

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: JEROME B. GRUBART, INC., Petitioner v. GREAT  
LAKES DREDGE & DOCK COMPANY, ET AL. and  
CITY OF CHICAGO, Petitioner v. GREAT LAKES  
DREDGE & DOCK COMPANY, ET AL.

CASE NO: 93-762 and 93-1094

PLACE: Washington, D.C.

DATE: Wednesday, October 12, 1994

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   JEROME B. GRUBART, INC.,                   :

4                   Petitioner                   :

5           v.                                   :   No. 93-762

6   GREAT LAKES DREDGE & DOCK                   :

7   COMPANY, ET AL.                           :

8   and   :

9   CITY OF CHICAGO,                           :

10                   Petitioner                   :

11           v.                                   :   No. 93-1094

12   GREAT LAKES DREDGE & DOCK                   :

13   COMPANY, ET AL.                           :

14   - - - - - X

15   Washington, D.C.

16   Wednesday, October 12, 1994

17                   The above-entitled matter came on for oral  
18   argument before the Supreme Court of the United States at  
19   10:04 a.m.

20   APPEARANCES:

21   BEN BARNOW, ESQ., Chicago, Illinois; on behalf of the  
22                   Petitioner Jerome B. Grubart, Inc..

23   LAWRENCE E. ROSENTHAL, ESQ., Deputy Corporate Counsel,  
24                   City of Chicago, Chicago, Illinois; on behalf of the  
25                   Petitioner City of Chicago.

1 JOHN G. ROBERTS, JR., Washington, D.C.; on behalf of the  
2 ORAL Respondents.

3 BEN BARKOW, ESQ.

4 On behalf of the Petitioner Jerome H.

5 Grubart, Inc.

6 ORAL ARGUMENT OF

7 LAWRENCE E. ROSENTHAL, ESQ.

8 On behalf of the Petitioner City of Chicago

9 ORAL ARGUMENT OF

10 JOHN G. ROBERTS, JR., ESQ.

11 On behalf of the Respondents

12 REBUTTAL ARGUMENT OF

13 LAWRENCE E. ROSENTHAL, ESQ.

14 On behalf of the Petitioner City of Chicago

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C O N T E N T S

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1 PROCEEDINGS

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 93-762, Jerome v. Grubart, Inc., v. Great  
5 Lakes Dredge & Dock Company, and No. 93-1094 consolidated  
6 with it, City of Chicago v. the same.

7 Mr. Barnow.

8 ORAL ARGUMENT OF BEN BARNOW

9 ON BEHALF OF THE PETITIONER JEROME B. GRUBART, INC.

10 MR. BARNOW: Mr. Chief Justice and may it please  
11 the Court:

12 In furtherance of the divided argument, I intend  
13 on concentrating on nonpreemption argument issues.  
14 Mr. Rosenthal intends on concentrating on the city's  
15 preemption argument.

16 On April 13, 1992, the Chicago Loop flooded.  
17 Thousands of persons and businesses suffered losses  
18 estimated upwards of \$1 billion. This catastrophe, which  
19 has now come to be known as the Chicago Flood, resulted  
20 from two occurrences. One was the City of Chicago's  
21 failure to maintain or repair an extensive underground  
22 tunnel system under the City of Chicago. The second was  
23 the pile-driving activities which occurred on the North  
24 Branch of the Chicago River to protect the Kinzie Street  
25 Bridge, which had been completed more than 6 months

1 earlier.

2 The pile-driving work was performed by Great  
3 Lakes Dredge & Dock Company, the respondent here. It  
4 accomplished this work using a tractor crane positioned on  
5 top of a spud scow which had been posted into the river  
6 bed and which was being used as a stationary platform.

7 On these facts, the Seventh Circuit, in  
8 reversing the district court, found that admiralty  
9 jurisdiction existed. In order to accomplish this, it had  
10 to do two things:

11 1) acting alone from the other circuits which  
12 have considered similar situations, it refused to adopt or  
13 use the totality-of-the-circumstances approach.

14 Secondly, it misapplied the rulings of this  
15 Court. It did that by misconstruing every ingredient that  
16 this Court indicated in Sisson and the cases before it,  
17 Executive Jet, and Foremost required.

18 QUESTION: Didn't our Sisson decision pretty  
19 well reject totality-of-the-circumstances test which you  
20 refer to?

21 MR. BARNOW: Not the way I read it.

22 In footnote numbers 3 and 4, the Court  
23 recognizes that the circuits were employing the totality-  
24 of-the-circumstances test and suggested that at least for  
25 that case that the guidance formula of Sisson would be

1 adequate guidance. It never said that no other circuit  
2 could continue to use that.

3           However, even if it did for the facts of that  
4 particular case, where all of the activities were uniform,  
5 were the same, it left open the door as to ~~what~~ the case  
6 would be where the instrumentalities were involved in  
7 different activities.

8           I would offer to the Court that in this  
9 particular case, we have myriad activities. The City of  
10 Chicago alone is engaged in at least two nonmaritime  
11 activities. One is the construction or maintenance of a  
12 bridge. The second is, is the maintenance of their  
13 underground tunnel.

14           We then have the nonmaritime activities of all  
15 of the other instrumentalities, all of the people like  
16 Grubart and the businesses and buildings in the Chicago  
17 Loop, which are far away, none of whom were engaged in any  
18 activity which, under any argument, could be maritime.

19           QUESTION: Isn't that an argument against the  
20 Extension Act? Isn't that going to be true in virtually  
21 every case in which there is, in effect, a land-based  
22 injury?

23           MR. BARNOW: No, Your Honor, and the reason is,  
24 is that when this Court developed the nexus test it did it  
25 to find a substantial connection between the activity and



1 traditional maritime activity.

2 Unfortunately, and one of the other errors that  
3 the Seventh Circuit committed, was that it allowed the  
4 Admiralty Extension Act to bootstrap this Court's  
5 requirement, and skipped it.

6 If you are to separate the Admiralty Extension  
7 Act from a nexus requirement, which this Court cannot  
8 intend, what it would be doing is, defeat its own opinion.  
9 It would take all land-based injuries and put them in a  
10 special category, and allow them to have admiralty  
11 jurisdiction without any connection to traditional  
12 maritime activity.

13 QUESTION: Incidentally, you don't question the  
14 Congress' authority to do that if it chooses?

15 MR. BARNOW: If it chooses to do that, but I  
16 don't believe it has. It set up no independent --

17 QUESTION: Congress can define admiralty  
18 jurisdiction any way it wants, even though it's a  
19 constitutional term.

20 MR. BARNOW: The definition has been left open,  
21 as Your Honor is aware, and this Court has defined and  
22 determined that definition. As to how far it can go under  
23 the Commerce Clause, for instance, frankly, I'm not sure.  
24 What I do know is, is that it has not done so here.

25 QUESTION: Well, I don't think there's much

1 problem under the Commerce Clause, but if Congress  
2 purports to be defining admiralty jurisdiction in a way  
3 differently than this Court has done, does that cause a  
4 constitutional problem with reference to the authority of  
5 the Congress to define what admiralty jurisdiction means?

6 MR. BARNOW: Frankly, I'm not sure. If it goes  
7 too far, I suppose it might create constitutional issues.  
8 What I do know is that in this case it has not, that in  
9 the passage of the Admiralty Extension Act, it meant it as  
10 an extension of admiralty, in that it did not separate it  
11 apart from what this Court would determine to be admiralty  
12 and maritime jurisdiction.

