ORIGINAL

In the

Supreme Court of the United States

MONTANA, ET AL.,

APPELLANTS,

v.

UNITED STATES,

APPELLEES.

No. 77-1134

Washington, D. C.
December 4, 1978

Pages 1 thru 46

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IN THE SUPREME COURT OF THE UNITED STATES

MONTANA, ET AL., Appellants,	:	
v.	:	Case No. 77-1134
UNITED STATES, Appellees.	:	

Washington, D. C.

Monday, December 4, 1978

The above-entitled matter came on for argument at 1:59 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT A. POORE, ESQ., Assistant Attorney General, State of Montana, Suite 400, Silver Bow Block, Butte, Montana 59701; on behalf of the Appellants.

STUART A. SMITH, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGE:R We will hear arguments next in Montana v. United States.

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

ORAL ARGUMENT OF ROBERT A. POORE, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This is an appeal by the State of Montana from the majority judgment of a three-judge Federal District Court declaring that the Montana contractors gross receipts tax is unconstitutional as to the government and those with whom it deals on the grounds that it violates the Supremacy Clause in that the proceeds of the Act which is a state act, of course, flow to the State of Montana and not to the Federal Government and therefore that is discrimination against the Federal Government.

Of course, for an understanding of the lower court's holding, it is necessary to also understand the Act in question, which imposes a 1 percent gross receipts tax on any public contractor who has a job above $1,000 in the State of Montana. Thus, a contractor who would be building a road for the State of Montana or a contractor building a road for a dam for the Federal Government -- and this is important to us -- a contractor who would be building a school for a school district

in Butte or building a dam for private landowners who had organized a public irrigation district as authorized by the Montana statute, or building a sewage lagoon for the benefit of private citizens who had orvanized a sewage disposal district and on and on as to the various sub-boards and commissions that are authorized under our Montana Act and generally throughout all of the states to the best of my knowledge, any such contract for construction, whether it was state, whether it was federal or whether it was board or commission oriented would pay the tax.

The tax, however ,does not fall upon a private contractor, that is a contractor doing business for a strictly private individual.

It is important also that the Court understand the purpose of the Act. The need for the Act became apparent in Montana in the mid-sixties when, by virtue of the amount of public construction, both state and federal, and the natural mobility of the equipment used in such construction, the various assessing counties in the state found that they are unable to keep track of the heavy equipment used by contractors and that, to quote the testimony you might say of the witnesses at the trial court level, some contractors would claim that their equipment on tax day was in Gallatin County, another would claim that it was -- he would then claim to another county, that it was in Cascade County, and to a third that didn't even

exist.

QUESTION: I can confirm that to a certain extent. One of my experience of work in construction in the middle part of Colorado during summers was loading contractors' equipment onto flatcars and shipping it from one county to another.

MR. POORE: That is the very problem, Your Honor. For a while they used to even drive cattle across state lines. Of course, that isn't applicable here, but the chasing down of equipment and getting it assessed to the proper county and properly assessed was a real problem. Consequently, the incentive for these contractors to properly declare their equipment and the problem wasn't as pertinent to ordinary private individuals building a home or a garage or building a barn because he was traditionally dealing in his own county with contractors known to the assessors. But instead under the Act --

QUESTION: Mr. Poore, would there not be large private contractors who would have the same kind of problem to building a big office building or a hotel or something?

MR. POORE: Yes, the large private contractor -- again, there aren't that many in Montana, but if the Montana Power Company was going to build a large office building, they probably would, if he was going to build it, if it was going to be built in Butte, there probably would be some contractors come from the far ends of the state and therefore get out of their own particular counties and it would create a similar

problem, Your Honor.

QUESTION: How many large buildings does the Montana Power Company have throughout the state?

MR. POORE: It has one in Butte --

QUESTION: When you say large, what do you mean by large? How many stories?

MR. POORE: Butte's building is four stories high and about 100 feet fronting on Broadway Street, and I am guessing that they have maybe two or three other somewhat comparable buildings throughout the entire state.

The incentive, of course, for the declaration in the -- the purpose behind the Act was not to get at the Federal Government in any way, shape or form.

QUESTION: Mr. Poore, is it the state's submission that substantially all of the large construction projects are public projects? For example, schools and all the rest are --

MR. POORE: I think that would definitely be true. The larger construction is state construction like a new law building at the university or building roads and that type of thing. Of course, the federal construction in Montana has been substantial. And the private construction, like the Montana Power, and another name just doesn't jump to me, would be relatively small.

Of course, the incentive was the dollar-for-dollar credit so that the -- I think the government uses a happy phrase

that this tax was hostage to the payment of personal property taxes and income taxes. By virtue of these credits, the effective rate of the 1 percent tax becomes one-half of one percent, and Kiewit #2, the State of Montana held that this was a valid revenue producing measure.

Now, this Act was enacted in 1967. Thereafter, the Federal Government, which had a contract to build Libby Dam with Kiewit & Sons, directed Kiewit to file one action in the state courts which became Kiewit #1. The Federal Government itself filed this action in the federal court, as I say, this particular action.

Now, it is important that the Court understand that these two actions were substantially identical, that the government had directed the filing of the state court action, but stipulated and it is stipulated to be the real party in interest, controlled all the strategy of the state court action and paid all of the costs.

As soon as the -- these two actions were filed in April of 1971. The state court action was first. The federal court action was shortly thereafter. The three-court judge then ordered a hearing on the question of abstention of the tax and an injunction against the State of Montana, and the State of Montana filed a motion that an abstention of the action in the federal court pending a resolution in the state court, and cited the Meridian case of this Supreme Court.

