specifications. *Supra* 5. Specifically, the Navy required Ingersoll to use certain asbestos-containing parts (for

example, gaskets and packing) with its compressors. But to the extent any such parts were originally supplied with Ingersoll's equipment, they had worn out, and been replaced by the Navy many times before McAfee began serving on the *Wanamassa* and the *Commodore*. *See* Appellants Br. 9, 22, 29, *McAfee v. Ingersoll Rand Co.*, No. 15-2667. Ingersoll did not manufacture, supply, or play any other role in replacing the asbestos-containing parts that allegedly injured McAfee. *See* Pet. App. 4a. Indeed, Kenneth McAfee admitted that he did not know who made any of the asbestos-containing gaskets or packing that he handled on the *Wanamassa* or the *Commodore*. *See* MJA 77–79.

McAfee and his wife sued nearly 50 entities, including Ingersoll Rand, for injuries allegedly caused by asbestos exposure aboard the *Wanamassa* and the *Commodore*. The District Court granted summary judgment to Ingersoll, after determining that Ingersoll did not manufacture or supply the insulation, gaskets, or packing that the Navy used with Ingersoll's compressors. *See* Pet. App. 61a–62a.

As it did in *DeVries*, the Third Circuit summarily remanded the case with the instructions to clarify the bare-metal rule's application to negligence claims. *See* Pet. App. 47a. And the District Court, as it did in *DeVries*, reaffirmed its earlier judgment. *See* Pet. App. 18a–19a. Shirley McAfee appealed on her own behalf, and on behalf of her now-deceased husband's estate.

C. The Third Circuit's consolidated resolution of the *DeVries* and *McAfee* appeals

The Third Circuit consolidated the second *McAfee* and *DeVries* appeals. For a second time, it remanded both matters. This time, however, it addressed whether and how the bare-metal rule applies in maritime-law cases.

The court framed the appeal as presenting the following question: "When, if ever, should a manufacturer of a product that does not contain asbestos be held liable for an asbestos-related injury most directly caused by parts added on to the manufacturer's product?" Pet. App. 5a. It held that manufacturers can be held liable for injuries caused by third-party asbestos—at least in negligence cases—when those injuries are reasonably foreseeable consequences of the manufacturer's own conduct. Pet. App. 15a–16a. Whether a particular injury *is* the reasonably foreseeable consequence of a manufacturer's conduct will be a fact-specific inquiry, guided by five non-exhaustive factors.

The Third Circuit's holding grew out of its view that the question whether manufacturers should be held liable for injuries caused by others' asbestos is really all about foreseeability. In the Court's words: "When parties debate the bare-metal defense, they debate when and whether a manufacturer could reasonably foresee that its actions or omissions would cause the plaintiff's asbestos-related injury." Pet. App. 7a. The Court cited nothing in support of this assertion. Indeed, its opinion altogether ignored the black-letter tort-law principle that defendants are liable only for injuries they cause—a principle that

the petitioners argued required affirmance, since Roberta DeVries and Shirley McAfee sought to hold petitioners liable for injuries allegedly caused by asbestos and asbestos-containing products made, distributed, and sold by other companies.

After "rooting the bare-metal defense in foreseeability," the court characterized the issue before it as involving a choice between two options. On the one hand, it could adopt a bright-line rule, under which injuries caused by third parties' asbestos are never reasonably foreseeable. On the other, it could adopt a totality-of-the-circumstances test for evaluating foreseeability.

