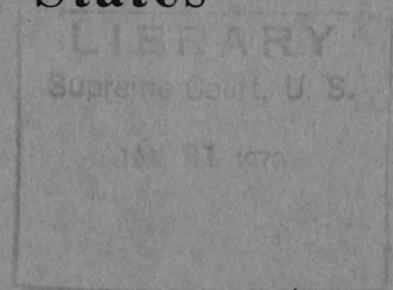


Supreme Court of the United States

OCTOBER TERM, 1969



In the Matter of:

----- x
 AUGIE REETZ, COMMISSIONER OF :
 FISH AND GAME FOR ALASKA, et al. :
 :
 Appellants, :
 :
 vs. :
 :
 JOHN BOZANICH, et al. :
 ----- x

Docket No. 185

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Place Washington, D. C.

Date January 13, 1970

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Charles K. Cranston, Esq., on behalf
of Appellants

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Robert Boochever, Esq.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

AUGIE REETZ, COMMISSIONER OF FISH AND GAME FOR ALASKA, ET AL.,

Appellants,

vs.

JOHN BOZANICH, ET AL.

No. 185

Washington, D. C.
January 13, 1970

The above-entitled matter came on for argument at 10:10 a.m.

BEFORE:

- WARREN BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

CHARLES K. CRANSTON, Esq.
Assistant Attorney General
of Alaska,
Anchorage, Alaska

ROBERT BOOCHEVER, Esq.
Juneau, Alaska

1 common use.

2 A three judge District Court in Anchorage, Alaska,
3 held the statute unconstitutional as being in violation of
4 the equal protection clause of the 14th Amendment and the two
5 Alaska Constitutional provisions to which I have referred. It
6 is the position of the State of Alaska that summary judgment
7 was improperly granted in this case, and that the basic issue
8 involved is whether or not the provision allowing new entrance
9 into the salmon fishery by virtue of their right to fish
10 commercially for three years is illusory, whether it is
11 meaningless or not.

12 The three judge District Court concluded that notwith-
13 standing the provision, entry into the fishery was controlled
14 not by the state, as intended by the statute, but by the
15 fishermen themselves. It is the state's position that this
16 conclusion of the three judge court is not supported by the
17 record, and for that reason summary judgment should not have
18 been granted on the record as it appeared before the Court at
19 that time.

20 The allegations in the pleadings relative to this
21 aspect of the case were denied, and the pertinent affidavits
22 and answers to interrogatories did not touch on the issue,
23 although the Court itself found that there was no right of new
24 entry other than by the permission of those already in the
25 fishery.

1 Q State that again.

2 A The three judge District Court concluded that
3 in fact for a person to be eligible for a salmon net gear
4 license in Alaska, he had to receive employment by those
5 already engaged in the fishery, and therefore the right to his
6 license was not within his control, but was within the control
7 of others, and on this basis the Court concluded the fishery
8 in effect was closed, there was an exclusive right, and the
9 right was not open to all who might wish to enter.

10 Q Does the state contest that?

11 A The state contests this finding, Mr. Justice,
12 on the basis that it is not supported by any facts presently
13 in the record, or by any implications which could be drawn
14 from those facts in the record. We feel that the provision
15 of the statute which allows a license to be issued to one who
16 fishes commercially for three years is sufficient in allowing
17 new entry into the fishery.

18 Q What was the basis for the District Court's
19 conclusion in that respect? It was not just the construction
20 of the statute, I take it? The statute does not say that,
21 does it?

22 A No, Mr. Justice, the statute says only that a
23 license may be issued to one who has fished actively as a
24 commercial licensee for three years.

25 Q Or has had a salmon license in the last year.

1 A Or has had a salmon license in any year in
2 the particular area.

3 Q Then what was the basis for the District
4 Court's conclusion that just as a matter of the way the statute
5 operates, no one could get a license unless existing fishermen
6 approved of it? Is that it?

7 A Yes, Mr. Justice. I would assume that is the
8 basis on which the Court made its finding, that it determined
9 that the application of the law resulted in this. This of
10 course is the very point which I am arguing, that if the Court
11 is going to determine that this is how the law operates in
12 application, then more facts are needed.

13 Q Let me ask you, in these salmon fishing areas,
14 how would one be a commercial fisherman except by fishing for
15 salmon? Are there other commercial fish in those same areas
16 from which he can make a living catching them?

17 A Mr. Justice, I would answer that question by
18 stating yes, one can fish commercially in Alaska for fish
19 other than salmon.

20 Q As a matter of fact, does anybody do it and
21 make a living without fishing for salmon in those areas?

22 A Again, this is not disclosed by the record,
23 but I would assume that there are people who make a living
24 fishing for halibut, fishing for crab.

25 Q In those same salmon areas?

1 A Yes, although this again gets to my basic point
2 that in order to determine this, to answer your question, sir,
3 there would have to be hearings at the District Court level in
4 order to answer this question. I believe the state would agree
5 that others may make a living at fishing commercially for fish
6 other than salmon. Appellees, of course, assert that maybe they
7 can't make a living, and this is something that should be
8 determined in plenary proceedings.

9 Q Let us assume that a man works as an employee
10 for a salmon fisherman for three years, then applies for his
11 own salmon license. Has he satisfied the statute?

