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SIDNEY S. HICKLIN, et al.,

Appellants,

== VS ==

EDMUND ORBECK, Commissioner of the
Department of Labor of Alaska, et al.,

Appellees.

No. 77-324

Washington, D. C.
March 21, 1978

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

-----X
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Appellants,

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No. 77-324

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 Department of Labor of Alaska, et al.,

Appellees.
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Washington, D. C.

Tuesday, March 21, 1978

The above-entitled matter came on for argument at

10:13 a.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
 LEWIS F. POWELL, JR., Associate Justice
 WILLIAM H. REHNQUIST, Associate Justice
 JOHN P. STEVENS, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Hicklin against Orbeck and others.

Mr. Wagstaff, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT H. WAGSTAFF ON
BEHALF OF APPELLANTS

MR. WAGSTAFF: Mr. Chief Justice, and may it please the Court: In 1972 the legislature of the State of Alaska adopted a law which gives a residency preference to all designated Alaska residents in any job having to do with oil and gas within the State. The exact mechanism is that the law requires that any person or party who has a contract with the State in the nature of a lease or right-of-way permit or the like to preferentially hire Alaska residents and to first hire the residents of other States. It's an across-the-board preference to all Alaska residents.

The scope, the swath, that this cuts is quite broad. It applies not only to these contractors, it applies to subcontractors and suppliers as well. It does not have to take place on State land.

We believe that this is a direct violation of the Privileges and Immunities Clause of the Constitution. The Supreme Court of Alaska split three to two on this issue. We are asserting before this Court the dissents of Justices

Boochever and Rabinowitz in the Alaska Supreme Court which we feel articulates exactly our position. There is also a Fourteenth Amendment claim presented as well.

The use of the word "residents" in the context of Alaska Hire means domiciliary.

QUESTION: Was the Fourteenth Amendment claim passed on?

MR. WAGSTAFF: Yes, it was, and it was denied as well by the majority.

The preference is given to all residents who are defined under the statute as domiciliaries. And the purported legislative reasons or justification for what is called Alaska Hire is chronic unemployment within the State of Alaska.

The Supreme Court of Alaska, it is our position and I believe appellees disagree, recognized that this was a transparency and that in fact this was simply a broad-based economic preference given to all Alaska residents in preference to the residents of other States. Additionally, Alaska Hire itself supports that position adopted by the Supreme Court.

QUESTION: Mr. Wagstaff, would your position here be precisely the same if Alaska restricted its residency requirement to employment directly by the State?

MR. WAGSTAFF: That issue, of course, the State employment issue, is much different than this case, and Alaska does have a case, State v. Wylie, that is cited, dealing with

governmental employment. My personal belief is that I do not feel that it is proper to discriminate against the residents of other States even in State employment as well, or public contracts. I realize that McCarthy v. Philadelphia Civil Service Commission might indicate otherwise, but that issue, Mr. Justice Blackmun, is not really relevant to this case because we are talking about private employment here, not governmental employment or not public contract.

QUESTION: You are really talking just about pipeline or oil employment, aren't you?

MR. WAGSTAFF: Oil and gas as far as this law goes so far. And the employment covered is all employment that results from such activities. And the Supreme Court of Alaska has recognized that this includes distribution and refineries such as they may be built in the State of Alaska.

QUESTION: But there is no reason why a non-resident can't go up and start manufacturing widgets. He wouldn't violate this law.

MR. WAGSTAFF: Not this specific law, but in terms of the danger of the law, if the widgets came from a natural resource or had any sort of arguable natural resource nexus in Alaska, then it would be a violation of the concept of this law.

QUESTION: But Alaska hasn't prohibited that sort of thing.

MR. WAGSTAFF: Not at this time. Not yet.

QUESTION: Mr. Wagstaff, suppose that Alaska set up a WPA project as we knew in the depression. That's a little bit before your time, maybe. But designed specifically by the State to relieve unemployment among State residents and restricted it to State residents. Would you be here attacking that one, too?

MR. WAGSTAFF: Mr. Justice Blackmun, those would be public works type projects, working on public works?

QUESTION: Building roads and this kind of thing.

MR. WAGSTAFF: Building roads, actually employed by the State?

QUESTION: Yes.

MR. WAGSTAFF: Of course, that is a different issue and we would not be here under Alaska Hire on that issue. I think that issue has been addressed in other cases. There are three levels of looking at that particular issue. There is the direct government employment, the employment by private contractors on government projects, and what we have here is strictly private activity now taking place on State lands. And the only nexus that the State asserts is that they own the resources involved here, oil and gas, and therefore they can do whatever they want to with them. They can make any requirement whatsoever with regard to their utilization.

Of course, this is one step even beyond that. This has nothing to do with extraction. It's the jobs created as a result of the oil and gas development.

QUESTION: I'm not sure I got your answer to Mr. Justice Blackmun's question.

MR. WAGSTAFF: Yes, Mr. Justice Rehnquist.

QUESTION: I am not sure I got your answer.

MR. WAGSTAFF: His question as I recall it, would we be here if this was a WPA project.

QUESTION: And Alaska had provided that only residents could work on the State-funded WPA project.

MR. WAGSTAFF: No, this is a different case than that. We would not be here.

QUESTION: I realize that, but would you feel that you had substantial constitutional grounds if Alaska had enacted such a law and your clients were excluded because of nonresidency?

MR. WAGSTAFF: Yes, I do. I do think that would be a constitutional violation of privileges and immunities if residents of other States were excluded from this. And I say this --

QUESTION: So a State can't use its own tax moneys to relieve unemployment among its own residents?

MR. WAGSTAFF: It can so long as it does not violate the Constitution. In specific other types of projects,

for instance, the dissent in the Hicklin case in Alaska said that such things as job training, such things as the Alaskan Native Claims Settlement Act were good bona fide ways of addressing this problem without discriminating --

QUESTION: The Alaskan Native Claims Settlement Act, I mean a lot of people aren't interested in just sitting at home and getting a check every month to buy groceries. They want work.

