

No. 17-1066

In the Supreme Court of the United States

REBECCA KOPRAS,
Petitioner,

v.

MARCO MARINE CONSTRUCTION, INC.,
Respondent.

*On Petition for Writ of Certiorari to the
District Court of Appeal of Florida, Second District*

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petitioner, REBECCA KOPRAS (“Petitioner”), has presented any compelling reasons to grant certiorari review over the trial and appellate courts’ correct application of the admiralty jurisdiction test set forth in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043 (1995), when dealing with a class of incidents involving vessels on navigable waters, engaged in a traditional maritime activity, which have sustained catastrophic structural damages at the location they are docked, and could pose a potential risk to maritime commerce?

CORPORATE DISCLOSURE STATEMENT

Respondent, MARCO MARINE CONSTRUCTION, INC. (“Respondent”), was a Florida corporation with its principal place of business in Marco Island, Florida at the time of the incident. It had no parent or publicly held company owning 10% or more of the Respondent’s stock.

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INTRODUCTION

Under this Court's Rule 10, there are narrow considerations when determining whether a Petition for Writ of Certiorari presents "compelling reasons" warranting discretionary certiorari review. The Petitioner's Petition for Writ of Certiorari fails to satisfy the Rule 10 considerations governing review on certiorari. Consequently, her Petition should be denied.

The crux of this case is whether an incident involving a boat that was lowered from its lift into navigable waters and began taking on water because of catastrophic structural damage to the hull could pose a potential risk to maritime commerce under the intermediate generality test set forth by this Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043 (1995). While Petitioner erroneously contends that the Circuits are divided as to the application of the *Grubart* test when dealing with a class of incidents, Respondent accurately contends that the trial and appellate courts correctly applied the *Grubart* test because there is no ambiguity among the Circuits or, in this particular case, the general maritime law applies when dealing with the class of incident at issue. In fact, ordinarily, "every tort involving a vessel on navigable waters falls within the scope of admiralty jurisdiction." *Grubart*, 513 U.S. at 543, 115 S. Ct. at 1053.

Further, it is well settled law that the class of incident at issue, incidents involving vessels docked on navigable water, which are partially submerged and unable to navigate because of structural damage, pose a potential risk to maritime commerce. Under *Grubart*, because this class of incident poses a potential risk to

maritime commerce, which may result in an obstruction to navigation and includes a threat of pollution, to safety or life, the general maritime law rather than state law governs in any resultant lawsuit. As further explained below, the cases cited in the Petition reached different outcomes in the application of the *Grubart* test only because those cases involve distinguishable classes of incidents. Unquestionably, the *Grubart* test is working properly and as intended by this Honorable Court.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioner's husband contracted Respondent to install a boatlift behind their home on Caxambas Bay, in Marco Island, Florida. The boatlift is attached to a dock. The dock is located on a navigable waterway that leads directly to the Gulf of Mexico with no impediments.

In 2010, maintenance workers lowered Petitioner's vessel into Caxambas Bay and it began taking on water. The workers raised the vessel and water poured out of several large holes in the hull. Water also poured out of the bilge back into Caxambas Bay. Petitioner's own expert testified that hull was so severely compromised that the vessel could sink and kill persons aboard causing a "catastrophic" "life saving event" while the vessel was at sea.

To repair the vessel, Petitioner arranged for a floating crane to lift the vessel from the boatlift and place it onto a barge. The barge then navigated from the Caxambas Bay, up the Gulf of Mexico to Caloosahatchee River, finally reaching its destination

in Fort Myers, Florida. Thus, the facts of this case involve a vessel docked on navigable waters that had severe structural damage, which could have caused a pollution or catastrophic lifesaving event, and did require salvage operations conducted over navigable waterways in order to remediate the damage.

