

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2110

TITLE UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF
CAMDEN COUNTY AND VICINITY, Appellant v. MAYOR AND
COUNCIL OF THE CITY OF CAMDEN, ET AL.

PLACE Washington, D. C.

DATE November 28, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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| UNITED BUILDING AND CONSTRUCTION | : |
| TRADES COUNCIL OF CAMDEN COUNTY | : |
| AND VICINITY, | : |
| | : |
| Appellant | : |
| | : |
| v. | : |
| | : |
| MAYOR AND COUNCIL OF THE CITY OF | : |
| CAMDEN, ET AL. | : |
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No. 81-2110

Washington, D.C.

Monday, November 28, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

STEVEN K. KUDATZKY, ESQ., Haddonfield, New Jersey; on behalf of the Appellant.

N. THOMAS FOSTER, ESQ., City Attorney, Camden, New Jersey; on behalf of the Appellees.

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

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

4 ORAL ARGUMENT OF STEVEN K. KUDATZKY, ESQ.

5 ON BEHALF OF THE APPELLANT

6 MR. KUDATZKY: Thank you, Mr. Chief Justice, and
7 may it please the Court:

8 We are here today to ask this Court of nip in
9 the bud a trend which we believe is pernicious to our
10 national unity, that trend being an attempt by the City of
11 Camden, among other cities, to solve in a blunderbuss
12 fashion the problem of its resident unemployment at the
13 expense of non-residents who seek the opportunity to ply
14 their trade, pursue their common calling, whatever the
15 Court cares to describe it as, in the City of Camden
16 without being discriminated against simply because they
17 are non-residents in the State of New Jersey and the City
18 of Camden.

19 It is our view that the Privileges and
20 Immunities Clause of the United States Constitution
21 applies to protect non-residents against this sort of
22 discrimination and that under the applicable tests set
23 forth by this Court for privileges and immunities issues,
24 set forth specifically in the Hicklin v. Orbeck case, that
25 the invalidation of the Camden ordinance should follow.

1 This case is before the Court on direct appeal
2 from the ruling of the Supreme Court of New Jersey
3 upholding the action of the administrative agency, the
4 Department of the Treasury for the State of New Jersey,
5 which approved and thereby gave life to the Camden
6 Resident Preference Ordinance.

7 The Supreme Court of New Jersey held essentially
8 that the Privileges and Immunities Clause did not vie in
9 this case either because the enactment was a municipal
10 enactment or, more accurately in my view, because the
11 discrimination on the basis of municipal residence is not
12 a right protected by the Privileges and Immunities Clause.

13 We believe the fact that this was enacted by the
14 City of Camden as opposed to be being enacted by the State
15 of New Jersey to be insignificant and that the real
16 question is does discrimination on the basis of municipal
17 residence call into play the protection of the Privileges
18 and Immunities Clause?

19 Supreme Court of New Jersey, in our view, erred
20 factually and legally in reaching that conclusion. The
21 Court felt that the impact of this ordinance would be
22 greater with respect to New Jersians who are non-residents
23 of Camden than with respect to non-residents of the State
24 of New Jersey.

25 We have sought to demonstrate through census

1 data that we have included in our reply brief that within
2 the standard metropolitan statistical area of
3 Philadelphia, which includes the City of Camden, certain
4 other counties in the State of New Jersey, and certain
5 counties outside of the City of Philadelphia in the State
6 of Pennsylvania, that there would be more non-residents
7 who are likely to be affected by this ordinance than New
8 Jersey residents who are non-residents of Camden.

9 We do not believe that the fact that other New
10 Jersians are adversely impacted by this ordinance either
11 renders the privileges and immunities protection
12 inapplicable or somehow serves to cure the harm done to
13 the non-residents by putting them on an equal footing
14 somehow with the New Jersians.

15 We believe that in assessing whether
16 non-residents of New Jersey are treated the same as
17 resident of New Jersey, that all residents of New Jersey
18 must be factored into the equation including the favored
19 class here, residents of the City of Camden. Some New
20 Jersey residents are clearly treated better than residents
21 of Pennsylvania and for that reason we believe the fact
22 that the discrimination is on the basis of municipal
23 residence does not render the privileges and immunities
24 protection inapplicable.

25 QUESTION: But the discrimination is not limited

1 to non-residents, is it?

2 MR. KUDATZKY: No, Justice. Clearly persons who
3 are not residents of the City of Camden are victimized to
4 the same extent.

5 QUESTION: Wherever they live?

6 MR. KUDATZKY: Wherever they live, yes.

7 Slightly more than a year ago this Court heard
8 argument in the case of White versus Mayor and Council of
9 the City of Boston, the case whose facts are replicated to
10 some extent in this case. However, we believe that the
11 ruling in White does not foreordain the rejection of our
12 arguments here, basically for the reason that we are
13 dealing in this case with an issue reserved for decision
14 in White; namely the extent to which the Privileges and
15 Immunities Clause might afford greater protection than the
16 Commerce Clause which was at issue in White.

17 We believe that the Privileges and Immunities
18 Clause, being as it is a constitutional guarantee of
19 equality of treatment to non-residents that it is personal
20 to the individuals involved, is not something that
21 Congress can waive or authorize a violation of by state.

22 We do have UDAG money involved in this case.
23 One of the two projects to which the ordinance is
24 presently being applied has in part UDAG money funding it
25 as was the case in the Boston situation. We also have

1 here, however, money from the Department of Transportation
2 funding the other large project presently being subjected
3 to the ordinance, a transportation center for --

4 QUESTION: Mr. Kudatzky, suppose the city was,
5 with its own employees, doing a lot of its own
6 construction work, but required that anybody who worked on
7 those jobs be residents of the city. Would you still be
8 here or would you think the Philadelphia case covered
9 that?

