NO. 19-_____

In the Supreme Court of the United States

CENTAUR, L.L.C.,

Petitioner,

v.

RIVER VENTURES, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), this Court mandated that a conceptual approach–not a spatial approach–be utilized to determine if the principal objective of a contract is maritime commerce, which may require the application of federal maritime law. In *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), which *Kirby* heavily relied upon, this Court stated that when deciding this issue, "[p]recedent and usage are helpful insofar as they exclude or include certain common types of contract." *Id.* at 735.

The First, Second, Sixth, Ninth, and Eleventh Circuits have all performed the required conceptual analysis set forth in *Kirby* and *Kossick* by reviewing the nature and subject matter of a contract and past precedent when determining whether a contract's principal objective is maritime commerce and thus governed by maritime law.

In the case at hand, the Fifth Circuit developed a new mechanical two-part test that involves a "spatial" approach and does not allow for case law to be considered when classifying a contract as maritime or non-maritime.

THE QUESTION PRESENTED IS:

Whether the Fifth Circuit's new mechanical test–which is inconsistent with the analysis utilized by the First, Second, Sixth, Ninth, and Eleventh Circuits–complies with the conceptual approach mandated by this Court in *Kirby* and *Kossick*.

PARTIES TO THE PROCEEDINGS

Petitioner

- Centaur, L.L.C. ("Centaur").

Respondent

- River Ventures, L.L.C.

Plaintiff Below and Non-Party to the Petition

- Devin Barrios

Per Sup. Ct. R. 12.6, Petitioner certifies that Devin Barrios, Plaintiff in the main demand, has no interest in the outcome of this petition, and is no longer a party.

RULE 29.6 STATEMENT

Centaur, L.L.C. is not a corporation and has no parent corporation. It is a privately-held limited liability company and no publicly-held company owns more than 10% of its stock.

LIST OF PROCEEDINGS

United States Court of Appeals for the Fifth Circuit

No. 18-31203

Barrios v. Centaur, L.L.C. et al.

Opinion dated November 11, 2019

Rehearing Denial dated December 16, 2019

United States District Court for the Eastern District of Louisiana

Civil Action No. 17-585

Barrios v. Centaur, L.L.C. et al

Final Judgment dated February 5, 2019

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Centaur, L.L.C. ("Centaur"), respectfully petitions for a writ of certiorari to review the judgments and opinions of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit reversing the District Court on the maritime/non-maritime issue, App. 1a-21a, is reported at 942 F.3d 670. The Fifth Circuit's order denying Centaur's petition for rehearing, App. 54a-55a, is unreported. The reversed opinion of the District Court on the maritime/non-maritime issue, App.41a-53a, is reported at 345 F.Supp. 3d 742. The opinion of the District Court on the main demand and Jones Act status, App.22a-49a, which was not appealed, is unreported but available at 2019 WL 424679.

JURISDICTION

The Fifth Circuit issued its opinion reversing the District Court on the maritime/non-maritime issue on November 11, 2019. App.1a-21a. Centaur's timely petition for rehearing was denied on December 16, 2019. App.54a-55a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves issue of federal common law and maritime jurisdiction, specifically Article III, Section 2 of the United States Constitution and 28 U.S.C. 1333(1).

U.S. Const., Art. III § 2

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; –to all cases affecting ambassadors, other public ministers and consuls; –to all cases of admiralty and maritime jurisdiction; –to controversies to which the United States shall be a party; –to controversies between two or more states; –between a state and citizens of another state; –between citizens of different states; –between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.
>
> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

28 U.S.C. § 1333(1)

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

STATEMENT OF THE CASE

To determine whether the contract at issue was maritime, the District Court correctly followed this Court's decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), and the reasoning of the First, Second, Sixth, Ninth, and Eleventh Circuits by performing the difficult-but-required conceptual analysis of whether the contract's principal objective was maritime commerce. App.49a-53a. The Fifth Circuit disagreed with the conceptual analysis utilized by the District Court.

Specifically, the Fifth Circuit held that the District Court erred by directly analyzing whether the contract

involved maritime commerce. Recognizing the uncertainty in its circuit regarding the proper analysis of the maritime/non-maritime issue, the Fifth Circuit created a new test. Under the Fifth Circuit's new test, to be maritime a contract: (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract. App.18a. The Fifth Circuit explicitly held that past precedent regarding classification of contracts as maritime or non-maritime should not be considered when applying its new test, referring to the process of reviewing precedent on the issue as a "trudge." App.15a. Under this new test, the Fifth Circuit no longer considers the conceptual issue of whether the contract's principal objective is maritime commerce, and centuries of established precedent regarding the classification of certain types of contracts have been disregarded.