II. LEGAL BACKGROUND

Over forty-five years ago, this Court developed a two prong test for admiralty jurisdiction. *Executive Jet Aviation Inc. v. City of Cleveland*, 409 U.S. 249, 258-61, 93 S. Ct. 493, 499-501 (1972). “[T]o invoke admiralty jurisdiction: (1) there must be a significant relationship between the alleged wrong and traditional maritime activity (the nexus requirement) and (2) the tort must have occurred on navigable waters (the location requirement).” Prior to *Executive Jet*, jurisdiction was generally determined by locality. *Thomas v. Lane*, 2 Sumn. 1; 23 F. Cas. 957, 960 (1833) (“In regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide”); *The Plymouth*, 70 U.S. 20, 36 (1865) (“The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality-the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.”)

As stated by former Justice Stewart in *Executive Jet*, “[d]etermination of the question whether a tort is ‘maritime’ and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not.” *Executive Jet*, 409 U.S. at 253, 93 S. Ct. at 497. Notwithstanding the existence of the “locality” test for jurisdiction, the test had become riddled with exceptions and the Court noted that “there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.” *Id.* at 261, 93 S. Ct. at 501. For the first time, a “nexus” requirement became a mandated part of the analysis for admiralty jurisdiction.

After the decision in *Executive Jet*, there was some confusion as to whether it was limited to aviation cases or would be part of the analysis for the application of admiralty jurisdiction in all cases. There was also an issue as to whether “traditional maritime activity” required for satisfaction of the “nexus” prong of the jurisdiction test needed to be commercial in nature. This was clarified in *Foremost Ins. Co. et al. v. Richardson et al.*, 457 U.S. 668, 660, 102 S. Ct. 2654, 2655 (1982), which arose from a collision between two pleasure boats on the Amite River in Louisiana.

First, the Court noted that the *Executive Jet* requirement that the wrong have a significant connection with traditional maritime activity is not limited to the aviation context. *Id.* at 674, 102 S. Ct. 2658. The Court then stated that “[b]ecause the ‘wrong’ here involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court.” *Id.* at 674, 102 S. Ct. at 2658. Rather than analyzing the direct impact on commerce by a collision of pleasure crafts in a remote Louisiana waterway, the Court analyzed the collision as though it had occurred on a busy waterway with commercial traffic stating “if these two boats collided at the mouth of the St. Lawrence Seaway, there would be a substantial effect on maritime commerce.” *Id.* at 675-676, 102 S. Ct. at 2654, 2658-2659.

Without saying so in so many words, the Court applied the same analysis it subsequently formalized in *Grubart*. That is, the Court looked to the general characteristics of the incident, a collision between two pleasure vessels on navigable waters, and the potential for such a collision to impact maritime commerce. The Court then extrapolated the potential impact on maritime commerce of such an incident if, instead of it occurring in a remote Louisiana waterway, the incident had occurred in one of the busiest waterways, the St. Lawrence River.

Next, in *Sisson v. Ruby et al.*, 497 U.S. 358, 359-360, 110 S. Ct. 2892, 2894-2895 (1990), the Supreme Court was faced with determining whether the admiralty jurisdiction test was satisfied after a vessel stored at a

marina caught fire. When evaluating the nexus prong of the admiralty jurisdiction test, the *Sisson* court noted that because the general features of a fire made it so the fire could spread to other boats or make the marina inaccessible, potential impact on maritime commerce existed. *Id.* at 362, 110 S. Ct. at 2895. Only the general features of the incident, not the actual effects or particular facts, were relevant to a court's evaluation. *Id.* As a result, the fact that the fire did not spread to any other vessels or actually make the marina inaccessible was immaterial. *Id.*

In its most recent clarification on the admiralty jurisdiction test, *Grubart*, 513 U.S. at 530, 115 S. Ct. at 1047, this Court explained that the appropriate level of scrutiny should examine the potential impact on maritime commerce. In *Grubart*, a company retained to replace pilings that compromised the structural integrity of a tunnel, which resulted in flooding, was sued. *Id.* The weakening of the tunnel took place on navigable waters because the pilings were removed and installed on navigable waters. *Id.* at 534, 115 S. Ct. at 1048.