13 QUESTION: Well, you don't raise that question  
14 in your brief. I'm not quite positive of the answer to  
15 that question.

16 QUESTION: In determining Federal court  
17 jurisdiction, subject matter jurisdiction, is there any  
18 other instance where a totality-of-the-circumstances test  
19 is used, for example, diversity, Federal question  
20 jurisdiction? The entrance requirements are precise, not,  
21 you take all these ingredients and mix them together.

22 MR. BARNOW: Well, I think the totality-of-the-  
23 circumstances approach has been used by this Court in  
24 other areas.

25 QUESTION: For jurisdiction, for subject matter

1 jurisdiction?

2 MR. BARNOW: I don't recall it in terms of a  
3 subject matter jurisdiction.

4 QUESTION: That's what we're talking about here,  
5 admiralty jurisdiction.

6 MR. BARNOW: We are, but in this particular  
7 case, it merely serves the test that this Court has  
8 already developed. We are not suggesting that it  
9 substitutes for that test. The totality-of-the-  
10 circumstances answers one part of this Court's test, and  
11 therefore, it is not bigger than that whole.

12 This Court has said that the activity from which  
13 the incident arises must have a substantial relationship  
14 to traditional maritime activity, not any relationship but  
15 a substantial relationship, and Your Honor is right with  
16 regard to an improper, perhaps imposition of a totality-  
17 of-circumstances approach at the inception, but this is  
18 not at the inception. It is merely designed to achieve  
19 the goals and guidelines and instructions that this Court  
20 has set up. All it does is answer the substantiality  
21 requirement.

22 Let's say you did not use the totality-of-  
23 circumstances test approach. You're still using the same  
24 test. You're still using *Sisson*. You're still looking  
25 for the incident arising from an activity that has a

1 substantial relationship to traditional maritime activity,  
2 and no way are you changing the jurisdictional test to  
3 determine whether or not there is admiralty jurisdiction.  
4 All you're doing is saying whether or not your test has  
5 been met.

6 What happens if you don't do that? If you don't  
7 do that, you wind up with a case like this one. You wind  
8 up with a case where the Seventh Circuit has felt it could  
9 not ask any of the questions which go to the  
10 substantiality issue, and I would repeat that this Court  
11 has used significant, the wrong must bear a significant  
12 relationship to traditional maritime activity.

13 Why did it do that in Executive Jet? Because  
14 the Court was tired of what it called absurd results.  
15 This case in admiralty, I propose, would be an absurd  
16 result. The suggestion that a company could come in on  
17 these facts -- and Grubart's position is, there is no  
18 maritime activity. Even if one were to say that Great  
19 Lakes' work was maritime, we suggest that the totality-  
20 of-circumstances forecloses an admiralty finding under the  
21 fact that the other situations do not warrant it.

22 But this case is not of a type designed for  
23 admiralty. You have common tort remedies. If you take  
24 the naked Sisson test and disregard a substantiality,  
25 you're realistically going to get the same kind of absurd



1 result that this Court has encountered, and which it did  
2 not want to encounter.

3 This Court has spent over 20-some years,  
4 starting with Executive Jet, trying to get itself out of  
5 the quagmire of these peculiar cases that come about now  
6 and then.

7 QUESTION: Mr. Barnow, may I ask you to get  
8 specific in applying the third Sisson prong? It's proper  
9 under the third Sisson prong to consider, I presume, not  
10 only what Great Lakes was doing but what the City of  
11 Chicago was doing, and your argument seems to be that the  
12 City of Chicago was simply maintaining, or for that matter  
13 failing to maintain a tunnel, and there's nothing with any  
14 maritime character to maintaining a tunnel, is that  
15 basically it?

16 MR. BARNOW: That's basically it on the point.  
17 I'm --

18 QUESTION: Well, may I ask you, then, is it also  
19 proper, or isn't it also proper under Sisson, to consider  
20 the fact that the City of Chicago I presume had some role  
21 in maintaining this navigable water?

22 Didn't the City of Chicago sort of maintain its  
23 banks, wasn't it the City of Chicago's bridge over the  
24 navigable water that was being repaired, and shouldn't  
25 these facts relating the city to the maintenance of a

1 channel of navigable water also be considered under  
2 Sisson, and if they are, doesn't the claimed absurdity  
3 shrink somewhat?

4 MR. BARNOW: Well, first, I'm buoyed by the  
5 Court's use of these additional inquiries, because Sisson  
6 doesn't tell you how to make those additional inquiries.

7 When Sisson is served by the totality-of-the-  
8 circumstances inquiry, then those types of inquiries can  
9 be made. For instance, Your Honor said, shouldn't we also  
10 take into account, or shouldn't -- doesn't the Sisson test  
11 also take into account the additional activity, the  
12 activity of the City of Chicago? Where?

13 In the literal reading, it says, one activity,  
14 but Your Honor couldn't do that. When he thought about  
15 the situation, Your Honor had to look at all of the  
16 activities, and that was recognized in Sisson.

17 Sisson said, what are we going to do when that  
18 occurs, and all the totality-of-the-circumstances says,  
19 and all -- the only thing all of these circuits have been  
20 saying is, we hear this Court's ruling, but in order to  
21 answer a very important part of it, we have to articulate  
22 these other questions, otherwise these questions really go  
23 sub rosa.

24 The more structure you have with regard to  
25 getting to the judgment, the more likely you are to serve

1       Sisson.

2               QUESTION: Well, is your claim, then, that what  
3       the lower court did in effect was simply to isolate the  
4       activity of, the kind of common-sense way, the maritime  
5       actor and say the activities of cotort -- of fellow  
6       tortfeasors simply are to be ignored? Is that the mistake  
7       that you say was made in applying Sisson?

8               MR. BARNOW: Well, first I'm not sure that  
9       common-sense approach ever works in an uncommon problem  
10      situation, and because this is an uncommon problem, had  
11      the --

12              QUESTION: Well, whether it does or not, is that  
13      what you're saying the court did, that it isolated --  
14      consistently or inconsistently with Sisson, it simply  
15      isolated the acts of one of the tortfeasors and ignored  
16      the acts of the others --

17              MR. BARNOW: It did --

18              QUESTION: -- or the activities of the others?

19              MR. BARNOW: Correct. It did that, in addition  
20      to misdefining all the ingredients. It picked the wrong  
21      incident. The Seventh Circuit said the incident was the  
22      negligent installation of pile-driving. We all know that  
23      isn't it, because this Court said, whether or not the  
24      washer and dryer was installed negligently in Sisson had  
25      nothing to do with it, but that would be the equality in

1       that analysis. It went on to say that the --

2               QUESTION: Well -- I'm sorry, I just want to go  
3 back to my point. Do you argue that they misapplied  
4 Sisson in this isolation or elimination, or are you saying  
5 that they applied Sisson properly and the Sisson test  
6 therefore can never work in a case in which one of the  
7 tortfeasors allegedly at least does not bear -- is not  
8 engaging in a traditional maritime activity?

9               MR. BARNOW: I am saying that the Seventh  
10 Circuit misapplied Sisson. I am saying that Sisson may  
11 work in a situation where one of the parties is not land-  
12 engaged, or doesn't have -- or has land injury.