10 MR. KUDATZKY: The City of Philadelphia versus
11 the State of New Jersey?

12 QUESTION: Yes.

13 MR. KUDATZKY: Justice, that is certainly not
14 our case. We do not --

15 QUESTION: I know it isn't. But, I just
16 wondered if you had a view about it.

17 MR. KUDATZKY: There is much to commend the view
18 basically set forth in the Court's cases on tuition
19 preference and right to public education. A city or a
20 state might have the right to prefer its own residents in
21 direct distributions of state resources to those
22 residents.

23 QUESTION: Such as --

24 MR. KUDATZKY: Such as --

25 QUESTION: Such as limiting its employees to

1 residents of the state or the city?

2 MR. KUDATZKY: Correct. The Court has --

3 QUESTION: And that would survive the privileges
4 and immunities challenge as well as the commerce
5 challenge?

6 MR. KUDATZKY: Well, I am not prepared to
7 concede that today, Your Honor. That is the Court need
8 not --

9 QUESTION: What if we were?

10 (Laughter)

11 MR. KUDATZKY: The Court need not go that far.

12 QUESTION: Well, I know, but, what if we were?
13 What if we thought that Camden could easily have withstood
14 any kind of a constitutional attack if it simply provided
15 that its own employees had to be city residents and they
16 did all their construction work with city employees?

17 MR. KUDATZKY: Even assuming that the could do
18 so in-house, as you are positing, I don't believe that
19 would answer the question in this case because these
20 people are clearly private employees. It cannot be
21 seriously argued in my view that these employees would
22 enjoy or not enjoy rather the protections of the Fair
23 Labor Standards Act as would be the case with in-house
24 employees of the city if they were doing the construction.
25 They are different. Whatever may be the case with respect

1 to doing the work in-house and the application of the
2 Privileges and Immunities Clause in the first instance
3 were whether that would survive privileges and immunities
4 scrutiny if the clause applies doesn't apply here. It is
5 not this case. The city is seeking to go far beyond
6 influencing direct distributions of its own resources by
7 trying to regulate private employment.

8 And, we believe that is a distinction of
9 constitutional dimension that we believe sets this case
10 apart from Boston and really undercuts the analogy in the
11 White case of these employees being city employees in an
12 informal sense as Justice Rehnquist stated.

13 We believe that the right being asserted here is
14 a right which has traditionally been held to be within the
15 protection of the Privileges and Immunities Clause as
16 interpreted by this Court and that in light of that fact
17 it is the burden of the city to come forward with a
18 showing that the non-residents here are a peculiar source
19 of the evil that the city is trying to deal with in its
20 ordinance. That evil, we think, is a broader one than the
21 city's characterization of it in its brief. It is simply
22 a problem of high unemployment among the residents of
23 Camden. It is not necessarily low employment of Camden
24 residents on Camden public works projects.

25 I think for the same reasons that Hicklin v.

1 Orbeck invalidated that rationale as a savings rationale,
2 it should be invalidated here. There is just simply no
3 showing that whatever the causes of the unemployment
4 problems in Camden are that they are fairly traceable to
5 the activities of non-residents.

6 QUESTION: Mr. Kudatzky, the Alaska statute in
7 Hicklin had a good deal broader sweep than the Camden
8 ordinance here, didn't it? I don't just mean
9 geographically, but didn't they try to regulate virtually
10 all private employment in the state?

11 MR. KUDATZKY: Yes, Justice. It was unfortunate
12 that the Hicklin court did not really address the
13 propriety of the -- if I can call it the first-tier
14 regulation -- the regulation of the employees who were
15 working directly on the pipeline as opposed to those
16 further down the line. Clearly the Alaska higher statute
17 had what was termed the ripple effect all the way down the
18 line.

19 The City of Camden here is limiting its
20 ordinance in a very precise way to persons who are going
21 to be employed by contractors with whom the city deals or
22 subcontractors of those contractors on projects, either
23 funded directly by the city or through grants administered
24 by the city, which need not and are not, to my
25 understanding, limited to public works projects. In fact,

1 to our understanding, with the nursing home project
2 presently half way done, I would say, if I can tell by
3 looking at it yesterday, is a privately-owned project or
4 at least not a city-owned project.

5 We further believe that the city has attempted
6 really to use a shotgun approach to a problem that
7 requires a surgically precise remedy. There has been no
8 attempt to limit the benefits of the ordinance to
9 unemployed persons, to persons of a certain economic
10 level, or to persons who are qualified to work in the
11 construction trades.

12 We also do not believe that the city has
13 asserted justification that this also promotes minority
14 hiring is enough to say the ordinance --

15 QUESTION: Would the Camden ordinance require a
16 contractor to employ someone that he regarded as
17 unqualified to be, say, a bricklayer or some other part of
18 the trade, in order to make up the 40 percent rather than
19 pick someone who he did regard as qualified who is not a
20 resident of the City of Camden?

21 MR. KUDATZKY: The ordinance does not
22 affirmatively say qualifications are irrelevant. I would
23 assume that that would come in when the city was trying to
24 determine the extent to which good faith compliance was
25 attempted by the contractor. The contractor would come in

1 and say that I didn't hire this resident because he was
2 unqualified, therefore, I took a non-residents who
3 happened to be more qualified. That may or may not
4 constitute sufficient good faith effort.

5 QUESTION: We really can't say at this point the
6 Camden ordinance would forbid choice of a non-resident on
7 the basis of qualification even though the 40 percent goal
8 weren't met?

9 MR. KUDATZKY: We can't say that at this point.
10 We do not believe that the invalidation of the
11 Camden ordinance would necessarily call into question the
12 continued validity of McCarthy versus the City of
13 Philadelphia that public employment itself may be limited
14 to residents.