The *Grubart* decision provided a comprehensive and instructive analysis of the admiralty jurisdiction test in its entirety. The court cautioned against examining a case under such a high level of generality that would remove any maritime connection. *Id.* at 541-542, 115 S. Ct. at 1052. For example, "pile driving near a bridge" is too general. *Id.* at 541, 115 S. Ct. at 1052. The Court clarified that *Sisson* should not be construed as providing a vehicle to eliminate admiralty jurisdiction. *Id.* at 541, 115 S. Ct. at 1052.

Instead, the Court in *Grubart* reiterated that the general features of the incident should be considered rather than the specific facts associated with the incident. *Id.* Courts should look to whether the incident poses more than a fanciful risk to a potential or nearby commercial navigation. *Id.* at 539, 115 S. Ct. at 1051. The “general features” of *Grubart* were described as “damage by a vessel in navigable water to an underwater structure” *Id.*

Following *Grubart*, federal Circuit Courts of Appeals have uniformly interpreted the requisite level of scrutiny as “neither too general to distinguish different cases nor too specific to the unique facts of the particular case.” *Tandon v. Captain’s Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 247 (2d Cir. 2014). This requires looking through a lens of intermediate generality to determine “whether the incident could be seen within a class of incidents that pose more than a fanciful risk to commercial shipping.” *Id.* In so doing, courts must not look to the particular facts of the case, but rather to whether similar occurrences are likely to be disruptive. *Id.* As further set forth below, courts have had no problem applying this standard to the class of incident at issue.

III. PROCEEDINGS BELOW

Petitioner’s Complaint in the trial court sought damages for repair costs as well as for the vessel’s loss of use and diminution of value under Florida law. At the summary judgment stage of the proceeding, Respondent argued that the lawsuit was governed by the general maritime law and Petitioner’s damages were limited to the cost of repairs. Respondent’s motion for summary judgment was denied and the case

went to trial under state law, but ultimately a mistrial was declared. After the mistrial, Respondent renewed its motion for summary judgment on the application of the general maritime law and the trial court reversed its previous decision. Petitioner subsequently appealed the trial court's holding that the general maritime law governed this case to the Florida Second District Court of Appeal. The parties briefed their positions and requested an oral argument, which was heard on August 23, 2017. On September 1, 2017, a mere one week after oral arguments, the appellate court affirmed the lower court decision *per curium*.

REASONS FOR DENYING CERTIORARI

I. PETITIONER HAS FAILED TO ESTABLISH A BASIS UNDER RULE 10 TO PERMIT CERTIORARI REVIEW.

Petitioner has failed to establish a “compelling reason” justifying this Court’s exercise of discretionary review on certiorari. First and foremost, Florida’s Second District Court of Appeal did not decide “an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals,” as required by Rule 10(b) of the Rules of the Supreme Court of the United States. Petitioner has likewise failed to satisfy the criteria for certiorari review under Rule 10(c) because the state courts below neither (1) “decided an important question of federal law that has not been, but should be, settled by this Court,” nor (2) “decided an important federal question in a way that conflicts with relevant decisions of this Court.”

Thus, Petitioner has not triggered this Court's discretionary certiorari review, the purpose of which was succinctly stated by former Justice Scalia over a decade ago: "Our principal responsibility under current practice . . . and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions, *see* Art. III, § 2, cls. 1 and 2, is to ensure the integrity and uniformity of federal law." *Kansas v. Marsh*, 548 U.S. 163, 183, 126 S. Ct. 2516, 2530, 165 L.Ed.2d 429 (2006) (Justice Scalia, concurring). "As the Court has observed in the past, 'it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" *Powell v. Nevada*, 511 U.S. 79, 86-87, 114 S. Ct. 1280, 1285, 128 L.Ed.2d 162 (1994) (Justice Thomas, with whom Chief Justice Rehnquist joined, dissenting); *see also Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857, 114 L.Ed.2d 385 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

Moreover, certiorari review should not be granted because Petitioner is, contrary to Rule 10, improperly challenging the lower courts' application of the *Grubart* standard for determining if general maritime law governs an action. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."); *see also Salazar-Limon v. City of*

Houston, Tex., — U.S. —, 137 S. Ct. 1277, 1278, 197 L.Ed.2d 751 (2017) (Justice Alito, with whom Justice Thomas joined, concurring in the denial of certiorari) (“[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case.”). Accordingly, the Petition for Writ of Certiorari should be denied.

