

In the

Supreme Court of the United States

United States Trust Company Of
New York, ets.,

Appellant,

v.

State Of New Jersey, et al.,

Appellees.

No. 75-1687

Washington, D. C.
November 19, 1976

Pages 1 thru 55

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Appellant, :
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v. : No. 75-1687
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STATE OF NEW JERSEY, et al., :
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Appellees. :
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Washington, D. C.,

Wednesday, November 10, 1976.

The above-entitled matter came on for argument at
1:48 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Association Justice

well
sent

APPEARANCES:

DEVEREUX MILBURN, ESQ., Carter, Ledyard & Milburn,
2 Wall Street, New York, New York 10005; on behalf
of the Appellant.

MICHAEL I. SOVERN, ESQ., 435 West 116th Street, New
York, New York 10027; on behalf of the Appellees.

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C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
Devereux Milburn, Esq., for the Appellant	3
Michael I. Sovern, Esq., for the Appellees	23
<u>REBUTTAL ARGUMENT OF:</u>	
Devereux Milburn, Esq., for the Appellant	51

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1687, United States Trust against the State of New Jersey.

Mr. Milburn, I think you may proceed when you're ready.

ORAL ARGUMENT OF DEVEREUX MILBURN, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case comes from the Superior Court, Bergen County, New Jersey, a decision by Judge Gelman, appealed directly to the Supreme Court of New Jersey, affirmed largely on the opinion of Judge Gelman.

We filed a Jurisdictional Statement with this Court. Probable jurisdiction was noted. And here we are.

Let me say at the beginning, before I start the statement of facts, we have a stipulation among counsel of 387 pages plus exhibits. All the briefs, at least half are devoted to facts, and they are lengthy, according to the new standards, too lengthy.

However, I would like to very briefly review the facts. I would then like to discuss the question of emergency as it applies to the impairment of contracts. I would then like to discuss the reliance of bond holders upon the 1962 covenant, and then the protection afforded to bond

holders by the 1962 covenant.

The facts, very briefly, are that subject -- or after the report of a commission in 1921, a compact was entered into between New Jersey and New York, establishing the Port Authority.

In 1922 a comprehensive plan was adopted. Both of those had the consent of Congress.

In the comprehensive plan, I think without question, there was no mention of passenger traffic. The Port Authority was conceived to handle the freight problem in the Port District.

Things went along quietly until about 1927, and legislation was passed requiring the Port Authority to take over the passenger mass transit problem. This legislation was vetoed by Governor Smith, and I might add that Governor Smith was an architect of the compact and of the comprehensive plan, and he pointed out in his veto message that the moving of freight was the primary -- I won't say the sole, but the primary and most important job for the Port Authority, and the one for which they were created.

The Port Authority thrived, although the mass transit problem was chronic.

In 1959 there was a legislative finding out of a Joint Assembly Committee of the New Jersey Legislature.

I would call your attention to page 16 of Appellees

Brief and page 7 of our Reply Brief -- page 7 of our Reply Brief sets out this finding a little more completely, shall we say, than the brief of appellees.

QUESTION: Did you say page 16?

MR. MILBURN: Page 7 of our Reply Brief; page 16 of Appellees Brief, the blue one, and 7 of ours.

It says that "no doubt the Port Authority could undertake an activity which would involve a deficit, even a permanent one" -- and if you're reading the Appellees Brief, that's where it stops, with a period.

But I would like to just continue what's in our brief. "It could only do so if there were real assurance that the size of the deficit would be such that there could be no doubt of its ability to absorb it." An important addition.

Now, nothing came of that. But in 1959, there were rumblings about the H&M, the Hudson tube. The rumblings were such that -- were caused by the fact that a district court had just decided that the Hudson tubes could continue, and gave them enough cash for two years.

It was obvious that something had to be done, and the Port Authority was looked to, and it was suggested to them.

Now, the Port Authority was not unused to deficits. Ever since 1931, and the General Reserve Fund, the Port Authority had gone on a pooling basis. It took its revenues and it took its deficits and it mixed them all together.

But we are talking about deficits -- let me point out that, for instance, that in 1962 the biggest deficit we're talking about was \$500,000 for the Newark Airport.

Now, all these deficits came from facilities which were expected to make money, and most of them did. It took a long time for some of them, but they all, with one or two minor exceptions, made money, and the major deficit in 1962 was \$529,000.

So along comes the H&M, and what is its projected deficit? \$5 million. A completely different ballgame.

Now, \$5 million was expected to level at \$6,725,000 over a period of time. There are two fallacies. It didn't level out at \$6 million, it leveled out, well, to take 1973, at \$18 million operating deficit plus seven or more million dollars debt service, or 25 to 28 million dollars.

Now, that is important, because it shows how wrong people can be when they project deficits. And, as you will see, that becomes very important later.

QUESTION: Nothing unique about that in public enterprise, is there?

MR. MILBURN: No, sir. You are right. And it still goes on, and will.

QUESTION: Right.

MR. MILBURN: Now, with this deficit looking the investors in the face, a new deficit, a completely different

concept of \$5 million to \$6 million, we are told that that ogre, Austin Tobin went out and beat up investment concern. I don't think you have to beat up investment concern when this type of operation, which you're not used to and which you don't want, is face-to-face with you.

Now, the 1962 covenant isn't very long, but what it provides is that if you take over --

QUESTION: Excuse me, Mr. Milburn, you mentioned Mr. Tobin. Was this after his retirement or --

MR. MILBURN: No, sir. This is 1961, when he was beating up the investor concern for that \$6 million deficit.

The 1962 covenant, basically what it said was you take the H&M and you don't have to take any more railroad deficits. There were limitations, but we have all agreed that because of the PATH deficit of the moment, there's no room for any more mass transit enterprises, because they are all deficit, and we have used up the limitations which were contained in the covenant.

The covenant was passed, the investments were made, and things were quiet until 1971 and \$1.2 billion worth of bonds was sold during that period with the covenant in effect.

In 1971 there was a hearing on our same old favorite subject: Can the Port take over mass transit?

In 1972, there were further hearings, and New York repealed the covenant, and Governor Rockefeller signed it.

This was too much for New Jersey. They thought that it was an unconstitutional act, and they would not go along.

In 1973, we have more hearings, and finally, what happened was, there was a prospective repeal of the covenant, because it was thought that a retroactive appeal would be unconstitutional.

Included in that legislation was the original PATH Tranford Kennedy-New York link.

Now, in 1974, the covenant was repealed without any further legislative hearing. We can guess why it was repealed, and we can guess right or we can guess wrong; we do not know why it was repealed.