12 A Yes, if while working for the salmon boat
13 owner or somebody who has the gear, if he has worked while
14 licensed as a commercial fisherman, which I believe --

15 Q Do you have to be licensed as a commercial
16 fisherman to work as an employee for a salmon fisherman?

17 A Generally I think you do, your Honor; in order
18 to engage in the activity of fishing, one would have to have
19 a commercial fishing license.

20 Q Even as an employee?

21 A If that employee is in fact fishing he would
22 have to have a commercial fishing license, and the issuance of
23 that license is not restricted. He pays, depending on whether
24 he is a resident or non-resident, a \$10 fee or a \$30 fee. Upon
25 payment of the fee, he can be issued a license.

1 Q Does the law require you actually to fish
2 three years as a commercial fisherman rather than just to hold
3 the license as a commercial fisherman?

4 A The law does require that you fish. It states
5 that the licensee must have been actively engaged in the
6 activity of commercial fishing, and there are other statutory
7 requirements which require that a prospective licensee furnish
8 affidavits to this effect, that he has actively engaged in the
9 fishery for each of those years.

10 I believe that the very questions which have been
11 asked indicate that in order to determine the application of
12 this statute to the fishery involved that there are questions
13 which have not been resolved, and which should have been
14 resolved prior to the lower Court's awarding summary judgment.
15 This case is a clear example of the proposition that important
16 Constitutional questions are usually not appropriate for
17 summary judgment.

18 Appellees themselves have cited the case, England
19 vs. Louisiana Board of Medical Examiners which contains the
20 quote, "It is the typical, not the rare case, in which
21 Constitutional claims turn upon the resolution of contested
22 factual issues." I would assert that this is the typical case
23 involving an important Constitutional question for the State
24 of Alaska, and that there are contested factual issues
25 remaining. Certainly the conclusion of the Court should not

1 rest upon such an inadequate factual basis.

2 I will give some examples of the inadequate factual
3 basis. The Appellees state that the new entry provisions are
4 illusory, and whether they are illusory depends upon facts
5 which they have set forth in their statement of facts, much of
6 which did not appear as the record in the lower Court. For
7 instance, it is possible for one to engage in salmon fishing
8 as a commercial licensee and troll. Trolling is an activity
9 which does not require salmon net gear. It is commercial
10 fishing. It is salmon fishing. The relationship of this
11 activity to the application of the statute has not been
12 investigated by the lower Court, and is not on record at this
13 time in order for this Court to investigate it.

14 Also, Appellees assert that that the unique effect
15 of eleven salmon registration areas in Alaska prohibits easy
16 movement of commercial salmon fishermen from one area to
17 another area with the statutory prohibition. We will agree
18 that there are eleven salmon fishing registration areas, but
19 we will not agree at this stage in the proceedings that the
20 effect of those regulations on the statute prohibits free
21 movement of fishermen from one area to the other, to their
22 economic detriment, as Appellees assert.

23 Q What do you mean by eleven places?

24 A Mr. Justice, Alaska's coast line in which the
25 salmon fishery is engaged covers approximately 3,000 or 3,500

1 miles. From southeast Alaska, near Ketchikan up to near the
2 Arctic Ocean, the coast line is segmented into eleven districts
3 based generally upon geography, the coast line, the types of
4 bays involved, and perhaps based upon the species of fish which
5 appear in those areas. When one acquires a license to fish
6 for salmon in Alaska, he is licensed only for one of those
7 eleven areas, and if during one season he acquires a license
8 for, say, the southeast Alaskan area, he may not then fish in
9 the Bristol Bay area. He is limited to a particular area
10 during each season. Appellees assert that the statute
11 coupled with the area requirement in effect closes the class
12 of those who may engage in the commercial salmon fishery. We
13 would assert that in order to reach this decision, this
14 conclusion, the application of the statute in the light of
15 the entire aspect of the areas involved bears further
16 investigation. There is simply not enough at this point to
17 reach the Appellees' conclusion.

18 Q I don't quite understand it yet, as to what
19 your point is.

20 A My point is that if a fisherman is licensed in
21 southeast Alaska --

22 Q One of the eleven areas.

23 A One of the eleven areas. -- the very fact that
24 he has to acquire a license to fish in Bristol Bay in some
25 other year, and that fact --

1 Q Some other year?

2 A Right. If he wishes to fish in Bristol Bay
3 in a year other than the year in which he is licensed in
4 southeast Alaska, he must comply with the statute and fish
5 commercially three years prior to acquiring a salmon net gear
6 license in a new area, or he must have been licensed in that
7 area.

8 Q That is your point, then, is it, the requirement
9 of the three year preparation?

10 A My point is that the deprivation of his right
11 to fish based upon the application of the area requirement is
12 not necessarily clear from the state of the record as it
13 appeared in the lower Court. The effect of the area require-
14 ment upon his right to use his vessel, upon his right to use
15 his gear to his economic detriment is not necessarily pointed
16 out in the lower Court record. If he in fact is deprived of
17 the use of his fishing vessel, or of the right to fish in any
18 particular area because of the area requirement, that
19 conclusion cannot be reached on the basis of the record as
20 it appears in this Court.

21 Q Did the District Court rest on this ground?

22 A The District Court did not discuss this ground
23 too heavily, Mr. Justice. The Appellees argued this ground
24 quite heavily in their brief, and I would assert that in order
25 to reach the conclusion that the Appellees may be deprived

1 of the use of their vessels during any particular salmon
2 fishing season because of the area requirement is not
3 supported by the record at the present time.