The day that the matter was set for hearing, the government, referring to the Federal Government, stipuled with the State of Montana for continuance of the lawsuit in the federal court pending a final resolution in the state courts. Thereafter, the matter did proceed, and I emphasize that the same identical questions of constitutionality of the Act under the Supremacy Clause and under the Equal Protection Clause were presented in the state court and proceeded up through the state court first in the trial court, tried before a county judge, then affirmed in the state supreme court, where the court held that the government was -- that the Act more accurately did not violate the Equal Protection Clause and it did not violate the Supremacy Clause, which the two -- at least the second one, the issue of the Supremacy Clause, is the viable issue here unless there are procedural difficulties to that.

After the case had been decided by the Montana Supreme Court, the State of Montana then notified the three-judge federal court and moved for a summary judgment. The government then pointed out that it had the right of direct appeal to this Court. This is in the spring of 1973. And a notice of appeal was actually filed to this Court. As of that time, if this matter had been heard by this Court in 1973, the same issues would have been presented or presentable to this Court as now appear here, namely whether or not the Act, the Montana Act does or does not violate the Supremacy Clause. As of that

time, however, Fresno had not been decided, but Phillips v. Dumas was the law of the land in this aspect.

As soon as the notice of appeal to this Court was filed, there was another stipulation again to continue the matter, and the order of the Court was made, of the federal court directing that the matter just be continued until there was a final disposition by appeal to the United States Supreme Court or otherwise. As I say, the appeal was filed and then the United States, at the direction of the then Solicitor General, Mr. Erwin N. Griswold, directed the dismissal of the appeal.

QUESTION: Does the state know why that decision was made?

MR. POORE: No, Your Honor, the state does not know. I would like to speculate as to why. They just wanted, they felt very strongly that they wanted another trial de novo in the federal court if they could get it, because of the status of the fact of the matter having been decided adversely to them at that stage.

QUESTION: I take it the State of Montana knew all the time that the United States was the real party in interest?

MR. POORE: Yes, Your Honor. The way that came about is at the end -- I tried the case in the county court. At the end of the case -- well, first of all, the Court should be apprised that as soon as it appeared that the matter was going

to be tried in the state court, the State of Montana moved to strike those allegations in the state action that pertained to the Federal Government itself, saying that it was irrelevant since Kiewit was the named party in the state court action. That was denied by the trial judge. At the end of the case, I and Mr. Sherman Lohn, who was then trying the case for Kiewit, I raised the question of real party in interest, and I said the true real party in interest is the United States Government, Mr. Lohn, and he conceded that, but both of us to get the matter expedited and proceed on through and have a determination of it just agreed that the United States Government was the real party in interest but that the matter would proceed under the Kiewit denomination.

QUESTION: Who did Mr. Lohn represent?

MR. POORE: He represented Kiewit and was paid by the U.S. Government.

QUESTION: Is it stipulated in the findings in the agreed statement that he was paid by the U.S. Government?

MR. POORE: Yes, the agreed statement of fact that all costs of the Kiewit litigation would be paid by the Federal Government, that determined the strategy, control the strategy of the case, paid all the costs, including costs of appeal.

QUESTION: Does the record show that if Kiewit had prevailed, whether the United States would have obtained a refund?

MR. POORE: If Kiewit had prevailed, Your Honor, what?

QUESTION: Does the record show that the government would have obtained a refund?

MR. POORE: If Kiewit had prevailed, then there would have been a refund, of course.

QUESTION: To whom?

MR. POORE: Well, that is a rather complex qust ion because that case was tried on the Libby Dam contract, and the Libby Dam contract had a Clause 58 that provided that the contractor, namely Kiewit, would not take advantage of the refunds and credits, which was a very strange provision, and then that was withdrawn by the government. But I would say that the refund would have to have been paid first to Kiewit and then I presume that it would have been passed on down to the owner of the property, namely the United States Government.

Again, I would like in an argumentative sense point out that I think the reason that Mr. Solicitor General Griswold directed the dismissal of the action was to endeavor to get a retrial in the federal court system, and as it turned out it was an advantageous result, but we feel that it was not justified or justifiable that they had by then waived their right to return to the federal court.

So after the appeal was dismissed in the summer of '73, the State of Montana again moved for summary judgment and cited the England rule and also raised the questions of

collateral estoppel and both of these motions were denied by the federal court below, and the court then proceeded to hear the trial of the case.

The lower court held here that under the Fresno County ruling, that revenue from the state tax which goes only to the State of Montana, of course, since it is a state tax, and does not flow over to the Federal Government, that in itself creates an unconstitutional imbalance in that it violates the Supremacy Clause. This, of course, is the issue that the amici curiae are very disturbed about.

I don't think it would be possible to read the Fresno County case, to study it and justify that particular holding. The lower court also held that the England rule did not bar the relitigation in the federal court, even though the litigation in the state court covered the same issues as in the federal court and had gone to the portals of the United States Supreme Court before being dismissed and could have been with probable jurisdiction since it was granted in this case, it could have been granted in 1973 and the same issues would have been determined by this Court and not required a retrial in the federal court.

QUESTION: Doesn't England though require that the case start out in the federal court and then both parties voluntarily submit their claims to the state court, the state then reserve their federal claims?