II. THE DECISION OF FLORIDA’S SECOND DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH THE SECOND, THIRD OR NINTH CIRCUITS’ DECISIONS CITED BY PETITIONER BECAUSE THOSE CASES ALL INVOLVE DIFFERENT CLASSES OF INCIDENTS.

Petitioner incorrectly and improperly attempts to create a conflict between the decision of Florida’s Second District Court of Appeal and the decisions of several federal Circuit Courts of Appeals. As further set forth below, the opinions cited by Petitioner all involve different classes of incidents making any holdings or rule of law enunciated in those cases inapplicable to this matter. Here, the general features of the incident before the Court can best be described as a vessel docked on navigable waters, which sustained severe structural damage that inhibits its ability to navigate. Such a description accurately captures the general nature of the event, yet it is not so fact specific as to isolate it from other similarly situated occurrences.

Inapposite to the mandates of *Grubart*, Petitioner originally focused narrowly on the incident’s specific facts at both the trial and appellate courts. In

recognition of this error, in her Petition for Writ of Certiorari, Petitioner has now analyzed cases under a broader lens. However, the view Petitioner has adopted, one where the class of incidents involves a fixed or retrained vessel with “self contained” transitory dangers, is too broad. Due to this overbreadth, Petitioner has alleged “conflicts” among the Circuits in their application of the *Grubart* test that are not in fact conflicts when applying the appropriate level of generality to the incident. As previously stated, the class of incident at issue is one where a vessel docked on navigable waters sustained severe structural damage that inhibits its ability to navigate. None of the cases cited by Petitioner fall into this class of incident.

By way of illustration, the Second Circuit’s decision in *Tandon v. Captain’s Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 240 (2d Cir. 2014), involved a fist fight on a floating dock. The court stated that the incident was “best described as a physical altercation among recreational visitors on and around a permanent dock surrounded by navigable water.” *Id.* at 249. The “class of incident” was a fight on a permanent dock. *Id.* at 249-250. The incident in *Tandon* did not satisfy the *Grubart* test because it could not have created an obstruction to the free passage of ships, did not involve a sinking structure or cause any immediate damage to nearby vessels. *Id.* As it stands, *Tandon* is completely factually distinguishable from this case because it involved a tort that originated on land. There was no structural damage to a vessel on a navigable waterway that rendered the vessel inoperable and dangerous.

Interestingly, the *Tandon* court found that, had the same incident occurred on a vessel (a situation more analogous to the case at bar), it would have satisfied the *Grubart* test. *Id.* Had the fight occurred at sea, it could have resulted in the diversion of the vessel to get medical care, which could place the vessel at a higher risk of colliding with another vessel or alliding with a dock. *Id.* Thus, the potential disruption to navigation and/or risk to other surrounding vessels steered the court's assessment of the general features of the incident. This reasoning is consistent with the Florida Second District Court of Appeal's application of the general maritime law to this matter.

In *Hargus v. Ferocious and Impetuous, LLC*, 840 F.3d 133, 135 (3d Cir. 2016), a group of individuals on a boat trip anchored and then waited into shore. The plaintiff stayed on the boat. *Id.* One of the individuals from shore threw a cup at the plaintiff and the plaintiff was injured. *Id.* The court described the class of incident as one involving the throwing of "a small inert object from land at an individual onboard an anchored vessel." *Id.* at 138. Accordingly, the court found that this class of incident does not threaten or have a disruptive effect on maritime commerce since the tort originated on land and does not have the potential of disrupting navigation, damaging nearby vessels, or causing a vessel to divert from its course. *Id.*

Like *Tandon*, the *Hargus* incident involved a tort that initiated on land. However, unlike the instant case, the *Hargus* incident did not involve any structural damage to a vessel that was rendered unable to navigate and partially submerged. Based on the

foregoing factual distinctions, this case is not in conflict with the *Hargus* decision.