The Fifth Circuit's new test is in error because it conflicts with this Court's precedent and is directly contrary to the analysis utilized by other circuits. In *Kirby*, this Court held that "to ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved . . . ." 543 U.S. at 24. Instead, this Court mandated the use of a "conceptual" analysis and "focusing [the] inquiry on whether the principal objective of a contract is maritime commerce." *Id.* at 26. Following *Kirby*'s directive, the First, Second, Sixth, Ninth, and Eleventh Circuits utilize a case-by-case approach that conceptually analyzes the "nature and character" of contracts to determine whether their "principal objective" is maritime commerce. Recognizing that there can be no "clean line of demarcation" for

this conceptual issue, this Court and those circuits have declined to formulate mechanical tests. *Puerto Rico Ports Authority v. Umpierre-Solares*, 456 F.3d 220 (1st Cir. 2006); *D'Amico Dry Limited v. Primera Maritime (Hellas) Limited*, 886 F.3d 216 (2nd Cir. 2018); *New Hampshire Ins. Co. v. Home Savings and Loan Co.*, 581 F.3d 420 (6th Cir. 2009); *Sentry Select Ins. Co. v. Royal Ins. Co. of America*, 481 F.3d 1208 (9th Cir. 2007); *Odyssey Marine Exploration v. Unidentified Shipwrecked Vessel*, 636 F.3d 1338 (11th Cir. 2011).

The Fifth Circuit's new test creates a circuit split regarding the analysis that *Kirby* requires to distinguish between maritime and non-maritime contracts. Unlike all other circuits that have considered this issue post-*Kirby*, the Fifth Circuit has removed the direct conceptual analysis of the nature of the contract and the requirement of maritime commerce, and instead instituted a mechanical test that improperly focuses on vessel involvement. Further, the Fifth Circuit's removal of the consideration of precedent as part of the analysis is contrary to this Court's decision in *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961) ("Precedent and usage are helpful insofar as they exclude or include certain common types of contract.").

This case presents a recurring and important issue of federal maritime law that warrants this Court's review, particularly in light of this Court's vital role in shaping rules of admiralty and safeguarding maritime commerce. *See Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 (1963) ("Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law."); *Exxon Corp. v. Cen. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991) ("[T]he 'fundamental interest giving rise to maritime jurisdiction is the

protection of maritime commerce.'"); *Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 388 (1949) (granting certiorari to "determin[e] important issues in the administration of admiralty law.").

I. Factual Background

This matter involves an indemnity dispute between Centaur and River Ventures, two contractors of United Bulk Terminal ("UBT"). Centaur's job for UBT involved constructing various structures at a grain-loading facility in Louisiana. The specific structure being built was a concrete containment rail on UBT's dock. Because the dock was crowded, Centaur utilized a dumb barge[1] as a stationary work platform.

River Ventures' job for UBT involved providing crew boats to transfer workers to-and-from the job site. Centaur and River Ventures each had separate contracts with UBT for their different scopes of work. Centaur had the construction contract with UBT, and River Ventures had the crew boat contract with UBT.

The contract dispute arose out of an accident involving Devin Barrios, a construction laborer employed by Centaur. His accident occurred while he was attempting to carry a portable generator from River Ventures' crew boat to Centaur's dumb barge/ stationary work platform. Mr. Barrios filed suit alleging

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[1] Non self-propelled barges are commonly referred to as dumb barges. Unlike the barges used on the waterways in Europe, most barges in use on American waterways are dumb barges. The great majority are also unmanned. Philip N. Davey, *The Tug and Tow Relationship in the United States*, 70 Tul. L. Rev. 475, 478 n.17 (1995).

general maritime law negligence against River Ventures and a Jones Act claim against Centaur.

The contract River Ventures had with UBT for its crew boat work did not provide indemnity and insurance to River Ventures for Mr. Barrios' claims. The classification of the UBT/River Ventures crew boat contract as maritime or non-maritime was not an issue in this litigation.

