ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-498 & 83-573

TITLE G. MICHAEL BROWN, ETC., ET AL., Appellants
v.
HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, ET AL.; and

MARTIN DANZIGER, ETC., ET AL., Appellants
v. HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, ET AL.

PLACE Washington, D. C.

DATE March 26, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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G. MICHAEL BROWN, ETC., ET AL., :

Appellants, :

v. : No. 83-498

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BARTENDERS INTERNATIONAL UNION :

LOCAL 54, ET AL.; and :

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Washington, D.C.

Monday, March 26, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:51 o'clock a.m.

APPEARANCES:

ANTHONY J. PARRILLO, ESQ., Assistant Attorney General of New Jersey, Trenton, New Jersey.

LAURENCE GOLD, ESQ., General Counsel, AFL-CIO, Washington, D.C.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Brown against Hotel and Restaurant Employees and the consclidated case.

Mr. Parrillo, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ANTHONY J. PARRILLO, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. PARRILLO: Thank you.

Mr. Chief Justice, and may it please the Court. This matter is here on appeal from the Third Circuit's decision declaring preempted a provision of New Jersey law which disqualifies certain labor union officials on the basis of state prosecribed criminal or quasi-criminal conduct from asscciation with our casino gaming industry.

That provision, Section 93 of New Jersey's Casino Control Act, is but part of a larger comprehensive statutory and regulatory scheme of casino control which is designed nct cnly to prevent the industry's infiltration by criminal elements or their agents, but alsc tc avcid any public perception that such a foothold is even available.

The issue the is whether New Jersey's exercise of its police power over conduct incompatible with the

well regulated casino industry impermissibly clashes with rights accorded unions and their members by federal labor law.

The facts here are not in dispute, and are basically a matter of historical, judicial, and legislative record. In 1976, New Jersey, within the sole confines of Atlantic City, legalized casino gambling, and spawned an industry that had been criminally outlawed for over 200 years in our state.

Intended as a tool to revive a decaying region in our state and to fund worthy programs for the benefit of our seniors and handicapped citizens, the casino gaming industry is vitally and strongly affected with a deep public interest. No matter how great its rewards, New Jersey would tolerate casino gaming only if it were regulated and controlled in such a manner as to avoid any risks to which the public would be exposed by legalizing this heretofore unlawful activity.

Thus, aware of the uniqueness of the industry, its historical susceptibility to crime and corruption, and the documented hazards associated with gambling generlly, our legislature enacted the toughest and the tightest set of casino rules perhaps in the world. The very prospect of such comprehensive legislation was the basis upon which New Jersey citizens consented to casino

gaming in the first place.

The distinction between this business of casino gaming and useful trades and occupations is substantial, and it compels a state regulatory interest in every aspect of casino activities, as well as those ancillary enterprises and individuals involved either directly or indirectly with a licensed casino operation.

Our legislature included within this latter class casino hotel labor unions, because by virtue of the relationship, of their relationship with the licensed employees they represent, and the licensed employer they collectively negotiate with, such unions are positioned to exert significant control and influence over the conduct of legalized casino gaming in New Jersey.

Thus, Section 93 of our Casino Control Act is basically an information gathering device for the state, and it requires that each union representing casino hotel workers as well as its leadership register and file disclosure forms with the Casino Control Commission.

This information in turn assists the sister agency, that is, the Division of Gaming Enforcement's investigation into whether these casino labor officials have engaged in any of the essentially criminal or

quasi-criminal conduct proscribed by another section of the Casino Control Act, and that is Section 86.

If proof of such conduct is uncovered, the Casino Control Commission is empowered to hold a full evidentiary trial type hearing. Upon finding a disqualifying event, the Commission may order that sanctions befall the union if the disqualified official remains in office. These sanctions, the ban on dues collection in employee benefit plan administration, whether applied singly, as in this case, or jointly, serve only to encourage the removal of the disqualified officer, and decidedly not to disqualify the union as an entity or as an organization.

The rest is history. In 1978, appellees Local 54 as well as its leaders did register and file the requisite disclosure forms with the Casino Control Commission. When the results of the Division of Gaming Enforcement's investigation were reported to it, the Commission scheduled a hearing. After appellee's motion in the Federal District Court to preliminarily enjoin the proceeding was denied, the Commission proceeded to a hearing and a decision, and that decision found three of Local 54's officers disqualified in accordance with the statutory criteria of Section 86.

