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INTRODUCTION: IDENTITY OF *AMICUS CURIAE*, INTEREST IN THE CASE, AND SUMMARY OF ARGUMENT

Amicus curiae, American Pilots' Association ("APA"), is the national trade association of professional maritime pilots. A non-profit organization, its membership is made up of approximately 60 groups of state-licensed pilots, including the Pascagoula Bar Pilots Association, as well as the three groups of United States-registered pilots operating in the Great Lakes. Pilots in APA-member groups pilot over 99 percent of all ocean-going foreign trade vessels moving in United States waters.

APA has a significant interest in, and serious concerns with, appellants' appeal of the Order by the United States District Court for the Southern District of Mississippi Southern Division granting Summary Judgment in favor of appellee Pascagoula Bar Pilots Association. Specifically, APA is concerned with attempts by appellants to argue in their appeal – with no basis in fact or law – for disregarding Guy v. Donald, 203 U.S. 399 (1906) and its accompanying one-hundred years of uninterrupted supporting jurisprudence, which stands for the unambiguous maritime law doctrine that neither a pilot association nor its members are liable for the negligence of another member pilot.

This *amicus* brief begins with a review of the Guy decision and the rationale used by the Supreme Court in finding that the Virginia Pilot Association could not be held liable for the alleged negligence of one its members in the performance of

pilotage duties. The brief then shows that the rule established in Guy has been consistently applied from 1906 to today and has been broadly interpreted to extend to all types and forms of pilot associations, regardless of their business structure or administrative operations. In the process, the Guy rule has become a well-settled principle of U.S. maritime law conferring upon pilot associations complete immunity from vicarious liability based on the unique circumstances of ship piloting.

The brief continues by discussing the historical context in which Guy was decided and the critical role that its rule shielding pilot associations from vicarious liability has played in the development and maintenance of the modern pilotage system in the United States. As described in the brief, the basic structure of that system can be traced to the emergence of pilot associations in the second half of the 19th century. Had the Supreme Court in Guy not established the rule of pilot association immunity from vicarious liability at that time, it is unlikely that the growing practice of pilots joining together into associations would have continued. In short, that rule was critical to the viability of pilot associations then and has remained so today.

The precedent appellants seek to disregard through their appeal of the Summary Judgment for the Pascagoula Bar Pilots Association has been firmly and securely fixed in U.S. maritime law for over a century, is crucial to the continued

effectiveness and survival of local pilot associations, and is one of the foundational pillars upon which the state compulsory pilotage system in the United States rests. For these reasons, as explained in the following, APA respectfully urges the Court to AFFIRM the Order by the United States District Court for the Southern District of Mississippi Southern Division granting Summary Judgment in favor of appellee Pascagoula Bar Pilots Association.

ARGUMENT

I. THE GUY V. DONALD RULE OF PILOT ASSOCIATION IMMUNITY FROM VICARIOUS LIABILITY IS FIRMLY ESTABLISHED IN U.S. MARITIME LAW AND CONSISTENTLY AND BROADLY APPLIED.

Guy v. Donald is perhaps the most well-known Supreme Court decision in pilotage law and certainly the one most important to pilotage operations today. As discussed, *infra*, the rule of pilot association immunity from vicarious liability established by the Court in Guy has played a pivotal role in the development of the modern pilotage system in the United States. It continues today to be a central feature of pilotage in this country. In the 103 years since the decision, the Guy rule has been repeatedly upheld and broadly applied. Indeed, there is no more settled and accepted principle in all of pilotage law.

A. IN GUY, THE U.S. SUPREME COURT HELD THAT NEITHER A PILOT ASSOCIATION NOR ITS MEMBERS ARE LIABLE FOR THE NEGLIGENCE OF ONE OF ITS MEMBER PILOTS.