Instead, River Ventures filed a cross-claim against Centaur seeking indemnity and insurance as a purported third-party beneficiary under the terms of the UBT/Centaur construction contract. The sole issue presented here is what analysis should be used to determine whether federal maritime law applies to the UBT/Centaur construction contract.

II. Prior Proceedings

A. The District Court's Ruling That the UBT/Centaur Construction Contract Was Non-Maritime.

Centaur filed a Motion for Summary Judgment on River Ventures' cross-claim for indemnity and insurance. Centaur argued that the UBT/Centaur construction contract was non-maritime, and therefore, River Ventures' claims against Centaur were governed by state law, which barred claims for indemnity and insurance coverage under the Louisiana Construction Anti-Indemnity Act.

Following this Court's decision in *Kirby* and using an analysis similar to that used by the First, Second, Sixth, Ninth, and Eleventh Circuits, the District Court held that to determine whether a non-oil-and-gas

contract (like the UBT/Centaur construction contract) is maritime or non-maritime, the court must first answer the conceptual question of whether the principal object of the contract involves maritime commerce. App.49a-51a. The District Court relied heavily on a decision issued by the Southern District of Texas, wherein the same analysis was utilized. *Lightering, LLC v. Teichman Group, LLC*, 328 F.Supp. 625 (S.D. Tex. July 2018). This distinction between oil-and-gas contracts and non-oil-and-gas contracts is relevant in the Fifth Circuit due to the circuit's recent en banc decision in *In re Larry Doiron*, 879 F.3d 568 (5th Cir. 2018), *cert. denied* 138 S.Ct. 2033, wherein the Fifth Circuit established a truncated test to determine the maritime or non-maritime nature of a contract, but specifically limited its holding to a class of oil-and-gas contracts.

After reviewing the facts surrounding the UBT/Centaur construction contract, and notwithstanding the use of the dumb barge as a work platform, the District Court determined that the contract's principal objective was land-based construction, not maritime commerce. App.50a-51a. Because the UBT/Centaur construction contract was non-maritime, the Louisiana Construction Anti-Indemnity Act nullified its indemnity and insurance provisions and River Ventures' cross-claim against Centaur was dismissed.

B. The District Court's Ruling on the Main Demand/Jones Act Status.

A bench trial was subsequently held on Mr. Barrios' tort claims against Centaur and River Ventures. The District Court found River Ventures was 100% at fault for the accident. App.36a. Because Mr.

Barrios spent less than 30 percent of his time in service of a vessel, the District Court also found that Barrios was not a Jones Act seaman. App.34a.

C. Respondent's Appeal of the Maritime/Non-Maritime Issue.

River Ventures did not appeal the District Court's ruling on the main demand or Jones Act status. But it did appeal the District Court's ruling that the UBT/Centaur construction contract was non-maritime. River Ventures contended that the District Court applied the wrong analysis to decide whether the UBT/Centaur construction contract was governed by maritime law. Specifically, River Ventures argued that the District Court erred by analyzing whether the contract involved maritime commerce. Instead, River Ventures asked the Fifth Circuit to formulate a new test that did not require the court to directly determine whether the contract involves maritime commerce, but instead, focused on whether a vessel was involved.

D. The Fifth Circuit Reversed the District Court and Created a New Test for Analyzing the Maritime/Non-Maritime Issue.

The Fifth Circuit disagreed with how the District Court analyzed the maritime/non-maritime issue, specifically the District Court's ruling that this Court's decision *Kirby* and its *en banc* decision in *Doiron* required a direct analysis of whether the contract's principal objective involved maritime commerce. In place of that difficult, conceptual analysis–which would have required a precedent-laden "trudge"–the Fifth Circuit created a new mechanical test. Under the Fifth Circuit's new test, "[t]o be maritime, a contract (1)

must be for services to facilitate activity on navigable waters, and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract." App.13a-18a.

The Fifth Circuit's new test did not utilize the *Kirby*-mandated conceptual analysis of whether the UBT/Centaur contract involved maritime commerce. *Id.* Instead, the Fifth Circuit stated that its new mechanical two-pronged test "stand[s] in for *Kirby*'s requirement that the 'principal objective' of the contract be maritime commerce." App.17a. Further, and contrary to the approach of other circuits and this Court's directive in *Kossick*, the Fifth Circuit's new test rejects any reliance upon precedent for determining the maritime/non-maritime issue. Indeed, the Fifth Circuit stated that "we should be out of [the] business" of reviewing case law as part of the analysis. App.15a.

