

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**

REPLY BRIEF FOR PETITIONER

CHARLES B. PEOPLES
Counsel of Record
THOMAS, THOMAS & HAVER LLP
1025 Connecticut Avenue, NW,
Suite 608
Washington, DC 20036
(202) 945-9500
cpeoples@tthlaw.com

Counsel for Petitioner

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REASONS FOR GRANTING THE WRIT

In its Opposition to Petitioner, Coastline Commercial Contracting, Inc.’s, Petition for a Writ of Certiorari, Respondent, Baltimore Gas & Electric Company (“Baltimore Gas”), attacks the Petition for a Writ of Certiorari (the “Petition”) on the grounds that Petitioner failed to raise its navigability arguments before the Fourth Circuit, the Fourth Court found that Eli Cove was navigable in fact, that there is no real circuit split regarding the test for navigability in the admiralty context, and that state tort law does not apply to admiralty cases. As argued below, Baltimore Gas fails to offer any persuasive reason to deny review, and thus this Court should grant the Petition.

I. The jurisdictional issue has not been waived

Baltimore Gas first argues that, because Petitioner did not raise the “navigability in fact” test before the Fourth Circuit, that the issue is not properly before this Court. To begin with, subject-matter jurisdictional issues, like this one, can be raised at any time, whether or not preserved below. *Henderson v. Shinseki*, 562 U.S. 428, 434-35 (2011).

Regardless, the jurisdictional issue was raised below. The issue in this Petition is whether the federal courts have admiralty or maritime jurisdiction over this case, which necessarily includes the appropriate test to apply to determine as much. There was no need to raise the navigability in fact test before the District Court or the Fourth Circuit because the Fourth Circuit does not employ the navigability in fact test. Petitioner raised the broad issue of subject matter jurisdiction before

the District Court and the Circuit Court. Preservation “does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue.” *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000); *see also Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (“Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.”). Thus, because the issue of whether the United States District Court for the District of Maryland has admiralty jurisdiction over this case was heavily litigated both in the District Court and before the Fourth Circuit, any arguments that Petitioner decides to make regarding admiralty jurisdiction are properly before this Court. Baltimore Gas’s argument is thus invalid and unpersuasive.

II. The Fourth Circuit did not find Eli Cove navigable in fact

Baltimore Gas argues that the Fourth Circuit found that Eli Cove was navigable in fact because the Fourth Circuit found that “Coastline itself was engaged in commercial activity when it allegedly struck the underwater cable.”

Whether commercial activity was ongoing at the time of the incident is not the test for navigability in fact. Rather, the test is whether the body of water can be “generally and commonly” used for commercial purposes. *The Montello*, 87 U.S. 430, 442 (1874); *Adams v. Montana Power Co.*, 528 F. 2d 437, 439 (9th Cir. 1975); *George v. Beavark, Inc.*, 402 F. 2d 977, 980 (8th Cir. 1968); *In re Special Exploration Co., Inc.*, 2008 U.S. Dist. LEXIS

125772, *21 (N.D. Okla. Feb. 22, 2008). The Fourth Circuit did not make any finding about whether Eli Cove can be generally and commonly used for commercial purposes. The Fourth Circuit merely found that Eli Cove was being used for commercial activity at the time of the incident giving rise to the case.

Furthermore, as the District Court found, the fact that the incident giving rise to this case occurred is evidence that Eli Cove could not generally and commonly be used for commercial activity: it is not deep enough for even a small vessel to avoid Baltimore Gas's submerged cable, let alone legitimate commercial vessels. Under Baltimore Gas's reasoning, every body of water that had a pier, no matter the size or use, constructed on it would be navigable in fact because commercial activity occurred on the water at some point when the pier was constructed. The truth of the matter is that Eli Cove is a small shallow muddy cove surrounded by residential properties with residential piers incapable of generally and commonly supporting commercial activity. The Fourth Circuit never made any finding to the contrary.

III. A circuit split exists

Baltimore Gas argues that, because the language used by each circuit to define the test for navigable waters in the admiralty context is similar, no circuit split exists regarding whether present commercial use is required for a body of water to be considered navigable. However, this argument ignores both the practical effect of each circuit's decisions and the numerous legal scholars who have recognized and analyzed this circuit split over the past fifty years.

The navigability in fact test applied by the Seventh, Eighth, and Ninth Circuits holds that “absent some present or potential commercial activity, there is no ascertainable federal interest that justifies frustrating the legitimate interests of the states in providing a forum and applying their law to regulate conduct within their borders.” *Adams*, 528 F.2d at 439; *see Livingston v. United States*, 627 F.2d 165 (8th Cir. 1980) (“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”).

The navigability in fact test, in practice, extends admiralty jurisdiction only to waters on which commercial activity is commonly and generally occurring or is likely to occur. *See Seymour v. United States*, 744 F. Supp. 1161, 1164 (S.D. Ga. 1990) (finding that a lake was not navigable for admiralty purposes because the only commercial activity that occurred on the lake was the operation of several commercial marinas and there was no ferry boat service or other commercial shipping occurring); *Moeller v. Mulvey*, 959 F. Supp. 1102, 1107 (D. Minn. 1996) (finding that a river was navigable because it was “frequently used for travel between the United States and Canada[]” and was used by numerous resorts and fishing guides to transport customers and guests); *In re Grants Pass Jetboats, Inc.*, 492 F. Supp. 3d 1123, 1129 (D. Or. 2020) (finding that a river was navigable, despite several navigational difficulties at various sections of the river, because several companies operating large tour vessels carrying passengers up and down the river were operating on the river at the time of the incident).

