

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1003

TITLE KENNETH H. WHITE, ETC., ET AL., Petitioners
v.

PLACE MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYEES,
INC., ET AL.
Washington, D. C.

DATE November 1, 1982

PAGES 1 thru 55



ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -x

3 KEVIN H. WHITE, ETC., ET AL., :

4 :

5 Petitioners :

6 v. : No. 81-1003

7 MASSACHUSETTS COUNCIL OF :

8 CONSTRUCTION EMPLOYERS, INC., :

9 ET AL., :

10 Respondents. :

11 - - - - -x

12 Washington, D.C.

13 Monday, November 1, 1982

14 The above-entitled matter came on for oral argument
15 before the Supreme Court of the United States at 10:47
16 a.m.

17 APPEARANCES:

18 LAURENCE H. TRIBE, ESQ., Cambridge, Mass.; on behalf of
 the Petitioners.

19 PAUL J. KINGSTON, ESQ., Boston, Mass.; on behalf of the
20 Respondents.

21 - - -

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
LAURENCE H. TRIBE, ESQ., on behalf of the Petitioners.	3
PAUL J. KINGSTON, ESQ., on behalf of the Respondents.	26
LAURENCE H. TRIBE, ESQ. On behalf of the Petitioner-rebuttal	51

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Tribe, I think you
3 may proceed when you are ready.

4 ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.,
5 ON BEHALF OF PETITIONER
6 KEVIN H. WHITE, ETC., ET. AL.

7 MR. TRIBE: Thank you. Mr. Chief Justice, may
8 it please the Court:

9 This case is about a Boston executive order
10 which applies to construction work on projects for which
11 the city makes the construction contract and provides
12 public revenues either from taxes that the city itself
13 raises or from funds that the city procures from the
14 Federal Government.

15 To the extent feasible, at least half the jobs
16 that the city creates on these projects must go to city
17 residents, and the issue is whether the Constitution
18 forbids giving residents this priority.

19 Let me stress that the question is not whether
20 the city may divert pre-existing private jobs from
21 nonresidents to residents. The only question is the
22 allocation of publicly subsidized jobs that the city
23 itself generates with its own foresight and industry.

24 Now, that foresight and industry by a city
25 confronting urban decay and unemployment may take two

1 main forms: First, it may take the form of focusing the
2 city's political energy on raising enough local tax
3 revenues to generate the needed jobs in classical public
4 works projects, like schools and roads; and secondly, it
5 may take the form of focusing political energy on
6 attracting enough federal aid to the city's coffers to
7 induce private firms in accord with the terms of
8 whatever federal grant is obtained to create needed jobs
9 in the construction of housing or other forms of urban
10 renewal.

11 Boston has done both of these things. And I
12 should like to begin with the second, with the
13 attraction of federal funds, since I think that is the
14 more innovative and the more controversial.

15 Urban renewal projects that are made possible
16 by efforts made by the City of Boston to attract the
17 federal aid that such projects need are just as much the
18 product of the city's collective political exertions as
19 are the schools and the streets that the city funds
20 through local taxes. Indeed, the State Supreme Court,
21 whose judgment is being reviewed here, said both in its
22 opinion and in the judgment of that Court, that all
23 projects covered by the executive order, in its words,
24 are "city-funded construction projects." That's all the
25 judgment at page A-17.

1 QUESTION: Mr. Tribe, under that line of
2 reasoning, wouldn't it be possible to say that the
3 decision of the Hilton Corporation to build a new Hilton
4 on Copely Square might be thought to be the result of
5 the city's ingenuity, too? I suppose city efforts go
6 into that.

7 MR. TRIBE: Well, in this case, Justice
8 Rehnquist, the key point is that the city is a but-for
9 cause under the very terms of the regulations. Under 42
10 U.S. Code section 5318(j), Secretary of HUD must find a
11 strong probability that the whole private development
12 would not occur but for the specific federal funds.

13 Now, if it could really be shown that in a
14 particular case a mix of public and private funds is the
15 direct result under the terms of the federal statute,
16 the direct result of a city process, a complicated
17 process of holding local hearings and then lobbying for
18 a grant, then our reasoning would apply.

19 QUESTION: Well, what if it were strictly
20 private funds but the city had been very active in
21 persuading the persons who had the disposition to
22 private funds to use them in Boston rather than
23 Minneapolis?

24 MR. TRIBE: I suppose that that would push our
25 logic beyond the point where I would urge the Court to

1 take it. That is, we are not suggesting that any time
2 the city deserves a pat on the head for having something
3 happen that the city can then parcel things out in a
4 preferential way. We are saying that when the federal
5 program itself identifies a special role for cities to
6 solve problems of severe economic distress, and to do so
7 by attracting indispensable federal money, then at least
8 the jobs on that project are indistinguishable from jobs
9 that are funded by municipal bonds or by other things.

10 QUESTION: Well, why should the city stand any
11 better if it applies its regulation to things that it
12 had no part in funding but was federally funded, but it
13 nevertheless had a great part in producing on the scene,
14 than it should the privately funded things that it had
15 the same great part in producing?

16 MR. TRIBE: Well, I suppose the judgments of
17 degree here are ones that this Court might well leave to
18 Congress. And Congress has drawn that line; that is, in
19 the relevant statute, the Housing and Urban Development
20 Act, Congress specifically said that with respect to
21 these projects, not only is it indispensable that the
22 city and the developer specify that the project couldn't
23 occur otherwise, but once the project is funded it is a
24 requirement under the statute that to the greatest
25 extent feasible, at least as to the job opportunities

1 that are made available on the project, that those go to
2 residents of the area.

3 And it seems to me when Congress has made that
4 judgment, there is no reason in the name of the Commerce
5 Clause or any other provision of the Constitution for
6 the Court to worry about remote hypotheticals in which
7 the city might someday make a broader argument.

8 Here I think what is remarkable about what the
9 City of Boston has done is not that it is in fact
10 reserving to its citizens half the jobs on these public
11 works projects and urban renewal projects, but that
12 notwithstanding the fact that the city plays the
13 indispensable role of generating all these jobs, it is
14 willing to let nonresidents have half of them even
15 though the federal statute and the federal regulations
16 say that to the maximum extent feasible the jobs should
17 go to local residents.

18 So it seems to me as far as the federally
19 funded portion is concerned, when the city goes and gets
20 the money from the Federal Government by showing that it
21 is needed to resolve problems of severe economic
22 distress, that at that point there is no basis for
23 drawing a constitutional distinction based on where the
24 money came from.

25 Now, I do want to suggest, though, that any

1 notion that somehow the city is trying to pyramid this
2 power into a broad takeover of the private sector on the
3 rationale that the city has played a key role after all,
4 but for the innovation of the city, the whole private
5 sector might be less well off. Any such notion should
6 be dispelled. We are talking here about approximately
7 11 percent of the construction that is going on in the
8 City of Boston, and we are talking about two kinds of
9 construction: classical, traditional public works
10 construction funded entirely by the city as to which I
11 have yet to see an argument on behalf of the respondents
12 as to why the preference is impermissible; and somewhat
13 more innovative urban development projects that have to
14 be tailored to the needs of the neighborhood.