Guy involved a ship piloted by a Virginia pilot that collided with another vessel. After paying damages to the other ship, the owner of the piloted ship sought to hold the Virginia Pilot Association and its members liable for his payment of damages. The questions certified to the Supreme Court were: "(1) whether the members of the association are partners on the facts set forth; (2) whether, if partners, they are liable to owners of piloted vessels for the negligence

of each other, and (3) whether, if not technically partners, they nevertheless are so liable." With respect to the first question, the Court, in the opinion written by Justice Holmes, declined to use the existence or non-existence of a partnership as a determining factor in deciding the liability question. It suggested that debating the matter in such "artificial terms" could lead to a wrong result. *Id.* at 406. Instead, the Court used as its test the general agency principle that one person cannot be made to answer for the torts of another if "he could not *select*, could not *control*, and could not *discharge* the guilty man." *Id.* (emphasis added).

Applying that test and examining the Virginia pilotage statute as well as the operations of the association, the Court found: "So far as appears, the Virginia Pilot Association had no one of the three powers which we have mentioned." *Id*. at 407. Focusing on the association's lack of control in particular, the Court explained:

> [I]t is quite plain that the Virginia code contemplates a bond of mutual personal liability between the master of a vessel and the pilot on board. If we imagine such a pilot performing his duties within sight of the assembled association, he still would be sole master of his course. If all of his fellows passed a vote on the spot that he should change and shouted it through a speaking tube, he would owe no duty to obey, but would be as free as before to do what he thought best.

Id. The Court concluded that the Virginia Pilot Association could not be held liable for the pilot's alleged negligence.

The Guy v. Donald decision created what is now recognized in the maritime law of the United States as an unambiguous rule of pilot association immunity from vicarious liability for negligence in the performance of piloting services by one its member pilots. As a U.S. district court has stated, the Supreme Court's holding in Guy over one hundred years ago that "pilots' associations are not liable for the torts of their member pilots is a well-settled rule of maritime law." Coffiey v. M/V Hellespont Mariner, 1988 A.M.C 1555, 1556 (D.Md Nov 13, 1987). Since Guy, there has been "an unbroken line of authorities" that supports the maritime law principle that "a pilots' association and its other members are not responsible for any faults by a member rendering pilotage service." Liv General v. Pilots' Association for Bay & River Delaware, 254 F. Supp. 447, 450 (D. Del. 1966). The holding in Guy is strong precedent that has been strictly adhered to by all federal courts before which questions of pilot association liability have been raised.[1]

B. SINCE GUY WAS DECIDED, FEDERAL COURTS HAVE APPLIED AN EXPANSIVE VIEW OF THE DOCTRINE OF PILOT ASSOCIATION IMMUNITY BY FOCUSING ON THE INDEPENDENT NATURE OF PILOTING WORK AND THE INABILITY OF

[1] See, *e.g.*, Manchioneal, 243 *F.* 801 (2d Cir. 1917); Liv General v. The Pilots' Association for the Bay & River Delaware, 254 F.Supp. 447 (D.Del. 1966); Coffiey v. M/V Hellespont Mariner, 187 WL 48211 (D. Md) 1988 A.M.C. 1555, United Fruit Co. v. Mobile towing & Wrecking Co., 177 F. Supp. 297 (S.D. Ala. 1959); Dampskibsselskabet Atalanta A/S v. U.S., 31 F.2d 961 (5th Cir. 1929); McGrath v. Columbia River Bar Pilots Association, 83 F. 2d. 746 (9th Cir. 1936). *See also*, City of Dundee, 108 F. 679 (3d Cir. 1901), which was cited with approval by the Supreme Court in Guy for its holding that because a pilot is not the agent of his pilot association, the association could not be held liable for any alleged negligence of the pilot.

ASSOCIATIONS TO CONTROL HOW PILOTING IS PERFORMED BY AN INDIVIDUAL PILOT.

Although the Supreme Court in Guy cited three powers that must be present under general agency law principles in order to impose vicarious liability on a person or entity, viz., the powers to select, discharge, and control, the Court clearly emphasized the inability of a pilot association and its members to control the pilot on a ship in the performance of his or her duties. In fact, although that was the last of these powers described, the Court elected to consider it first. Guy 203 U.S. at 406. In doing so, the Court noted the working relationship between the master and the pilot on the ship ("a bond of mutual personal liability") and dramatically described the complete inability of pilot associations and their members to direct how the pilot on the ship performs his professional services. This emphasis on the control prong of the three-pronged test has not gone unnoticed by the courts that have applied Guy since then.