The Commission then ordered that if these

three individuals were to remain in union office by a certain day, then the sanction of a dues collection ban would follow. The Commission determined not to invoke the other remedy available to it, and this order, of course --

QUESTION: This was what?

MR. PARRILLO: The other remedy available to the Commission was the ban, Justice White, on Local 54's administration of employee benefit plans.

QUESTION: Do you think the state could just have a general statute that generally imposed some kind of qualifications for holding a union office? For example, what if a state statute said no person who has been convicted of a felony may be president of any labor union in the state?

MR. PARRILLO: That is certainly not the case here.

QUESTION: Well, I know, but --

MR. PARRILLO: As I understand the question, I don't believe a state can do that without the proof of a demonstrable or of a compelling need to do so, and that concededly would be very hard to establish, much the same way that it was not established in Hill versus the State of Florida. If the sole purpose of the statements --

QUESTION: But you think you may achieve the same, almost the same result by imposing sanctions? I mean, if the sanctions are legal, it is going to be awfully hard for those officers to stay in office.

MR. PARRILLO: In the context of the casino union, that is the primary purpose of the sanction on -- of dues collection ban.

QUESTION: Yes.

MR. PARRILLO: And that is to remove the union officer. It is a more -- a less direct way than direct injunction against the union. I would now like to outline --

QUESTION: But you would say in the casino context, would you, that the state could just flat outright prohibit them from holding office. They wouldn't have to go about it indirectly.

MR. PARRILLO: I believe that is --

QUESTION: Would that be your position?

MR. PARRILLO: Yes. In fact, Justice O'Connor, our sister state, Nevada, who is amicus in this case, has a provision in its Casino Control Act which allows their Gaming Commission to go into federal -- into state district superior court to enjoin the actual service of the disqualified labor official from office. That is not part of our statute. Whether that

remedy is available to the regulatory agencies in New Jeresy is at this point an open question of state law. This is the first application of the statute in New Jersey.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

MR. PARRILLO: Thank you.

(Whereupon, at 12:00 o'clock p.m., the Ccurt was recessed, to resume at 12:59 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: You may continue, Mr. Parrillo.

ORAL ARGUMENT OF ANTHONY J. PARRILLO, ESQ.,

ON BEHALF OF THE APPELLANTS - RESUMED

MR. PARRILLO: Thank you, Mr. Chief Justice, and may it please the Court.

I would now like to briefly outline our four-point program of legal argument, which will focus in on whether Section 93 is preempted by the Taft-Hartley or Landrum-Griffin Acts.

I would, with this Court's permission, and if there are no questions, I would like to rely upon our brief for the other issues involved.

Our legal argument will begin with an analysis of the scope of the federal right in issue, namely, Section 7 of the Taft-Hartley Act, which appellees contend is totally preemptive, and which we submit on the basis of DeVeau versus Braisted in the 1959 Congressional enactment of Landrum-Griffin is necessarily less than absolute. We will then proceed to establish a Congressional intent to accommodate in certain limited instances the ability of the states to -- the state here to impose disqualification standards more stringent than those of federal law.

Such an intent is gleaned from essentially three events. Number One, the Congressional acquiescence in 1953 in state imposed eligibility standards upon a certain class of labor union officials, namely, those involved in the waterfront. Second, the affirmative grant of state authority explicit in Section 603 of Landrum-Griffin. And three, DeVeau's express ruling and appellees' proper concession that Landrum-Griffin does not preclude states from operating in this field.

Given the absence of a compelling Congressional direction to prevent, we will then demonstrate how Section 93 serves a unique and compelling state interest which on balance outweighs the minimal impact, if any, on the Section 7 right. The particular susceptibility of the state created and public interest charged industry to crime and corruption instinctively evokes the police power of state government and readily distinguishes this case from any other which may come before this Court in the labor preemption field.

Finally, we will show that the means by which New Jersey enforces its casino labor control program, particularly the ban on dues collection invoked in this case, is a necessary and permissible adjunct to our

power to legislate disqualification standards for casino labor officials. This case involves the choice of labor leaders, and in our view Section 7 of Taft-Hartley is neither as express nor as absolute as appellees or for that matter the Third Circuit majority would have it. Indeed, Mr. Justice Frankfurter writing for the Court in DeVeau versus Braisted declined to decide that case mechanically on an absolute concept of free choice.