The navigational capacity test applied by the First, Second, and Fourth Circuit, on the other hand, extends admiralty jurisdiction to a body of water that, “in its present configuration, constitutes a highway of commerce, alone or together with another body of water, between the states or with foreign countries over which commerce in its current mode is capable of being conducted.” *Alford v. Appalachian Power Co.*, 951 F.2d 30, 32 (4th Cir. 1991). This means that it is not necessary for a subject waterway to actually be used for commercial activity, only that the waterway be capable of use for commercial activity in its current configuration. *Price v. Price*, 929 F.2d 131, 134 (4th Cir. 1991).

In practice, the navigational capacity test used by the First, Second, and Fourth Circuits requires only that it be theoretically possible for commercial activity to occur on a body of water. See *Finneseth v. Carter*, 712 F. 2d 1041, 1044-45 (6th Cir. 1983) (holding that an interstate lake was navigable for purposes of invoking admiralty jurisdiction because of a showing of the lake’s capability or susceptibility for use as an interstate highway of commerce); *Price*, 929 F.2d at 135 (holding that “[a]lthough the Kerr Reservoir may not currently be used for commercial navigation, because it is capable of being used for purposes of transportation and commerce by customary modes of trade and travel on water, it is a navigable waterway for purposes of determining admiralty jurisdiction”); *Scarpa v. Precon Marine Inc.*, 2013 U.S. Dist. LEXIS 98520, at *12-13 (E.D. Va. July 10, 2013) (finding that a reservoir is not a navigable body of water because it is not connected to any other body of water and there was no evidence that the reservoir was capable of supporting commercial shipping).

Thus, there is a circuit split between the navigability in fact test applied by the Seventh, Eighth, and Ninth Circuits, which requires actual commercial activity be commonly and generally occurring or likely to occur, and the navigational capacity test used by the First, Second, and Fourth Circuits, which only requires that it be theoretically possible for commercial activity to occur on a body of water.

Numerous legal scholars have recognized and discussed this circuit split over the past fifty years. See John F. Baughman, *Balancing Commerce, History, and Geography: Defining the Navigable Waters of the United States*, 90 Mich. L. Rev. 1028 (1992); Mary Garvey Algero, *Ebb and Flow of the Tide: A Viable Doctrine for Determining Admiralty Jurisdiction or a Relic of the Past?*, 27 Seton Hall L. Rev. 138 (1996); *NOTES: Murky Waters: Another Questionable Navigability Determination and Ambiguity in the Definition of Commercial Shipping in United States v. McKee*, 48 Tul. Mar. L. J. 317 (2024); Joseph F. Smith, Jr., *Article: Choice of Law Analysis: The Solution to the Admiralty Jurisdiction Dilemma*, 14 Tul. Mar. L. J. 1 (1989).

Indeed, with respect to Baltimore Gas’s argument that there is no navigability in fact versus navigational capacity circuit split because the Seventh, Eighth, and Ninth Circuit all consider whether the body of water is “susceptible” of commercial use, just like other circuits, one of these scholars has explained that the cases use the word “susceptible” for different meanings. The navigability in fact Circuits use the word “susceptible” to mean “likely.” Baughman, *supra*, at 1043. The navigational capacity Circuits use the word “susceptible” to mean “physically capable.” *Id.* at 1046.

“Federal admiralty jurisdiction had its genesis in the felt need to provide a uniform body of law governing navigation and commercial maritime activity.” *Livingston*, 627 F.2d at 169. Because there is a significant circuit split regarding the proper test used to determine whether a body of water is navigable for admiralty jurisdiction purposes, this Court should take the opportunity to review this issue and establish a uniform national definition of navigable waters.

IV. Whether state tort law applies to admiralty cases is not at issue in this case

The final argument made by Baltimore Gas is that admiralty law, rather than state tort law, applies to admiralty cases. As stated in the Petition, Petitioner does not dispute or challenge the use of federal admiralty law to decide federal admiralty cases. Petitioner raises the encroachment on Maryland state tort law as a reason why the Fourth Circuit’s navigational capacity test is overbroad, and thus why Eli Cove should not be considered navigable in the first place. Baltimore Gas’s argument is thus inapplicable to the instant case.

CONCLUSION

It has been over one hundred years since this Court last took the opportunity to rule directly on the definition of navigable waters in the admiralty context. In the intervening century, the federal circuits have struggled with defining the outer boundaries of admiralty jurisdiction and have created several conflicting tests to determine whether a body of water is navigable. Countless cases and scholarly articles have discussed the existence

of this circuit split and ways to resolve it. This case offers this Court the perfect opportunity to resolve the circuit split and establish a national definition of navigable waters in the admiralty context.

For the reasons articulated herein, therefore, Petitioner, Coastline Commercial Contracting, Inc., respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

CHARLES B. PEOPLES
Counsel of Record
THOMAS, THOMAS & HAVER LLP
1025 Connecticut Avenue, NW,
Suite 608
Washington, DC 20036
(202) 945-9500
cpeoples@tthlaw.com

Counsel for Petitioner