15 The Court need not go that far as I have
16 indicated and in our view the implications of this ruling
17 are only with respect to attempts by governmental bodies
18 to influence the decisions of private employers and
19 further down the line employers -- I am sorry --
20 subcontractors of private employers. We do not think that
21 this case will sound the death knell of various attempts
22 by states to limit access to state resources whether
23 directly or indirectly to their own residents.

24 If I may return to my discussion of why this
25 case is not the same as White, I mentioned this

1 transportation center that is involved in this case as
2 being funded by Department of Transportation money under
3 the Urban Mass Transit Act.

4 We have cited in our brief the interpretation of
5 the Secretary of Transportation that resident preferences
6 in the projects funded by such monies are impermissible.
7 So, we do not have the harmony of -- the harmony with the
8 congressional goals that --

9 QUESTION: Was that point made to the Supreme
10 Court of New Jersey?

11 MR. KUDATZKY: No, Your Honor, it was not. The
12 Court never quite frankly addressed the issue at that
13 level. They stopped once they determined the Privileges
14 and Immunities Clause was --

15 QUESTION: I didn't mean was it made by the
16 Supreme Court of New Jersey. Was it made to the Supreme
17 Court of New Jersey by you?

18 MR. KUDATZKY: No, Your Honor, we have only
19 recently been able to determine who is funding what
20 projects. At the time this case was argued before the
21 Supreme Court of New Jersey, the transportation center
22 was, I think, very much at a conceptual stage or at least
23 on the drawing board.

24 The absence of that harmony, I think, undercuts
25 some of the White reasoning for upholding the resident

1 preference there. Here we have a situation where Congress
2 has at best spoken with a mixed voice as to resident
3 preferences.

4 The constitutional guarantee involved here
5 applies more specifically to the individual employees.
6 White did not really deal with the rights of individual
7 employees. It seemed to deal more with the rights of the
8 contractors under the Commerce Clause, although certain
9 union groups were parties plaintiff in that case.

10 QUESTION: I suppose Congress might take this
11 thing out of the Commerce Clause challenge, but I am not
12 sure it can forgive a privileges and immunities violation.

13 MR. KUDATZKY: Yes, that is precisely my point,
14 Justice. With respect to those projects which are funded
15 in part by federal monies, any inference that Congress has
16 approved resident preference, I think, is unavailable in
17 this case for the simple reason that Congress is not
18 authorized to waive privileges and immunities protections.

19 We do not wish to be construed to be attacking
20 the laudible goals of the Camden ordinance. Camden
21 clearly is a city with a lot of problems. We just believe
22 that their goals could be accomplished with less violence
23 to the Privileges and Immunities Clause in other ways such
24 as by preferring its residents for job training programs,
25 by doing some of the work in-house if they really felt

1 that that was necessary. The city, to my knowledge, has
2 not traditionally, as most governmental entities have not,
3 to my understanding, built their own public works with
4 their own work force, but it is a method that might be
5 available to them and would present certainly different
6 issues than are presented in this challenge.

7 QUESTION: Did you say, Mr. Kudatzky, at the
8 outset of your argument that your reliance is primarily on
9 Hicklin?

10 MR. KUDATZKY: Yes, Justice. We find little to
11 distinguish this case from Hicklin, although it is
12 clearly --

13 QUESTION: Well, I notice that the New Jersey
14 Supreme Court -- I gather this is the bottom line, isn't
15 it, because the Camden ordinance does not affect "the
16 states' treatment of each other's residents," citing
17 Hicklin. It does not violate any privilege. That you
18 think is error.

19 MR. KUDATZKY: Yes. We believe the Court read
20 Hicklin and the Privileges and Immunities Clause in
21 general in a very moderate fashion in that respect.

22 Pennsylvanians do not have access to New Jersey
23 political processes that other persons in New Jersey would
24 have access to.

25 Justice Marshall, in the Austin case, noted the

1 importance of the political accountability rationale in
2 dealing with privileges and immunities questions.

3 The fact that New Jersians might, if this Court
4 agrees with me, be in a worse position than Pennsylvanians
5 is not something that I really stop this Court from taking
6 that step. New Jersians have the right to petition the
7 New Jersey legislature to revoke Camden's power to have
8 such an ordinance.

9 And, specifically we believe that more
10 non-residents, given the location of Camden, two miles
11 from the center of Philadelphia, the fourth largest city
12 in the country, are going to be adversely impacted.

13 The New Jersey Court seemed to take into account
14 the entire population of New Jersey which, I suppose,
15 would fall within pretty much a 100-mile radius of Camden.
16 Even within the 100-miles radius, you would pick up New
17 York City, Baltimore, all those areas. There would still
18 be, in my view, more non-residents, although I don't have
19 the statistics to demonstrate that with respect to who is
20 actually within a 100-mile radius of Camden.

21 Unless the Court has any other questions, I will
22 reserve the remainder of my time for rebuttal.

23 CHIEF JUSTICE BURGER: Mr. Foster?

24 --

25 --

1 ORAL ARGUMENT OF N. THOMAS FOSTER, ESQ.

2 ON BEHALF OF THE APPELLEES

3 MR. FOSTER: Mr. Chief Justice, and may it
4 please the Court:

5 The City of Camden here, of course, takes quite
6 a different position than Appellants in this matter and
7 asks that this Court, if it would, to dismiss the appeal
8 and, in the alternative, to affirm the decision of the New
9 Jersey Supreme Court based on what we think are three very
10 critical and important premises.

11 First, that this case before the Court is not
12 ripe for decision because Appellants have established no
13 case of controversy.

14 Secondly, because the Camden ordinance provides
15 a basis for good or best-faith effort to provide hiring
16 preference for 40 percent of those persons employed on
17 construction projects for Camden residents does not
18 violate the Privileges and Immunities Clause and, of
19 course, the equal protection question raised by the
20 Duration Residency Clause has been mooted by amendment and
21 revision of our ordinance.

