IN THE
SUPREME COURT OF VIRGINIA

Record No.: 111775

EXXON MOBIL CORP.,
Appellant,

v.

RUBERT E. MINTON, et ux.,
Appellee.

BRIEF OF THE CHAMBER OF SHIPPING OF AMERICA, AMERICAN WATERWAYS OPERATORS, AND THE AMERICAN PETROLEUM INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Shipping of America, The American Waterways Operators, and The American Petroleum Institute by counsel and pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia, respectfully submit this brief *amicus curiae* in support of Appellant Exxon Mobil Corporation ("Exxon").

The Chamber of Shipping of America ("CSA") is an organization that represents thirty-six U.S.-based corporations that own, operate, or charter oceangoing tankers, container ships, and dry bulk vessels engaged in both the domestic and international trades and companies that maintain a commercial interest in the operation of such oceangoing vessels.

The American Waterways Operators ("AWO") is the national trade association representing the owners and operators of tugboats, towboats, and barges serving the waterborne commerce of the United States. Its mission is to promote the long term economic soundness of the maritime industry, and to enhance the industry's ability to provide safe, efficient, and environmentally responsible transportation, through advocacy, public information, and the establishment of safety standards.

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[1] *Amici* affirm that no counsel for a party to this appeal authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

The American Petroleum Institute ("API") is a national trade association representing more than 500 companies involved in all aspects of the oil and natural gas industry. America's oil and natural gas industry comprises more than 7.7% of the U.S. economy, supports 9.2 million domestic jobs, delivers more than $86 million a day in revenue to the U.S. government, and since 2000 has invested more than $2 trillion in U.S. capital projects to advance all forms of energy, including alternatives. API's member companies own, operate, and charter tankers, tank barges, and other commercial vessels to deliver the crude oil and refined products that fuel America's economy.

The issues at stake in this case are of direct concern to *amici* and their members. *Amici* strongly support, and are deeply committed to, the protection of shipyard and other longshore workers who are essential to the maritime industry. This includes ensuring that they and their families are fairly and adequately compensated for injuries they suffer while working. At the same time, *amici's* members, who frequently utilize shipyard and other longshore workers to load and unload cargo and perform various vessel repair and maintenance services, have a large stake in ensuring that the provisions of the Longshoremen's and Harbor Worker's Compensation Act ("LHWCA" or "the Act"), 33 U.S.C. § 901 *et seq.*, and United States

Supreme Court precedent interpreting the Act, are fairly and consistently applied.

The judgment entered below permitted a shipyard worker to recover against a vessel owner based on a theory that the vessel owner owes a general duty to supervise and protect shipyard workers even after turning the vessel over to the custody and control of the workers' land-based employer. This ruling disturbs well-established maritime law that provides once a ship has been turned over to shipyard workers in a reasonably safe condition, the vessel owner owes no general duty to protect those workers from hazards that may arise during the course of their work. According to Supreme Court precedent and statutory law, the general duty of care instead lies with the workers' employer because the employer is in the best position to protect its workers.

The judgment's expansion of the duties owed to shipyard workers by vessel owners is at odds with the LHWCA's goal of incentivizing shipyard employers to provide safe working conditions for their employees by shifting primary responsibility for foreseeable injuries to the employers. Expanding the duties owed by vessel owners will also impose unwarranted and unpredictable costs on vessel owners who use Virginia ports, as well as undermine the maritime law's goal of national uniformity. *Amici* have

strong interests in maintaining the scheme established by the LHWCA and its interpreting precedent, which promotes a fair and predictable method of compensating injured workers while simultaneously fostering a thriving national maritime industry.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This is an appeal of a $17.5 million judgment entered in favor of Rupert Minton based on injuries he allegedly suffered due to his exposure to asbestos while working for the Newport News Shipbuilding & Dry Dock Company (the "Shipyard").

Minton was employed at the Shipyard from 1956 until 1993. After being diagnosed with mesothelioma in 2009, he filed the present action against numerous defendants, including manufacturers of asbestos-containing products and vessel owners. By trial, Minton had settled with the other defendants, and only his claim against Exxon for "negligence of a vessel" under the LHWCA remained.

Under the LHWCA, a vessel owner has but one general duty: the "turnover duty." Stated generally, the turnover duty provides that a vessel owner must exercise ordinary care under the circumstances to turn over the vessel, including its equipment and workspace, in a reasonably safe

condition so that a reasonably competent shipyard worker[2] can safely perform his work. The vessel owner also owes a concomitant duty to warn shipyard workers of any hidden hazards that would not be known or obvious to a reasonable shipyard employer or worker. *See Scindia Steam Navigation Co. v. de los Santos*, 451 U.S. 156, 164–65 (1980). Once the vessel owner satisfies this duty, it has no general legal obligation to supervise or inspect the vessel to discover dangerous conditions that develop later in the workplace. This duty falls to the shipyard worker's employer.

Prior to trial, Minton withdrew his claim that Exxon breached the turnover duty. Instead, Minton claimed that Exxon violated two much narrower duties arising under the LHWCA: (1) the "active control duty," which a vessel owner assumes if it exercises actual control over the methods and details of the shipyard employee's work, and (2) the "intervention duty," which a vessel owner assumes when it gains actual knowledge of a hazard to shipyard workers and actual knowledge that the shipyard employer is failing to reasonably protect its workers from the danger.

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[2] The brief refers to Mr. Minton as a shipyard worker, longshore worker, and longshoreman. These terms are used interchangeably throughout this brief, as they are in most published cases, to describe the nature of Mr. Minton's employment at the Shipyard.

