In the

Supreme Court of the United States

REUBIN O'D. ASKEW, et al.,

Appellants,

v.

No. 71-1082

THE AMERICAN WATERWAYS OPERATORS, INC., et al.,

Appellees.

Washington, D. C.
November 14, 1972

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Washington, D. C.
Tuesday, November 14, 1972

The above-entitled matter came on for argument at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DANIEL S. DEARING, Chief Trial Counsel, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304, for the Appellants.

ROBERT L. SHEVIN, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304, for the Appellants.

[Appearances continued on page following.]

APPEARANCES, Continued:

LeROY COLLINS, of Counsel, ERVIN, VARN, JACOBS & ODOM, Post Office Box 1170, Tallahassee, Florida 32302, for the Appellees.

NICHOLAS J. HEALY, ESQ., 29 Broadway, New York, New York 10006, for the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 71-1082, Askew against The American Waterways Operators, Inc. Mr. Dearing, you may proceed.

ORAL ARGUMENT OF DANIEL S. DEARING, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. DEARING: Thank you. Mr. Chief Justice, may it please the Court:

This case is here on appeal from the Middle District of Florida wherein a three-judge panel struck the Florida Oil-Spill Prevention and Pollution Control Act of 1970. With permission of the Court, the argument will be divided between myself and the Attorney General Robert L. Shevin of the State of Florida, and I understand that the argument will also be divided for the appellees.

Essentially the operative facts bringing this matter before the Court today are the passage in 1970 by the Florida legislature of its Oil-Spill Prevention and Pollution Control Act. This act, like most legislation, was the result of recent history. The Florida legislature was not unaware of the serious and deleterious effects of oil spills, massive oil spills, in state waters. They were aware, all too aware, of the results of the Torrey Canyon disaster in the English Channel in 1967. They were all too aware also of spills up country. For instance, when the P. W. Thirtle went down and

spilled 31,000 gallons of bunker sea oil into Narraqansett Bay off the coast of Rhode Island. It was reported to have ruined the fishing industry in Narraqansett Bay as it pertained to oysters.

They were aware also that the United States Congress was considering the Federal Water Quality Improvement Act of 1970. They were aware of the laborious steps taken by the various committees in the passage of this legislation. The Florida legislature had convened and had been in session for only a few weeks when this matter came before its attention. The real impetus to the Florida act, however, was the collision in Tampa Bay of the tanker Delian Appollon and the spillage of 21,000 gallons of bunker fuel oil into Tampa Bay. This brought home rather quickly and clearing to the legislature the dangers involved in being vulnerable, as the state is, to the ravages of oil-spill pollution of its territorial waters. And so the legislature met and passed this act, the Florida Oil-Spill Prevention and Control Act, which provides for absolute, unlimited liability against the owners of vessels in the event of a major spill and which also provides for certain mechanics for the before-the-fact enforcement of the act itself.

Shortly before the act was to go into effect--that is to say, the financial responsibility provisions were to go into effect--the appellees before the Court today, the

plaintiffs below, filed suit challenging the constitutionality of the act on several grounds. The stated defended on the grounds that the act was a valid expression of a state's police power, but the lower court decided that instead of being a valid expression of the state's police power, it was in fact an intrusion into an exclusive federal admiralty domain. And, although the act was challenged on other grounds, the court below decided the issue on that fact alone, on that decision alone.

I think that it is absolutely necessary that we invite the court's attention to two sections of the act. First of all, section two, which sets forth the legislative intent, contains this very brief but important paragraph. It says, "The legislature further declares that it is the intent of this act to support and complement applicable provisions of the Federal Water Quality Improvement Act of 1970."

And section 21 of the act states that "This act, being necessary for the general welfare, the public health, and the public safety of the state and its inhabitants, shall be liberally construed to effect the purposes set forth under this act and the Federal Water Quality Improvement Act of 1970."

Under provisions of the act, the state Department of Natural Resources was to issue certain regulations going

to the mechanics of enforcement. These regulations, it is submitted, must reflect the intent as set forth in these two phrases, the regulations as well as all other enforcement provisions of this act, it is submitted, would have to comply and supplement the Federal Water Quality Improvement Act of 1970, and this is particularly important to the position of the State of Florida before the Court today.

The lower court found that the act violated provisions of uniformity absolutely necessary to the federal maritime domain. We submit to the Court that this is not true. In the first place, we submit that the concern with the prevention and control of oil-spill pollution of territorial waters is not a maritime matter at all. But if it is--if it is--it is certainly a non-exclusive maritime matter where there is concurrent jurisdiction between both the state and the federal governments. And we would illustrate that fact--

Q You mean without any shoreside damage?

MR. DEARING: No, Your Honor, we don't mean without any shoreside damage.

Q What about when there is no shoreside damage: does the state have any business in the area?

MR. DEARING: If there is no shoreside damage, then the state may not have any interest in the area to protect. We would submit, however, in response to the question, that the ecological balance which is interrupted by a spill, even

though the slick never touches shore, has a very detrimental and adverse effect shoreside.

Q You mean on those people who are making their living at sea, like in fishing.

MR. DEARING: Mr. Justice White, it certainly has an application there. But it also--

Q I just ask you again: Has the state got any business providing a rule of liability for an oil spillage at sea that has no immediate impact shoreside?

MR. DEARING: The state does not purport to have any--

Q So, the answer is no.

MR. DEARING: No, Your Honor. Our answer is no. The question is, I think, in that instance whether there is any adverse effect shoreside and only then does the state purport or represent to have any concern or interest in the matter that would give rise to the police power.