QUESTION: Did he write for the Court?

MR. PARRILLO: Mr. Justice Frankfurter did. Yes, Justice Blackmun. He declined to decide that case mechanically, opting instead to weigh --

QUESTION: In other words, there were five votes in his opinion?

MR. PARRILLO: There were, on the issue of whether the Landrum-Griffen Act preempted state -- the New York Waterfront Act, there were five votes, Mr. Justice Brennan concurring in the opinion, and particularly on that portion of the opinion which dealt with the Landrum-Griffin Act. Mr. Justice Frankfurter spoke for four justices, a plurality, on the view that the National Labor Relations Act did not preempt all states' regulation of the employee freedom of choice.

In any event, Justice Frankfurter decided to weigh the competing interest involved and to determine

whether Congress would have intended to preempt the state legislation that was in issue. If there be any doubt on that score, well, Congress itself in 1959, through the enactment of Landrum-Griffin, established that the Section 7 right was not unfettered, and that national labor policy admits of some limitations.

Indeed, Section 504 of that Act establishes minimum standards for and prohibits certain individuals from holding union office. Thus, Section 7, even if it ever did, does not now guarantee unlimited employee freedom of choice. That choice is obviously and necesarily limited by the operation of federal law itself. Equally clear is that national labor policy allows some state regulation of the complete freedom of a group of employees to designate representatives of their own choosing.

In fact, DeVeau held that Section 8 of the New York Waterfront Act which permanently disabled all expellants from serving in union office did not deprive a Section 7 right, but merely placed a limited restriction on its exercise. This holding is all the more significant when one considers that New York law was prohibiting certain convicted individuals from holding union office even though federal law would have allowed them to serve.

Earlier, in 1953, Congress had approved the bi-state compact which was later at issue in DeVeau, and expressly endorsed the state's supplementing legislation, of which Section 8 was a part. In lending its support to New York's method of enforcement, Congress clearly indicated that it did not view all state regulation of union officer qualifications as incompatible with federal labor policy.

On the contrary, Congress manifested its general willingness to tolerate in certain limited situations more stringent state regulation even if it included a component which restricted the Section 7 right. This conclusion again is reinforced by the passage of Landrum-Griffin in the absence of an express provision within Section 504 preempting state action.

This was a telling omission, since as other sections of Landrum-Griffin indicated, where Congress meant to preclude the operation of state laws, it left absolutely no doubt on that score, and to make the matter conclusive, Section 603(a) of Landrum-Griffin affirmatively preserves the operation of state laws such as Section 8 of the Waterfront Act and by necessity Section 93 of the Casino Control Act.

Justice Frankfurter stated for the DeVeau plurality Section 603(a) is an express disclaimer of

preemption of state laws regulating the responsibility of union officers, and again, Mr. Justice Brennan, providing the fifth vote on that ruling, concurred that Landrum-Griffin explicitly provides it shall not displace such legislation of the states.

Confronted with this clear pronouncement of the Court, it is not surprising that appellees concede on Page 27 of their brief that "It is clear that Section 504 does not preempt" the states from establishing more stringent standards for labor union officials.

While the Taft-Hartley Act does not preclude every state policy that may restrict the Section 7 right, neither admittedly does it condone all state incursions. Rather, whether state regulations should be allowed because of the deeply rooted nature of the local interest really involves, as this Court has counseled and commanded in Jones, Farmer, and Sears, a balancing of the state interest against any harm to the federal regulatory scheme established by Congress.

Well, here a compelling and demonstrable need exists to go beyond the federal norm in our unique and localized casino industry. That gambling is a distinctively state problem to be governed and controlled by the states is abundantly clear. As part of New Jersey's overall program of casino integrity,

Section 93 stands as a prophylactic measure designed to keep this cash intensive industry free from the risk of crime or its taint through the back door access provided by ancillary services and including labor unions that are associated with the industry.

The standards for disqualifying casino labor officials achieve that statutory goal by removing such unacceptable risks from positions where they can exert influence and control over casino operations. The exercise of such a compelling state interest neither interferes with the primary jurisdiction of the National Labor Relations Board nor does it impermissibly infringe on a substantive federal right.

As to the former, well, the objectives of New Jersey's law and those of the labor boards are really mutually exclusive and don't provide any opportunity for collision. I think this is most evident in the exercise of the board's jurisdiction in industries such as casino gaming in Nevada and the waterfront in New York and New Jersey. The boards' jurisdiction has historically successfully coexisted with enforcement of local laws in those extensively state regulated industries.