MR. WAGSTAFF: That's correct. But I don't think the State can discriminate against the residents of other States in such activities. And we are talking directly about public employment, as I understand the question.

Now, that's my belief and my position. Again, it is certainly not necessary to reach that in order to meet the issue in this case.

The Alaska Supreme Court made it clear that they were deciding this as a broad economic preference, flatly stated, to Alaska residents. There is a real question factually or functionally as to whether or not Alaska indeed owns the resources. The resources, oil and gas, are actually being extracted by private industry. The State has a claim to the subsurface resources where they are being extracted from.

There also is a strong national interest that has been recognized by Congress twice in Alaska oil and gas,

once in the Trans-Alaska Pipeline Act and more recently in the Alaska Gas Transportation Act of 1976 in which Congress makes a specific finding of the national interest.

QUESTION: What difference, constitutionally, do you see, if any, in a statute such as you have confined to natural resources of Alaska and all employment in Alaska independent of the resources, the source of the material.

MR. WAGSTAFF: I don't think there really is that much difference, Mr. Chief Justice. The State can usually in Alaska and I am sure in other States, can usually find some sort of nexus or tangential relationship with governmental activity or ownership or proprietary interest so that it can offer this justification in other jobs as well. That is one of the things that the dissent noted, that this would apply to agriculture in Alaska, lumber, or anything else if the legislature wishes to expand it that far.

QUESTION: It could be expanded on that theory to salesmen of Toyota automobiles which, so far as I know, don't draw on any resources of Alaska for the manufacture.

MR. WAGSTAFF: Well, they do have some nexus. Most of the crates that they are shipped in come from Alaska lumber, but there would be some nexus possibly to that extent. The State can always find some reason that it has a touch upon the particular job involved. And that's one of the real dangers of Alaska Hire is how much further under this theory

of State ownership of resources can it be expanded. And, of course, if Alaska does it, any other State can, and I think predictably will.

I think Alaska's problems are real, but they aren't that much different from many other States at this time or any other time. And I think that under some of the cases that we have cited in our brief, the proper way of dealing with these types of problems is not by isolation and dealing with them separately, that a State cannot insulate itself from what is termed in some Commerce Clause cases as a national welfare. So, too, the same national welfare has a legitimate national public interest in the resources themselves. And Alaska is seeking, really, to isolate itself from the nation, from the Union, in dealing with these particular problems.

QUESTION: Mr. Wagstaff, would you help me with one thing? As I understand it, they held unconstitutional the one year residency requirement.

MR. WAGSTAFF: That's correct.

QUESTION: What exactly is it other than being in the State for 30 days that your clients must do in order to be eligible for work?

MR. WAGSTAFF: It's covered specifically by statute, Mr. Justice Stevens, and it appears in the definitional section within the appendix. There is a definition of resident in there, what a resident is .

QUESTION: What page is that?

MR. WAGSTAFF: Page 12. And he must maintain a place of residency within the State. Most importantly, he must show by all attending circumstances that his intent is to make Alaska his permanent residence, a clear domiciliary situation. Additionally, the Alaska Supreme Court majority spent some five pages talking about the steps that a State can go to, or the State could go to to ensure that this is a person who actually has made the commitment to Alaska, not simply just come there in order to meet the 30-day requirement.

QUESTION: You wouldn't object to the residence, I suppose, because I guess he has got to live in Alaska while he is doing the work. The main objection is to the declaration of intent to make it a permanent residence.

MR. WAGSTAFF: That's correct. That's actually having come there, habitating there at the time is different, although there is the position in our right-to-travel argument that you actually have to go there before you qualify for a job. It discourages job applications from other States. And people cannot make inquiries as they historically have done in Alaska by letter. They actually have to make a commitment to travel and spend a considerable amount of money to get that far.

QUESTION: Your position, then, is that Alaska

could not even prohibit hiring someone, say, from Kansas or Texas who simply applied to an Alaska firm, that they could not require the people even to show up in Alaska before they were hired.

MR. WAGSTAFF: That's correct. I can see no justification for that.

The State of Alaska based its opinion, the ownership theory, strictly and exclusively on McCready v. Virginia which, if it has not been overruled and not been severely limited, should be today. The State feels, as I have stated, that because they believe that they own the resources, they can do with them as they see fit.

Now, McCready is highly distinguishable and has been severely limited by the Toomer case in which this Court refused to expand it any further than it already was, which was very narrow and relates, of course, to the planting of oysters in the tidal waters of the Wex River in Virginia. It deals with access for planting of oysters to State property. It has nothing to do with resulting employment. And, of course, in Alaska oil and gas is in commerce, and we believe it falls directly under the Foster Fountain Louisiana shrimp holding, that is, the State relinquishes all ownership claims such as they may even exist when it places and permits the resources which it purports to own to go into commerce. And that is specifically what happened here. That is the

way Alaska makes money off oil and gas is having it sold in other States.

The McCready case, of course, is limited as well to fish and game in which there is an historical exception or public interest that the court talks about at length in Geer v. Connecticut, which is totally different, we believe, than natural resources in general. It's talking about common property, that is, property that is owned jointly by all the people of the State which fish and game had historically been thought to be, which is different and distinguishable than property ownership in chief or in general.

Also, McCready is a conservation case, as was Corfield v. Coryell and as was asserted in Geer v. Connecticut. And this case has nothing to do with conservation whatsoever. It has to do with exploitation and development.

The conservation argument was made in Toomer v. Witsell as well. And McCready, as was recognized by the Court in Toomer, is the only case that has ever been decided by this Court in which there are no persuasive independent reasons for the discrimination. And the Court then, in 1948, refused to expand McCready to encompass any other areas. And I think this Court should do the same thing today, because there are no independent reasons for Alaska Hire regardless of the purported legislative purposes. It's an across-the-board economic preference for all Alaska residents. And the

Supreme Court of Alaska recognized this as such, but said it was justified because the State owned the resources.