15 QUESTION: Does the record really tell us how
16 much of each is involved --

17 MR. TRIBE: Justice O'Connor, the record is
18 ambiguous. It -- it suggests if you turn to page, I
19 believe it is, A.42 in the petition for certiorari, the
20 appendix to the petition, we know that \$483 million
21 approximately is the total construction, at least in the
22 fairly typical year of 1980. Of that amount, \$54
23 million was covered by the executive order. And of that
24 \$54 million, \$34 million represented projects that in
25 some way or other involved urban development action

1 grants.

2 QUESTION: But we don't know how, we don't
3 know if the city was signatory or what. It seems like a
4 pretty --

5 MR. TRIBE: Well, we know that the city does
6 not in fact -- the city does not in fact sign the
7 construction contract on the hotel and other purely
8 private-seeming parts of the project. The city signs
9 the construction contract on infrastructural parts, such
10 as those that are paid for by about \$4 million of the
11 \$18 million Copely Place grant.

12 But the reason that I press the point to
13 discuss the entire urban development action grant
14 picture is that no ambiguity about the record on that
15 point could possibly justify the judgment that is being
16 reviewed in this Court.

17 QUESTION: Did the city make the argument
18 about the federal policy that is being made now in these
19 briefs to the court below?

20 MR. TRIBE: Well, actually, it was in the
21 Complaint, it was in the Complaint made against the
22 city; that is, the Complaint quoted some of these
23 regulations. And it has always been puzzling to the
24 city why the plaintiffs in this case would have relied,
25 in part, on federal regulations which seems to us fully

1 vindicate everything the city is doing with respect to
2 the federally funded portion in this case.

3 And it is for that reason that we have seen
4 this case as principally about city-funded in the
5 traditional limited sense, city-funded public works
6 projects, and the question whether as to those projects
7 it is permissible after this Court's precedents in
8 Hughes and Reeves were the preference.

9 QUESTION: Do you think your UDAG argument is
10 really fairly presentive of the writ for certiorari?

11 MR. TRIBE: It -- in the petition for
12 certiorari, Justice --

13 QUESTION: No, the question is presented on
14 there on the first page.

15 MR. TRIBE: No, that's right. It was
16 certainly not mentioned in the questions presented,
17 although the questions presented are broad enough to
18 encompass it potentially; that is, tax-supported public
19 works employment, I would think, after this Court's
20 decision in cases like United Transportation Union v.
21 Long Island, ought not to be interpreted in a static
22 historical sense; that is, public works need not take
23 the form of roads and parks and schools, they can take
24 the form in the modern period when the needs of a given
25 decaying urban area require an infusion of outside funds

1 for shopping centers, and it can take that form as well.

2 And so the same fundamental issue is
3 presented, and indeed in the petition elsewhere we
4 discuss the reason that we did not think it made any
5 difference if some of the funds were federal, on page 20
6 and 21 of the petition. But it seems to me that the
7 Court need only reach the question whether public works
8 projects, however precisely defined, funded by city
9 funds, raised in a variety of ways, can be so
10 administered that at least half the work crews on those
11 projects are required to be Bostonians, members --
12 residents of the city -- I say "members" having just
13 heard that colloquy about membership -- residents of the
14 city to the extent feasible.

15 Now, when the city uses its public revenues to
16 fund traditional, classical public works -- schools,
17 streets, and so on --

18 QUESTION: Mr. Tribe, before you get to the
19 traditional --

20 MR. TRIBE: Sir.

21 QUESTION: -- public works, just pausing with
22 the public federally funded projects for the moment,
23 isn't there a possibility that there's a conflict
24 between some of the federal secretary's regulations and
25 the specific 50 percent requirement of the Boston

1 executive order which might raise the preemption issue,
2 which is one of the questions that, as I understand, the
3 Massachusetts Supreme Court did not answer, and that --

4 MR. TRIBE: I would think --

5 QUESTION: -- that might remain in the case?

6 MR. TRIBE: I would think, Justice Stevens,
7 that it would cut the other way; that is, the other --

8 QUESTION: For the most part, I can see a
9 parallel between the two. But isn't it possible that
10 there would be some fringe areas in which the 50 percent
11 requirement might differ from the requirement for
12 low-income persons and things of that character?

13 MR. TRIBE: If there were a flat 50 percent
14 requirement without any feasibility test, then it
15 might. But at page 25, A.25 of the petition, the
16 documents that are there reproduced specify that if all
17 reasonable steps have been taken to comply with the 50
18 percent rule, the contractor shall be deemed in
19 compliance. And the Chief Justice's opinion in
20 Fullilove treated best efforts language of just that
21 kind in the federal public works provision as enough to
22 make it not a quota but a goal.

23 And indeed, in the Copely Place UDAG, urban
24 development action grant, which is described and relied
25 on heavily by the other side, at page 137 of the grant

1 application it is specified that all the contractor need
2 do is take reasonable measures, every reasonable
3 possible measure, to achieve compliance. But if the
4 contractor can't do it because insufficient qualified
5 workers are available, he is excused.

6 So it seems to me clear that if it's
7 administered in a way that is not only parallel but
8 completely convergent -- and understandably, because the
9 point is the city couldn't get these federal grants
10 without conforming its detailed reading of the 50
11 percent rule to the requirements of federal law -- if
12 anything, the only colorable argument I could imagine
13 about any tension with federal law, I could imagine the
14 Department of Housing and Urban Development saying,
15 what do you mean just 50 percent: we say that to the
16 extent feasible you've got to target these jobs to local
17 residents.

18 And so it might be said that by feeling
19 satisfied with giving one out of every two jobs to a
20 Bostonian, the City of Boston is not doing as much as
21 federal law might require, but it's clear plaintiffs
22 would not have standing to raise that issue in the Court
23 below or in this Court.

24 Now, if I might turn to the public works
25 project --

1 QUESTION: Before you leave UDAG grants again,
2 Mr. Tribe, for a moment, what is it that the city itself
3 actually does or performs on these UDAG grants that
4 would make those programs proprietary rather than
5 governmental?

6 MR. TRIBE: Well, what the city has to do is
7 identify a developer and hold local hearings to make
8 sure that the developer's precise plans will meet the
9 needs of the unemployed and underemployed and
10 particularly the minority residents of the area. The
11 city having held the hearings then works out through a
12 rather elaborate system of negotiation with the ultimate
13 developer a set of rules that will comply with HUD
14 requirements, comply with respect to the kind of work
15 force that will be retained.

16 QUESTION: Well, why isn't all that
17 governmental?

18 MR. TRIBE: Well, it seems to me it's
19 governmental in the same sense that when the government
20 procures something for its own police department, that's
21 governmental. That would bring it within the very core
22 that every member of this Court, as I read Reeves,
23 seemed to agree about; that is, in Reeves v. Steak, what
24 was troublesome to some members of the Court, as I
25 understood it, about creating an immunity for South

1 Dakota when it sold cement was that selling cement is
2 the sort of activity through which a city might distort
3 the private market. Whereas here we are talking about
4 the very essence of what it means to be a city; that is,
5 building public infrastructure and doing so in a way
6 that meets the city's own needs.

7 There is, I think, a confusing distinction
8 between proprietary and governmental which can mean
9 different things in different contexts.