H20 Houseboat Vacations Inc. v. Hernandez, 103 F.3d 914, 915 (9th Cir. 1996), involved an incident where a family rented a houseboat, closed the windows, went to sleep and awoke with carbon monoxide poisoning. In analyzing whether the incident could potentially impact maritime commerce, the court classified the danger as “the emission of carbon monoxide fumes inside a contained spaced within a houseboat tied to the shore.” *Id.* at 916. The fumes dissipated immediately. *Id.* The court then concluded there could not be any ancillary disruption of maritime activity. *Id.*

Unlike the class of incident in *H20*, the trial and appellate courts here found that the class of incident could create an ancillary disruption of maritime activity because of severe structural damage to a vessel that became partially submerged. In contrast to the instant case, *H20* involved a transitory condition that resolved itself upon simply opening up an enclosed space. *Id.* The case at bar involved an incident that required the removal of the vessel by a barge with a floating crane. Unquestionably, *H20* involved a factually distinct class of incident and is, therefore, not in conflict with the trial and appellate courts below.

Similarly, *Peru v. USS Missouri Mem’l Ass’n, Inc.*, 207 Fed. App’x. 843, 844 (9th Cir. 2006), is not in conflict with the trial and appellate courts’ decisions here. *Peru* does not involve severe structural damage that caused partial submersion of a vessel in a navigable waterway. *Id.* at 843-845. In *Peru*, a tourist was injured while ascending a ladder on board the

naval-historical museum located inside the USS Missouri. *Id.* at 844. The Ninth Circuit analyzed *Grubart* and concluded that the case did not fall under admiralty jurisdiction. *Id.* This class of incident, a fall on a museum ship, did not have a potential impact on maritime commerce. *Id.* at 844-845.

Critically, the “vessel” involved in *Peru* was a “museum-ship,” which is not a typical vessel. *Id.* at 844. A “museum-ship” is a structure that used to be a functional ship before converted into a museum for educational and memorial purposes. https://en.wikipedia.org/wiki/Museum_ship (last visited March 28, 2018). Only some are still capable of movement. *Id.* The USS Missouri, however, was decommissioned, removed from the Naval Vessel Register service in 1995, donated to the nonprofit USS Missouri Memorial Association of Honolulu and has achieved status on the National Register of Historic Places. [https://en.wikipedia.org/wiki/USS_Missouri_\(BB-63\)](https://en.wikipedia.org/wiki/USS_Missouri_(BB-63)) (last visited March 28, 2018). The National Register of Historic Places list districts, sites, buildings, structure and objects deemed worthy of preservation for historical significance. https://en.wikipedia.org/wiki/National_Register_of_Historic_Places (last visited March 28, 2018). This kind of “ship” is analogous to a waterfront structure preserved in the form of a “ship” for historical reasons only, as opposed to the type of vessel that could potentially create an impact on maritime commerce under the *Grubart* test. The incident here had no structural impact on the “vessel”.

Petitioner’s reliance on *White v. United States*, 53 F.3d 43 (4th Cir. 1995) is misplaced. There is no conflict between *White* and the case before the Court,

both having found admiralty jurisdiction to exist. *Id.* at 47. Further, *White* is also factually distinguishable from the Second, Third and Ninth Circuit decisions upon which Petitioner relies. In *White*, a security guard stumbled on a gangway and sustained an injury. *Id.* at 44. The court described the class of incident as one where a person is injured while disembarking from a vessel docked on navigable water. *Id.* at 47. The court found that under *Grubart*, the inability to avail oneself of the gangway and its appurtenances would greatly inhibit a variety of activities essential to commercial shipping, more specifically loading, resupply, and the coming and going of crew and contractors. *Id.* Incidents involving gangways have long been held to be governed by the general maritime law. *The Admiral Peoples*, 295 U.S. 649, 650 (1935). The mere raising of *White* shows Petitioner's total lack of understanding of the general maritime law.

