

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
Florida Second District Court of Appeal

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
REPLY BRIEF FOR PETITIONER.....	1
I. The intercircuit conflict exists.....	2
II. Respondent does not dispute the importance of the question presented or that this case provides an ideal vehicle to decide that question.....	7
III. The decision below is incorrect on the merits.	8
CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases

<i>Executive Jet Aviation, Inc. v. City of Cleveland</i> , 409 U.S. 249 (1972)	2
<i>H2O Houseboat Vacations Inc. v. Hernandez</i> , 103 F.3d 914 (9th Cir. 1996)	5, 6
<i>Hargus v. Ferocious & Impetuous, LLC</i> , 840 F.3d 133 (3d Cir. 2016)	4
<i>Hicks v. BP Exploration & Production, Inc.</i> , No. 17-2275, 2018 WL 1635694 (E.D. La. Apr. 5, 2018)	8
<i>Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.</i> , 513 U.S. 527 (1995)	2, 11, 12
<i>Peru v. USS Missouri Mem’l Ass’n, Inc.</i> , 207 Fed. App’x 843 (9th Cir. 2006)	6
<i>Tandon v. Captain’s Cove Marina of Bridgeport, Inc.</i> , 752 F.3d 239 (2d Cir. 2014)	4
<i>The Admiral Peoples</i> , 295 U.S. 649 (1935)	7
<i>White v. United States</i> , 53 F.3d 43 (4th Cir. 1995)	6, 7

Other Authorities

United States Coast Guard, *2015*

Recreational Boating Statistics

(May 13, 2016), [https://bit.ly/ 2H3eZqG](https://bit.ly/2H3eZqG)

(last visited Apr. 7, 2018).....8

REPLY BRIEF FOR PETITIONER

Respondent implicitly recognizes that it would be appropriate for this Court to grant certiorari if an intercircuit conflict exists. Indeed, respondent makes little, if any, attempt to counter petitioner's explanation of why this case both raises an important issue of maritime law with significant federalism implications and also provides an ideal vehicle for clarifying the boundaries of admiralty jurisdiction.

Respondent devotes almost all of its energy to denying the existence of a circuit conflict. As part of that effort, respondent recharacterizes the incident's general features here and in the conflicting cases to ignore the feature common to each incident—i.e., that every incident occurred on a restrained vessel—even though that was the distinguishing feature for the Second, Third, and Ninth Circuits between potential maritime disruptions and mere fanciful ones. Respondent then declares victory (at 10) because, alas, no conflict exists since the cases “all involve different classes of incidents”

That rationale reflects the confusion and discord playing out among federal courts over how to properly apply *Grubart's*

potential-disruption test.¹ By simply redefining the general features in the conflicting cases to ignore the common features that pose similar risks, courts could whimsically conclude that any incident has a potential to disrupt maritime commerce, even in fringe cases like this one that do not involve “‘claims for cargo damage, collision, seamen’s injuries and the like—all well and comfortably within the [admiralty] circle’” *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 255 (1972) (citations omitted). This Court’s intervention is thus necessary to restore uniformity to the proper application of the *Grubart* potential-disruption test.

I. The intercircuit conflict exists.

Respondent denies that a conflict exists between the Second, Third, and Ninth Circuits on the one hand and the court below and the Fourth Circuit² on the other hand. Respondent anchors its arguments

¹ *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 538–39 (1995).

² Respondent argues (at 14–15) that “[t]here is no conflict between [the Fourth Circuit] and the case before the Court” Petitioner never asserted such a conflict. This case is consistent with the Fourth Circuit’s application of *Grubart*, but both of them are in conflict with the Second, Third, and Ninth Circuits’ application. (Pet. 12–17).

against the conflict's existence on three mischaracterizations.

1. Respondent characterizes the petition (at 9–10, 20) as challenging merely the lower courts' misapplication of *Grubart's* “well-settled” standard for determining when maritime law applies. That is incorrect. The conflict is not that the court below misapplied *Grubart's* potential-disruption test, but that its (and the Fourth Circuit's) application of that test directly conflicts with the Second, Third, and Ninth Circuits' application, especially when the tort occurs on—and all harm is contained to—a restrained vessel (or other floating object). In other words, the conflict concerns how to describe the incident at an “intermediate level of generality” and then how many stackable inferences are acceptable for differentiating “realistic” potential maritime risks from “fanciful” risks.

