

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CHANDRIS, INC., ET AL., Petitioners, v.

ANTONIOS LATSIS

CASE NO: 94-325

PLACE: Washington, D.C.

DATE: Tuesday, February 21, 1995.

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHANDRIS, INC., ET AL., :

4 Petitioners :

5 v. : No. 94-325

6 ANTONIOS LATSIS :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, February 21, 1995

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 1:00 p.m.

13 APPEARANCES:

14 DAVID W. McCREADIE, ESQ., Tampa, Florida; on behalf of the
15 Petitioners.

16 LEWIS ROSENBERG, ESQ., New York, New York; on behalf of
17 the Respondent.

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1 PROCEEDINGS

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 94-325, Chandris v. Latsis.

5 Mr. McCreadie.

6 ORAL ARGUMENT OF DAVID W. MCCREADIE

7 ON BEHALF OF THE PETITIONERS

8 MR. MCCREADIE: Mr. Chief Justice and may it
9 please the Court:

10 This case involves the common and troublesome
11 question of who is a seaman under the Jones Act.
12 Unfortunately, the Jones Act does not define the statutory
13 term, seaman, so that task is left to the courts. This
14 Court has struggled with that issue over the years, as
15 have the circuit and district courts.

16 Traditionally, the test that has been used, even
17 if it has more than two parts, breaks the seaman test down
18 into the examination of the connection of the employee to
19 his employer, or the vessel and then, secondly, the
20 employee's contribution to the vessel itself.

21 In Wilander, this Court addressed the second
22 part of that test, and answered the question of whether a
23 seaman must contribute to the navigation of the vessel
24 and, of course, the holding was that that is not
25 necessary. The seaman must merely contribute to the

1 function or contribute to the mission of the vessel.

2 The issue today addresses the first question,
3 and that is, what is the employment-related connection to
4 the vessel that is necessary?

5 Wilander, although it addressed the navigation
6 issue, did make statements and give clues as to what
7 employment-related connection is necessary. One
8 important --

9 QUESTION: Well, but I think what it didn't do
10 was answer the question whether the employee's
11 contribution has to be simply substantial, or a more
12 permanent one, in effect, with regard to his maritime
13 employment.

14 MR. McCREADIE: That issue was certainly left
15 open.

16 QUESTION: Yes, it was, and the Fifth Circuit
17 seems to have a more restrictive test, pointing, perhaps,
18 to permanent employment in that capacity, and the Second
19 Circuit spoke in terms of a substantial contribution in
20 terms of duration or nature.

21 MR. McCREADIE: And I think that that focuses us
22 squarely on the issue today.

23 QUESTION: And what test do you say this Court
24 must adopt?

25 MR. McCREADIE: Well, in analyzing, Justice

1 O'Connor, those two tests, I believe that although there
2 were some good intentions in the Latsis test, there are
3 two fatal flaws in that test, and therefore I advocate the
4 Fifth Circuit test which has withstood many, many years of
5 tests under fire, under battle.

6 QUESTION: What do you say are the fatal flaws
7 with the Second Circuit's articulation of the test?

8 MR. McCREADIE: The Latsis test -- the problem
9 with the Latsis test is that we do know from Wilander that
10 Longshoreman and Jones Act seamen are mutually exclusive.
11 We also --

12 QUESTION: Do you think Mr. Latsis could have
13 been covered under the Longshoreman and Harbor Workers'
14 Act for these injuries?

15 MR. McCREADIE: Yes.

16 QUESTION: Did -- to your knowledge, does the
17 record disclose whether he ever made an application under
18 that act?

19 MR. McCREADIE: The record does not disclose
20 whether Mr. Latsis made an application. Going outside the
21 record, if may, Mr. Justice, there is no indication that
22 he has done so.

23 I have, in anticipation of that question, tried
24 to determine without unduly getting off the track to
25 determine whether he still has that remedy, and my

1 preliminary research is that under 33 U.S. 13(g), I
2 believe it is, there is a tolling section that would allow
3 him to proceed that remedy if he's unsuccessful as this
4 case runs through the courts.

5 QUESTION: Are engineers treated as
6 longshoremen?

7 MR. McCREADIE: Traditional crew members who
8 hold the position of engineers are not treated as
9 longshoremen. They are permanently assigned to a vessel,
10 and therefore, under any tests --

11 QUESTION: No, but even a land-based engineer;
12 would a land-based engineer be a longshoreman?

13 MR. McCREADIE: A land-based engineer who was
14 performing ship repairs would be a longshoreman under the
15 Fifth Circuit Robinson test, and in my view the correct
16 test, because he's going to split time between shore and
17 sea, and depending on how much time he spends at sea and
18 how much time at shore, he could be a longshoreman. Most
19 of those questions, of course, are for the jury to decide,
20 and this Court has been unequivocal also in that
21 statement, that seaman status, unless it's so clear --

22 QUESTION: But is it not true that there are a
23 category of personnel who are neither seamen nor
24 longshoremen who might go to sea once in a while?

25 MR. McCREADIE: There is that category, and in

1 that case they are entitled to traditional negligence
2 remedies, but here, because he is performing ship repair,
3 or species of ship repair, I believe he is covered by the
4 Longshore Act.

5 QUESTION: Well, is that technically correct to
6 say he was -- I mean, he wasn't getting down there and
7 soldering any wires himself, was he?

8 MR. McCREADIE: There --

9 QUESTION: He was a supervising engineer.

10 MR. McCREADIE: To my knowledge there are no
11 Supreme Court cases that specifically define what a repair
12 is for the purposes of the Longshore Act or the Jones Act.
13 However, there are some circuit cases, and my
14 interpretation of those cases is that it's a fairly common
15 sense definition, and that if a person is utilizing his
16 talents to replace communication equipment, or shore up
17 communication equipment, or to fix engine problems or
18 consult on engine problems, that that person then would be
19 doing repairs.

20 QUESTION: You mean, he can work in a skyscraper
21 in Manhattan -- I guess the individual here worked in New
22 York most of the time. Is that -- am I right about that?

23 MR. McCREADIE: He -- his residence was in New
24 York, but he spent most of his living time in Miami,
25 Florida, in the company offices and in a condominium that

1 had been rented for his purpose in Miami.

2 QUESTION: But if you had the right computer
3 hookup, you could really be in Manhattan in a high rise
4 office building and still be a longshoreman.

5 MR. McCREADIE: That's correct.

6 QUESTION: Virtual reality.

7 MR. McCREADIE: Under that circumstance, I think
8 to correct myself, he would not be a longshoreman, because
9 to be a longshoreman you need to satisfy the situs and the
10 status test, and although he would satisfy the status
11 test, he would not satisfy the situs test, so I stand
12 corrected on that answer. That --

13 QUESTION: Even though there may be difficult
14 cases, is there a possibility here to at least carve out a
15 category of easy cases, and that is, if we assume that the
16 individual is employed by the vessel owner, that the
17 vessel is on a voyage, which I take it this one
18 indisputably was, that the person is supposed to do some
19 work for the vessel owner on the voyage -- he's not a
20 passenger, and he's not a stowaway -- would we get into
21 trouble in carving out a central category in that case
22 when all those conditions are met, and say anyone in that
23 capacity is a seaman for purposes of that voyage?

24 MR. McCREADIE: Justice Souter, if I understand
25 your question correctly, you're reviewing the elements of

1 the voyage test, which would cover the situation that
2 you've described, and I believe not only would you create
3 difficulties, I think you would open the floodgates to
4 more and more litigation over this issue, and more
5 importantly, I think --

6 QUESTION: Well, would we open floodgates to
7 more litigation over the issue, or just open floodgates to
8 more claimants who would succeed on their claims? Is
9 there a difference?