QUESTION: Isn't the fact of unemployment among Alaska residents a perfectly rational reason for this? It doesn't mean it is necessarily constitutional, but it is a reason.

MR. WAGSTAFF: It is a legitimate concern. I don't think it is properly addressed by Alaska Hire because if it is indeed the unemployed who are going to be benefited, then it is those who should be given the preference. But it's not just them, it's the employed, it's all Alaskans.

QUESTION: If a person has a job somewhere else, he presumably is not a beneficiary of this. If he is unemployed looking for a job, he is the beneficiary, isn't he?

MR. WAGSTAFF: These jobs that we are talking about particularly are extremely high paying, extremely desirable. And it is very common for people to --

QUESTION: Quit other jobs.

MR. WAGSTAFF: Quit other jobs, including actually several attorneys I have known who have gone to work on the pipeline.

Of course, there will be another pipeline. The gas pipeline is going to be built probably in the next year or two. And, of course, this will apply to any other gas exploration and development, oil and gas within the State, of

which it is predicted there will be a great deal.

QUESTION: I am still not sure I understood your answer to my question which was prompted by your assertion that there was no reason whatsoever. And my question was isn't unemployment among Alaska residents a reason?

MR. WAGSTAFF: Yes, it is a reason, and it does exist, as it exists elsewhere. If you are talking about the lowest level test that you can apply to it, you say, well, there is some possible reason here that the legislature may have articulated.

Now, that reason was rejected specifically by the Supreme Court of Alaska.

QUESTION: It said what?

MR. WAGSTAFF: It said that this is simply an economic preference.

QUESTION: That's the same thing, isn't it?

MR. WAGSTAFF: No, no. The trial judge found that these were legitimate needs and they had been addressed by the statute. The Alaska Supreme Court rejected that reasoning and said we rather prefer and believe that the Alaska Hire is simply a preference --

QUESTION: An economic preference; i.e., hiring residents before you hire nonresidents.

MR. WAGSTAFF: An economic preference to all Alaskans, not just the unemployed. Not the unemployed.

QUESTION: But it would help the unemployed, even under the view of the Supreme Court of Alaska.

MR. WAGSTAFF: The unemployed Alaskans, yes. But the preference is not restricted to them.

QUESTION: I am not sure I understand your answer. The whole point of this case is that it is restricted to Alaska residents.

MR. WAGSTAFF: That's correct. That's the whole point of the case, and that it is impermissible to do so, and that the unemployed justification for it, first of all, was rejected by the Alaska Supreme Court. Secondly, it's not valid in and of itself, because States can always find reasons of that nature, and this, of course, has been articulated --

QUESTION: The Alaska State legislature enacted this statute. Now, were they crazy when they did it? Didn't they have some reason for doing it?

MR. WAGSTAFF: They enacted it because they wanted to --

QUESTION: There must have been a reason behind it.

MR. WAGSTAFF: They wanted to give preference to Alaska residents.

QUESTION: Precisely. And that's what they did.

MR. WAGSTAFF: That's exactly what they have done. And we believe impermissibly so. The State does not have

that power to give preference to its residents in resulting employment from oil and gas exploration in Alaska, particularly so when the oil and gas is in commerce, as it is here, and that's how money is made.

QUESTION: If this statute were sustained here and Alaska had another gold rush, could they extend the sweep of this statute to gold mining?

MR. WAGSTAFF: Yes. It can cover any State natural resource that it purportedly or believes that it owns -- gold, coal, anything of that nature. And, of course, any State can do that.

QUESTION: How many Alaskans could take gold out -- or non-Alaskans only after they had resided for one year? Would that be the case under this statute? As long as they are permanent residents.

MR. WAGSTAFF: Yes, they would have to show permanent residency.

QUESTION: Well, the one-year provision was struck down by the majority.

MR. WAGSTAFF: Yes. It was limited to 30 days. And, of course, this is done by an enforcement procedure as you apply for a residency card. The burden is on the applicant. The residency card is good for two years and this entitles you to preference if you are a card holder.

As far, Mr. Chief Justice, as the gold situation

is concerned, if that were considered a State resource, which it would, and the dissent clearly points out how much further this law could go and predictably would, then it would apply to gold as well. And only in terms of employment--we are not talking about extraction -- in terms of employment in the gold industry that residents would be preferred in all employment.

QUESTION: Can Alaska require that candidates for public office be residents of Alaska?

MR. WAGSTAFF: Yes, it can. It can and has, I think properly.

QUESTION: Why is that different from this?

MR. WAGSTAFF: There are some legitimate exceptions, if they be deemed such, to the Privileges and Immunities Clause. I believe a State cannot discriminate against a citizen of another State unless there is substantial compelling and legitimate interest that is being furthered thereby and the means chosen is the least drastic. And voting is one such category.

QUESTION: Why?

MR. WAGSTAFF: Well, that's how the State government is controlled.

QUESTION: But that isn't much of an answer, is it?

MR. WAGSTAFF: Well, I think as far as the controlling of how State government is created, how the people

choose the persons to govern that State, it is legitimate in that context.

QUESTION: One would think that would be quite illegitimate. There is a kind of a self-perpetuation scheme built in by the legislature to make sure that the people don't have a right to choose anybody but people who have been around Alaska for quite a while.

MR. WAGSTAFF: Well, the legitimacy interest is to keep people, I suppose -- now, I am not defending that position, I am just recognizing that it exists --

QUESTION: It not only exists; it has been upheld by this Court.

MR. WAGSTAFF: Yes, it has been upheld.

-- is to keep people from coming across State lines---

QUESTION: So you wouldn't have floating governments.

MR. WAGSTAFF: Right.

QUESTION: Spend six months in Alaska, six months in Georgia, the next six months in California. That's the reason, isn't it?