Q While you're interrupted, could I ask you if you will read the district court's opinion as looking at the Federal Water Pollution Act as being an exercise of congressional jurisdiction in the admiralty area?

MR. DEARING: The state does not so interpret it, Your Honor.

Q What authority did the Federal Government have to adopt the Water Pollution Act? What constitutional authority was Congress exercising?

MR. DEARING: I believe that the Congress had authority under the commerce power to exercise--and it did so exercise--this power in the act itself, Mr. Justice White.

Q You do not think it has anything to do with admiralty jurisdiction or admiralty power?

MR. DEARING: No, sir, we do not.

Q Does it not make any difference?

MR. DEARING: Yes, sir, we think it makes a considerable difference.

Q It doesn't if the question is a conflict with the federal act, does it, with a constitutional act?

MR. DEARING: I am sorry, I beg your pardon--

Q Under whatever authority the Water Pollution Act was adopted, if the question is one of conflict with a valid federal act, then it doesn't make any difference what the source of the congressional authority was.

MR. DEARING: No, sir, it would not make any difference at all. If the Florida act conflicts with the Federal Water Quality--

Q The district court then did ascertain some conflict between the Water Pollution Act and the Florida law, did it not?

MR. DEARING: Yes, sir. To be more specific, they said that the Federal Water Quality Improvement Act was proof

positive or a strong indication inter alia of the conflict, that the conflict existed. And we construe that to be or we interpret that as being or giving rise to the pre-emption question.

Q Is it really important in this case to talk about admiralty jurisdiction if we are really talking about a question of pre-emption under the Water Pollution Control Act?

MR. DEARING: We believe it's important only because we are appealing from an order that stated this, that it was applicable, that provisions of maritime law applied here. We maintain that they do not.

Q Incidentally, Mr. Dearing, if the source was not the admiralty power, what was the source?

MR. DEARING: Commerce power, Mr. Justice Brennan; yes, sir.

Q Would it make a difference--perhaps I am asking the same question that Mr. Justice White did--would it make a difference on pre-emption whether it was the commerce power or the admiralty power?

MR. DEARING: Yes, it would, for reasons, if I may, just address myself briefly to at this point.

Q Under Jensen, I suppose.

MR. DEARING: This is what the court said below, and this is what we take issue with. We do not believe that

this is a matter of exclusive jurisdiction, (b). If it is any admiralty jurisdiction at all, it is not exclusive. It is concurrent. And (b) I would suggest to the Court that the reason it is not admiralty or maritime is because of the traditional view of this Court. This is based upon the premise that the Court and the Court alone can determine the limits of the maritime grant under the Constitution. Congress cannot determine those limits. Only this Court can construe the Constitution. This Court has so construed the Constitution and defined the limits of the maritime grant as applying the locality test to those occurrences which occur on navigable waters. A sea to shore tort being consummated ashore is beyond the purview of that locality test limitation.

Q Mr. Dearing, if in Knickerbocker Ice Company the Court held that a land-based employee's Workman's Compensation claim could not be enforced by the state because it was sufficiently closely related to admiralty, surely the type of oil spillage you are talking about here is a good deal more closely related to traditional admiralty jurisdiction than what the Court was talking about in Knickerbocker, was it not?

MR. DEARING: Yes, sir, we would agree that the incidental effect of this legislation on maritime law would be much more emphatic than would be the Workman's Compensation

laws at issue in Jensen and reflected in the Knickerbocker case.

Q What do you do with those cases?

MR. DEARING: We would ask the Court to continue the statement that appeared in the Standard Dredging case and severely limit the Knickerbocker, the Jensen doctrine to its facts of Workman's Compensation cases, which is what this Court said, of course, in the Standard Dredging case, that Jensen is limited to its facts. And, if we may, there is an alternative to looking at this from the point of view or the strict point of view of maritime law, and I would invite the Court's attention at this time to what the Attorney General has to say in that respect. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Shevin.

ORAL ARGUMENT OF ROBERT L. SHEVIN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. SHEVIN: Mr. Justice, may it please the Court:

Your Honors, just as maritime law was developed to meet the crisis of a developing industry with peculiar problems, so environmental needs of today, we believe, demand their own jurisprudence. The federal act, the Water Quality Improvement Act, is reflective of this need to develop new concepts of legal responsibilities in crimes against the environment. The federal act sets the pattern. The Florida act, we contend, is a legitimate response to the federal act,

to the awakening of a growing necessity by Congress. And if it conflicts with the necessity to deal with massive oil spills, which has not heretofore been dealt with, and if it conflicts with the tenets of maritime law or any other body of law, then we contend that the conflict is purely incidental and unfortunate. There certainly is no irreconcilable conflict between the federal and the Florida acts. The two acts speak to federal-state relationship and cooperation in meeting the threats of massive oil spills. The acts speak of joint cooperation between the state and the Federal Government to meet serious economic and environmental problems.

The national contingency plan that is outlined in the Water Quality Improvement Act of 1970 speaks to a coordination of effort with matters such as containment, dispersal, and removal of oil, with state and local agencies. In the federal act, when it speaks of a marine disaster, it talks of coordinating all public and private interests. So, the two acts, they interrelate rather than conflict. And the implication in both statutes is not competition but cooperation. And, as Mr. Dearing pointed out, the Florida act itself says that it is the intent of this act to support and complement the applicable provisions of the Federal Water Quality Improvement Act of 1970.