13              It depends, for instance, on the nature of the  
14 maritime aspect.

15              QUESTION: And could it work here, if -- could  
16 you, would you make an argument that Sisson, properly  
17 applied --

18              MR. BARNOW: I believe it --

19              QUESTION: -- would be an appropriate test here?

20              MR. BARNOW: I believe it could. I think if you  
21 properly define the incident as the breach of an  
22 underground tunnel, which it clearly is, because that is  
23 the only event that encompassed all the damages --

24              QUESTION: Well, if you want to get down to that  
25 detail, isn't the incident -- you say the breach, but the



1 incident is the -- in effect is the flood, is that what  
2 you're saying?

3 MR. BARNOW: I do not. I say the breach is the  
4 under --

5 QUESTION: Well, why isn't the flood the  
6 equivalent of the fire in Sisson?

7 MR. BARNOW: Because it does not encompass all  
8 the damages, and if you do not encompass all the damages,  
9 you do not have the incident for the event.

10 QUESTION: You mean, consequential damages like  
11 loss of business, and so on?

12 MR. BARNOW: No. The damage from the tort. In  
13 order to define the incident --

14 QUESTION: Why would we look to the damages?  
15 Take the Federal Tort Claims Act, for example. What  
16 counts there is where the conduct occurred, where the  
17 allegedly negligent conduct occurred, not where the  
18 consequences of that conduct are felt.

19 MR. BARNOW: I appreciate that, and one of the  
20 reasons that the Court ruled the way it did in Executive  
21 Jet was it refused to engage in determining where the tort  
22 occurred with the airplane crash. That's why it got into  
23 the more substantial issues --

24 QUESTION: Well, why shouldn't we -- why  
25 shouldn't we look to where the conduct occurred, Great

1 Lakes conduct occurred on the river, and not where the  
2 damage occurred?

3 MR. BARNOW: Well, I have no problem with the  
4 Court looking to where the conduct occurred, but where the  
5 conduct occurred was on a stationary barge which had been  
6 spudded in to the river bed, which more likely is a work  
7 platform, bears more resemblance to a dock, or a derrick  
8 rig, than it does to a vessel.

9 Grubart's position has been, is that that wasn't  
10 even a vessel, and that there is no test that is before  
11 this Court that would find admiralty jurisdiction under  
12 these facts.

13 QUESTION: Thank you, Mr. Barnow.

14 MR. BARNOW: Thank you.

15 QUESTION: Mr. Rosenthal.

16 ORAL ARGUMENT OF LAWRENCE E. ROSENTHAL

17 ON BEHALF OF THE PETITIONER CITY OF CHICAGO

18 MR. ROSENTHAL: Thank you, Mr. Chief Justice,  
19 and may it please the Court:

20 Today, the Court is asked to extend admiralty  
21 jurisdiction beyond its historic boundaries, the shore and  
22 property abutting the shore, and bring it into the  
23 basements of downtown Chicago. While we think it  
24 extraordinary that there should be Federal admiralty  
25 jurisdiction over water in the basement of Marshall

1 Fields, that is what the court of appeals managed to hold,  
2 and this morning I will press two points with respect to  
3 that holding.

4 QUESTION: Mr. Rosenthal, before you do that,  
5 what would your position be if a ship on navigable waters  
6 slipped its moorings, drifted into a dam, caused a breach  
7 in the dam, and the dam flooded surrounding territory,  
8 causing damage?

9 MR. ROSENTHAL: Our view is that that would be  
10 an admiralty case.

11 QUESTION: That would be, but this --

12 MR. ROSENTHAL: That would be.

13 QUESTION: It's the difference between a dam and  
14 a tunnel, is that --

15 MR. ROSENTHAL: Well, I think it quite important  
16 to start by identifying the cause of action with  
17 considerable precision, because the cause of action in  
18 this case is not how a boat was spudded down on navigable  
19 water, or anything having to do with navigation or  
20 seaworthiness.

21 The cause of action here, to be precise, is an  
22 alleged lack of due care, when driving pilings through  
23 subsoil, for underground tunnels in the area, a cause of  
24 action that didn't arise on the water, in the water, it  
25 actually arose 15 feet underneath the bed of the river.

1 QUESTION: But the pilings went through the  
2 water, didn't they?

3 MR. ROSENTHAL: It did. It did, but the cause  
4 of action, it seems to me, Mr. Chief Justice, is garden-  
5 variety construction, tort litigation, if the cause of  
6 action is that when you're going through soil, whether  
7 it's underneath a river or not, you are supposed to  
8 exercise due care with respect to underground structures.

9 QUESTION: What if you're a vessel doing some  
10 oil exploration in the middle of the ocean, and through  
11 some negligent activity an oil pollution occurs? Would  
12 that be maritime? That would not be maritime because oil  
13 exploration is not maritime activity, is that it?

14 MR. ROSENTHAL: It could well be maritime. It  
15 depends, I think --

16 QUESTION: Oil exploration is different from  
17 pile-driving?

18 MR. ROSENTHAL: Well, we have, for example, the  
19 Rodrigue case --

20 QUESTION: Nobody sails for the purpose of  
21 sailing. You go on navigable waters for the purpose of  
22 doing something else, to drill for oil, to drive piles,  
23 whatever.

24 MR. ROSENTHAL: Well, Justice Scalia, Rodrigue,  
25 for example, involved somebody on an oil derrick who was



1 injured by defective construction equipment. That person  
2 was on navigable water in an oil rig. Nevertheless, that  
3 was held not to be within admiralty because there was no  
4 Federal maritime interest in adjudicating cases about  
5 defective construction equipment, and that's why I urge  
6 the Court to define the cause of action with some  
7 precision.

8 QUESTION: Were the workers on this barge  
9 covered by the Longshore and Harbor Workers' Compensation  
10 Act?

11 MR. ROSENTHAL: Well, in our view -- actually I  
12 think it has been clear since 1942 that workers not  
13 engaged in maritime activities, and the 1972 amendments to  
14 the act confirm this, are not within admiralty, so --

15 QUESTION: So you would say the workers on this  
16 pile-driving barge were not within the admiralty  
17 jurisdiction?

18 MR. ROSENTHAL: Well, I'm not sure what the  
19 answer to that question is, Justice Kennedy, but a court  
20 would look to a nexus inquiry, if you will. Is the  
21 activity that those workers were engaged in maritime in  
22 character?

23 QUESTION: It seems to me most unlikely that  
24 they would be found to be not within the admiralty  
25 jurisdiction.

1 MR. ROSENTHAL: They could well. They could  
2 well. I am willing to concede, for present purposes, that  
3 that cause of action might be within admiralty. In fact,  
4 more generally, let me concede there are many causes of  
5 action that could arise from pile-driving on navigable  
6 water that would be within admiralty and, Justice Kennedy,  
7 that could well be one, but that does not mean that every  
8 cause of action --

9 QUESTION: Mr. Rosenthal, does the city have any  
10 role in maintaining the navigable water?

11 MR. ROSENTHAL: The city was responsible in this  
12 case for maintaining the pilings that were near the river,  
13 and that in some sense is maintaining the river with  
14 respect to navigability.

15 QUESTION: May that be considered under  
16 Sisson --

17 MR. ROSENTHAL: It absolutely -- if the cause of  
18 action were that the city permitted pilings to be  
19 negligently placed in a navigable channel where they could  
20 injure boats, that would absolutely be an admiralty case.

21 QUESTION: Well, aren't --

22 QUESTION: Yes, but that's narrowing -- excuse  
23 me.

24 QUESTION: Excuse me.

25 QUESTION: I was just going to say, that would

1 be narrowing the second of the Sisson nexus tests,  
2 wouldn't it, because the second Sisson test looks to the  
3 activity out of which the incident arose, and I presume  
4 that activity would include the maintenance of pilings as  
5 well as the driving of pilings, and hence the city would  
6 be an actor in that activity.