MR. WAGSTAFF: Yes. And there are some others, too, as well that have been recognized. For instance, tuition differentials in cases have been recognized as allowing a State which created the institutions, the taxpayers of that State have paid for it, to discriminate in differentials for tuition. But that's the least drastic. The in-State students

aren't given preference as they are in Alaska Hire.

I would like to reserve the rest for rebuttal, if I may.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Lorensen.

ORAL ARGUMENT OF RONALD W. LORENSEN ON
BEHALF OF APPELLEES

MR. LORENSEN: Thank you, Mr. Chief Justice, and may it please the Court: I think directly at the outset it needs to be pointed out what Alaska Hire effects is founded upon is State ownership of resources and not just State ownership in the more general usage of the fact that oil and gas may be found within Alaska, is because this oil and gas was found on land, below land, which is owned by Alaska. In the true legal sense and despite what counsel for the appellants would indicate, I don't believe there is any power in Congress to require that Alaska sell, dispose of its oil and gas as long as it sits in the ground and is not held under private leases by private individuals.

However, Alaska has said, if we are going to lease this oil and gas which we the State own on behalf of our people, our residents, we are going to require certain conditions.

QUESTION: And I take it your argument would be the same if there wasn't a single unemployed person in Alaska.

MR. LORENSEN: Yes, it would, with respect to the underlying justification.

QUESTION: And your Supreme Court upheld the law on the basis you are submitting?

MR. LORENSEN: Yes.

QUESTION: General Lorensen, I have been curious. There is some difference of opinion in the briefs at least as to the scope of this statute. Is the scope measured by section 38.40.050 appearing on page 8 of the appendix?

MR. LORENSEN: It's repeated in two places, but section 050 does contain the scope. I think section 030(a) is really the underlying basis for it. That section states that in order to preserve rights of Alaskans to employment a certain provision shall be incorporated into oil and gas leases on pipeline rights-of-way where the State is a party to those leases and rights-of-way.

QUESTION: 050 seems to be a little broader. "...must be performed directly for the person subject to this chapter or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor."

MR. LORENSEN: Yes. What 050 requires is that a lessee who leases the oil agree that he will see to it that his subcontractors do in fact also hire Alaska residents --

QUESTION: And the suppliers of his subcontractors.

MR. LORENSEN: And suppliers.

I would point out, Your Honor, that to this point the suppliers aspect has in fact not been enforced. We have had our hands full just enforcing with respect to actual construction activity.

QUESTION: Would this apply to refineries?

MR. LORENSEN: It would depend on the nature in which the refinery arose. If it is built on State land which is leased for that purpose, yes.

QUESTION: No, no. If this is a refinery built on public land, not State land, United States land. You are not taking over the United States land, are you?

MR. LORENSEN: No, we are not. Are you speaking of Alaska oil and gas which is being refined?

QUESTION: Some of these pipelines run over United States land, don't they?

MR. LORENSEN: Yes, they do.

QUESTION: Does this law apply to those?

MR. LORENSEN: It applies to the extent that there is employment taking place --

QUESTION: Where do you get jurisdiction over United States land?

MR. LORENSEN: Well, it's not the land, Mr. Justice Marshall. It's the employment activity.

QUESTION: Well, the pipe is on the land.

MR. LORENSEN: Yes, but it's the employment activity

which we are regulating.

QUESTION: And you would go onto United States land and enforce your State law?

MR. LORENSEN: Yes, and I think we have.

QUESTION: What percentage of the State work force would be affected by this Act? I think the brief said roughly 6 percent?

MR. LORENSEN: That's correct. At the height of pipeline employment, it represented only 6 percent of the entire work force in the State.

QUESTION: Would that be true if you had included suppliers as well as contractors and subcontractors or lessees?

MR. LORENSEN: It may have been somewhat higher, Mr. Justice Powell, but, again, as I indicated, we have not in fact enforced it against the suppliers at this point.

QUESTION: But you could under the Act.

MR. LORENSEN: We could. We are limiting the scope of suppliers by regulation very stringently, however, to suppliers whose activity is 95 percent directly related to that activity. So we don't grab a small supplier who really doesn't have any direct contact with the pipeline.

QUESTION: When you say suppliers, the Act applies to employees of suppliers, not to the suppliers themselves, I take it?

MR. LORENSEN: Well, it requires that the supplier hire employees who are Alaska residents.

QUESTION: But the supplier himself or itself need not be an Alaskan.

MR. LORENSEN: That's correct. We don't place any requirements in terms of who operates the business, who the business entity is. That's correct.

So throughout your analysis of Alaska Hire, I urge you to keep in mind the fact that what we are talking about is the State disposing of resources which it really owns and disposing of them in a way which it sees will best benefit its own residents, the people on whose behalf it owns those resources.

QUESTION: Mr. Lorenson, is it fair to analogize this to sort of a monopolist who imposes a tying clause on his customers: If you want my product, you have got to accept this condition in order to get the product, namely, employ people I designate. It's sort of that kind of --

MR. LORENSEN: I suppose that analogy could be made. I am not experienced at all in the area you are speaking of, antitrust area. So it's difficult for me to --

QUESTION: It's not your gas once it hits that pipeline, is it?

MR. LORENSEN: Mr. Justice Marshall --

QUESTION: The gas doesn't belong to Alaska once it

hits the pipeline.

MR. LORENSEN: No, that's correct. We don't attempt to regulate the gas itself in any way.

QUESTION: You regulate the pipeline.

MR. LORENSEN: Only the construction before gas is ever put into it.

It's also important to keep in mind that the jobs we are talking about wouldn't exist if the State hadn't granted these leases and pipeline rights-of-way in the first place.

QUESTION: But there is no question that Alaska can use that money.

MR. LORENSEN: There is no question Alaska can use it and will be using the money that it receives. That's correct. But very frequently the money the State receives with respect to individual residents of the State never has any real impact. A school may be built and an individual, a resident, of the State says, "Well, I don't have any children," or, "My children are no longer in school." He sees a more direct benefit to himself by finding himself being employed in this type of activity which is the result of the exploitation of the resources which he owns, really he owns.