MR. POORE: I don't think, Your Honor, that England requires that the actions start in the federal court. I think the rationale of England is that there is a federal court action and that there are constitutional issues as to which there should be a determination by the state court. And here there is already a week earlier pending action in the state court, and I think this Court would be interested that in 1965 the State of Montana had thrown out as unconstitutional an earlier act that would be the immediately predecessor act to this, and it was thrown out on the grounds that there was discrimination between in-state and out-of-state contractors. But the Montana Supreme Court recognizing the problem of collection of taxes in Montana, had in effect urged or invited the legislature to come up with a constitutional solution to this problem, so this Act came up and so it was obviously very right for determination by the Montana Supreme Court as to whether this particular Act was or was not constitutional, the second try, so to speak.

QUESTION: But you are not arguing that the government's agreement for a continuance of the federal court litigation amounted to a stipulation that the federal court should abstain under the England act, are you?

MR. POORE: Yes, that is just what I -- there again, I was an attorney present, we had made our motion for an abstention, we met before the court commenced in hearing that

morning, and the Federal Government said we will -- we didn't unfortunately use the word "abstain," we said continued, but to us it is a matter of semantics.

QUESTION: Well, I think the meaning to me would be quite different. A defendant could move that a plaintiff's complaint be dismissed ten days prior to trial, on trial date you come in and stipulate that the trial be continued for two months. That isn't the same thing as stipulating that it be dismissed.

MR. POORE: Did I say that we moved to have it dismissed?

QUESTION: No, you say it is semantical as between continuance and agreeing that there should be England doctrine abstention.

MR. POORE: I didn't mean to say that the government agreed that they would be out of court if by virtue of this continuance we automatically apply the England. It all depended on what happened in the state court. But I do believe that the matter was continued to obtain a determination in the state court and the mechanics of that agreement fully complies with the doctrine of England because there was a submission of all of the issues by the Federal Government to the state court for determination, they are in control of the case and they are the real party in interest, and then when it went adversely they sought to return to the federal court, and I think they had as

of that time waived the right to return to the federal court under England.

The holding of the majority below, their main point was that the Act was unconstitutional under the lower court's interpretation of Fresno which we feel is in error. Secondly, they held that the rule of England didn't bar relitigation in the federal court, and the lower court also held that the doctrine of collateral estoppel doesn't bar relitigation in the federal court.

The dissent of Judge Kilkenny, of course, points up the issues before this Court because he felt that there was this grey procedural problem that the doctrine of England had precluded return to the federal court, that collateral estoppel did bar litigation and that the majority had misapplied the Fresno County case.

Because of the dialogue between the Court and counsel this morning, I will jump over the first procedural question that is raised by England and collateral estoppel and get into the merits of the case on Fresno, that Fresno County was misconstrued by the lower court.

We respectfully submit that the doctrine of the holding of Fresno County fully supports the constitutional validity under the Supremacy Clause of this Montana Act in question.

Of course, Fresno is based upon the ancient case of M'Culloch v. Maryland, and the rule of Fresno as updated --

excuse me, the rule of M'Culloch as updated by Dravo, which was decided in 1937, and Phillips Chemical in 1960 and Fresno County just less than two years ago, stands for the proposition that a state tax with economic impact on the United States is not unconstitutional if the economic impact is not direct, and here it was not direct, there was no tax upon any instrumentality of the government, any property of the government, it is not substantial, it is half of one percent --in Dravo, it was a 2 percent tax-- if the tax is not discriminatory.

QUESTION: Do you think, counsel, that the Supremacy Clause and what has been referred to in some of our cases as the doctrine of intergovernmental tax immunity are interchangeable?

MR. POORE: Yes, I believe that as soon as there is a question of intergovernmental tax immunity, if there is impact on the federal government I think we have a supremacy issue.

QUESTION: Well, supremacy often involves a preemption. The Supremacy Clause is at least broader than intergovernmental tax immunity, is it not?

MR. POORE: It is --

QUESTION: Governmental tax immunity might be one aspect of the Supremacy Clause.

MR. POORE: Yes. My understanding of supremacy is that there cannot -- that a state cannot take any action which could embarrass the Federal Government in the proper performance

of its functions and any aspect of --

QUESTION: The Supremacy Clause as such means in some context different than other things, doesn't it?

MR. POORE: Yes.

QUESTION: Preemption, for example, which is not here at all, is it?

MR. POORE: No, there is no issue of preemption. That I think brings up the confusion at least of the tax administrators in the western states initially under what did discrimination mean, because in 1937, under Dravo, just the bald word "discrimination" seemed to connote a 14th Amendment due process discrimination, but Phillips Chemical indicated that it was much broader than that, and this Court indicated in cases where there was a potential conflict between the sovereigns, between a sovereign state and the nation that the language that would be found in equal protection clauses would not be necessaily controlling. Fortunately, then Fresno County came along and it seems to us that that has clarified at least in this area that we are concerned with here what does discrimination mean where there is a state tax with potential economic impact upon the Federal Government.

Of course, the initial holding of that case which the lower court didn't apparently recognize is that there must be a political check available amongst the constituents of a particular state such that there can't be a ganging up on the

Federal Government such that the State of Montana would have inhibitions in endeavoring to up the tax such that there would be adverse economic impact on the Federal Government.

What are the protections against that in our Act? The important thing is to point out that there are these multitudinous statewide irrigation districts, flood control districts, soil conservation districts, lighting districts. I myself, my home is subject to a lighting district, where private individuals get together, organize under allowable state law to create an improvement district for their own properties and then assess or make their own personal property subject to the repayment of the costs of the improvements.

Now, all construction under such districts would be subject to this tax. The irrigation district itself would be precisely in the same position as the Federal Government in its construction of property. In other words, the contractor building the irrigation district would pay identical tax as the contractor building an irrigation district for the Federal Government. The passed-on impact of the tax would be identical to the irrigation district organized by the small group of private property owners as would be the impact on the Federal Government.