We do know this, however. Built into the covenant there is a provision for changing it, for modifying it, and that provision calls for the consent of two-thirds of the bond holders. This may sound like a difficult proposition, but I might remind the Court that it was done in the Triborough Bridge Authority case, where the bond holders consented, they got an extra quarter of a point, and they put out something like \$305 million which was applied to mass transit.

No effort was made to contact the bond holders. I understand it would be absolutely impossible to contact them, but I have to tell you that I understand that from Dean Sovern and from nobody else.

I do not know why they didn't try; I know they didn't.

try.

Now, we have heard, we have read in the briefs, a great deal about \$40 million which is going to be realized from an increase in the fares over Port Authority facilities, George Washington Bridge in particular; they were doubled. We are not sure that they are going to stay double, because of the Bridge Act of 1906, and because there are hearings, and because there is a certain amount of litigation. But, right at the moment, they are double. And it is anticipated if they hold, they will give out \$40 million.

We are told by Appellees this \$40 million will go to mass transit. It said it was going to mass transit in the paraphernalia that went along with the toll raise. But, let me ask you this: How can it go to mass transit? It belongs to the bond holders, under the rate schedule, under the rate agreement.

It doesn't just go \$40 million to mass transit, it goes into the pot; and what does that mean? It means that between 1974 and 1975, the surplus of the Port Authority, after a mandatory provision for the retirement of two years' debt service, amounted to \$296,000.

Where did the 40 million go? It went to increased expenses of the Port Authority. There is no \$40 million that we're talking about. That goes into the bond holders' pot, and what came out was \$296,000.

If there's an overflow from it or a flow-through of the \$0 million, it can go to mass transit. But the flow-through we're talking about is \$296,000, which does not build much mass transit.

QUESTION: Mr. Milburn, has the covenant been repealed by New York, too?

MR. MILBURN: Yes, sir; it had to be.

QUESTION: So both States have done it?

MR. MILBURN: By State action, yes, sir. They did it both in the -- I believe in 1974, months apart.

QUESTION: Was the New York repeal ever litigated in the New York courts?

MR. MILBURN: It is being litigated in the New York courts.

QUESTION: I see. That's still not decided.

MR. MILBURN: There has been a complaint and an answer, and a lot of papers prepared, but if you ask me why we haven't proceeded immediately, I will give you the answer: It is that we are waiting for the Flushing Bank case to come down from the Court of Appeals of New York. The argument was September 8th; we haven't had the decision. And, I have to confess, I'm surprised we haven't had it. But, depending on that, or certainly using that in our papers, we will proceed in New York --

QUESTION: What's the issue there?

MR. MILBURN: Big Mac -- the New York notes; the New York notes were extended, and somebody sued, and it's before the Court of Appeals in New York.

QUESTION: What's the market for Port Authority bonds now? Has it been affected by this repeal?

MR. MILBURN: The effect on the market was for a period of eight months. There was a very decided drop, and we used the mass ports as a comparison, and it showed a decided drop for eight months, and then a basic return and leveling off.

I can say in that connection that prior to repeal --

QUESTION: A leveling off at what?

MR. MILBURN: At about the same as -- same spread.

QUESTION: I see.

MR. MILBURN: Prior to repeal, the Port Authorities in New York were a much finer bond than Mass Ports. After repeal, they have never been a finer bond than Mass Ports.

Now, I have to admit that when we picked Mass Ports, we picked a lemon. But it was fine for that short period, after repeal.

But, all of a sudden, Mass Ports got mixed up in political controversy in Massachusetts, where the Governor tried to take over the Commissioners and make their term coterminus with his, and, in other words, it became a political football; and that affected the market, the banks blew a fuse,

if you will, and just complained. And the market, their market reacted accordingly. So we picked the wrong one. We did not predict that.

But during -- before that and during the eight-month period there was a decided drop in the secondary market.

Now, we admit that the States have a never-abdicated police power. We've read that time and time again, and we admit it's there. Take lotteries, prohibition, things like that, sure --

QUESTION: Even with respect to its own obligations?

MR. MILBURN: Even -- well, may I say this: I do not admit that there has ever been a case where a contract, in the form of a statute, made by a State or two sovereign States with its creditors, made to induce investment, bargained for and relied upon, has ever been repudiated and sustained in the courts.

QUESTION: Well, you could add a few more facts and just describe this case?

MR. MILBURN: I almost did, I think.

QUESTION: Yes, that's what I thought.

MR. MILBURN: Yes. I might have missed --

QUESTION: But even -- you wouldn't say there's any per se rule against a State exercising its police powers with respect to its own obligation?

MR. MILBURN: Per se? No. I think that there -- it

is possible that circumstances could exist where the State can do anything.

QUESTION: But you think this case is --

MR. MILBURN: This case, I think, is --

QUESTION: -- is distinguishable from any cases that approved a modification, such as El Paso or something?

MR. MILBURN: I do, sir. And would you like to discuss it now or --

QUESTION: No, no, I just wanted --

MR. MILBURN: -- should we bring in the law --

QUESTION: Well, you go about it in your own --

MR. MILBURN: Well, we're going to discuss El Paso, Mr. Justice White, as you can imagine.

QUESTION: Mr. Milburn, being on the creditors and all, but how long has Holland Tunnel been paid for? Didn't they make an agreement on that that when it was paid for it would be free.

MR. MILBURN: [Laughing]. No, sir. That's part of our pool.

[Laughter.]

MR. MILBURN: That takes care of some of the deficits, including PATH, sir.

As a matter of fact, the Holland Tunnel was thrown in to make the pool work. Because, at the time, everybody was going busted, around 1931 and '32, including the Port Authority

and the pool wasn't working because there was a deficit pool, and the State put in the Holland Tunnel, and that brought it up over. And that's one of our pride and joys, that and the George Washington Bridge, as you know.

Now, what justifies the use of the police power?

In such a case as we have here, if it can be justified -- and I say that Blaisdell and its progeny established that it must be an emergency.

Now, Blaisdell had a real emergency. They had mobs in the Middle West. They had --

QUESTION: You mean something like the Minnesota Mortgage moratorium?

MR. MILBURN: This was it, yes. That was the statute in Blaisdell, and there were riots and there were mobs, and something had to be done. The statute was passed, and Mr. Justice Hughes' opinion in that case refers again and again and again to emergency. He also refers to temporary.

Now, the Appellees say, in their case, that an emergency is not necessary. No case that I can find has ever so held. Gelfert doesn't, which is cited by Appellees.

In Gelfert, the contract was not covered by the contract clause, and that was a result of Honeyman v. Jacobs.
? But then they tried to say, because there is no emergency declared, therefore the police power doesn't work, therefore you're covered by the contract clause. And the Court said

nothing doing. If you weren't covered under Honeyman v. Jacobs, just because there's no emergency, we're not going to slip you in under that coverage.