10 MR. McCREADIE: I think both would occur. More
11 importantly, I believe that the Congress' intent under the
12 Longshore Act would be vitiated by that test. To give you
13 an example --

14 QUESTION: Well, before you get to the example,
15 I'm not following the discussion, because I had been under
16 the impression that you can't be a long -- a seaman for
17 purposes of the voyage, that it is an employment status;
18 that you are either a seaman, or you are not a seaman.
19 And if you are a seaman, and have made one voyage, that
20 makes you a seaman. You remain a seaman when you're back
21 in Manhattan.

22 MR. McCREADIE: That is correct, and --

23 QUESTION: And if you get injured in the office
24 building, because of that one voyage -- is that what the
25 Second Circuit does with it?

1 MR. McCREADIE: That's not what the Second
2 Circuit does. That is the correct law that you're
3 describing.

4 QUESTION: All right, but the Second Circuit's
5 test would say you can be a seaman for one voyage, and
6 then when you go back to land, you're no longer under the
7 Jones Act and you --

8 MR. McCREADIE: The two flaws that the Second
9 Circuit -- the Latsis test suffers from are not the same
10 as the voyage test that was introduced in the respondent's
11 brief on the merits.

12 QUESTION: The voyage test would even be more
13 favorable --

14 MR. McCREADIE: More liberal, yes, sir.

15 QUESTION: -- to seamen than the Second Circuit
16 test would be. Is there a textual reason why the voyage
17 test is wrong?

18 MR. McCREADIE: The reason why the voyage test
19 is wrong is, it has absolutely no resolving power, and the
20 examples of who would qualify under that test, you can go
21 on and on and on, and in fact the justice of this Court --

22 QUESTION: Well, we're going on and on and on
23 now. Wherever we go, we seem to go on and on and on, and
24 is there a textual reason why the voyage test is
25 impermissible?

1 MR. McCREADIE: Well, the voyage test does not
2 comply with the requirements that were set down in
3 Wilander, and the voyage test certainly would not be
4 restricted to the master or members of the crew.

5 QUESTION: Well, I take it you're telling me
6 implicitly that there's no textual reason why it's wrong.

7 MR. McCREADIE: I'm not sure I --

8 QUESTION: I keep asking you, and you -- there's
9 nothing in the act.

10 MR. McCREADIE: The act unfortunately only has
11 the word seaman --

12 QUESTION: It just uses the word seaman.

13 MR. McCREADIE: Yes, sir.

14 QUESTION: So there is no textual --

15 QUESTION: Well, there is no definition, is
16 there?

17 MR. McCREADIE: There is no --

18 QUESTION: It's been left to this Court to
19 define, and I guess under the Longshoreman and Harbor
20 Workers' Act we've extended coverage to people who make
21 short trips all the time. They're in and out of the
22 harbor, and they're making very short trips, and to use a
23 voyage test might get us into some difficulty, I assume.

24 MR. McCREADIE: For example, the justices of
25 this Court could be seamen under the voyage test. If the

1 ABA or another bar group chartered a vessel and they
2 operated the vessel, and there was a seminar on board, and
3 one or more of the Court was invited to be a speaker on
4 that cruise, that voyage, and there was an injury to one
5 of the justices, the simplistic elements of the voyage
6 test would be met, because the justice would be
7 contributing to the mission of the vessel -- i.e., giving
8 an educational seminar, like an entertainer on a cruise
9 ship, you would be hurt during the voyage, and it would be
10 for the duration of the voyage.

11 QUESTION: But you wouldn't be employed by the
12 vessel.

13 MR. McCREADIE: But the voyage test does not
14 require employment. That's another reason --

15 QUESTION: Well, my hypo did.

16 QUESTION: I thought Justice Souter's hypo did.

17 MR. McCREADIE: Then that would --

18 QUESTION: You could be employed by the vessel,
19 and be -- and further, be at sea when you get hurt.

20 MR. McCREADIE: If you impose a further duty
21 that was not mentioned in the respondent's brief on the
22 merits, that there be an employment relationship between
23 the owner of the vessel and that employee, that would
24 exclude the example of the justices of this Court, but it
25 would not exclude the example of the general counsel of

1 the cruise line, the CEO of a cruise line, the in-house
2 marketing person from the cruise line, all who would have
3 employment relationships with the vessel owner, and then
4 you've satisfied that element, and then you go right back
5 to the point of, they're on a voyage for the duration of
6 the voyage --

7 QUESTION: But those are all clearly examples of
8 people who would not be longshoremen, I assume.

9 MR. McCREADIE: That's correct.

10 QUESTION: So we do have a category of people
11 who are neither longshoremen or seamen.

12 MR. McCREADIE: There certainly are.

13 QUESTION: I take it the situs of the injury,
14 the fact that it occurred on a voyage, is relevant, is one
15 of the factors?

16 MR. McCREADIE: In the Latsis case itself, the
17 Longshore Act in my view does cover the situation, because
18 he was a ship repairman. The examples I gave of the
19 general counsel, the CEO, and an in-house marketing
20 person, they do not fall within the category of the
21 Longshore Act.

22 QUESTION: I'm asking --

23 QUESTION: But if you're a seaman, and the
24 injury occurs on land, you are still covered under the
25 Jones Act as a seaman, I assume.

1 MR. McCREADIE: Absolutely correct, and that is
2 because the seaman status is not established at the exact
3 time of the accident, or -- and what you're doing
4 immediately before the accident.

5 In seaman's cases, this Court over and over has
6 decided that it doesn't want seamen to walk in and out of
7 coverage, so you looked to the overall employment
8 relationship, decided what status the person was, and
9 whether they were on shore or on a ship, they're entitled
10 to seamen's remedies.

11 QUESTION: But in a close case, where the
12 claimant is arguing for seaman's status, is it relevant
13 that the injury occurred on the vessel on a voyage?
14 That's where Justice Souter was leading.

15 It seems to me there may be a category of easier
16 cases, and we can say that in a close case this can be the
17 dispositive factor. It occurred on the voyage, where he's
18 subject to the perils of the sea, he's got to do what the
19 ship's doctor says, et cetera, et cetera.

20 MR. McCREADIE: That is certainly a complicating
21 factor, and it makes it more difficult for us just to
22 exclude that person. I've tried to point out examples of
23 how using just a voyage test creates problems.

24 QUESTION: Well, it's not a complicat -- it
25 seems to me, if you're being consistent to your argument,

1 your answer to Justice Kennedy has to be no, that it is
2 irrelevant where the injury happened to occur. The
3 individual is either a seaman or not a seaman.

4 Now, it may tug at the heartstrings, and it may
5 be a -- you know, an emotionally significant factor, but
6 as I understand your theory, the question is whether the
7 individual is normally doing the work of a seaman, and if
8 not, even if he happens to have been injured at sea,
9 during a voyage, it should make no difference.

10 MR. McCREADIE: And I agree with your summary.
11 Perhaps I misunderstood your question. It does not fit
12 the -- or, the status tests that I advocate. It does have
13 a certain intuitive, simplistic appeal that it is an easy
14 test to apply, and from that perspective, I thought that
15 it is complicating, but it's not --

16 QUESTION: But it seems to me not only
17 intuitive, but it has some bearing on the rationale for
18 the act, which is that the seaman is subject to the
19 discipline of the ship, the orders of the ship's doctor,
20 et cetera, which is precisely why we have seaman's status
21 at all.

22 MR. McCREADIE: The perils of the sea is
23 certainly one of the policy considerations in protecting
24 seamen. The problem comes in when you use that as your
25 sole basis for fashioning a seaman test.

1 QUESTION: Well, I'm suggesting that it is a
2 weighty factor, not the sole factor.

3 MR. McCREADIE: It is one of the factors
4 involved, but, for example, as we discussed earlier,
5 seamen who are on shore are no longer subjected to the
6 perils of the sea, and --

7 QUESTION: Mr. McCreadie, I thought I had your
8 position right, but from what you're saying now, I'm not
9 clear. I thought your position is you could type every
10 person, every employee. Before the accident occurs, you
11 say, tell me what Latsis' work is, and I will tell you
12 whether he's a seaman or not.