Post-Guy litigants seeking to hold pilot associations liable for the alleged negligence of an individual pilot have sought to avoid application of the Guy rule by suggesting characteristics that the pilot association involved in their particular cases might share with a partnership (or other business structures such as a corporation) or describing the association's role in choosing or training member

pilots. Such efforts have been unavailing. While federal courts have unanimously[2] applied the clear holding of Guy, these courts have also taken a broad view of the holding by focusing – in some cases, exclusively – on the personal, independent nature of a pilot's work and the resultant fact that an association does not direct or control the manner in which a pilot carries out the actual duties of piloting a vessel. Taking note of the image painted by the Supreme Court of the futility of assembled pilot association members shouting through a "speaking trumpet," courts since 1906 have recognized and emphasized the plain fact that when a ship takes a compulsory pilot, it is taking "a man, not an association." The Manchioneal, 243 F. 801, 807 (2d Cir. 1917).

For example, in Dampskibsselskabet Atalanta A/S v. U.S., 31 F.2d 961 (5th Cir. 1929), the Fifth Circuit, when applying Guy to a case in which damages were sought against the Associated Branch Pilots of the Port of New Orleans (Branch Pilots), conceded that the Branch Pilots had characteristics that are common in normal business partnerships or agency arrangements (e.g., it owned and operated shared equipment and facilities, paid expenses out of a common pool, controlled

[2] There was one case, decided shortly after Guy, The Joseph Vaccaro, 180 F. 272 (E.D. La. 1910), that some have erroneously cited as inconsistent with the clear holding in Guy. However, the facts of this case, which involved a pilot association's suit against a member pilot, are completely different than those in Guy. The Fifth Circuit later made amply clear that this case should not be viewed as being in conflict with Guy because "the question of the responsibility of the association to a third person for the negligent act of one of its members was *not considered in that case*." Dampskibsselskabet Atalanta A/S v. U.S., 31 F.2d 961 (5th Cir. 1929). (emphasis added).

association membership, and assigned members of the association to work in regular order). Nevertheless, the court went on to state that it is "immaterial whether a pilots' association be considered a partnership or not…[*t]he fundamental principle underlying the exemption of pilots' associations from liability for negligence of their members in performing their duties as pilots is that the association exercises no control over the manner in which those duties are to be performed, and therefore a pilot cannot be said to be an agent of the association in that respect*." *Id*. at 962 (emphasis added).

In McGrath v. Nolan, 83 F.2d 746 (9th Cir. 1936), a claimant, who was injured during a marine casualty in which he alleged pilot negligence, sought to hold the Columbia River Bar Pilots Association liable. The court agreed with the claimant that the association maintained facilities for use by all member pilots, collected pilotage fees on behalf of member pilots, and "had the exclusive direction and control over which of its members should pilot any particular vessel." *Id*. at 750. However, the court held that there was no cause of action against the Columbia River Bar Pilots Association because "such direction and control do not make the pilotage contract any less a contract of the individual pilot alone…." *Id*.

In Liv General v. The Pilots' Association for the Bay & River Delaware, 254 F.Supp. 447 (D.Del. 1966), the U. S. District Court for Delaware went even further in clarifying that a court's consideration of pilot association liability is not to be

based on agency, partnership or other organizational factors, but rather on the independent nature of pilot work. The court noted that activities of the Pilots' Association for the Bay & River Delaware (e.g., coordinates requests for pilotage service, collects fees, manages employment benefits, etc.) "justify the conclusion that the Pilots' Association is the personal agent for each pilot member" and that the association "as an entity is extremely active." *Id*. at 450. Nevertheless, the court emphasized that even where an association exercises some control over its members, the decisive test is whether or not the association exercises "[t]he type of control which extends to the acts of a pilot *while on the bridge piloting a ship*." *Id*. at 454 (emphasis added). The court concluded that because the association was "powerless to control members in the performance of their profession as pilots…a pilots' association and its other members are not responsible for any faults by a member rendering pilotage service." *Id*. at 450.