Many environmental problems at the state and local

level exist, Your Honors--

Q Mr. Attorney General, just incidentally, as you put it, is there a conflict between the Florida law and the federal law?

MR. SHEVIN: No, Your Honor, we contend there is no conflict. There is no conflict between the Florida law of 1970 and the Federal Water Quality Improvement Act of 1970.

Q Is there a limitation of liability in the federal act?

MR. SHEVIN: There is in effect in the federal act, Your Honor, an absolute liability. But it's somewhat qualified with certain defenses--

Q It is limited liability?

MR. SHEVIN: To a certain extent. Not the same as the 1851--

Q But there is not any limitation in the Florida act?

MR. SHEVIN: There is no limitation, and to this, Your Honor, we contend that the Federal Government in the anti-preemption clause specifically granted to the state the right to pass any requirement of liability--and those are the words, any requirement or liability, are the terms or the words used in the anti-preemption clause. So, we contend that the Florida act is simply an extension.

With regard to the question of limitation, the

federal act does allow certain defenses. The Florida act also allows certain similar defenses of acts of God, third parties that would be responsible for the negligence, and so forth, are provided within the Florida act as well, that they can be raised.

Your Honors, many of these problems exist in the first instance because of pressures to continue traditional tenets of established jurisprudence. Time-honored concepts of property law obstruct the state many times in an effort to protect the rights of beaches, of inland waterways, of natural resources, and compound problems with sewage treatment, water purity, and other problems of air and water pollution.

So, we contend that the federal act, the Water Quality Improvement Act is a step forward. It's a threshold upon which the state and local governments can build together with the Federal Government a new system of laws and environmental jurisprudence to meet the crucial demands wrought by the industrial system itself. We contend that this is federalism in the truest sense. If Florida were to seek to limit or extend damages to the federal agency involved, which is what the federal act speaks to, then and only then would there be a conflict. There is no irreconcilable conflict between the two acts that are being reviewed here. If the federal act were to address itself

to state recoveries, which it does not, then such a conflict might be found.

On the contrary, the federal act invites the state to impose any requirement or liability with respect to the discharge of oil into the waters of the state. And Florida has done this. The danger of a massive oil spill by pollution is both a federal and a state problem. The district court, by its decision, we contend, has frustrated this expression of federalism. And if federalism is to be more than an academic theory, then it requires an expression in the instant case by a reversal of the lower court and a declaration that the Florida law is valid in all respects. This is a matter of particular concern to Florida.

Q Mr. Attorney General, at this point I think you stated in your brief that the district court's refusal to sever portions of the state statute will not be disputed on appeal. Does this mean it is your position, as I think you have just intimated, that the act is valid in its entirety and that you want the whole thing and would not be content with any portions of it?

MR. SHEVIN: Your Honor, we take the position that the act is valid in its entirety. Quite obviously it contains a severability clause. The Solicitor General in his amicus brief which supports the position of the state in many respects, disagrees with the position of the state in

one or two other respects. He urges the Court to strike certain portions and allow others to remain. Of course, the Court has this option. But it is our contention, and we take the position in this appeal, that the entire act is valid and that within the traditional police powers of the state, the state has a compelling and urgent and reasonable need to legislate in this field to complement the federal legislation, that relief is not obtainable in the admiralty courts when the limitation of liability is based upon the value of the vessel after the facts. Because, if the vessel sinks, we are talking about the limitation being based upon the salvage value of the vessel, that this will not give us the type of remedy that is necessary to clean up massive oil spills and to give relief to third parties to citizens of Florida who have a justifiable cause and cannot obtain any justice in the courts if they are limited to going into an admiralty proceeding.

Q Suppose the Court should hold that the Florida act, insofar as it affects terminal facilities, for instance, is valid and the rest of it is not. Would you take at least that much if you could have it?

MR. SHEVIN: Your Honor, quite obviously, I would be less than candid if I said that we would not want to see certain portions, at least certain portions of the act, upheld, but we feel very strongly that the entire act should be

upheld.

Your Honor, on this point of the relief and the remedy, I would challenge the appellees to show us how a third person, a citizen, a hotel owner whose surrounding beaches that are available to the public and to his hotel guests, if those beaches are ruined, how he is going to receive relief in the admiralty courts and how the State of Florida is going to clean up a massive spill in the admiralty courts.

Q What about up to this date if a vessel is sitting at a pier in navigable waters causes a fire ashore and a hotel burns down; what is the governing law in that situation?

MR. SHEVIN: I think the governing law in that situation--it would again depend, if we are talking about a--

Q We are talking about a cause of fire that originates on the ship, causing a shoreside injury. How about the Admiralty Extension Act?

MR. SHEVIN: Your Honor, I believe in that case that the hotel owner would have his third party rights, his common law rights, and would not be limited to the relief that the Congress purports--

Q Why is that?

MR. SHEVIN: Because I do not believe that the Congress could properly--

Q There must be law in that area. Do you mean

that your answer depends on the constitutionality of the Admiralty Extension Act?

MR. SHEVIN: My answer to that question would, Your Honor. Yes, sir.

Q Let's assume that the Admiralty Extension Act is constitutional. What about the hotel owner then?

MR. SHEVIN: I think in that case that he would be limited to go into a court of admiralty. He would be limited in his remedies to that extent.

Q So that this thing you're talking about, about the people injured ashore by an oil slick, those people are like the hotel owner?

MR. SHEVIN: The hotel owner, people who--

Q Multiplied many times.

MR. SHEVIN: Many times. Citizens, the state in its cleanup processes.