10 QUESTION: And can slide by the boards.

11 MR. TRIBE: And it slides back and forth. And
12 that's why we haven't tried to rely on those labels, not
13 knowing quite what the Court has meant by them, frankly,
14 or what one ought to mean by them.

15 But we think whatever the labels might be,
16 that it's awfully hard to think of any function with
17 respect to which the small silent voice of the Commerce
18 Clause has less to say. It is the function that a city
19 performs in building streets and parks in such a way
20 that it meets its own local unemployment needs.

21 QUESTION: Well, why isn't there some of this
22 federal market participation?

23 MR. TRIBE: Federal market participation so
24 that Congress should have a dominant voice. It seems to
25 me Congress has spoken with that voice. That's where

1 this case is not silent. What is silent here is the
2 Commerce Clause. But Congress by statute, and federal
3 agencies by regulation, have specified that this money
4 should be targeted to residents of the city that applies.

5 To the extent that's so, I would imagine that
6 the thrust of the respondent's argument is that the City
7 of Boston was insufficiently generous to the New England
8 region by going out and getting federal grants that had
9 this condition attached. Perhaps Boston should have
10 looked for some kind of federal grant which would
11 benefit residents of New Hampshire or Rhode Island.

12 But so far as Boston has obtained money to
13 supplement its tight fiscal situation from the Federal
14 Government, it is surely impermissible to say that the
15 silent Commerce Clause somehow overrides congressional
16 regulation.

17 If Congress were, however, to tell Boston,
18 this is money that's available only if you use it to
19 help people in western Massachusetts and perhaps in
20 Rhode Island and Connecticut, it'd be up to Boston
21 whether to accept that money or not.

22 We're not suggesting that this is an area so
23 governmental, so close to that National League of Cities
24 core, that Congress' spending power could not even have
25 conditions imposed. But it does seem clear that nothing

1 in the Commerce Clause prevents the city from using
2 these federal dollars as it was intended that they be
3 used.

4 Now, with respect to the public works projects
5 themselves, I think it is conceded all around and it
6 seems to me it would have been conceded by the Court
7 below, that if the public works jobs -- the jobs
8 rebuilding streets and parks and maybe little city halls
9 -- if they were filled through direct hiring by the
10 city, if the city set up a bureaucracy to do public
11 works construction, then the preference for residents as
12 employees of the city would be constitutional under the
13 decisions of this Court, such as McCarthy against
14 Philadelphia Civil Service Commission in 1976.

15 Indeed, I think that a fair implication,
16 Justice Brennan, of your Shapiro opinion was that
17 residency requirements for welfare would be perfectly
18 acceptable; it was only the durational residency
19 requirement that was -- that was a difficulty.

20 So the problem here seems to be that rather
21 than setting up an unwieldy bureaucracy to hire public
22 works groups, the city has actually created a market for
23 private firms to do some of that public works
24 construction. And it is said by the Court below that
25 when the hiring operates through private firms rather

1 than directly, that somehow that removes whatever
2 immunity the city might have.

3 Frankly, I fail to understand why that should
4 be. I can understand how in a case like Hickland the
5 fact that the State of Alaska tried to use its hold over
6 a scarce and important national resource like oil and
7 gas to kind of trickle out into the entire private
8 economy so that anyone who even supplied something to a
9 subcontractor who had anything to do with the ripple
10 effect of the Alaskan oil and gas was suddenly trapped
11 by the preference.

12 But nothing like that is happening here.
13 Subcontractors are included only to make sure that every
14 single job on the project is covered. It really is not
15 a matter of concern, I would think, to the Federal
16 Constitution how many links there are in the chain of
17 command between the City of Boston and the people who
18 work on the site and --

19 QUESTION: Mr. Tribe --

20 MR. TRIBE: -- the extension of the
21 subcontractors and the use of private firms in no way
22 broadens the power that the city is asserting here. It
23 is a vertical extension and not a horizontal one.

24 QUESTION: Mr. Tribe, your comment to Justice
25 Brennan made me wonder, what does it take to be a

1 resident?

2 MR. TRIBE: What does it take to be a resident
3 of Boston?

4 QUESTION: Yes.

5 MR. TRIBE: I think that --

6 QUESTION: Can you move there at the time the
7 job starts?

8 MR. TRIBE: If you move there at the time the
9 job starts, and you sign a form saying that you intend
10 to live there, I think the test of domicile is met. I
11 don't think that the enforcement problem has been very
12 serious, so far as I know.

13 QUESTION: So if an out-of-state contractor
14 brought his crew in, and they all rented rooms in the
15 fancy hotel, whatever it might be --

16 MR. TRIBE: Right.

17 QUESTION: -- and stayed there for the
18 duration of the job, they'd qualify?

19 MR. TRIBE: Well, I think if they said, we
20 intend to leave when the job was done, they would not be
21 residents.

22 QUESTION: They must have an -- ,

23 MR. TRIBE: It's the intention to make it your
24 place of domicile. And I would think that evidence that
25 they intended to vote tomorrow, for example, back in New

1 Hampshire would be used to prove that they were not
2 local residents, or indeed that they intended to vote in
3 the Springfield election tomorrow.

4 And that's another point that I think it's
5 crucial to stress. Even if we were talking about
6 something to which the limits of the Commerce Clause
7 were to apply, we are not dealing here in any sense with
8 an attempt by Boston to target any discrimination
9 against out-of-staters. Of the non-Bostonians who were
10 adversely affected in any potential way by this order in
11 the period from 1978 to 1980, 94 percent were from the
12 State of Massachusetts, only 6 percent were from outside
13 Massachusetts.

14 And of those who were outside Massachusetts,
15 only half could even potentially have been affected; the
16 other half were on work crews that already had at least
17 50 percent Bostonians.

18 QUESTION: Well, on that basis, I suppose you
19 would argue that you could sustain a state provision or
20 a local provision, a city provision, that any kind of
21 construction within the jurisdiction of the enacting
22 government, any construction should employ 50 percent
23 residents?

24 MR. TRIBE: Justice White, that would
25 certainly be harder. Let me tell you why I think

1 there's a difference. We are not maintaining that
2 building borders around cities is immune to Commerce
3 Clause scrutiny.

4 QUESTION: Or states. Or states. Or states.

5 MR. TRIBE: Well, certainly, building a border
6 around the state would be subject to Commerce Clause
7 immunity if it applied to the whole public -- whole
8 private sector. We're talking here not about any
9 construction, we're talking about conserving the state's
10 resources as it might conserve welfare resources or
11 public jobs.

12 QUESTION: Well, why would you suggest that a
13 general, a general provision requiring hiring residents
14 by any contractor, whether it's supported by public
15 funds or not --

16 MR. TRIBE: Why might I think that --

17 QUESTION: -- why would that violate the
18 Commerce Clause, if it would?

19 MR. TRIBE: The reason, I think, Justice
20 White, that it would is that the framework of the
21 Constitution on this subject represents a -- an
22 accommodation between two importantly different ideas.
23 One is the idea that we are, after all, a single
24 nation. We must sink or swim together. The other,
25 however, is the idea that we are not a single nation

1 governed only from Washington with states and cities
2 being just little departments of that nation. That is,
3 what it means to be a state or a city is to be able to
4 pool one's collective efforts and make a collective
5 sacrifice through taxation or make a collective exertion
6 to get federal money, and to use the public goods
7 generated by those public efforts in a way that prefers
8 one's own constituents.

