SUPREME COURT OF THE UNITED STATES

Nos. 93–762 AND 93–1094

JEROME B. GRUBART, INC., PETITIONER
93–762 *v.*
GREAT LAKES DREDGE & DOCK COMPANY ET AL.

CITY OF CHICAGO, PETITIONER
93–1094 *v.*
GREAT LAKES DREDGE & DOCK COMPANY ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February 22, 1995]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

I agree with the majority's conclusion that 28 U. S. C. §1333(1) grants the District Court jurisdiction over the great Chicago flood of 1992. But I write separately because I cannot agree with the test the Court applies to determine the boundaries of admiralty and maritime jurisdiction. Instead of continuing our unquestioning allegiance to the multi-factor approach of *Sisson* v. *Ruby*, 497 U. S. 358 (1990), I would restore the jurisdictional inquiry to the simple question whether the tort occurred on a vessel on the navigable waters of the United States. If so, then admiralty jurisdiction exists. This clear, bright-line rule, which the Court applied until recently, ensures that judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction.

This case requires the Court to redefine once again the line between federal admiralty jurisdiction and state power due to an ambiguous balancing test. The

fact that we have had to revisit this question for the third time in a little over 10 years indicates the defects of the Court's current approach. The faults of balancing tests are clearest, and perhaps most destructive, in the area of jurisdiction. Vague and obscure rules may permit judicial power to reach beyond its constitutional and statutory limits, or they may discourage judges from hearing disputes properly before them. Such rules waste judges' and litigants' resources better spent on the merits, as this case itself demonstrates. It is especially unfortunate that this has occurred in admiralty, an area that once provided a jurisdictional rule almost as clear as the 9th and 10th verses of Genesis: "And God said, Let the waters under the heaven be gathered together unto one place, and let the dry land appear: and it was so. And God called the dry land Earth; and the gathering together of the waters called he Seas: and God saw that it was good." The Holy Bible, Genesis 1:9–10 (King James Version).

As recently as 1972, courts and parties experienced little difficulty in determining whether a case triggered admiralty jurisdiction, thanks to the simple "situs rule." In *The Plymouth*, 3 Wall. 20, 36 (1866), this Court articulated the situs rule thus: "[e]very species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." This simple, clear test, which Justice Story pronounced while riding circuit, see *Thomas* v. *Lane*, 23 F. Cas. 957, 960 (No. 13,902) (CC Me. 1813), did not require alteration until 1948, when Congress included within the admiralty jurisdiction torts caused on water, but whose effects were felt on land. See Ex-tension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U. S. C. App. §740.

The simplicity of this test was marred by modern cases that tested the boundaries of admiralty jurisdiction with ever more unusual facts. In *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249 (1972), we held that a plane crash in Lake

Erie was not an admiralty case within the meaning of §1333(1) because the tort did not "bear a significant relationship to traditional maritime activity." *Id*., at 268. What subsequent cases have failed to respect, however, is *Executive Jet*'s clear limitation to torts involving aircraft. As we said:

> "One area in which locality as the exclusive test of admiralty tort jurisdiction has given rise to serious problems in application is that of aviation. . . . [W]e have concluded that maritime locality alone is not a sufficient predicate for admiralty jurisdiction *in aviation tort cases." Id.,* at 261 (emphasis added).

Our identification of the "significant relationship" factor occurred wholly in the context of a discussion of the difficulties that aircraft posed for maritime law. In fact, while we recognized the extensive criticism of the strict locality rule, we noted that "for the traditional types of maritime torts, the traditional test has worked quite satisfactorily." *Id.*, at 254. Thus, *Executive Jet*, properly read, holds that if a tort occurred on board a vessel on the navigable waters, the situs test applies, but if the tort involved an airplane, then the "significant relationship" requirement is added.