4 The main point I am attempting to make is that the
5 fishery regulation in Alaska is extremely complex, involving
6 areas of differing types of salmon, differing weather
7 conditions, differing sea conditions, and at the state at
8 which the District Court reached its conclusion, none of these
9 particular factors had been investigated by the Court.

10 A second point which the State of Alaska is urging
11 is that the District Court should have abstained completely
12 from reaching a conclusion in this case. The basis for our
13 argument that the District Court should have abstained is due
14 to the fact that Appellees asserted that the statute violated
15 unique provisions of the Alaska Constitution. Those provisions
16 are, as I have stated, that no exclusive right of fishery
17 should be granted, and that the fish resource is reserved to
18 the people for their common use. These provisions, so far as
19 I have been able to ascertain, are unique among the state
20 constitutions, and no constitution contains language similar
21 to that of Alaska, and therefore the interpretation of these
22 provisions have not been resolved by any court of any state,
23 including Alaska.

24 Generally there are three grounds upon which
25 abstention may be granted, and three grounds which support the

1 requirement that a District Court abstain from deciding
2 Federal questions.

3 First, abstention should be granted to avoid a
4 decision involving Federal Constitutional grounds where the
5 state law may resolve the question. This of course is
6 applicable to this case, in that the application of the
7 exclusive right of fishery provision of the Alaska Constitution
8 could resolve this case without the necessity of deciding the
9 Federal Constitutional question under the equal protection
10 clause.

11 Also, abstention has been required to avoid needless
12 conflict with the state's administration of its own resource
13 and its own affairs. This is in recognition of the fact that
14 the state's police power should be the proper means to
15 regulate the resource.

16 The Appellees would assert that the Constitutional
17 provision is so clear on its face that it needs no further
18 interpretation, and certainly needs no interpretation in the
19 light of the state's police power. I would assert that this
20 is not true, and an example would make this point clear.

21 Q Where is that quoted in the brief, the
22 provision of the Constitution?

23 A Mr. Justice, I believe it is quoted at the
24 very beginning under Constitutional Provisions on page 3. I
25 have set out the two provisions of the Alaska Constitution

1 which are involved.

2 Every constitution contains the requirement that no
3 state shall impair the obligation of contract. However, this
4 Court has ruled that a state may in fact impair the
5 obligation of contract pursuant to a valid exercise of its
6 police power. I would assert that in this case, the State of
7 Alaska may create, if necessary, in the valid exercise of its
8 police power, an exclusive right of fishery. The extent to
9 which it may do this should be determined by a court of the
10 State of Alaska, and should not have been determined by the
11 Federal District Court of Alaska.

12 These provisions, as I have said, have not been
13 interpreted by any state court. Appellees assert that the
14 case of Hynes vs. Grimes Packing Company, which interpreted a
15 similar Federal statutory provision during territorial days,
16 is determinative of this case. However, in the Hynes case,
17 the Secretary of the Interior had granted an exclusive right
18 of fishery over a particular area to a particular native
19 village. There was no attempt on the part of the Secretary of
20 Interior to justify his granting of this right pursuant to any
21 conservation purpose or other regulatory police power purpose.
22 In this case, of course, the State of Alaska has recognized
23 that the accumulation of excessive net gear has resulted in
24 an over-harvest of fishery and has created severe management
25 and enforcement problems. This is quite different from the

1 case of Hynes, where there was no regulation of this type
2 involved.

3 Lastly, the Appellees have asserted that the industry
4 of fishing is a common calling, and as such is apparently
5 immune from state regulation of this sort. The mere fact
6 that industry is called a common calling does not remove it
7 from state regulation, if that regulation is necessary in order
8 to preserve a resource, to rectify management and enforcement
9 problems with that resource. This has been done in the past.
10 At common law, such economic pursuits as the sale of
11 intoxicating beverages or the transportation of people for
12 hire were considered common callings. However, at the present
13 stage, these activities are heavily regulated by the states,
14 and quite often certificates of public convenience and
15 necessity are required. There is no reason why salmon fishing,
16 especially with net gear, should be removed from state
17 regulation simply because it is connoted as being a common
18 calling.

19 Q Well, is your only answer to the District
20 Court's invalidation of this statute under the Alaska
21 Constitution, is your only answer that it should not have done
22 so, but should have deferred to the state courts, or are you
23 asking us to just disagree with the three judge Court on the
24 construction of the Alaska Constitution?

25 A Mr. Justice, I am not asking you to disagree

1 with the construction of the Alaska Court. I am asking that
2 the Court should remand the case to the District Court to be
3 held pending the determination of the unique Alaska
4 Constitutional provisions in the light of Alaska law by an
5 Alaska Court.

6 Q So your only answer is to defer to the state
7 courts.

8 A Mr. Justice, one other answer would be that at
9 the present stage of the record the application of the statute
10 in the light of the Alaska Constitutional provision does not
11 necessarily reach the result that that provision is violated.
12 I don't believe there is enough in the present state of the
13 record to reach that conclusion.

14 Q I understand that the three judge Court rested
15 on two grounds. One was equal protection, the 14th Amendment,
16 and one was on the Alaska Constitution. Is that right?