The case proceeded to a 10-day jury trial. At trial, and in contravention of established law, Minton asserted and attempted to establish that Exxon assumed active control over his work because Exxon supervised the work and Exxon employees were present on the vessel. Minton's theory was invalid as a matter of law because it is well-established that a ship does not assume active control over a shipyard employee's work by supervising the course and progress of the work being done. Nor is the duty triggered by the mere presence of the vessel's crew. Minton also claimed and attempted to prove that Exxon breached its duty to intervene and warn him of the potential hazards of working in the vicinity of asbestos. Minton attempted to prove this by falsely stating that at the time only Exxon was aware of the dangers asbestos posed to shipyard workers. Exxon attempted to adduce evidence that the Shipyard was fully aware of the dangers of asbestos at the time Minton worked on its vessels and had policies in place to deal with this danger; policies and procedures it had developed in the 1960's and was required to maintain under federal regulations issued as early as 1971. While falsely representing to the jury that only Exxon had knowledge of the hazards of asbestos exposure, Minton convinced the trial court to suppress the contrary evidence by arguing that the Shipyard's knowledge was irrelevant.

Exxon moved to strike Minton's evidence at the close of his case-in-chief and renewed the motion at the close of all the evidence. Given that Minton was allowed to present his overly expansive and erroneous view of Exxon's duties under the LHWCA to the jury, and the inability of Exxon to put on evidence of the Shipyard's knowledge of the risks associated with asbestos, the verdict was a *fait accompli*.

The jury returned a $25 million verdict—$12.5 million in compensatory damages and $12.5 million in punitive damages. Exxon moved to set aside the verdict in its favor or, alternatively, for a new trial or remittitur. The trial court granted Exxon's motion for remittitur as unopposed to the extent it sought to reduce the punitive damages award to $5 million as pleaded by Minton. The trial court summarily denied the other motions and entered judgment.

Exxon petitioned this Court to appeal the $17.5 million judgment, and on March 8, 2012, this Court granted the petition on four assignments of error.

ASSIGNMENTS OF ERROR

This Court granted Exxon an appeal on four assignments of error, and while *amici curiae* support and adopt Exxon's arguments on all four

assignments of error, this brief focuses its arguments on the following two assignments:

I. The trial court erred in allowing liability to be imposed on Exxon—a vessel owner—for a longshoreman's asbestos-related workplace injuries despite the absence of evidence demonstrating either that Exxon actively controlled his work or the instrumentality that injured him, or that Exxon failed to intervene to protect him in the face of actual knowledge that his employer was ignoring an obvious risk to this safety.

III. The trial court erred in excluding all evidence that Minton's employer (the Shipyard) knew of the relevant hazard and had asbestos control procedures in place.

STATEMENT OF FACTS

Amici adopt the Statement of Facts provided in Exxon's Brief.

STANDARD OF REVIEW

The first assignment of error concerns the proper construction and application of the LHWCA and the three narrow duties defined in *Scindia Steam Navigation Co. v. de lo Santos*, all questions of law deserving *de novo* review. *See Davenport v. Little-Bowser*, 269 Va. 546, 552 (2005); *see also Fontenot v. United States*, 89 F.3d 205, 207 (5th Cir. 1996) ("The dispute . . . is not resolvable by accepting one version of fact over another version. Rather, the answer lies in the meaning of *Scindia*, an issue of law.).

The third assignment is also reviewed *de novo* because the trial court's decision to exclude Exxon's evidence was premised on a fundamental error of law. *See Davenport*, 269 Va. at 552.

ARGUMENT

I. THE JUDGMENT IS AT VARIANCE WITH THE PURPOSE AND HISTORY OF THE LHWCA

The United States Supreme Court has recognized that a federal statute should be interpreted against the historical context from which it arose to ensure it is applied in a manner that effectuates its broader purpose. *United Steelworkers v. Weber*, 443 U.S. 193, 201–02 (1979); *see also Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). The theory advanced by Minton and reflected in the trial court's judgment—that vessel owners owe a general duty to provide shipyard workers safe working conditions throughout the course of their work aboard ship—stands at odds with the history and purpose of the LHWCA and the 1972 Amendments (or "the Amendments").

Almost a century ago, Congress recognized that the practice of allowing injured longshoremen to bring claims against vessel owners under an expansive tort theory served to misapportion primary responsibility for a longshoreman's safety to the shipowner rather than the longshoreman's employer—notwithstanding the employer's superior position to recognize

potential hazards and provide protection to its workers. This system placed employees in greater danger because their employers had less incentive to ensure their safety. To remedy this problem, Congress enacted, and later amended, the LHWCA in which it created a compensation scheme to provide the "exclusive remedy" for injured longshoremen vis-à-vis their employers, while carving out a very narrow exception to allow injured workers to pursue claims against vessel owners for their actual negligence.

The judgment in this case runs contrary to this purpose, and creates the very problem Congress attempted to solve—the misallocation of liability from employer to vessel owner and a concomitant reduction in worker safety. Simply put, the judgment apportions principal responsibility for a longshore worker's injury to the shipowner despite the fact the vessel owner (1) turned over the vessel to the Shipyard in a reasonably safe condition, (2) had no active control over the methods and instrumentalities used by Minton in the course of his work, and (3) reasonably relied on the Shipyard's expertise and knowledge of the hazards posed by asbestos and had no actual knowledge that the Shipyard was not taking reasonable precautions under the circumstances. Because the judgment is based on a fundamental misunderstanding of the Act's history and purpose and

frustrates longstanding Congressional policy, as recognized by the Supreme Court in *Scindia*, the judgment should be reversed.