The Third Circuit acknowledged that the Sixth Circuit had already addressed the question before it in *Lindstrom v. A-C Products Liability Trust*, 424 F.3d 488 (6th Cir. 2005). There, the Sixth Circuit adopted what the Third Circuit characterized as the "bright-line rule, holding that a manufacturer of a bare-metal product is never liable for injuries caused by later-added asbestos-containing materials." Pet. App. 5a. But the Third Circuit parted ways with its sister circuit, adopting the totality-of-the-circumstances approach. It held that a "manufacturer of a bare-metal product may be held liable for a plaintiff's injuries suffered from later-added asbestos-containing materials if the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's" conduct. Pet. App. 15a. "[F]or example," the court explained, "a bare-metal manufacturer may be subject to liability if it reasonably could have known, at the time it placed its product into the stream of commerce, that":

(1) asbestos is hazardous, and

(2) its product will be used with an asbestos containing part, because

(a) the product was originally equipped with an asbestos containing part that could reasonably be expected to be replaced over the product's lifetime,

(b) the manufacturer specifically directed that the product be used with an asbestos-containing part, or

(c) the product required an asbestos-containing part to function properly.

Pet. App. 15a–16a.

The court stressed, however, that these "may *or may not be* the only facts on which liability can arise," and noted that the "finer contours of the" bare-metal rule "must be decided on a case-by-case basis." Pet. App. 16a (emphasis added).

The Third Circuit adopted this totality-of-the-circumstances approach because it believed it would do better than the bright-line rule at promoting maritime law's "deep[] concern" for "the protection of sailors." Specifically, the totality-of-the-circumstances approach would permit "a greater number of deserving sailors to receive compensation." Pet. App. 13a. The court acknowledged that maritime law is additionally concerned with "traditions of simplicity and practicality," Pet. App. 13a (quoting *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959)); that it "seeks out 'uniform rules to govern conduct and liability,'" Pet. App. 14a (quoting *Foremost Ins. Co. v Richardson*,

457 U.S. 668, 674–75 (1982)); and that its "fundamental interest" is "the protection of maritime commerce," *id.*(quoting *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991)). But it concluded that each of these purposes was equally consistent with the bright-line rule it rejected and the totality-of-the-circumstances test it adopted. Pet. App. 13a–15a.

This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

The question presented involves an acknowledged circuit split—one exacerbated by contradictory decisions from federal district courts and state courts. That is reason enough to grant a petition for certiorari in *any* case involving federal law. But it is a particularly strong reason to grant a petition arising under this Court's admiralty jurisdiction, which exists to ensure uniformity in maritime law. On top of all that, the decision below is wrong, and will cause confusion in the context of maritime-law products-liability suits.

I. THE CIRCUITS ARE SPLIT REGARDING THE ANSWER TO THE QUESTION PRESENTED

In *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488, the Sixth Circuit held that maritime-law defendants cannot be held liable for injuries caused by exposure to asbestos from later-added insulation and asbestos-containing parts that third parties manufacture, distribute, and sell. *Id.* at 492–95. The Third Circuit expressly rejected that rule in favor of its totality-of-the-circumstances foreseeability test, and thus expressly created a circuit split. Pet.

App. 10a, 14a. The Third and Sixth Circuits are now in direct conflict.

The approaches that the Third and Sixth Circuits took to answering the question presented are as inconsistent as the answers they reached. *Lindstrom* grounded its holding on the principle that tort-law plaintiffs "must establish causation." 424 F.3d at 492. As the Sixth Circuit explained in an earlier case addressing the same issue, "in order to maintain an action for either negligence or strict liability under maritime law, a plaintiff must show causation of his injury by either the defendant's negligence or the product defect." *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 375 (6th Cir. 2001). In asbestos cases, this means establishing that the *defendant* made, supplied, or otherwise assisted in providing the injury-causing asbestos. *Lindstrom*, 424 F.3d at 495–96. Thus, a defendant "cannot be held responsible for material 'attached or connected' to its product" post-sale. *Id.* at 495 (quoting *Stark*, 21 F. App'x at 381). This approach stands in marked contrast to that taken by the Third Circuit, which described the bare-metal rule as turning entirely on the concept of foreseeability, considering the totality of the circumstances. Pet. App. 7a–8a.

