No. 24-397

IN THE

Supreme Court of the United States

COASTLINE COMMERCIAL CONTRACTING, INC.,

Petitioner,

v.

BALTIMORE GAS & ELECTRIC COMPANY, *et al.*,

Respondents.

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

BRIEF FOR RESPONDENTS IN SUPPORT OF CERTIORARI

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RESPONSE IN SUPPORT OF CERTIORARI

The Respondents respectfully request that this Court grant Coastline Commercial Contracting, Inc.'s, petition requesting the issuance of a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Respondents join with the Petitioner in their stated reasons for granting the Writ. The Respondents offer the following additional argument in support of the Petition.[1]

I. This Court should grant the writ of certiorari because the navigational capacity test is overbroad and encroaches on Maryland's right to enforce its chosen legal doctrine for negligence liability

As Petitioner set forth, Maryland's contributory negligence doctrine is unique amongst the several states. A federal court sitting in admiralty jurisdiction applies a unique body of tort law that supplants state law. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206, 116 S.Ct. 619, 623, 133 L.Ed.2d 578 (1996) ("With admiralty

1. Whether the U.S. District Court had admiralty jurisdiction is a threshold matter and "no court may decide a case without subject matter jurisdiction, and neither the parties not their lawyers may stipulate to jurisdiction or waive arguments that the court lacks jurisdiction." *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 381 (2001) (citing *United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000). Therefore, even if the parties fail to raise the issue on appeal "a court must raise the jurisdictional question on its own. . . ." *Id.* (citing *Tittjung*, 235 F.3d at 335; *see also Florio v. Olson*, 129 F.3d 678 (1st Cir. 1997). Accordingly, this issue is preserved for review before this Court.

jurisdiction . . . comes the application of substantive maritime law.") As such, admiralty jurisdiction should be extended only where necessary to protect maritime shipping interests. As several federal courts have reasoned:

> The logic of requiring commercial activity is evident. The purpose behind the grant of admiralty jurisdiction was the protection and the promotion of the maritime shipping industry through the development and application, by neutral federal courts, of a uniform and specialized body of federal law. . . . The strong federal interest in fostering commercial maritime activity outweighed the interest of any state in providing a forum and applying its own law to regulate conduct within its borders. It follows that admiralty jurisdiction need and should extend only to those waters traversed or susceptible of being traversed by commercial craft. In the absence of commercial activity, present or potential, there is no ascertainable federal interest justifying the frustration of legitimate state interests.

Chapman v. U.S., 575 F.2d 147 (7th Cir. 1978) (citing *Adams v. Montana Power Co.*, 528 F.2d 437 (1975)); *Fahnestock v. Reeder*, 223 F.Supp.2d 618, 625 (E.D. Pa. 2002) (adopting the above-quoted "cogent reasoning" from the *Adam*'s court).

As Petitioner has identified, there is a split in authority regarding exactly when waters are navigable such that admiralty jurisdiction is triggered. The Fourth Circuit

takes a more expansive view of navigability, applying the "navigational capacity" test, which does not require any present commercial use. The Fourth Circuit's view will mean that admiralty jurisdiction, and therefore its attendant body of law, will be applicable to more cases than those circuits which apply the "navigation in fact" test, which does require present commercial usage of a navigable waterway. Accordingly, because of the Fourth Circuit's broad expansion of federal admiralty jurisdiction and ensuing infringement of Maryland's long held interest in applying the contributory negligence doctrine, this Court's review is warranted to decide whether the so-called "navigational capacity" test or "navigation in fact" test is the law of the land.

II. This Court should grant the writ of certiorari to resolve the circuit split and hold that the navigability in fact test applies to admiralty jurisdiction nationwide

As Petitioner has stated, there is a circuit split regarding the test used to define navigable waters for admiralty jurisdiction purposes. The split turns on whether current commercial activity is required for a body of water to be considered navigable in the admiralty context.

In the Fourth Circuit, the navigational capacity test is applied. According to the Fourth Circuit, "[w]e have judged navigability based on a waterway's capability to bear commercial navigation." *Mullenix v. U.S.*, 984 F.2d 101, 104 (1993). Further, "[c]urrent uses of the waterway go to the issue of navigability but are not conclusive, so a purely recreational waterway can be navigable for

admiralty purposes[.]" *Id*. This view has been adopted by several circuits. *Aqua Log, Inc. v. Lost and Abandoned Pre-Cut Logs and Rafts of Logs*, 709 F.3d 1055 (11th Cir. 2013) (citing *Cunningham v. Dir., Office of Workers' Comp. Programs*, 377 F.3d 98, 108 (1st Cir. 2004) (noting that for admiralty-jurisdiction purposes, navigability is understood to describe a present capability of a waterway to sustain commerce); *LeBlanc v. Cleveland*, 198 F.3d 353, 359 (2d Cir. 1999) (looking to whether the waterway is "presently used, or is presently capable of being used, as an interstate highway for commercial trade" in determining whether it is navigable); *Finneseth v. Carter*, 712 F.2d 1041, 1044 (6th Cir. 1983) (considering whether the waterway "is used or capable or susceptible of being used as an interstate highway for commerce" when deciding whether it is navigable). Under this view, there does not need to be any present or recent commercial usage of a waterway for admiralty jurisdiction to properly attach. The mere capacity to sustain commercial usage is sufficient.

"Conversely, the Seventh, Eighth and Ninth circuits interpret the 'navigable waters' language as requiring 'contemporary navigability in fact." *Seymour v. U.S.*, 744 F. Supp. 1161, 1163 (S.D. Ga. 1990) (citing *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978); *Livingston v. United States*, 627 F.2d 165, 170 (8th Cir. 1980); *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975)). Specifically, these courts require contemporary commercial usage. *See Seymour*, 744 F. Supp. at 1163 ("I endorse the Eighth Circuit's realization that '[f]ederal admiralty jurisdiction had its genesis in the felt need to provide a uniform body of law governing navigation and commercial maritime activity. Admiralty law, as a

consequence, is concerned almost exclusively with the special needs of the shipping industry.").

This split in authority has raged for decades. *See Finneseth*, 712 F.2d at 1045 ("*Livingston* appears to be erroneously decided to the extent that it requires contemporary, current or present commercial maritime activity as a prerequisite for navigability under the admiralty laws. . . ."); *Three Buoys Houseboat Vacations U.S.A. Ltd. v. Morts*, 921 F.2d 775, 778 (1990) ("Thus, despite the criticisms express in *Finneseth v. Carter* . . . , and until Supreme Court authority to the contrary, *Livingston* remains the controlling authority in this court for the determination of what is a navigable waterway. The standard is one of 'contemporary navigability in fact.'"). This split in authority was encountered by the Eleventh Circuit in 2013, when that circuit overruled a district court which applied the navigation in fact test. *See Aqua Log, Inc.*, 709 F.3d at 1060.

A test which requires current commercial activity on a navigable waterway strikes the appropriate balance between protecting commercial maritime activity and respecting the ability of the states to regulate their own affairs by not applying substantive maritime law in the absence of actual commercial activity. The resolution of this circuit split in favor of the navigation in fact test warrants the issuance of a writ of certiorari at this time.

CONCLUSION

For the foregoing reasons, Respondents, Raymond C. Bostic and Candice M. Bateman, respectfully request that this Court issue a writ of certiorari.

Respectfully submitted,

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