7 MR. ROSENTHAL: It would, and that's why we  
8 think the Sisson test should not be used in a case like  
9 this, because most fundamentally, unlike Sisson, this  
10 involves a case of injury on land to nonmaritime parties,  
11 Grubart, the shoe store and the other case --

12 QUESTION: That just brings you right back to  
13 the Extension Act. Sure it does. That's what the  
14 Extension Act is there for.

15 MR. ROSENTHAL: And the --

16 QUESTION: You're in effect saying that by  
17 considering an activity of the city, which involves the  
18 maintenance of a channel of navigable waters, or water,  
19 you're getting the wrong result because it results in  
20 liability for damage which ultimately eventuated on land,  
21 but that's what the Extension Act is there for.

22 MR. ROSENTHAL: Well, but the Extension Act uses  
23 a phrase, admiralty and maritime jurisdiction, which the  
24 Court has construed to require a nexus to Federal maritime  
25 interests and --

1           QUESTION: Right, and the nexus includes an  
2 activity of yours involving navigable water.

3           MR. ROSENTHAL: Well, but I think it's most  
4 instructive to look at the Askew and Huron Portland Cement  
5 cases. Those were vessels engaged in navigation alleged  
6 to have done injury on the shore, and yet in both those  
7 cases the Court held that that was not within admiralty  
8 jurisdiction because the Federal interests in adjudicating  
9 that cause of action were quite slight. The State  
10 interests in protecting the coast or inland property were  
11 quite substantial, and --

12           QUESTION: Well, Mr. Rosenthal, I thought what  
13 was being done here was work on so-called river dolphins,  
14 and I thought they were put in place to prevent damage to  
15 the bridge by ships in the navigable channel.

16           MR. ROSENTHAL: That's correct.

17           QUESTION: And to protect both ships and bridges  
18 and to serve as aids to navigation.

19           MR. ROSENTHAL: That's correct, and --

20           QUESTION: And so that's a pretty close  
21 connection there --

22           MR. ROSENTHAL: That's why --

23           QUESTION: -- to work from a vessel on navigable  
24 waters.

25           MR. ROSENTHAL: That's why we urge the Court to



1 define the cause of action with precision, because, of  
2 course, the cause of action is not putting the pilings in  
3 a place where they interfered with navigation.

4 QUESTION: No, but you say that they were  
5 installed in a way that caused land-based injuries.

6 MR. ROSENTHAL: Only because of their proximity  
7 to an underground tunnel. That issue, how you take care  
8 for underground structures, is the same whether one is  
9 driving pilings on land or water.

10 QUESTION: It just seems to me it's a causation  
11 question. The activity on the navigable water caused  
12 land-based injuries.

13 MR. ROSENTHAL: I quite agree, but because this  
14 case is all about preempting the rights of land-based  
15 parties. After all, that's why Great Lakes invokes  
16 admiralty jurisdiction.

17 QUESTION: What if there were injuries that  
18 occurred to a ship by virtue of the piling installation  
19 and also the land-based injuries? Would you have some of  
20 them tried in State court and some in Federal, even though  
21 the essential cause of action is the same?

22 MR. ROSENTHAL: If the cause of action -- if  
23 there is an interest in Federal adjudication of the cause  
24 of action, such as a navigational error, then all injuries  
25 should be in Federal court, land and sea, but if there is

1 no Federal interest in a Federal adjudication of the cause  
2 of action, then we submit that, just like any other  
3 preemption case in which the court looks -- as it does  
4 when it asks whether State causes of action are preempted  
5 by Federal law, it looks and says, on this cause of  
6 action, is there a Federal interest that --

7 QUESTION: Mr. Rosenthal, you're stressing cause  
8 of action, but Sisson said you look at the activity. It  
9 didn't say, look at the cause of action.

10 MR. ROSENTHAL: Well, Sisson did not say ignore  
11 the complaint, who has sued, but we do agree that Sisson  
12 says, and this is why we think Sisson is ill suited for  
13 this case, don't look to the effects that are alleged to  
14 have followed from the action.

15 We think in a case where what is going on is  
16 preemption of rights ordinarily governed by State law, the  
17 rights of land-based parties, there should be present a  
18 Federal interest sufficiently weighty to justify Federal  
19 adjudication.

20 QUESTION: Can you think of any large class of  
21 cases where the finding of admiralty jurisdiction wouldn't  
22 preempt some sort of State claim?

23 MR. ROSENTHAL: No. But, of course, in most  
24 cases you have parties that are engaged in maritime  
25 activities and not presumptively governed by State law.

1           In Victory Carriers, for example, an Extension  
2 Act case, the Court began its analysis by saying, the  
3 rights of land-based parties are presumptively governed by  
4 State law, and we should proceed with caution, because of  
5 the risk of preemption.

6           I urge the Court to exercise the same caution in  
7 this context.

8           QUESTION: Mr. Rosenthal, you're urging us to  
9 evaluate the Federal interest in admiralty jurisdiction.  
10 It reminds me, the only other field I can think of where  
11 we do an interest analysis kind of case that comes readily  
12 to mind, anyway, is conflict of laws, where, in the past  
13 30 years or so, interest analysis has become, in academic  
14 circles at least, a fashionable thing. It has not  
15 produced very much certainty in the law. In fact, that is  
16 a gross understatement. It has produced a great chaos in  
17 the entire field.

18           MR. ROSENTHAL: I urge the same kind of analysis  
19 the Court uses when it asks, is a State tort cause of  
20 action preempted by Federal law, as in Cipollone. Look at  
21 the cause of action and the relevant interests. Here, I  
22 suggest, there is no Federal interest in adjudicating this  
23 cause of action sufficient to bring admiralty jurisdiction  
24 into downtown basements.

25           QUESTION: Whatever label you put on it, you

1 really are urging a choice of law analysis to determine  
2 the jurisdictional question.

3 MR. ROSENTHAL: Well, I am urging, I think,  
4 Justice Ginsburg, an analysis just like Cipollone or the  
5 other cases, which we know is a jurisdictional analysis.

6 If State courts jurisdiction can be governed by  
7 conventional preemption analysis, then here, where you  
8 have land-based parties presumptively governed by State  
9 law and within the authority of the States, where there  
10 are legitimate State interests in being able to adjudicate  
11 liability for injury to person or property on land, that  
12 should also be analyzed. Is the Federal interest in  
13 navigation and seaworthiness implicated?

14 With the Court's permission, I'll reserve the  
15 balance of my time.

16 QUESTION: Well, I do have a question, actually.  
17 Why? My question is why? You say, do this very finely,  
18 but look, why do it finely? Why not do it crudely?

19 And my -- to show you what I'm thinking,  
20 sometimes admiralty jurisdiction will hurt plaintiffs like  
21 your client. Of course, it does, because they get less  
22 money. Sometimes, it will help plaintiffs. Sometimes it  
23 will hurt defendants. Sometimes it will hurt little  
24 people. Sometimes it will help little people.

25 I don't know how it works out in balance, but



1 I'm -- so I take that out of my mind. But I'm reasonably  
2 certain what does hurt people is litigating costs, and  
3 here, as in this case, you spend an awful lot of money  
4 because there isn't a clear test.

5 So my question is, why not have a clear test?  
6 That will help everybody. And I don't know how it works  
7 out in the wash, you know, between -- but at least it will  
8 help people by making the jurisdictional thing clear, and  
9 therefore let's go crude.