13 MR. McCREADIE: That is correct.

14 QUESTION: So that, in answer to Justice
15 Kennedy's question, on your theory it should be irrelevant
16 whether Latsis was injured in a sea storm, because you
17 know from day 1, based on the obligations and duties of
18 his job, that he will not be a sailor. I thought that was
19 your position.

20 MR. McCREADIE: That is my position, and I
21 probably confused it by, again, conceding that there are
22 some advocates who want to just look to the place of the
23 injury to determine whether someone is a seaman. That is
24 contrary, I believe, to Wilander, contrary to the Fifth
25 Circuit test --

1 QUESTION: But your position is, it's not even a
2 relevant factor.

3 MR. McCREADIE: That is correct.

4 QUESTION: Okay.

5 QUESTION: Well, Mr. McCreadie, enlighten me, if
6 a seaman is on land, and is injured, say, by a negligent
7 automobile driver, can he recover from the ship's owner?

8 MR. McCREADIE: Mr. Chief Justice, he can, and
9 that's the series of Supreme Court cases that hold that
10 you're not going to let a seaman walk in and out of
11 coverage solely because of the fortuity of where the
12 injury occurs.

13 His status is established by looking at his
14 entire employment with that vessel, or that employer, and
15 when he comes ashore and is injured, I think there's cases
16 dealing with dance halls and all -- you know, all kind of
17 activities that seamen engage in. They all are entitled
18 to maintenance and cure, and seamen's remedies, including
19 the Jones Act.

20 QUESTION: Mr. -- I'm sorry. No, you go ahead.

21 QUESTION: Go on -- go on.

22 QUESTION: Let me go back to Justice Kennedy's
23 question with a slight variation, although I'm not sure it
24 really is a variation. Let's assume whatever the test is,
25 you need a tie-breaker. I'm the judge. I cannot decide.

1 You know, there's this and there's that -- I'm on the
2 fence.

3 Why is it an impermissible tie-breaker to give
4 dispositive weight to the fact that the voyage -- that the
5 ship was on a voyage, that he was employed, that he was
6 not a passenger, or a stowaway, and the injury resulted
7 from an accepted hazard of sea voyages? Why is that an
8 impermissible tie-breaker on any test?

9 MR. McCREADIE: I agree with your position, and
10 it is a line-drawing problem we have here today. Where do
11 you draw the lines? I do not agree that whether they're
12 on a voyage should be the end-all and be-all of the tests,
13 but I do advocate using that at the very end --

14 QUESTION: Justice Kennedy wasn't suggesting
15 that, and at this point I'm not suggesting that. I'm just
16 saying, whatever the test is, we come out at a point of
17 equipoise. Why is that factor, or that congeries of
18 factors, not a reasonable and sufficient basis to break
19 the tie?

20 MR. McCREADIE: I argue that that's how the tie
21 should be broken, and that the perils of the sea that
22 occur at sea or on vessels that are in movement, that that
23 should be added to the Fifth Circuit test to provide the
24 proper test for this Court.

25 QUESTION: Well, you've taken several different

1 positions here. First, you seemed to agree with Justice
2 Kennedy, and then in response to Justice Scalia's and
3 Justice Ginsburg's questions, you say it was irrelevant
4 that -- and now you say it's a permissible tie-breaker.
5 You've taken three different positions. Which do you end
6 up with?

7 MR. MCCREADIE: My position is that you cannot
8 use perils of the sea as the sole basis for your test.
9 You have to start with Wilander, and use an employment-
10 related connection to a vessel.

11 The only place that the perils of the sea comes
12 into play is, when you're trying to draw the fine line at
13 the very end of the test, I think it's relevant to
14 distinguish between longshoremen and seamen.

15 QUESTION: Well --

16 QUESTION: Well, then you have to retract your
17 answer to Justice Ginsburg, who suggested to you,
18 shouldn't we be able to know, before the voyage ever
19 occurs, by looking at the person's job description,
20 whether or not he or she is a seaman?

21 MR. MCCREADIE: The test that we've advocated
22 here would allow the employer or the court to make that
23 determination --

24 QUESTION: No, it wouldn't --

25 QUESTION: Isn't that what the Fifth Circuit

1 does? You look at the job as a whole, and look to see
2 whether there is a permanent employment as a seaman on a
3 vessel?

4 MR. McCREADIE: The permanent connection --

5 QUESTION: Is that right? I mean, is that more
6 the focus of the Fifth Circuit test?

7 MR. McCREADIE: The Fifth Circuit test, the
8 first prong, or -- is the permanent connection. There
9 is --

10 QUESTION: All right. Now, the Second Circuit
11 does not require a permanent connection. It says, there
12 can be some in-and-out coverage to the extent that the
13 employment, or the contribution of the employee was
14 substantial in terms of its duration and nature, is that
15 right?

16 MR. McCREADIE: That is correct.

17 QUESTION: Now, neither the Second Circuit nor
18 the Fifth Circuit use the so-called voyage test, as I
19 understand it.

20 MR. McCREADIE: No port that I know of has used
21 that test.

22 QUESTION: And we're not reviewing a judgment
23 that used that test. That would be going off in another
24 direction, would it not?

25 MR. McCREADIE: That is correct. This case

1 involves a dispute between the Robinson-Barrett test and
2 the Latsis test, and the problem with the Latsis test is
3 that when it uses the terms, duration or nature, it allows
4 a person who spends, in the jury's eyes, 90 percent of
5 their time on shore, and who have some contact with
6 vessels, to be seamen, and that is contrary to the Fifth
7 Circuit test, and I believe to the statements in Wilander.

8 QUESTION: Is that one of the fatal --

9 QUESTION: I think it's relevant to what we're
10 considering here. I mean, the concession you've made with
11 regard to the place of the injury, because frankly, I
12 thought the strongest part of your case was the necessity
13 for the employer to be able to tell whether the employee
14 is a Jones Act employee, or not a Jones Act employee, and
15 I thought we had two categories of people. You could
16 study the person's job and decide he was or he wasn't.

17 But you have now told us that there are three
18 categories of employees. There are those who are clearly
19 Jones Act, there are those who are clearly not Jones Act,
20 and there is a third category where it's too close to
21 call, as Justice Kennedy says, and they either are or are
22 not Jones Act, depending upon where they get injured.

23 MR. McCREADIE: I think the --

24 QUESTION: That does not strike me as a very
25 happy system of --

1 MR. McCREADIE: The difficulty is, and the
2 reason that that is a problem, is because, as this Court
3 has pointed out, the Court has to give the law, and the
4 jury has to make the decision, and what I'm trying to
5 explain is that there are situations that superficially
6 fall under the Robinson-Barrett test, and makes a
7 longshoreman into a seaman, and that is contrary to
8 Congress' intent as to what they want to occur.

9 And what I'm trying to explain in the fourth
10 part of my brief on the merits is that, in order to
11 fortify the Fifth Circuit test, to shore it up so that it
12 is more precise, so that it does help a jury reach a
13 realistic and honest appraisal of the seaman's status and
14 also help an employer know what his employees are, that
15 conceptually it is fair to shore that up by adding in that
16 you need either a permanent connection, or a substantial
17 connection, as long as the substantial prong is fortified
18 by exposure, the perils at sea, not at the dock, or to the
19 dangers of vessels while they're underway at sea.

20 QUESTION: That's why I didn't really see the
21 difference between the briefs. I mean, I know this must
22 be my fault, but they -- it seems to me it comes down to
23 whether the perils of the sea, and they say the hazards of
24 the sea, and then later on they define hazards of the sea
25 to be deep sea perils and the dangers incident to the

1 movement of vessels on navigable waters, and once I saw
2 that, it seemed to me, what's the difference?