In In re China Union Lines, Ltd., 342 F.Supp. 426 (E.D.La. 1971), a case seeking damages against the Crescent River Port Pilots' Association (Crescent) and Crescent member pilots arising out of a collision between a piloted vessel and a tug, the U.S. District Court for the Eastern District of Louisiana analyzed the organizational structure of Crescent. The court determined that Crescent was incorporated under Louisiana law. *Id*. at 428. It also found that under Louisiana business law, the group of pilots within Crescent was an "ordinary partnership"

and the individual pilots were "ordinary partners." *Id*. at 431. The court further observed that under Louisiana law, ordinary partnerships would be liable for the torts of their partners. *Id*. at 431. Nevertheless, the court did not apply vicarious liability. Instead, the court cited Guy, as it was interpreted by Dampskibsselskabet Atalanta, as "judicially creating a doctrine of immunity for pilot associations and individual pilots, whether or not the nature of their association be characterized a corporation or a partnership." *Id*. at 431. *See also*, King , *et al*. v. Upper Great Lakes Pilots Association, Inc., *et al*., No. 86-CV-73694-DT (E.D. Mich. 1987) (In granting the motion for dismissal by the Upper Great Lakes Pilots Association, Inc., an incorporated pool of pilots, the court made clear that under Guy a pilot association cannot be held liable for the acts of its pilots and went on to state that "Guy has been consistently followed by lower courts and is binding precedent on this court despite plaintiffs' assertion that it is 'unsound and antiquated.'")

In another case from the Eastern District of Louisiana applying this unambiguous doctrine of pilot association immunity in favor of a pilot association, the court stated that "reported decisions have uniformly held pilot associations immune from various vicarious liability for the torts of their members." McKeithen v. the S.S. Frosta, 441 F.Supp. 1213, 1218 (E.D. La. 1977). The court took note of the fact that the pilot association had a considerable role in choosing, training, and educating member pilots, but in its rationale for granting summary

judgment, the court emphasized the lack of control the pilot association can exert on its members *once they take the helm of a vessel*. *Id*. at 1220 (emphasis added).

In Re Lloyd's Leasing, Ltd., 764 F. Supp. 1114 (S.D. Tex. 1990), *aff'd* Lloyd's Leasing v. Bates, 902 F.2d 368 (5th Cir. 1990), was a case in which several claimants sought to impose liability on Lake Charles Pilots, Inc., due to an oil spill from a ship that occurred while a member pilot was at the helm of the vessel. The court focused on the unique relationship between a pilot association and its members and the lack of control associations have over a pilot while he is actually at the helm of the vessel. The court stated, "The Lake Charles Pilots, Inc., lacks the legally recognizable power to control the individual pilots in the rendition of their professional services and in this case would not be accountable for any negligence of [its member pilot]." *Id*. at 1139.

Similarly, in In re: J.W. Wescott Co., 33 F. Supp. 2d 601 (E.D MI 2003), the court granted a pilot association's Motion for Summary Judgment, by stating, "A pilots association cannot be held liable for the negligence of one of its member pilots if the association did not have control over the pilot in the discharge of his duties on board the ship….[t]o be liable the association must control the pilot's actions while discharging his professional duties *on board the vessel*." *Id*. at 605. (emphasis added).

In summary, the meaning of Guy, as it has been applied by courts over the past one hundred plus years, is clear. Irrespective of how a pilot association opts to organize itself under the business laws of its state, or if the association exercises some control in choosing, training, or assigning pilots, neither a pilot association nor its member pilots are liable for the negligence of another member pilot. This is so because of the independent nature of a pilot's work and the fact that pilot associations have no ability to control the manner in which a pilot actually carries out his or her duties while aboard a ship. As the Guy rule has been applied since 1906, it has come to be recognized as a fundamental principle of U.S. pilotage law and not as an application of general agency law to the facts of a particular pilot association in a particular time and place. It is a judicially created broad grant of immunity from vicarious liability for pilot associations and their members in consideration of the unique circumstances of the piloting profession.[3]

II. THE GUY V. DONALD RULE OF PILOT ASSOCIATION IMMUNITY FROM VICARIOUS LIABILITY IS A NECESSARY COMPONENT OF THE PILOTAGE SYSTEM IN THE UNITED STATES.