22 We noted, Your Honors, with a great deal of
23 interest, that the Appellants here have not established
24 any injury either to themselves or any member of their
25 unions. There is no record of any injury, there is no

1 record of any person being denied a job, there is no
2 record of any individual outside the State of New Jersey
3 being denied employment because of the ordinance here that
4 the City of Camden has established.

5 There are no concrete facts for this Court to
6 determine whether, in fact, if not an actual privileges
7 and immunities issues has been raised by the Appellant.
8 We have no factual backdrop to determine how many persons,
9 if any persons, have been injured by this ordinance passed
10 by the City of Camden.

11 We think that one of the reasons why there has
12 been no factual backdrop or no clear definition of a
13 concise injury or concrete establishment of a fact of
14 injury is because Appellants here clearly misapply and
15 misunderstand, in our opinion, the Privileges and
16 Immunities Clause. The Privileges and Immunities Clause
17 itself is a clause historically which is established to
18 develop national unity, a national republic, out of a
19 number of independent sovereign states at the beginning of
20 this country's history.

21 The purpose of it was to form a comity of
22 interests among the states, among the citizens of those
23 states, assuring to the citizens of each state the same
24 fundamental rights and privileges of citizens of other
25 states.

1 Nowhere in the case law, nowhere in the
2 Constitution does the Privileges and Immunities Clause
3 itself deny states their own sovereignty, the sovereignty
4 to solve their own problems, the sovereignty to solve
5 their own local social ills. Nowhere does the
6 Constitution --

7 QUESTION: Would you suggest that Camden could
8 pass an ordinance that said that every contractor
9 performing any construction work in the city, whether for
10 the city or privately, must employ 40 percent Camden
11 residents?

12 MR. FOSTER: No, we don't say that.

13 QUESTION: Why not? Why wouldn't you? Why
14 shouldn't the city have the authority to solve its own
15 problems?

16 MR. FOSTER: All right. We could say that, Your
17 Honor. We don't say that, however, is what I mean.

18 QUESTION: Because of Hicklin?

19 MR. FOSTER: Well, yes, because of Hicklin, but
20 because of the far reaching impact of the ripple effect,
21 of course, that Hicklin has established.

22 We feel that the Privileges and Immunities
23 Clause does not deny a state or local government from
24 solving its own problems. We don't feel as though it says
25 that at all. It does not say that in fact. In fact, as

1 we look at a number of cases -- this Court has stated in
2 Federal Energy Regulatory Commission v. Mississippi that
3 the idea of states solving their own local ills is no
4 judicial myth. States, in fact, promote the idea of
5 states as laboratories to solve their own local problems.

6 Here the City of Camden, a city with severe
7 labor, economic, and social problems is attempting to do
8 that very -- to achieve that very goal, solving its own
9 local problems. The city, which, by the way, has an
10 unemployment rate of over 20 percent, over twice that of
11 the national record, and, of course, as counsel stated
12 something to the effect that it would be a blunderbuss
13 fashion to solve a social ill. This is no blunderbuss
14 fashion to solve a social ill. It is the attempt by the
15 City of Camden to ameliorate serious social problems
16 facing its unemployed persons.

17 We feel in no way this ordinance would simply
18 ask that a contractor who comes into Camden to work on
19 public works projects in the cost range of over \$50,000
20 make a good faith effort to provide employment for -- in
21 terms of its hiring practice hire 40 percent citizens of
22 the City of Camden.

23 I think it is important also for us to stress at
24 this point that there are no penalties for a contractor
25 who fails to reach the 40 percent. In fact, there is a

1 very good possibility the 40 percent could be all members
2 of this union here or --

3 QUESTION: Mr. Foster?

4 MR. FOSTER: Yes, sir.

5 QUESTION: You said a moment ago that you
6 thought there was no concrete case of controversy here. I
7 was just looking over the opinion of the Supreme Court of
8 New Jersey, on page A2 of the jurisdictional statement,
9 and the only sense I could find in there was Appellant
10 United Building and Construction Trades Council, an
11 association of labor organizations, challenges state
12 approval of the Camden program as both unauthorized under
13 New Jersey law and unconstitutional. How did this case
14 work its way into the New Jersey court system?

15 MR. FOSTER: Your Honor, it was -- It worked its
16 way into the New Jersey court system in a very interesting
17 fashion. According to New Jersey statute in terms of
18 anti-discrimination law, the State Department of the
19 Treasury, its affirmative action ordinance, has the right
20 to endorse any local plan. We call this, in effect, the
21 Camden plan. The Camden City Council adopted this
22 ordinance and it became effective once it was approved by
23 the state affirmative action officer.

24 QUESTION: It could not have become effective
25 without that?

1 MR. FOSTER: That is correct, Your Honor. (

2 At that point in time, once this case was
3 approved by the Department of the Treasury or the state
4 affirmative action officer, the Appellants here then took
5 the case directly, following an administrative decision --
6 it was an administrative decision -- into the New Jersey
7 Appellate Division, Superior Court Appellant Division.
8 That is under Rule 256 of New Jersey Court Rules which
9 says that a party may at any time, if it opposes or feels
10 aggrieved by an administrative ruling, the state may go
11 directly into the Appellate Division. And, this is what
12 the Appellants here elected to do. That is why there was
13 no concrete record below.

14 QUESTION: This was really at the formative
15 stage of the Camden ordinance. It was just getting off
16 the ground.

17 MR. FOSTER: That is correct, Your Honor. That
18 is exactly -- The ordinance had just been approved by the
19 State Treasurer. Immediately they appealed to the
20 Appellate Division of the New Jersey Superior Court.

21 We feel, Your Honors, that this case in no way
22 threatens any person who is not a resident of the State of
23 New Jersey because it places persons within the State of
24 New Jersey in the same precise predicament and posture as
25 persons outside the State of New Jersey.