Rulings from federal district courts around the country have further clouded the issue. Some have sided with *Lindstrom*. *See, e.g.*, *Nelson v. Air & Liquid Sys. Corp.*, 2014 WL 6982476, at *12–*13 (W.D. Wash. Dec. 9, 2014*); Cabasug v. Crane Co.*, 989 F. Supp. 2d 1027, 1039 (D. Haw. 2013). Others have adopted something similar to the foreseeability test embraced below. One court, for example, has held that plaintiffs may bring failure-to-warn claims

against manufacturers based on later-added asbestos if the breach of the duty to warn "regarding the *original* asbestos components that the manufacturer added to the product is *a* proximate cause of a subsequent harmful exposure to asbestos contained in an aftermarket replacement part." *See Bell v. Foster Wheeler Energy Corp.*, 2016 WL 5780104, at *6 (E.D. La. Oct. 4, 2016) (emphasis added). Other courts hold that manufacturers can be held liable, at least in failure-to-warn cases, if the future use of asbestos is in some sense "inevitable." *See Chesher v. 3M Co.*, 234 F. Supp. 3d 693, 713 (D.S.C. 2017); *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 769 (N.D. Ill. 2014).

There is further division even within these camps. For example, the "inevitability" courts do not agree on what the test requires. Some posit a three-part test, under which manufacturers can be held liable if:

(1) "the defendant manufactured a product that, by necessity, contained asbestos components";

(2) "the asbestos containing material was essential to the proper functioning of the defendant's product"; and

(3) "the asbestos-containing material would necessarily be replaced by other asbestos-containing material, whether supplied by the original manufacturer or someone else."

Quirin, 17 F. Supp. 3d at 769–70; *accord Osterhout v. Crane Co.*, No. 2016 U.S. Dist. LEXIS 39890, at *34 (N.D.N.Y. Mar. 21, 2016); *McAlvey v. Atlas Copco Compressors, L.L.C.*, 2015 WL 5118138, at *2 (S.D.

Ill. Aug. 28, 2015). Others modify this test slightly, so that failure-to-warn plaintiffs must show:

(1) that "the defendant actually incorporated asbestos-containing components into its original product," and *either*

(2) (a) "the defendant 'specified' the use of asbestos-containing replacement components," *or*

(b) "such components were 'essential to the proper functioning' of the defendant's product."

Chesher, 234 F. Supp. 3d at 714 (internal quotation marks and citations omitted).

Further complicating matters, state courts disagree about the bare-metal rule's applicability in cases arising under state law. Some have adopted the *Lindstrom* test. *See, e.g.*, *Grant v. Foster Wheeler, LLC*, 140 A.3d 1242, 1248–49 (Maine 2016); *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 502 (Wash. 2008). Others have adopted some version of a foreseeability-based approach. *See, e.g.*, *In re New York City Asbestos Litig.*, 59 N.E.3d 458, 475 (N.Y. 2016); *May v. Air & Liquid Sys. Corp.*, 129 A.3d 984, 994 (Md. 2015).

While states are free to design their tort law however they wish, this divergence causes problems for federal courts applying maritime law, because federal courts "draw guidance from" state law when formulating maritime-law principles. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 839 (1996). With the states divided as to the rule's application, federal courts cannot look to state law for consistent guidance regarding how (and whether) the bare-metal rule ought to apply in the maritime context. As such,

the lower courts' chances of resolving the confusion without this Court's help are even slimmer than they would be in the context of a typical circuit split.

II. THE DIVISION IN THE LOWER COURTS UNDERMINES MARITIME LAW'S STRONG INTEREST IN UNIFORMITY

"The judicial Power" extends to "all cases of admiralty and maritime Jurisdiction." U.S. Const., Art. III, §2. This jurisdictional grant ensures "[t]he advantages resulting to the commerce and navigation of the United States … from a uniformity of rules and decisions in all maritime questions." *DeLovio v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (Story, J., riding circuit). To this day, maritime courts' primary goals include assuring that "*all* operators of vessels on navigable waters are subject to uniform rules of conduct." *Foremost Ins.*, 457 U.S. at 675. Those uniform rules should adhere to the maximum extent possible to admiralty law's "traditions of simplicity and practicality." *Kermarec*, 358 U.S. at 631.