So the fact that there was no emergency declared didn't help Gelfert, because it wasn't covered by the contract clause; you don't have a conflict between police power and the contract clause in Gelfert.

In the other case, the name I might have difficulty pronouncing it, but it's Viex, there was an emergency, but I think the attention is directed in that case against the word "temporary".

Now, Mr. Justice Hughes used "temporary" all the way through his decision in Blaisdell. But here the Court said you had a serious crisis, you had an emergency, you passed permanent legislation. Now let's take a look at it.

And they took a look at it and they said that situation still exists. You've still got withdrawals from your savings and loan, your insurance companies ought to be controlled, we're not going to strike down that, because it isn't temporary, we are going to permit permanent legislation, because the facts that gave rise to the emergency are still there.

Now, why do Appellees claim that there doesn't have to be an emergency? In my opinion, it's because they have got a very poor emergency. And it would be nice if you could say

they didn't have to have one, because they've got two that -- the Legislature didn't consider them, as far as we know; maybe they did. But, as far as we know, as far as there is any legislative history, the Legislature did not talk about energy, the Legislature did not talk about the environment, and neither did Governor Byrne and neither did Governor Wilson.

QUESTION: What did they talk about?

MR. MILBURN: Nothing.

QUESTION: Well, they must have -- this wasn't just a thoughtless thing, I don't suppose -- or was it?

MR. MILBURN: As far as the record shows, Mr. Justice White, it was completely thoughtless.

Now, there might have been thought.

QUESTION: Now, you would like to -- I know you would like to say it was that, and they would like to say there was an emergency.

MR. MILBURN: That is exactly right. But I don't know where it --

QUESTION: But is there any evidence at all?

MR. MILBURN: No.

If you're talking about energy, and if you're talking about environment -- if you say that there was an energy crisis, we admit that, we all tried to get gasoline; there was one. But they didn't mention it. They did not tie their legislation to the --

QUESTION: Well, perhaps at the minimum you could say their object was to achieve what the repeal of the covenant would achieve, which was what?

MR. MILBURN: They -- as far as we know, the object was to put the Port Authority into mass transit.

QUESTION: Well, that's --

MR. MILBURN: And the mass transit -- mass transit is going to, some day, is going to have an effect on the environment and it's going to have an effect on energy.

QUESTION: Did you say, Mr. Milburn, to put the Port Authority "into" mass transit?

MR. MILBURN: Well, let's reverse that: put mass transit into the Port Authority. That's even worse.

QUESTION: Because under the covenant, mass transit would mean more deficits, and the covenant would prevent more debts.

MR. MILBURN: Absolutely.

Look, the covenant basically said no more railroads, no more mass transit; because it's all deficit, and, we agree with you, you're not going to put it in.

So that's what the covenant said.

So there's the stumbling block, there's no question about that.

QUESTION: So -- well, was there an emergency about mass transit? I guess you would say there isn't any more than

there always had been?

MR. MILBURN: Well, I go back to 1921, if you'd like, and come all the way through, there's always been an emergency -- well, why use that word? Because I don't think it's as chronic a situation.

An emergency to me is a house on fire.

QUESTION: And it's precisely the -- precisely the object of the covenant.

MR. MILBURN: Precisely. It was to stop it, and get the investors to put the money in to buy the H&M, which is mass transit, and it's a beautiful piece of mass transit, including --

QUESTION: But the covenant said this is one emergency that we won't take care of in the Port Authority. That's what the covenant said.

MR. MILBURN: The covenant said what?

QUESTION: If you call mass transit an emergency, you could say that the covenant said this is one emergency that the Port Authority won't take care of?

MR. MILBURN: If you call it an emergency, yes.

They're not going to take care of it because of the covenant. No matter what you call it. The covenant is there.

Now, we say, because of the lack of legislative history, because we don't really basically know what "emergency" was, -- what the emergency was, we would have to say that we

don't think that this legislation was based on an emergency, and if it was, we don't think this is the way to handle the situation.

If you came around a corner, you were the mayor of the town, and you see a house on fire, what are you going to do? You will put it out. You're not going to go to your desk and draft legislation to get a new fire department, which is going to come into existence ten years from now, and put the next fire out. The emergency is -- an emergency to us is something immediate.

And here we have a drop in the bucket, even when it works, all the Port Authority could do is a drop in the bucket of the transit problem on the Eastern Seaboard.

QUESTION: Suppose you don't -- suppose you just don't go at it by labels, and you just say -- and say that the real inquiry is the significance of the interest of the State in achieving what they are trying to achieve by the repeal of the covenant?

MR. MILBURN: If you say that that is the interest of the State?

QUESTION: Say that, instead of calling it an emergency, instead of asking whether there's an emergency, shouldn't you ask how important are the interests of the State that seem to justify the action?

MR. MILBURN: I think you can ask how important the

interest of the State is, and the interest of the State in mass transit is extraordinarily important.

I might add here, and we've developed it in our brief to some extent, there are lots of other ways to do it. And the worst way, in our opinion, that you can possibly do it is to break your word to the creditors that you induced to invest in the bonds of Port Authority, and because you have an interest in mass transit -- and God knows, there are lots of other ways you can get that money; and there are lots of other ways you can cut down on automobiles.

I merely mention World War II, they cut down on automobiles, they cut down on the use of gasoline. If you've got an emergency, you can handle it. But you do not handle it by going out and breaking your solemn word to investors who have invested \$1.2 billion while that covenant was in effect, on reliance on the States that they were not going to repeal it.

So much for emergency and the basis for the State's action.

In 1962 -- from 1962 to 1974, the covenant was an integral part of the bond holders' contract. It was contained in every official statement.

QUESTION: Mr. Milburn, before you use all your time, will you be sure and discuss El Paso? Develop the El Paso case.

MR. MILBURN: I was going to ask for time to rebut, but let me discuss El Paso, and maybe I can --

MR. CHIEF JUSTICE BURGER: I think, under the circumstances, we'll enlarge the time of each side five minutes; so you can take that into account.

MR. MILBURN: Thank you, sir.

Just to finish reliance -- well, I won't finish reliance, I'll come back to reliance.

And let us go to El Paso.

I am sure that everyone here is familiar with the facts of that case, and the decision in it. I have established here, I hope, that the covenant induced investors to put their money into the Port Authority. There was no inducement in El Paso.

El Paso -- the people that were hurt by El Paso were defaulters. The plaintiff or the petitioner was a rank speculator. He had, in that statute, an unbargained-for benefit. If he had any bona fide interest in the piece of land in which he owned an interest, he had five years, after the passage of the new statute, within which to come up with the money to stop being a defaulter and to own the land.

QUESTION: Why do you call his interest an unbargained-for one?