A. History and Background of the LHWCA: Pre-1972

Prior to the LHWCA's enactment, an injured longshoreman could bring suit against his employer and the vessel upon which he was injured for the full panoply of remedies available under maritime law—including damages for negligence and/or seaworthiness, and the remedies of wages and maintenance and cure. *See International Stevedoring Co. v. Haverty*, 272 U.S. 50, 51–52 (1926) (Holmes, J.); *Atl. Transp. Co. of W. Virginia v. Imbrovek*, 234 U.S. 52, 61–62 (1914). This judicially created compensation system proved poor public policy because it permitted an injured longshoreman to pursue large jury verdicts while failing to apportion liability between the longshore employer and the vessel owner relative to their ability to guard against and prevent the harm suffered by the longshoreman. To solve this problem, Congress enacted the LHWCA, which, like any worker's compensation statute, represented a compromise: the longshoreman gave up the prospect of large jury awards in exchange for the certainty of recovery without proof of his employer's fault; on the other hand, employers forfeited the chance to escape liability in court, but gained the assurance of lower, statutorily defined awards. *See Ryan*

Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 140–41 (1956) (Black, J., concurring); *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1242 (3d Cir. 1977). Yet, while the Act provided the "exclusive remedy" for injured workers vis-à-vis their employers, it failed to address whether a covered employee could bring a suit against third-party vessel owners in the event the employee's injury occurred while aboard a vessel.

The effects of Congress's oversight became manifest after a series of Supreme Court decisions. First, in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944), a suit brought under the Jones Act by a seaman injured on the high seas, the Supreme Court expanded claims brought under the maritime warranty of seaworthiness against vessel owners into a broad species of strict liability. Next, the Supreme Court in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), ruled that long shore workers, like seamen, could bring claims against vessel owners under the strict liability seaworthiness theory minted in *Mahnich*. Lastly, to relieve the great costs *Sieracki* imposed on the shipping industry and reallocate primary responsibility to long shore employers, the Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, allowed vessel owners to seek indemnification from the injured long shore worker's employer for breach of the warranty of workmanlike performance, a doctrine that held long shore employers liable for virtually

every unseaworthy condition possibly connected to them and their employees. 350 U.S. at 131–34; *see also Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 567–68 (1958); Comment, *Shipowner's Duties and Apportionment of Liability Under the Longshoremen's and Harbor Workers' Compensation Act*, 47 Fordham L. Rev. 323, 324–25 (1978). Through this circuitous process, a long shore worker was able to entirely circumvent the LHWCA and indirectly obtain full tort remedies from his employer for most injuries suffered while aboard a vessel. *See Hurst*, 554 F.2d at 1243; *Longshoremen's and Harbor Workers' Compensation Act*, H.R. Rep. 1441, 92d Cong., 2d Sess. 1, 4-5 (1972). In many cases, however, the employee was no better off because much of his award went towards attorneys' fees while a considerable portion—perhaps all—of the balance went to the employer's insurer as reimbursement for worker's compensation payments already paid to the plaintiff. *See Kakavas v. Flota Oceanica Brasileira, S.A.*, 789 F.2d 112, 117 (2d Cir. 1986) (Friendly, J.).

B. The 1972 Amendments

To cure the "anomalous and intolerable situation" created by *Mahnich*, *Sieracki*, and *Ryan Stevedoring*, Congress passed the1972 Amendments. *Id.* Through the Amendments, and specifically amended §

905(b), Congress abolished longshore worker suits against vessel owners based on unseaworthiness and eliminated indemnification actions brought by vessel owners. *Davis v. Portline*, 16 F.3d 532, 547 (3d Cir. 1994); Kenneth G. Engerrand & Jonathan A. Tweedy, *A Tedious Balance: Third-Party Claims Under the Longshore and Harbor Workers' Compensation Act*, 10 Loy. Mar. L.J. 1, 6 (2011). Section 905(b) did, however, preserve a limited right of recovery for longshore workers against third-party vessel owners if a longshore worker could demonstrate his injury was caused "by the negligence of a vessel."[3] Congress did not, however, fully delineate the standards applicable to a § 905(b) negligence action, leaving that task principally to the courts to resolve "through the application of accepted principles of tort law and the ordinary process of litigation—just as they are

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[3] 33 U.S.C. § 905(b) provides in pertinent part as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person...may bring an action against such vessel...and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

in cases involving alleged negligence by land-based third parties." *Kakavas*, 789 F.2d at 117 (quoting H.R. Rep. No. 1441 at 7).

Still, Congress provided some guidance on the proper interpretation of § 905(b)'s negligence remedy through the legislative history of the 1972 Amendments. In both the Senate and House Reports, Congress expressed its intention to establish a compensation system that promoted safe working conditions for longshore workers. Kenneth G. Engerrand & Richard L. Rogers, *The Continuing Conflict Between Congress and the Supreme Court Over the Standard of Care in Longshore Third Party Cases*, 22 S. Tex. L.J. 423, 432 & n.59 (1982). And to obtain this goal, Congress reasoned that primary responsibility for the protection of longshore workers should fall squarely on the shoulders of their employers:

> It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.

S. Rep. 1125 at 2. This required courts to interpret the § 905(b) negligence remedy narrowly so as to maximize the "incentives for longshore employers to avoid exposing longshore workers to unreasonable risks of injury." *Davis*, 16 F.3d at 548 (citing H.R. Rep. No. 1441 at 1; S. Rep. 1125 at 2).

Congress understood that a broad construction of the negligence standard would frustrate its goal because the longshore employer could recover the full amount of the statutory benefits owed to the worker pursuant to 33 U.S.C. § 933—which allows the longshore employer full subrogation rights of its employee's compensation award whenever a vessel is held liable for the injuries suffered by a longshoreman. In short, if a longshore worker could recover damages from a third-party vessel based on a broad negligence theory, the employer "would lack sufficient financial incentives to ensure a safe workplace." *Davis*, 16 F.3d at 548.

