

In the  
Supreme Court of the United States

COASTLINE COMMERCIAL  
CONTRACTING, INC.,  
*Petitioner,*

v.

BALTIMORE GAS  
& ELECTRIC COMPANY,  
CANDICE M. BATEMAN,  
RAYMOND C. BOSTIC,  
*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

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BALTIMORE GAS & ELECTRIC COMPANY'S  
BRIEF IN OPPOSITION TO  
PETITION FOR CERTIORARI

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**QUESTION PRESENTED**

1. Whether Petitioner preserved its “navigability in fact” argument before the District Court or the Court of Appeals?
2. Whether there is a split among the circuits concerning the definition of navigable waters of the United States?
3. Whether the application of admiralty tort liability encroaches upon state law?

## **CORPORATE DISCLOSURE**

Pursuant to Supreme Court Rule 29.6,  
Respondent Baltimore Gas & Electric Company  
represents that it is a wholly owned affiliate of  
Exelon Corporation which is a publicly traded  
company.

## **STATEMENT OF RELATED PROCEEDINGS**

Respondent, Baltimore Gas & Electric Company,  
does not contest Petitioner's Statement of Related  
proceedings.

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## STATEMENT OF THE CASE

Respondent disagrees with Petitioner's assertion that the United States Court of Appeals for the Fourth Circuit only applied a "navigational capacity" test in finding Eli Cove to be navigable waters of the United States.

In determining Eli Cove to be navigable, the Court ruled that based on "the undisputed facts in this case: not only is the cove lined with commercially built piers, but Coastline itself was engaged in commercial activity when it allegedly struck the underwater cable." App. 7a.

Otherwise, Respondent does not contest Petitioner's Statement of the Case

## REASONS FOR OPPOSING THE WRIT

1. Petitioner failed to raise its "navigational in fact" test argument at any level.<sup>1</sup>

The district court dismissed the admiralty matter for lack of subject- matter jurisdiction "[b]ecause BGE advances no facts show that Eli Cover, as opposed to Stoney Creek, is used to, or susceptible of being used, in their ordinary condition as a highway for commerce, the Court must conclude that Eli Cove is not navigable water of the United States." App. 27a. (emphasis added).

After de novo review, the Fourth Circuit determined that the district court had admiralty

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<sup>1</sup> Candice M. Bateman, Raymond C. Bostic, and Coastline Commercial Contracting, Inc. moved to dismiss the action in the district court for lack of subject matter jurisdiction. App. 15a. Bateman, Bostic, and Coastline filed a joint reply brief with the Fourth Circuit. App. 1a.

jurisdiction over the suit. App. 4a. At issue, among other factors, was whether Eli Cove was navigable water of the United States. App. 5a.

In determining Eli Cove to be navigable, the Fourth Circuit held:

The district court found that Eli Cove was neither being used as a highway of commerce nor susceptible of such use because it was a residential inlet whose purpose was “to provide access to the water from these residences” and because it was too shallow to support commercial navigation. *Balt. Gas & Elec.*, 681 F. Supp. 3d at 460. But this determination is belied by the undisputed facts in this case; not only is the cove lined with commercially built piers, but Coastline itself was engaged in commercial activity when it allegedly struck the underwater cable. App.7a. (emphasis added).<sup>2</sup>

Petitioner’s appellate brief failed to raise that only a “navigational in fact” test should be applied in determining whether a body of water is navigable waters of the United States. Instead, Petitioner relied upon the district court’s determination under *Mullenix v United States*, 984 F.2d 101 (4th Cir. 1993). App. 27a. The Petitioner now contends that the case relied upon by the district court is not controlling.

Had Petitioner briefed the question of whether a navigation in fact test should be used in determining

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<sup>2</sup> The Fourth Circuit noted that the district court’s determination that Eli Cove was no more than five feet was at odds with the charts in the record. App. 8a, n.1.

navigability, then the Fourth Circuit would have addressed that argument. There is no mention that Petitioner raised “navigability in fact” test in its brief or at oral argument. See App. 12 a. Further, any argument over a “navigability in fact” test would necessarily have included the now alleged split among circuits.