As to the federal guarantee, well, we know from DeVeau, we know from Congressional acquiescence that Section 93 does not deprive employees of their

choice of labor representatives. Again, it merely imposes a limited restriction which, as in DeVeau, as here, it is both narrow in scope and historically explained, which is perfectly compatible with the less than absolute nature of the federal right.

If, then, New Jersey can validly disqualify certain casino labor officials, it necessarily follows that New Jersey can enforce its lawful demands. Thus, Section 93 provides for a ban on dues collection which was invoked in this case, but solely as a means to effect the removal of the disqualified officer from the union, and from, more importantly, association with our casino industry.

The dues collection ban, we submit, is a reasonable and necessary means of achieving the statutory purpose of Section --

QUESTION: Does the dues collection ban extend only to members of the union who are employed in the casino industry?

MR. PARRILLO: That is correct. The way to enforce that, Justice Rehnquist, would be perhaps a Commission order to those under its jurisdiction, namely, the licensed employees who are also members of the union, as well as the licensed employers who may be checking off the union dues.

Not only does it achieve the statutory purpose of Section 93, but it has been previously implicitly upheld by this Court in Alabama State Federation of Labor versus Macadory. This Court refused to invalidate a state statute which prohibited a union from collecting dues if the union failed to file requisite information with the state, and similarly, again, the Waterfront Act, validated by this Court in DeVeau, also prohibited the receipt of union dues by a union that retained in office a disqualified individual.

QUESTION: You wouldn't suggest, would you, that New Jersey could say that unless a so-called disqualified official resigns the union may not act as collective bargaining agent?

MR. PARRILLO: We are not doing that.

QUESTION: I know. I didn't ask you that.

MR. PARRILLO: We would suggest that that would be a more direct -- what Justice White suggests would be a more direct -- would be a more intrusive invasion of the Section 7 right, and if Hill is to be good law, we would say we could not do it.

QUESTION: Well, it seems to me you pretty well cripple a union acting as a collective bargaining agent if it can't get any money to perform its job.

MR. PARRILLO: Again, Justice White, the

purpose -- the remedy wouldn't be --

QUESTION: Well, think of how much more effective remedy it would be to say they can't act as a collective bargaining agent unless this official resigned.

MR. PARRILLO: The Court in Macadory did distinguish, though, Justice White, from a dues collection ban with a criminal enforcement procedure which we don't have here from a direct injunction against the operation of a union as such, so there is that distinction. If the practical effect of a dues collection ban would be the dismantling of a union, and if Hill can be read as saying you can't enjoin a union from operating as such, and if DeVeau can be read as saying you can allow a dues collection ban, perhaps it is Hill that should be reconsidered by this Court, because it is an earlier case, a case that has obviously been modified by subsequent developments, Congressional developments, and a shift in preemption analysis by this Court itself.

QUESTION: Mr. Parrillo, what are the numbers involved here, the total numbers of members of the union and those whose dues would be withheld?

MR. PARRILLO: The record establishes that there are presently around approximately 12,000 members

in Local 54, 8,000 of which are licensed casino hotel employees. However, our records indicate -- it is not a matter of just because they have had, I guess, increased membership over the years. I believe the figure now, there are approximately 9,500 members who are licensed casino hotel employees.

QUESTION: So that would pretty much cripple the operation, I suppose, of the union. We should just assume that in answering this question, shouldn't we?

MR. PARRILLO: I cannot deny the fact that that remedy would have an impact on 54.

QUESTION: Well, the collective bargaining units, are they individual casinos? Is that it?

MR. PARRILLO: There are the nine casino hotels that voluntarily recognized --

QUESTION: Is that a multi-employer bargaining unit? Do they bargain for all of them? Or do they bargain individually?

MR. PARRILLO: I believe they bargain individually, but the contract, the collective bargaining agreement is fairly standard throughout the industry. I may not be totally accurate on the first point, but I understand the contract is fairly standard.

To conclude, there are certain union officals

not disqualified under federal law that may nevertheless present the gravest kinds of danger to our casino industry. The Court of Appeals held that New Jersey citizens may be compelled to accept organized and other kinds of criminal involvement as the price for having legalized casino gaming. I do not believe that Congress intended to put our state to the choice of having no industry at all or one that it could not effectively regulate.