3 I take it what you're trying to get at is, there
4 are people who wear blue suits, used to put up sails, work
5 on the motors, everyone would say they're seamen, and
6 they're covered all the time.

7 MR. McCREADIE: Correct.

8 QUESTION: All right. Then there are some other
9 people like a welder, who may come on the ship when it's
10 at the dock, and the question, suppose the ship, while the
11 welder's on it, goes out on a little trip, and he keeps
12 welding. Well, common sense would say he should be
13 covered while he's out there but not when he gets back to
14 the dock. And then we're trying to get a test to work
15 that out.

16 All right. My questions, I guess, are, is that
17 right, and if that's not right, still, what's the
18 difference between your two tests?

19 MR. McCREADIE: The difference between the tests
20 are that the perils of the sea is mentioned in the Latsis
21 test, but when they use the term, regularly exposed to the
22 perils of the sea, they did not address or use the word
23 regularly, so under the Latsis test --

24 QUESTION: Regularly.

25 MR. McCREADIE: -- all a person has to be is

1 exposed at the time of his injury, he's a seaman --

2 QUESTION: Well, now, wait a minute. I thought
3 that the Second Circuit in the very case we're looking at
4 here said that one of the requirements of their test was
5 that the course of the plaintiff's employment regularly
6 exposed the plaintiff to the hazards of the sea.

7 MR. McCREADIE: That's right.

8 QUESTION: That was their express test, and
9 that's what I hear you saying the test ought to be.

10 MR. McCREADIE: But they didn't apply the
11 "regularly" portion, because regularly --

12 QUESTION: Well, did they articulate the right
13 test? Let's go that far.

14 MR. McCREADIE: The perils of the sea prong is
15 correct. That does conform with what I believe the rule
16 should be. The problem with the Latsis test is that they
17 use that alternative, nature or duration, and they allow
18 the shore-based person to gain sea-time, if you will,
19 while he's endeavoring to provide services to a ship while
20 he's sitting in his office, and it's that activity which
21 can be up to 90 percent, according to the facts in this
22 case, that I believe violates Congress' intent under the
23 Longshore Act, and therefore, pursuant to Wilander,
24 violates the Jones Act.

25 QUESTION: Well, you know, it's very hard to pin

1 you down, because you've just wavered this way and that
2 throughout this argument, but the Second Circuit had
3 several requirements in its test, and one of them was that
4 the plaintiff's contribution was substantial in terms of
5 its duration or nature.

6 MR. McCREADIE: Correct.

7 QUESTION: And you take issue with that, is that
8 where you differ?

9 MR. McCREADIE: That is the main problem. That
10 is a problem with the test itself, because it allows
11 shore-based employees, contrary to Wilander, to be seamen.

12 I also take exception with the fact that they
13 articulate, regularly exposed to the perils of the sea,
14 but they never used it and never applied it to the facts
15 of the case, because if a person who is only out there
16 10 percent of the time is regularly exposed to the perils
17 of the sea, then that doesn't have any meaning that will
18 help with a test that will resolve these cases.

19 QUESTION: Those are the two fatal flaws that
20 you were going to tell us about at the very beginning --

21 MR. McCREADIE: Yes.

22 QUESTION: -- of your argument? All right.

23 QUESTION: And is there anything wrong with
24 covering the welder if, in fact, he does go out on this
25 mission, and they sail about 1,000 miles, and he sits

1 there and welds? I can see there would be something wrong
2 with covering him once he comes back to shore, but is
3 there anything wrong with covering him while he's at sea?

4 MR. McCREADIE: That would be tantamount to the
5 voyage test, and I believe there are problems with
6 covering an employee just because he goes on one voyage.
7 You have to look to his entire employment-related
8 connection to the vessel.

9 QUESTION: You say that he can't go in and out.

10 MR. McCREADIE: That's correct.

11 QUESTION: I thought your position was you
12 cannot cover someone just for a voyage, and then when he
13 comes back he goes out of his Jones Act status. If he has
14 the status, he has it for his entire employment.

15 MR. McCREADIE: That is correct.

16 QUESTION: Is that --

17 QUESTION: Why is that? I mean, why is it in
18 the law -- why is it that a person couldn't, for example,
19 be a welder, and then he says, I'm going to sign up now to
20 help with this ship, and he goes on the ship and pulls the
21 ropes and everything --

22 MR. McCREADIE: If he totally changes his job
23 status --

24 QUESTION: Yes.

25 MR. McCREADIE: -- and is permanently assigned

1 to the vessel, he changes from a longshoreman into a
2 seaman.

3 QUESTION: All right, and why do you have to say
4 that while he's on the shore and doing the welding at the
5 dock, he's the one thing, and then when he goes out to sea
6 we couldn't say he's the other?

7 MR. McCREADIE: Because this Court and Congress
8 have shown a disinclination to allow people to wander in
9 and out of coverage.

10 QUESTION: Well, is part of the problem that the
11 Longshoreman and Harbor Workers' Act is set up as a sort
12 of a scheduled Workman's Compensation type program, and
13 you calculate the benefits and the employer's liability
14 based on predictable factors of the employment, whereas
15 the Jones Act is just an open-ended damages cause of
16 action, isn't that right?

17 MR. McCREADIE: That is correct.

18 QUESTION: And so what the courts have done,
19 basically, is not to adopt this voyage test so that they
20 keep a stable Longshoreman and Harbor Workers' Act
21 compensation scheme in place, is that right?

22 MR. McCREADIE: That is correct, and that's the
23 benefit of this system.

24 QUESTION: But you've got problems, because the
25 two systems are not the same, and so at the margins you

1 run into some difficulties.

2 MR. MCCREADIE: I'll reserve my remaining time,
3 Mr. Chief Justice.

4 QUESTION: Very well, Mr. McCreadie.

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

6 Would you enlighten me on the same question I
7 asked Mr. McCreadie? I'll detail it more. Supposing that
8 someone who is concededly a seaman is on a ship which ends
9 a voyage at Boston, and he lives in Boston. He's walking
10 down Washington Street and is run over by a car, and the
11 ship is going to sail next week. He's just home for a
12 week. Is the ship owner liable to him for any damages
13 under the Jones Act?

14 ORAL ARGUMENT OF LEWIS ROSENBERG

15 ON BEHALF OF THE RESPONDENT

16 MR. ROSENBERG: Mr. Chief Justice, and may it
17 please the Court:

18 I was thinking about answering that question
19 when I got on my feet immediately. There's an important
20 element necessary in the Jones Act before an employee can
21 bring suit successfully. He must show that the employer
22 is negligent. It's not a --

23 QUESTION: It's not a --

24 MR. ROSENBERG: -- no-fault system. He must
25 establish that there's some neglect on the part of the

1 employer.

2 QUESTION: And if the shipping company had
3 nothing to do with the car that ran him over on Washington
4 Street, it's not responsible --

5 MR. ROSENBERG: Exactly.

6 QUESTION: -- under the Jones Act.

7 MR. ROSENBERG: Exactly, Your Honor. There's
8 no -- they control their risk. It's not something that
9 makes them a guarantor of the safety of all their
10 employees.

11 QUESTION: What if it was the company's car?
12 What if it was the company's car, and it was negligent?

13 MR. ROSENBERG: And it was negligent --

14 QUESTION: And he's on land --

15 MR. ROSENBERG: Then the employer would be
16 liable.

17 QUESTION: I think Mr. McCreddie was mentioning
18 that he would be typed a sailor for purposes of other
19 relief like maintenance and cure. He'd get maintenance
20 and cure, wouldn't he, if he had a sailor status?

21 MR. ROSENBERG: Of course, Your Honor. As a
22 matter of fact --

23 QUESTION: Which he wouldn't have, if he didn't
24 have sailor status.

25 MR. ROSENBERG: Exactly.

1 QUESTION: Even though there's no question of
2 negligence.

3 MR. ROSENBERG: That's right. That's right, and
4 that's an important feature of it.

5 If I might just digress just for a moment from
6 the discussion about the particular test to be applied to
7 something of a very important nature with regard to the
8 status of this appeal that I think I should bring it to
9 the Court's attention, the decision below is based upon
10 two independent bases.