QUESTION: Do you happen to have any idea of how many people in Alaska are on relief? Is it a substantial number?

MR. LORENSEN: It is a substantial number. I don't have any idea of the number of people on relief. I can tell you that we have the highest unemployment rate in the Nation. We always have any time of the year. At this time of year it is approximately 12 percent.

QUESTION: People can come from another State and go on relief immediately in Alaska, can they not?

MR. LORENSEN: If they declare themselves residents, yes.

QUESTION: And that consumes the natural resource of Alaska, does it not?

MR. LORENSEN: Dollars. That's right.

QUESTION: Tax revenues.

MR. LORENSEN: That's right.

QUESTION: I suppose that's a resource, whether natural or artificial.

QUESTION: I can understand perhaps why you would prefer residents. But how about residents for a year? Why do you insist on the year?

MR. LORENSEN: That aspect of the law has now, of course, been struck by the State Supreme Court. We put forth what we felt was a very compelling justification, and we showed by affidavit that it was necessary to provide this year cushion especially for undertrained individuals in the State who had undertaken training programs who upon

entering training needed some assurance that they could in fact look for a job and that they would not be bypassed as soon as they got out of the training program by new residents who had come into the State with higher skills, higher qualifications at the outset.

We put forward a number of other justifications, but I don't think I need to go into those.

QUESTION: The Supreme Court of Alaska threw it out on State constitutional grounds.

MR. LORENSEN: Well, it threw it out on both the State and the Federal Constitution. We have indicated in a footnote that we feel they may have erred in relying on the Federal constitutional analysis.

QUESTION: But that's not here because they also relied on the State constitution.

MR. LORENSEN: That's correct.

QUESTION: In any event, you didn't cross-petition.

MR. LORENSEN: That's correct, we saw no basis for it.

QUESTION: You accepted the 30 days, and indeed your brother on the other side doesn't quarrel with the 30 days as such, as I understand it.

MR. LORENSEN: That's correct, Mr. Justice Stewart.
Yes.

Now, both the appellants and the dissent in the

State Supreme Court decision spoke in strident terms of the threatened Balkanization to our nation and parochial isolation which would result if this law were in fact upheld. I think that if we just stop to think about it for a moment, that those fears are more fears than practicality which will ever arise.

For one thing, I doubt that there is any State which owns the quantity of developable resources -- and again we are talking about State ownership of developable resources -- in the quantity that Alaska does. So that as a practical matter -- and that would be the extent of any decision by this Court upholding Local Hire -- as a practical matter the implementation by the various States would probably be minimal at best, because they don't own a large amount --

QUESTION: Is that a valid argument? Why, if your position is correct, could not another State that didn't own the resources itself but just sought to regulate them just say that anybody who works on oil that comes out of Louisiana, say, shall be a Louisiana resident? For the same reason that you want to protect your citizens from unemployment and the like, why couldn't Louisiana do the same saying that in our regulatory power over resources that have their source in the State will exercise this kind of jurisdiction. Why wouldn't that be equally reasonable?

MR. LORENSEN: That argument does not form the

basis for our position at all. It may in fact be reasonable. I'm not sure. I haven't given that aspect a lot of thought. What you run into there is interference with interstate commerce problems, your West v. Kansas and --

QUESTION: You have the same interference here. The only difference is that you happen to be the legal owner instead of just the sovereign that has the power to decide what happens to the resource. And should that make a difference when you are talking about the exercise of a governmental function?

MR. LORENSEN: In fact, there is no interference with interstate commerce here. The situation which you have propounded, it seems to me, would depend on precisely the facts as to whether or not there was an interference.

QUESTION: Precisely the same statute except that Louisiana might not say with respect to all we own, but just all that the other oil companies own that comes out of Louisiana. It's a State resource and because it's subject to our jurisdiction we will impose this kind of employment condition, just as you have. Wouldn't they have the same motivation and same justification for it?

MR. LORENSEN: They may have the same motivation; they don't have the same constitutional underpinnings to rely upon, because they can't point to McCready to say that this is the basis for our requiring that oil and gas employment be

given to Alaska residents first. McCready goes to the ownership of the land.

QUESTION: McCready doesn't deal with employment of other persons in using the resource, does it?

MR. LORENSEN: No, the factual situation, McCready didn't. It seems to me that if you read McCready, I think if this Court would have been presented with a law that said not only must Virginia residents plant oysters, but also any individuals hired by Virginia residents to harvest those oysters must as well be Virginians, I think this Court would have upheld that requirement as well under the analysis provided in McCready.

QUESTION: What about Texas where the State does own the oil?

MR. LORENSEN: If Texas does in fact own the oil --

QUESTION: The University of Texas has more oil than anybody else in Texas.

MR. LORENSEN: I would certainly argue on behalf of Texas that they would have the same constitutional basis for requiring that Texas residents be hired first.

QUESTION: You were starting to say when we interrupted you that this wouldn't have a broad impact in the other States because Alaska is peculiar in that it owns a great quantity of developable resources. But it's true, is it not, that any land anywhere is a developable resource,

either for farming or for building an office building or for whatever. Not that that weakens your basic argument, but certainly the impact of this case wouldn't be confined to the State of Alaska.

MR. LORENSEN: That is certainly true. My only point is that with respect to other States who could use the same theory, the amount of land which another State owns in almost all cases is very minimal, except perhaps for parks. In most States, the property that the State still owns has been set aside for parks and it is no longer developable.

QUESTION: What percentage of the area of Alaska is owned by the State?

MR. LORENSEN: Well, when transfer of all property to the State is finally completed, it will be about one-third of the property of the State.

QUESTION: And almost two-thirds by the United States, isn't it?

MR. LORENSEN: Except for the transfer to the native corporations which is presently in the offing. I am not sure how the split will eventually break off. But those will be the three largest landholders in the State.

QUESTION: And then the individual private landowners --

MR. LORENSEN: Only about 1 percent of them.