C. *Scindia Steam Navigation* v. *de los Santos* and the "*Scindia Duties*"

Subsequent to Congress's enactment of the 1972 Amendments, courts struggled to develop consistent standards for deciding negligence claims brought against vessel owners under § 905(b). While some courts heeded Congress's instruction and formulated stringent negligence standards designed to properly allocate principal liability to long shore employers—ultimately encouraging an increase in worker safety—others developed expansive tests to interject general maritime negligence standards that allowed injured longshore workers to escape the LHWCA's compensation scheme—the result of which was an increase in costs to the shipping industry and a reduction in worker safety. *Compare Gay v. Ocean*

Transport & Trading, Ltd., 546 F.2d 1233, 1237–38 (5th Cir. 1977), *with Bachtel v. Mammoth Bulk Carriers*, 605 F.2d 438, 445–47 (9th Cir. 1979).

To resolve the conflict amongst the courts of appeal, the Supreme Court granted certiorari in *Scindia Steam Navigation Co. v. de los Santos*, 451 U.S. at 156. Pressing an argument similar to Minton's, the plaintiff in *Scindia* argued that a shipowner, even after turning the vessel over to the longshore employer in a safe condition, has a continuing duty to use reasonable care to discover dangerous conditions during the entire course of the shipyard operation and to exercise reasonable care to protect longshore workers from these conditions. *Id.* at 163. Rejecting plaintiff's argument, the Court noted that through the Amendments Congress intended responsibility for the safety of longshore workers to fall primarily with their employers and thus a "shipowner may rely on the longshore employer to avoid exposing the longshoreman to unreasonable hazards." *Id.* at 170. The Court further explained:

> The shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the [longshore employer]. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The

> shipowner, within limits, is entitled to rely on the [longshore employer], and owes no duty to the longshoremen to inspect or supervise the cargo operations.

Id. at 172.

Still, a vessel may be liable, according to the *Scindia* Court, "if it actively involves itself in the cargo operations and negligently injures a longshoreman, or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation." *Id.* at 167. Additionally, where a vessel owner has actual knowledge that a danger exists and actual knowledge that he cannot reasonably rely on the longshore employer to avoid or correct the dangerous condition, he owes a duty to "take steps, reasonable in the circumstances, to eliminate or neutralize the hazard." *Id.* at 175–76.

Summarizing succinctly the judgment of the Court, Justice Powell in concurrence wrote:

> Under the Court's opinion, the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the [longshore employer] . . . . In addition, the opinion makes clear that the shipowner has only a limited duty with respect to obvious hazards of which it is aware. Although the shipowner cannot rely in all cases on the judgment and primary responsibility of the [longshore employer] concerning what conditions allow safe work to continue, safety is a matter of

> judgment committed to the [longshore employer] in the first instance.

Id. at 180 (quotation marks and internal citations omitted).

Accordingly, under the LHWCA, as explained by *Scindia* and its progeny, a vessel owner owes three strictly defined duties to longshore workers under § 905(b)—otherwise known as the "*Scindia* duties." First, a vessel owner owes a general duty to turn over the vessel to the longshore employer in a reasonably safe condition and warn the employer and its workers of any hazards or hidden defects that would not be known or obvious to the employer after vessel turnover—the so called "turnover duty." *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110, 115 (5th Cir. 1981). After fulfilling this duty, the vessel owner is entitled to rely on the employer to protect its employees from inherent dangers that may occur during the course of the work aboard the ship. *Kirsch v. Plovidba*, 971 F.2d 1026, 1030 (3d Cir. 1992) ("[A] shipowner can, ordinarily, reasonably rely on the [longshore employer] (and its longshore employees) to notice obvious hazards and to take steps consistent with its expertise to avoid those hazards where practical to do so.")

Second, the shipowner owes a narrow duty to protect longshore workers from danger it creates after actively assuming control over the longshoreman's work or the equipment that causes his injury—the "active

control" or "active operations duty." *See Turner v. Costa Line Cargo Services, Inc.*, 744 F.2d 505, 508 (5th Cir. 1984). Active control requires just that, active control. The mere presence of a vessel's employees does not establish active control, nor does the daily presence of a vessel's crew to monitor a longshore employer's progress. *See Fontenot v. United States*, 89 F.3d 205, 208 (5th Cir. 1996) (finding active control did not arise where vessel owner's employees did not directly "supervise employees, direct the work, determine where equipment was to be stored, or tell workers how they were to get to and from their work stations.").

Finally, once the shipyard begins its work, the vessel owner has a narrow duty of care to protect longshore workers from open and obvious dangers only if the vessel owner has actual knowledge of the danger and actual knowledge that he cannot reasonably rely on the longshore employer or longshoreman to correct or avoid the danger—the "duty to intervene." *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1036 (5th Cir. 1983). And, as made clear by *Scindia*, absent some contractual agreement, law, or custom, the vessel owner has no general duty to supervise or inspect shipyard operations once they begin. 451 U.S. at 172; *see Singleton v. Guangzhou Ocean Shipping Co.*, 79 F.3d 26, 28 (5th Cir. 1996).

At its core, the narrow negligence standard articulated in *Scindia* serves to effectuate Congress's intent of establishing a stable and predictable worker's compensation regime while providing sufficient incentives to employers to protect their workers. Indeed, while the narrow *Scindia* duties circumscribe the ability of injured longshore workers to seek large jury verdicts against vessel owners, the benefits of the holding redound to workers through their employer's choices to provide safer working conditions and avoid higher worker's compensation premiums. Echoing this sentiment, Justice Powell in his *Scindia* concurrence noted the harm that imposing a broader standard of care on a shipowner would cause:

> The difficulty with a more general reasonableness standard . . . is that it fails to deal with the problems of allocating responsibility between the [longshore employer] and the shipowner. [W]hen, in a suit by a longshoreman, a jury is presented with the single question of whether it was "reasonable" for the shipowner to fail to take action concerning a particular obvious hazard, the jury will be quite likely to find liability . . . . This would decrease significantly the incentives toward safety of the party in the best position to prevent injuries [the longshoreman's employer], and undercut the primary responsibility of that party for ensuring safety.