Petitioner did not cite the Seventh, Eighth, or Ninth Circuit cases it now relies on at either the district court level or the Fourth Circuit Court of Appeals. Accordingly, the Supreme Court should not decide whether a “navigability in fact” test should be the sole test to be applied. *See City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1115 (1987) (“We ordinarily will not decide questions not raised or litigated in the lower courts.”).

2. The Fourth Circuit found Eli Cove navigable in fact.

The Supreme Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870) defined waterways as navigable in fact “when they are used, or susceptible of being used in their ordinary condition as a highway for commerce.” (Emphasis added).

Here, the Fourth Circuit overruled the district court based on the undisputed facts that Eli Cove was lined with commercially built piers and that “Coastline itself was engaged in commercial activity” when it allegedly struck Respondent’s underwater cable. App. 7a. Thus, the Fourth Circuit found that Eli Cove was, in fact, currently navigable.

The district court recognized that Eli Cove flows into Stoney Creek which “can be, and is in fact, used for commercial purposes.” App. 25a. The district court

further acknowledged that Stoney Creek flows into the Patapsco River and Chesapeake Bay. App. 25a. Unlike the Seventh, Eighth, and Ninth Circuit cases cited by Petitioner, it is undisputed that one could push off from Eli Cove and travel uninterrupted to the Chesapeake Bay to reach the State of Virginia and on to the Atlantic Ocean. App. 7a.

3. There is no split among the circuits concerning current use, or current capability in determining navigability.

The Supreme Court in *The Roberts W. Parsons*, 191 U.S. 17, 26 (1903), quoting from *The Daniel Ball*, 77 U.S. 563, defined navigable waters as those which “form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries.”

Petitioner advances the argument that there is a split among the circuits concerning a “navigational capacity” test versus a “navigation in fact” test. Petitioner’s argument, however, is based upon a stilted comparison of the Fourth Circuit’s decision where there was no impediment to navigation (App. 7a) and cases where the bodies of water, in their present configuration, could not bear commercial shipping.

In *Alford v. Appalachian Power Company*, 951 F.2d 30, 32 (1991)<sup>3</sup>, the Fourth Circuit held that a waterway need not be in current use for commercial shipping, rather it must be in its current configuration be so capable. The Fourth Circuit found

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<sup>3</sup> Petitioner cited *Alford* solely for a navigational capacity test. Petitioner’s Writ at 7.

that the historical configuration of the Roanoke River was not determinative of admiralty jurisdiction. When the Roanoke River was impounded by a dam, it created a lockless lake wholly within the State of Virginia. As such, the Fourth Circuit determined that the lake could not act as a highway of commerce between two states nor, because of its present configuration, become part of a highway by uniting with other waterways.

Petitioner's Seventh, Eighth, and Ninth Circuit cited cases do not hold that a navigation in fact test is based solely upon actual present commercial use.<sup>4</sup> Rather, the test also looks at whether a body of water, in its present configuration, would allow commercial shipping.

In *Chapman v. United States*, 575 F.2d 147, 151 (7th Cir. 1978) (en banc), cert denied, 439 U.S. 893 (1978),<sup>5</sup> the Seventh Circuit held that a recreational boating claim did not come within admiralty jurisdiction when it occurred on waters that “are not in fact used for commercial navigation and are not susceptible of such use in their present state.” The court determined that the Kankakee River was unusable for commercial shipping as the damming of the waterway had “the practical effect of eliminating commercial activity.” Id. at 149. The court also relied upon *Adams v. Montana Power Co.*, 528 F.2d 437, 440

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<sup>4</sup> Petitioner's navigability in fact test argument is based upon John F. Baughman, *Balancing Commerce, History, and Geographical: Defining the Navigable Waters of the United States*, 90 Mich. L. Rev. 1028 (1992).

<sup>5</sup> Petitioner's citation failed to show that certiorari was denied. Chapman's petition sought review of a conflict with other Courts of Appeal as to the scope of Federal Admiralty Jurisdiction. Chapman's Petition for Writ of Certiorari at p. 7.