QUESTION: One percent of the whole --

MR. LORENSEN: That's right. Private ownership in Alaska is very minimal, of land.

The other reason that we don't think that parochialization and Balkanization is something to be feared is, as we have pointed out in our brief, there are numerous states, and we have pointed to 19 or 20 of them, which currently have statutes which require that in public construction work done for those States or their political subdivisions, that contractors performing that work hire residents of those States first. In some cases it's an absolute preference. In many cases it requires a durational aspect, but there are a great number of States which currently require similar kinds of employment preferences for residents in private employment.

QUESTION: The Federal Government has at least one statute that imposes conditions with which those who contract with the Federal Government have to comply. Isn't that true? The Davis-Bacon Act?

MR. LORENSEN: The Davis-Bacon Act. I don't know how that applies to residency.

QUESTION: It does require a certain level of compensation.

MR. LORENSEN: It does. That's the main aspect of the Davis-Bacon Act. Of course, the Federal Government has now also adopted the 10 percent minority contractor requirement which I assume will eventually get to this Court, but that is

again another subject.

QUESTION: Would you argue that Alaska could provide that people who lease or buy property, as a condition of that lease have to employ only white people?

MR. LORENSEN: I would not argue that.

QUESTION: So there is a limit on conditions which the State even as owner can impose.

MR. LORENSEN: I think so, yes. The State Supreme Court has indicated some of the limitations. We have presented to this Court and to the State Supreme Court an alternative argument based simply on the State's power to contract without ever looking at the exercise of its police powers, where the State is the owner or where the State wishes to be a purchaser, that it may do so without the standard restrictions of due process and equal protection requirements.

The State Supreme Court rejected that with respect to the one-year durational requirement. It didn't address it with respect to the remainder of the law.

QUESTION: You are relying on the State's power as owner to contract with respect to the property which it owns.

MR. LORENSEN: That's right. There is no obligation on the part of the State to --

QUESTION: That is your sole reliance, isn't it? I mean, that is your basic reliance. You begin with that premise.

MR. LORENSEN: We begin with the premise that the State owns the land, and then we say standard constitutional principles are applied to the State's action. The Privileges and Immunities Clause is satisfied. The Equal Protection Clause is satisfied. If a State power to contract argument and analysis is applied, it still is valid under that absent the analysis under Privileges and Immunities.

QUESTION: But you do concede clearly that there are limitations. You just have. You said they couldn't require that only white people be hired.

MR. LORENSEN: Yes. Not only that, but with respect to its power as a proprietor it seems to me it would be subject to the same anti-discrimination laws as any other private contractor.

QUESTION: Is there any difference between its power as a contractor and its power as an owner?

MR. LORENSEN: That's an interesting question which I have been unable to resolve in terms of the research.

QUESTION: Basically it's the same.

MR. LORENSEN: It seems to me it should be the same. It should be the same. The cases have always addressed the State's power to contract as purchaser rather than its power to contract as seller.

QUESTION: I suppose you would say, then, that certainly in the State's unemployment, it could put on the same

conditions.

MR. LORENSEN: Yes. For State public employment.
Yes.

QUESTION: But you wouldn't say that the State could require that all the oil taken out of the lands it owns in Alaska be used only in Alaska.

MR. LORENSEN: No. It seems to me that that would be directly contrary to this Court's holdings in the West Virginia --

QUESTION: That would be a Commerce Clause violation, wouldn't it?

MR. LORENSEN: That's right, Commerce Clause. And one of our points is we are not affecting the product or its distribution in any way by Local Hire.

QUESTION: General Lorensen, with respect to this one-third of the land in the State which is owned by Alaska, I take it your theory would justify a statute which said that any purchaser of any portion of that land must as long as he owns the land give preference in employment to Alaska residents and require his purchaser to do the same. So that forever for one-third of the State the employment preference could be restricted to Alaska residents.

MR. LORENSEN: If we are going upon a State power to contract theory, yes, very definitely. In the same way it would be my argument that the State -- The State has

considered from time to time, and we may find ourselves in the position very soon, of once again adopting a homestead provision. It seems to me very clearly the State can require that only Alaska residents participate in homesteading programs.

QUESTION: What historically has been -- of course, homesteading basically -- there used to be a Federal program and it was for newcomers primarily, wasn't it?

MR. LORENSEN: It was to encourage people to settle the land. Whether the Federal program was for newcomers or just encourage settlement --

QUESTION: Has there ever been, do you know, with respect to homesteading, whether historically there have been residential restrictions?

MR. LORENSEN: I really do not know that.

QUESTION: I don't either. I was just asking for information.

MR. LORENSEN: No, I don't know.

The State has had a mini-homesteading program in the past for recreational provisions, but it cut that out not too long ago.

QUESTION: Of course, your statute does not preclude employment of nonresident aliens, does it -- I mean of resident aliens.

MR. LORENSEN: No, it does not. That is a point we have made. Mr. Wagstaff in his reply brief has somehow

indicated that we do not permit aliens to participate in the program if they are residents. That is not in fact the case. To the extent that he makes that argument, I am not sure what his basis for it is.

I would point as well that the Alaska legislature is charged with a duty under the Alaska Constitution, Article VIII, Section 2, to see to it that the resources of the State of Alaska are developed and utilized to the maximum benefit of the people. This provides an independent, separate justification, separate basis for the legislature enacting Local Hire. It is charged with the duty under the Alaska Constitution to maximize benefits to residents. And this maximizes those benefits.

QUESTION: How from a constitutional point of view is that an independent basis as contrasted to a legislature simply deciding without any constitutional mandate that it wants to do that?

MR. LORENSEN: It seems to me that the constitutional requirement places the nature of a trust upon the legislature in its relationship with that land that may or may not exist in the absence of that kind of a constitutional requirement.

QUESTION: But in either case where you are being challenged on Federal constitutional grounds --

MR. LORENSEN: That's correct. I am certainly not asserting that the Alaska Constitution can overrule the

Federal Constitution.