QUESTION: When you say an irrigation district as organized by a small group of private property owners, when it is organized it becomes a public entity?

MR. POORE: That is exactly right, Your Honor. Montana is 700 miles long and 400 miles wide. Water is a curse and a blessing. We will have an irrigation district in one part of the state and we will have a flood control district in another. On soil, we have a soil conservation district some place and we will have -- also we have relatively large towns and relatively small towns, and small towns have to have water districts, they have to have sewage districts, they have to have lighting districts. And of course, every city has a school district. All of these are public entities that are taxed exactly. The tax impact is exactly the same upon them as upon the Federal Government, and the owners of that district, if you will, the people who are going to be impacted are private voting citizens of the State of Montana, consequently we submit that the required political check that was set forth in the Fresno County case is here in our Montana Act. There is no way that --

QUESTION: On the other hand, these are all creatures of the state, aren't they?

MR. POORE: No, no, no. No, Your Honor, none of them, they are not creatues of the state. If this Court were to organize an irrigation district, it could be in Gallatin County and the State would have nothing -- the state court, the county could would organize that district upon petition of the land-owners. If the district went broke and couldn't pay for the

dam that had been set up, then the claim would be on the property of those people who had set up the district, and there is no feedback whatever, Your Honor, of --

QUESTION: Suppose it were a municipality, would your answer be the same?

MR. POORE: Yes, the municipalities have to rise or fall or stand on their own revenues. There is no identification of a municipality with the State of Montana. If in the City of Butte we are considering building a new city hall, that will be a perfect example. It will cost the citizens of the City of Butte one-half of one percent of passed-on tax to build a new city hall.

QUESTION: Does the city get any direct allocation from the contractor's tax that is taken by the state?

MR. POORE: No, there is absolutely no feedback. The tax -- the contractor would pay the tax to the state and there would be no feedback to the city of Butte or to any of these irrigation districts. There is no identification of these funds that the Federal Government is concerned about. The city would be in identically the same position as the Federal Government. Also the other rule we would submit of the Fresno County case that the contractors would be no worse off than other similarly situated. The contractors for the State of Montana, all of these for the city, the irrigation districts, et cetera, all are in the same position.

We respectfully submit and reserve the rest of the time that the lower court's judgment is --

QUESTION: Before you sit down, I just want to get one thing, and Justice Rehnquist has already asked you this. Take an irrigation district as an example, I think you indicated that the burden of the tax money falls upon the private property owners that formed the district.

MR. POORE: Yes, it would.

QUESTION: Well, would that be true if there were no default on the contract, would there just be an extra charge to the contractor and therefore -- oh, I see, it would be borne by the --

MR. POORE: Let's assume it was a $100,000 dam, Your Honor, to control some flood water that was going to come out of this creek and maybe inundate five or ten ranches around there. If it cost $100,000, there would be a bond, the money would be raised, the construction would be completed, and it would cost --

QUESTION: How would the money be raised to pay the $100,000?

MR. POORE: It would have to be a bond, in other words it would have to be tax-free bonds --

QUESTION: Sold to the public?

MR. POORE: Yes.

QUESTION: Then the cost wouldn't be borne by the

property owner?

MR. POORE: Oh, yes, and then the cost of it would become a lien upon the property owner and then he would have to pay it off, say, over ten years.

QUESTION: Oh, I see.

MR. POORE: You see, that would be just an advance, the bonds would have to be paid off to whoever owned the bonds.

QUESTION: I see. Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Smith, you may proceed.

ORAL ARGUMENT OF STUART A. SMITH, ESQ.,

ON BEHALF OF THE APPELLEE

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

In our view, the starting point of analysis of any intergovernmental immunity question must, of course, be this Court's celebrated decisionin M'Culloch v. Maryland. There the state imposed a tax on the issuance of notes by "any bank established without authority from the state." The only bank that fit that description was the Bank of the United States, and this Court, speaking through the great Chief Justice, struck down that tax on the authority of Article VI of the Constitution, the so-called Supremacy Clause which declares that this Constitution and the laws of the United States shall be the supreme laws of the land.

The Court holding of M'Culloch is that the states and localities cannot directly tax the United States or impose taxes the legal incidence of which falls upon the United States. But there is a corollary tax immunity principle that the Court has derived from M'Culloch, the so-called discrimination principle which is at issue here, and that is that a tax may be invalid even though it does not fall directly upon the United States if it operates so as to discriminate against the government or those with whom it deals. And two terms ago, in United States v. County of Fresno, the Court reaffirmed this aspect of the teaching of M'Culloch.

The County of Fresno involved a county tax on possessory interests of those who leased improvements in tax-exempt land. The Court upheld the tax on the federal leasees who were employees of the United States Forest Service, and in so holding the Court observed that federal leasees were no worse off under California tax laws than those who rented houses in the private sector. The fact that the private leasees were also subject to the tax, albeit indirectly through their rents, meant that the tax in the Court's view did not threaten to destroy the federal function so as to run afoul of the policies underlying the Supremacy Clause.

The critical statement in our view of what the Court did in County of Fresno is set out at page 462 of Volume 429. The Court said the rule to be derived from the Court's more

recent decisions then is that the economic burden are on a federal function of the state tax imposed on those who deal with the federal government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the state.

QUESTION: Mr. Smith, before you proceed, just so I am sure I can fully follow and understand your argument, do you rely or are you going to rely at all on that part of Judge East's reasoning that has the amicus so stirred up?

MR. SMITH: No. Judge East, I think as Mr. Poor pointed out, stated in part that he thought that one of the problems with this tax is that the Federal Government didn't get any of its money but the state did.