MR. MILBURN: He bought the land -- he didn't buy the land; when he bought it the statute was in effect.

Now, in our case, we bargained for the statute. We said, we'll give you the money, but you do this. In person, at that time, in 1962. The investment community talked to the State, and said: You do this, we'll do that, and the H&M will run.

But this fellow didn't have any bargaining with the statute -- with the Legislature that passed this statute. And that's an important difference.

Now, as Mr. Justice White said, five years is a pretty fair deal for anybody, any defaulter who really wants his land. It gave him five years to come up with the money, and he could keep it.

This statute was directed against the defaulters, the speculators who were in there, and it was a case to quiet a land problem in the State of Texas.

Now, I can -- in my opinion, this Court never dreamt that the El Paso case, dealing as it did with defaulters and speculators, would be brought out and used as a binding precedence in a case such as this, where the creditors of a State dealt with the State, bargained for a deal with the State, and then it was repudiated -- abrogated, not modified; abrogated completely.

Now, in El Paso it was modified, it wasn't abrogated.

So, Mr. Justice Stevens, I can say that I agree with El Paso. I think El Paso is right. But I agree with our

position in this case, and I think we're right. I think you have two completely different contracts, and two completely different situations.

Now -- excuse me, is that light going to go on again in five minutes, or --

MR. CHIEF JUSTICE BURGER: If you want to save -- how much do you want to save for rebuttal?

MR. MILBURN: Well, I'd like to save what I have left, will be about seven minutes, I guess.

MR. CHIEF JUSTICE BURGER: That's about right.

You may reserve that for rebuttal.

MR. MILBURN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Sovern.

ORAL ARGUMENT OF MICHAEL I. SOVERN, ESQ.,

ON BEHALF OF THE APPELLEES

MR. SOVERN: Mr. Chief Justice. If the Court please:

Of all the hundreds of cases alleging contract impairment that have come before this Court in two centuries, none has involved public ends as vital as those sought to be served by the State here, and few have involved contract infringements so inconsequential.

In the second slaughterhouse case, the Court found offensive smells sufficiently serious to bring butchering squarely within the State's police power, and the justification

for the State's repealing the statute, granting an exclusive franchise to a company that had invested large sums of money in reliance on the promise that the exclusive franchise would be good for 25 years.

No one suggested that butchering threatened anybody's life or health.

QUESTION: Did you have any express -- were there any express assurances there about the malodorous factors?

MR. SOVERN: As to whether --

QUESTION: Or was it just that it was an incident of running a slaughterhouse in those days?

MR. SOVERN: That was the basis on which the police power was asserted.

QUESTION: Yes, I know, but was there an express grant -- was it articulated there that they could go on without any restraint of that kind?

MR. SOVERN: In that case, Your Honor, the repeal did not involve their losing the right to continue; all they lost was the right to do it exclusively. So the existence of the police power justified a destruction of a very valuable portion of their investment, even though there had been an explicit promise that it was to be good for 25 years.

And the justification was that when one is dealing with stench, the State has the power to act as it will.

Here, the Federal Environmental Protection Administra-

tor has found automobile emissions so threatening to the physical well-being of the citizens of New Jersey that he has ordered them to drive less. He's insisted that parking facilities be limited, that trucks not pick up or deliver on weekday mornings from six to eleven, with all the economic dislocation that entails, and has said that if these and other measures don't work, he will reduce the amount of gasoline that may be sold in the State.

In Blaisdell, as this Court knows well, the Court upheld Minnesota's Mortgage Moratorium Act because of the economic distress --

QUESTION: Mr. Sovern, how does the repeal of the 1962 covenant change the air quality in New Jersey?

MR. SOVERN: The covenant does two things, Your Honor, that it is critical to correct. One is it effectively prevents the imposition of higher tolls on the users of the Port Authority's bridges and tunnels between New York and New Jersey.

That is to say, because the Port Authority's revenues and reserves are so large, a toll rise on the bridges would be disapproved as not just and reasonable within the meaning of the Bridge Act of 1906, which means that the disincentive to automobiles crossing from New Jersey to New York -- the Port Authority owns all of the crossings between those two States, in the Port District --

QUESTION: Is the only method of limiting the number of vehicles that cross the bridge to increase the fare?

MR. SOVERN: No, Your Honor, there --

QUESTION: That would be the only consequence in terms of air quality, wouldn't it?

MR. SOVERN: Well, there are many other methods, at least some of which would be far more destructive of the bond holders' interest, without --

QUESTION: Well, are there any methods of, just if you concentrate on that one feature, limiting the amount of traffic coming across the bridge -- are there any ways that that could be done without tampering at all with the New York Port Authority? With the bond holder structure.

Couldn't you close the bridge for a couple of hours a day?

MR. SOVERN: You could, Your Honor. I do believe Mr. Milburn would be here maintaining that that was a violation of covenants with bond holders. I do believe that the police power does entitle the State to do that.

This is far less intrusive on bond holder rights. The bridges are among the Port Authority's biggest money makers. I believe the States could close them. I believe the States could close them during the summer, during commuter hours, for as many hours as they wished, that bore the relationship that was necessary to reduce carbon monoxide and

hydrocarbon poisoning.

The bond holders would be seriously hurt by that. They have not been hurt at all in this case. That point is important to focus on, so that the States here have sought to achieve their goals in the ways that are least destructive of the interests that are being claimed to have been violated.

To complete my answer to your question, Mr. Justice Stevens, not only does the covenant prevent that particular mode of responding to the pollution problem, it also prevents what all students of this subject regard as the most rational approach; and that is to say, to use charges imposed upon auto drivers to support mass transit.

QUESTION: Is there any evidence of an attempt to get a more limited change in the terms of the bonding venture, to just permit that change without repealing the entire covenant?

MR. SOVERN: The difficulty, Your Honor, is that the covenant is absolutely categorical, and --

QUESTION: It does have a procedure for getting consent to change, isn't there?

MR. SOVERN: Yes, Your Honor. And this --

QUESTION: You don't think the bond holders would have consented to a permission to increase the tolls, then?

MR. SOVERN: Unquestionably not, Mr. Justice Stevens. Mr. Milburn says the only person from whom he heard how

difficult it would be was me. The chief witness for the plaintiff in the trial court was Mr. John Thompson; at page 192 of the Appendix, Mr. Thompson wrote as follows:

"In my opinion an approach to the bondholders for a modification of the 1962 restrictions accompanied by a moderate increase in interest rate on their bonds would fail, partly because it would be unacceptable and partly because of the procedural difficulties."

QUESTION: Would that change --

QUESTION: All right, who is Mr. Thompson?