There is some question as to what the Alaska Supreme Court did say about Local Hire and how it characterized it. I would just like to read that to you to indicate that it did not say that Local Hire is simply an across-the-board economic preference to residents. The State Supreme Court said: "We are hesitant to classify Alaska Hire as --

QUESTION: Where are you reading from?

MR. LORENSEN: I am reading from -- this is the brief of the appellants, in their footnote 7 on page 7. It can also be found in their jurisdictional statement in their Appendix 1, page 19A, which contains the entire decision.

"We are hesitant to clarify -- to classify; this is a typo -- to classify Alaska Hire as something other than an attempt to strengthen the Alaskan economy." It is an attempt to strengthen the Alaskan economy; it is not simply some across-the-board preference for residents.

"We believe that the better alternative is to consider Alaska Hire an economic measure justified by the 'natural resources exception,'" and then they go on into McCready. They do not reject the notion that Alaska Hire was adopted to promote either education and training in the State. We have presented numerous affidavits to the Superior Court indicating that training did in fact take place to qualify Alaska residents for these jobs as they became available. So

training was a very integral part of the Alaska Hire program. It did not operate in a vacuum.

QUESTION: In your view of the Privileges and Immunities Clause, would it forbid the Alaska legislature from requiring all private employers to hire Alaskans first?

MR. LORENSEN: I won't say that it would forbid it. Such a requirement would not invoke the McCready principle. The question then would be whether or not there are under your Toomer test for Privileges and Immunities analysis, whether there are valid and independent reasons for the discrimination.

QUESTION: Also assume the legislature invoked the same reasons that it did here with respect to employment on State property, namely, that Alaska has a high unemployment rate and they intend to give an economic benefit to Alaskan residents.

MR. LORENSEN: I would hate to express an opinion on behalf of the Attorney General's office at this point in time on that issue. However, it seems to me that your true --

QUESTION: Let me ask you something different, then, just short of that. What test do you think is applicable in the Privileges and Immunities Clause to test a law like that?

MR. LORENSEN: A law such as the one you are proposing?

QUESTION: Yes.

MR. LORENSEN: Your Toomer test, are there valid

and independent reasons for the discrimination. I can read it to you.

QUESTION: You mean, just any reason?

QUESTION: You mean whatever the Court meant in Toomer?

MR. LORENSEN: Yes, to state it very simply.

In Toomer you articulated a very specific test. The Court articulated it. It was a two-pronged issue, and the questions went as follows: Are there valid, independent reasons for the disparity of treatment? Does the degree of discrimination bear close relation to those reasons? And coupled with that was a caveat added by the Court that indicated that your inquiry must always be conducted with due regard to the principle that States should have considerable leeway in analyzing local evils and in prescribing appropriate cures for them.

It's our position that if the Court does not apply the McCready principle to Local Hire, that that test must still be satisfied. That is the applicable test for analyzing Local Hire, and it is our position --

QUESTION: Suppose we reject your McCready principle? You still have to face the Toomer problem, I guess.

MR. LORENSEN: That's right, the Toomer test. I don't consider it a problem. We have addressed it in our brief.

QUESTION: That's why I'm asking you. If we reject the McCready principle, would there really be any difference between this law and a law which required a preference in all private employment?

MR. LORENSEN: Yes. And that's where the constitutional provision of the State Constitution comes into play, which directs the legislature to see to it that land which the State owns is utilized for the maximum benefit of residents. That constitutional mandate applies only to land which the State owns and does not apply to privately held land in the State.

So there is still a valid, independent reason, and that is that the State seeks --

QUESTION: It's kind of a bootleg reason, isn't it?

MR. LORENSEN: Bootleg or however --

QUESTION: Well, you have a provision in your State Constitution that says you may do this, so you must do it.

MR. LORENSEN: No. The reason is that the State owns this land and desires to utilize, if it's to be utilized at all, if it's to be disposed of, it desires to see to it that it be utilized in a manner which is most beneficial to Alaska residents. And you can't apply that test to private ownership, to land which is privately owned. The State does not have that same interest in private land which it has in land which it owns on behalf of its people.

I have only a couple of minutes left, but I would just like to address briefly the equal protection issues raised by the appellants that this Court should find that nonresidency is either a suspect classification for purposes of equal protection analysis or that the resident-nonresident discrimination violates, impinges upon, the fundamental right to travel, which this Court has articulated in a number of recent cases.

With respect to the suspect classification argument, we have pointed out that this Court has never held that nonresidency falls into that suspect classification category. In fact, the underlying justification for suspect classifications which this Court has articulated in the San Antonio Independent School District case that suspect classifications are recognized where you are talking about a group which has no independent political power base, essentially, simply does not apply to nonresidents who can at any time go to their congressional leaders here in Washington and seek to get Congress to make discrimination by any State on the basis of residence illegal. So that nonresidents do in that case have that kind of political option.

QUESTION: Then they don't need the Constitution, do they?

MR. LORENSEN: I beg your pardon?

QUESTION: We don't need the Privileges and Immunities Clause in the Constitution. They can take care of

themselves.

MR. LORENSEN: I'm not going to take that position, certainly not. But it seems to me that with respect to your concerns that there not be a great many suspect classifications created, the concerns which you have articulated as justifying the creation, the recognition, of suspect classification, simply do not apply to the situation of resident versus nonresident discriminations.

As to the right of travel argument, this Court has recognized the right of travel only in the context of duration of residency requirements where the discrimination is imposed between new residents and old residents, and the right of travel which you have discussed in those cases is the right to migrate, the right to actually pick up and move one's residence from one State to another. This Court has yet to expand that right to travel notion to include the right to travel casually throughout the United States. As we have indicated in our brief, we do feel that there are, upon analyzing the cases, two different rights of travel which this Court has recognized. One is the right of migration, the right to actually move one's residence, take up residence in a new State. That is what this Court has protected through its Fourteenth Amendment analysis.