Id. Thus, "in cases involving obvious and avoidable hazards. . . the shipowner's liability is limited to the unusual case in which it should be

anticipated that the [longshore employer] will fail to act reasonably." *Id.* at 181 n.2.

D. Minton Cannot Establish that Exxon Breached Any of the *Scindia* Duties

1. Minton abandoned any claim that Exxon breached its turnover duty

Exxon owed a duty to the Shipyard and Minton to "exercise ordinary care under the circumstances" to turn over the ship and its equipment and appliances "in such condition that an expert and experienced [longshore] contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care" to carry on maintenance operations "with reasonable safety to persons and property." *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 98-99 (1994); *see also Scindia Steam*, 451 U.S. at 167. As a corollary to its turnover duty, Exxon was obligated to warn the Shipyard and Minton "'of any hazards on the ship or with respect to its equipment," so long as the hazards were "known to the vessel or should be known to it in the exercise of reasonable care." *Howlett*, 512 U.S. at 98 (quotation marks omitted). Minton conceded prior to trial that Exxon did not breach its turnover duty by abandoning that claim. (Pl.'s Notice of Withdrawal of "Turnover" Duty Claim (filed Jan. 20, 2011)).

Minton thus admitted that Exxon turned over its vessels to the Shipyard in a reasonably safe condition and did not fail to warn the Shipyard or its workers of any hidden dangers. This concession accurately reflected "that the use of asbestos on ships and its health risks was known as early as the 1930's," and shipyards were well aware during the 1960s and 70s that their workers would be exposed to asbestos while servicing vessels. *Bartholomew v. SeaRiver Maritime, Inc.*, 123 Cal. Rptr. 3d 171, 184 (Cal. App. 1st Dist. 2011). In fact, the Shipyard built many of the vessels it serviced and knew that during the course of construction it installed substantial amounts of asbestos on those vessels. (*See, e.g.*, Tr. Vol. IX, 102:10-13; Tr. Vol. VIII, 187:16-188:19.) By surrendering his claim that Exxon breached its turnover duty, Minton acknowledged that the Shipyard knew of the presence of any hazardous material, including asbestos, and Exxon could reasonably expect the Shipyard to take measures to adequately protect its workers.

2. Minton failed to prove that Exxon assumed or breached the active control duty

After the Shipyard began maintenance and repair operations, Exxon could become liable for harm caused to Minton if it "substantially controlled or [had] been in charge of (i) the area in which the hazard existed, (ii) the instrumentality which caused the injury, or (iii) the specific activities the

[Shipyard] undertook." *Davis*, 16 F.3d at 540 (citations omitted); *see also Lampkin v. Liberia Athene Transport Co.*, 823 F.2d 1497 (11th Cir. 1987). The record evidence does not support the claim that Exxon assumed and breached the active control duty.

Minton's evidence showed merely that (1) Exxon had a policy "to supervise outside contractors and shipyard workers," (Pl.'s Ex. 25), (2) Exxon's onboard employees ordered various items of repair work from the Shipyard, provided specifications for completing the work, monitored the work's progress, and approved the work upon completion, (Tr. Vol. XII, at 168:25-171:12:175:17-22; 176:13-179:5), and (3) Exxon's employees worked with asbestos in Minton's vicinity. The law is pellucidly clear that none of these actions alone or combined constitutes "active control" under *Scindia*.

First, that Exxon retained "ultimate authority to make decisions" regarding repair operations onboard its ship does not support the conclusion that it assumed the duty of active control. *See Fontenot v. McCall's Boat Rentals, Inc.*, 227 F. App'x 397, 403 (5th Cir. 2007) ("Although . . . the captain of the vessel retains the ultimate authority to make decisions about the operation of the vessel and the safety of those

aboard, this overarching authority is not the equivalent of 'active control' for purposes of the owner's duties under *Scindia*.").

Second, the evidence that Exxon's employees ordered work, monitored its progress, and approved its results, proves nothing more than that Exxon wished to ensure the work it ordered was done correctly. *See Futo v. Lykes Bros. Steamship Co.*, 742 F.2d 209, 210 (5th Cir. 1984) (finding vessel owner did not trigger active control duty by having its employees board the vessel daily "to ensure the security of the ship and to check on the progress of the contractor's work"); *Green v. United States*, 700 F. Supp. 2d 1280, 1303 (M.D. Fla. 2010) (finding the "presence aboard the vessel, or periodic progress checks by government representatives, are insufficient to trigger the active operations duty"); *Beckwith v. Sanko Kisen K.K.*, 654 F. Supp. 1217, 1220-21 (D.S.C. 1987) (finding active control must be "over the actual methods of the work used by the independent contractor and the operative detail.").

Third, any concrete evidence that Exxon's employees worked with asbestos in Minton's vicinity, which there was none, fails to support Minton's claim. Even assuming Exxon employees did somehow assume active control by working with asbestos in Minton's vicinity, the record is simply devoid of any evidence that Exxon failed to exercise reasonable

care under the circumstances in handling asbestos and this failure was the proximate cause of his injury. *See Scindia*, 451 U.S. at 167.

3. **Minton failed to establish Exxon assumed and breached the duty to intervene**

Exxon had a duty to intervene to protect Minton only if it "became aware that the ship or its gear pose[d] a danger to [Minton] and that the [Shipyard] was failing, unreasonably, to protect [Minton and other longshore workers] . . . ." *Lampkin*, 823 F.2d at 1501; *see also Roach v. M/V Aqua Grace*, 857 F.2d 1575, 1581 (11th Cir. Fla. 1988) ("The shipowner must intervene only when it becomes aware that the ship, its equipment or gear poses a danger . . . and is also aware that the [employer] is acting unreasonably to protect the [longshore workers]."). Put simply, this "narrow" duty requires a showing that the condition "is so hazardous that anyone can tell that its continued use creates an unreasonable risk of harm—even when the longshore employer's expertise is taken into account." *Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1249 (5th Cir. 1997) (citations omitted); *see also Casaceli v. Martech Int'l, Inc.*, 774 F.2d 1322, 1328 (5th Cir. 1985) ("*Scindia* . . . requires the existence of two basic conditions for the imposition of the shipowner's duty to intervene—the shipowner's actual knowledge of a danger to a [longshoreman], and the shipowner's knowledge that the [longshoreman]'s

employer is not acting reasonably to protect its employees from that danger.").