MR. SOVERN: Mr. Thompson was plaintiff's witness, called to discuss this question among --

QUESTION: What is his expertise? I mean, why should his testimony --

MR. SOVERN: Oh, he was presented as an expert on the bond market, the rights of bond holders and the behavior of the investment community.

QUESTION: But was the change he was discussing one that would permit investment into mass transit, or merely a change in the tolls? I mean, is that testimony really responsive to the kind of question I was asking?

MR. SOVERN: Well, I'm not clear, Your Honor. His basic position was that any moderate rise in the interest rate for bond holders would not induce them to come out and go through the procedures required to consent to any change.

That is to say, there is a very elaborate procedure for bond holder change --

QUESTION: Well, the reason -- let me just -- I don't want to be obtuse, and I may not be following you, but, as I understand their argument, they say the objection to the repealer is that it will permit the Port Authority to make investments in mass transits, which are deficit operations, where you lose lots of money.

And you say well, we want to do that because we want to raise the tolls on the bridges.

And I'm asking you, couldn't you have made an amendment which permitted you to raise the tolls on the bridges without also permitting you to go into mass transit facilities operations?

MR. SOVERN: I think -- I think not, Your Honor. There would have been several problems.

One is that the legislation governing tolls on bridges is federal. I would say the Bridge Act of 1906 entrusts now to the Federal Highway Administrator the discretion, judgment really, to determine whether bridge tolls are just and reasonable.

In his proceeding, and it's been confirmed in the Third Circuit Court of Appeals, he has taken into account the use to which tolls are put and has declared that the use of tolls for the purpose of mass transit justifies a higher toll

than would otherwise be permissible. Therefore, the simple modification of the New Jersey legislation to raise tolls would not pass federal muster. Moreover, --

QUESTION: In other words, toll raising cannot be a device for cutting down on air pollution, then? Which I thought you were saying was the reason for this whole thing.

MR. SOVERN: It can as part of a package, Your Honor. That's the point. The covenant blocks a coordinated addressing of these problems.

What it does -- when it's gone, you can then take a package that says you charge higher tolls, creating disincentive to those polluting automobiles. You take those increased tolls, you support mass transit. With that mass transit, you then provide the alternative to those auto drivers, so that you're not just simply preventing them from traveling. And it is that coordinated attack on the problems of the State that the covenant precludes.

Now, there's not just pollution. As this Court knows very well, the energy problems of the region were critical. Indeed, the gun battles that attended the fuel oil allocations in parts of this country bore a very strong resemblance to the way in which Minnesota farmers greeted foreclosing sheriffs and judges.

And the economic dislocation that the Federal Environmental Protection Administrator has told us this State

must bear if it is to come into compliance with federal law is very much like the kind of destruction of economic affairs that afflicted Minnesota.

QUESTION: Is it possible, Mr. Sovern, that closing the bridges down and doing some of these other things that were suggested by Justice Stevens were politically unpalatable?

MR. SOVERN: Well, there's no question about that, Your Honor, that neither Legislature --

QUESTION: The voices of those people would be heard more widely than the voices of the bond holders in the public arena, wouldn't they?

MR. SOVERN: Well, there's no question about it. But the difficulties are not simply those of political choice. The State has only the most limited kinds of controls left to it. It really is under the gun of those environmental orders, and when the Environmental Protection Administrator tells the State of New Jersey that it must sell no more gasoline, than it did in 1973, I don't know where the politics would be.

I would guess there are a lot more New Jersey voters who never cross the Hudson, and that, closing down the bridges and tunnels may begin to look like an attractive alternative.

As this Court said in El Paso, when you get to the subject of means, that's exactly the kind of question as to which the Legislature has to have the widest possible

discretion. For this Court to put the State of New Jersey in condition where it has to choose whether to close those bridges and tunnels, we'll let the local business close up for certain of the days, is, I respectfully submit, --

QUESTION: Mr. Sovern, couldn't the States have provided that if the Authority was to go into mass transit, it could go into it as a separate operation in the sense that its other revenues and its other assets would not be subject to a lien of any losses in mass transit, and couldn't the State have otherwise underwritten those losses, rather than expose the bond holders who have the right to the revenues in other operations?

MR. SOVERN: Well, let me say two things about that, Mr. Justice White. First, I think it is not --

QUESTION: Isn't it historically -- didn't it, in the beginning, didn't they used to, in the Port Authority early days, specialize in bonds -- I mean the bonds would just reach certain projects?

MR. SOVERN: In the very earliest days the bonds were single projects to the bonds.

QUESTION: Yes. Yes.

MR. SOVERN: But they failed.

QUESTION: Oh, I understand, --

MR. SOVERN: And that's why --

QUESTION: -- I understand. But, nevertheless, if

the State had wanted to -- if the States had wanted to commit their own credit rather than the Port Authority's, they could have had the Port Authority go into mass transit as a separate single venture.

MR. SOVERN: There is no project of the Port Authority for which it would have been possible to sell bonds, if it were not supported by the others. So --

QUESTION: Unless the States -- unless the States themselves --

MR. SOVERN: Unless the States guaranteed. But it's important --

QUESTION: Yes. Well, that's what I'm asking you. Wasn't this some -- this certainly was a feasible and less intrusive way of going about it.

MR. SOVERN: I'm afraid it wasn't feasible. And it --

QUESTION: Well, it wasn't feasible, but it was less intrusive, as far as the bond holders go.

MR. SOVERN: No question the bond holders would have been happier had the States done it that way.

QUESTION: In the States, isn't there a constitutional barrier to a State doing anything like that?

MR. SOVERN: Well, in both States it would require public referenda, and you would have problems with debt limitation clauses.

Moreover, it's important to remember that the Port District is not a State, so that in each referendum the citizens voting from outside the Port District would be being asked to increase their taxes in order to pay for mass transit in the Port District while it is running annual revenues that grow every year, and reserves that grow every year.

It's just --

QUESTION: That's what I'd like to know. How much mass transit do you get if you win?

MR. SOVERN: Well, the leverage is extraordinary. by the commitment of \$12 million in increased tolls, the State of New Jersey has so far been promised \$157 million by the Department of Transportation for the PATH Plainfield extension, and has received permission to use another \$70 million from Federal Highway funds.

Now, that \$12 million is already in the till. It is not coming from bond holders, it is coming from drivers. The returns on those tolls, as Mr. Milburn indicated, as an increase of \$40 million a year. So that by being able to apply those tolls, it will now be possible, the DOT has signed off on that grant, provided the local share is committed. And the local share has, by agreement between New Jersey and the Port Authority, been divided between them.

If the Port Authority cannot put up its share, which is debt service of \$12 million a year. The project will fail.

The irony is that that project is intended to serve Newark Airport.