Q But again assuming the constitutionality of the Admiralty Extension Act; what about that?

MR. SHEVIN: Your Honor, assuming the constitutionality of the Admiralty Extension Act, it creates a very serious problem, except for the fact that the Congress in the Water quality Improvement Act, we think, founded that on the commerce clause, specifically recognizing other responsibilities, other concepts of liability, rather than the old 1851 standard; and specifically, Your Honor, if the Federal

Water Quality Improvement Act was considered by the Congress to be in the admiralty area dealing with oil spills, then why would they have provided in the act that the remedies are in the Federal District Court. That would have been totally unnecessary.

Q You must then be arguing also that the Admiralty Extension Act has been somewhat modified by the Water Pollution--

MR. SHEVIN: Yes. We are arguing--

Q And that Congress has power to cede to the state, in effect, certain jurisdiction in this area, in this zone.

MR. SHEVIN: Yes. We are arguing that the Congress recognized an emerging new concept of jurisprudence, that they legislated accordingly, that they clearly gave the states the responsibility and invited the states to pass similar legislation and to go further. And this is what the State of Florida has done. And if the Water Quality Improvement Act is to have any meaning in the field of jurisprudence to be able to react to and prevent a massive oil spill, then the state ought to be able to legislate in this field as well.

Your Honors, the federal act does nothing more than set minimum standards. It gives the states the right to adopt more stringent requirements. This is what the state

has done, just like in the Clean Air Act, just like in the Water Pollution Act, in all of the anti-water pollution acts the state has been given the right to move further, just like the present cooperation between the Federal Government and Florida to save Florida's coastal lands and tidewaters. The Florida act is no more violative of the Water Quality Improvement Act than are water quality standards developed by the states violative of another section of the law, 33 U.S.C. 1171, Subsection (b), which requires a party seeking a federal discharge permit to obtain certification from the state water pollution agency that the anticipated discharge will not violate state water quality standards. And if the non-preemption clause of the Water Quality Improvement Act is to have any meaning as the Congress intended, surely it should permit the state, as Florida has done, to allow private claimants and the state itself to recover under strict liability principles rather than the fault concept of maritime law. And they speak of uniformity. Certainly uniformity would be something that the maritime attorneys would desire and perhaps the insurers would desire uniformity. But the Solicitor General in his brief agrees and concedes that although the application of Florida's standard of liability, the absolute, might create a lack of uniformity, that this is not a subject requiring uniform federal regulations, that there has been no pre-emption. And even if

negligence is considered to be the standard, there is no policy of maritime law opposed to liability without fault for damages caused by oil spills from ships. But Florida has a legitimate right and interest to legislate and to apply the standards of liability in view of the potential impact of oil spills on Florida's environment and economy, and that the Solicitor General, in other words, contends that this is an area of concurrent jurisdiction.

The lower court apparently felt that its course was dictated by a series of earlier cases--Jensen, Knickerbocker, Dawson--and these cases have been mentioned by Mr. Dearing. However, these cases are more than 48 years old. They're of dubious logic. This Court has severely limited their application. And it is hoped that these precepts will not be perpetuated simply by the inertia of the rule of precedent. Because if this Court affirms the district court--

Q Are you suggesting we overule Jensen or that we--

MR. SHEVIN: I am suggesting that Jensen has already been severely limited and as a result of the limitation--

Q I think you said earlier it is limited largely to conflicts on personal injury cases?

MR.SHEVIN: Yes, on Workman's Compensation.

Q And that is the way we ought to leave it?

MR. SHEVIN: Yes, sir, we contend that that is the way you ought to leave it.

Q Jensen had to do with seaward side of the gangplank, though, did it not?

MR. SHEVIN: Yes.

Q It did not have anything to do with shoreside damage.

MR. SHEVIN: That is correct.

Q Why do you need to modify it at all?

MR. SHEVIN: I am contending, Your Honor, that the lower court based its decision basically on Jensen, Knickerbocker, and Dawson, which we think--

Q As a general principle that anywhere there is admiralty it is exclusive.

MR. SHEVIN: That is correct. That was the basis of the lower court's decision. We contend that if this court affirms the district court, it will be tantamount to affirming 200 years of law but no justice. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Healy.

ORAL ARGUMENT OF NICHOLAS J. HEALY, ESQ.,

ON BEHALF OF THE APPELLEES

MR. HEALY: Mr. Chief Justice, and may it please the Court:

The subject of this appeal, if Your Honors please, is not water and the need to conserve it, as the state

contends. There is no issue whatever between the appellants and any of the appellees concerning the absolute necessity of maintaining a clean environment, particularly in the marine area. There is only one genuine issue in our submission which is presented here, and that is whether, as the court below decided, the subject of marine oil pollution, like other subjects of maritime law, should remain within the federal domain, within the domain of the Congress and this court and the other federal courts, or whether, to borrow a phrase from Mr. Justice Frankfurter's concurring opinion in the Wilburn Boat case, it should be left to the crazy quilt regulation of the different states.

In this connection, we respectfully call the Court's attention to Table B annexed to the brief of appellees American Institute of Merchant Shipping and others which contains a sampling of the various state laws in this new field. This shows at a glance, if Your Honors please, that there is a great deal of difference among the various states in their handling of the pollution problem.

Q Treated historically, about when would the oil spill problem become a serious problem in navigation?