QUESTION: It being a state tax, it --

MR. SMITH: Well, it is a state tax and, of course, the Federal Government isn't going to get any money. In fact, carried to its logical or illogical conclusion, depending upon your view, it would undermine much of what the Court has done since Alabama v. King & Boozer.

QUESTION: Exactly.

MR. SMITH: Right, and we don't rely on that.

QUESTION: That is what stirred up the amicus brief.

MR. SMITH: We don't rely on that at all. What we rely on is the distinction between private contractors and the public contractors.

QUESTION: That was my understanding from the brief, and I wanted to be sure of that understanding.

MR. SMITH: Exactly. Applying the rule of County of Fresno, as I extracted it from the Court's opinion, we submit that the Montana tax at issue in this case is invalid and cannot pass constitutional muster. It is a tax, as has already been described, of one percent of gross receipts of public contracts, and the statute further defines public contractor as "any person who enters into a contract performing all public construction work in the state with the Federal Government, the State of Montana, or with any other public board, body, commission or agency authorized to let or award contracts for any public work when the contract costs exceed $1,000."

So by its terms, the Montana statute applies a tax to those contractors who perform services for the Federal Government. But a contractor who performs the same services for a private party is not subject to the tax. In our view, this tax is therefore not -- and to harken back to what the Court said in County of Fresno, "imposed equally on the other similarly situated constituents of the state" because federal contractors are, unlike the California, unlike the Forest Service leasees in County of Fresno, worse off than their counterparts who work in the private sector. The private sector don't pay the tax, the public contractors do.

QUESTION: You concede, don't you, that people other

than federal contractors are liable for the tax?

MR. SMITH: Absolutely, we do. Public contractors include contractors who work for the state and contractors who work for these local localities.

QUESTION: What if the tax were made applicable as a tax in Alabama v. King & Boozer was, to all contractors, but had the same exemption here for contracts under $1,000, and the Federal Government came in and said it is in fact discriminatory against us because we never enter into any contracts that are under $1,000, and many private individuals do?

MR. SMITH: I suppose it would really depend on the evidence. I mean that is not this case. It would seem to me that --

QUESTION: Well, suppose --

MR. SMITH: It would seem to me --

QUESTION: Suppose the Federal Government were able to make out its claim that they never did enter into any contracts under $1,000?

MR. SMITH: But I think, Mr. Justice, it would depend also on what kind of contracts in the private sector, you know, in the non-federal sector were let for more than $1,000, and that --

QUESTION: Well, suppose one were let for $900 and one for $1,100, and they were very much the same except one was a little bigger than the other?

MR. SMITH: No, no, no, you misunderstand what I was trying to say. In other words, the fact that the -- I think that the fact that the Federal Government didn't let any contracts for less than $1,000 wouldn't carry the day for the discrimination case. It would depend in part I think as to how the tax operated in the non-federal sphere, and there are a lot of private contracts for less than $1,000.

QUESTION: You concede then that there may be some discriminatory impact upon the Federal Government that is not felt by private entities similarly situated, if you would allow a line to be drawn at $1,000?

MR. SMITH: I suppose I do. But it seems to us that the point that we think is critical here is the fact that a very -- in our view, a very significant group is excluded from the operation of the tax, it is not done in terms of, you know, dollars but rather it is done in terms of the fact that private contractors are simply excluded from the tax. Mr. Poore has painted a picture at the beginning of his argument which I must tell the Court is really not borne out by the record at all. I mean, there is really nothing in the record that suggests that there is no private construction activity in Montana.

QUESTION: He didn't say that.

MR. SMITH: No, he didn't say that, but --

QUESTION: He said it was moderate.

MR. SMITH: -- that there was a moderate amount. You

see, the record really doesn't talk about how much the relative volumes of private versus public construction work exists in Montana. I think we have to take it, take the statute on its face.

QUESTION: Well, isn't the burden on you then to show that it is discriminatory?

MR. SMITH: Well, we think that we have made at that burden by the fact that the Federal Government -- in fact, to the extent that there are statistics in the record, Mr. Justice, we think that they demonstrate a large amount of federal activity.

QUESTION: Don't you also have to show a very small amount, a very large amount of private activity? If Mr. Poore's version is correct, there just isn't too much private contracting on a large scale done in Montana.

MR. SMITH: Yes.

QUESTION: It is either done by the state or by the federal government, and therefore the state was justified in lumping together these entities and saying that they were going to have to pay a tax, whereas contractors employed by private entities were just kind of on a much lesser scale and could be treated differently.

MR. SMITH: Well, I think the statistics really refute that simply because, if I may refer the Court to page 5, footnote 3 of our brief, we state here, the record indicates that

federal projects accounted for at least 65.8 percent of the amount of gross receipts tax collected and for at least 57.2 percent of the balanced retained after credits. However, these figures do not include all federal projects. In fact, there are a number of federal -- there are a number of state projects that are funded by the Federal Government, so in effect the Federal Government --

QUESTION: That could have been true in King & Boozer, too?

MR. SMITH: In fact, it may well be. I think that it seems to us that under the rule of County of Fresno that the Court review that case as establishing a rule that requires the Court to scrutinize a state statute and to look at it and say are all similarly situated constituents of the state taxed equally. And in this particular case, you know, it leaps out from the page, the fact that private contracting activity is not subject to the tax.

QUESTION: In Fresno, the Court said that you need a political check against the abuse.

MR. SMITH: Right.

QUESTION: And Mr. Poore's answer to your claim is that the numerous municipal corporations and their constituents form a political check.