The other right is protected by the Privileges and Immunities Clause of Article IV, Section 2.

With that I will close.

Thank you.

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

REBUTTAL ARGUMENT OF ROBERT H. WAGSTAFF
ON BEHALF OF APPELLANTS

MR. WAGSTAFF: Yes, I do. Thank you, Mr. Chief Justice.

There is a disagreement among the parties over what the Alaska Supreme Court has ruled. However, it is our position, as I attempted to amplify to the Court in my reply brief, that the Alaska court rejected the legislative findings as being any sort of justification or any sort of basis for Alaska Hire and rather found that it is simply an across-the-board economic preference given to Alaska residents that the State has a right to do because it owns the resources.

The independent reasons asserted, the independent reasons being high unemployment, were rejected by the Supreme Court. But even if they are considered, they do not in and of themselves justify discrimination against residents of other States just because of unique problems, if they exist at all, in Alaska. Because, as I have tried to argue, every State at least in its own eyes has its own unique problems and unique attributes.

QUESTION: Mr. Wagstaff, do you think the Alaska

State bar can impose a residency requirement?

MR. WAGSTAFF: It does impose a residency requirement, and, of course, there are cases. This Court's, as I recall, affirming without opinion the New Mexico case several years ago indicates that it is constitutionally valid.

I personally, again, see no justification for a residency requirement for admission to the bar, because you don't have to remain a resident once you are admitted to practice law, at least in Alaska. The theory, as I understand it is that it gives the State Board of Bar Examiners an opportunity to examine the person's qualification. If they are actually there, I think a domiciliary requirement doesn't meet that particular need, is not necessary. If a person is physically present, I think that's adequate. But again that holding certainly is not necessary to this particular case.

QUESTION: You concede that cases hold that the residency requirement for admission to the State bar is permissible?

MR. WAGSTAFF: Yes, that is one of the exceptions, similar to the voting, professional licensing, divorce, if you want to think of it in those terms, possibly municipal employment under the McCarthy opinion, and receipt of welfare. Those are exceptions -- exceptions is perhaps the wrong word. It's instances where a State is showing a substantial compelling and legitimate need which it has the burden to show.

Of course, as I believe Mr. Justice Stevens has suggested that a State could justify a law like Alaska Hire under its general regulatory powers, not simply we own it.

QUESTION: Maybe it could and maybe it couldn't. But in this case, the State doesn't seek to justify it under any such powers, but rather only on the limited foundation that in this case we are dealing with assets that are owned by the State as owner.

MR. WAGSTAFF: That it purports to own. That's correct.

QUESTION: It does own. You don't quarrel with that, do you?

MR. WAGSTAFF: Well, there is a -- only in the sense of being able to restrict it. I don't think you can --

QUESTION: Own. Own.

MR. WAGSTAFF: Yes, it does. It is entitled to a portion of the money from the sale of it. That's correct.

The McCready case itself does not deal specifically with direct ownership, because fish and game is owned by the people of the State, and the State in that case was recognized as the trustee, the party having the proprietary interest to assert this. So McCready is not directly helpful to them on that particular point.

QUESTION: If that an argument that can prevail even if we don't overrule McCready?

MR. WAGSTAFF: Yes, it is. Because this is a different type of ownership. It's not a trustee representation of something that is owned collectively by the people.

QUESTION: McCready didn't involve transient fugitive wildlife, but rather sedentary oysters, wasn't it, planting oysters?

MR. WAGSTAFF: Planting oysters in the tidelands of the Weir River. Access to this. It had nothing to do with sale or jobs or anything else. It was just whether or not the State can restrict access to its own residents.

QUESTION: Mr. Wagstaff.

MR. WAGSTAFF: Yes.

QUESTION: Earlier in your argument you emphasized the fact that the employment here was private. Assume that Alaska undertook to perform all of its functions that it now leases out, that is, drilling the oil or gas and constructing and operating pipelines, perhaps a refinery, so that the people employed would be employees directly of the State. Would that make a difference to your position?

MR. WAGSTAFF: It's a different case. Of course, that's the State employment issue. I still believe that those circumstances would be a violation of the Privileges and Immunities Clause. I don't think the public employment or -- not the public employment; the public contracting, public works doctrine should be any longer valid. The Heim and Crane

theory of employment on public works, I think, has been rejected by this Court. So I think if they are contractors, it seems to me under existing law, if they are contractors in which the State has an interest or is hiring directly, then under existing law it would be a violation of privileges and immunities.

QUESTION: In McCarthy we were dealing with employees of the city of Philadelphia as I recall.

MR. WAGSTAFF: Correct.

QUESTION: Would you draw a distinction between city employees on the one hand performing public functions and employees of Alaska in the example I gave you?

MR. WAGSTAFF: Yes, I certainly do. McCarthy was involved with firemen. It was a per curiam decision. There are other articulable reasons for municipal employment justifications, such as knowing, as in the firemen's case or policemen's case, knowing what the city is like, having a feel for the people in the city, things of that nature, that are different and additional reasons. With an off-company employee, those reasons simply do not exist.

QUESTION: You said McCarthy was a per curiam opinion. Is that one of the distinctions you would draw?

MR. WAGSTAFF: I said that in the sense that that was not fully analyzed, as I recall, in the particular opinion as to the specific reasons for municipal employment.

QUESTION: It was a summary disposition, which is why it was per curiam.

QUESTION: You feel, therefore, it is less authoritative?

MR. WAGSTAFF: In my judgment, it is, in trying to seek guidance from it. The fact that it was not argued and was a per curiam opinion does carry less weight with me as an attorney.

QUESTION: As a matter of fact, I think we suggested that perhaps summary decisions are less authoritative even for us.

MR. WAGSTAFF: Yes, that's correct.

QUESTION: Not even for us.

QUESTION: Especially for us.

QUESTION: No. For us, but not for others.

MR. WAGSTAFF: I see my time is up. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:13 a.m., oral argument in the above-entitled matter was concluded.)

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