17 A Mr. Justice, that is correct.

18 Q Then if equal protection is valid, there is no
19 point in us even considering the ground.

20 A Mr. Justice, depending upon the position of
21 this Court in its application of the abstention doctrine. First,
22 that doctrine has been characteristically applied in order to
23 avoid the reaching of a Federal Constitutional decision if
24 the matter could be resolved by the application of a state
25 constitutional provision. Also I would urge that the District

1 Court was in error in finding the statute unconstitutional
2 under Federal Constitutional provisions.

3 Q That is a different ground, yes.

4 A And there is nothing before the Court sufficient
5 to justify its conclusion at that time.

6 Q Has there been any litigation at all in the
7 state courts in Alaska of these claims or any similar claims
8 with respect to this legislation?

9 A Mr. Justice, no. This statute has not been
10 interpreted by an Alaska court so far as I know at any level.
11 The only litigation involving the statute has been this case,
12 which commenced in the Federal District Court in Anchorage.
13 Again this points up my claim that since we are involved with
14 a highly complex industry, unique constitutional provisions,
15 it is appropriate for state court determination.

16 Q What decision could be made by the Alaska
17 Court on the state law to which you referred that would leave
18 the case in such a situation that you did not have to still
19 try the equal protection question?

20 A Mr. Justice, the Alaska Court could decide,
21 although the state would naturally fight the issue heavily in
22 the state court, but it is possible that it could reach a
23 decision that the statute is in violation of the exclusive
24 right and common privilege provisions of the Alaska
25 Constitution.

1 Q That would knock the law out, wouldn't it?

2 A If that were so, that would knock the entire
3 statute out, since the provisions do not apply themselves
4 piecemeal across the statute. If it is unconstitutional under
5 state law, the entire statute is unconstitutional and there
6 would be nothing left to determine in the light of the Federal
7 Constitution.

8 Q Of course, there would be no advantage so far
9 as this law and passing it back to the state court if they
10 could hold that, would there?

11 A There would certainly be no advantage to the
12 state if that were the conclusion of the state court.

13 Q And knocked it out. That is what the attack
14 on it is about.

15 A This is one of the attacks. However, Mr.
16 Justice, the state at this point is asserting that if it were
17 afforded a complete hearing at the state court level in the
18 light of the Alaska provisions that it could prove that the
19 statute is not unconstitutional to the satisfaction of the
20 state court. In other words, we feel that given a fair hearing
21 in plenary proceedings in a state court, we could show that
22 the statute is a valid application of the state's police power
23 under those constitutional provisions.

24 Q You would still leave hanging fire the question
25 of denial of equal protection of the law.

1 A Under that result, this would be possible, Mr.
2 Justice.

3 Q It would be more than possible, would it not?

4 A That would be a fact, that if the state court
5 resolved that the statute was constitutional, the Federal
6 question would remain for decision. However, there have been--

7 Q Then you would have to go back to the Federal
8 Court, would you not, or try it in the state court? What is
9 your theory about this?

10 A My theory on this, Mr. Justice, under the more
11 recent decisions of this Court, and particularly the England
12 vs. Louisiana Board of Medical Examiners, that the Federal
13 question should be reserved in the Federal Court for its
14 determination, that the state court should not determine, if
15 there is the abstention doctrine, the Federal provisions.

16 Q Well, that is only if the plaintiffs in the
17 Federal suit want it that way, isn't it, under England? They
18 may submit it to the state court.

19 A They may.

20 Q And have the Federal issue come directly to
21 the state courts.

22 A They may do this. They are not required to do
23 so, if I read England correctly.

24 Q But they are required to if they want to stay
25 in the Federal Court expressly to alert the state courts that

1 they want to go back to the Federal Court. Isn't that it?

2 A That is my understanding.

3 Q I understand your argument here, Mr. Cranston,
4 in the light of what has been pointed out by Justices Black
5 and Douglas, i.e., that the equal protection question is here.
6 That was decided by the Federal District Court, and that is
7 before us now. As I understood your argument, it is simply
8 on the merits of that issue that this does not violate equal
9 protection, because this is economic regulation, and the Court
10 long since in the area of economic regulation has discarded
11 the practices of the Court of the Twenties and the Thirties to
12 strike down economic legislation of the states under the due
13 process or equal protection clause, and that on the merits,
14 therefore, the District Court should be reversed. If it is
15 reversed in that aspect of the case, then, and only then, only
16 if you win on the equal protection, with respect to the other
17 horn of the case, i.e., the validity of this legislation under
18 the Alaska Constitution, that that is a matter in which there
19 should be abstention. Isn't that your argument?

20 Or on the other hand are you telling us that we
21 should not here decide the equal protection issue?

22 A Mr. Justice, I am taking the position that
23 this Court should not decide the equal protection issue since
24 there is not enough before it to decide that issue. I believe
25 on that point that the record should be supplemented by further

1 hearings at the District Court level.

2 Q Before we decide against you.

3 A Yes, Mr. Justice, and there might not be a
4 decision against us if we are afforded a full hearing. Thank
5 you.

6 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cranston.

7 Mr. Boochever.

8 ARGUMENT OF ROBERT BOOCHEVER, ESQ.

9 MR. BOOCHEVER: Mr. Chief Justice, may it please
10 the Court, I believe the issues in this case, as in many cases,
11 may be a little clearer if we look at them in their historical
12 context. Alaska, when it was a Territory, had its fisheries
13 regulated by the Federal Government, and back in 1926, the
14 White Act was passed pertaining to the Alaska fisheries to a
15 considerable degree.