MR. HEALY: I would say, Your Honor, about 1924 or a little before. The 1899 Refuse Act makes no mention of oil, although as I am sure you are aware, sir, the courts have been applying the 1899 act to include discharges of oil and have

been fining shipowners for causing discharges of oil. But the first time oil was ever mentioned as such in a federal statute was in the 1924 oil pollution act, which was amended in 1966 and was repealed by the Water Quality Improvement Act of 1970.

Q Historically is there some correlation between the development of the very, very large tankers and greater incidence of oil spills?

MR. HEALY: I do not believe the size of the tankers has had much to do with it, because there have been very few incidents of spills of large quantities of oil from large tankers. The Torrey Canyon, of course, is the most notable. But there is no doubt that the increased need for oil in the more developed countries and also now in the developing countries has greatly increased the need for ocean tonnage in the tanker area. And many, many times more oil is being carried today by sea than was carried just a few years ago.

Another development, Your Honor, is the tendency to refine oil at destinations rather than at the source. This increases the potential for pollution damage. But, on the other hand, it minimizes the number of tragedies that resulted from explosions and fires on vessels carrying gasoline and so on.

The admiralty clause, if the Court pleases, is not merely a constitutional grant of judicial power. It is

perfectly true that it is couched in terms of judicial power, but when read in conjunction with the necessary and proper clause, this Court has repeatedly held that it grants to Congress the paramount power to legislate in the maritime field. And where Congress has not acted, then it is for this Court and the lower federal courts to define the general maritime law which is to prevail throughout the whole country and not just in one area.

Q Did Congress purport to say that authority was being exercised with the Water Pollution--

MR. HEALY: To the best of my recollection, no, Your Honor, there is no mention of the constitutional clause under which it was acting. But it seems to me clear, if Your Honor please, that it must have been the admiralty clause rather than the commerce clause, because otherwise what possible right would Congress have to pass legislation which would relate not only to vessels engaged in interstate commerce but even to local barges that may never leave the borders of a single state and which may cause damage only to the waters of that state and to the shoreline of that state.

Q What is the consequence if it was the admiralty power, Mr. Healy?

MR. HEALY: If it was the admiralty power, then it does not make any difference whether the vessel concerned was engaged in interstate or foreign commerce. It would

apply to a barge on a river which never left the confines of a particular state.

Q Does it make any difference with respect to the issues in this case?

MR. HEALY: In this case, it does, if Your Honor please, because the innumerable decisions of this Court holding that uniformity in the maritime law is essential.

Q Do you suggest that if it is admiralty, then there is absolutely no power of anything in the states?

MR. HEALY: There is one exception, if Your Honor please, and that is the local concern doctrine. If the matter is puraly one of local concern and is a matter concerning which Congress has not acted, then the states have been held free to act.

It is true that the Jensen case has been criticized severely--

Q That is an understatement, is it not?

MR. HEALY: I suppose it is. But I am wondering, if Your Honor please, whether the criticism of Jensen has not been focused in the wrong direction. I can certainly sympathize with those who feel that the Court in the Jensen case could, if it had wished, have decided that Workman's Compensation laws of a particular state applied to shoreside workers when on board a vessel loading or discharging in the particular state should have been considered as a matter of

local concern. I think that is the advice of the Jensen case if there is any. But I think the philosophy behind the Jensen case is the best thing that has ever happened to the steamship industry and the people who depend on it for their products.

Q Does the Harbor Workers Act pre-empt state compensation acts?

MR. HEALY: Yes, Your Honor.

Q with respect to everyone who is covered by it?

MR. HEALY: Yes, Your Honor. The Harbor Workers Compensation Act, of course, was passed in order to remedy the situation left by the Jensen case and it applies to all workers when--all maritime workers engaged in maritime employment when they are on board the vessel.

Q Jensen would not have kept the state from giving a Workman's Compensation remedy to people who were injured on shore.

MR. HEALY: No, sir.

Q But the Harbor Workers Act provides a remedy for them if they are in maritime pursuits, does it not?

MR. HEALY: No, sir, not if they are injured ashore.

Q So, it is just on ship?

MR. HEALY: That is right, sir. The employer must--

Q Could it have done so? Congress could have

covered shoreside harbor worker injury?

MR. HEALY: I believe it could under the act of extension of admiralty jurisdiction.

Q But it would not necessarily have to have been an exclusive?

MR. HEALY: It would seem to me that if Congress once chose to act, it would have to--

Q You have to say that, do you not?

MR. HEALY: I think so. But it seems to me that if Congress once choses to act, it occupies the field and there is no room for state action.

Q Does that depend on congressional intent or is it just a question of facts that the judiciary addresses itself to as to whether there has been pre-emption? In your Water Quality Improvement Act you have this expressed negation of pre-emption.

MR. HEALY: If Your Honor please, the act simply says that nothing in this section shall be deemed to prevent any state from enacting water pollution legislation or words to that effect. It does not state it in a positive way. It is more of a negative--

Q In some areas this act does not preclude current exercise of power by the states: would that be any different?

MR. HEALY: I do not think that Congress could

consistently with the decisions of this Court have so held.

Q I guess you have to say that, do you not?

MR. HEALY: I suppose I do, but I believe it. The Knickerbocker Ice Company so held. As far as I am aware, there has never been any decision to the contrary.

Q Unless you take Knickerbocker Ice and the rest of them as personal injury cases.

MR. HEALY: Well, that is right.

Q That would not be true if this were just a commerce power on land, would it? If Congress wants to say the states can have concurrent jurisdiction, there is no principle of law that prevents the states from having concurrent jurisdiction. You are depending basically on the admiralty approach.