1 QUESTION: Excuse me, Mr. Foster.

2 MR. FOSTER: Yes, sir.

3 QUESTION: I gather the Appellate Division did
4 not -- There was no decision there. The Supreme --

5 MR. FOSTER: Yes.

6 QUESTION: -- Court certified --

7 MR. FOSTER: Certified directly. In other
8 words, it was never heard by the Appellate Division,
9 Your Honor. It went directly to the New Jersey Supreme
10 Court.

11 One of the points we try to make on this case is
12 that no one is -- No state citizens of New Jersey is
13 advantaged or given an advantage because of state
14 citizenship and no out-of-state citizen is denied an
15 advantage because of out-of-state residency in this
16 particular ordinance. There is no benefit to being a New
17 Jersey resident just as there is no disadvantage to being
18 an out-of-state resident. Therefore, we do not feel that
19 this matter falls under ambiance of the Privileges and
20 Immunities Clause as traditionally has been argued.

21 We feel that in terms of the Hicklin case, which
22 was argued by the Appellants, that there is a different
23 case altogether. There are similarities, however, we
24 feel that the Hicklin case goes much further than the
25 Camden ordinance in terms of its ripple effect.

1 If we look at the Hicklin case, we can see where
2 the advantages of the Alaskan hire law even went to
3 suppliers of subcontractors and it was very difficult, as
4 this Court has stated for the Court to even determine how
5 remote or how the attenuating factors involved in this
6 case affected or achieved the goals that were to be
7 affected by this hire law.

8 Our particular ordinance is specific, it is to
9 the point, and applies only to persons working on public
10 works projects for the City of Camden.

11 Another point that I think is important in terms
12 of privileges and immunities argument is that no person is
13 denied any fundamental right here. There is no
14 fundamental right to work on a construction project for
15 the City of Camden. And, when we weigh that particular
16 factor with the interest the city has or the state has in
17 developing its urban infrastructure or the development of
18 those citizens within our city, we feel that weighing the
19 fundamental right alleged here and the interest of the
20 state far outweigh the particular argument being made by
21 counsel.

22 What we also want to impress upon this Court,
23 that the City of Camden, like so many other cities in the
24 northeastern part of our country and throughout this
25 country, as they become older, find that one of the

1 remaining resources available to those cities is the
2 rehabilitation, revitalization, remodernization of the
3 city's infrastructure. We feel that the development of a
4 city for those persons who continue to live there, for
5 those new industries or services who wish to move there,
6 redevelopment of highways, facilities such a bridges,
7 sewers, whatever, is a new resource and new industry
8 facing our cities, the redevelopment of our transportation
9 systems. And, we feel that the City of Camden, as well as
10 the State of New Jersey, has an interest in seeing to it
11 that its citizens benefit directly from the need to
12 rehabilitate and revitalize the infrastructure of our
13 cities.

14 The important factor here again is that the City
15 of Camden is not here attempting to develop some sort of
16 obstructionist goal or doctrine of trying to keep people
17 out. In fact, we welcome people to come into the City of
18 Camden. What we are attempting to do here is to pass
19 affirmative social legislation to benefit the citizens of
20 our city and we do not in any way violate the Privileges
21 and Immunities Clause in doing so.

22 QUESTION: Of course, what you don't want to
23 happen is to have people cross the Delaware River from
24 Pennsylvania and come to work in Camden by day and go back
25 to their Pennsylvania homes by night. That you have

1 prohibited I take it.

2 MR. FOSTER: Well, we -- I can't say, Your
3 Honor, that we don't want that. We don't want that if it
4 is, in effect, going to take jobs away from Camden
5 citizens certainly.

6 If we are talking about, and I think it is a
7 very important factor here, where construction companies,
8 using your example, are hiring people from Philadelphia
9 while Camden people go unemployed, then, of course, yes, I
10 agree exactly with what you are saying.

11 I think the point is very interesting here about
12 unions' posture in this entire case. We see several
13 things here. Number one, the unions obviously must have
14 some people who belong to it who benefit from our
15 ordinance. Keep in mind that our ordinance says make a
16 best-faith effort to hire 40 percent residents in terms of
17 manpower. Obviously, it would seem to me, that a union
18 that would come into Camden or a construction company that
19 would come into Camden to work would normally, ordinarily
20 hire persons who worked in the City of Camden.

21 QUESTION: What difference would it make whether
22 the Union members are benefited or not to the issues in
23 this case?

24 MR. FOSTER: Well, Your Honor, it does in terms,
25 we feel, in position of standing. We find that the union

1 is somewhat in conflict if it has members of its union
2 who, for instance, are benefiting from the preference
3 clause or -- as well as those they say who don't benefit
4 or are injured by it.

5 QUESTION: Last year we had a case where I think
6 the League of Women Voters in Wyoming was challenging the
7 apportionment of one particular county. Now, you wouldn't
8 throw the League of Women Voters out because they had a
9 member who lived in that county and might benefit?

10 MR. FOSTER: No. No, I would not, Your Honor.

11 The point is that I think in addressing the
12 Chief Justice's question as I recall it is that the
13 posture we are taking is that the standing issue is one
14 that has to be addressed. It is one that we feel has not
15 been addressed by the posture of the unions in this case.

16 QUESTION: May I ask, would your argument be
17 different, instead of 40 percent it were 100 percent?

18 MR. FOSTER: No, Your Honor, it would not be.

19 QUESTION: So, you would agree, of course, then
20 that Philadelphia could have imposed the same kind of
21 requirement on --

22 MR. FOSTER: We see no difficulty with that at
23 all.

24 QUESTION: It would be better if each city
25 preferred its own citizens rather than let anybody cross

1 the river.

2 MR. FOSTER: Your Honor, I didn't --

3 QUESTION: I can see that this sort of ordinance
4 cuts both ways for people in Camden it seems to me.

5 MR. FOSTER: No, I would disagree with Your
6 Honor. That was a point that the Appellants make here
7 about what they call economic vulcanization or parochial
8 interest.