Although it modified the strict locality test, *Executive Jet* still retained a clear rule that I could apply comfortably to the main business of the admiralty court. Nonetheless, the simplicity and clarity of this approach met its demise in *Foremost Ins. Co.* v. *Richardson*, 457 U. S. 668 (1982). That case involved the collision of two pleasure boats on the navigable waters, a tort that some commentators had argued did not fall within the admiralty jurisdiction because it did not implicate maritime commerce. See, *e.g.,* Stolz, Pleasure Boating and Admiralty: *Erie* at Sea, 51 Calif. L. Rev. 661 (1963). The Court could have resolved the case and found jurisdiction simply by applying the situs test. Instead, responding to the arguments that admiralty jurisdiction was limited to commercial maritime

activity, the Court found that the tort's "significant connection with traditional maritime activity" and the accident's "potential disruptive impact" on maritime commerce prompted an exercise of federal jurisdiction. 457 U. S., at 674–675.

It is clear that *Foremost* overextended *Executive Jet*, which had reserved the significant relationship inquiry for aviation torts. As JUSTICE SCALIA noted in *Sisson*, *Executive Jet* is better "understood as resting on the quite simple ground that the tort did not involve a vessel, which had traditionally been thought required by the leading scholars in the field." 497 U. S., at 369–370 (opinion concurring in judgment). *Executive Jet* did not in the least seek to alter the strict locality test for torts involving waterborne vessels. *Foremost*, however, converted *Executive Jet*'s exception into the rule. In addition to examining situs, *Foremost* required federal courts to ask whether the tort bore a significant relationship to maritime commerce, and whether the accident had a potential disruptive impact on maritime commerce. 457 U. S., at 673–675. The lower courts adopted different approaches as they sought to apply *Foremost*'s alteration of the *Executive Jet* test. See *Sisson, supra,* at 365, n. 4 (citing cases).

Sisson then affirmed the inherent vagueness of the *Foremost* test. *Sisson* involved a marina fire that was caused by a faulty washer-dryer unit on a pleasure yacht. The fire destroyed the yacht and damaged several vessels in addition to the marina. In finding admiralty jurisdiction, the Court held that the federal judicial power would extend to such cases only if: (1) in addition to situs, (2) the "incident" poses a potential hazard to maritime commerce, and (3) the "activity" giving rise to the incident bears a substantial relationship to traditional maritime activity. 497 U. S., at 362–364. The traditional situs test also would have sustained a finding of jurisdiction because the fire started on board a vessel on the waterways. Thus, what was once a simple question—did the tort occur on the navigable waters—had become a complicated, multi-factor analysis.

The disruption and confusion created by the

Foremost-Sisson approach is evident from the post-*Sisson* decisions of the lower courts and from the majority opinion itself. Faced with the task of determining what is an "incident" or "activity" for *Sisson* purposes, the Fourth, Fifth, and Ninth Circuits simply reverted to the multi-factor test they had employed before *Sisson*. See *Price* v. *Price*, 929 F. 2d 131, 135–136 (CA4 1991); *Coats* v. *Penrod Drilling Corp.*, 5 F. 3d 877, 885–886 (CA5 1993); *Delta Country Ventures, Inc.* v. *Magana*, 986 F. 2d 1260, 1263 (CA9 1993). The District Court's opinion in this case is typical: while nodding to *Sisson*, the court focused its entire attention on a totality-of-the-circumstances test, which includes factors such as "the functions and roles of the parties" and "[t]he traditional concepts of the role of admiralty law." Pet. for Cert. of Chicago 32a. Such considerations have no place in the *Sisson* test and should have no role in any jurisdictional inquiry. The dangers of a totality-of-the-circumstances approach to jurisdiction should be obvious. An undefined test requires courts and litigants to devote substantial resources to determine whether a federal court may hear a specific case. Such a test also introduces undesirable uncertainty into the affairs of private actors—even those involved in common maritime activities—who cannot predict whether or not their conduct may justify the exercise of admiralty jurisdiction.

Although the majority makes an admirable attempt to clarify what *Sisson* obscures, I am afraid that its analysis cannot mitigate the confusion of the *Sisson* test. Thus, faced with the "potential to disrupt maritime commerce" prong *ante,* at 10, the majority must resort to "an intermediate level of possible generality" to determine the "`general features'" of the incident here, *id.,* at 11. The majority does not explain the origins of "levels of generality," nor, to

my knowledge, do we employ such a concept in other areas of jurisdiction. We do not use "levels of generality" to characterize residency or amount in controversy for diversity purposes, or to determine the presence of a federal question. Nor does the majority explain why an "intermediate" level of generality is appropriate. It is even unclear what an intermediate level of generality is, and we cannot expect that district courts will apply such a concept uniformly in similar cases. It is far from obvious how the undefined intermediate level of generality indicates that the "incident" for *Sisson* purposes is that of a vessel damaging an underwater structure.