When it comes to the bare-metal rule, admiralty-law defendants are *not* "subject to uniform rules of conduct." The Third and Sixth Circuits have adopted squarely contrary approaches to the question whether manufacturers are liable for injuries caused by asbestos made and sold by third parties. This means that sailors, ship operators, and maritime manufacturing companies are subject to different rules depending on where on the Ohio River (Pittsburgh or Cincinnati) or the Great Lakes (Toledo or Erie) a barge happens to be. "The conflict between the approaches to this question taken by the Courts of Appeals is reason enough to grant this petition, for uniformity and predictability in the maritime industry

were the ends sought in the Constitution when federal-court maritime jurisdiction was created in the first instance." *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031, 1034 (1985) (Brennan, J., dissenting from denial of certiorari).

The divergent approaches taken by federal district courts and state courts show that the confusion is spreading, not subsiding. This Court's intervention, therefore, is the only realistic option for restoring uniformity as to the question presented. Until the Court intervenes, sailors and potential defendants will be hard-pressed to make even an educated guess regarding the applicable law outside the Third and Sixth Circuits. They will, in other words, be deprived of the chance to "look ahead with some ability to know what the stakes are in choosing one course of action or another." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008). Permitting that confusion to stand "would be foreign to" admiralty law's "traditions of simplicity and practicality." *Kermarec*, 358 U.S. at 631. And it would run contrary to the principle that the rules of maritime law ought not be "too indeterminate to enable manufacturers easily to structure their business behavior." *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870 (1986).

It is especially important to establish clear, uniform rules for adjudicating the liability of actions taken pursuant to military contracts. Needless to say, the federal government has a significant interest in procuring the equipment it needs to defend the country. And "[i]t is plain that the Federal Government's interest in the procurement of equipment is

implicated by suits such as the present one—even though the dispute is one between private parties." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506 (1988). Again, the Navy contracted with each of the petitioners to provide equipment for use on board ships, and *mandated* that this equipment use asbestos insulation and asbestos-containing parts. *Supra* 5–6. Thus, Roberta DeVries and Shirley McAfee seek to hold the petitioners liable for actions they took in performance of military-procurement contracts. Assuming petitioners can be held liable for such conduct at all, the standards by which their liability is to be judged must be uniform. After all, contractors (and prospective contractors) cannot rationally predict their risk if they do not know the rules according to which their liability will be determined. And when risk is difficult to gauge, businesses will insure against it either by imposing higher prices or by leaving the market altogether. Both possibilities undermine the government's interest in obtaining military equipment.

These risks are magnified in the Navy context: "On a ship most things are connected to other things." *Stark*, 21 F. App'x at 381. As a result, most anything that goes on a ship works with or is incorporated into numerous other components and systems. *Id.* Permitting the imposition of liability based on foreseeable interactions between products thus exponentially increases the potential liability—particularly since ships are built to last for decades, with their various components interacting all the while.

III. THE THIRD CIRCUIT ERRED IN ADOPTING A FORESEEABILITY TEST

Finally, the Court should grant certiorari because this is the perfect vehicle for reversing the foreseeability approach that the Third Circuit wrongly adopted below.

A. Maritime law does not recognize products-liability theories under which defendants can be liable for injuries caused by third parties' products

The judiciary develops the substantive rules of admiralty law "in the manner of a common law court." *Exxon Shipping*, 554 U.S. at 489–90. When fashioning a national admiralty rule, courts look to traditional common-law principles. *See, e.g.*, *id.* at 490–515. They judge the wisdom of adopting these principles with reference to admiralty law's underlying objectives—for example, its interest in advancing maritime commerce, ensuring predictability, and promoting uniformity. *See, e.g.*, *Kermarec*, 358 U.S. at 630–31 (rejecting common-law distinction between licensees and invitees, which "would be foreign to [maritime law's] traditions of simplicity and practicality").