9 We feel that in terms of the privileges and
10 immunities argument that if a state -- I don't think any
11 state or any city can just simply make a rule saying that
12 you must hire our own and keep out other people and that
13 is the point that I am trying hard here to impress upon
14 the Court. I think that would be a violation of
15 privileges and immunities.

16 However, the Privileges and Immunities Clause
17 has certain principles. One, of course, as long as the
18 discrimination is not based upon alienage or based upon
19 residency, that, of course --

20 QUESTION: But here it is based on residency.

21 MR. FOSTER: Well, no, it is not based on
22 residency, Your Honor, because this is not an ordinance
23 that simply says that out-of-state residents or --

24 QUESTION: Residency in the city. You have got
25 to be a resident of Camden to get to be one of the --

1 MR. FOSTER: Yes, but that is not, Your Honor, a
2 privileges and immunities argument. We don't take that
3 position. This is based on municipal residency, not state
4 residency.

5 QUESTION: Yes, but if you are -- You say you
6 have to be a Camden resident, but if you are a Camden
7 resident, you are a resident of the state.

8 MR. FOSTER: That is correct.

9 QUESTION: So, you are preferring certain state
10 residents, certain residents of New Jersey to
11 non-residents of the state.

12 MR. FOSTER: We are providing a preference for
13 certain residents, those are residents of the City of
14 Camden.

15 QUESTION: Mr. Foster, do you suggest this case
16 would be some how different if the State of New Jersey had
17 enacted a state-wide law saying that Camden shall grant 40
18 percent preference to its local residents?

19 MR. FOSTER: Well, Your Honor, I think in fact
20 this is our case in terms of the facts established because
21 the State of New Jersey --

22 QUESTION: It seems to me that way too. I
23 gather from one of your comments in response to one of my
24 colleagues that where perhaps the State of New Jersey
25 couldn't enact a statute, it would have exactly the ame

1 effect as the Camden ordinance. Somehow the City of
2 Camden can do it because there is an ordinance of just
3 kind of local -- by a local governing body rather than a
4 state-wide law. Do you take that position?

5 MR. FOSTER: Your Honor, I don't see that as
6 being in violation of the Privileges and Immunities
7 Clause. No, I don't. I do take that position, yes.

8 QUESTION: But, you would say the case would be
9 different. At least you would be making a different
10 argument if the state enacted a law saying that 40 percent
11 of all the people who are working on contracts that the
12 state is financing must be residents of the State of New
13 Jersey. That would be a different case. I don't know how
14 you would -- At least you would say that case is not here
15 because --

16 MR. FOSTER: I would like to say this case is
17 not here, but I am not clear, Your Honor, if the case
18 would fail for that reason. I think one of the things
19 that was very important in the Hicklin case, and even in
20 the case of Toomer against Witsell, was that those cases
21 indicated that the Privileges and Immunities Clause is not
22 an absolute; that there can be distinction made between
23 citizens and non-citizens and one of the factors was
24 whether or not a state had a possessory interest in any of
25 the factors concerned such as its own resources, money, or

1 whatever.

2 There is another factor that I would like to
3 argue here. There has been some discussion about the White
4 case, White against Massachusetts Council of Construction
5 Employers. That case, of course, was founded on the
6 Commerce Clause, found that that case did not violate the
7 Commerce Clause.

8 I think it is important for us to point out that
9 we feel that the Commerce Clause and the Privileges and
10 Immunities Clause are mutually reinforcing doctrines, each
11 attempting in its own way to establish a certain sense of
12 national unity; one vis a vis the flow of commerce, the
13 other through the flow of persons and privileges and
14 fundamental rights of citizens through the states.

15 We feel that there are times, for instance, when
16 a state does get involved in commerce, as long as it is
17 acting as a market participant rather than a market
18 regulator, that it may get involved in commerce and
19 somehow involve itself in the flow of commerce. As long
20 as the state is using its own money and it may distinguish
21 and favor citizens of that state which was certainly the
22 case in this Court's opinion in Hughes v. Alexandria
23 Scrap, Reeves and Stake.

24 I think the same thing can be said true about
25 the Privileges and Immunities Clause, that there are times

1 when the state -- when it can in the protection of certain
2 vital state interests find that it can and should favor or
3 distinguish or make distinction between its own citizens
4 and other citizens.

5 I don't feel that when those vital interests
6 are -- When those particular factors are prevalent that
7 there is a violation of the privileges and immunities of
8 any particular individual.

9 We also find it interesting that here a Council
10 of Trade Unions, who probably feel that a clause in a
11 contract that says buy American is patriotic, but on the
12 other hand, a clause in a contract that says hire local is
13 unconstitutional. We do not feel that the statute here or
14 the ordinance of the City of Camden, which attempts to
15 ameliorate certain local evils, addresses specifically
16 those evils, and simply requests of those contractors who
17 do business with it to try to hire our own.

18 In the Appellant's brief, they speak in strong
19 terms of our ordinance being exclusionary, denying access
20 to out-of-state persons.

21 The concern that we have here is that that is
22 not true and if one reads that ordinance carefully you can
23 see that it excludes no one and denies no one access and
24 impinges upon no one's constitutional right. It is merely
25 an effort by the City of Camden to address a very grave

1 social issue by passing what it thinks is an affirmative,
2 positive, social legislation to cure a local ill. And, we
3 feel that we should pass reference the Privileges and
4 Immunities Clause because we do not feel as though it
5 reaches that level.

6 Unless there are any further questions --

7 QUESTION: Mr. Foster?

8 MR. FOSTER: Yes.

9 QUESTION: Perhaps you have stated this, but I
10 want to be sure. Do you, representing the Mayor and
11 Council, rely on the proposition that the Privileges and
12 Immunities Clause does not apply to classifications drawn
13 on the basis of a municipal as opposed to state residency?