16 Now, Section 1 of that Act provided that there be no
17 exclusive right or special right in the fisheries of the State
18 of Alaska, and that section was passed, and the history of it
19 shows that it was passed, with the express purpose of doing
20 away with some administrative orders that had existed prior to
21 that time whereby the licensing for fishing in certain areas
22 was restricted to the prior licensee, which is basically what
23 we are confronted with in this subject litigation, a revival
24 of this old outlawed provision that was outlawed by the White
25 Act back in 1926.

1 After the White Act was passed, the Secretary of
2 Interior at a subsequent time had in his powers the regulation
3 of the fisheries of the then Territory of Alaska. He provided
4 for an Indian Reservation called the Karluk Indian Reservation,
5 and he provided in that same regulation that the fishing in
6 the waters abutting the Karluk Indian Reservation would be
7 restricted to the Karluk Indians and their licensees. In
8 other words, the Indians themselves could license third persons
9 to fish with them in this particular area.

10 The matter was tried, and it came to the Supreme
11 Court of the United State in the case of Hynes against Grimes
12 Packing Company in 337 U.S. It was decided in 1945. The
13 Supreme Court held the provision limiting the right of
14 fishery in these reservation waters, even though the
15 promulgating of the regulation as far as the establishment of
16 the Indian reservation was upheld, that the Secretary could
17 not limit the fishing in those waters to the Karluk Indians
18 and their licensees because it ran afoul of the White Act
19 provision that I have just been referring to.

20 This is the background. That decision was made in
21 1949. In 1955, prior to statehood, Alaska held a
22 constitutional convention, and at that constitutional
23 convention one of the provisions that was enacted was Article
24 VIII, Section 15, and this provides for a regulation or
25 restriction on the regulation of fisheries almost identical

1 to the White Act. The provision, and I quote from the Alaska
2 Constitutional provision, is "No exclusive right or special
3 privilege of fishery should be created or authorized in the
4 natural waters of the state."

5 I would like, with your Honor's indulgence, to read
6 the comment of the Natural Resources Committee of the
7 Constitutional Convention as to why they enacted that
8 particular Constitutional provision into the Constitution of
9 the State of Alaska.

10 Q Is that in your brief?

11 A Yes, your Honor, it is, at page 31.

12 In proposing Section 15 of the Alaska Constitution,
13 the Natural Resources Committee of the Constitutional
14 Convention made the following commentary:

15 "No exclusive right of fishery. This section
16 is intended to serve as a substitute for the
17 provision prohibiting the several right of fisheries
18 in the White Act. Instead of using the terminology
19 of that act, the purposes sought by it are given
20 expression in a prohibition of exclusive right or
21 special privileges of any person to the fisheries of
22 the state."

23 That is the Commentary on the Article on State Lands
24 and Natural Resources.

25 Now, your Honors, this subsequently was adopted as

1 the Constitution of the State of Alaska, this provision as a
2 part of the Constitution, when Alaska was admitted to statehood
3 in 1959. As I have explained initially, this was based on the
4 White Act provision, and the purpose of that White Act
5 provision was to prevent the restriction of fishing rights to
6 those who had had those rights in prior years.

7 We have had, unfortunately, in Alaska quite a history
8 of legislative attempts that created local favoritism, efforts
9 to give the people in Alaska advantages over non-residents
10 particularly, and even as to residents in certain areas over
11 other areas. I refer to the case of Smith against Freeman
12 in 282 U.S. where it was attempted to impose a \$250 license
13 fee for non-resident fishermen as opposed to a \$1 resident fee,
14 and Mullaney against Anderson in 342 U.S. where they attempted
15 a \$50 non-resident license fee as opposed to a \$5 resident fee.

16 Q Does that come into your case?

17 A Pardon me, your Honor?

18 Q Does non-residency come into your case?

19 A Not as such, no. This case does not depend
20 upon non-residency, because it would work a discrimination
21 as to residents in the state as well as non-residents, in that
22 it restricts it to specific areas in the state. It is the same
23 general plan to give an advantage to the local fishermen, that
24 is, an unconstitutional advantage.

25 In Brown against Anderson the attempt was made

1 where under certain hardship conditions only fishermen of a
2 local area could fish, and no non-residents could come in to
3 fish.

4 In the last year, the case of Alaska against the
5 International Union of Operating Engineers, 393 U.S., involved
6 an attempt to give local laborers of a union favoritism over
7 non-resident labor.

8 It is our position, your Honors, that Chapter 186
9 of SLA 1968, which is the legislation with which we are here
10 concerned, comes right in this series of an effort to create
11 a local monopoly in the fishing areas of Alaska to those who
12 had prior licenses in those particular areas. To better
13 understand the nature of this discrimination, I think some
14 background of the fishing processes and the nature of the
15 licenses required is needed.