MR. HEALY: That is right, sir. The line of cases has been quite different. And, of course, I suppose it is largely historical; when the Constitution was adopted, the only interstate and foreign commerce of any account at all in this country was by water. We had no railroads or airplanes or trucks.

Q I suppose you would still be here even if there were no federal water improvement legislation at all, would you not?

MR. HEALY: Absolutely, Your Honor.

Q You claim that Florida was without power to

legislate in the area of admiralty.

MR. HEALY: Absolutely.

Q That was the basic decision of the district court, was it not?

MR. HEALY: Exactly, sir. We are not arguing that the federal act pre-empts the whole field. It does not. The federal act applies only to U. S. Government cleanup costs. And with reference to that, if Your Honor please, the Attorney General challenged us to explain how the poor hotel keeper whose beaches were damaged could find relief in admiralty. I think the answer is that under the federal act, Congress has appropriated huge sums of money and has charged the Federal Government with the obligation of cleaning up an oil spill, and no distinction is made between government-owned property and private property. If the shoreline is damaged, the government comes in and cleans it up if the owner does not clean it up. And if the government does it, then the government is entitled to reimbursement, subject to a limitation of a hundred dollars per ton, with a ceiling of $14 million and subject to four defenses, act of God, act of war, negligence of the government itself, and act or omission of a third party.

Q But the government would not provide any lost profits, which might be recovered in a private suit.

MR. HEALY: No, sir, but in a private suit, of

course, the hotel keeper could sue for all his lost profits. And if the spill were a very bad one and the vessel were damaged so that she had very little value left, it is true that the limitation of liability statute would be applicable.

Q Absent the Water Pollution Control Act and absent the Admiralty Extension Act, you would not be here, would you?

MR. HEALY: Yes, Your Honor, because--

Q Under the decisions of this Court prior to the Admiralty Extension Act?

MR. HEALY: Yes, because we are dealing here with liability not only to the shoreside but to the water--

Q I agree with you. I should have limited the question to shoreside damage.

MR. HEALY: As far as shoreside damage is concerned, we would not be here.

Q Absent the Admiralty Extension Act.

MR. HEALY: That is right, sir.

With this reservation, if Your Honor please, the Florida act, of course, applies to terminals as well as to vessels. And if a terminal or shoreside facility causes a spill and damage is caused to another shoreside installation or shoreside property, there might be a serious question of admiralty jurisdiction and federal substantive law, the general maritime law applying. But here the terminal is

liable also for damage under the Florida act for damage to another ship or for damage to the water and for the cost of cleaning up the water. And, as the Fifth Circuit Court of Appeals said in a fairly recent case, nothing is more maritime than the sea. And, therefore, I think it is quite conceivable that even a statute which was limited to damage caused by shoreside installations to water and certainly to vessels would be unconstitutional. Certainly the damage to another vessel by a shoreside installation is admiralty and was even before the 1948 act.

My colleague, Governor Collins, will continue the argument. Thank you.

MR. CHIEF JUSTICE BURGER: Governor Collins.

ORAL ARGUMENT OF LeROY COLLINS, ESQ.,

ON BEHALF OF THE APPELLEES

MR. COLLINS: Mr. Chief Justice, may it please the Court:

I respect very highly our Attorney General. But I find that some of his statements here to be, frankly, incredible. When you make the flat statement that there is no conflict between a state act and the federal laws, I think he is badly wrong, as I'd like to try to demonstrate. In fact, the district court, after considering this case, found that there was so much in conflict and so much wrong about the state act, that if it were stripped of all of its

conflicts, there would be no viable act left, and that is the reason why we have not considered, if there was any question of severability, to relieving. Of course, I do not deny that this Court would have every opportunity that it has to be with the case in that way. But the appellant himself in his brief acknowledges that there is no basis of severability here, and we strongly make that contention too. There was no question raised in the jurisdictional statement regarding severability, and so we do not believe that question is properly before this Court on the initiative of the parties involved here.

The thing I would like first of all to emphasize is the fact that what Florida really seeks to do here is to establish, in the words of the Solicitor General, a comprehensive regulatory scheme. It is not just an act dealing with these couple of matters of liability without fault and limitation of liability. The State of Florida puts itself in the business of regulating what is obviously admiralty jurisdiction, and it regulates it in a very comprehensive way. This involves the control and regulation of ships, the state act does. It involves terminals that exist for the purpose of servicing those ships. It involves navigation in the navigable waters of the United States very importantly. And this total scheme is what the district court invalidated and what we feel this Court should do.

Let me refer to just a few of the provisions of this law that have not been mentioned here at all. The law provides, of course, for licensing of these terminals and issuing certificates of registration for them annually, provided the terminals demonstrate that they have certain equipment on hand and that they are disposed to cooperate completely with the state in any program of correction of oil spills.

Then they follow with this language: The department--that's the state department--shall adopt regulations to govern operating and inspection requirements for facilities, vessels, personnel, and matters related to licensee operations under this act and specifically requiring that vessels transporting polluters within state waters shall maintain on board such containment gear as may be required by the department--that is, the state--with a crew trained in the use of such gear.

This is what the state is seeking to do. The state further makes provisions under this law for the designation of port managers, and take a look at some of the duties and obligations and rights of these port managers. They are to organize recovery teams. That's understandable, although the federal law provides for what they call strike forces, which is the same function really. These port managers are authorized to board vessels that are out there

and they want to come into the port, to inspect these vessels for their seaworthiness--and, of course, that can include a great many things--and to decide whether in their opinion, the port manager, the state manager's view, it is seaworthy and decide whether it has the proper gear on it and decide whether its crews have been trained suitably to allow them to enter one of Florida's 11 deep water ports.