9 We really wouldn't find quasi-sovereign
10 entities like cities and states making massive exertions
11 if the moment they had public schools they automatically
12 had to be open to everyone in the country who wanted to
13 travel there, if the moment they had a welfare plan more
14 generous than someone else's that residence couldn't be
15 a qualification.

16 That is the reason that the conception of at
17 least quasi-sovereign entities like cities and states
18 suggests that public goods, public jobs, public works
19 employment, public welfare, can be reserved completely,
20 I would say, but certainly to the extent of 50 percent --

21 QUESTION: What is the --

22 MR. TRIBE: -- to citizens.

23 QUESTION: What case or cases are closest to
24 agreeing with you?

25 MR. TRIBE: I would suppose the closest cases

1 are McCarthy against Civil Service Commission; Califano
2 v. Torres, to some extent; Doe v. Boulton in 1978,
3 suggesting that there is a fundamental difference
4 between limiting the general medical care available in a
5 state to residents and limiting public medical
6 facilities to residents; probably also the Montana Elk
7 case, to a degree -- that is, the Chief Justice --

8 QUESTION: How about Reeves?

9 MR. TRIBE: Well, certainly --

10 QUESTION: Does that help you at all?

11 MR. TRIBE: I thought you -- closer to the
12 general theory, Reeves and Hughes not only help, we
13 think this is case is a fortiori.

14 QUESTION: That's what I mean. Yes. Those
15 are the ones that --

16 MR. TRIBE: Oh, I am sorry, Justice White. I
17 thought --

18 QUESTION: That's all right.

19 MR. TRIBE: -- I guess I was strengthening --

20 QUESTION: They don't support your theory?

21 MR. TRIBE: I think they support the result.

22 QUESTION: But they support your result. Yes.

23 MR. TRIBE: They support the result, and I am
24 interested in the result as well as in the theory.

25 QUESTION: You are not frightened by the

1 specter of Balkanization if you win?

2 MR. TRIBE: I think that it's the kind of
3 Balkanization Congress seemed to think would solve local
4 unemployment problems. So it doesn't scare me any more
5 than it scared this Court on the Prudential case.

6 QUESTION: And the Constitution?

7 MR. TRIBE: Pardon?

8 QUESTION: And the Constitution?

9 MR. TRIBE: I think the Constitution's concept
10 of Balkanization draws a line at the -- sort of at the
11 water's edge of an individual community's collecting
12 their effort to make public goods available to public
13 citizens. In *Hughes v. Alexandria Scrap*, for example, I
14 think it's important that every member of the Court,
15 including the dissenting opinion in the *Hughes* case,
16 took it as an axiom that of course the State of Maryland
17 could take steps designed to make sure that it was not
18 extending its money cleaning up the Virginia
19 environment, that it could reserve its public money to
20 clean up the Maryland environment.

21 There was a question whether the way it did it
22 might have violated the Commerce Clause. And the Court
23 understandably divided on that question. But there is
24 no question that it's permissible for cities and states
25 to collect their effort and take the public goods that

1 they generate that way and reserve them for their own
2 citizens.

3 But let me assume for a moment that we lost
4 that issue, that the Court were to say that this is not
5 immune. It seems to me very clear, and I want to make
6 the point briefly before taking up --

7 QUESTION: Are you going to talk about the
8 privilege and --

9 MR. TRIBE: That's exactly what I wanted to
10 talk about, Justice Brennan.

11 First of all, it's important to note that the
12 State Supreme Court, in not finding any violation of the
13 Privileges and Immunities Clause, noted that the law
14 here did not aim -- the executive order -- did not aim
15 solely or chiefly at out-of-state residents. That makes
16 a difference. This Court has never held the Privileges
17 and Immunities Clause would apply --

18 QUESTION: Because residents of every other
19 community in Massachusetts are --

20 MR. TRIBE: That's right. And in fact, the
21 overwhelming majority of those supposedly hurt are
22 residents of Massachusetts. More fundamentally, the
23 right --

24 QUESTION: Was that not true of the recent
25 Alaska case?

1 MR. TRIBE: In the -- which of the Alaska
2 cases? You mean Zobell v. Williams?

3 QUESTION: Yes.

4 MR. TRIBE: Well, I guess though Justice
5 O'Connor did have a theory about the Privileges and
6 Immunities Clause which would have made it apply even to
7 internal discrimination, your opinion for the Court did
8 not rely on Privileges and Immunities, and specifically
9 didn't on the ground that it applies only to
10 discrimination against residents of other states.

11 But I was going to say one other thing about
12 Privileges and Immunities. And that is that the right
13 to share in a city's public largesse or a state's public
14 largesse in the form of public jobs in a case like
15 McCarthy or welfare in a case like Shapiro, has never
16 been held to be one of those things that must be shared
17 equally regardless of residency.

18 We do not believe the Privileges or Immunities
19 Clause has any application at all to this case, for
20 those reasons. And I should like to reserve the
21 remainder of my time.

22 CHIEF JUSTICE BURGER: Mr. Kingston.

23 ORAL ARGUMENT OF PAUL J. KINGSTON, ESQ.,

24 ON BEHALF OF RESPONDENT

25 MASSACHUSETTS COUNCIL OF CONSTRUCTION

1 EMPLOYERS, INC., ET AL.

2 MR. KINGSTON: Mr. Chief Justice Burger, and
3 may it please the Court:

4 The City of Boston, often referred to as the
5 "Athens of America" because of its rich cultural and
6 historical heritage, we believe has placed in jeopardy
7 the very premise for which that heritage stands; and
8 that is, the right for all to participate in and benefit
9 by the city's life without regard to their place of
10 residence.

11 QUESTION: We don't suggest that Boston would
12 have to permit nonresidents to attend their school
13 district, their schools?

14 MR. KINGSTON: No, I don't, Justice White.
15 But we have an entirely different --

16 QUESTION: Then how can they reserve their
17 elementary schools to residents?

18 MR. KINGSTON: They may do so.

19 QUESTION: How? Why may they do so?

20 MR. KINGSTON: They may do so because they are
21 involved with something that is integral to their very
22 purpose; and that is, to provide education for their
23 children.

24 QUESTION: Why can't they, why can't Boston
25 then require that only residents build their school

1 buildings?

2 MR. KINGSTON: Because at that point the city
3 is not acting with respect to an integral government
4 function. The city is not in the business --

5 QUESTION: Well, cities normally build school
6 buildings, and school districts normally build school
7 districts -- school buildings.

8 MR. KINGSTON: They do --

9 QUESTION: Nobody else ever builds them --

10 MR. KINGSTON: Well, Your Honor --

11 QUESTION: -- except private, private schools
12 do.

13 MR. KINGSTON: The city does not build the
14 school building in the sense that they have their own
15 employees perform -- the city is not in the contracting
16 business.

17 QUESTION: So what if a school district has a
18 requirement that the school building we contract to have
19 built will be built by residents of our school district?