MR. SMITH: I think that the fact that the Federal Government may be joined or that the tax base may include --

let me back up for a moment. Of course, if you have a tax that is only on federal contracting activity, it is very plain that that falls on one side of -- that that falls on the wrong side of the line.

Now, if you start adding to that the tax base and include, say, here state contractors, we would say, as we pointed out in the brief in further detail, that really doesn't change the picture dramatically or from a constitutional point of view because of the fact that these taxes are sort of charged by the state but in effect the contractor charges them back to the state.

In other words, it seems to me that his case, the state's case, if it has to stand and fall on the addition of these local, you know, contracting activities, it seems to me it really depends upon your perspective. If you want to say -- I don't think that the record here demonstrates or it really can be demonstrated in any logical sort of way as to what kind of political check the local contracting activity would constitute to protect the Federal Government.

I prefer to view it from the other side of the spectrum and say that a significant amount of contracting activity which I think really has to be conceded as similarly situated. I don't think that the state really seriously argues here, as indeed I don't think it can, that private contracting activity is not similarly situated. In fact, in Kiewit, if I

may just refer the Court to the fact that the rationale of the Montana Supreme Court offered four different reasons for why it thought that private contracting activity was different, and they are as follows, that defective public works to expose the public at-large to danger, that public contractors have to be experienced, that public contractors have to put up a bond, and that public works usually involve elaborate plans, architect's specifications, and mandatory inspections.

I submit to the Court -- and I don't think the state would quarrel with that -- that these distinctions have no bearing as to tax classifications but simply go to the competence of a particular contractor to do a job. So --

QUESTION: Mr. Smith, how do you meet Mr. Poore's argument? He didn't make that argument, I realize, but his argument is that every school, every local construction project by a local body is in the last analysis paid for by taxes assessed against local real estate or the local citizens, and that is what provides your political check.

MR. SMITH: Well, there is nothing in the record that indicates that that --

QUESTION: Well, the statute does tell us -- every contractor built school would be covered, wouldn't it?

MR. SMITH: Every contract to build a school would be covered by that.

QUESTION: And don't we know that the local taxpayers

pay for those schools?

MR. SMITH: Right. Well, I suppose there are several answers. To begin with, it would seem to me that to talk about political check, I mean it seems to me that it is kind of an indirect nature here. When we are talking about the fact that the private contractors are exempt from the tax, they I think it is concede, they wouldn't care.

QUESTION: But this isn't an equal protection case.

MR. SMITH: Right.

QUESTION: The question is as to whether there is a sufficient political base in addition to the United States as a taxpayer to give some kind of protection against an arbitrary tax imposed just against the United States.

MR. SMITH: Right. I think --

QUESTION: It doesn't have to be universal. It just has to be a substantial segment of the political body. Isn't that the way you understand the --

MR. SMITH: Well, I don't think that is what the Court said in County of Fresno. I think it said that the fact -- I think the Court examined in County of Fresno the private sector and found, you know, that the people in the private sector were being treated the same way as --

QUESTION: Of course, none of them hold the possessor interest --

MR. SMITH: Right -- would be treated the same way as

the federal leasees in County of Fresno, and for the Court I think that carries the day, the fact that essentially, you know, looking at it under the spectrum, everybody was treated the same. Here I think it is plain that everybody is not treated the same.

Now, I think in a way it makes the Court's job easier to end the matter there than to start having to weigh the relative political clout or the political check of a particular segment of the state economy. It seems to me that the interests of the Supremacy Clause is such -- Mr. Justice, you said earlier that this is not an equal protection case, and I heartily agree with that. It is not an equal protection case. In fact, the Court in Phillips said that equal protection decisions were not controlling when the Federal Government's tax immunity is at stake. It seems to us that the standard is much stricter and that when you have a significant element of the economic sector which is immune from a tax that the Federal Government has to pay, I think that really that ends the matter and it eliminates the need for having to judge the political check of any particular person, because one can foresee endless amounts of litigation and fact-finding as to whether people exercise sufficient political clout in a particular instance.

It seems to me that the easier way to sort of approach this case is to simply say -- is to examine the tax base and say is there a significant interest that is excluded from the

tax, so that the Federal Government in effect is discriminated against by being treated less well than a similarly situated constituent. I think really that is the easy way to do it. I know the Court has moved a long way from Alabama v. King & Boozer from the economic burden test, but it seems to us that the core of what is left of federal tax immunity is this discrimination point that the Court reaffirmed in County of Fresno, and on that basis we think this tax is invalid.

I think it is invalid, you know, and I think the fact that the state contractors are added to it, although we suggest that that really is economically illusory in a way, and Mr. Justice Stevens actually explored those illusory aspects in your dissenting opinion in County of Fresno. But it seems to us that the critical fact is this exclusion of a large class of similarly situated private parties.

I would like, if I may, to use the remaining few minutes of my time to -- if the Court has some questions about the so-called procedural bars which I really think are not controlling here. I think the Court can and should reach --

QUESTION: I definitely would like to have you treat this.

MR. SMITH: If I may, Mr. Justice, I would like to address a question that you put to Mr. Poore as to why the government did not seek certiorari in Kiewit #1.

QUESTION: Because if you haven't addressed it, I

would ask it.

MR. SMITH: There were two reasons why the government did not seek certiorari in Kiewit #1, and it seems to us that they really bear on why these doctrines don't apply. And that is, to begin with, Kiewit #1 dealt with a kind of contract which is no longer involved in this litigation, a contract in which the government forbad its contractor from taking the credits, and the Supreme Court of Montana said, and not without justification, that indeed the whole tax may be a washout, and as a result we don't really have -- in fact, if this tax is creditable in full agin st other Montana tax liability, the tax is a washout.