(1975) for the proposition that admiralty jurisdiction did not extend “where no commercial shipping occurred or was likely to occur.” (emphasis added).

In *Livingston v. U.S.*, 627 F.2d 165 (8th Cir. 1980), the Eighth Circuit held there was no dispute that commercial activity on the Norfolk River ceased after construction of a hydroelectric dam in 1941-43. The court cited the holding in *Adams* that, “absent some present or potential commercial activity,” admiralty law should not apply where a dam obstructed the river. *Id.* at 170 (emphasis added). The court rejected that historic commercial use of a river was determinative of whether it was presently navigable where a dam completely blocked travel between the river and lake. *Id.* at 168.

In *Adams v. Montana Power Co.*, 528 F.2d 437,439 (9th Cir.1975), the Ninth Circuit held that admiralty jurisdiction should extend only to those waters “traversed or susceptible of being traversed” by commercial craft. Citing *The Daniel Ball* case for the proposition that a waterway is navigable provided it is used or susceptible of being used as an artery of commerce, the court found that a dam obstructed a portion of the Missouri River such that commercial activity had been eliminated.

The above cases show that a body of water must presently be used or presently be capable of being used as a highway of commerce. Eli Cove, unlike the Missouri River blocked by the Hauser dam in *Adams*, the hydroelectric dam blocking the Norfolk River in *Livingston*, the Kankakee River blocked by a dam in *Chapman*, flows into Stoney Creek, which the district court found to be navigable. App. 25a. The Fourth Circuit elaborated further in stating that one could

push off from Eli Cove and travel an uninterrupted route to the Chesapeake Bay to reach Virginia and the Atlantic Ocean. App. 7a.

Accordingly, there is no conflict with the Fourth Circuit's decision as Eli Cove is not blocked by some physical impediment which renders navigation, in fact, impossible.

4. Admiralty law governs maritime torts on navigable waters, not state tort law

The U.S. Constitution, art. III § 2 and 28 U.S.C. § 1333 confers jurisdiction to the federal courts over admiralty and maritime cases. App.4a. The rationale for federal admiralty jurisdiction is protection of maritime commerce by ensuring that uniform rules of conduct are in place. *Exec, Jet Aviation, Inc. v City of Cleveland*, 409 U.S. 249, 269-70 (1972).

Petitioner camouflages its “navigational capacity” argument as an encroachment on Maryland’s right to enforce a state’s chosen legal doctrine for negligent liability. The question of which legal doctrine applies to a tort on water depends, in the first instance, on whether the tort occurred on navigable waters. If so, and other factors are met, admiralty law applies.<sup>6</sup> If the tort does not occur on navigable waters, state law applies.

Petitioner’s encroachment argument is simply a different way of arguing that a “navigability in fact” test, limited to current use, should be the only criteria for whether the body of water is navigable water of the United States. A state’s chosen legal doctrine for

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<sup>6</sup> Admiralty jurisdiction over maritime torts depends on both location of the tort on navigable waters and its connection with traditional maritime acidity. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

negligent liability does not apply to maritime torts and the application of admiralty law.

While states have the right to regulate conduct solely within their borders, federal courts protect “the important national interest in uniformity of law and remedies for those facing the hazards of waterborne transportation.” *Jerome B. Grubart, Inc. v. Great Lakes Dredge & dock Co.*, 513 U.S. 527, 544 (1995).

#### CONCLUSION

Petitioner did not argue, at any level, that the only test for navigable water should be a navigation in fact test. Regardless, the navigation in fact test, as defined in *The Daniel Ball*, simply requires that the waterway “is used or susceptible” of being used in its present condition as a highway for commerce. It is not, as Petitioner argues, a requirement that the waterway be presently used for commerce.

Even so, the Fourth Circuit held that Eli Cove was presently used for commercial navigation and could be used to travel to the State of Virginia and the Atlantic Ocean.

For the foregoing reasons, Respondent, Baltimore Gas & Electric Company, requests that this Court deny Coastline Commercial Contracting, Inc.’s petition.

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