14 MR. FOSTER: Yes, Your Honor, we do rely on
15 that.

16 QUESTION: Because that is the first point in
17 your corespondent's brief.

18 MR. FOSTER: That is true. That is our point,
19 Your Honor. It is not -- I thought we had addressed that
20 to one of your colleagues. That it is not municipal --
21 Because it is municipal residency rather than state
22 residency --

23 QUESTION: But suppose every municipality in
24 the State of New Jersey did the same thing?

25 MR. FOSTER: Your Honor, we feel two ways about

1 that. Number one, we don't think it will happen. If it
2 did, we don't see anything -- We don't see that violating
3 privileges and immunities constitution, the Privileges and
4 Immunities Clause.

5 QUESTION: No, but I gather you would say that
6 situation would present a problem that the city ordinance
7 does not under the --

8 MR. FOSTER: Yes. We would concede that if that
9 were to happen, then the State of New Jersey -- and if the
10 ill effects attained, then we think the State of New
11 Jersey then would have an obligation to --

12 QUESTION: And, I gather you don't think the
13 requirement of the state's approval of the ordinance makes
14 this a state enactment rather than a municipal one?

15 MR. FOSTER: Well, Your Honor, that is the
16 position the Appellants take, because the State of New
17 Jersey has -- this Department of Treasury has sanctioned
18 or approved our ordinance, that it is state action. Our
19 position is that it is really a municipal ordinance
20 created by the City of Camden to cure local evils within
21 the --

22 QUESTION: I thought you earlier said, and I
23 thought it made good sense, that even if the State of New
24 Jersey had passed a statute saying that Camden, all Camden
25 contracts --

1 MR. FOSTER: Yes.

2 QUESTION: -- should have 40 percent Camden
3 residents employed, that it would be the same case.

4 MR. FOSTER: That is correct.

5 QUESTION: Because it would be conditioned on
6 municipal residency rather than state residency.

7 MR. FOSTER: Yes. Apparently I answered that
8 question differently.

9 QUESTION: Would it also be the same case if the
10 New Jersey legislation said every city such as Camden and
11 every other New Jersey city bordering on another state
12 shall require local residency as a requirement, sort of
13 applied to each of the cities if you can cross the river
14 and commute to?

15 MR. FOSTER: Your Honor --

16 QUESTION: One of the other rivers. There are
17 different rivers I believe.

18 MR. FOSTER: I don't see any difficulty with
19 that under the Constitution. I think that --

20 QUESTION: As long as some part of New Jersey is
21 not covered by the statute.

22 MR. FOSTER: Well, I would assume that could be
23 true, Your Honor.

24 I think the thing we have to look at is what are
25 we asking or what are we trying to legislate? Remember,

1 that the ordinance of the City of Camden states very
2 specifically that for any contractor who performs public
3 works projects for the City of Camden, paid by the City of
4 Camden, either in whole or in part or through funds
5 administered by the City of Camden, attempt to hire 40
6 percent -- Attempt to hire in his work force 40 percent
7 residents of the City of Camden.

8 There is no fundamental right to working on a
9 public works project in the City of Camden. There is no
10 fundamental right to work in a public works project in
11 Trenton, Cherry Hill, Elizabeth, Jersey City, or Newark.
12 So, I would say that in terms of that there would be no
13 fundamental rights involved.

14 Of course, as stated earlier, there are a number
15 of cases, McCarthy v. Philadelphia, Detroit Association
16 against Detroit, it has been determined that even the
17 right to direct employment with a municipality is not a
18 constitutional right or fundamental right.

19 If there are no further questions, Mr. Chief
20 Justice --

21 QUESTION: Counsel, just as a matter of
22 interest --

23 MR. FOSTER: Yes.

24 QUESTION: -- has the population of Camden
25 declined in the decade of the 70s?

1 MR. FOSTER: Yes, Your Honor, tremendously. In
2 1970, the population of the City of Camden, I believe, was
3 approximately 103,000 persons. In 1980, it had dropped to
4 85,000.

5 QUESTION: Does the record show what percentage
6 of the present population is on relief?

7 MR. FOSTER: Your Honor, approximately 34
8 percent of the population of the City of Camden is
9 receiving some type of social relief, welfare assistance.
10 It represents approximately one-third of our population.
11 Camden is also a community which is approximately 75
12 percent minority and, of course, our unemployment rate is
13 approximately 20 percent, twice that of the nation, and
14 some five or six percent higher than the State of New
15 Jersey.

16 QUESTION: Thank you.

17 CHIEF JUSTICE BURGER: Do you have anything
18 further, Mr. Kudatzky?

19 MR. KUDATZKY: Yes, Mr. Chief Justice.

20 CHIEF JUSTICE BURGER: You have ten minutes
21 remaining.

22 ORAL ARGUMENT OF STEVEN K. KUDATZKY, ESQ.

23 ON BEHALF OF THE APPELLANT -- REBUTTAL

24 MR. KUDATZKY: Justice Powell, with respect to
25 that very point, the City of Philadelphia has suffered

1 many of those same problems over the last decade. There
2 is no evidence and no basis for assuming that
3 Philadelphians or Pennsylvanians or Delawarians have
4 caused any of these problems to be suffered by Camden.

5 I would also like to concur with, I believe,
6 Justice Stevens' observation that this case must be
7 analyzed as if it were 100 percent preference here,
8 because clearly, I believe, that if the city can do 40
9 percent, they can require 100 percent preference and that
10 the case should be analyzed in that fashion.

11 QUESTION: Do you agree with the city attorney
12 that there is nothing in this record to show that anyone
13 has been injured?