QUESTION: Why did the government pursue that policy?

MR. SMITH: That is a question that I have struggled with for quite some time.

QUESTION: You raise my curiosity.

MR. SMITH: To me --

QUESTION: It is quixotic or irrational.

MR. SMITH: -- it is quite quixotic and, if I may, if you would permit me, no more quixotic than not following --

QUESTION: Than many other things the government does.

MR. SMITH: -- than not following the Court's blueprint for establishing immunity in the Kern-Limerick case as well. I mean, there are a lot of things that are puzzling in this area as well as other areas. In any event, the point is,

really two reasons, Mr. Justice. Number one, the Supreme Court of Montana we believe decided the case on a factual assumption that no longer exists; and, secondly, that this contracts clause no longer exists. So while I was not privy to the decision, I have been advised that really for those two reasons the case was not regarded as an attractive one to bring to this Court.

QUESTION: I take it you concede that that litigation, however, was the U.S. Government's, lock, stock and barrel?

MR. SMITH: The U.S. Government did, and I think it is concede, finance that litigation and appeared as amicus in the state courts. But the fact that it did that, it does not seem to us triggers either the rule of England v. Medical Examiners or the doctrine of collateral estoppel. The rule of England v. Medical Examiners and the whole doctrine of abstention, it seems to us, has no application here.

England, as we point out in the brief, really depends -- the application of the rule in England depends upon the existence of four conditions.

QUESTION: Mr. Smith, let me ask one other detail. In the present litigation, the government is seeking refund, is it not?

MR. SMITH: The government is seeking -- no, not -- well, so to speak. The cases is before the Court from the judgment of the three-judge district court which enjoined the collection of the tax. The three-judge district court referred

the question of refund to a single-judge district court, and my understanding is that the single-judge district court has not yet acted in that regard, so the case is here on --

QUESTION: You are asking for damages?

MR. SMITH: We are asking for damages.

QUESTION: You are asking for refund?

MR. SMITH: Yes.

QUESTION: Are you not asking for refund of taxes in the very year in which was the litigation of Kiewit #1?

MR. SMITH: I don't think so, no. I think there have been a succession of contracts. The Kiewit contract is no longer an issue.

QUESTION: There is no overlap in the two actions?

MR. SMITH: No, I don't think so.

QUESTION: I was under the other impression.

MR. SMITH: I think that litigation is over. I think that Mr. Poore might have some better information, but it seems to me that the whole Libby Dam contract that he was describing was long finished and whatever costs have been --

QUESTION: Well, it may be over with, but wasn't it at issue in that --

MR. SMITH: It was at issue, but I would assume there has been a final judgment in that case in terms of whatever refunds are applicable. As I was --

QUESTION: You didn't finish telling us why res

judicata doesn't apply.

MR. SMITH: Well, I was actually discussing the rule of England --

QUESTION: Before you tell us that, I was really more interested in res judicata, and I want to be sure you get to that.

MR. SMITH: Okay. Well, the rule of -- well, it was not really res judicata, because it is a different thing.

QUESTION: Estoppel.

MR. SMITH: It is estoppel. For the same reasons really that I was describing why we didn't seek certiorari in Kiewit, really I think sort of suggests why estoppel doesn't apply, because the operative facts have changed and the --

QUESTION: Now, what are the facts? One of them was that in that contract the money, if it was repaid to Kiewit, would then be turned and reimbursed to the government, is that right?

MR. SMITH: No. In the Kiewit contract, if Kiewit was forbidden to take -- yes, forbidden to take the credits, so I suppose the government would get the money.

QUESTION: Cut the other way, that is why I didn't understand. Wouldn't that make it even more clear that the judgment should be binding on the United States, because the United States would have gotten the full benefit of the judgment?

MR. SMITH: Well, I am not sure that is so, Mr. Justice, because it seems to me that not only do we no longer have that contract provision in operation, it would seem that the Court really would have to view the tax as in effect a real tax as opposed to -- in other words, the Court more or less, the Supreme Court of Montana in Kiewit #1 said, look, this tax is a phony, it is a washout. In fact, they said that it may not even apply to anybody.

QUESTION: But when you say it is a phony or washout, what does that mean? It may mean that the contractor doesn't bear the economic burden of the tax, isn't that what that means, rather than the contractor, the United States did.

MR. SMITH: No one would in that instance because if the -- in other words, if Kiewit could take credit for personal property taxes for this tax, then it would pay no tax and presumably --

QUESTION: Presumably then there would be no added cost on to the contracting party here, the government?

MR. SMITH: In other words, there wouldn't be any tax. In other words, the Supreme Court of Montana --

QUESTION: Do you understand that to be the ground or the basis of the decision in the case?

MR. SMITH: That was one of the grounds of the decision in the case. There was a lot of discussion. I refer the Court, if I may, to pages 111 through 113 of the appendix to

the jurisdictional statement. The court uses the term "washout" as for the other reason why -- where they talk about the fact that it may be a washout, and at the bottom they say --

QUESTION: What page, Mr. Smith? I want to follow you.

MR. SMITH: If I may refer the Court to the top, where it says it is true that the practice to date has not resulted in any --

QUESTION: The top of what? I just can't --

MR. SMITH: Well, I think that is --

QUESTION: The top of what? What page?

MR. SMITH: Page 113, I'm sorry. It is true that the Act and practice to date has not resulted in a total washout of the 1 percent gross receipt payments, it does appear that one of the reasons for this failure is the Federal Government has inserted a clause in some of the federal contracts, and the court viewed those things as really intertwined, the fact that the Federal Government --

QUESTION: Which is -- let's go ahead and read it.