The port manager also has the right, after he stops the ship out there, to tell them he must anchor, he cannot come in now because of weather conditions. And if he does come in, he can tell him where to go and where to stop and other things that are purely operational and navigational and are completely covered by Coast Guard services and other federal services at the present time.

The law also provides for the preparation of a contingency plan involving all the agencies of the state government to help it enforce all of these provisions and to help provide remedies for a spill if it occurs. This, of course, is patterned directly after the Federal Government. The 1970 Water Quality Improvement Act was passed in advance of this act and obviously the federal act was before the drafters of this act and was used as a model somewhat. What the state was just trying to do was do all the Federal Government was going to do and do much more in conflict with some of the things the Federal Government provided.

In doing all these things this port manager is authorized to do, he runs squarely into the Coast Guard and its responsibilities. This is a comprehensive federal contingency plan, and there is a federal contingency plan responsible for recovery of spills and strike forces and all these things are provided under that federal law, and the Coast and the federal authorities of course have authority to prevent ships from coming in and giving them directions which the state is putting itself in the business of doing. So, here you have very specific conflicts. But these conflicts are just the beginning--these navigational management conflicts--because both the state and the federal require showings of financial responsibility. The state makes no provision for accepting the showing that the Federal Government requires of financial responsibility. It imposes its own, making it a little tougher. And there is a provision that--and I do not know just how this should be interpreted--but in all of this where the Coast Guard and the state teams move together, there is a provision that the state shall act independently of the federal authorities.

Q Is it your position that the regulation under the state act is so pervasive that none of it can survive?

MR. COLLINS: Yes, sir. That's absolutely, sir. And, of course, we go on and there are these conflicts

regarding the extent of liability, limitation and non-limitation of liability. The state deprives people of rights and defenses in very harsh terms in conflict with the federal terms and all these other things that are mentioned herewith. And the state frankly insists that its laws supersede those of the Federal Government in these respects. And we say that it is the Congress's responsibility to regulate in this field and it must be the Congress's responsibility to regulate in this field. We are proud of our beaches and of course want to protect them. There are 49 other states of this Union who are equally proud of those that they have or may have, and this is a matter requiring uniformity of action and that action can only come through federal leadership and federal direction. There is room for the states to cooperate, but this is not any way for a state to seek to cooperate with the Federal Government in its comprehensive plan to deal with this very difficult problem.

I think the best of all the cases in the past century dealing with this matter of federal/state relations and responsibilities in the admiralty field is Kelley against Washington. There you have a rather pervasive state to a statute that sought to provide inspection of boats and ships that were not provided to be inspected by the Federal Government. And there were all kinds of boats. Some of them in foreign commerce, some in interstate commerce, some in

intrastate commerce. And the State Supreme Court there held that that act was an improper invasion in the federal admiralty domain, though it did apply only to ships not subject to federal inspection. The case came up here and Justice Hughes wrote the opinion for the Court and he sets out very clearly the three governing rules that apply and I think apply right here.

First, he says, is there a conflict with federal law? He says if there is a conflict with federal law, the federal law prevails because it is paramount and the state law fails.

Secondly, he says, if the subject is one demanding uniformity, whether a conflict or not, the state action will not be permissible. Well, we submit here we have a proposition that does require uniformity of dealing.

Then he said there was room for a state to deal with purely local exigencies and there was neither conflict nor necessity for uniformity, and some very limited action was allowed the state to act in this area pending action by the Federal Government.

That is a modern rule for protecting the maritime jurisdiction and administration of this nation, and it does belong to this country and it does not belong to the several states because it has a countrywide responsibility and a nationwide responsibility.

I submit that on all three of those considerations that this act fails. They argue that Furon, which cited the Kelley against Washington case, the case from Michigan over there where there was a municipal ordinance dealing with smoke propensity and the court allowed that to stand; they claim that that was a departure from Kelley against Washington. It was really an effort by the court to adjust to that little local room there, local exigency, the particular situation which provided the misdemeanor for a ship to be emitting smoke in the city limits of Detroit.

Q As I remember, Governor, there was no federal statute on that, was there?

MR. COLLINS: No, sir, there was not.

Q They were federally licensed vessels, that it was somehow an impairment of the federal license.

MR. COLLINS: Yes, it was claimed that federal inspections were required in this and that this particular type of boiler met with federal inspections. And there was a strong dissent in that case that my personal feeling would follow, actually. That was by Justice Frankfurter and Mr. Justice Douglas. But even so, that's just a tiny, tiny island there. That cannot possibly be a base for an act that is as far-reaching as this one is.

So, we say it is up to the Congress to say what this law is. And I would like to call the Court's attention

to the fact that the Congress has not been lax in its interest in this matter. It has moved very importantly over the last 25 years to meet needs arising in this manner of greater and greater demand for more and more shipping of oil to meet the greater and greater demand for electric power in this country. That same thing is true all over the world. This is a serious problem, but it is not one that the Congress is not aware of. It is not one that the Congress did not move in very specifically and very importantly to meet.