16 In Alaska, any fisherman must have a commercial
17 fishing license. Every fisherman must have that. In addition,
18 where fishing is done by vessels, and far and away the large
19 amount of fishing is done by vessels, there must be a vessel
20 license. Now, there is no restriction on the issuance of the
21 commercial fishing license or the vessel license, but there is
22 a third thing that is needed for almost all of the fishing
23 that is done in Alaska, and that is a salmon net gear license.
24 What we consider this attempt to set up a monopoly is by use
25 of that salmon net gear license. The law specifies that only

1 those who are licensed in prior years in a specific area may
2 secure a salmon net gear license unless he fishes commercially
3 for three years in that specific area.

4 Q This does not apply to people who are
5 commercial fishermen in the sense that they are trollers, is
6 that right?

7 A No, it does not. One can troll without a
8 salmon net gear license.

9 Q As a commercial fisherman.

10 A Yes, your Honor, and I might point out right
11 here that trolling is an entirely different type of fishing.
12 It uses a different type of vessel. In trolling a line is hung
13 out from the vessel, only four lines are permitted --

14 Q I understand, but what percentage of salmon
15 caught in Alaska are caught by trollers and what by the net
16 system?

17 A Less than five per cent are caught by trollers.
18 Ninety-five per cent are caught by the net fishermen. This
19 appears in the statistical reports of the State of Alaska.

20 Q I understood it was a different variety of
21 salmon that was caught mainly by trollers.

22 A Yes, your Honor, that is also true. Primarily
23 the fish that are caught by trolling are the large king salmon
24 and the silver salmon, and they are not as a rule used in the
25 canneries, which can the other salmon. They are sent to the

1 eastern market.

2 Q What are they, the sockeye?

3 A Yes, your Honor. The sockeye, the pinks and
4 chums are the other three varieties.

5 Q They are caught by gill nets?

6 A They are caught by gill nets and by seine nets.

7 Q Both kinds.

8 A Yes, your Honor. For instance, in Bristol Bay,
9 which is one of the most valuable of the areas and one of the
10 ones in which the largest runs of fish are anticipated -- in
11 fact, they anticipate this coming year that there will be
12 37 million fish caught in Bristol Bay alone, the largest run
13 anticipated on record. In that area, it is impossible to
14 troll. The statistical reports show no troll caught fish,
15 and it is well known, and the District Judges below had perfect
16 cognizance of this, that you could drag a troll line through
17 there day in and day and you would never catch a fish because
18 of the silty waters, and the fact that the sockeye salmon do
19 not strike in those waters. They will hit a fly up in the
20 stream, further up, when the water gets fresh, but they won't
21 hit the troll lures, and there is no trolling. So there is no
22 way of getting entry into this valuable fishery unless you are
23 in the favored class, those who had a license before, or unless
24 one can secure the permission of one of those licensees to
25 fish with him. In other words, it is exactly the thing that

1 was prohibited in the Hynes case, where the licenses were
2 limited to the Karluk Indians and their licensees. In the
3 Hynes case, the Karluk Indians had authority to let other
4 people get into the field and issue licenses. In the subject
5 case, for instance, in Bristol Bay, there are two gill net
6 fishermen usually to a vessel, and one owns the gear. If you
7 can't get his permission to fish with him, and you can't get
8 a gear license, you are frozen out of the field. You can't
9 fish at all. This of course is the exact provision that was
10 involved in the Alaska Constitutional provision of Article VIII,
11 Section 15, which prohibited the use of the exclusive right
12 or special privilege in the fisheries, and which was
13 interpreted prior to the adoption of the Alaska Constitution
14 by the Supreme Court in Hynes against Grimes Packing Company.

15 I might add that at the time that that was passed by
16 Hynes against Grimes Packing, we not only had a decision by
17 the highest Court of the land, the Supreme Court, but at that
18 time it was the highest Court of the state, that is, the
19 Territory, because our Territory had a District Court, which
20 was a District Court for the Territory of Alaska. It had a
21 joint function as a territorial court and a Federal Court.
22 There was no territorial appellate court. The appeals went
23 to the United States Court of Appeals for the Ninth Circuit
24 and then to the Supreme Court. So we had a clear decision on
25 the Constitutional provision not only by the Supreme Court

1 of the United States, the highest Court of what was then
2 the Territory, and we might add that Alaska's Supreme Court
3 has held that when a statute is adopted from another
4 jurisdiction, it takes with it the construction placed on that
5 statute by the highest court of that jurisdiction. I refer to
6 the case of Scheible against Lathrop Company in that regard.

7 We feel that not only is this violative as I have
8 shown, and clearly so with a Supreme Court decision on it
9 already of the state constitutional issues, but it also is a
10 discrimination based purely on past fishing efforts, and
11 violates the equal protection clause of the 14th Amendment. In
12 that regard, we feel that the case of Takahashi against Fish
13 and Game Commission in 334 U.S. is very much in point. As your
14 Honors will recall, in that case the State of California
15 prohibited fishing by certain aliens, and in expressing their
16 reason they gave very much the same reason as my learned
17 colleague here has given today, that this was a conservation
18 method, that there was too much gear in the waters of
19 California, and that it was necessary in order to conserve
20 fishing to reduce the amount of gear and therefore to eliminate
21 certain aliens from the fishery. This learned Court, of course,
22 held that was violative of the equal protection clause, even
23 though the purpose was a justifiable purpose, assuming it was
24 a justifiable purpose, that of conservation.

25 Q You have an additional element, however, do you

1 not, in this case, that of experience. That makes this case
2 a little more akin to the Koch case, does it not?