Accordingly, I would ask this Court to reverse the decision of the third circut. I would also like to reserve whatever time I have left for reply.

QUESTION: Were you going to address the younger abstention question at all?

MR. PARRILLO: As I said, I would rely on the brief for that. I will note for the Court that our sister agency, co-appellant, has pursued that in this Court, but we have -- that is, the Attorney General's office has withdrawn that --

QUESTION: And you are the prosecuting end.

MR. PARRILLO: We are the prosecuting and enforcement arm of the dual regulatory agency.

QUESTION: And as far as you are concerned, it is waived?

MR. PARRILLO: The Attorney General of New

Jersey has waived that argument in this Court.

CHIEF JUSTICE BURGER: Very well.

MR. PARRILLO: Thank you.

CHIEF JUSTICE BURGER: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE APPELLEES

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

Our argument in this case that the state law is preempted by the National Labor Relations Act as amended rests on Hill versus Florida. We have set out the essence of the reasoning in Hill on Pages 15 through 17 of our brief, the red brief.

Hill was a case concerning a Florida statute which prohibited individuals who were not citizens of ten years' standing who had been convicted of a felony or who were not judged to be of good moral character from serving as union officers. Moreover, the statute had certain registration requirements and enforced those requirements as well as the requirement I have just stated by injunctive and criminal proceedings.

QUESTION: Mr. Gold, to what extent do you think the case of Local 926 versus Jones, decided in 1983, cuts back on Hill against Florida, where the Jones opinion indicated that something that touches on

interests so deeply rooted in local feeling and responsibility requires a balancing, and could tip it the other way? Should we read that as any modification of Hill against Florida?

MR. GOLD: Your Honor, we don't believe so, for the following reason. As this Court has recognized throughout the development or the modern development of the preemption doctrine in labor law, there are two distinct parts, or maybe it would be more accurate to say there are two distinct doctrines. One concerns substantive supersession, situations in which the state law conflicts directly with the federal law, and where under all normal supremacy clause analysis, and going back to cases like Hines versus Davidovitz, there would be preemption.

The second doctrine is the doctrine based on the primary exclusive jurisdiction of the labor board, and that doctrine was first stated in the Garman case in 359 US, whereas Hill was decided back in 325 US in 1945.

The Court has made clear, and Jones is a Garman case, the Court has made clear that there is an exception to the Garman doctrine for state regulation deeply rooted in local feeling, and that that exception to the Garman doctrine is to be administered through a balancing test. It isn't simply that the state interest

may be deeply rooted, but it also concerns the relative impact on the board's jurisdiction. There is no case of which we are aware in the other branch of the doctrine that concerning substantive supersession, which emplcys a balancing test, and we do not think this is a happenstance.

It seems to us to be a principal distinction between these two different types of preemption. It is not, with all deference to this Court, to balance where there is a substantive conflict between federal and state law. As noted in a very recent case which we cited and set out in our brief at Page 41, the Fidelity Federal Savings and Loan versus De La Ccsta, a case which is in 458 US. Where the Court concludes that there is substantive conflict, the determination is that Congress has weighed the different interests, and no matter what the state law means to the state, the supremacy clause applies.

The Garman rule is a more far-reaching rule than substantive supersession. It guards against potential conflicts in administration which may have an effect on the law, a potential conflict which the Court has determined is inconsistent with Congress's plan in setting up its single administrative agency in elaborating that doctrine, as I say, because it is more

far-reaching, and because the conflict is different kind, the Court has applied a balancing test.

For that reason, we suggest that one of the three principal arguments made by the state in this case, namely, its reliance on Garman and deeply rooted in state interest exception to Garman as a reason for doubting the continuing force of Hill is mistaken, and is wrong in theory.

I would note just to complete this point that the distinction I have stated between these two different preemption doctrines is articulated in the Court's opinions, most notably in the Railway Trainmen opinion for the Court by Justice Harlan, and is a basic element of a very recent decision last term in Bellknap versus Hale, where the Court applied a balancing test only with regard to the Garman preemption claim and not to the other preemption claim made in that case.

The Hill case, as I said, concerned the Florida statute I have just described, and with the Court's permission, because, as I say, it is the bedrock of our argument, I would like to quote portions of the full reasoning of the Court which is set out, as I said, on Pages 15 to 17 of the red brief.