10 Let's say, for example, if it's a vessel, and  
11 it's in the water, that's the end of it -- admiralty. And  
12 maybe it's a meteor, it's not really a vessel, or an  
13 airplane.

14 MR. ROSENTHAL: Well --

15 QUESTION: But -- in other -- but don't answer  
16 the specific. What I'm interested in, as a practical  
17 matter, if you're trying to -- as a practical matter,  
18 what's wrong with having a fairly crude, simple test that  
19 at least will tell lawyers what court they're supposed to  
20 file their paper in?

21 MR. ROSENTHAL: Preemption analysis like  
22 Cipollone has been fully workable in the lower courts.  
23 This Court has not found preemption analysis too crude  
24 when it comes to a question whether a State court still  
25 has jurisdiction, and there are legitimate State interests

1 in being able to adjudicate liability for injury to person  
2 or property on land that do deserve consideration.

3 Thank you.

4 QUESTION: Thank you, Mr. Rosenthal.

5 Mr. Roberts, we'll hear from you.

6 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

7 ON BEHALF OF THE RESPONDENTS

8 MR. ROBERTS: Thank you, Mr. Chief Justice, and  
9 may it please the Court:

10 The petitioners seek to hold Great Lakes liable  
11 for the operations of its vessel on the navigable waters  
12 of the Chicago River while that vessel was doing what  
13 vessels of its sort normally do on navigable water,  
14 maritime repair work. In this instance, replacing pilings  
15 in the river.

16 QUESTION: What exactly -- how would you  
17 describe this vessel?

18 MR. ROBERTS: It was a repair barge. It's  
19 lengthy, I think about 150 feet --

20 QUESTION: And it moves from place to place on  
21 water?

22 MR. ROBERTS: With a tug. It's motivated by a  
23 tug. The fact that it lacks its own motive force doesn't  
24 make it any less a vessel, as this Court held in 1903 in  
25 cases involving barges on the Erie Canal.

1           The -- a Federal statute gives Great Lakes the  
2       express right to bring an action in Federal district court  
3       to limit its liability when faced with allegations of this  
4       sort, which is what it did, and the Seventh Circuit  
5       correctly held that that claim was in admiralty.

6           First, the incident for which petitioners seek  
7       to hold us liable, and as to which we seek to limit our  
8       liability, occurred on navigable water. It posed a threat  
9       to maritime commerce. The greatest threat to maritime  
10      commerce was, in fact, realized when the river was shut to  
11      maritime traffic for more than a month, and the incident  
12      arose from traditional maritime activity.

13      QUESTION: Suppose the Court were to  
14      determine -- the district court -- that the limitation act  
15      doesn't apply, that you don't qualify within the terms of  
16      the statute. Then what?

17      MR. ROBERTS: Well, that's a decision on the  
18      merits that would have to be made after trial, as the  
19      Seventh Circuit ruled in an issue on which the Seventh  
20      Circuit did not --

21      QUESTION: But then would there be no more  
22      admiralty jurisdiction? Would the Court then --

23      MR. ROBERTS: No.

24      QUESTION: -- say, case dismissed?

25      MR. ROBERTS: It would be case dismissed on the

1 merits, like anything else. If you assert a cause of  
2 action under Federal law and get into Federal court that  
3 way, and it turns out the facts show that it didn't arise  
4 under Federal law after trial, jurisdiction doesn't  
5 evaporate. You lose on the merits. The same with the --

6 QUESTION: I'm thinking of the claims coming in,  
7 the Great Lakes start this controversy, but couldn't  
8 counterclaims come into the admiralty forum?

9 MR. ROBERTS: Yes, and they can be adjudicated  
10 once the court has jurisdiction. It's a typical pendant  
11 jurisdiction question, whether it makes sense to retain  
12 jurisdiction of those other claims after the claim giving  
13 rise to jurisdiction has been dismissed.

14 QUESTION: And if the court decided it didn't  
15 make sense, would the character of those claims then  
16 change so that when you brought your suit elsewhere it  
17 would no longer be considered under maritime law?

18 MR. ROBERTS: I think if the case were brought  
19 elsewhere it would be governed by the law in that court.  
20 Once it's been established that this is, in fact, not  
21 something within admiralty jurisdiction, the fact that it  
22 was initially and it later developed that it was not  
23 shouldn't change the character of the law that applies.

24 QUESTION: Mr. Roberts, is it your position that  
25 the Maritime Extension Act is really not at issue here, at



1 this stage?

2 MR. ROBERTS: Well, the Admiralty Extension Act  
3 added to 1333 gives jurisdiction. We make an alternative  
4 argument that it gives jurisdiction standing alone, but  
5 that's an argument that the Seventh Circuit didn't have to  
6 reach. Nor would this Court if it concludes that this is  
7 within general maritime jurisdiction supplemented by the  
8 Extension Act.

9 QUESTION: Well, would you -- are you saying  
10 that the Admiralty Extension Act is just irrelevant to  
11 your case?

12 MR. ROBERTS: No, not at all. I'm saying  
13 that -- the Admiralty Extension Act, we argue, gives  
14 jurisdiction quite apart from 1333. Our main argument is  
15 1333, supplemented by the Admiralty Extension Act, confers  
16 jurisdiction.

17 This activity took place on navigable water.

18 QUESTION: Does the Admiralty Extension Act  
19 purport to be defining the constitutional meaning of  
20 admiralty jurisdiction?

21 MR. ROBERTS: No. It specifies that the  
22 admiralty jurisdiction includes all cases -- all cases of  
23 injury on land caused by a vessel on navigable water.

24 QUESTION: Well, then, it's construing the  
25 phrase admiralty jurisdiction, is it not?

1 MR. ROBERTS: It's within Congress' power to  
2 modify and supplement the admiralty jurisdiction, yes.

3 QUESTION: Can it expand it?

4 MR. ROBERTS: It can expand it within reasonable  
5 bounds, yes.

6 QUESTION: What's the authority for that  
7 proposition?

8 MR. ROBERTS: Well, the lower courts have  
9 uniformly found the act constitutional, and Congress --

10 QUESTION: Well, the Genesee Chief extended  
11 admiralty and overruled the Daniel Ball, did it not?

12 MR. ROBERTS: It did, and Congress does it with  
13 some regularity -- the Longshore and Harbor Workers Act,  
14 where, for example --

15 QUESTION: But relying on the commerce power.

16 MR. ROBERTS: Relying on the commerce power --

17 QUESTION: Which, of course, it has, but here it  
18 purports to be simply defining the meaning of admiralty  
19 jurisdiction.

20 MR. ROBERTS: It defines a category of cases  
21 that were -- are arguably within admiralty jurisdiction  
22 apart from the Extension Act. The question depends, if  
23 you have a tort on navigable water and the injury occurs  
24 elsewhere, it's an academic question where that tort  
25 occurred, and what Congress did, it said, we're going to

1 resolve that controversy by saying that the fact that  
2 injury occurred on land doesn't defeat jurisdiction.

3 QUESTION: Sisson didn't cite the Admiralty  
4 Extension Act.

5 MR. ROBERTS: No. It noted that the act had not  
6 been raised. This Court, of course, has applied the  
7 Admiralty Extension Act in cases like Gutierrez, without  
8 raising any question as to its --

9 QUESTION: Do you think the Sisson test  
10 incorporates the Admiralty Extension Act and we can just  
11 apply the Sisson test and be faithful to what the  
12 Admiralty Extension Act says?