11 One of them, of course, is what we've been
12 focusing on so far, which test to be applied, but there's
13 another one as well, and that has not been addressed in
14 the petition, nor has it been addressed in the brief on
15 the merits, and that is to say, the Second Circuit's
16 holding that the trial judge was in error in instructing
17 this jury as a matter of law that the vessel was out of
18 navigation when it was in drydock in Germany, and that is
19 an independent basis for the Court's decision, and it has
20 not been addressed in the petition nor in the brief on the
21 merits.

22 Now, I'm prepared -- and we have addressed that
23 merits of that position in our brief, because we support
24 it. There are two cases of this Court that support that
25 position, and are very important in the Jones Act and the

1 evolution of the Jones Act which was cited in the Wilander
2 case, and those are the Senko cases and the Butler case.

3 QUESTION: Those are rather extreme decisions,
4 though, some 30 years ago, weren't they?

5 MR. ROSENBERG: Well, I would not characterize
6 them as extreme, because they've been guiding courts all
7 along since that time, in terms of coverage, but just
8 let's examine factually what Butler involved and see how
9 it fits in with the situation at hand.

10 In Butler, there was a tugboat that had not been
11 moved in the year in question, except when it was towed to
12 a drydock. It was, I guess, effectively decommissioned.
13 It was awaiting Coast Guard inspection, it had no captain,
14 it had no other crew members except a laborer who was
15 assigned to it, and the laborer was mysteriously found
16 drowned, and the assumption was that he had somehow fallen
17 from a gangplank.

18 Now, that vessel, this Court held, that question
19 as to whether that vessel was or was not in navigation was
20 a question for a jury, in the same way that the Second
21 Circuit held that whether or not that drydock, 6 months,
22 with very close planning, which had a crew on board, where
23 Mr. Latsis was, I contend, one of the crew members on that
24 boat, on that ship for that period of time, they executed
25 a plan where they restored that vessel in 6 months and she

1 was on her way, and as a matter of fact, Mr. Latsis
2 attended the shakedown cruise, and when they put it back
3 into drydock in Norfolk --

4 QUESTION: Was he on the ship during the 6
5 months it was in the drydock?

6 MR. ROSENBERG: He worked on that ship for 6
7 months, 7 -- the testimony is, 7 days a week for 6 months,
8 from early in the morning to 11:00 at night.

9 QUESTION: But he didn't live on the ship?

10 MR. ROSENBERG: He didn't live on the ship, no.
11 There were some -- there were some personnel living on the
12 ship. He was not one of the personnel that was
13 accommodated on the ship, but nonetheless, that certainly
14 shows a very intimate connection.

15 Now, if this Court is going to reverse the
16 Second Circuit, considering that finding, it's going to do
17 so without considering this point as to whether the --
18 this Court's prior holdings have vitality, without anybody
19 briefing this point, and I think it's elementary in
20 procedure before this Court that before you take such
21 action, reversing precedent, even if it's old precedent,
22 Your Honor -- it's old, but it was cited in Wilander, in
23 the unanimous opinion of this Court.

24 Wilander took cognizance of both Senko and
25 Butler, and the efficacy of the rules laid down there, and

1 I don't think that was a casual observation that was made.

2 QUESTION: But didn't Judge Oaks say that if the
3 accident had happened while the boat was in drydock, maybe
4 Latsis would not have been a sailor?

5 MR. ROSENBERG: He said it was an open question.
6 He said, whether -- in those circumstances an employee
7 connected to that vessel might or might --

8 QUESTION: And if it was an open question, then
9 he had to at least have contemplated the possibility that
10 Latsis is a seaman sometimes and not a seaman at other
11 times.

12 MR. ROSENBERG: I think what he meant by that
13 is, how substantial was the association of Mr. Latsis to
14 that vessel during that period of time, in the context of
15 his whole employment? In other words, the --

16 QUESTION: How is that affected by where he's
17 injured?

18 MR. ROSENBERG: Excuse me?

19 QUESTION: How is that affected by where he is
20 injured?

21 MR. ROSENBERG: Well, you know, there was an
22 issue raised about the intuitive approach to these kind of
23 cases. As a matter of fact, the Fifth Circuit used those
24 very words when it rejected affording seaman status to
25 pilots, which forever have always been considered seamen.

1 But in any event, to address that point, I think
2 it's very compelling. It's a tie-breaker, as Justice
3 Souter pointed out. The man was enduring the risk that --

4 QUESTION: I don't find it compelling at all.
5 I -- why is it compelling --

6 MR. ROSENBERG: Well, because --

7 QUESTION: -- if what you're looking for is
8 status, what --

9 MR. ROSENBERG: Certainly, status.

10 QUESTION: -- the individual's employment status
11 is?

12 MR. ROSENBERG: The purpose of the Jones Act --

13 QUESTION: It's based on his job description,
14 not where the injury occurs.

15 MR. ROSENBERG: As everyone has pointed out,
16 Your Honor, there are close cases, a lot of close cases.

17 QUESTION: Fine. Well, what about flipping a
18 coin? That's a good tie-breaker, too.

19 MR. ROSENBERG: Well, I don't think --

20 QUESTION: I mean, why do you seize upon the
21 place of the injury?

22 MR. ROSENBERG: It's not merely the place of the
23 injury, Your Honor, but the risk associated. In other
24 words, this was, according to the Second Circuit, and I
25 think logically it follows, a risk of the employment, of

1 being involved in a vessel underway on the sea, and that's
2 what's compelling about it.

3 QUESTION: Well, but if he were a seaman, if
4 Latsis is in fact, or was in fact at the time a seaman for
5 purposes of the Jones Act, and if his retina had detached
6 while he was sitting in his office on the dock, he would
7 have been covered, wouldn't he, as a seaman under the
8 Jones Act?

9 MR. ROSENBERG: If you assume that somehow or
10 other the doctor was neglectful in treating him in that
11 context, yes.

12 QUESTION: Same doctor, said don't -- you know,
13 don't worry right now.

14 MR. ROSENBERG: Yes.

15 QUESTION: Do you find it compelling that he was
16 sitting at his desk?

17 MR. ROSENBERG: No.

18 QUESTION: Then why do you find it compelling
19 when he's sitting on the boat?

20 MR. ROSENBERG: Because --

21 QUESTION: I don't see the difference.

22 MR. ROSENBERG: If he was sitting on a dock,
23 Your Honor, he would have alternatives. If he had some
24 question about the competence of that physician, and if
25 you read the record in this case you'd have questions

1 about the competence of this physician, he could go
2 somewhere else.

3 He wasn't bound to accept only the medical care
4 that was afforded him by this particular physician. He
5 wouldn't have that risk of the sea. He wouldn't realize
6 injury as a result of the risk of the sea.

7 QUESTION: One of the risks of the sea is you
8 get a bad ship's doctor?

9 MR. ROSENBERG: No. No. No. I think a risk of
10 the sea is something that, because of the confinement,
11 you're restricted to whatever's offered to you in that
12 context. That's why it's a risk of the sea, Your Honor.
13 It's not --

14 QUESTION: Now, if he's not a seaman, would he
15 be covered under the Longshoreman and Harbor Workers' Act?

16 MR. ROSENBERG: He might. I mean, to step out
17 of the record again, I know of no -- he has not made any
18 application for that coverage, and --

19 QUESTION: Right, but as far as you know he
20 would be. If he isn't a seaman, then you think --

21 MR. ROSENBERG: He might be, but he's not a
22 longshoreman, that's for sure, and there might be some
23 objection to his -- in terms of the employees having a
24 choice, I'm sure he'd prefer -- if the employee had
25 control of choosing whether he would be considered a Jones

1 Act sailor --

2 QUESTION: Which he doesn't?

3 MR. ROSENBERG: No. Then I'm sure --

4 QUESTION: It's not a scheme that's set up for

5 employee option, is it?