1. At common law, defendants are liable only for the injuries they cause. *See* Restatement (Second) of Torts §§ 4, 315 (1965). They have neither a duty to control third parties, nor a duty to rescue potential plaintiffs from injuries caused by third-party acts. *See id.* §§ 314, 315.

As applied to products-liability law, this means that defendants are liable only for injuries caused by products that they either manufactured or sold. Re-

gardless of whether liability is predicated upon negligence or strict liability, the law penalizes only those parties who placed the harmful product "into the stream of commerce"—that is, those who manufactured, distributed, or sold the defective product. *See id.* § 402A (strict liability only for "[o]ne who sells" product); *id.* § 388 ("[o]ne who supplies directly or through a third person a chattel" is liable in negligence for harms "caused by the use of the chattel"). This makes sense: A defendant cannot be said to have "caused" an injury by making and selling something other than the product that inflicted the injury. *See, e.g.*, *In re Darvocet, Darvon, & Propoxyphene Prod. Liab. Litig.*, 756 F.3d 917, 939 (6th Cir. 2014) (concluding, under the law of 22 different states, that branded-drug manufacturers cannot be held liable under failure-to-warn theories in suits brought by generic-drug consumers).

Products-liability law does not impose liability on defendants for injuries caused by the use of other parties' products *even when* the products will be used in combination. A manufacturer generally has no duty of care with respect to another's products. *See, e.g.*, Restatement (Third) of Torts: Prod. Liab. § 5 cmt. a (1998); 63A Am. Jur. 2d Prods. Liab. § 1027. That is why courts have held makers of dialysis machines have no "duty to warn of the hazards" associated with dialysis-machine cleaning agents "manufactured by someone else." *Brown v. Drake-Willock Int'l, Ltd.*, 530 N.W.2d 510, 515 (Mich. Ct. App. 1995). It is why automakers cannot be held liable for defects in replacement wheels added to their cars post-sale. *See Baughman v. Gen. Motors Corp.*, 780 F.2d 1131, 1133 (4th Cir. 1986). It explains the rule

that manufacturers of non-defective component parts of an integrated product cannot be held liable "for injury that results from a defect in the integrated product." *Cipollone v. Yale Indus. Prod., Inc.*, 202 F.3d 376, 379 (1st Cir. 2000); *accord Hidalgo v. Fagen, Inc.*, 206 F.3d 1013, 1017 (10th Cir. 2000). And it justifies *Lindstrom*'s view that equipment manufacturers cannot be held liable for injuries caused by third parties' asbestos added to their equipment years after its sale. *See Lindstrom*, 424 F.3d at 495–96; *see also, e.g.*, *Grant*, 140 A.3d at 1248; *Braaten*, 198 P.3d at 498, 500–01, 504.

The foregoing applies "[r]egardless of the theory which liability is predicated upon." 51 A.L.R.3d 1344 § 2[a]. Because the bare-metal rule is premised on the principle that a defendant has no duty of care concerning another entity's products, the rule bars claims sounding in negligence. *See, e.g.*, *Braaten*, 198 P.3d at 501; *Conner*, 842 F. Supp. 2d at 801; *see also, e.g.*, *Walton v. Harnischfeger*, 796 S.W.2d 225, 228 (Tex. App. 1990) ("the absence of a duty" to warn about a third party's products "compels a summary judgment for [a manufacturer] based upon its 'no-duty' ground"). And it applies equally to suits predicated on manufacturing-defect, design-defect, and failure-to-warn theories. *See, e.g.*, *Lindstrom*, 424 F.3d at 495 (in manufacturing-defect case, rejecting liability where "asbestos that [plaintiff] may have been exposed to in connection with [defendant's] product [was] attributable to some other manufacturer"); *Sanders v. Ingram Equip., Inc.*, 531 So. 2d 879, 880 (Ala. 1988) (in design-defect case, "a distributor or manufacturer of a nondefective [product] is not liable for defects in a product that it did not

manufacture, sell, or otherwise place in the stream of commerce"); *Braaten*, 198 P.3d at 498 (describing "majority rule" as a "'manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products,'" not "'products of others'").