The Fifth Circuit applied its new test to the classification of the UBT/Centaur construction contract. It found that both prongs were satisfied, which made the UBT/Centaur construction contract maritime. In performing its analysis, the Fifth Circuit did not look to any precedent regarding the treatment of construction contracts on land as maritime or non-maritime. Instead, it focused on the use of the dumb barge as a work platform to complete the work, which is all that the second prong of its new test required. App.18a-20a.

E. The Fifth Circuit's Denial of Rehearing.

Centaur timely sought rehearing to address the lack of the required conceptual analysis, and on December 16, 2019, the Fifth Circuit denied the application. App.54a-55a.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S NEW TEST IS CONTRARY TO THIS COURT'S DECISIONS IN *KIRBY* AND *KOSSICK*.

In *Kirby*, this Court ruled that the distinction between maritime contracts and non-maritime contracts is "whether the principal objective of a contract is maritime commerce." 543 U.S. at 25. Stating that the distinction between the categories is "conceptual rather than spatial," this Court noted that the boundary is "difficult to draw" and that its cases "do not draw clean lines between maritime and nonmaritime contracts." *Id.* at 23-24. Because the analysis of whether a contract involves maritime commerce is conceptual, it cannot be reduced to a mechanical test and this Court declined to provide one.

Kirby expressly rejected tests that "simply look to the place of the contract's formation or performance" or "geography." *Id.* at 24, 27. *Kirby* also rejected tests that focus on whether a vessel is involved in the contract. *Id.* at 23 ("To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute."). Instead this Court emphasized that the answer to the maritime /non-maritime issue "'depends upon . . . the nature and character of the contract,' and the true criterion is whether it has 'reference to maritime service or maritime transactions.'" *Id.* at 24 (internal citations omitted). The *Kirby* Court also approvingly cited its past decision in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961). In *Kossick*, the Court stated that "precedent and usage are helpful" to the maritime/non-maritime

issue "insofar as they exclude or include certain common types of contract." 365 U.S. at 735.

The Fifth Circuit's new test removes the direct, conceptual analysis of whether the contract's principal objective is maritime commerce. In its place, the Fifth Circuit substituted a mechanical, two-part analysis: "[t]o be maritime, a contract (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract." App.18a. The Fifth Circuit erroneously reasoned that its mechanical, two-pronged test that does not consider precedent "stand[s] in for *Kirby*'s requirement that the 'principal objective' of the contract be maritime commerce." App.17a.

The Fifth Circuit's new test impermissibly removes the "difficult"–but required–conceptual analysis of whether the contract involves maritime commerce. In its place, the Fifth Circuit formulated a test comprised of two spatially-focused prongs, which this Court has explicitly rejected. *See Kirby*, 543 U.S. at 24, 27 (rejecting approaches that "simply look to the place of the contract's formation or performance" and stating that "identifying maritime contracts [by depending] solely on geography [is] inconsistent with the conceptual approach our precedent required."); *Id.* at 23 (rejecting approaches that focus on whether a vessel is involved in the contract, stating that "[t]o ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute."). The Fifth Circuit's creation of a mechanical, spatial analysis to decide a conceptual issue is improper because it conflicts with *Kirby*.

Further compounding the problem, the Fifth Circuit instructed the district courts that they should not consult past precedent when deciding the maritime/non-maritime issue, stating that "we should be out of that business." The Fifth Circuit's new position that precedent plays no role in deciding the maritime/non-maritime issue is irreconcilable with this Court's ruling in *Kossick*, wherein this Court stated that "[p]recedent and usage are helpful insofar as they exclude or include certain common types of contract." 365 U.S. at 735.

II. THE FIFTH CIRCUIT'S NEW TEST CREATED A CIRCUIT SPLIT ON THE MARITIME/NON-MARITIME ISSUE.

Since this Court issued *Kirby*, six circuits have analyzed whether a contract is maritime. Unlike the Fifth Circuit's new mechanical test, all of the other circuits employ a conceptual analysis that closely follows *Kirby* and *Kossick* and requires the determination of whether the contract involves maritime commerce. Indeed, the other circuits' conceptual analysis largely mirrors the approach utilized by the District Court in this case, an analysis that resulted in the UBT/Centaur construction contract being declared non-maritime because its principal objective was not maritime commerce.