20 MR. KINGSTON: There'd be no different,
21 Justice White. The point is that the city is not in the
22 business of contracting. When the city builds a public
23 building, they normally contract with a -- a private
24 contractor. And therein lies one of the key points of
25 the respondents: that the city is attempting to

1 overreach into a relationship beyond which it should
2 properly be able to exercise some control.

3 QUESTION: But if it had its own employees to
4 build school buildings, you would say they could confine
5 their employment to residents?

6 MR. KINGSTON: I think, yes, Justice White,
7 they could under the Court's decision in McCarthy v. the
8 Elks --

9 QUESTION: The Firemen, the Firemen's case?

10 MR. KINGSTON: The Firemen's case, that's
11 correct. They could. But that's a crucial and
12 essential distinction. The city has not hired its own
13 complement, its own work force to engage in the
14 activities which are here before you.

15 Approximately two-thirds of the construction
16 activity in 1980 to which the executive order was
17 applicable involved these UDAG projects. And they do
18 not involve public schools or buildings or roads, they
19 involve private office buildings, luxury condominiums,
20 marinas --

21 QUESTION: Well, as to those, the federal
22 grant programs seem to mandate some degree of preference
23 for local hiring. Now, how do you deal with that in the
24 analysis?

25 MR. KINGSTON: Well --

1 QUESTION: Because it seems to have had rather
2 little attention, I think.

3 MR. KINGSTON: Yes, Justice O'Connor. With
4 respect to that, the -- in the first instance, the
5 federal regulations, of course, apply only to the scope
6 of the order as the order applies to UDAGs. The order
7 also applies to city-funded projects to which the
8 federal regulations --

9 QUESTION: All right, but let's talk about it
10 insofar as --

11 MR. KINGSTON: Insofar as --

12 QUESTION: -- the UDAG funds are --

13 MR. KINGSTON: Involved --

14 QUESTION: -- marked and the federal
15 regulations are applicable.

16 MR. KINGSTON: All right. To that extent,
17 Justice O'Connor, in fact, the order does not comport
18 with the boundaries of the federal regulations because
19 the UDAG regulations -- which incidentally have been
20 amended since this case began, so I am not precisely
21 sure where all of this fits at the moment -- but those
22 federal regulations, insofar as I see, require a
23 preference with respect to unemployed residents. The
24 order doesn't target that way. And in the federal
25 regulations would require a preference in the locale

1 where the building project is ongoing.

2 QUESTION: If we had a case where the city's
3 order matched in all respects the federal --

4 MR. KINGSTON: Yes.

5 QUESTION: -- mandate, what does that do?

6 MR. KINGSTON: At that point, Justice
7 O'Connor, first there are other federal projects other
8 than those administered by HUD, the UDAGs. The
9 Department of Transportation, for example, also has a
10 set of regulations, and those regulations specifically
11 preclude a municipality from excluding people based on
12 their residence.

13 But apart from that point, focusing again on
14 the UDAGs, it seems to me the Court would still be left
15 very clearly with the Privileges and Immunities portion
16 of this case, because there there would be personal
17 rights which would have been and, we argue, have been
18 and are adversely affected.

19 QUESTION: Mr. Kingston.

20 MR. KINGSTON: Yes, Justice Brennan.

21 QUESTION: Perhaps you have already answered
22 Justice O'Connor to this effect. But are there any
23 projects covered by this order -- it's an executive
24 order, as I understand it -- that are not either public
25 works or direct subsidies by the city or these UDAG

1 projects?

2 MR. KINGSTON: Are there any projects which
3 are not --

4 QUESTION: Within either of those classes.

5 MR. KINGSTON: Are there -- the scope of the
6 order would cover either projects entirely funded with
7 city dollars -

8 QUESTION: By Boston. Yes.

9 MR. KINGSTON: By Boston.

10 QUESTION: Or covered by UDAG?

11 MR. KINGSTON: Or covered by UDAGs.

12 QUESTION: But nothing else?

13 MR. KINGSTON: There may be, Justice Brennan,
14 some projects which have not been identified but which
15 would have been covered under the Department of
16 Transportation I alluded to a moment ago. And in that
17 respect, the federal regulations are, it seems to me,
18 diametrically opposed to the UDAG regulations. We have
19 not identified which goes up. But the terms of the
20 order, however --

21 QUESTION: So for our purposes, may we treat
22 this case as presenting under the executive order only
23 the two classes I have mentioned?

24 MR. KINGSTON: Two classes being city-funded --

25 QUESTION: City, city-funded or UDAG.

1 MR. KINGSTON: No, Your Honor.

2 QUESTION: I see.

3 MR. KINGSTON: Because the terms of the order
4 apply to all projects --

5 QUESTION: I see.

6 MR. KINGSTON: -- to which the city is the
7 contributing --

8 QUESTION: Yes.

9 MR. KINGSTON: -- source or any project
10 involving federal funds.

11 QUESTION: Right.

12 MR. KINGSTON: It is not limited to --

13 QUESTION: It could be more than UDAG.

14 MR. KINGSTON: It could clearly be more than
15 UDAG.

16 QUESTION: While I have you interrupted, may I
17 ask one other question? Did you just suggest that the
18 UDAG coverage of these, UDAG, might be saved, as by the
19 Commerce Clause argument, by the federal regulations
20 requiring the local hiring preferences but that if that
21 were so, you would still make the Privileges and
22 Immunities argument?

23 MR. KINGSTON: That's absolutely correct,
24 Justice Brennan.

25 QUESTION: But you don't concede, or do you,

1 that the federal regulations really save the UDAG
2 coverage?

3 MR. KINGSTON: No, we don't concede that the
4 federal regulations save the UDAG. We believe that they
5 are inconsistent with the UDAG because they are not
6 properly targeted to unemployed in the locale.

7 QUESTION: Mr. Kingston.

8 MR. KINGSTON: Yes, sir.

9 QUESTION: Do you think that an ordinance
10 which simply carried out and matched perfectly a
11 provision of a UDAG which said that each ordinance which
12 gets UDAG money shall provide for 50 percent employment
13 of residents would violate the Privileges and Immunities
14 Clause if it represented an affirmative sanction of
15 Congress acting under its spending power and the
16 Commerce Clause?

17 MR. KINGSTON: Respondents do.

18 QUESTION: Well, do you have any case for that?

19 MR. KINGSTON: Your Honor, I don't --

20 QUESTION: About that precise situation?

21 MR. KINGSTON: I do not have a case for that
22 precise situation. But the Commerce Clause representing
23 an affirmative grant of power to the Congress, it would
24 seem to me there would be some substantial reason for
25 acknowledging that the city could put such limitations

1 in its regulations and the city or the states might be
2 able to do by virtue of that grant to the cities and the
3 states what those cities and the states could not
4 otherwise do.

5 But when it comes to the Privileges and
6 Immunities Clause, Justice Rehnquist, I don't understand
7 that there is that grant of power to the Congress. Here
8 we are dealing with personal rights, and in respondents'
9 view, the Congress would not have the power to strip
10 individuals of their right to earn a livelihood.

11 QUESTION: Although Congress might enforce it
12 in a way that the courts might not otherwise; might
13 expand it?

14 MR. KINGSTON: Yes, Justice White.

15 QUESTION: But your -- the question is here
16 whether Congress could limit the reach of the clause
17 beyond that that courts might otherwise find?