2. The traditional rule that a manufacturer generally owes no duty of care concerning another manufacturer's product serves admiralty law's underlying purposes.

First, a bright-line rule imposing liability only for harm caused by products that a defendant manufactured or sold adheres to admiralty law's general goals of "simplicity and practicality." *Kermarec*, 358 U.S. at 631. Because defendants know which products they manufacture and supply, the traditional rule enables them to accurately assess their potential "liability and then incorporate the insurance cost into the price of the product." *Kealoha v. E.I. du Pont de Nemours & Co.*, 844 F. Supp. 590, 595 (D. Haw. 1994), *aff'd*, 82 F.3d 894 (9th Cir. 1996). That, in turn, facilitates "the smooth flow of maritime commerce." *Foremost Ins. Co.*, 457 U.S. at 676; *see also Exxon Shipping*, 554 U.S. at 502 (adopting rule that allows parties to "look ahead with some ability to know what the stakes are in choosing one course of action or another"); *E. River S.S.*, 476 U.S. at 870 (rejecting rules that are "too indeterminate to enable manufacturers easily to structure their business behavior").

Second, the traditional rule furthers admiralty law's goal of national uniformity. *See Foremost Ins.*, 457 U.S. at 675; *Calhoun v. Yamaha Motor Corp.*, 216 F.3d 338, 351 (3d Cir. 2000). As just noted, the

traditional rule is easy to apply and thus leads to predictable results. And an easily applied, predictable test is a test capable of uniform application throughout the country. By contrast, a malleable, totality-of-the-circumstances test is not.

Third, the traditional rule promotes "the protection of maritime commerce" by eliminating the substantial burdens of requiring a manufacturer to engage in the costly and duplicative testing of third parties' products. *Exxon*, 500 U.S. at 608; *see* Restatement (Third) of Torts: Prods. Liab. § 5 cmt. a; *Kealoha*, 82 F.3d at 899–900. This concern is heightened in the maritime context, because "[o]n a ship most things are connected to other things," so any attempt to hold one manufacturer liable in admiralty for another's products would "implicate[] a broad[er] class of potential sources of exposure" than in the land-based context. *Stark*, 21 F. App'x at 381; *see also McIndoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170, 1174 (9th Cir. 2016). In addition, admiralty law routinely involves goods like anchors or engines that are made to last for decades. It is thus particularly unreasonable to expect a manufacturer "to anticipate improper installation of all foreseeable aftermarket equipment [to its products,] and to ironclad [them] against every conceivable harm from [the] improper installation" of another manufacturer's defective product. *Westchem Agric. Chems., Inc. v. Ford Motor Co.*, 990 F.2d 426, 430 (8th Cir. 1993).

Finally, maritime law is sometimes described as showing a "special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970). The tradi-

tional rule admittedly does nothing to advance this interest, aside from creating predictable rules on the basis of which sailors (like everyone else) can litigate their cases. But neither does it *hinder* this special solicitude: The traditional rule leaves seamen free to sue those who cause them harm.

3. Because the relevant common-law principle is consistent with the principles of maritime law, it ought to be adopted as the governing principle in maritime law cases.

B. The Third Circuit's *ad hoc* foreseeability test hinders the purposes of maritime law

The Third Circuit did not perform anything like the foregoing analysis. It began by declaring that the question presented—whether maritime-law defendants can be held liable for injuries caused by others' products—turns on foreseeability. The Third Circuit appears to have relied on nothing beyond its own say-so in reaching this conclusion. But regardless, the Third Circuit certainly did not derive the rule from traditional common-law principles, since it did not even consult those principles. Had it done so, it would have recognized one such principle previously invoked by this Court in the maritime-law context: "In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate brake" on liability. *E. River*, 476 U.S. at 874.