6 MR. ROSENBERG: No, it's not.

7 QUESTION: We're clear about that.

8 MR. ROSENBERG: Most certainly.

9 QUESTION: He either is, or he isn't.

10 MR. ROSENBERG: Exactly, Your Honor. Exactly.

11 QUESTION: Mr. Rosenberg --

12 QUESTION: How would he make his choice? I

13 mean, you never finished your sentence. If he had a

14 choice, what would he choose?

15 MR. ROSENBERG: Well, if the employer had a

16 choice --

17 QUESTION: The employee. I thought you were

18 talking about --

19 MR. ROSENBERG: No, the employer. The employer

20 would cap his liability, obviously, with -- I mean, it's a

21 schedule. It says, so many weeks at two-thirds of -- if

22 he lost his eye, they'd give him 160 weeks -- two-thirds

23 of 160 weeks of his salary if it's a total loss of the

24 eye. I don't know -- I'm not quite sure what --

25 QUESTION: But the choice is not perfectly clear

1 if it's an employee, because one side you get absolute
2 liability, and on the other hand you have to prove
3 negligence.

4 MR. ROSENBERG: That's right. It's not a no-
5 fault scheme, the Jones Act. You've got to prove
6 negligence, and I think the record here amply, amply
7 supports a conclusion that there was negligence here, no
8 doubt about it.

9 In the --

10 QUESTION: May I just go back to one answer, or
11 one question you answered a moment ago? You're not making
12 the argument that place of injury combined with exposure
13 to hazards at sea is, I think the word was compelling,
14 you're saying that it may, indeed, break the tie.

15 MR. ROSENBERG: Yes.

16 QUESTION: And that's perfectly consistent with
17 answering that if a person is a seaman, and has the same
18 eye injury on land, he will still be treated as a seaman
19 for purposes of the act?

20 MR. ROSENBERG: Exactly. As a matter of fact,
21 this Court has held quite the same in a --

22 QUESTION: Of course, it's very close whether
23 he's a seaman or not, in which case, you ought to find the
24 fact that he was on land compelling.

25 MR. ROSENBERG: It might be, judge. It might

1 very well be.

2 QUESTION: Does the Second Circuit's opinion say
3 it felt this was a very close case that needed a tie-
4 breaker?

5 MR. ROSENBERG: No. That's something we've
6 introduced into the concept.

7 QUESTION: The Second Circuit was concerned with
8 the error in an instruction to the jury --

9 MR. ROSENBERG: Absolutely.

10 QUESTION: -- is that right?

11 MR. ROSENBERG: Yes, in several facets.

12 QUESTION: And it happened to be the error to
13 which you -- the instruction about permanent connection to
14 which you did not object.

15 MR. ROSENBERG: Yes, that's quite correct, Your
16 Honor.

17 QUESTION: And so -- and this case was not -- it
18 was not determined that Latsis was a seaman. It was sent
19 back for retrial under a proper instruction.

20 MR. ROSENBERG: Exactly, under the test of the
21 Second Circuit as modified by this Court's holding in
22 Wilander eliminating the requirement that the employee aid
23 in navigation, which this Court directed no longer be part
24 of any test for seaman status, that there are others
25 besides blue water sailors that are covered by the Jones

1 Act.

2 And it's clearly contemplated that -- for
3 instance, in enumerating all the occupations and trades
4 that historically have been considered as seamen before
5 the Jones Act was enacted, and that was the starting point
6 for the analysis in Wilander, there have been engineers,
7 pilots, and all kinds of occupations that have been said
8 to have contributed to the mission of a voyage or the
9 function of the vessel, and those alternatives were
10 incorporated into -- in the -- universally in all the
11 tests.

12 QUESTION: The term, ship's engineer has a
13 somewhat different connotation, doesn't it, than
14 Mr. Latsis' profession?

15 MR. ROSENBERG: Mr. Latsis was a supervising
16 engineer. In other words, he supervised the engineers
17 that were on board the vessel.

18 QUESTION: What do the nonsupervisory, laboring-
19 in-the-vineyard type engineers do on board a vessel?

20 MR. ROSENBERG: Well, they operate the engines.

21 QUESTION: Yes.

22 MR. ROSENBERG: They effectuate repairs at sea
23 when necessary. They coordinate, or make suggestions, but
24 ultimately the decisionmaking is Mr. Latsis' as the
25 superintendent engineer as to how to execute on -- and

1 they accept the directions, whether they're on hand -- in
2 other words, Mr. Latsis regularly -- the evidence
3 indicates he visited these ships regularly in port, and
4 also traveled with them at sea.

5 QUESTION: The engineers operate the ship's
6 machinery, don't they?

7 MR. ROSENBERG: Yes, exactly. They're operating
8 engineers, I think, in a major way, as -- the railroad
9 used to have engineers on, operating engineers as well,
10 and they're fixed plant operating engineers as well.

11 The category, engineer, covers a lot of
12 territory.

13 QUESTION: Now, Mr. --

14 QUESTION: Mr. Rosenberg, can I ask you -- I
15 should know this, and I've just forgotten it. Isn't there
16 both a situs test and a status test under the
17 Longshoreman's Act?

18 MR. ROSENBERG: Under the Longshoreman's Act,
19 yes, sir.

20 QUESTION: Now, in the situs test, would he have
21 met the situs test in this case?

22 MR. ROSENBERG: Well --

23 QUESTION: What is the situs test?

24 MR. ROSENBERG: The situs is the area -- the
25 Longshoreman, as the act has indicated, is to cover

1 principally -- the impetus for the enactment was to cover
2 people loading and unloading materials on board ships.

3 QUESTION: Could he be a longshoreman if he was
4 1,000 miles out to sea?

5 MR. ROSENBERG: Don't think so.

6 QUESTION: So, I mean, it wouldn't meet the
7 situs test.

8 MR. ROSENBERG: No, it wouldn't, no.

9 QUESTION: So --

10 MR. ROSENBERG: And in his office he wouldn't
11 meet it, either.

12 QUESTION: So isn't it true that a lot of people
13 who are at sea -- this is following up on Justice Souter's
14 approach -- would not meet the situs test under the
15 Longshoreman's Act.

16 MR. ROSENBERG: That's true, yes, and as a
17 matter of fact, there is a case that was not mentioned so
18 far, a recent case of this Court, Gizoni, a ship
19 repairman, where the employer advocated that since he was
20 a ship repairman, how could he be a seaman?

21 Well, this Court found Mr. Gizoni, a ship
22 repairman, a seaman because he traveled on work platforms
23 that were floating, and therefore the vessel requirement
24 was met, even though it was several vessels.

25 QUESTION: Do you agree that our law indicates

1 that you cannot go in and out of seaman and longshore
2 status?

3 MR. ROSENBERG: Yes, I do.

4 QUESTION: Well, that's exactly what I wondered
5 in the Second Circuit test. That is to say, they talk
6 about a person, other things being satisfied, that he
7 either -- he makes a contribution that is substantial
8 either in respect to duration, or nature.

9 MR. ROSENBERG: Correct.

10 QUESTION: So I'm thinking, what about our
11 welder? Ninety-nine percent of his time he's at the dock.
12 One day, he's repairing the bulkhead and they say, come
13 with us, continue to do it while we go to Hamburg.

14 Now, reading that test, I thought it would cover
15 him while he is making a substantial contribution in terms
16 of nature, though not of time.

17 MR. ROSENBERG: Exactly.

18 QUESTION: And therefore he would be covered.
19 But when he got back to the shore, and he got off the
20 boat, and he went back to his normal welding facilities,
21 he's no longer covered, while, on the other hand, the
22 seaman, who's there because of duration, i.e., the real
23 sailor, is covered always.