In order to appreciate fully the significance of Guy v. Donald in the U.S. pilotage system, as well as the need for its continued application in cases seeking

[3] While some may point out that traditional common law partnerships of attorneys, CPAs, and other professionals are subject to vicarious liability, the Supreme Court in Guy recognized that a different rule is appropriate for pilot associations given the way that they operate and, most importantly, the way that pilotage is performed on a ship by an individual pilot. As the Court on another occasion noted, pilotage "is a unique institution and must be judged as such." Kotch v. Board of River Pilots Commissioners, 330 U.S. 552, 557 (1947).

to impose liability on pilot associations, it is helpful to review the historical context of the decision. Although pilots have operated in this country since earliest colonial times, and state pilot regulatory systems have been around for as long as there have been states, the basic structure of today's compulsory pilotage operations in this country emerged near the end of the 19th century. Changes to pilotage that occurred during that period started a process of evolution in pilotage operations that has continued to this day and has produced substantial benefits to commerce, safety, and environmental protection in the United States. That process would have been stopped dead in its tracks if the Supreme Court had decided Guy v. Donald differently, however.

A. THE FORMATION OF PILOT ASSOCIATIONS IN THE LATE 19TH CENTURY WAS A CRITICAL DEVELOPMENT IN THE EVOLUTION OF THE MODERN U.S. PILOTAGE SYSTEM.

Today's compulsory state pilots use in-depth local knowledge, seasoned navigational and shiphandling expertise, and informed judgment independent from the economic interests of ship owners and operators to guide thousands of ocean going foreign trade ships of all sizes and types into and out of the narrow and often shoaled channels of America's ports each year. Indeed, today's state pilots provide one of the most important maritime safety services available to the shipping industry and to the public. This service is critical for safe and efficient navigation in and around U.S. ports. The U.S. Supreme Court described the pilot as follows:

> Studies of the long history of pilotage reveal that it is a unique institution and must be judged as such. In order to avoid invisible hazards, vessels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters. The pilot's job generally requires that he go outside the harbor's entrance in a small boat to meet incoming ships, board them and direct their course from open water to the port. The same service is performed for vessels leaving the port. Pilots are thus indispensable cogs in the transportation system of every maritime economy.

Kotch v. Board of River Pilots Commissioners, 330 US 552, 557-558 (1947).

Although the typical state pilot today is considered a self-employed professional, pilots in ports around the country are organized into local pilot associations. Local associations play a vital role in ensuring safe and efficient pilotage for a given port. Collectively, associations are key to the effectiveness of the state compulsory pilotage system nation-wide. Associations facilitate essential joint activities such as administering the pilot rotation and dispatch systems; conducting, evaluating and improving pilot training; identifying the best use of navigation technology (both existing and emerging); ensuring the safety and efficiency of pilot boat operations; assisting in the coordination of harbor traffic, and carrying out the myriad administrative and accounting functions and support services necessary for a modern, efficient pilotage operation.

Despite the manifest advantages of pilot associations, however, there was a time when state pilots did not work together in unified groups. Throughout much of the 1800s, pilots in the U.S. actively worked against each other, focusing on

their individual business interests rather than on the overall quality and reliability of pilotage in their port. During this time, "the piloting profession in America was a free-for-all, hit or miss affair and hundreds of pilots were independent free lancers…." Roger Clancy, Ships, Ports, and Pilots: A History of the Piloting Profession, at 57 (1984).

As the volume of maritime trade during the period grew, so too did the "demands for pilots to conduct ships in and out of ports that were new and unfamiliar to the captains and crews." *Id*. at 57. Pilots – or sometimes individuals with little training who called themselves pilots – would literally race one another far out to sea and offer approaching ships their pilotage services. This period was aptly characterized as the "mad race to the sea," and saw independent pilots working under the "grudgingly implied understanding that the first one to get to a ship and climb aboard was entitled to the job of guiding her in…." *Id*. at 57. Unfortunately for shipping and port interests, during this chaotic time, the "nautical know-how or competence of the winners of these races was not always certifiable." *Id*. at 57. It was a dangerous reality during this era that "anyone could sail out from the harbor; accost an incoming vessel and, claiming the requisite skill and knowledge, be hired to bring the vessel into port." Interport Pilots Agency, et al. v. New Jersey Board of Commissioners of Pilots, No. Mon-C-385-91 (N.J. Super. Ct. Ch. Div. April 16, 1997), at 11.