The Court there stated, "The declared purpose of the Wagner Act as shown in its first section is to

encourage collective bargaining and to protect the full freedom of workers in the selection of bargaining representatives of their own choice. Congress attached no conditions whatsoever to their freedom of choice in this respect. Full freedom to choose an agent means freedom to pass upon that agent's qualifications.

Section 4 of the Florida Act circumscribes the full freedom of choice which Congress said employees should possess. To the extent that Section 4 limits a union's choice of such an agent or bargaining representative, it substitutes Florida's judgment for the workers' judgment."

Chief Justice Stone concurred in that portion of the Court's opinion, and as the court below noted, the statute at issue here replicates the vice of the Florida statute exactly. It is the state that makes the determination rather than the employees as to who will be their agents.

The state law as well in practical terms as Justice O'Connor points out runs afoul of the second holding of Hill. Hill also held that even a proper registration requirement could not be enforced by means which would constitute an obstacle to collective bargaining. There is no need for surmise here on the effect of a dues remedy, if I can use the word "remedy"

in this context, in this case. There are undisputed affidavifs from the union that it cannot act as the collective bargaining representative for some 85 to 90 percent of its membership if there is an absolute state bar for those people paying a penny to the union as dues.

QUESTION: Mr. Gold, do you think Hill remained absolutely unimpaired by the DeVeau opinion, which was four-one-three, with Justice Harlan not participating?

MR. GOLD: We believe that the principle of Hill does remain unimpaired. The Court distinguished Hill. It did not overrule or question its reasoning, and that is so even though Justice Frankfurter wrote the plurality opinion, and he was one of the two dissenters in Hill.

It seems to us as it appears to have struck the Court that the decisive difference between the Hill case and this case on the one hand and DeVeau on the other is that Congress had acted. Congress is not limited to making such exceptions to its general rules as Congress chooses to make, and in DeVeau, New York and New Jersey had gone to Congress and asked for approval of a compact and a compact which Justice Frankfurter underlined gave Congressional authorization to enabling

legislation.

Section 8 of the Waterfront Act was part of the package of enabling legislation which was already in force.

QUESTION: Yes, but Section 8 itself was not approved by Congress.

MR. GOLD: It was and it was not. The Congress did not simply give approval to the compact, the substantive terms of the compact. It also gave approval -- Whether that was wise or not is another question. It also gave approval to enabling legislation, and it did so after hearings at which it was advised that the enabling legislation included Section 8 of the Waterfront Act and where the waterfront unions had argued that that was precisely why the compact which provided for approval of enabling legislation should not be approved. And in those terms, we do not believe that DeVeau, the ruling in DeVeau changes the law of substantive supersession.

QUESTION: What if another state, what if Connecticut had come up with a law just like Section 8 of the New York statute that was upheld in DeVeau against Braisted? They had not -- They were just operating by themselves. They weren't operating under a compact. And their argument was, well, surely if

Congress would have approved it for New York and New Jersey, they would likewise have approved it for Connecticut. Now, should they prevail?

MR. GOLD: I think that they should not prevail. I think that the question is about as nicely balanced as one can imagine. There is one other factor which was heavily relied on by the Court and it is this added factor which seems to me to make the question a particularly difficult one, or one of the two reasons I think it is a particularly difficult one.

New Jersey and New York did not simply come to Congress and say we have a feeling that a compact is needed. We would like to extend our authority because there are certain possibilities that we can envisage. They came to Congress and said, there is persuasive evidence detailed in hearings held in New York and New Jersey and held by Congress that there is a very, very substantial problem in the New York-New Jersey waterfront, and that extreme measures are necessary to deal with that problem.

And Congress, the reports show, was convinced of the soundness of that argument. Now, I had no basis for judging, and I don't know how one would go about the process of whether Connecticut could make a sufficient showing and what is a sufficient showing for Congress.

I think that the situation therefore is that those states that wish authority in this area have to make their case to Congress just the way anyone who wishes, any state authority that wishes authority which is contrary to general federal principles has to make the case to Congress.

It may be that the sheer number of requests will have one of two effects. First, to cause Congress to change the general rule rather than to make ad hoc exceptions. Or, to repent of its one exception on the ground that it has proved unwise, and it is the proverbial camel's nose under the tent.