MR. SMITH: It says --

QUESTION: -- which prohibits the contractor from taking the refunds that are available to him.

MR. SMITH: In other words, the court was saying that if the contractor did take advantage of the credits and refunds, there wouldn't be any tax, it would wash out, and the Federal

Government wouldn't be bearing any economic burden, so the whole tax really doesn't exist. And I think that was a principal basis upon which we felt that the case was hardly an appropriate vehicle for this Court to consider in its discretionary review, plus the fact that really the operative facts change.

If I may say in conclusion, this is a constitutional question that I think is of some moment here to the way the Federal Government administers iits contracts, and it seems to us peculiar in a way that a decision here which is based on --

QUESTION: Let me interrupt you once more.

MR. SMITH: Sure.

QUESTION: The decisionin this case upheld a state tax against a challenge that it was violative of the Federal Constitution. Would not the United States have had a right to appeal? Am I confused? Was it a cert case or was it an appeal?

MR. SMITH: I suppose the United States would have had the right of appeal, but then --

QUESTION: Then it is not a discretionary decision.

MR. SMITH: In other words, we decided not to appeal because --

QUESTION: It was discretionary whether to appeal it or not?

MR. SMITH: -- and the last thing we needed was to have it affirmed.

QUESTION: Well, it was one of a federal substantial

question.

MR. SMITH: I suppose, and indeed that would have been an appropriate disposition, given all the discussion about washout and contracts clauses that no longer exist.

QUESTION: Well, you haven't yet got around in your argument you were going to make as to why this isn't collateral esteoppel. I don't think we have heard you make the argument yet.

MR. SMITH: Because the issues are different. The operative facts on which this was --

QUESTION: You have never finished saying what the operative facts are.

MR. SMITH: The operative facts were that the court viewed the Montana tax in Kiewit #1 as resulting in a total washout if the contracts clause didn't apply. As a result, now these contracts clause, the Federal Government no longer forbids its contractors from taking advantage of credit, and in fact there would be this cost, this tax is now a real tax, in a way that it arguably was not in Kiewit, and that change and circumstane, you know -- the Court has said in Southern that the doctrine of collateral estoppel has to be confined when the matter raised in the second suit is identical in all respects without deciding the first proceeding where the controlling facts and applicable illegal rules remain unchanged. In our view, the facts have changed because the contract has changed

and the factual assumption on which the Supreme Court of Montana decided Kiewit #1 --

QUESTION: Could you have attacked the tax in your state action on a different ground than you did?

MR. SMITH: Could we have attacked the tax --

QUESTION: On the same ground you are using now?

MR. SMITH: I am not sure if that is the case. In other words, if the court viewed it as a total washout, in their view they viewed it as a case that really was a lot of puff and smoke about, you know, what was essentially nothing. What we have got now is a real tax, a small one but a real one.

QUESTION: What puzzles me about this argument is apparently the United States litigated all the way to the Supreme Court of Montana twice in a case in which there really wasn't a federal issue here.

MR. SMITH: Well, the second time was simply a question of the computation of the refund.

QUESTION: At least the first time.

MR. SMITH: Yes.

QUESTION: And you didn't realize until you were through the Supreme Court of Montana that you really had no business spending federal money participating in this litigation?

MR. SMITH: Well, oftentimes wisdom comes late, but when it comes we shouldn't reject it.

I have nothing further, if the Court please. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Poore, you have a few minutes left.

ORAL ARGUMENT OF ROBERT A. POORE, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. POORE: First of all, the tax does generate revenue. The opinion of the Supreme Court in Kiewit #1 was that the infancy of the administration of the tax and also the infancy of the Kiewit building of the dam in question and that subsequently turned out that the tax does generate, as is stipulated, one-half of one percent, so there is only one-half of one percent that is revenue enforcing, and there is a tax.

Justice White, there is an overlap. The funds that would be repayable to the state under the stipulation that is set forth at page 51 of the appendix to the jurisdictional statement requires the retention of all license fees collected after that date, which is May of '71, and at that time the Libby Dam was in its infancy.

On the question of the statement of counsel that requires as a rule of Fresno a determination of who is excluded, rather than a determination of who is similarly situated, we do not think that that is either the rule of M'Culloch or the rule of Fresno. In Fresno, there were other taxpayers -- the tax did not fall, for example, on renters of private tax-free

property, rental of a church or a tax-free school would not be included under the tax. It is a question of degree. As Justice Powell summarized it, it seems to me that that would be it. In other words, is there an adequate protection in the voters of Montana, the constituents of Montana to provide that there cannot be any ganging up on the Federal Government.

One final point. It seems to us that it is important that we explain why the private contractor was left out in the first place. First of all, as I tried to explain in the initial part of my argument, we were trying to catch and tax the fleeting taxpayer who had been brought in by these larger public and state and federal contracts, and the local person had never traditionally posed that problem.

Secondly, the administrative cost of having every guy who builds a garage that is more than $1,000 or a barn that is more than $1,000 and having them go through the process and all for one-half of one percent in net tax is not justified. And where there is enough constituent impact, as we respectfully submit there is, there is no -- this tax is not unfair to the Federal Government.

There are those who are identically situated to the Federal Government who would be up in arms, in school districts and on and on, if the tax impact were such as to be onerous and oppressive. In addition to that, there are the contractors themselves who do not want their industry to be impacted by

oppressive taxation. We believe that Fresno is fully met, that our case is stronger than Fresno, and we respectfully submit that the action should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:58 p.m., the case in the above-entitled matter was submitted.)

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