This "keen and sometimes vicious"[4] competition and frenzied quest to be the first to "speak"[5] a vessel led many pilots and those who crewed pilot boats to take unnecessary risks and fall victim to the stormy seas. In addition, this uncoordinated cut-throat competitive environment not only placed pilots and pilot boat crews in peril, it also negatively impacted both the quality and reliability of pilotage.

Because the person who managed to "speak" the vessel first generally got the pilot job, regardless of qualifications, "very often, ships and their cargoes and passengers were placed in jeopardy" and "[g]roundings, delays, ship damage, cargo losses, law suits, criminal actions, and even bad collisions and loss of life were prevalent." Clancy, *supra*, 57-58. Also, since pilots were competing for business and income, larger ships and ships carrying more valuable cargo (both of which commanded a higher pilotage fee) would naturally garner most of the attention from pilots, who were engaged in an intense battle for pilotage fees. Smaller ships or those carrying cargo of lesser value, which were still dependent on local pilot expertise to get safely into and out of port, would often be left wanting for pilotage services. According to a 1942 report by the Commandant of the U.S. Coast Guard, until about 1880, "[l]ittle effort was made to maintain pilot

[4] Interport Pilots Agency, et al. v. New Jersey Board of Commissioners of Pilots, No. Mon-C-385-91 (N.J. Super. Ct. Ch. Div. April 16, 1997), at 11.
[5] To "speak" a vessel refers to the offer by a pilot to provide his or her pilotage services. *See*, The Mascotte, 39 F. 871 (S.D. Fla. 1889).

stations, and frequently pilots could not be had when wanted."[6] The same U.S. Coast Guard report concluded that this "cut-throat competition" on the part of individual pilots proved to be "unprofitable, wasteful, unsafe, and inefficient."[7] This uncoordinated, chaotic, and unsafe piloting system was also described as follows:

> During a considerable portion of the 19th century, individual pilots were struggling against each other in a mad race at sea to gain the first incoming ship. Certainly, no one could fail to sympathize with those who lost the senseless race with miles of travel at sea expended for naught and with loss of time, effort and capital. More important, however, was the effect of such a practice upon the service itself. In many instances, individual pilots raced together for one ship while other ships, trying to ride out the storms and inclement weather, signaled frantically for a pilot, but to no avail. Many a good vessel faced disaster off our harbors while vainly signaling for a pilot.

Ernest A. Clothier, State Pilots in America: Historical Outline with European Background, at 29 (2d. ed. 1979).

Fortunately, this unacceptable situation did not last. A positive change to how pilots operated began to take place in the early 1880s "through the formation and development of pilot associations, regulated under law and working cooperatively with the law." Clancy, *supra*, at 59. Recognizing that the manner in which pilotage was being carried out had to be improved, pilots "joined into associations so as to avoid cutthroat competition; reduce the number and expense

[6] A Report on Pilotage in the United States, by the Commandant, U.S. Coast Guard, November 1942, at 7.
[7] *Id*. at7.

of pilot boats needed to meet with and depart from ocean-going ships; provide a steadier income based on cooperative efforts; provide for their families in the event of death or disability (a rather common occurrence especially in the days of sail) and build an association reputation of such high esteem as to cause a ship's master to chose an association pilot over an independent of no particular repute."[8]

In addition to enhancing the reliability of pilotage, increasing critical support and business efficiencies, and providing for the welfare of pilots and their families, pilot associations also played a large role in improving the training of pilots. The pilot association "took on the form of a guild to provide training for new members"[9] that generally included lengthy apprenticeships. These local pilot associations, "working together with governing authorities, helped meld together a unified program of piloting activities under government regulation." Clancy, *supra*, at 58.

Maritime business and government interests supported this movement toward the formation of local pilot associations. The 1942 U.S. Coast Guard report recounted:

> It appears that the shipping interests, as well as the insurance and other commercial interests of the ports encouraged the pilots in the formation of these associations since it was apparent to them that better

[8] Interport Pilots Agency, et al. v. New Jersey Board of Commissioners of Pilots, No. Mon-C-385-91 (N.J. Super. Ct. Ch. Div. April 16, 1997), at 11.
[9] *Id*. at 11-12.