24 Now, that's how I was reading that, and that's
25 why I started out with Justice Souter's idea. Perhaps

1 that would work. But now from various -- I'm quite shaken
2 as to whether that works or doesn't work.

3 QUESTION: I don't think that's what the Second
4 Circuit is saying.

5 QUESTION: Well, regardless --

6 MR. ROSENBERG: They didn't address that, no,
7 but let me tell you that there is a case in this Court
8 that was decided in 1959, Braen v. Pfeifer, which is cited
9 in the reply brief -- we didn't cite it in our brief, but
10 it's in the reply brief, which involved a -- the question
11 as to whether you could step out of seaman status.

12 And this was a -- this was someone who was a
13 seaman, and he was assigned to nonseaman duties, and the
14 question was, by that assignment, would that take him out
15 of seaman status, and the holding was that it was not, and
16 I think implicit in that holding, and this also I think is
17 also the rationale of Senko, was the fact that it was an
18 intention that he would return at some point, that he was
19 destined to once again encounter the hazards of the sea,
20 and therefore he retains that seaman status.

21 QUESTION: So how could we do that? What I'm
22 basically getting at is, I don't understand why the welder
23 shouldn't be covered when he's out there in the ocean.

24 MR. ROSENBERG: I think he should be.

25 QUESTION: But I can perfectly well understand

1 why he shouldn't be covered once he comes back to the
2 dock.

3 MR. ROSENBERG: If, when he comes --

4 QUESTION: So how does the law work in order to
5 achieve that result without cutting off the person with
6 the blue -- you want him to be covered when he comes back
7 to the --

8 MR. ROSENBERG: Exactly.

9 QUESTION: So how does it work, this statute, to
10 get there?

11 MR. ROSENBERG: If the -- if your hypothetical
12 welder, Your Honor, did an odd job at sea, so he wasn't
13 regularly -- that wasn't part of his regular employment,
14 that was extraordinary. Then if the welding job at hand
15 was substantial, he would become a seaman.

16 When he went back, however, if -- in proving
17 that it was isolated, did not ever encounter that kind of
18 risk or job again, or was not intended to, nobody planned
19 him doing that, then in effect his job changed, and he
20 lost the seaman status because he's no longer --

21 QUESTION: Well, the Second Circuit test would
22 not cover the welder who was asked to go to Hamburg,
23 because it clearly said, you also have to find that in the
24 course of the plaintiff's employment, the plaintiff is
25 regularly exposed to the hazards of the sea. The Second

1 Circuit wouldn't cover the welder.

2 MR. ROSENBERG: Well --

3 QUESTION: Now, I thought that this case had
4 gone back to be -- have the jury consider this under the
5 Second Circuit's test.

6 MR. ROSENBERG: Oh, no. That has not occurred
7 as yet, Your Honor.

8 QUESTION: But that's their plan.

9 MR. ROSENBERG: Oh, yes.

10 QUESTION: That's what we're reviewing.

11 MR. ROSENBERG: Exactly. Exactly.

12 QUESTION: And you don't like the Second Circuit
13 test.

14 MR. ROSENBERG: Well, no, I do like it, but I
15 would modify the word, regular --

16 QUESTION: But you didn't petition for
17 certiorari.

18 MR. ROSENBERG: No, I did not, no.

19 QUESTION: And as it now stands it will go back
20 under that test, which certainly wouldn't cover the welder
21 who's sent to Hamburg, would it?

22 MR. ROSENBERG: Not if that was isolated, no.
23 No, unless we wanted to modify the word, regular, to mean
24 something different than that, nonsporadic, or non --

25 QUESTION: You in effect accepted the Second

1 Circuit's position for here.

2 MR. ROSENBERG: I think so.

3 QUESTION: And you're faced with your opponent

4 who says it should be a much narrower definition of

5 seaman.

6 MR. ROSENBERG: Exactly, Your Honor.

7 QUESTION: So presumably, neither of you would

8 think it would cover the welder who went to Hamburg.

9 MR. ROSENBERG: Unless -- with the proviso that

10 there was some recurrence to that type of --

11 QUESTION: That he frequently went to Hamburg?

12 MR. ROSENBERG: Not necessarily --

13 QUESTION: Well, we could all agree to that.

14 MR. ROSENBERG: -- Hamburg, but some place

15 where --

16 (Laughter.)

17 MR. ROSENBERG: I'm sorry.

18 QUESTION: I said if he frequently went to

19 Hamburg, I think we could all agree --

20 MR. ROSENBERG: Sure. Absolutely, but the

21 concept, I think, is that it was not isolated, whether it

22 was Hamburg or some other place where he would perform

23 that function while at sea.

24 QUESTION: I have really lost the thread of the

25 disagreement, then, between you and the other side of the

1 case. You both agree that it has to be regularly, that
2 the individual does not occupy seaman status unless he's
3 regularly at sea, is that right?

4 MR. ROSENBERG: Well, we're obliged to do that
5 because that's what the Second Circuit said, and we're
6 supporting the Second Circuit. However, that term
7 regularly has not been defined in any -- to any degree,
8 and I think contextually the -- regularly in that
9 situation means not sporadically, not spasmodically.

10 Not related to the clock, however, because that
11 was the one thing that the Second Circuit was clear in
12 rejecting, that having a time-only index --

13 QUESTION: Mr. Rosenberg, we're talking about a
14 charge to the jury.

15 MR. ROSENBERG: Yes.

16 QUESTION: Judge Oaks wrote a charge for that
17 jury. Judge Kearse agreed that's a perfectly fine charge,
18 but what she says, it wasn't plain error.

19 MR. ROSENBERG: Yes.

20 QUESTION: So either the Fifth Circuit words are
21 right, permanent, or the Second Circuit's words are right,
22 substantial -- what is it? -- but more refinements we
23 can't give, because what we're talking about is, what was
24 the correct charge --

25 MR. ROSENBERG: Exactly.

1 QUESTION: -- for a jury to be given, in the
2 words of the Fifth Circuit, or in the words of the Second
3 Circuit?

4 MR. ROSENBERG: Exactly.

5 QUESTION: And nothing more elaborate is going
6 to help this district judge, who is either going to be
7 finished with the case, if the district judge is right, or
8 we'll have to charge another jury, if we uphold the Second
9 Circuit's decision.

10 MR. ROSENBERG: Except, of course, that other
11 point I brought up, Your Honor, that in addition, Judge
12 Oaks' opinion states it was error to have excluded from
13 the jury's consideration the period of time the vessel was
14 in drydock from their determination whether Mr. Latsis, in
15 his overall employment, had a substantial connection to
16 that vessel.

17 The Second Circuit held that error, and that
18 ruling has not been challenged here, so in effect the
19 choices I see before the Court are, as you pointed out,
20 Your Honor, the Fifth Circuit test or the Second Circuit
21 test, but in any event a remand and a new trial, and that
22 seems inevitable on the state of this record.

23 QUESTION: You say there should be a new trial
24 even though we were to adopt the Fifth Circuit test?

25 MR. ROSENBERG: Yes, Your Honor. Yes.

1 But the Fifth Circuit test was not always so
2 time-oriented. Until the Bach case, and until the Chevron
3 case, the Fifth Circuit was not so narrowly construing
4 that test. This is a gloss that has only occurred,
5 relatively speaking, in recent times, and the older Fifth
6 Circuit test, where that emphasis of time was not so
7 narrow, is very much the same, except I think in the
8 Second Circuit it's more well articulated, to get away
9 from that concept, and I think that that --

10 QUESTION: May I reveal my stupidity once more,
11 but you know, we've talked about this welder going to sea,
12 just one example. I thought he would be covered under the
13 Second Circuit test, because I thought they left the
14 duration as one way of proving substantiality, and nature
15 the other way, and if the nature of his work during the
16 voyage was what every seaman does -- maybe they just send
17 this welder out -- I thought that would be covered under
18 the Second Circuit test, but you've conceded it would not
19 be.