14 MR. KUDATZKY: No, Justice, I do not. We
15 started this case as early as we could. We didn't want to
16 wait and file a 1983 action after people had actually lost
17 jobs. The ordinance came into effect upon its approval by
18 the state affirmative action officer. Under New Jersey
19 law, the exclusive method of reviewing state
20 administrative agency action is by appeal to the Appellate
21 Division. At that point, once the ordinance came into
22 play, non-residents, out-of-state residents, seeking to
23 work on construction projects were the victims of a
24 diminution in their job market, that diminution being 40
25 percent of the component of that job market represented by

1 City of Camden public works projects, which is not an
2 insubstantial amount.

3 While I cannot name an individual who has
4 suffered the loss of a job at this point, it seems
5 undeniable to me that some day someone is going to
6 actually lose a job, but presently people are having a
7 diminution.

8 QUESTION: Why not file suit when that happens?

9 MR. KUDATZKY: Pardon me?

10 QUESTION: Why not file suit when that happens?

11 MR. KUDATZKY: Well, we didn't think that it was
12 necessary or appropriate to wait that long.

13 QUESTION: But, you do agree that nobody --
14 There is nothing in the record that shows anybody applied
15 for a job and was denied employment?

16 MR. KUDATZKY: I will agree that no specific
17 individual has done that. We do assert, nevertheless, the
18 standing does exist because these persons are likely to
19 suffer the detriment. That detriment is traceable to the
20 ordinance and, in fact, they are presently suffering a
21 detriment in the reduction of their employability
22 represented by the resident preference.

23 I would again note that we are representing or
24 asserting rather the rights of out-of-state employees. We
25 are not here defending the contractors. It is irrelevant

1 in my view what penalties or non-penalties might exist for
2 contractors.

3 In this case, even if one out-of-state resident
4 loses a job or an employment opportunity, I think that is
5 sufficient to confer standing and to create a privileges
6 and immunities controversy cognizable by this Court.

7 With respect to the point that we are asserting
8 a right to work on Camden public works projects, I
9 disagree that the right being asserted is so specific.

10 In Hicklin v. Orbeck people could have work on
11 non-oil and gas related jobs in Alaska, yet the fact that
12 those jobs were denied them was deemed sufficient to
13 trigger the applicability of the clause.

14 In Toomer, the shrimp people could have gone and
15 fished for something besides shrimp or fished beyond the
16 three-mile limit, yet that constriction of their
17 employability was sufficient.

18 We see a trend already under way in New Jersey
19 where two other jurisdictions have enacted protectionist
20 preference ordinances perhaps as a result of the New
21 Jersey Supreme Court's ruling here. I think the
22 Privileges and Immunities Clause would be gutted,
23 literally gutted if it is not applicable to municipal
24 residents' discrimination. It would be no different than
25 allowing the state to accomplish via the backdoor what it

1 cannot accomplish directly.

2 In State of New Jersey versus City of
3 Philadelphia, New Jersey could vend Philadelphia's trash
4 on a county-by-county or municipality-by-municipality
5 basis. If it could do that, but couldn't do it directly,
6 this Court's ruling would have been eviscerated.

7 We see a day coming when people will only be
8 able to work where they live. Philadelphia surely has
9 cause now to enact a retaliatory resident preference
10 ordinance and a number of Camden residents would be
11 penalized by that certainly. Other municipalities in New
12 Jersey have reason to do that. 1984 is coming. We
13 would not like to see this Court encourage in any way a
14 system which could lead ultimately to an internal passport
15 system where people --

16 QUESTION: Well, no one suggests that -- At
17 least under our cases there is a limit on what they can do
18 about private employment.

19 MR. KUDATZKY: Correct.

20 QUESTION: We are just talking about public
21 employment here.

22 MR. KUDATZKY: Well, the public --

23 QUESTION: We are talking about the employment
24 by contractors doing business with the city.

25 MR. KUDATZKY: Yes. That, nevertheless, in the

1 building and construction trades these days is virtually
2 the entire field. There is little -- Certainly in Camden,
3 there is little going on that is not public-works related
4 in the broadest sense.

5 With respect to the divided loyalty question,
6 clearly some members of our unions are Camden residents
7 and are being benefited, however, they, I believe, would
8 rather see this type of protectionism struck down because
9 they know that they are going to be the victims when it is
10 Philadelphia or another Camden suburb that enacts the
11 ordinance.

12 There is no reason to think this is going to
13 stop at Camden's door. There are 521 municipalities in
14 New Jersey. All of them could do the same thing and
15 certainly a vast number more throughout the country.

16 The goal of revitalization cited by the city
17 simply is not well served by pitting Camden against its
18 neighbors, particularly its out-of-state neighbors in this
19 respect.

20 We believe the Privileges and Immunities Clause
21 applies here and limits the rights of the city in
22 preferring its own residents or trying to ensure to them
23 the benefits of some of its expenditures when they try to
24 do it this way. Regulation of private employment is
25 simply beyond any concept validated by this Court of state

1 or municipal sovereignty. There are differences. They
2 are doing it in a constitutionally impermissible fashion
3 in this case. It is not to say that they cannot do it in
4 some other fashion and accomplish substantially a similar
5 result.

6 I have nothing further.

7 CHIEF JUSTICE BURGER: Thank you, gentlemen, the
8 case is submitted.

9 We will hear the next case at 1:00.

10 (Whereupon, at 11:58 a.m., the case in the
11 above-entitled matter was submitted.)

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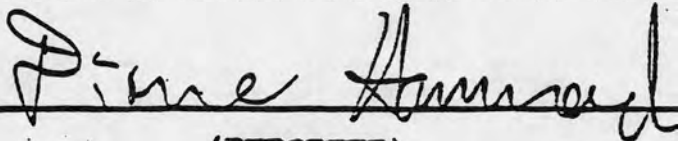
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Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#81-2110 - UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY, Appellant v. MAYOR AND COUNCIL OF THE CITY OF CAMDEN, ET AL.

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

BY



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