The Third Circuit next considered the purposes of maritime law, but only for assistance in helping it define the breadth of the foreseeability test it had conjured up. The court (for reasons not entirely clear) thought itself tasked with choosing between

two options. On the one hand, a bright-line rule under which injuries caused by others' products are *always* unforeseeable—and thus never give rise to foreseeability. On the other, a totality-of-the-circumstances standard under which such injuries are *sometimes* foreseeable—and thus sometimes give rise to liability. The court looked to the purposes of maritime law in deciding between these options.

This approach is upside down: Rather than identifying a rule and testing it against the purposes of maritime law, the Third Circuit used maritime law to craft the rule in the first place. And in any event, as already explained above, the rule the Sixth Circuit adopted in *Lindstrom*—the "bright-line rule" that is in fact a straightforward application of the principle that defendants are liable only for injuries that they cause—is the one that promotes the purposes of maritime law. *Supra* 24–26.

The Third Circuit's contrary reasoning is unpersuasive. For example, the Third Circuit determined that maritime law's concern with "simplicity and practicality" is *neutral* between a bright-line rule and a totality-of-the-circumstances standard. According to the court, while "'simplicity' might be seen as favoring the rule-based approach," it "could also be seen as favoring a foreseeability-based standard, because simplicity is related to familiarity, and foreseeability is such a familiar and key part of tort law." Pet. App. 13a–14a. None of this makes sense. For one thing, it is not true that familiarity implies simplicity—many familiar tasks are complex to carry out and lead to unpredictable results, as anyone who has attempted to calculate her own taxes can attest. For another, it is particularly dubious to suggest that

foreseeability, which "remains an elusive and indefinite concept" after all these years, *Stockton v. Ford Motor Co.*, 2017 WL 2021760, at *14 (Tenn. Ct. App. May 12, 2017), is simple because it is familiar.

What is more, the concept of foreseeability is especially elusive, indefinite, and incapable of principled application in the bare-metal context. The Third Circuit's opinion directs courts to ask, in assessing foreseeability, whether the defendant "reasonably could have known" that its "product required an asbestos-containing part to function properly." Pet. App. 15a. Relatedly, courts are to consider whether the defendant "reasonably could have known" that its product "was originally equipped with an asbestos-containing part that could reasonably be expected to be replaced over the product's lifetime." *Id.* Making these determinations is an inevitably arbitrary task. If, for example, there are three products that are compatible with a defendant's own product, does a defendant "know" that any given one will be used based on the 33 percent chance that a particular consumer may select it? What about ten alternatives, each with a 10 percent chance of being used? Is a 51 percent likelihood required, and how is that determined?

And what does it mean for equipment to "function properly"? If the product would operate 95 percent of the time without an asbestos-containing part, does the product "require" that part? Could it "reasonably be expected" that the part will be replaced with another asbestos-containing part? How about if the rate drops to 85 percent? Does a product "require" the asbestos-containing part if it would work without it, but slightly less efficiently? What if there is a per-

fect substitute for the asbestos-containing part, but it is twice the price? Three times the price? Ten times the price? One hundred times the price?

In addition to these metaphysical questions, there are practical ones. Most obviously: How far into the future are manufacturers expected to see? If a manufacturer could have reasonably expected that a product would "require" the use of asbestos in the immediate future, but had no idea what alternative technologies might arise later, is the exposure to asbestos six months down the line foreseeable? How about a year? Ten years? Forty years? Does it depend on the state of the science? Does it depend on what the manufacturer *knows* about the state of the science? The Third Circuit's foreseeability approach cannot plausibly be described as simpler and more predictable than a bright-line rule.