2. Respondent next recharacterizes (at 10–15) the circuit-court decisions to disclaim the conflict as simply involving different classes of incidents. That recharacterization fails, however, because it either highlights the conflict or is based on features unrelated to those courts' reasoning.

For example, respondent's discussion of *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 249 (2d Cir. 2014) (at 11–12), highlights the distinction

between an incident on a “permanent dock surrounded by navigable water”—which posed no realistic risk to maritime commerce—and one “on a vessel that is at sea” *Id.* at 249–50. An incident involving a vessel secured in a boat lift out of the water (as depicted in the photographs at Pet. a13–a15) is more like a permanent-dock incident than a vessel-at-sea incident.

For *Hargus v. Ferocious & Impetuous, LLC*, 840 F.3d 133, 137 (3d Cir. 2016), respondent (at 12–13) focuses on the incident’s having begun on land and having not damaged the vessel as the relevant features. The lack of vessel damage formed no part of the *Hargus* court’s reasoning. Nor has any case mechanically held that all vessel-damage incidents are necessarily subject to admiralty jurisdiction (as respondent seems to suggest at 12). And while *Hargus*’s description did refer to “throwing an inert object from land,” the no-disruption conclusion did not turn on where the tort began; indeed, the location requirement was assumed. But even if the court’s conclusion had turned on where the tort began, that factor would not render *Hargus* distinguishable because, in this case, the tort began *and ended* while the vessel was out of the water, secured in a boat lift that was part of a dock affixed to land. (Pet. a13).

Respondent's description of the two Ninth Circuit decisions (at 13–14) also focuses on features irrelevant to that court's conclusions. The key factor in *H2O Houseboat Vacations Inc. v. Hernandez*, 103 F.3d 914, 916–17 (9th Cir. 1996), was not the “transitory” nature of the “condition” (Br. Op. 13), but the fact that the incident was “contained” to a “houseboat tied to the shore” (103 F.3d at 916) and the court's refusal to ignore the “actual” incident by stacking inferences (*id.* at 916–17). Similarly, the court in *Peru v. USS Missouri Mem'l Ass'n, Inc.*, 207 Fed. App'x 843, 844 (9th Cir. 2006), did not discuss whether the *USS Missouri* constituted a vessel. It found admiralty jurisdiction inapplicable solely because harm from a defective ladder within a moored ship could not possibly spread outside the ship to disrupt maritime commerce. *Id.*

Finally, respondent contends (at 14–15) that *White v. United States*, 53 F.3d 43, 46–47 (4th Cir. 1995), does not conflict with the three circuits above because it was based on the precedent established in *The Admiral Peoples*, 295 U.S. 649, 650 (1935), that incidents involving gangways fall within admiralty. Although *Admiral Peoples* controlled *White*'s “location” analysis, it was not relevant to the Fourth Circuit's potential-disruption analysis (which is

unsurprising, given that this Court decided *Admiral Peoples* long before adopting the two-part connection test). *White*, 53 F.3d at 47. The conflict is in that analysis since a person stumbling while disembarking from a moored vessel is fundamentally identical to the incidents in *Tandon*, *H2O*, and *Peru*: All involve self-contained incidents on a fixed vessel that, according to the latter cases, pose no realistic maritime risks.

3. Respondent also misunderstands (at 15–16, 20) petitioner’s use of scholarly commentary and federal district court decisions. Of course they are not part of the conflict. The scholarly commentary simply shows that academic experts have recognized the intercircuit conflict. And the district court decisions serve to illustrate the widespread confusion over the proper application of *Grubart*’s potential-disruption test, especially in the context of restrained vessels.³ In fact, the confusion continues as shown by the district court decision announced less than two weeks ago in *Hicks*

³ Respondent itself notably used three district court cases (at 16–18) to argue that uniformity exists in applying *Grubart* to boat-lift cases. But those cases differ on the key feature at the heart of the conflict: They all involve vessels or persons falling *unrestrained* from the boat lift, not vessels resting securely in the lift before, during, and after the damage-causing incident.

v. BP Exploration & Production, Inc., No. 17-2275, 2018 WL 1635694, at *7–*8 (E.D. La. Apr. 5, 2018), which held that there was no realistic threat to maritime commerce from an incident involving a worker transfer between a fixed platform and a moored vessel on the Outer Continental Shelf in the Gulf of Mexico.