Furthermore, Petitioner's total lack of understanding the basis for Supreme Court certiorari review is also illustrated by her reliance on two federal district court decisions, *Boudwin v. Hastings Bay Marina, Inc.*, 4:07CV00299 JLH, 2008 WL 2741557, at *3 (E.D. Ark. July 11, 2008), and *In re Houseboat STARSHIP II*, 2:05-0086, 2005 WL 3440788, at *2 (M.D. Tenn. Dec. 12, 2005). Even if these decisions are in conflict with the decisions made in the instant case, which Respondent expressly denies, district court decisions do not trigger the conflict basis for certiorari review. Rule 10(b) requires a decision from a state court of last resort on an important federal question that conflicts with the decision of another state court of last resort or of a United States court of appeals, and does not apply to conflicting decisions among federal

district courts or between a United States Court of Appeals and a federal district court.

As to the substance of the purported conflict arising from the foregoing federal district court decisions, Petitioner asserts that *Starship* creates a conflict with *H20*. *H20* is clearly distinguishable from *Starship* because, despite the contained nature of the incident, the vessel in *Starship* was in the midst of commercial travel at the time of the carbon monoxide incident, which, therefore, clearly impacts commercial navigation. *Starship*, 2005 WL 3440788, at *2. The other self-contained incident referenced by Petitioner purportedly in conflict with *H20* occurred in *Boudwin*. *Boudwin* involved a person slipping on a vessel that was being shown to sell and is not the same type of commerce contemplated under the *Grubart* test. *Boudwin*, 2008 WL 2741557, at *3. Again, neither *Starship* nor *Boudwin* are in conflict with *H20* or the instant case because of critical factual distinctions.

III. THE DECISION OF FLORIDA'S SECOND DISTRICT COURT OF APPEAL IS CONSISTENT WITH THE REPORTED BOATLIFT CASES APPLYING *GRUBART*.

The decisions Respondent has found involving boatlifts on navigable waterways, *Hupp v. Danielson*, 2013 WL 3208588, *3-4 (S.D. Tex. June 24, 2013); *Parker v. Darby*, 109 F. Supp. 3d 1347, 1348 (M.D. Fla. 2015); *Burke v. Quick Lift, Inc.*, 464 F. Supp. 2d 150 (E.D.N.Y. 2006), arose in three district courts from three different federal circuits and uniformly held that admiralty law applied. In applying the *Grubart* test, all three decisions consistently and conclusively determined that incidents involving boatlifts over

navigable waterways could impact maritime commerce. *Id.* The general maritime law is accordingly unified that incidents involving boatlifts over navigable ways satisfies the *Grubart* test. *Id.* Conspicuously absent from Petitioner's Petition for Writ of Certiorari is any contrary authority involving boatlifts over navigable waterways.

The most extensive jurisdictional analysis of an incident occurring while a pleasure boat was on a lift was conducted by the Southern District of Texas in *Hupp*. The plaintiff in *Hupp* kept his boat on a lift on a canal behind his house and was injured while cleaning the boat when a beam on the lift failed. *Hupp*, 2013 WL 3208588 at *1. The court examined whether “the general features of the incident, projected to the busiest of commercial waterways, would likely disrupt commercial activity” and found “a potentially disruptive impact.” *Id.* at *4. These potential disruptions included personnel responding to the incident and visual distraction to vessels near the incident site. *Id.* The *Hupp* court stated “a malfunctioning boat lift poses a threat to boats in its vicinity, which may cause a disruption to maritime commerce if the boat were located on a busy seaway” and concluded that the incident met the *Grubart* test. *Id.*

In *Parker*, 109 F. Supp. 3d at 1348, the Middle District of Florida examined *Grubart* after the plaintiff sustained an injury while cleaning and maintaining a boat suspended on a boatlift behind a home. The court found *Sisson* instructive and kept its analysis succinct. *Id.* Because the incident involved an injury on a vessel,

the general features of the incident could potentially disrupt maritime commerce. *Id.*