Minton adduced no evidence that any identifiable Exxon employee actually knew he was working under conditions so obviously hazardous that "anyone" would recognize the danger. In fact, Minton admitted that Exxon employees aboard the vessel were working in the same hazardous conditions—necessarily undermining his claim that Exxon employees had actual knowledge of an "obviously" improvident danger. (*See* Tr. Vol. IX, 117:9–118:9.) Over Exxon's objection, Minton instead offered evidence that industrial hygienists and medical directors employed by Exxon were aware of the potential hazards and recommended safeguards for handling asbestos in the workplace. (Tr. Vol. XII, 156:15-157:13.) Yet, Minton offered no evidence that these employees had knowledge of Minton's activities on Exxon's vessels or the Shipyard's policies or procedures regarding asbestos. Indeed, because Exxon satisfied its turnover duty, Exxon and its industrial hygienists were legally entitled to assume the Shipyard (which had safety procedures in place since 1965) did take the necessary steps to protect its employees from all known dangers.

E. The Judgment Undermines and Frustrates the Incentive Scheme Enacted Through the LHWCA to the Detriment of Workers

As demonstrated, Minton cannot, as a matter of law, establish that Exxon was liable for negligence under § 905(b), as defined by *Scindia* and its progeny. Minton instead seeks to reconceptualize the scope of the *Scindia* duties by relying on paper thin evidence of active control and the erroneous claim that Exxon employees present at the Shipyard had a duty to intervene to protect Minton because several Exxon industrial hygienists, who were far removed geographically from the Shipyard, were aware of the hazards posed by asbestos. Minton's theory essentially merges the *Scindia* duties into a single general duty to use reasonable care to inspect and discover dangerous conditions that arise during the course of the repair and maintenance operation—a theory quite similar to the argument rejected by the Supreme Court in *Scindia*. If accepted, such a legal theory would undermine the incentive scheme created through the LHWCA and the 1972 Amendments to the detriment of workers.

As the legislative history makes clear, through the LHWCA Congress sought to establish a predictable worker's compensation regime that would provide the proper incentives to the party best able to protect workers: long shore employers. Minton's employer, who knew of the risks posed by

asbestos exposure, was the party in the best position to protect Minton from those dangers. And, as explained in *Scindia*, Exxon could rely on the Shipyard to provide Minton reasonable protection under the circumstances, and Exxon's duty to intervene arose only when it had *actual* knowledge that the Shipyard failed to provide sufficient protection. This arrangement properly apportions liability relative to the shipowner and longshore employer's ability to protect workers against the dangerous conditions that arise during the course of their work.

The theory upon which the judgment is based upsets this balance by eliminating the incentive structure Congress aimed towards employers. Minton's broad negligence standard places shipowners in the cross-hairs of injured longshoremen based on the hope of large jury verdicts, while employers are able to get off scot-free after taking advantage of their subrogation rights as provided under 33 U.S.C. § 933. And as Justice Powell recognized in his *Scindia* concurrence, such an arrangement "would decrease significantly the incentives toward safety of the party in the best position to prevent injuries [the longshoreman's employer], and undercut the primary responsibility of that party for ensuring safety." 451 U.S. at 181.

In sum, the record fails to establish that Exxon violated any of the duties created by *Scindia*. Exxon turned over the vessel to the Shipyard in a reasonably safe condition, did not assume active control over the repair work generally or Minton's work specifically, and did not assume any duty to intervene. The judgment of the trial court should accordingly be reversed and judgment should be entered in favor of Exxon. Left to stand, the judgment entered in this case will serve to undermine and upset the balance struck by the LHWCA and the 1972 Amendments.

II. THE JUDGMENT IS CONTRARY TO THE CONSTITUTIONALLY BASED POLICY OF UNIFORMITY IN MARITIME LAW

Through the Admiralty and Foreign Commerce Clauses of the United States Constitution flows "the principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *See Moragne v. States Marine Lines*, 398 U.S. 375, 401–02 (1970) (quoting *Lottawanna*, 88 U.S. 558, 575 (1875)); *see also* U.S. Const. art. I, § 8, cl. 3 and art. III, § 2, cl. 1. This case threatens that constitutionally based principle because, to the knowledge of Exxon and *amici*, it is the first case in the nation where a shipowner has been held liable under § 905(b) for asbestos injuries caused to a longshore worker.

To be sure, this is certainly not the first § 905(b) suit brought by a longshore worker against a vessel owner for injuries caused by exposure to

asbestos. There are three reported appellate decisions deciding such claims—and all three ruled that the longshore worker could not recover against the vessel owner. The first case was *Catorina v. Lykes Brothers Steamship*, 758 F.2d 1025 (5th Cir. 1985) (Wisdom, J.). In *Castorina*, the longshoreman plaintiff was exposed to large amounts of asbestos dust while off-loading burlap bags containing raw asbestos from ships owned by the defendant. *Id.* at 1027. After developing asbestosis, the plaintiff brought suit against the vessel owner on a number of theories, including that the vessel owner "knew or should have known of the danger to longshoremen presented by the asbestos dust and that [the shipowner] negligently failed to protect him from the hazards." *Id.* at 1028. The court rejected this argument, finding, *inter alia*, that the dusty work environment caused by the asbestos was an open and obvious hazard and the vessel owner could, as a matter of law, rely on the longshore employer to conduct its operations safely under the circumstances. Without actual knowledge that the employer was unreasonably exposing its workers to the hazard, the shipowner could not be held liable. *Id.* at 1036.