18 MR. KINGSTON: And my response, Justice White,
19 is that while I do not have a case --

20 QUESTION: They could not?

21 MR. KINGSTON: They could not.

22 QUESTION: And what, Mr. Kingston, is your
23 answer to Mr. Tribe's argument: yes, but 94 percent of
24 those involved are residents of other communities in
25 Massachusetts, so there's no discrimination between

1 residents of several states?

2 MR. KINGSTON: With respect to the Commerce
3 Clause or the Privileges and Immunities?

4 QUESTION: Privileges and Immunities.

5 MR. KINGSTON: All right. With respect to the
6 Privileges and Immunities Clause, we do not, of course,
7 have a de nunc precedent which is available in the
8 Commerce Clause. However, several points seem
9 appropriate. One, with respect to the Boston order,
10 suburban residents in Massachusetts had no greater
11 access to the political process which produced the
12 executive order than did non-Massachusetts residents.

13 Secondly, the state statute which the mayor
14 cited as authority for the promulgation of that
15 executive order, and which the Massachusetts Supreme
16 Judicial Court found to be unconstitutional, that
17 statute in giving the localities a preference or
18 allowing them to make a preference for employment in
19 their -- with respect to their residents, gave each
20 community within the Commonwealth of Massachusetts
21 something, whereas non-Massachusetts residents got
22 nothing. So that --

23 QUESTION: Well, doesn't that kind of
24 contradict your earlier argument that some suburban
25 residents or residents of Springfield or Northampton

1 don't have access to the political process that enabled
2 Boston to do this? They do have access to the state
3 process, and I suppose the Massachusetts Legislature
4 could pass a law disenabling Boston from doing something
5 like this.

6 MR. KINGSTON: Well, my point, Justice
7 Rehnquist, is that the state statute upon which the
8 executive order was premised in itself allowed the
9 suburbs and gave them a preference with respect to
10 public construction works within their locality. So
11 insofar if the point is that the non-Massachusetts
12 residents had representation in the process, if that was
13 the point, what I am answering is that they did not have
14 representation in the process because the other suburbs
15 were getting something in the deal, if you will. They
16 were getting a local preference with respect to projects
17 within their communities, whereas the non-Massachusetts
18 residents got nothing.

19 We recognize the Court's pronouncements in
20 Hughes v. Alexandria Scrap and Reeves that if the city
21 is acting as a market participant, the Commerce Clause
22 is simply not applicable. But the scope of the order,
23 as we have described, to private construction projects
24 where no city dollars are involved, and the scope of the
25 project to persons with whom the city has no

1 relationship reveals, we believe, the city's role not as
2 a market participant but as a market regulator.

3 QUESTION: Well, isn't the order restricted to
4 projects where the city is going to be writing the check?

5 MR. KINGSTON: No, Justice White.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 MR. KINGSTON: No, Justice White. With
2 respect to the UDAG's, the city is not --

3 QUESTION: Well, no, but it is the prime
4 mover. It is the one that's doing the contracting,
5 isn't it?

6 MR. KINGSTON: It applies to the Federal
7 Government for these federal funds.

8 MR. KINGSTON: It then, if the Federal
9 Government decides to make that grant, it is a conduit
10 for the transfer of those funds to the developer for the
11 construction of the UDAG project.

12 When I said earlier these projects relate to
13 condominiums and office buildings, it was no
14 exaggeration. There is not a UDAG project in the city
15 of Boston which does not fall within one of those
16 categories.

17 QUESTION: In UDAG projects, what is the
18 premise for the use of the federal funds?

19 MR. KINGSTON: The premise, Justice White, is
20 to leverage private reinvestment in our nation's
21 cities.

22 QUESTION: Yes, and they are given when a city
23 applies for it, I suppose.

24 MR. KINGSTON: I don't understand that they
25 are automatically given. The Federal Government --

1 QUESTION: Well, I know, but nevertheless the
2 Federal Government doesn't go around and shop for this,
3 does it? Doesn't it depend on some local application?

4 MR. KINGSTON: Oh, yes, Your Honor, it does.

5 QUESTION: The city applies.

6 MR. KINGSTON: The city applies.

7 QUESTION: And so, please help us out as a
8 city.

9 MR. KINGSTON: That's correct. But that's the
10 extent of it, Your Honor. Once those federal dollars
11 come in, they are transferred to the developer and the
12 private project begins.

13 My brother makes reference to the
14 infrastructure. A certain amount of those UDAG dollars
15 are provided for the traffic rerouting, for the streets
16 and the sewers. But Respondents' position is, if the
17 city can obtain market participant immunity on that
18 attenuated basis, there is virtually no private
19 construction project in the city which would not merit
20 participation partnership.

21 QUESTION: Well, it may merit it, but you
22 wouldn't be satisfied to win this case on that basis, I
23 guess, that this regulation, this order, is invalid to
24 the extent that federal funds are used?

25 MR. KINGSTON: No, Your Honor. We also

1 challenge --

2 QUESTION: So putting aside those, then you're
3 talking about the city itself paying for municipal
4 improvements.

5 MR. KINGSTON: With respect --

6 QUESTION: And you say they are not a market
7 participant in those because they are not using their
8 own employees to build the buildings?

9 MR. KINGSTON: That's correct. And in that
10 regard, we consider that by analogy, if you will, this
11 Court's decisions in Reeves and in Hughes can be viewed
12 as prohibiting secondary boycotts. That is, it
13 prohibits the city from reaching beyond the party with
14 whom it has privity and prevents the city from dictating
15 terms to subcontractors and employees.

16 When Maryland with its own tax dollars
17 provided a bounty for the processing of automobile
18 hulks, this Court was careful to point out that Maryland
19 had not sought to prohibit the flow of those hulks out
20 of state. And in Reeves, when South Dakota preferred
21 its own residents in the sale of cement which had been
22 produced in a state-owned facility, which had been
23 constructed with state dollars, this Court was careful
24 to point out that South Dakota had not attempted to
25 restrict the resale of that cement to state citizens.

1 But Boston, with somebody else's money for the
2 most part and for economic purposes, is attempting to do
3 something that this Court would have prohibited Maryland
4 and South Dakota from doing.

5 QUESTION: Mr. Kingston, I guess all we have
6 in front of us, though, is those things to which the
7 executive order would apply, right?

8 MR. KINGSTON: I don't know if I understand,
9 Justice O'Connor.

10 QUESTION: Well, we have before us the city's
11 executive order requirements.

12 MR. KINGSTON: Yes.

13 QUESTION: And under the terms of the
14 executive order, it says that it's limited to those
15 projects to which the city is a signatory to the
16 construction contract. So we aren't really concerned
17 about the others, are we?

18 MR. KINGSTON: Well, I think it continues,
19 Justice O'Connor, "or to which the city is an applicant
20 for the federal funds." The scope of the order
21 continues beyond.