In our case, there is conflict. The United States is exercising its paramount power and the state is seeking to supersede this. In our case there is the necessity for uniformity. They argue about--they cannot possibly say that this matter of controlling this kind of navigational operation and experience is a local matter. But we could have an oil spill at Pensacola that might not hurt Pensacola at all; it might wind up in Mobile and create a problem in that state. Or suppose--to use a hypothetical case--we had a spill up near New York and it got in the Gulf Stream and started drifting up the New England coast there. If they applied the law that the Attorney General is seeking to uphold here, then we would have a New York State team out there trying to deal with this matter, telling the master of the ship what to do with his ship and how to

handle it and trying to manage a team. And then when the spill crossed the state line and you got into Connecticut, why here is another state out there with another team and more regulations and more controls and different ones, and so it goes, meaning you would have the same sort of thing. This is differently an area which requires uniformity and requires the kind of action that the Federal Government is applying at the present time.

International conventions are dealing with this subject and of course these would supersede any state regulation.

The shippers I represent do not seek to avoid regulation concerning oil spills. On the contrary, they have worked with Congress and continue to do so in relation to oil spill legislation. However, these shippers work daily in the complexities of the federal admiralty scheme and they realize as a practical matter any possible situation would exist if states were free to legislate in the area of oil-spill control as Florida seeks to do. There is a better way now. There is a better way than for each state to try to outdo the Federal Government. We are all in this together. This state act should be found invalid here, as the district court has. The interested state should then find ways to exert their effectiveness in the formulation, support, and execution of federal policy in this field. And

there is no lack of federal power, there is no disposition by our federal leadership not to move. There is no lack of awareness of the states involved for Florida and all her sister states as well. So, we submit that the decision should be affirmed. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General, you have about four minutes left.

REBUTTAL ARGUMENT OF ROBERT L. SHEVIN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. SHEVIN: Mr. Chief Justice, and may it please the Court:

Governor Collins, if that spill that you referred to ends up in Mobile, then I would hope that the State of Alabama has a law similar to Florida's because then they could take care of that spill. If it ends up in Pensacola, then I want to be certain that the State of Florida can clean up that spill and that the people that are damaged by that spill have a right of recovery in a court of law and are not limited by hide-bound traditions which do not speak to the question of massive oil spills.

By the use of the words "any requirement of liability" in the Water Quality Improvement Act, it is clear that the Congress fully intended to give broad latitude to the states to enact whatever requirements of liabilities and standards that the states deem warranted in the exercise of

their legislative powers to prevent and control and provide relief from oil pollution. Congress was not only acquiescing in the enactment of state legislation, but was actually inviting the states to act, pass such legislation. And pursuant to this invitation, Florida passed its law, and this law is based on direct and compelling interests that the state has, urgent interest, for the protection of its economy and its environment. It is the proper exercise of the police power of the state to protect our citizens and as such should be given full weight, despite the lack of uniformity which might result because of the act.

If it please the Court, the Federal Admiralty Extension Act, we contend, was improperly extended by the Congress beyond the constitutional jurisdictions of the Admiralty Court. However, even if the extension act were to apply and is upheld by this Court and even if the Water Quality Improvement Act was bottomed on admiralty rather than commerce, there still would be room for state action. This is not an exclusive domain. There is still room for state action. There is still concurrent authority and the Solicitor General in his amicus brief says uniformity--and we agree--must yield to the overriding need for the state to legislate in the interests of its citizens. Florida has legislated within the traditional bounds of the state's police power to protect our citizens and to protect our

environment.

Q To have uniformity yield would mean turning over a long, long line of authority, would it not?

MR. SHEVIN: No, Your Honor. I think not, because the Jensen, Knickerbocker, and Dawson cases have all been very severely limited and this Court has never dealt with this emerging law, particularly with regard to massive oil spills; and uniformity has yielded in the past where there has been an overriding state interest to protect, and I do not think it requires the overriding of a long line of cases.

Q Is it not conceivable that if all of the coastal states had acts of one kind or another, that it might pass your inspection in Florida when they put in at Miami, if they put in there, and Pensacola, but that they might not pass at Mobile or they might not pass at other ports?

MR. SHEVIN: I think, Mr. Chief Justice, you are now speaking to the argument that was raised as far as containment gear and the inspection of the vessel, what type of gear it has--

Q Equipment generally.

MR. SHEVIN: Let me speak to that, because I think that would be the test. There have been no Florida regulations promulgated as to what type of containment

gear this vessel must have to be able to prevent the spill and take it up as soon as it occurs. The Coast Guard has not yet promulgated regulations. And to rule our act or that section invalid, this Court must presume that Florida's regulations will conflict with the federal Coast Guard regulations. And we do not think that this Court should presume that or speculate with regard to what the regulations will be. We think it is entirely consistent with the Florida act which says this act was designed to complement the Federal Water Quality Improvement Act that certainly as to questions of containment gear and this type of regulations, that those regulations will be promulgated to be consistent with the regulations of the Federal Government.

If I may just end, Your Honor--I think my time is just about out--we challenge them to show us how Florida and its citizens would be able to damages for cleanup. And they said, "Well, the Federal Government will come in and clean up the beaches." We do not want to have to rely upon that. We are not certain that that is going to occur. That is not part of this record. If the Torrey Canyon went down 16 miles off of Florida rather than 16 miles off of London, there would have been no recovery. We would have been limited to $50 salvage value. And that is why the Water Quality Improvement Act gives broad powers and directs the state to act, and why is there presently pending before the Senate of the United

States a treaty which would be geared to unlimited liability, $15 million, and a contingency fund, and absolute or strict liability. Why is that treaty pending if the existing federal law is enough to provide cleanup costs and damages? Obviously existing federal law is not enough. The Water Quality Improvement Act seeks to speak in this field, directs the states to act. The state has acted constitutionally. We ask you to uphold this law.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:06 a.m., the case was submitted.]

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