> organization of pilotage, even including the elimination of competition, would serve to expedite the movement of shipping and to make it safer.[10]

Similarly, a study by the U.S. Department of Commerce also found that shipping, port and insurance interests encouraged the pilots to form into local associations. This report observed:

> "The advantages of a well-organized pilotage system were as apparent to these interests as to the pilots themselves, for the commerce of the port was not only facilitated and expedited but made much safer by reason of the better organization of the pilot system."[11]

The Commerce Department report, after reciting the numerous advantages of the formation of pilot associations (e.g., ships could depend on receiving pilotage services from fully qualified pilots when needed; pooling of operating costs such as acquisition and maintenance of pilot boats, central pilot dispatching services, etc.), went on to conclude that the listed advantages of pilot associations "should be borne in mind when reference is made to pilots' associations, since there is a common tendency to regard them merely as labor unions, organized for the purpose of maintaining a monopoly and of conducting political propaganda for retaining special privileges."[12]

Because pilots had considerable incentive to join together, associations continued to develop throughout the 19th and 20th centuries. Associations

[10] A Report on Pilotage in the United States, by the Commandant, U.S. Coast Guard, November 1942, at 7-8

[11] Grosvenor M. Jones, Pilotage in the United States, Department of Commerce Special Agents Series No. 136, pp. 28 and 29. 1917, Washington, DC Government Printing Office.

[12] *Id*. at 28-29.

maintain training programs, pilot boats, dispatch services, rotation systems, and all other types of equipment and support systems needed for a modern, efficient and safe pilotage operation. Individual pilots could not make the infrastructure investments necessary for these things. Also, a fundamental and common principle in the various comprehensive regulatory and oversight systems put in place by the coastal states in the U.S. is to ensure that each ship that requires a pilot – regardless of its size, type, or cargo – receives a trained, competent, well-rested pilot without delay. Pilot associations are key to meeting those responsibilities.

B. THE EMERGENCE OF PILOT ASSOCIATIONS WOULD NOT HAVE BEEN POSSIBLE WITHOUT THE GUY RULE, AND THE RULE REMAINS NECESSARY FOR PILOT ASSOCIATIONS TODAY

At the time of the Guy decision, as is even more true today, the movement of large vessels carrying valuable or hazardous cargo within the narrow and restricted waters of ports, harbors, and their approaches carried with it serious risk of accident and the potential for substantial damages. The consequences of marine casualties included the loss of the lives of passengers and crew, damage or loss of cargo, and serious harm to the port and its waters. The financial costs of such consequences far exceeded the assets of a typical Virginia pilot in 1900 and the ability of such a pilot to pay even a significant portion of those costs. Liability insurance then, as now, was either not available at any price or was available only at a price that was prohibitive in relation to the fee earned for a pilotage job.

Neither the pilot nor the ship could bear the costs of such insurance, even if it were available

A career as a pilot in Virginia in 1900, therefore, carried with it a high risk of not only personal injury or death, but of financial ruin as well. For an individual pilot, the only protection against ruinous damages judgments was a traditional, if unspoken, reluctance of injured parties, including both piloted ships and third parties, to seek damages from the pilot. Although under the general maritime law pilots may be held liable for their own negligence, suits against pilots have generally not been sought because "the pilot is usually without sufficient financial resources to make it worthwhile to attempt to pursue recovery." Alex L. Parks & Edward V. Cattell, The Law of Tug, Tow, and Pilotage, 1011 (3d ed. 1994).

If a pilot's association and all of its members could be held liable for a member's negligence, however, the calculation underlying a plaintiff's decision as to whom to sue would be much different. The collective assets of the association and of each of its members may well be sufficient to warrant a suit against the association. In short, the association and its members become the "deep pocket" sought by most plaintiffs. As a consequence, the financial risks of liability exposure to each pilot would become substantially greater. As an independent working alone, a pilot has the liability risks associated with his or her own piloting. Without the Guy rule, a pilot working in an association would be forced to assume

the liability risks of every other association member as well as the greater likelihood of suits seeking damages from the pilot interests. This increased liability exposure would far outweigh the benefits to the individual pilot of joining with others into an association.