II. Respondent does not dispute the importance of the question presented or that this case provides an ideal vehicle to decide that question.

Having an unambiguous, clear-cut method to ascertain—at the beginning of a case—whether a federal court has admiralty jurisdiction is essential. (*See* Pet. 20–22). Aside from the constitutional implications, clear jurisdictional rules avoid unnecessary surprises late in a case on threshold issues, which simply waste resources and discourage early settlements.

The need to establish clear jurisdictional rules is so well-recognized that respondent did not dispute the importance of the question presented. Nor could respondent plausibly do so, given that it spent almost two years actively litigating under Florida law before realizing that it might have an argument that maritime law applied. The issue was also no easier to resolve once respondent finally raised it, given that the

trial court initially found under *Grubart* that the relevant incident posed no realistic potential to disrupt maritime commerce.

This case provides an ideal vehicle to clarify *Grubart*'s potential-disruption test because the scope of admiralty jurisdiction is the only remaining merits issue and because the facts here are not only straightforward and undisputed, but are also typical of countless incidents that occur on the border between land and navigable water. Virtually any of the nation's almost 12 million recreational boat owners⁴ could face exactly the situation that confronted petitioner. And accidents routinely happen on—and are confined to—moored vessels, as shown in many of the cases cited here and in the petition.

III. The decision below is incorrect on the merits.

As part of its argument against the conflict, respondent suggests (at 18–19) that the court below was correct on the merits. Although a full merits discussion is currently premature, it is worth noting that respondent's merits argument—like its effort to avoid the conflict—is based on its

⁴ United States Coast Guard, *2015 Recreational Boating Statistics* (May 13, 2016), <https://bit.ly/2H3eZqG> (last visited Apr. 7, 2018).

recharacterizing the general features of the underlying incident. That recharacterization has at least two flaws.

First, the principal issue here is how to describe an incident's general features at *Grubart's* "intermediate level of generality" when the harm is contained to a restrained vessel. By artificially recharacterizing the incident to include a potential disruption to maritime commerce, respondent assumes its desired conclusion—i.e., that admiralty applies.

Second, to create its desired potential to disrupt maritime commerce, respondent's recharacterization includes post-incident features. The incident at issue was the tort that respondent committed in negligently damaging petitioner's vessel, and that tort was completed while the vessel was on the boat lift out of the water. But when respondent characterizes the incident, its description includes (at 1 & 18–19), for example, the vessel's lowering into the water and becoming "partially submerged." Under this case's undisputed facts, respondent can only be referring to when the vessel, while secured to the boat lift, was partially lowered into the water and then immediately lifted out of the water. (*See* Pet. 5). Although that action led to the incident's discovery, the incident itself had already

been completed some time before (while the vessel rested securely in the boat lift).

To illustrate the flaw in respondent's description, consider this Court's description of the *Grubart* incident: "damage by a vessel in navigable water to an underwater structure." 513 U.S. at 539. The Court focused on the defendant's tortious conduct that caused the damage—not the incident's discovery months later when the basements of downtown Chicago were flooded. *Id.* at 530, 538. Similarly, the incident here was not the eventual discovery of the damage when the vessel was partially submerged after being lowered into the water, but rather the boat lift's damaging the vessel while it rested securely in the boat lift.

If a litigant could claim admiralty jurisdiction based on events that might happen long after a defendant's tortious conduct had concluded, *Grubart*'s potential-disruption test would become irrelevant. For example, if a rowboat on a trailer suffers hull damage in a traffic accident on an interstate highway, and the damage is discovered only when the boat and trailer are eased into the water at a boat ramp a week later, then even the traffic incident would have the potential to disrupt maritime commerce under respondent's expansive theory.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,
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