QUESTION: I'm asking, what is this project? I want to know how much mass transit will you get. That's simple to answer.

MR. SOVERN: Yes, sir. You will get an extension of the PATH railroad from Newark to the City of Elizabeth, New Jersey, and Newark Airport, the area of Newark Airport.

QUESTION: When?

MR. SOVERN: Well, as soon as this litigation is concluded --

QUESTION: If you're successful.

QUESTION: It will be built as soon as it's concluded?

MR. SOVERN: Yes, Your Honor.

QUESTION: It will be finished?

MR. SOVERN: No, no, it will be begun.

QUESTION: Well, when will it be finished?

MR. SOVERN: They have talked about two to four-year construction period.

QUESTION: All right. And no -- and how much is the cost of the leg going to be? Don't try to answer it, please.

[Laughter.]

MR. SOVERN: I don't know. But the --

QUESTION: But in the meantime the Port Authority is

stuck with a great big deficit bill, year after year, for the four or five years.

MR. SOVERN: But it's --

QUESTION: And in the future. Because mass transit will never pay for itself.

MR. SOVERN: That is correct, Your Honor. It will not pay for itself, but the Port Authority is not being stuck with a deficit, they are in this to the tune of 12 million a year, and they have already received far more than that from the toll rise. And they will continue to receive far more than that from the toll rise.

Mr. Milburn talked about the rising deficits of the PATH railroad. In every year in which those deficits went up, so did the revenues and reserves of the Port Authority. It has absorbed every nickel of those reserves -- of those deficits. It has absorbed every nickel of the cost overruns on the World Trade Center. It lived with the fuel crisis, hurting its airport, bridge and tunnel business, and every year its revenues and reserves rose, and it passed the quarter of a billion dollar mark last year in reserves that have not been called upon.

That is to say, there is approximately \$260 million in reserves belonging to the Port Authority that are not going to have to be looked to for support of anything, because the annual revenues of the Port Authority also continue to grow, and

they are used to pay these deficits, with enough left over so that each year the reserves grow again.

QUESTION: Mr. Sovern, if I might interrupt you. Do you think that Section 10 of Article I of the Federal Constitution, which contains the provision we're talking about in this case, imposes any restriction at all on the power of the Port Authority, the Legislature of the two States to withdraw from any commitment when it sees it would be advantageous in a financial sense to do so?

MR. SOVERN: Yes, sir.

QUESTION: What's -- give me an example of what limit it does impose.

MR. SOVERN: Well, I think this Court's cases are clear on the point. Where the --

QUESTION: But there's never been one quite like this, has there?

MR. SOVERN: Well, not -- no, not exactly like this. But there have been many cases that make it clear that promises, whether by the State or by private party, may be modified, depending on the ends to be served, and on the degree of damage done.

QUESTION: Well, I assume every change they would seek to make would be in the best interests of the State, or the two States --

MR. SOVERN: Not enough that it would be in the

best --

QUESTION: Is that enough so they can make any changes --

MR. SOVERN: No, Your Honor. It seems to me it has to be to serve a matter of real consequence. Now, where that line is is obviously a matter of --

QUESTION: When you're dealing with \$100 million or \$100 billion, there's always going to be real consequence, isn't there?

MR. SOVERN: Well, not like this. I began by saying, and it was not a rhetorical flourish, that you haven't had a case with ends as important as these. I mean, this is the living and breathing of the citizens of two States, the economic survival of their institutions in the face of an energy crisis. These are consequences that are greater than any of those, any previous contract cases put before this Court.

QUESTION: This might have something to do with the capacity of governments at all levels to borrow money, doesn't it also?

MR. SOVERN: Mr. Chief Justice, the evidence in this case indicates that it does not. Just last month the Port Authority sold \$50 million worth of bonds at a seven percent coupon, with this case pending before this Court, the State having repealed the covenant. That is three-eighths of a point.

higher than the 35th series of Port Authority bonds sold for, with the covenant in effect. And it sold at a time when every bond dealer that tries to sell a security with the name New York on it finds himself with a drug.

So that the notion that this record supports the proposition that the municipal bond market will be destroyed or even seriously impaired by permitting States to take measures that meet two conditions: one, the pursuit of an important public purpose; and, two, no damage.

One of the witnesses for the plaintiff below was a fellow by the name of Murphy, and he's an officer of Barr Brothers. And Barr Brothers is -- and he was offered to tell us about the bond market, too. And Barr Brothers has announced as follows -- this appears at pages 422 and 423 of the Appendix:

"Whether or not the Port Authority ever gets involved in mass transit, we feel it continues to be one of the finest revenue credits in the country, amply protected by the basic bond resolution, excellent management and some highly profitable and monopolistic facilities that can more than carry a reasonable amount of mass transit, particularly with the recent toll increases."

That was issued after the trial court's decision. There is no risk of default, nobody's claimed any risk of default. The revenues are safe. The reserves are safe. There

are bond holder protections here that the General Solicitor of the Port Authority described as precluding any assumption of mass transit responsibilities that would threaten the bond holders.

Our friends profess puzzlement as to how we can say that the covenant is an impediment to rational planning and at the same time that it's repealed will not hurt bond holders by freeing up resources.

The answer is that the other bond holder protections save the bond holders from any project that could really threaten their security.

All the covenant does is prevent projects that are not threatening. It bans categorical and therefore it prevents even a project it wouldn't hurt.

There's no way that the Port Authority can pick up a mass transit project that would threaten the security of bond holders. And that was the opinion of Mr. Goldberg in 1961, before the adoption of the covenant and not made in the context in which he was peddling bonds. That was a talk he gave to Port Authority insiders, and that was later published three years later, because it was regarded as such a fine statement of the financial status of the Port Authority.

And Mr. --

QUESTION: Mr. Sovern, supposing that immediately after the repeal of the covenant the value of these, the market

value of these bonds had dropped to fifty percent of what they had been immediately before, you would obviously have a much worse case than you do now.

Do you think you would lose it, or do you think you might still be able to win it?

MR. SOVERN: On this record, if that were the only change, I would think we should still win it.

The reason being that on the day of the repeal, the day Governor Byrne signed the repeal, the plaintiff held a press conference and savaged these bonds, said they have been gravely impaired -- the story was reported in the Wall Street Journal, the New York Times, and every Jersey newspaper coming out weekly or daily.

Now, if anything is calculated to obscure the probative effect of a market reaction, that surely is. The plaintiff is the largest holder of these bonds, and to say that they had been severely damaged would clearly cause some drop in the market, and it did. The bonds did go down. Mr. Milburn has suggested to you that something has happened to the Mass Ports, bonds of the Massachusetts Port Authority, to make them no longer comparable.