13 MR. ROBERTS: I think if you have an incident on  
14 navigable water posing a threat to maritime commerce  
15 arising from traditional maritime activity, that that  
16 could be considered within the admiralty jurisdiction  
17 apart from the Admiralty Extension Act, yes, and here --

18 QUESTION: Mr. Roberts, may I get down to more  
19 specific cases and the application of Sisson here?

20 Do you believe it is proper in considering the  
21 second of the Sisson nexus tests, the activities test, to  
22 consider the activities of the city as well as the  
23 activities of Great Lakes?

24 MR. ROBERTS: No, we don't, Your Honor. We  
25 think --

1 QUESTION: Why not? Why do we divorce the one?  
2 They're joint tortfeasors. Their suit is joint  
3 tortfeasors.

4 MR. ROBERTS: The definition of the incident and  
5 the activity comes from the allegations in the complaint.  
6 They seek to hold us liable for what we did. We seek the  
7 limit our liability for what we did. The pertinent  
8 activity is what we did. The fact that there are other --

9 QUESTION: Well, doesn't -- doesn't -- I confess  
10 I didn't pull out the complaint before argument. Doesn't  
11 the complaint also charge the city?

12 MR. ROBERTS: We allege in our limitation  
13 complaint, yes, that the city is liable to us for  
14 contribution and indemnity, but the existence of other  
15 contributing causes doesn't defeat admiralty jurisdiction  
16 once it's found to exist. The test in *Sisson* looks to a  
17 potential threat to maritime commerce.

18 QUESTION: Oh, I see, the plaintiff made no  
19 claim against the city.

20 QUESTION: You are the plaintiffs in this --

21 MR. ROBERTS: We are the plaintiffs in the  
22 limitation action.

23 QUESTION: I'm sorry.

24 MR. ROBERTS: Yes. We were sued by Grubart and  
25 the city and then brought the limitation action in



1 Federal --

2 QUESTION: But Grubart made no claim against the  
3 city.

4 MR. ROBERTS: Oh, no, they do make claims  
5 against the city.

6 QUESTION: Well, then, why do you not consider  
7 the claims under the second part of the nexus test, why  
8 shouldn't the claims against the city be considered as  
9 well as the claims against you?

10 MR. ROBERTS: Because the question before the  
11 Court is whether we, Great Lakes, may bring a petition to  
12 limit our liability in admiralty. Well, limit your  
13 liability for what?

14 QUESTION: And why shouldn't -- yes, why  
15 shouldn't however, the entire -- the entire tort claim,  
16 including the joint character of the joint claim, be  
17 considered in making that determination?

18 MR. ROBERTS: Because the admiralty inquiry  
19 isn't a weighing, does the admiralty interest outweigh any  
20 other interests, it asks, under Sisson, is there a  
21 potential threat to maritime commerce, is there a  
22 substantial relation --

23 QUESTION: Well, but the second Sisson nexus  
24 test is a test, or an inquiry, into the character of the  
25 activities out of which the incident arose, and I presume

1     that if a claim is brought against two joint tortfeasors,  
2     those activities include the activities of each.

3             MR. ROBERTS: Well, the pertinent inquiry is  
4     into the activity of the party that's seeking admiralty  
5     jurisdiction, because once they establish their right to  
6     that jurisdiction, it can't be defeated by the fact that  
7     there are other contributing factors in the case.

8             QUESTION: Mr. Roberts, let me ask this: isn't  
9     it possible, if you have a tort caused by the negligent  
10    actions of two different people, that one of them would be  
11    suable only in admiralty and the other one would not be  
12    suable in admiralty? If you have joint -- if you have  
13    dual causality, it's quite possible that the City of  
14    Chicago can't be sued in admiralty, and that the barge  
15    company must be sued in admiralty, isn't that possible?

16            MR. ROBERTS: Yes, and then added to that, of  
17    course, admiralty's traditional liberal joinder rules, and  
18    rule 14, which allows them to bring in other parties for  
19    contribution and indemnity, but the point is --

20            QUESTION: Well, it's perfectly --

21            QUESTION: Your answer indicates that you  
22    disagree with, what is it, the Maritime Law Association,  
23    that sees this entire matter as governed by maritime law.

24            Your answer to my question, and your most recent  
25    answers, seem to me inconsistent with the argument that's

1 made by the Maritime Law Association, that if your  
2 limitation act claim fails, if the district court should  
3 decide Great Lakes is not entitled to limit its liability,  
4 then the district court would have the option, in effect,  
5 of remanding the case to the State court, at which point  
6 you said it loses its water equality and goes over to be  
7 just an ordinary, garden variety tort suit, but the  
8 Maritime Law Association says where the claimants,  
9 Grubart, may pursue their actions under the saving to  
10 suitors clause, which would be subject to substantive  
11 maritime law, so --

12 MR. ROBERTS: The question of what law to apply,  
13 and this gets into the city's argument, is a different  
14 question from whether or not there is admiralty  
15 jurisdiction. The argument that admiralty jurisdiction  
16 should turn on preemption analysis, choice of law  
17 analysis, is an argument that has been made before this  
18 Court before and rejected in the context of the Romero  
19 case.

20 There, the question was, do admiralty claims  
21 arise under Federal law under 1331, and Justice  
22 Frankfurter, writing for the Court, said no, and the main  
23 reason he gave was that if they did, we would have to look  
24 at each admiralty claim and say, does this arise under  
25 State law or under Federal law, what's the Governing law,

1 and he said, that type of analysis is inappropriate at the  
2 jurisdictional stage, and it's just as inappropriate today  
3 as it was in 1959.

4 QUESTION: But your position remains that if you  
5 lose on your limitation claim there's no more admiralty  
6 jurisdiction, there's no more maritime law governing this  
7 case.

8 MR. ROBERTS: No. It is up to the discretion of  
9 the district court judge in that case whether to retain  
10 the claims that were brought in ancillary to the admiralty  
11 claim.

12 In other words, we don't think there's anything  
13 necessarily admiralty about Grubart's claims against the  
14 city. We think those claims could be brought in State  
15 court. We think they can be brought in admiralty because  
16 they arise out of the same general occurrence that gave  
17 rise to this claim, and under rule 14, we're entitled to  
18 bring the city in to seek contribution and indemnity, but  
19 we're not asserting that admiralty covers those claims.

20 The issue is, can we bring our action, given to  
21 us under Federal law, to limit our liability in admiralty,  
22 and the question then becomes, in defining the activity,  
23 liability for what, and the liability is for what they say  
24 we did, our negligent conduct on the river while we were  
25 engaged in traditional maritime repair work.



1           If the activity of the pleasure yacht in Sisson,  
2 tied up at the dock doing nothing, is traditional maritime  
3 activity, then surely the activities of this commercial  
4 vessel out on the navigable waters, plying its trade for  
5 hire, are as well.

6           QUESTION: So your picture is that the Grubart  
7 claimants should remain in State court with their  
8 lawsuits, they just sit there, till the district court  
9 decides the limitation question. If no limitation, then  
10 those ordinary tort claims go forward in State court.

11          MR. ROBERTS: The claimants are in the admiralty  
12 case under rule 14, and the city is brought in.  
13 Therefore, the city must defend its claims, Grubart's  
14 claims against the city under rule 14 practice, but if --  
15 taking the whole thing from the beginning, if the Grubarts  
16 had just sued the city, that's not an admiralty case  
17 because it didn't arise out of maritime activity, didn't  
18 occur on navigable waters.