The majority also applies levels of generality to the next prong of *Sisson*—whether the tortfeasor is engaged in "activity" that shows a "substantial relationship to traditional maritime activity." The majority decides that the activity is repair work by a vessel on a navigable waterway. But, as the petitioners rightly argue, the "activity" very well could be bridge repair or pile driving. One simply cannot tell due to the ambiguities intrinsic to *Sisson* and to the uncertainty as to the meaning of levels of generality. The majority's response implicitly acknowledges the vagueness inherent in *Sisson*: "Although there is inevitably some play in the joints in selecting the right level of generality when applying the *Sisson* test, the inevitable imprecision is not an excuse for whimsy." *Ante*, at 14. The Court cannot provide much guidance to district courts as to the correct level of generality; instead, it can only say that any level is probably sufficient so long as it does not lead to "whimsy." When it comes to these issues, I prefer a clearer rule, which this Court has demanded with respect to federal question or diversity jurisdiction. Indeed, the "play in the joints" and "imprecision" that the Court finds "inevitable" easily could be avoided by returning to the test that

prevailed before *Foremost*. In its effort to create an elegant, general test that could include all maritime torts, *Sisson* has only disrupted what was once a simple inquiry.

It should be apparent that this Court does not owe *Sisson* the benefit of *stare decisis*. As shown above, *Sisson* and *Foremost* themselves overextended *Executive Jet* and deviated from a long tradition of admiralty jurisprudence. More importantly, the new test of *Sisson* and *Foremost* did not produce greater clarity or simplicity in exchange for departing from a century of undisturbed practice. Instead, as discussed earlier, the two cases have produced only confusion and disarray in the lower courts and in this Court as well. It would seem that in the area of federal subject-matter jurisdiction, vagueness and ambiguity are grounds enough to revisit an unworkable prior decision.

In place of *Sisson* I would follow the test described at the outset. When determining whether maritime jurisdiction exists under §1333(1), a federal district court should ask if the tort occurred on a vessel on the navigable waters. This approach won the approval of two Justices in *Sisson*, see 497 U. S., at 373 (SCALIA, J., joined by White, J., concurring in judgment). Although JUSTICE SCALIA's *Sisson* concurrence retained a "normal maritime activities" component, it recognized that anything a vessel does in the navigable waters would meet that requirement, and that "[i]t would be more straightforward to jettison the `traditional maritime activity' analysis entirely." *Id*., at 374. I wholly agree and have chosen the straightforward approach, which, for all of its simplicity, would have produced the same results the Court arrived at in *Executive Jet*, *Foremost*, *Sisson*, and this case. Although this approach "might leave

within admiralty jurisdiction a few unusual actions," *ibid.*, such freakish cases will occur rarely. In any event, the resources needed to resolve them "will be saved many times over by a clear jurisdictional rule that makes it unnecessary to decide" what is a traditional maritime activity and what poses a threat to maritime commerce. *Id.*, at 374–375.

In this case, a straightforward application of the proposed test easily produces a finding of admiralty jurisdiction. As the majority quite ably demonstrates, the situs requirement is satisfied because the tort was caused by a "spud barge" on the Chicago River. *Ante*, at 6–8. Although the accident's effects were felt on land, the Extension of Admiralty Jurisdiction Act brings the event within §1333(1). While I agree with the majority's analysis of this question, I disagree with its decision to continue on to other issues. A simple application of the situs test would yield the same result the Court reaches at the end of its analysis.

This Court pursues clarity and efficiency in other areas of federal subject-matter jurisdiction, and it should demand no less in admiralty and maritime law. The test I have proposed would produce much the same results as the *Sisson* analysis without the need for wasteful litigation over threshold jurisdictional questions. Because *Sisson* departed from a century of precedent, is unworkable, and is easily replaced with a bright-line rule, I concur only in the judgment.