20 MR. ROSENBERG: Well, if the hypothetical we
21 presented was just one isolated instance --

22 QUESTION: Well, it's one long voyage from, you
23 know, here to Tokyo -- or Yokosuka, I guess.

24 MR. ROSENBERG: I had assumed that since there
25 was a port mentioned that he worked only at that

1 destination, and not en route.

2 No. If that were true, I would -- I'd say that
3 the welder is covered.

4 QUESTION: The --

5 QUESTION: And isn't perhaps a way to -- I'm
6 sorry.

7 QUESTION: The Second Circuit clearly had an
8 additional requirement, in addition to, that it be
9 substantial contribution. The Second Circuit also said
10 that the plaintiff's employment had to regularly expose
11 the plaintiff to the hazards of the sea.

12 MR. ROSENBERG: Yes.

13 QUESTION: So the Second Circuit had an
14 additional requirement.

15 MR. ROSENBERG: Exactly, Your Honor.

16 QUESTION: And the welder on a one-time trip
17 would not be covered under that test.

18 MR. ROSENBERG: Assuming a trip was finite, it
19 wasn't a long, you know, worldwide cruise kind of thing,
20 he would or wouldn't be covered under that test, but you
21 have to employ that term to ascertain whether or not that
22 requirement was made, that fourth requirement.

23 QUESTION: Is it possible to read the Second
24 Circuit test and to answer Justice Breyer's question in
25 some such way as this: we will start with agreement that

1 once a person has attained seaman status, he doesn't lose
2 that status by going ashore for a month or something of
3 that sort, he doesn't become a nonseaman when he crosses
4 the gangplank, and we will assume that when someone does
5 not have seaman status, mere presence for a short time,
6 perhaps even as an employee on the ship, may not be
7 enough.

8 But there are some cases, and perhaps this is
9 one, in which, by -- in which the previously nonseaman
10 goes on a voyage and performs duties which in fact
11 indicate a change in his job, and when that happens, as it
12 might be if the welder went to sea and while they were at
13 sea somebody said, my God, there's a leak in the hull, can
14 you weld it shut, and he goes down, of course he's
15 contributing to the mission of the ship, et cetera.

16 In that case, he is simply performing a
17 different kind of job for his employer from what he does
18 when he sits in drydock and so on, and this may be one of
19 those cases, and the Second Circuit's test is consistent
20 with applying -- may consistently be applied to find
21 seaman status, because once the job has changed, he
22 regularly is performing those duties. Is that perhaps a
23 way to reconcile --

24 MR. ROSENBERG: I think that is --

25 QUESTION: -- and answer what is bothering all

1 of us?

2 MR. ROSENBERG: I think that does, because that
3 clearly defines it at that point.

4 QUESTION: Well, except that the Fifth Circuit
5 would say no.

6 MR. ROSENBERG: That's right.

7 QUESTION: That you look at the permanent job
8 assignment --

9 MR. ROSENBERG: Well --

10 QUESTION: -- and if the permanent assignment is
11 to be in an office and supervise the engineering on the
12 whole fleet of ships, even though occasionally having to
13 make a trip at sea in doing that, the permanent assignment
14 is not that of a seaman.

15 MR. ROSENBERG: I think --

16 QUESTION: I mean, you would have a difference
17 in the circuits on that.

18 MR. ROSENBERG: I think that Justice Souter's
19 put his finger on something, though. This -- the test in
20 that circumstances would be, of that particular
21 employment, but the nature of the employment changes.

22 QUESTION: Well, that's nifty, but people always
23 come in and say, whenever they go to sea, they say, well,
24 this was a new job. I mean, there's no end to the
25 litigation over that, when everybody's going to claim that

1 as soon as he gets assigned in the course of any
2 employment, to go on a ship, well, that was a new job.

3 MR. ROSENBERG: Well, judge, there are other
4 requirements besides being assigned to the ship. We're
5 talking somebody who's involved --

6 QUESTION: Mr. Rosenberg --

7 QUESTION: It wasn't a new job. This was part
8 of his regular job.

9 QUESTION: -- you answered -- you gave a firm
10 answer to the question, there's no in-and-out for a true
11 sailor.

12 MR. ROSENBERG: Right.

13 QUESTION: He's assigned to land for 2 months,
14 he remains, he's ever and always a sailor.

15 Now, you seem to be shuffling on whether
16 somebody who is not that traditional sailor, but who
17 spends a considerable amount of time on a voyage, can be,
18 for that temporary time, a sailor, even though he's going
19 to go back on shore and be an engineer and sit in his
20 office in Miami, and maybe fall down the stairs there.

21 Is Latsis ever and always a sailor, or can he be
22 a sailor, under your argument, when he's in the middle of
23 the ocean on the way to Bermuda, and yet not be a sailor
24 when he gets back to his office in Miami and falls down
25 the stairs?

1 MR. ROSENBERG: Traditionally, it has been that
2 once you achieve the status of seaman, you don't step out
3 of it, as long as that continuity of the duties related to
4 that employment continue, but people do change jobs.

5 QUESTION: But his job hasn't changed. He
6 occasionally goes on ships, but he spends most of his time
7 on land. Are you -- is your answer yes, you must type him
8 as either a sailor or not so that just as when he had the
9 detached retina in the middle of the way to Bermuda, if he
10 got it in his office in Miami, when he got back, he would
11 still be a sailor?

12 MR. ROSENBERG: Oh, he'd still be a sailor, yes,
13 but there's no negligence of an employer in the office in
14 Miami, so he would --

15 QUESTION: I'm assuming that the office is ill-
16 equipped, or the stairs in the property that was rented by
17 the employer were defected, so the negligence is still
18 there.

19 MR. ROSENBERG: If there's negligence, if he's a
20 seaman --

21 QUESTION: You're saying that this man -- you
22 two seem to agree, then, that either you're a sailor, or
23 you're not a sailor, and there's no in-and-out. There's
24 no welder case possible, because either that welder is
25 always a sailor, or never a sailor.

1 MR. ROSENBERG: That's -- that's --

2 QUESTION: So if you don't permit the in-and-
3 out, then a person who goes on one trip to Hamburg, and he
4 has a blue suit, he puts up the sails, he steers the ship,
5 he repairs the engine, he rows half the way --

6 (Laughter.)

7 QUESTION: He is not covered under the act,
8 because you'd call him not a seaman? I mean, that's what
9 to me makes very little sense, frankly.

10 MR. ROSENBERG: I agree, it doesn't seem to make
11 any sense.

12 QUESTION: All right. Then isn't Justice
13 Souter's approach a way of dealing with it, though it has
14 Justice Scalia's cost?

15 MR. ROSENBERG: It does, but there's another
16 factor I think we're overlooking. Traditionally, in
17 terms -- this question of a voyage has come up, and it's
18 been called a voyage test, and except in -- well, even in
19 modern times, but at the times under consideration, the
20 times before the Jones Act was enacted, seaman, blue water
21 sailors traditionally would sign on for a voyage.

22 In this Court's opinion in Wilander, it cited no
23 less than five times a single case decided by the district
24 court in New York by Judge Howe, called the Buena Ventura,
25 as typifying how the analysis went to determine who was a

1 seaman. This was a case --

2 CHIEF JUSTICE REHNQUIST: Thank you,

3 Mr. Rosenberg. Your time has expired.

4 The case is submitted.

5 (Whereupon, at 2:00 p.m., the case in the above-
6 entitled matter was submitted.)

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CERTIFICATION

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CHANDRIS, INC, ET AL., Petitioners v. ANTONIOS LATSIS

CASE NO.: 94-325

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BY *Ann Marie Federico*

(REPORTER)