To make all of this worse, the Third Circuit's logic extends beyond asbestos cases; it extends to *all* products-liability suits alleging an injury caused by a hazardous substance or component added to a defendant's product post-sale. The breadth of the rule is especially troubling as applied to Navy contractors. As addressed above, the inability to confidently predict potential liability will cause Navy contractors to charge more, or to cease providing goods, frustrating the Navy's interest in efficient procurement contracting. And the Third Circuit's foreseeability test is nothing if not unpredictable. Third Circuit's assessment of maritime law's predictability interest is therefore difficult to credit.

The same goes for its treatment of the interest in promoting maritime commerce and the adoption of uniform rules. Pet. App. 14a–15a. The Third Circuit

concluded that these interests too were neutral between the bright-line rule and the totality-of-the-circumstances standard. This was so, it said, because other courts had adopted *both* approaches, meaning it was impossible to achieve uniformity regardless of the test adopted. This is a *non sequitur*. First, when courts are divided between a bright-line rule that limits liability and a totality-of-the-circumstances standard that expands it, maritime commerce is best promoted by the former, *regardless* of what other courts have done. To be sure, maritime law's interest in *uniformity* is best promoted by adhering to decisions from other courts. But that should have led the Third Circuit to adopt the bright-line rule, which was at the time the *only* rule ever adopted by a federal appellate court.

Having wrongly determined that the foregoing purposes of maritime law were neutral between a bright-line rule and a foreseeability approach, the court below relied exclusively on the "special solicitude" that admiralty courts pay to seamen. And it determined that this policy favored the foreseeability test, because it would "permit a greater number of deserving sailors to receive compensation." Pet. App. 13a. Of course, this Court has never held that maritime law's concern for the welfare of seamen requires whatever rule maximizes their potential recovery. To the contrary, it has emphasized that it is "not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990) (adding: "We will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States and that goes well be-

yond the limits of Congress' ordered system of recovery for seamen's injury and death.") Regardless, since the traditional common-law rule is at least consistent with the concern for seamen's welfare, *supra* 25–26, this interest alone does not justify rejecting the traditional rule.

C. The petitioners were entitled to summary judgment under the foregoing principles

Because maritime-law defendants cannot be held liable for injuries caused by third parties' products, the petitioners are not liable as a matter of law for John DeVries's and Kenneth McAfee's injuries. Accordingly, the Third Circuit erred in reversing the District Court's summary judgment awards.

Roberta DeVries claims that her husband was injured by exposure to external asbestos insulation attached to blowers, turbines, and generators manufactured by Westinghouse, and pumps manufactured by Buffalo. But the *DeVries* petitioners did not manufacture or supply any of that insulation. *See* DJA 490. Indeed, even Roberta DeVries's own evidence confirms that "[i]nsulation [was] furnished and installed by the shipbuilder." DJA 695; *see also* DJA 699 ("All other required fittings and attachments will be furnished by the purchaser, including turbine-heat insulation and lagging."); DJA 682 ("The naval architect is responsible to cover the turbines and the other piping insulation in the engine room so that personnel will not be burned.").

The claims in *DeVries* are additionally predicated on the allegation that John DeVries's injuries were caused by exposure to internal asbestos-containing

gaskets and packing used with equipment made by Foster Wheeler and Buffalo. Similarly, Shirley McAfee alleges that her husband contracted cancer caused by exposure to asbestos in replacement parts used with Ingersoll's compressors. None of the petitioners, however, manufactured or supplied any of the asbestos-containing parts to which DeVries and McAfee were allegedly exposed. *See* Pet. App. 4a, 61a, 69a, 78a, 86a.

Because it is undisputed that the petitioners neither made nor sold the asbestos alleged to have caused John DeVries's and Kenneth McAfee's injuries, this case squarely presents the question—on which the circuits are divided—whether products-liability defendants in maritime law cases can be held liable for injuries caused by products that they neither made nor sold. This case thus affords the Court an opportunity to resolve that question, and to correct the Third Circuit's erroneous answer.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

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