That is for Congress. That is uniquely for Congress, and there is, we submit, no showing that Congress has repented of what it has done in general terms in the National Labor Relations Act. Indeed, we would suggest that the 1947 legislative history of the Taft-Hartley Amendment tends to prove exactly the opposite. Congress, as the Court knows, completely rewrote the National Labor Relations Act in 1947.

In the legislative deliberations, Congress was conscious of and referred to Hill versus Florida, and to Bethlehem Steel versus New York Board, both of which stand for the principle that it is not open to the states in industries covered by the National Labor

Relations Act to regulate any aspect of the representation process, that that -- that such state regulation is inconsistent with the federal scheme, and Congress in light of those determinations made two specific judgments.

First, as a proviso to Section 10(a) of the National Labor Relations Act, there is a special permission for the Federal Labor Board to enter into agreements with state labor boards to administer the law so long as the law is substantively consistent with the federal law. To that extent, Congress recognized and dealt with the problem presented to this Court in the Bethlehem Steel case. It did not do what New York had wanted in the Bethlehem Steel case, namey, the right to regulate whether or not the state law was absolutely consistent, but only on an undertaking of consistency.

QUESTION: Mr. Gold, what, if anything, in the federal law would prevent the state of New Jersey from passing a law that says that there are -- establishing certain qualifications for union officers in its gaming or casino industry? Any union who has a collective bargaining agent can't have an officer that is so and so, and going farther than the federal law. Would that be preempted?

MR. GOLD: We believe that on the reasoning of

Hill, it is Sections 7 and 9 of the National Labor Relations Act and Section 2-5 of the National Labor Relations Act which prevents the states from narrowing the scope of employee free choice, and we do not believe that there is anything that Congress has said or done since passing Sections 7 and 9 and 2-5 and reconsidering the matter in 47 which changes the substance of the federal law.

This is an area, employee free choice, where Congress has taken the matter in hand, has stated an overall purpose and principle, and has made only such very narrow limitations --

QUESTION: That is another branch of your substantive supersession --

MR. GOLD: Yes, we have only a substantive supersession argument here.

QUESTION: Well, but certainly it wouldn't be impossible to comply with both. It isn't a square conflict in the sense that you couldn't comply with both the federal and the state law. You have to establish that Congress intended that the states establish no stiffer qualifications.

MR. GOLD: That's correct. It would not be --

QUESTION: There aren't any case here square on on that, are there?

MR. GOLD: We believe that Hill versus Florida is specifically on that unless you confine your question to a specific industry.

QUESTION: That is what I --

MR. GOLD: Oh, I apologize. I thought you meant --

QUESTION: I have already -- I did that.

MR. GOLD: Oh, I apologize. We think that on the question of whether states can move in particular industries as opposed to whether a state, to go back to the question you asked before lunch, could pass an across the board statute, that the principle on which we rely is best stated in the Wisconsin Board case in 340 --

QUESTION: You think the federals just plainly occupied the field on this?

MR. GOLD: Well, we think the structure of the Act is that Congress has not given it to the states to make industry by industry deviations from the general rule.

QUESTION: What if New Jersey enacts a statute saying that no one may be employed in a casino who has been guilty of conviction of the following felonies, and it includes some felonies that the Landrum-Griffin Act does not include as barring union office, and the union complains and says, we ought to have a right to vote for

any union member for shop steward, and now there are people who can't work here who would otherwise be members of the union.

MR. GOLD: We don't think that the National Labor Relations Act creates any right to work. If a union were to protest either -- were to protest a licensing law that you can't be a skilled craftsman, plumber, or electrician -- there are such laws -- unless you meet certain requirements to be an employee, we simply don't believe that the Act speaks to that. The Act takes the group of employees as they are. The only thing that Hill says is that once you have that group, they make the judgment of who among their number may be a state office.

So we simply don't think that Congress has regulated that far, just as we have no brief to carry for the employers who are regulated by the New Jersey law. There is simply no inconsistent federal law which protects their interests, and therefore putting due process and other such interests aside, New Jersey can do what it sees fit.

QUESTION: Well, you may be here again, then.

MR. GOLD: That is true.

QUESTION: Even if you win this case.

MR. GOLD: That is true. But in terms of the

industry specific question, it seems to us that the issue here is akin to and is answered in principle by the arguments made by the public utilities and the states that wish to regulate public utilities in the Wisconsin Board case.