Nothing has happened to those bonds, except that that original shakeout, attributable, we think, to the United States Trust Company's damaging these bonds, improved with the passage of time, statements like Barr Brothers, the renewal of

the same A rating by Moody's and Standard & Poor's, that they had always given it.

After that initial savaging, people had a chance to take a look and do an evaluation. And what they found out was that these bonds are terrific.

Moreover, the briefs tell you there's a short-term effect of that recovery -- that recovery has now been in effect for two years. The Mass Ports and New York Ports last week were selling within a half a point of each other.

So that there's no damage in the market, there's no damage in the light of Moody's and Standard & Poor's. The company that employs one of the plaintiff's witnesses says this is terrific, there's nothing to fear, go out and buy it.

There's no damage. And all those opinions -- and those are opinions that count, that people are acting on, not testimony in litigation -- all those opinions are supportive by the documents themselves. Because when one looks at those bond covenants --

QUESTION: That's all before they begin to lose more money on mass transit.

MR. SOVERN: They can't lose more at this time than --

QUESTION: Well, mass transit is not going to bring in any profit.

MR. SOVERN: That's absolutely correct, Your Honor, but lots of other projects are. And this enterprise has always

operated a number of deficit facilities, and --

QUESTION: And it's always stayed out of mass transit.

MR. SOVERN: Well, that's not true, Your Honor.

One of the fascinating things is their peculiar belief that --

QUESTION: Did anything in the record come up about San Francisco's mass transit brainstorm?

MR. SOVERN: There's nothing in the record, Your Honor.

QUESTION: Okay.

MR. SOVERN: The recent -- I saw a recent report that suggests it isn't doing so well, but, of course, it wasn't running very well, either. Everybody agrees that the PATH is a very well-run railroad.

But, to come back to Mr. Justice Stevens' question earlier, about what the opinions suggest about what kinds of modifications are permissible:

The modifications that have typically been permitted have been those that leave the basic obligation intact. And that where a State deprives the bond holder of its principal or his interest, that then you have a case in which the legislation may well be struck down. Though, even there, given sufficient conditions, and there some of the emergency cases come in, there is no requirement in this Court's opinions that there be an emergency. Viex, El Paso, Gelfert, slaughterhouse cases, any number of cases have upheld State repudiation of

their promises in the absence of an emergency.

But where the repudiation in the bond context involves an actual taking away of principal or interest, then, it seems to me, this Court is going to take a much closer look -- should take a much closer look at the justification, and come to the case with --

QUESTION: You don't think something that would materially change the risk would be within that definition?

The risk of default.

MR. SOVERN: It --

QUESTION: You of course argue there's no material change, I understand that, --

MR. SOVERN: You understand my position.

QUESTION: -- but, assuming we felt the other way on that particular problem, would it be within the constitutional provision?

MR. SOVERN: If there is a material change in the risk, it is at that point that the Court must look to the justification for the action taken, and are the ends sufficiently important.

QUESTION: How do we judge whether there's a material change in the risk?

MR. SOVERN: Well, I would give great weight to the assessments of the securities rating agencies, Standard & Poor's, Moody's, Barr Brothers assessment; and I believe the

Court can look at the bond covenants themselves and see --

QUESTION: Then it really boils down to a question of market value, as Mr. Justice Rehnquist has implied.

MR. SOVERN: Well, except that it's very important to remember that these are bonds that -- whose temporary diminution in market value, even in the early part, the days following repeal, those -- that kind of loss is only a temporary loss in liquidity. And if there's anything that this Court has upheld when there have been valid justifications is a temporary loss in liquidity. That's blazed out. That's Viex.

In other words, as long as --

QUESTION: Well, I suppose the change in the risk here is not an immediate risk, it's rather the risk that after the several years that are required to build the extension of the railroad, they finally get it done and, like they did out in Oakland and all, that then you start losing larger sums of money than were anticipated, instead of it being a \$5 million deficit, it's \$100 million deficit.

That's the kind of risk that I suppose is at stake here.

MR. SOVERN: But it is a very hypothetical risk, Your Honor. The arrangement between the Port --

QUESTION: Well, isn't there some factual basis for assuming that it can happen?

MR. SOVERN: Oh, that it is possible? Yes, Your Honor.

QUESTION: Well, don't you have experience with this one railroad that you've taken over, that its losses were much greater than anticipated?

MR. SOVERN: Yes, but this deal does not contemplate the Port Authority paying operating deficits. The arrangements that have been made will use the Port --

QUESTION: Well, but the covenant would permit you to do -- I mean, the repeal would permit you to do so, wouldn't it?

MR. SOVERN: The repealer would, but the State legislation, and the implementing administrative actions, have provided that the Port Authority is responsible only for the debt service: a knowable defined figure --

QUESTION: But those various actions could be changed, if things get a little worse and you need more money some place else, you change things one at a time, wouldn't you?

MR. SOVERN: Well, conceivably yes, Your Honor; although it is -- the Port Authority has, on many occasions, made its own promises to bond holders, without State --

QUESTION: It has no obligation to keep them, apparently.

MR. SOVERN: Well, again I come back to your question, and that is, does it have an obligation to keep them when nothing

is at risk, or very little is at risk.

It does -- not only does it have an obligation to keep them, it has an obligation that has been quite -- taken quite seriously by the courts in both New York and New Jersey.

QUESTION: Well, what -- if it's such a little risk, why doesn't the State -- the States just guarantee the outstanding bonds?

MR. SOVERN: They can't do that, Your Honor.

QUESTION: You mean -- well, they can't do it without having a referendum, I guess.

MR. SOVERN: That's right. And both States must have it, since it's a bi-State agency.

QUESTION: Well, you can't say it's impossible.

MR. SOVERN: No, but we can say that the chances of success are very dim, indeed.

QUESTION: Well, it's a very tiny risk, if you say, so I don't know why the States wouldn't shoulder that risk.

MR. SOVERN: Well, they haven't, Your Honor. And it is the voters that will have to choose, to vote to support projects that are already --

QUESTION: Well, you can't say it's much of an emergency until you try, can you?

MR. SOVERN: Well, New York has had a transportation bond issue defeated, and so has New Jersey. The difficulty in trying it now is, of course, that the pending projects will

be scrapped, and further delay, further cost escalation, and the -- again I come back to the statement in El Paso that states that where you have legitimate public ends, the choice of means is one as to which this Court will give wide latitude to the Legislatures.

The judgment whether to hold referenda on support for the addition to Port Authority facilities, it seems to me, is one that -- the outcome of which is almost nullible, it's highly likely that the people of the two States will defeat those referenda, knowing, as cannot be denied and hasn't been denied, that the Port Authority's resources are ample to undertake that, without a ripple. I mean, the Port Authority has the continuing revenue from its other facilities that can support that without the least bit of difficulty.