19          QUESTION: I'm picturing Grubart and all the  
20 others suing Great Lakes as well as the city.

21          MR. ROBERTS: Then the claim --

22          QUESTION: In the State court, if your  
23 limitation claim fails, then you are as vulnerable as the  
24 city to an ordinary tort suit, in State court?

25          MR. ROBERTS: Well, the -- it could be,

1 depending on how the district judge in admiralty exercises  
2 his discretion under rule 14 to retain the cases after the  
3 determination of a failure of the liability claim or, the  
4 limitation claim, or to remand those to State court.

5 QUESTION: If he chose to retain them, they  
6 would be governed by State law, not maritime law?

7 MR. ROBERTS: It's a separate choice of law  
8 inquiry that doesn't -- on which jurisdiction doesn't  
9 turn.

10 We don't know yet. The allegations against us,  
11 and against the city, for that matter, run the gamut. We  
12 drove the pilings in the wrong location. We didn't pull  
13 up the old ones well enough before driving the new ones.  
14 We drove the new ones in too deeply. We failed to  
15 discover the tunnel.

16 Whether Federal law or State law governs any of  
17 those claims is an issue that can't be decided at the  
18 jurisdictional stage. It's easy to imagine the  
19 desirability of a uniform Federal rule about the location  
20 of pilings. It's easy to imagine the desirability of a  
21 uniform Federal rule about how deeply they're driven.  
22 Vessels are lied against them both deliberately and  
23 inadvertently all the time.

24 Jurisdiction doesn't turn on that, because to  
25 make jurisdiction turn on it would require us to answer

1 the question, what actually caused this incident, and  
2 Sisson tells us jurisdiction doesn't turn on such an  
3 inquiry into the merits.

4 What does it turn on? Whether the incident  
5 occurred on navigable waters, as this did, whether it  
6 poses a threat to maritime commerce, as this did, and  
7 whether it arose out of traditional maritime activity, as  
8 this plainly did. This is the strongest case for  
9 traditional maritime activity to come before this Court  
10 since it first articulated the nexus test in Executive  
11 Jet.

12 For the first time, we have a commercial vessel.  
13 For the first time, we have navigable water actually used  
14 by commercial traffic, and for the first time, we have the  
15 actual conduct of commercial activity.

16 Foremost, two tiny pleasure boats in an area not  
17 used by commercial traffic, Sisson, a pleasure yacht at a  
18 recreational marina, yet in each case this Court found  
19 admiralty jurisdiction because of the potential threat to  
20 maritime commerce and the substantial relation to maritime  
21 commerce. The case for jurisdiction is that much stronger  
22 here, where you have actual maritime commerce involved and  
23 directly affected.

24 Now, the answer that what's involved is pile-  
25 driving is a red herring. They say pile-driving is a

1 common activity, takes place on land all the time, rules  
2 are developed to deal with it. Well, the transportation  
3 of goods from point A to point B is also something that  
4 takes place on land all the time and as to which rules  
5 have been developed, but when it takes place on navigable  
6 water, you're in admiralty.

7 The same is true with respect to marine  
8 construction. There are whole fleets of vessels designed  
9 for marine construction work, just like there are vessels  
10 designed for carrying cargo, people, for fishing, salvage,  
11 towing, rescue, ice-breaking, and when the marine  
12 construction vessels are out on the navigable waters  
13 plying their trade, they are as involved in traditional  
14 maritime activity, maritime commerce, the core of this  
15 Court's admiralty jurisdiction, to as great an extent as  
16 any of those other vessels are.

17 Now, there's -- the petitioner's answer to the  
18 Admiralty Extension Act is to rewrite it. It's worth  
19 recalling what it says: the admiralty and maritime  
20 jurisdiction shall extend to and include all cases -- all  
21 cases -- of damage or injury to person or property caused  
22 by a vessel on navigable water, notwithstanding that such  
23 damage or injury be done or consummated on land.

24 Now, they read that as if Congress meant to say  
25 the jurisdiction shall extend to some cases of injury on



1 land caused by a vessel on navigable waters. Those were  
2 the injuries within the reach of the vessel and reasonably  
3 contemporaneous with the negligent conduct giving rise to  
4 it, but those qualifications are found nowhere in the  
5 language of the statute or in its legislative history.

6 Congress knows how to write a statute like that  
7 if it wants to. That's what it did in the Longshore and  
8 Harbor Workers Act. It said jurisdiction extends to the  
9 dock, to the water, to the pier -- a laundry list of  
10 things near the shore. That's not the approach it took in  
11 the Admiralty Extension Act, and --

12 QUESTION: Well, the word caused requires some  
13 limitation. I mean, you acknowledge that there has to be  
14 some limitation of proximity of cause.

15 MR. ROBERTS: Jurisdiction goes hand-in-glove  
16 with liability. If it is a reasonable allegation of cause  
17 sufficient to give rise to liability, or trial, it  
18 triggers jurisdiction. That's a system that makes perfect  
19 sense.

20 Under petitioner's approach you'd have  
21 jurisdiction stopping short of liability. They say we  
22 caused this for purposes of liability, but they want to  
23 say we didn't cause it for purposes of the Admiralty  
24 Extension Act. The symmetry should be maintained.

25 QUESTION: If you -- you at -- one part of your

1 argument disassociates jurisdiction from choice of law.  
2 If you're right about admiralty jurisdiction, does it  
3 follow that the Workman rule of concern to the City of  
4 Chicago applies as well?

5 MR. ROBERTS: Well, we think it does.

6 QUESTION: It follows like the night the day,  
7 once you get jurisdiction, that the choice of law will be  
8 the maritime rule?

9 MR. ROBERTS: It doesn't follow night from day.  
10 It's a separate question, but we think because of the need  
11 for uniformity at the basis of admiralty jurisdiction, the  
12 Workman rule does apply.

13 Now, that's something that can be debated once  
14 jurisdiction is established, but like everything else --

15 QUESTION: But you -- so you concede that there  
16 would be a choice in the admiralty forum, a choice  
17 possibly of State law rather than maritime law.

18 MR. ROBERTS: We think it is a separate  
19 question. We think the question has already been answered  
20 by this Court in Workman, but it wasn't answered as a  
21 jurisdictional question, it was answered as a choice-  
22 of-law question. This is the rule that applies in  
23 admiralty.

24 The city can argue there should be a different  
25 rule, that Workman for whatever reason ought to be

1 overruled, but they're two separate questions, choice of  
2 law, and jurisdiction. That's the teaching of Erie  
3 Railroad v. Tompkins in the diversity area.

4 QUESTION: Except maritime jurisdiction is a  
5 little different, isn't it? In admiralty, the choice of  
6 law to a large extent, if you have jurisdiction you apply  
7 maritime law, is that not so?

8 MR. ROBERTS: Yes, to a large extent, but not on  
9 every issue.

10 QUESTION: It's quite different from diversity,  
11 where you have Federal jurisdiction but you apply State  
12 law.

13 MR. ROBERTS: Well, the number of areas in which  
14 State law apply are many. The Court listed some of them  
15 in Romero, and it dealt with another one just last term in  
16 American Dredging.

17 It's an admiralty case in State court under the  
18 savings to suitors clause, but the question was, what law  
19 applies on forum non conveniens, State or Federal, and the  
20 difficult analysis in that case that gave rise to four  
21 different opinions is as good a reason not to adopt a  
22 choice-of-law rule for jurisdiction as can be imagined.  
23 It's the reason Justice Frankfurter gave in Romero.