Twenty-two years later, in *Buck v. ACandS, Inc.*, 154 P.3d 750 (Ore. App. 2007), four longshore workers attempted to recover against a vessel owner for asbestos-related injuries they suffered while performing repair

and maintenance services on the defendants' vessels. The *Buck* plaintiffs argued the defendants breached the general turnover duty of care by turning over the vessel in a condition that left repair workers exposed to airborne asbestos and failing to warn the shipyard workers of the presence of asbestos-containing parts that would emit asbestos fibers into the air when disturbed during the repair process. *Id.* at 756. The court rejected these claims because asbestos was widely used in the shipping industry and it was widely known in the industry that disturbance of asbestos in the repair process would "cause the release of airborne fibers, and that exposure to asbestos is harmful." *Id.* at 758 n.6. As such, the necessary legal conclusion was that "airborne asbestos is a type of danger that an expert and experienced [shipyard employer] would reasonably expect to encounter, arising from the hazards of the ship's service or otherwise." *Id.*

Just two years later, in *Bartholomew v. Seariver Maritime, Inc.*,123 Cal. Rptr. 3d at 171, the California Court of Appeals rejected arguments substantially similar to those previously rejected in *Catorina* and *Buck*. Essentially, the *Bartholomew* Court found as a matter of law that airborne asbestos was a danger that an "expert and experienced ship repair contractor would have reasonably expected to encounter" while working aboard a vessel. *See id.* at 180. Notably, the court reiterated that the

vessel owner could rely on the presumption that a shipyard would have knowledge of the dangers posed by asbestos. And to conclude otherwise would impermissibly frustrate the goal of the LHWCA to "shift the responsibility for compensating injured [shipyard workers] from the vessel owner to the employer, who is 'in a far better position' to avoid the injuries that a [worker] might suffer in the course of providing his services." *Id.* at 182 (quoting *Scindia*, 451 U.S at 171). The Court also pointed out that "as early as the 1930's it was known that the breathing of asbestos dust in the workplace was harmful and dangerous to worker health," and the Secretary of Labor had published specific and detailed "Safety and Health Regulations for Longshoring" governing respiratory protections that are applicable to employers. *Id.* (citing 29 C.F.R. § 1910.134 (1971)). Further, "since 1971 shipyard employers have been required by OSHA to know about the potential hazards of asbestos and to protect their workers accordingly." *Id.* (citing 36 Fed. Reg. 10466 (May 29, 1971)).

These cases make clear that the presence of asbestos on vessels was a known danger as early as the 1930s and a vessel owner could presume that a shipyard employer was taking necessary precautions to protect its workers, especially in light of federal regulations made applicable to employers. The judgment in this case stands contrary to these holdings

and, if left in place, pushes Virginia outside the mainstream, upsetting the constitutional mandate for uniformity in maritime law.

III. THE TRIAL COURT ERRED IN EXCLUDING EXXON'S EVIDENCE THAT THE SHIPYARD KNEW OF THE HAZARDS ASSOCIATED WITH ASBESTOS AND HAD ASBESTOS CONTROLS IN PLACE

On Minton's motions *in limine*, the trial court precluded Exxon from offering evidence related to the shipyard's knowledge of asbestos-related hazards in the workplace, including vessels, and its written asbestos control policies. This error requires a new trial.

The four key premises of Minton's case were that: (1) asbestos was a hidden danger found aboard Exxon's vessels; (2) Exxon, and Exxon alone, knew of this danger; (3) Exxon failed to warn Minton of this danger; and (4) Exxon knew that the Shipyard did not have proper asbestos controls in place. In his opening statement and summation, Minton's counsel asserted that Exxon failed to warn Minton of the hidden danger. And in his summation, Minton's counsel asserted inaccurately that no one "working at the shipyard" during the relevant time had any clue about the risks posed by asbestos. (Tr. Vol. XII, 153:14-154; 182:23-184:9.) Minton himself testified incorrectly that the Shipyard "didn't have any [asbestos] controls" in place. (Tr. Vol. IX, 22:15.) Thus, Minton created the false impression that the Shipyard was entirely ignorant of the hazards of

asbestos and that only Exxon had the knowledge and ability to protect him.

Had the trial court allowed Exxon's evidence, it would have demonstrated clearly that the Shipyard was fully aware of the asbestos risks to its employees working on vessels and that, even before Minton began supervising ship repairs, the shipyard had in place written policies and procedures to address asbestos in the workplace. This evidence was clearly relevant to defend Minton's claims that Exxon violated the *Scindia* active control and intervention duties.

As explained more fully above, to trigger the active control duty, the vessel must have substantially controlled or been in charge of (i) the area in which the hazard existed; (ii) the instrumentality which caused the injury; or (iii) the specific activities the longshore employer undertook. *Davis*, 16 F.3d at 540. Once this duty is triggered, a plaintiff must establish four elements to present a *prima facie* case for breach of the active control duty:

(1) the vessel appreciated, should have appreciated, or with the exercise of reasonable care would have appreciated the condition;

(2) the vessel knew, or should have known, that the condition posed an unreasonable risk of harm to a longshore worker;

(3) *that a longshore worker foreseeably might fail to (i) discover the condition or apprehend the gravity and probability of harm or (ii) protect himself or herself against the danger*; and

(4) the vessel failed to take reasonable precautionary or remedial steps to prevent or eliminate the dangerous condition.

Id. at 541 (emphasis added).

To prove a case for breach of the active control duty, Minton was required to present evidence that it was foreseeable that he might fail to discover a dangerous condition posed by asbestos or protect himself from that condition. Here, Minton was a supervisor for one of the largest shipyards in the country. His knowledge and conduct and the knowledge and conduct of his employer was directly relevant to whether Exxon might reasonably expect Minton to know and appreciate the dangers associated with shipyard work, including the hazards of asbestos.