Without Guy, therefore, it would not have been in the interests of pilots to form into associations. Dangerous competition would have continued, each pilot would have had to provide his or her own pilotage support infrastructure, no economies of scale would have been achieved, little investment in new technology and improved training and operations would have been made, and pilotage very well could have remained, as the U.S. Coast Guard characterized it, "unprofitable, wasteful, unsafe, and inefficient."

These circumstances of U.S. pilotage creating the need for the Guy rule in 1906, as well as its public policy rationale, continue to exist today. In fact, the liability risks are far greater for pilots now than 100 years ago. As ships have grown larger and larger and their cargoes both more valuable and more hazardous, the potential financial consequences of a marine casualty have grown exponentially. Moreover, the concept of environmental damages may have been unfamiliar in 1900, but certainly not today. Even a relatively minor oil spill resulting from a marine casualty can result in damages of tens, or even hundreds, of millions of dollars. In addition, the current realities of tort litigation are that any

party with any conceivable connection, no matter how attenuated, to an accident can expect to be sued. The costs of defending a suit alone can exhaust the resources of many defendants.

The economic reality of a pilot's liability exposure today is that the potential damages from a marine accident can be thousands of times – even hundreds of thousands of times – greater than the compensation the pilot receives for an assignment and substantially greater than the typical personal resources of the pilot. It is still the case that liability insurance for both individuals and pilot associations is not realistically available, and certainly not in amounts that could come near to the potential damages exposure. Even if suitable insurance could be purchased, the cost of such insurance would add significantly to the pilot's costs and thus to pilotage fees charged to ships. Since vessels already carry very substantial liability insurance coverage, which includes coverage for pilot errors, it would not be cost efficient for vessel owners and operators who hire pilots to, in effect, pay twice for insurance coverage in the form of higher pilotage rates.

The Guy rule shielding pilot associations as well as individual association members from vicarious liability promotes economic efficiency by avoiding duplication of insurance costs. Protection of injured third parties is provided by the maritime law principle that the ship is subject to suit *in rem* for recovery for the negligence of a pilot. Barnstable, 181 U.S. 464 (1901). As a result, there is no

public benefit to holding pilot associations liable for individual pilot negligence and forcing them to seek insurance, as appellants have suggested. However attractive as deep pockets the Pascagoula Bar Pilots Association may seem to appellants, there is no rationale under agency law principles or public policy considerations for imputing the alleged negligence of one of its pilots to the other members of the association. As the Court in Guy stated, in order to impose vicarious liability on the Virginia Pilot Association, "something more and better must be found than that defendants divide the pay for the work that they have done, or that it is a convenience to the party aggrieved to discover a full purse to which to resort." Guy, 203 U.S. at 406.

IV. CONCLUSION

Guy v. Donald is good law and binding precedent. It is applied consistently by all courts in the U.S. in suits seeking to impose liability on pilot associations and their members for the alleged negligence of one of the members while performing piloting services. The doctrine of immunity from vicarious liability established in Guy is sound public policy and of paramount importance to ensuring that the state compulsory pilotage system in this country continues to be the safest and most effective and efficient pilotage system in the world.

For the foregoing reasons APA, as *amicus curiae*, respectfully urges the Court to AFFIRM the Order by the United States District Court for the Southern

District of Mississippi Southern Division granting Summary Judgment in favor of appellee Pascagoula Bar Pilots Association.

RESPECTFULLY SUBMITTED this 18th day of September, 2009.

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FRAP 32(a)(7)(B) CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type and volume limitation specified in Rule 32 (a)(7)(B), Federal Rules of Appellate Procedure. This brief contains 5862 words, including footnotes.

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Attorney

CERTIFICATE OF SERVICE

I certify that an original and six copies of the above and foregoing were furnished to the U.S. Court of Appeals, Fifth Circuit, and that a true and correct copy of the above and foregoing was served on the following appellate counsel of record by Federal Express on this 18th day of September, 2009.

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