3 A I think the Koch case, your Honor, as stated
4 in the opinion there, is a unique case. In fact, they stated
5 there that one should not hypothesize about any other facts
6 from it. In that case, the riverboat pilots were officers of
7 the state, itself, and there were only a very limited number
8 of those positions available, so under that unique situation
9 it was upheld in a divided decision. So I don't think the
10 Koch case is applicable at all to the situation which we have.

11 Q At least you do have asserted here the interest
12 of Alaska in having only people fish who are familiar with the
13 waters, with the notices, with the weather, with the bottom,
14 with the safety, and having experience, which you did not, as
15 I remember, have in the California case. Am I right in that?

16 A Yes, that is so, your Honor. However, in this
17 subject case, what there is in the recitation of the statute,
18 there is a statement that experience plays a part in
19 management, in safety and in law enforcement, and we served
20 interrogatories on the state requesting any examples they
21 could give where this was a factor, experience, I might add, in
22 the particular area, because the plaintiffs in this case are
23 all experienced fishermen who have fished a great deal, but
24 they have been denied the right to fish in the particular area.

25 In answer to those interrogatories, the state was

1 able to furnish no example of any one of those areas where
2 experience had played a part. Of course, this has come before
3 the Court below on a motion for summary judgment.

4 Q In the Koch case, wasn't the experience factor
5 related directly to the safety of the harbors?

6 A Yes, your Honor, it was, and as I stated,
7 there were very few people who could be in any event employed
8 as riverboat pilots, and they were officers of the state
9 itself. It was a unique situation in that instance.

10 Q Is there any safety factor here, or any factor
11 in which the experience relates to safety here, as distinguished
12 from relating to conservation methods and practices?

13 A Not as such as related to fishing in a
14 particular area. There is certainly, I would say, a certain
15 degree that experience in any field helps. Certainly experience
16 as a boatman would give some experience toward safety in
17 navigating a boat. I could not deny that. But as far as a
18 fisherman who has fished, for instance, in southeastern
19 Alaska, where that one area is as large as all of the New
20 England States, and has a tremendous shoreline, the fishermen
21 there each fish in their own little favorite harbors, and
22 their experience there would give them, as far as fishing in
23 the rest of the area, just the same as their experience in
24 fishing in Bristol Bay or somewhere else would be. So I do
25 not feel that it is a valid criterion. However, I am not

1 arguing that point. Assuming that it is, in this particular
2 case, they should not exclude, based on the past right, and
3 then leave it in the hands of those who have that exclusive
4 right to decide who will come in, because no one can fish
5 without fishing with the gear licensees.

6 Incidentally, your Honors asked as to what --

7 Q You mean they won't fish.

8 A No, your Honor; what I mean is that in order
9 to fish, they have to get the consent of one of the gear
10 licensees.

11 Q I know you keep saying that, but you don't
12 have to have their consent to go out and fish.

13 A To fish commercially with a net, one does.

14 Q Why?

15 A Let me give the example again in Bristol Bay.

16 Q I know you can't fish with a net, but you can
17 troll.

18 A You can't troll in Bristol Bay.

19 Q You can troll. You just won't catch any fish.

20 A I guess one could do that.

21 Q Well, you keep saying you can't fish, except
22 with the consent of somebody. You can fish all you want to.

23 A You can fish without catching fish, your Honor.

24 Q Is this only true in Bristol Bay?

25 A No, there are a number of other areas.

1 Q Aren't there a lot of areas in which it is not
2 true?

3 A Yes, your Honor, but this would eliminate
4 one from fishing in the Bristol Bay area, which is in itself
5 the area which at times has as much as half of the fish for
6 the whole state.

7 Q Do you think that is enough to invalidate the
8 entire statute?

9 A I think, your Honor, that this applies to each
10 of the areas independently. In other words, there is no
11 relationship between trolling, which is the one example that
12 has been given, there is no relationship between trolling and
13 seine fishing or net fishing.

14 Q That is a different point. You are just
15 challenging the state judgment that there is a relationship,
16 and that is certainly a different point than saying that you
17 can't fish at all. Of course, you can fish. How about
18 catching other fish besides salmon?

19 A Your Honor, in some of the areas one can fish
20 for other fish besides salmon. For instance, in southeast
21 there is --

22 Q What about Bristol Bay?

23 A In Bristol Bay, to my knowledge, the salmon
24 fishery would be the only fishery, but I could not say that
25 categorically. That is my impression.

1 Q If you can't say it categorically, the state
2 is saying go ahead and fish commercially, learn about the area,
3 learn about the water and the other characteristics, how to
4 handle the boat. Maybe you won't learn much about salmon
5 fishing, but at least we will be satisfied that you can
6 maintain yourself on the ocean safely, and obey the law.
7 Isn't that enough for the state?

8 A No, in my opinion it is not, your Honor.

9 Q I know it is not in your opinion, but it is
10 only because you disagree with the substantive judgment of the
11 state.

12 A No, my feeling would be that if you have a man
13 who has fished commercially in one area, and he has shown his
14 knowledge and has fished there, there is no reason why he should
15 be discriminated against in fishing in another area whereby
16 his only means of entering that field is by the grace of the
17 licensee, or else he is subjected to leaving his vessel, his
18 gear, and to try to gain employment there, or else to do, as
19 in the case of the salmon fishery in Bristol Bay, a futile
20 act for three years.