The Shipyard's knowledge was also relevant to the "duty to intervene." Under this duty, Exxon would be required to intervene to protect Minton from harm only if it actually knew that the Shipyard was failing to protect its workers from an obvious risk of asbestos injury. Evidence of what the Shipyard knew regarding the risks of exposure and the procedures it had in place to protect its employees were directly relevant to the issue of whether Exxon was justified in relying on the shipyard to fulfill its primary duty to protect its employees. In the absence of this evidence, jurors could only conclude that the Shipyard was ignorant of the conditions of vessels, had no protocols to protect its workers from

asbestos, and that it was therefore incumbent upon Exxon to protect the interests of Minton.

The prejudice to Exxon from the exclusion of shipyard knowledge was further compounded when the Court permitted Minton to argue that all of Exxon's corporate knowledge relating to asbestos was imputed to John Ireland, Exxon's port engineer at the shipyard. The court permitted the imputation of the entire scope of Exxon's corporate knowledge to Mr. Ireland regardless of where, when, or by whom that knowledge was originally acquired. Conversely, the trial court prohibited Exxon from imputing the shipyard's knowledge of asbestos hazards to Minton. In fact, the court prohibited Exxon from offering any evidence of the shipyard's extensive knowledge about the hazards of asbestos, which prevented Exxon from arguing that Minton—a senior supervisor at the shipyard—had that same knowledge.

At trial, Minton claimed that he never received any information or heard anything about the hazards of asbestos until 1977. However, the evidence proffered by Exxon would have established that the shipyard had knowledge of asbestos hazards and had taken steps to protect its workers from these hazards as early as 1965. Exxon also would have offered evidence regarding the shipyard's implementation of OSHA rules and

regulations issued in 1972,[4] and the information that would have been available to Minton at that time—five years before he claimed to have discovered the hazards of asbestos. As a result, Minton was able to argue that he knew nothing about the danger of asbestos, and the jury never had the opportunity to consider evidence that the shipyard—where Minton worked as a foreman and supervisor since 1960 and who had the primary duty to protect Minton in the course of his duties—knew about those same hazards.

Evidence of Minton's employer's knowledge of and experience with asbestos—and by extension his own knowledge—was required for the jury to understand the relative responsibilities of Minton's employer and Exxon in dealing with this risk. The prejudice to Exxon in not being able to introduce this evidence and argue its importance to the jury is obvious.

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[4] The Occupational Safety & Health Administration ("OSHA") began regulating asbestos in 1971 when, under authority of § 6(a) of the Occupational Safety and Health Act (the "Act"), it adopted the existing Federal standard for asbestos. *See* 36 Fed. Reg. 10466 (May 29, 1971). Following issuance of an emergency temporary standard (ETS) for exposure to "asbestos dust" in 1971, *see* 36 FR 23207 (December 7,1971), OSHA conducted rulemaking and issued a permanent standard under § 6(b) of the Act, which regulated occupational exposure to asbestos. 29 C.F.R. 1910.93a (later renumbered as Section 1910.1001); (37 Fed. Reg. 11318 (June 7, 1972)). These regulations applied to all employers, including the Shipyard.

IV. CONCLUSION

The judgment in this case is based on fundamental errors of law. First, the trial court permitted Minton to recover based on the narrow *Scindia* active control and intervention duties despite his pre-trial concession that when Exxon turned over the vessel to the Shipyard the Shipyard was aware of the asbestos hazards on the vessels and was competent to perform safely the work it was hired to perform. Allowing Minton to recover under this internally inconsistent and counterfactual theory expands the duties owed by vessel owners to longshore workers and frustrates the essential purpose of the LHWCA, as interpreted by *Scindia*.

Second, the judgment creates an inconsistency in the law of admiralty by allowing a longshore worker to recover against a vessel owner for injuries caused by asbestos. As *Castorina*, *Buck*, and *Bartholomew* make clear, the dangers of asbestos were well known to longshore employers and workers and vessel owners could reasonably presume that longshore employers would take reasonable precautions to protect their workers.

Third, the trial court allowed Minton to create the false impression in the minds of the jury that the Shipyard and Minton "had no clue" that

asbestos posed a danger to longshore workers and only Exxon, armed with its unique knowledge of the dangers of asbestos, could protect him. This was accomplished when the trial court excluded Exxon's evidence that the Shipyard was actually aware of the hazards of asbestos and as early as 1965 had policies and procedures in place to guard against the danger.

If the judgment is allowed to stand, longshore worker asbestos claimants will undoubtedly proceed with vigor against vessel owners in Virginia courts. Such a trend would portend economic hardship not only to *amici* and their members, but to Virginia's economy and the national maritime industry. For all of the above reasons, and those expressed in Exxon's Petition for Appeal, *amici curiae* respectfully request this Honorable Court to grant the petition and reverse the judgment of the trial court.

THE CHAMBER OF SHIPPING OF AMERICA, THE AMERICAN WATERWAYS OPERATORS, AND THE AMERICAN PETROLEUM INSTITUTE

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CERTIFICATE

Pursuant to Rule 5:18 of the *Rules of the Supreme Court of Virginia*, I hereby certify that on the 17th day of April, 2012, fifteen copies of the foregoing *Brief Amici Curiae in Support of Appellant* were hand-delivered to the Clerk of the Supreme Court of Virginia, and three copies were served by first class, postage prepaid, mail upon the following:

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There also were electronic copies sent by email in PDF format to the Clerk and each of opposing counsel on the same day.

Rule 5:30 Written Consent of the Parties

Exxon Mobil Corporation v. Rubert Minton, et ux.,
Supreme Court of Virginia
Record No. 111775

Under Rule 5:30 of the Rules of the Supreme Court of Virginia, the parties, by counsel, consent to the filing of any briefs amici curiae in this case.

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