22 QUESTION: Well, it still signs the contracts
23 in those.

24 MR. KINGSTON: If it signs the contracts,
25 Justice White --

1 QUESTION: Well, doesn't it?

2 MR. KINGSTON: I don't believe it does. But
3 whether or not it does --

4 QUESTION: You mean it doesn't sign the
5 construction contracts where the federal funds are
6 provided? Who does?

7 MR. KINGSTON: The developer would -- I'm
8 sorry. Maybe the developer would sign the contract with
9 the city.

10 QUESTION: Yes, yes.

11 MR. KINGSTON: But the point is, there is no
12 commitment, there is no entrepreneurial aspect, there is
13 no assumption of risk, there is no financial commitment
14 which the city has made, in those UDAG projects. And
15 insofar as the order applies to traditional or true
16 public works projects which are funded entirely with
17 city dollars, we believe that the order is defective
18 because it reaches beyond the parties with whom it has
19 privity and it attempts to dictate conditions to persons
20 with whom it has no relationship, results we understand
21 clearly would be prohibited by this Court's decisions in
22 Reeves and in Hughes.

23 QUESTION: You say it attempts to dictate
24 conditions to people with whom it has no relationship.

25 MR. KINGSTON: Yes.

1 QUESTION: Give me an example, if you would,
2 of the people to whom it's dictating conditions?

3 MR. KINGSTON: It is dictating -- first of
4 all, it is dictating to subcontractors the terms of the
5 order, namely that they must hire at least 50 percent
6 Boston residents. Those subcontractors are not in
7 privity with the city.

8 QUESTION: Well, but that's a fairly archaic
9 concept if you apply it that way, isn't it? I mean,
10 lots of owners sign an agreement with a contractor that
11 may provide that each of his subcontractors has to
12 produce a performance bond, and that in a sense is
13 dictating to people not in privity and yet that's fairly
14 commonly done.

15 MR. KINGSTON: That may be so, Justice
16 Rehnquist, but it seems to us that if we're dealing with
17 constitutional matters that normal contractual matters
18 may not always carry.

19 QUESTION: I think that's true, and that's why
20 I was wondering why you kind of resurrected the notion
21 of privity to analyze a commerce clause problem.

22 MR. KINGSTON: Yes. Only, Justice Rehnquist,
23 because we understand this Court in Hughes and in Reeves
24 suggested that as a barrier. At some point the city
25 loses its market participant immunity, remembering that

1 the market participant immunity is an exception in the
2 first instance to the otherwise general and well
3 established rule that cities and states are not entitled
4 to throw up economic barriers in an attempt to isolate
5 themselves from problems that are shared by all.

6 But there's a second feature, Justice
7 Rehnquist, and that is that the order attempts to
8 preclude non-Boston residents and non-Massachusetts
9 residents from work opportunity. So to that extent as
10 well, the city is reaching beyond the initial party with
11 whom it has privity in an attempt to dictate conditions
12 which they do not have a right to do.

13 One of the further basic defects of the
14 executive order is that it invites retaliation. If
15 Boston is able to have a resident preference scheme such
16 as this, then there is no reason why other cities and
17 states would be precluded from doing the same. And it
18 would be very difficult for any political leader to
19 resist the temptation to protect, if you will, his
20 constituency in such a manner. And this again gets to
21 the very purpose of the commerce clause, to prohibit
22 forms of economic balkanization.

23 With respect to the privileges and immunities
24 clause, just as the executive order triggers scrutiny
25 under the commerce clause, so too it triggers scrutiny

1 under the privileges and immunities clause. And in this
2 respect, the Court's decision in Hicklin versus Orbeck
3 provides the instruction. And there, when Alaska's hire
4 statute was struck Alaska was not able to successfully
5 argue that it had as a purpose, as Boston is arguing, an
6 effort to alleviate unemployment, because there was no
7 showing that the out of state residents were a source of
8 the unemployment problem. Rather, lack of job training
9 and lack of education were.

10 And further, as in Hicklin, there is no
11 showing that the order is targeted to address the
12 problem before the city. That is to say, all Boston
13 residents, whether they're employed or not, are given a
14 preference in the employment.

15 When -- the order then contradicts the basic
16 principles of this Court's decisions in Paul versus
17 Virginia, which recognized there was no provision of the
18 Constitution which so tended to constitute the people of
19 this country, one nation, as that clause, and in Toomer
20 versus Witsell, where this Court advised that the
21 primary purpose of the clause was to help fuse into one
22 nation what had been a collection of independent
23 sovereign states.

24 In sum, if we are to preserve our national
25 economic free trade unit, then we must permit it to

1 flourish without governmental restrictions on business
2 and people who seek work opportunity without regard to
3 their place of residence.

4 This Court's instruction in Philadelphia
5 versus New Jersey is so very relevant. There, in
6 striking New Jersey's statute, the Court held that, just
7 as the commerce clause protected her neighbors today, so
8 the commerce clause would protect New Jersey in the
9 future from efforts by one state to isolate itself in
10 the stream of interstate commerce from problems shared
11 by all.

12 Unemployment is a national problem and it can
13 only be worsened by permitting retaliatory resident
14 preference schemes, and which can only be alleviated by
15 promoting the infrastructure and the instrumentalities
16 of interstate commerce which are embodied in our private
17 enterprise system.

18 QUESTION: Let me ask just one question on the
19 commerce clause. What is the market, economic market
20 that you're concerned with primarily?

21 MR. KINGSTON: The economic market is the
22 construction market.

23 QUESTION: It's the market in which the
24 contractors compete? You're not talking about the labor
25 market, in other words?

1 MR. KINGSTON: I don't know if I understand.
2 We speak of the construction market as represented by
3 the contractors and by the laborers.

4 QUESTION: And 94 percent of the laborers are
5 not out of state people?

6 MR. KINGSTON: Oh, in that respect. Those
7 statistics are valid for one point in time and they only
8 related to the city-funded projects, not to the UDAG
9 projects. And by the way, there's been a tenfold
10 increase in the UDAG activity in Boston over the past
11 two or three years.

12 QUESTION: Does the record tell us what is the
13 impact in any measurable way on interstate trade of any
14 kind, either employees or out of state people?

15 MR. KINGSTON: The agreed statement of facts,
16 Justice Stevens, which the Massachusetts Supreme
17 Judicial Court expressly relied upon in its decision
18 contained the stipulation that out of state, without any
19 numerical limitations, out of state residents will be
20 denied work opportunity, contractors will be discouraged
21 from bidding in Boston construction.

22 QUESTION: Is there any quantification?

23 MR. KINGSTON: No quantification.

24 A significant impact, the agreed statement
25 says, on specialty contractors, resulting in fewer

1 competitive bids and higher costs for construction for
2 all of the contractors. What the --

3 QUESTION: Would it matter for your interstate
4 commerce theory what the facts actually show, or is it
5 just the fact that there is this potential is enough?

6 MR. KINGSTON: Well, the agreed statement of
7 facts specifically contained an acknowledgment that it
8 would have those disadvantages and those burdens on
9 interstate commerce. There was no quantification. So
10 it did have that.

11 And what the contractors and the building
12 trade unions and the working people who are represented
13 by the private industry here today, representing private
14 enterprise in this context, what they seek to do is to
15 prevent a discrimination launched at the very essence of
16 their livelihood. They are journeymen by definition, by
17 history, and hopefully by constitutional guarantee.

18 We are urging, therefore, the unanimous
19 decision of the Massachusetts Supreme Judicial Court,
20 which by its findings and conclusion held the executive
21 order unconstitutional.