The Fifth Circuit's reversal of the District Court–and its departure from *Kirby*, *Kossick*, and the other circuits–resulted in a non-maritime contract being declared maritime merely because a dumb barge was used as a work platform to complete the work. The lack of uniformity among the circuits on how the maritime /non-maritime issue should be analyzed, an issue which

directly impacts federal subject matter jurisdiction, merits this Court's attention.

A. First Circuit

In *Puerto Rico Ports Authority v. Umpierre-Solares*, the First Circuit analyzed whether a contract to remove a sunken vessel that presented a hazard to navigation was a maritime contract. 456 F.3d 220 (1st Cir. 2006). This issue needed to be decided because the defendant challenged the existence of admiralty jurisdiction. If the contract was maritime, then the court had jurisdiction; if the contract was non-maritime, the court did not have jurisdiction. The First Circuit began its analysis by citing this Court's decision in *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991), and stating that "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Id.* at 224.

The First Circuit then cited this Court's decision in *Kirby* for the proposition that "[t]o ascertain whether a contract is a maritime one . . . . the answer depends upon the nature and character of the contract, and the true criterion is whether it has reference to maritime service or maritime transactions." *Id.* The First Circuit then closely analyzed the contract and what it required, while also reviewing the precedential treatment of similar contracts. The Fifth Circuit's new mechanical two-part test conflicts with the First Circuit's conceptual approach that utilized an examination of past precedent to determine maritime commerce and jurisdiction.

B. Second Circuit

In *D'Amico Dry Limited v. Primera Maritime (Hellas) Limited*, the Second Circuit analyzed whether a forward freight agreement was a maritime contract. 886 F.3d 216 (2nd Cir. 2018). The court cited *Kirby* and stated that "there is no 'clean line' of demarcation between maritime and nonmaritime contracts." *Id.* at 223. To analyze the issue, the court stated that it was required to consult "precedent and usage for help insofar as they exclude or include certain common types of contract." *Id.* But the court noted that categorizing an agreement "depends upon the nature and character of the contract," and that the true criterion is "whether it has reference to maritime service of maritime transactions." *Id.* (citing *Kirby*, 543 U.S. 14 (2004)).

Importantly, the Second Circuit cited *Kirby* in stating that "[t]he Supreme Court has cautioned that this inquiry is 'conceptual' and not constrained by the location of contract performance or a vessel's involvement in the dispute." *Id.* Finally, the court noted that its guiding beacon was "the purpose of the jurisdictional grant–to protect maritime commerce." *Id.* (citing *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608, 111 S.Ct. 2071, 114 L.Ed.2d 649 (1991)). The Fifth Circuit's new mechanical two-part test conflicts with the Second Circuit's conceptual approach to determine maritime commerce.

C. Sixth Circuit

In *New Hampshire Ins. Co. v. Home Savings and Loan Co. of Youngstown Ohio*, the Sixth Circuit analyzed whether an insurance policy issued to a yacht dealer and marina operator was a maritime contract. 581 F.3d 420 (6th Cir. 2009). The Sixth Circuit cited

Kirby in stating that the issue "depends upon the nature and character of the contract, and the true criterion is whether [the contract] has reference to maritime service or maritime transactions." *Id.* at 423. Although the insurance policy covered moorings of ships, hauling and launching of vessels, and other marina services, the Sixth Circuit rejected placing undue reliance on the policy's relation to vessels. *Id.* at 424 ("Simply because this insurance policy relates to boats and a marina does not necessarily imply that it is a 'maritime contract.'").

Instead, the Sixth Circuit cited *Kirby* as mandating the inquiry be "on whether the principal objective of a contract is maritime commerce." *Id.* (emphasis in original). The Sixth Circuit cited several of this Court's decisions in which acknowledged the difficulty of drawing the line between maritime and non-maritime contracts:

> Despite our best efforts, however, we have not been able to divine an overarching principle or scheme that brings together all of the disparate maritime contract cases under a single, unified banner. Although the Supreme Court repeatedly has acknowledged this difficulty, see *Kirby*, 543 U.S. at 23, 125 S.Ct. 385 ("Our cases do not draw clean lines between maritime and non-maritime contracts."); *Kossick*, 365 U.S. at 735, 81 S.Ct. 886 ("The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw."); *Sisson v. Ruby*, 497 U.S. at 372 n. 4, 110 S.Ct. 2892 (Scalia, J., concurring) ("As Professor Black has put it, in the field

> of maritime contracts 'the attempt to project some "principle" is best left alone. There is about as much "principle" as there is in a list of irregular verbs . . . .'" (citation omitted)); see also *Planned Premium Servs.*, 928 F.2d at 165 ("The waters become murky when we seek the precise parameters of a maritime contract."), thus far it has offered very little in way of guidance.