24 Choice-of-law questions are delicate, sensitive,  
25 require a complex weighing of interest. Look what they

1 ask the district court --

2 QUESTION: I thought those rules, the Romero  
3 type rules, were kind of gap-filling rules consistent with  
4 the admiralty rules, not which do you pick when they are  
5 different.

6 MR. ROBERTS: Not what you pick when they're  
7 different, no, but the question is, if there's no rule to  
8 apply, do you apply State law, or do you devise a uniform  
9 Federal rule of maritime law, and what the city says is,  
10 you can only have jurisdiction if it's going to be a  
11 uniform rule.

12 On what question? It's too early. Look what  
13 they ask a district court judge to do. A complaint lands  
14 on his desk. The district court judge apparently must  
15 decide, what are the dispositive legal issues going to be  
16 in this case?

17 Then he or she must employ a choice-of-law  
18 analysis to decide whether Federal law is going to govern  
19 those dispositive issues or State law and then, finally,  
20 if it turns out, as will often be the case, there are more  
21 than one dispositive issue that might come up, apparently  
22 the judge has to weigh those governed by Federal law  
23 against those governed by State law, and somehow decide  
24 which interest predominates. All that to decide  
25 jurisdiction, to decide whether this case can proceed past



1 the threshold step.

2 QUESTION: Mr. Roberts, you've been talking  
3 about applying State law. I guess there is this  
4 difference between admiralty and diversity jurisdictions,  
5 that in admiralty it's a Federal rule that's always  
6 applied, is it not, although the Federal law may look to  
7 State law --

8 MR. ROBERTS: Well, the State law --

9 QUESTION: -- for the rule of decision, whereas  
10 in diversity cases it is not really Federal -- it is  
11 really State law that is being applied as State law,  
12 whereas in admiralty it is State law as applied as a rule  
13 of Federal decision.

14 MR. ROBERTS: Well, except in some instances,  
15 for example, the State law can provide the cause of  
16 action, the wrongful death cases, before the passage of  
17 legislation by Congress.

18 QUESTION: But that's not what you're talking  
19 about here.

20 MR. ROBERTS: No. No. This is a rule of  
21 decision, and again, we don't know what the dispositive  
22 issues are going to be, because we don't know what caused  
23 this incident. Is it because we drove the pilings  
24 allegedly in the wrong location? Admiralty will have a  
25 lot to say -- Federal uniform rules, a lot to say where

1 pilings should be in navigable water.

2 Is it because we drove the pilings too deeply?  
3 Admiralty will have a lot to say about that, too. Maybe  
4 State law will govern, but vessels come up against the  
5 pilings all the time, and perhaps a uniform Federal rule  
6 would be appropriate. That's not the sort of decision  
7 that is made at the preliminary jurisdictional stage.

8 Instead, you look at more -- the inquiry is, as  
9 the Seventh Circuit said, more structured. Did this  
10 incident occur on navigable waters? Yes. Did it pose a  
11 threat to maritime commerce? Yes. That's not seriously  
12 disputed. Did it arise from traditional maritime  
13 activity? Yes.

14 This case involved the hiring of a vessel to  
15 perform services on navigable water, not freakish  
16 services, but what these vessels do, what they're designed  
17 to do all the time, maritime repair work, repair work that  
18 was directly related to navigation.

19 Keep in mind, what I've been maintaining is this  
20 activity is itself traditional maritime activity. All  
21 that the test requires is that it be substantially related  
22 to that. These pilings protect vessels as well as bridges  
23 from the dangers of allisions. They serve as fulcrums in  
24 the tight channels such as underneath the Kinzie Street  
25 Bridge to turn barge traffic by being towed by tugboats.

1           They operate as channel markers if they're in  
2 the right location, as to which Federal admiralty law will  
3 have something to say, and by protecting the drawbridge  
4 they protect maritime commerce, because, of course, if the  
5 drawbridge didn't work, the commerce couldn't get through.  
6 The relation to maritime commerce here is as strong as in  
7 any case to come before this Court since Executive Jet.

8           Looking at the injury, taking into account, as  
9 they say, the totality of the circumstances, and focusing  
10 on where the injury occurred, is, in our view,  
11 inconsistent with the Admiralty Extension Act. It means  
12 that in two identical cases, one in which the injury is  
13 felt on navigable water, and the other in which the injury  
14 is felt on land, there will be jurisdiction in the former  
15 but not in the latter, despite the clear direction from  
16 Congress to the contrary.

17           The test they propose, a totality of the  
18 circumstances, seven-factor, policy-based balancing test,  
19 is wholly unsuited to the jurisdictional inquiry.  
20 Jurisdictional rules need to be clear, precise, easy to  
21 apply, and lead to predictable results.

22           Totality-of-the-circumstances balancing tests  
23 are by their nature vague, indeterminate, manipulable, and  
24 lead to different results, depending on who does the  
25 balancing, a particular concern in jurisdictional cases,

1 because, of course, any appellate court must look at the  
2 question of jurisdiction sua sponte and reevaluate it as a  
3 matter of law.

4 The Sisson test is more structured, it is more  
5 focused, it limits the activities that are pertinent, it  
6 doesn't look at injured parties, what they were doing, it  
7 focuses on what took place on navigable water.

8 We have in this case an incident on navigable  
9 water that closed the Chicago River for more than a month.  
10 It arose from traditional maritime activity. The  
11 conclusion of the Seventh Circuit that that case was  
12 within admiralty was correct, and should be affirmed.

13 QUESTION: Thank you, Mr. Roberts.

14 Mr. Rosenthal, you have 1 minute remaining.

15 REBUTTABLE ARGUMENT OF LAWRENCE ROSENTHAL  
16 ON BEHALF OF PETITIONER CITY OF CHICAGO

17 MR. ROSENTHAL: Mr. Roberts discussed many  
18 causes of action except the one that is actually before  
19 the Court, because this is the first time that this Court  
20 is asked to put any cause of action arising further inland  
21 than the reach of the vessel and its appurtenances into  
22 admiralty.

23 The Extension Act does not put every cause of  
24 action arising from ship-to-shore injury into admiralty.  
25 Huron Portland Cement and Askew would have to be



1 overruled, and there would be serious constitutional  
2 questions about the validity of the Extension Act if no  
3 nexus to Federal interests in maritime commerce were  
4 required.

5 We read the Extension Act as it was read in the  
6 Askew case to require a preemption-based analysis. There  
7 is, indeed, no such thing as an admiralty case that does  
8 not provide for the displacement of State law with Federal  
9 law.

10 As this Court said in the East River Steamship  
11 case, with admiralty jurisdiction comes the application of  
12 substantive maritime law. Admiralty jurisdiction is --

13 QUESTION: Which may sometimes refer to State  
14 law, however.

15 MR. ROSENTHAL: That's correct, and it's up to  
16 Federal district courts, not State legislatures, to decide  
17 what rule, and whenever there is an applicable Federal  
18 rule, that Federal rule will always trump State law.

19 That is why I say, Justice Scalia, admiralty  
20 jurisdiction is inherently preempted, and the test we urge  
21 is the preemption test this Court already uses when it  
22 asks whether State courts have lost jurisdiction.

23 Thank you.

24 CHIEF JUSTICE REHNQUIST: Thank you,  
25 Mr. Rosenthal.

1                   The case is submitted.

2                   (Whereupon, at 11:00 a.m., the case in the  
3 above-entitled matter was submitted.)

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