Finally, the New York district court in *Burke* was faced with evaluating *Grubart* after a boat owner sustained personal injuries when a boatlift davit malfunctioned. *Burke*, 464 F. Supp. 2d at 154. In finding that the *Grubart* test was satisfied, the *Burke* court looked broadly at the “class of incidents” that the actual incident fell within. *Id.* at 155. It then determined that the “improper installation, and subsequent failure, of a device designed to lift small boats from the water . . . poses more than a fanciful risk of disrupting commercial activity at ports on waterways.” *Id.* at 156. This “class of incident” could result in the deploying of emergency medical personnel, which carries a potential risk to disrupt maritime commerce. *Id.*

Consistent with *Grubart*, the *Hupp*, *Parker* and *Burke* opinions did not analyze any specific disruptive impact those incidents actually had on maritime commerce. *Hupp*, 2013 WL 3208588, at *3-4; *Parker*, 109 F. Supp. 3d at 1348; *Burke*, 464 F. Supp. 2d 153-156. Instead, each case analyzed the general characteristics of the event and the possibility such an event could have a disruptive impact on maritime commerce, even if in a different setting such as a busy seaway as described in *Hupp* or the St. Lawrence Seaway as utilized in *Foremost*. *Id.*; *See Foremost*, 475 U.S. at 675, 102 S. Ct. at 2658.

With that in mind, the trial and appellate courts in the instant case recognized the obvious potential disruptive impact of the incident at issue on maritime commerce. In particular, the bunks actually broke and

caused catastrophic fractures to the hull, which rendered the vessel unnavigable, and the boat began to take on water and partially submerged. While maintenance men were responsible for lowering the vessel in the water under the actual facts, Petitioner and her family could have been the ones lowering the vessel into the water. In that case, had they taken the vessel out prior to it partially submerging, per Petitioner's own expert, there could have possibly been a "catastrophic" "life saving" event that most certainly, at a minimum, would have required rescue and salvage. As it stands, in order to fix the vessel, Petitioner had to hire a barge with a floating crane to move the vessel onto the barge and transport it over the seas to the repair facility. Additionally, based on the bilge water spilling into the Bay, there could have been a pollution event. Each of these issues are far from the "remote, fanciful" risk discussed in *Grubart*. Instead, each constitute a real and possible disruptive impact on maritime commerce, which makes the application of the general maritime law to this case conclusively appropriate.

Importantly, these potential disruptions were argued before the trial and appellate courts and both courts correctly found Respondent's argument meritorious. In those proceedings, Petitioner did not present any persuasive arguments suggesting a ruling to the contrary is appropriate. Similarly, here, Petitioner has not set forth any persuasive arguments that suggest that the facts or law at issue make it appropriate for certiorari review. At best, her Petition for Writ of Certiorari constitutes an improper challenge to an alleged misapplication of a properly stated rule of law, an allegation which Respondent expressly denies.

IV. THE ADMIRALTY JURISDICTION TEST SET FORTH IN *GRUBART* DOES NOT REQUIRE ANY CLARIFICATION OR REFINING.

Unlike the issues presented in *Executive Jet*, *Foremost* and *Grubart*, no nuances of the admiralty jurisdiction test will be defined by this Court granting certiorari review here. In addition to the class of incidents presented by this case lacking any nuance that would aid in the application of the admiralty jurisdiction test, Petitioner's claim that commentators have called for the re-examination of *Grubart* is somewhat a red herring argument because it has no connection to the grounds for granting discretionary certiorari review under Rule 10. A petition for writ of certiorari should only be granted if there is a compelling reason to do so. While academic scholars may identify inconsistencies in the application of the *Grubart* test due to "result oriented judges," as demonstrated through this Response, none of the cases cited by Petitioner demonstrate "result oriented" decisions. Likewise, the trial and appellate courts analyzed this case based on the very well settled application of *Grubart* to the particular class of incidents at issue. Accordingly, Petitioner has not submitted any arguments establishing that certiorari review is appropriate here and her Petition for Writ for Certiorari should be denied.

CONCLUSION

For the reasons stated above, Respondent MARCO MARINE CONSTRUCTION, INC. respectfully submits that the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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