Ultimately, the Sixth Circuit concluded that "the [Supreme Court] has endorsed a 'conceptual' approach, encouraging courts to consider the contract as a whole and instructing that we should look for guidance in analogous precedent," and held that "it is the approach we must apply." *Id.* at 427. The Fifth Circuit's new mechanical two-part test conflicts with the Sixth Circuit's conceptual approach to analyze maritime commerce.

D. Ninth Circuit

In *Sentry Select Ins. Co. v. Royal Ins. Co.*, the Ninth Circuit analyzed whether an insurance policy containing a maritime employer's liability endorsement was a maritime contract. 481 F.3d 1208 (9th Cir. 2007). The Ninth Circuit cited *Kirby* in stating that there are "few clean lines between maritime and non-maritime contracts" because the separation between them is "conceptual rather than spatial." *Id.* at 1217. It noted that "the conceptual boundary is defined by the purpose of the jurisdictional grant–'the protection of maritime commerce.'" *Id.* To decide the classification of the contract before it, the Ninth Circuit stated that this Court's precedent mandated an examination of the "nature and subject matter" of the contract and

that "the true criterion is whether it has reference to maritime service of maritime transactions." *Id.*

In noting that the dispositive inquiry must be "whether the principal objective of [the] contract is maritime commerce," the Ninth Circuit acknowledged that *Kirby* "explicitly rejected the spatial approach adopted by some lower federal courts, which had determined whether a contract was maritime by assessing whether its land components were 'incidental' to its maritime components." *Id.* at 1218. The Fifth Circuit's new mechanical two-part test conflicts with the Ninth Circuit's conceptual approach to analyze maritime commerce.

E. Eleventh Circuit

In *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, the Eleventh Circuit analyzed whether it had jurisdiction over a contract dispute, an issue that required it to determine whether the underlying contract was maritime. 636 F.3d 1338 (11th Cir. 2011). The court began its analysis by citing *Kirby* and correctly noted that the involvement of a vessel or the place of the contract's performance or formation was not determinative.

Instead, the answer depended upon and required an examination of "the nature and character of the contract" and whether "it has reference to maritime service or maritime transactions." *Id.* at 1340. In analyzing the contract before it, the Eleventh Circuit also cited past precedent regarding the classification of certain categories of contracts as maritime. *Id.* The Fifth Circuit's new mechanical two-part test conflicts with the Eleventh Circuit's conceptual approach to analyze maritime commerce.

III. THE FIFTH CIRCUIT'S RULING PRESENTS A RECURRING AND IMPORTANT QUESTION.

This case presents a recurring and "important question" of federal law. *See* Sup. Ct. R. 10(c). Courts are often required to analyze whether contracts are maritime or non-maritime. The Fifth Circuit's new framework for determining whether a contract is maritime or non-maritime conflicts with decisions of the First, Second, Sixth, Ninth, and Eleventh Circuits and is contrary to this Court's decisions in *Kirby* and *Kossick*. The classification of a contract should not depend upon the venue, and uniformity in the general maritime law has long been demanded by this Court.[2]

Further, the maritime/non-maritime classification of contracts is often presented in the context of the existence or non-existence of admiralty jurisdiction. *See Odyssey Marine*, 636 F.3d 1338 (11th Cir. 2011). If the circuits utilize different tests to decide the maritime/non-maritime issue (which is presently the situation), the extent of the court's admiralty jurisdiction to decide cases and controversies will differ depending upon the circuit. It is therefore vital that this Court grant review to ensure uniformity in this important area of federal common law.

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[2] See generally *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (discussing "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformity in, the whole country.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted to address this split in the circuits now, due to the fact that the new mechanical test from the Fifth Circuit is new, and as future cases are decided, the split in the circuits will only become more pronounced.

Respectfully submitted,

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