22 QUESTION: There's no bar to out of state
23 firms or no discrimination against interstate commerce.
24 You say that this requirement may keep some out of state
25 firms from coming in because they would have to hire

1 locals.

2 MR. KINGSTON: The agreed statement of facts,
3 Justice White, contained an expression, and the
4 Massachusetts Supreme Judicial Court acknowledged and
5 relied on it, that both in-state and out-of-state
6 contractors would be discouraged from bidding on Boston
7 construction work.

8 QUESTION: Because they would have to hire
9 locals?

10 MR. KINGSTON: They would have to hire
11 locals. Some of these contractors, especially the
12 specialty contractors, have permanent work crews, and
13 when they come in they'd have to disband those crews to
14 make up a local composition. And even with respect to
15 local contractors, there would be a disbanding of work
16 crews in order to be sure there were 50 percent of
17 Boston residents.

18 QUESTION: Why would that requirement
19 discourage a non-Bostonian?

20 MR. KINGSTON: A contractor?

21 QUESTION: Yes.

22 MR. KINGSTON: Well, there are
23 inefficiencies. The New York State Supreme Court in --

24 QUESTION: It may be inefficient, but they
25 wouldn't bid except at a price that would cover those

1 inefficiencies. And if they didn't get the contract
2 they wouldn't be doing it, I suppose. Is that their
3 problem?

4 MR. KINGSTON: Well, that may be their
5 problem. But the commerce clause we understand is
6 designed to protect interstate commerce and to prevent
7 city and state regulations which tend to burden
8 interstate commerce, regardless of what the contractors
9 might do, Justice White. They in fact --

10 QUESTION: Well, a building code might require
11 certain specifications for a building that some
12 out-of-state contractor is not used to putting up with.

13 MR. KINGSTON: Correct, Justice White.
14 However, we are challenging the legality of the order,
15 the constitutionality of the order under the commerce
16 clause and the privileges and immunities clause. And we
17 consider the record amply supports burdens on interstate
18 commerce.

19 CHIEF JUSTICE BURGER: Do you have anything
20 further, Mr. Tribe?

21 REBUTTAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.

22 ON BEHALF OF PETITIONERS

23 MR. TRIBE: A couple of points, Mr. Chief
24 Justice.

25 First of all, as to the impact on commerce, I

1 do want to make it very clear that the record did not
2 really leave it so ambiguous. The court below
3 recognized that the provisions may have little impact on
4 the industry or on its functioning in interstate
5 commerce. It's just some firms that might be affected.

6 I think it's clear from Justice White's
7 questions, and he may have been recalling Exxon v.
8 Maryland, that adverse impact on some firms is not a
9 constitutionally cognizable commerce clause violation.
10 And I just want to remind the Court that, even if there
11 were adverse impact on commerce, we've argued that that
12 impact would be amply justified.

13 Moreover, the record is clear that the data
14 stipulated at page A-44, the data as to one month,
15 December 1978, are representative. And in that one
16 month 93 percent of the firms would have been wholly
17 unaffected by the order. None of the 7 percent that
18 were affected were from out of state. I don't think
19 there's a viable commerce clause objection here.

20 I think there also are some confusions that
21 Respondents have spawned with respect to the federally
22 funded part of all this. Justice White asked, isn't it
23 true that the city signs the checks. I just want to
24 say, it's entirely true. This is the city's money.

25 In the Copley Place project, for example, to

1 say that there's no risk assumed by the city would be
2 rather fanciful. As our reply brief points out at
3 footnote 11, the grant is to the city, the city has
4 simply loaned the money to the developer, and if it
5 fails the city's loan becomes no good.

6 We're told in some vague way that there are
7 other federal regulations, maybe of the Department of
8 Transportation, that might be violated here. I haven't
9 heard that since the complaint in this case, but the
10 fact is that the DOT regulations just specify that there
11 should be no discrimination against out of staters. And
12 the Supreme Judicial Court in this case, as its reason
13 for not finding a violation of privileges and
14 immunities, said that it's clear that neither on its
15 face nor in fact is this aimed chiefly at out of
16 staters.

17 Mr. Kingston says that there's something in
18 the executive order before this Court that makes the
19 order apply whenever the city goes out and applies for
20 federal money. That's not true. It's just not what the
21 order says. What the order says is, the city must be a
22 signatory to the construction contract, which it
23 sometimes is as to these federal funds, but not always.

24 The federal regulations have not been amended
25 since we filed our brief. You can rely on the version

1 that we have. And in fact, the statute does not say
2 what the Respondents claim it says. 12 U.S. Code
3 Section 1701(u) does not require that the city become
4 the employer of last resort and target the money at the
5 unemployed.

6 It says specifically that the jobs assisted
7 under the program be given to lower income persons
8 residing within the unit of government or the
9 metropolitan area. So it seems to me quite clear that
10 the regulations are complied with here.

11 QUESTION: In your earlier argument you seemed
12 to rest quite heavily on the proposition that Boston was
13 entitled to have these jobs to take care of its
14 unemployment. But isn't it an economic reality that for
15 every body occupying a job in one place it means that a
16 body in some other place doesn't have that job?

17 MR. TRIBE: Well, Mr. Chief Justice, it would
18 be if we were throwing other bodies out of work. But
19 the point is that the money that's being used to
20 generate two jobs gives one job -- that money may come
21 from the Defense Department for all I know. I mean, I
22 don't know how many jobs it would create in its other
23 uses.

24 QUESTION: Where does that money come from?

25 MR. TRIBE: It comes from the federal Treasury

1 in part, but a fifth of it under the law has to be
2 matched by the city, and a lot of it is directly raised
3 from city residents.

4 QUESTION: Well then, 80 percent of it comes
5 from the Federal Government. So does that have some
6 bearing on the commerce clause?

7 MR. TRIBE: I think not at all, Mr. Chief
8 Justice. It does have bearing on Congress' power to
9 target the money to the city that applies, which it
10 surely can do despite the privileges and immunities
11 clause, unless it is suggested by an extension of this
12 privity concept that the fact that the money gets to
13 Bostonians through the hands of Boston somehow changes
14 the fact, and I don't think that can change anything,
15 any more than it can change the right of the city to
16 prefer Bostonians in the building of schools that it
17 actually does something so strange as hiring a private
18 firm to build it. I don't think the Constitution is
19 violated here.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.

21 The case is submitted.

22 (Whereupon, at 2:48 p.m., the case in the
23 above-entitled matter was submitted.)

24

* * *

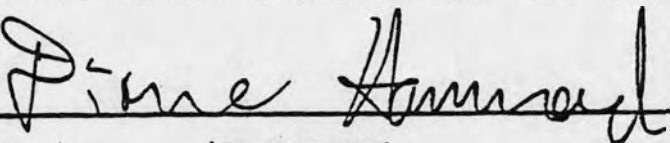
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: Kevin H. White, Etc., Et Al., Petitioners v. Massachusetts Council of Construction Employers, Inc., Et Al., No. 81-1003

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY



(REPORTER)

RECEIVED
SUPERIOR COURT U.S.
MARSHALS OFFICE

1932 DEC 6 PM 4 06