And, as this Court knows, that is not true of the ability to borrow of New York City or New York State at this time.

QUESTION: What do you suppose a referendum among the bond holders, on whether the covenant should be repealed, would bring?

MR. SOVERN: Well, I have no doubt, Your Honor, that they don't like it.

QUESTION: Well, they don't like it, they -- but you couldn't convince them that it's just a tiny risk?

MR. SOVERN: I'll tell you, the fact is that when the

covenant hasn't been there, they have bought the bonds.

That is to say, the last series to be sold before the covenant was sold in January 1962. The previous year the New York State Legislature had directed the Port Authority to take over the Hudson & Manhattan. That was the fearful takeover.

Those bonds went off without a hitch, and at then prevailing interest rates. When the covenant was repealed, prospectively, the Port Authority --

QUESTION: But you're just saying that they can still sell some bonds, but the people buying bonds now are taking their risk.

MR. SOVERN: What I'm suggesting to Your Honor --

QUESTION: The old bond holders didn't think they were taking any risk.

MR. SOVERN: What I'm suggesting to Your Honor is that the perception of purchasers before and after the -- before adoption of the covenant and after repeal, was that they needed no protection from such a risk. That the Port Authority's other bond holder protections would take care of them. I am inviting you to draw the inference that that kind of perception of the risks is an accurate one, in which they are betting -- we have no way of knowing whether the bond holders who bought during the period of the covenant would have bought without the covenant.

What we do know is those who bought before bought

without, and that those who bought after bought without.

QUESTION: But you're saying that you wouldn't expect the old bond holders ever to agree to the repeal of the covenant.

MR. SOVERN: That is correct, Your Honor. I really am relying very heavily on the plaintiff's own witnesses, and on plaintiff's counsel, who swore that 95 percent of the bond holders' identities were unknown to the Port Authority.

So that the burden there, really, was assumed to be that -- one that could not be met.

The Court reaches the question of the impairment of contracts, of course, only if it first finds that there was a contract. And we have urged two grounds for maintaining that there was no contract: one, the avoidability of an amendment of an Interstate Compact, without congressional consent; and the other, the preemption of the covenant by federal enactments, whose full effectuation it impeded.

Naturally, if the Court is moved by either of those arguments, it could quite logically take them instead of the impairment question. The courts below chose to address the impairment question and not the compact question.

To come back for just a moment to the question of the effect of the covenant, we find it at a time when it's desired to discourage auto traffic, and increase mass transit. We find that the public agency responsible for coordinating the

region's transportation entrusted by the States with a highly profitable monopoly of bridges or tunnels could contribute to the area's transportation needs only because of the covenant, by further support of the internal combustion engine.

The repeal of the covenant makes it possible to take a more balanced approach to those needs. And we have talked about the PATH-Plainfield project.

To sum up, plaintiff admits, at page 66 of its brief, that: "If it can be said in the case at bar that the ends to be accomplished are improvement in mass transit, decrease in air pollution and conservation of energy, it must be granted that they are legitimate."

The end is legitimate. Repeal serves them. No damage has been proved. This is a classic case of the proper use of the State's police power.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Milburn, do you have anything further?

REBUTTAL ARGUMENT OF DEVEREUX MILBURN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. MILBURN: Yes, sir.

I was wrong, and I apologize. I had forgotten Mr. Thompson's statement about the obtaining of bond holders' consent. I don't know who in the State was in touch with Mr. Thompson, so they didn't try it. But it seems to me they should

have tried it. It's built right into the statute, that that's the way to change it, and that's the way to modify it. And I don't think there's any excuse for not trying it, because you think it isn't going to work, particularly when it did work not too long before that with the Triborough Bridge Authority.

Now, increasing tolls -- I thought I had covered this in my opening statement -- \$40 million, \$12 million, it doesn't go to mass transit, it goes to the bond holders, it goes into the pot. And if it doesn't go into the pot, there's a breach of the covenant with bond holders, and there's another loss of -- and Dean Sovern is quite right, I would be back if that happens.

Now, actually, there is \$296,000 increase between 1974 and 1975. Now, you're not talking about \$40 million, you're not talking about \$12 million, you're not talking about the \$12 million you need for PATH Plainfield. Is a State guarantee impossible? New York did it with the commuter cars. New Jersey didn't, but New York did. And they are still there, some of them.

Now, also, I might point out that the two governments have prevented, between them, first one and then the other, a fare rise. They don't even do that. They don't even pass 35 cents. The Antrak is running at a dollar, right next to it, right -- two parallel tracks.

But will the Governors give them a fare rise? No,

they won't.

Why can't the States do something, except abrogate our contract? That's what I would like to know. I don't know the answer to that kind of question.

Now, Mr. Justice Marshall, you mentioned a new deficit going into PATH. We've got a beauty, we'll all admit that. We've got one running about \$28 million. It was supposed to run six, it's running 28.

Let's put another one in there, and let's say that the Commissioners are wrong again, are wrong by a factor of five again, and let's say we've got another \$30 million deficit in there, and, in the meantime, PATH has gone up. We're talking about a \$70 million deficit. Let's have a little depression, let's have our airports slack off a little bit, and they are going to default on the bonds.

That's why we don't want a tremendous new deficit into the Port Authority, and you can't stop it because it comes in as a baby and it grows into a giant.

Now, the plaintiff's press conference, we savaged the bonds. In my humble opinion, one of the major reasons that those bonds haven't gone down further is because we're standing here. I don't know a bond man in Wall Street that doesn't think that this is an outrage and that we're going to win.

Now, if we don't, let's see what happens to the bonds.

Now, I just have a minute or two, if I could consider Mr. Murphy for a moment. Mr. Murphy made a statement which is quoted in our brief, that if you bought a car and you had a 12-month warranty and all of a sudden it became a six-month warranty, you wouldn't buy a car from that fellow again. He said that's what has happened to the bond market.

Now, Barr Brothers puts out their ads, but what is their business? Pushing bonds. Who owns the Port Authority bonds? They do. They've got to sell them. They can't just leave them on the shelf.

I put no credence in that -- and that's an ad, that's puffing.

But Mr. Murphy was testifying under oath, and I do put some credence in that.

Now, to sum up, let me say this: I don't think this is -- this case is a case that can be -- it could be decided either way. It has been decided the way that I thought was impossible, but it has been decided that way, it would be possible to decide it the other way. I don't think this is a fact case. I don't think this is a law case. I think that this is a moral case.

I think the States have repudiated their words.

I think this case, in its present posture, represents a leak in the dike of State integrity. And I think that this Court can stop that leak before it becomes an avalanche.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:56 o'clock, p.m., the case in the
above-entitled matter was submitted.]

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