21 Q I suppose you would concede that the state
22 has the right to limit the number of people who can fish in
23 any area.

24 A No, I do not, your Honor, not under the
25 State Constitutional provision. The State Constitutional

1 provision is express in the no exclusive right to fishing.

2 Q You mean it has no power to limit the number
3 of fishermen in the area?

4 A No, I do not believe it does, your Honor.
5 This is a more difficult question. In other words, if there
6 were, say, a lottery as to whether this would be permissible,
7 I would say that is a more difficult question under the State
8 Constitution.

9 Q Isn't this regulation an indirect way of
10 doing that?

11 A Of limiting the number of fishermen? Yes,
12 your Honor, it did limit the number of fishermen, but by an
13 unconstitutional way.

14 I would like to answer Mr. Justice White further, if
15 I may. With reference to the regulation under the State
16 Constitutional provision, there are a number of means that
17 are permissible. They may reduce the number of hours that
18 fishing is permitted. They may reduce the number of areas
19 where it is permitted. They may reduce the size of the gear
20 that is permitted. But they can not create an exclusive or
21 special right in certain people to fish in the areas. This is
22 what they have attempted to do here, and in our opinion is a
23 clear violation.

24 Q What is the issue? Certainly they can't
25 establish an exclusive right in certain people, if those

1 certain people are chosen irrationally, such as only white
2 people or only Negroes or only people over six feet tall, or
3 only people between the ages of 25 and 26. But if those
4 people are chosen rationally, then the question under the equal
5 protection clause, at least, is one of seeing whether there
6 is a rational state purpose for this sort of classification,
7 isn't it?

8 A I would agree with that under the equal
9 protection laws, although not under the state exclusive right
10 of fishery clause. I would agree that that is the test under
11 the equal protection clause.

12 Q You mean under the State Constitution, if the
13 state wants to limit or take steps to conserve its fish, the
14 only way it can do it is by limiting the hours of fishing, or
15 the number of fish that can be caught, or something like that?

16 A Yes, your Honor.

17 Q Which means that if enough people came in,
18 there just would not be any commercial fishing. Nobody could
19 ever make a living.

20 A Excuse me, your Honor. The laws of supply
21 and demand would affect it. In other words, if you had more
22 fishermen and they reduced the hours to such a few hours that
23 it was uneconomical to fish, then they would have to drop out
24 of the field.

25 Q So only the strong could survive, I suppose.

1 A It would be more or less on that basis, I would
2 say, your Honor, but this is what was passed as part of the
3 Alaska Constitution, and knowingly passed with the idea of
4 preventing giving any exclusive right to any group in the
5 fishery there.

6 Q Are salmon a dwindling resource in Alaska?

7 A No, I don't believe they are at this time, your
8 Honor. The forecast, as I mentioned, for this coming year is
9 for the largest run in the history, since the 19th Century.
10 They anticipate over 50 million fish in Bristol Bay alone. I
11 am referring to the Bristol Bay fishery. It varies a great
12 deal. One year you will have a good run in southeastern
13 Alaska. Another year it will be a good run in Bristol Bay.
14 The forecast this year is for the greatest in history. So I
15 don't think we can say it is a dwindling resource, and it
16 appears that it is on the upgrade under the state management
17 at the present time.

18 Q Don't these questions, which have been bringing
19 out a lot of factual matters, suggest that this is a subject
20 which ought to be explored in a full scale evidentiary process?

21 A No, your Honor, because most of the facts which
22 I have stated are matters that are so well known in Alaska that
23 they are a matter of judicial knowledge.

24 Q But not well known to us.

25 A It is difficult, I must admit, to talk to

1 someone who has not been in the particular area, but our
2 District judges, two of the District judges are long time
3 Alaska residents and are thoroughly familiar with the Alaska
4 fishery, and were able to take notice of what the actual facts
5 are in the fisheries.

6 Secondly, there was no statement of issues made by
7 my learned colleague raising any issues of fact. We brought
8 up our position initially in this case in our briefs and in
9 our complaint, and they never, as required by the District
10 Court rules for the United States District Court in the District
11 of Alaska, set forth a factual issue challenging our position
12 until oral argument in the court below and in their briefs
13 before this learned Court.

14 I would like in the few remaining minutes to address
15 myself to the abstention problem. In this case, as I have
16 stated, we have a Supreme Court decision on the Alaska
17 Constitution issue. We have a clear history of that Alaska
18 Constitutional issue. There is therefore no reason why the
19 lower court should have abstained because of that issue. We
20 had every right to be in the Federal Court under diversity of
21 citizenship, and because of the admittedly substantial
22 Federal question that is involved.

23 Q Did your complaint rest jurisdiction on both
24 of those grounds?

25 A Yes, your Honor, it does.

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Q Diversity as well as the Federal question.

A Yes, your Honor. So we are there on both reasons. The statute is perfectly clear. There is no question of interpretation of the statute, no question but that these plaintiffs were denied a fishing right under the statute. There is no question but that the Alaska Constitution has been construed by the highest state court and the Supreme Court of the land, and therefore there is no reason for application of the unusual doctrine of abstention. Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Boochever. Your time has expired. Thank you for your submission. The case is submitted.

(Whereupon at 11:10 a.m., the argument in the above entitled matter was concluded.)

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