The argument there was that while Congress had regulated the right to bargain collectively and the right to strike, it had regulated those activities in a fashion which showed that they are not absolute rights, because Congress had placed limits on the rights, and therefore the states could in industries that were "local" and of particular importance to the state, and that had historically been regulated by the state, impose additional requirements not permitted by federal law and not enacted by Congress.

And the Court rejected that argument, recognizing that the National Labor Relations Act is general in terms, and states general principles, and that in the Act Congress made a conscious determination to regulate to the full extent of its commerce power, and Congress has in fact made certain industry specific exemptions and exceptions to its rules.

Section 8(e) and Section 8(f) deal in specific terms with the construction and garment and apparel industry. Section 8(g) deals specifically with the

hospital industry. There are specific provisions which deal with industries that are national in scope, the so-called emergency strike provisions.

And Congress can and has and may make such exceptions to its general rules as it wishes, but where you have a general principle, as we do have, and as Hill states, either for employee free choice or for collective bargaining for the states to add or subtract to the federal rules in this area seems to us to be plainly inconsistent with the most elementary preemption principles.

QUESTION: Mr. Gold, let me ask you to go back for a moment to the concern about whether DeVeau cut back on Hill at all. There is the one sentence that I have looked at several times toward the bottom of Page 152 of Justice Frankfurter's opinion in which he says, "Obviously, the National Labor Relations Act does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate representatives of their own choosing."

Do you think that sentence is consistent with Justice Black's opinion in the earlier case?

MR. GOLD: I think that it may be consistent with it in the way that Chief Justice Stone pointed out in his concurring opinion in Hill. Chief Justice Stone

said there are no immunities in this statute from state penal law. If that is the limit of Justice Frankfurter's cryptic statement, I think that there is no inconsistency.

Certainly it is such a muted call for Hill's limitation or rejection that we would hope it would not be read as such. I think if I can I would like to spend a moment on Section 504 of the LMRDA, the provision in which Congress stated certain limits on the right to run for and hold union office, and I wish to make only two points about that section.

First of all, as I have just noted, Congress has limited the right to bargain collectively and the right to strike. The Court has recognized, and it seems to me to be indisputable, that Congress's limitations do not mean that the states can move into the field and either add or subtract, and in that regard, I do wish to stress in particularity the difference between Section -- a critical difference between both Section 504 and Section 8 of the Waterfront Act at issue in DeVeau.

Both those sections were limited to individuals who had been convicted of felonies. While the Court did not use the term, it was in the nature of an added penalty.

The New Jersey statute sweeps well, well

beycnd any such limitation. This statute is triggered by an administrative determination that there is a reason to believe that somebody who has never committed a wrong is associating with other people who may or may not have committed a wrong but do not have to have been shown to have committed a wrong.

Moreover, there is a disqualification for "failure to cooperative with the Commission" and to supply information not merely relevant to the Act under the language of the New Jersey statute, but information requested by the Commission. I think we are exactly back into the area covered by Hill. It is this Commission created by New Jersey which is going to make a highly subjective, unfocused judgment which will override the judgment of the employees, unless, as the court below held and as we believe is compelled by both the statute and precedent, the New Jersey law is declared preempted.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Parrillo?

ORAL ARGUMENT OF ANTHONY J. PARRILLO, ESQ.,
ON BEHALF OF THE APPELLANTS - REBUTTAL

MR. PARRILLO: Just very briefly, in response to a question by Justice O'Connor, Mr. Gold said that this Court should pay no deference to balance where

there is state substantive conflict with a federal right. Well, that justification for preemption is really a function of the strength of the argument that Section 7 does in fact absolutely protect the conduct at issue, and of course here we submit that Section 7 doesn't lend that absoluteness ascribed to it by appellee or by the Third Circuit majority.

With respect to Hill, we are not asking this Court to overrule Hill, just to recognize that subsequent developments have limited the scope of Hill's applicability and require that it be substantially restricted to circumstances not here present.

In any event, Hill can be clearly distinguished from this case in at least four distinct aspects. In the first place, the Florida regulatory scheme, as Justice White had recognized, was applicable across the board to all labor unions operating in the state of Florida, whereas New Jersey's law only affects --

QUESTION: Yes, but what do you say about his reliance on the Wisconsin case? The public utility case.

MR. PARRILLO: Your Honor, the strike cases are, Number One, Wisconsin acted to totally abrogate the right to strike. Number Two, Congress, we contend, was

much more specific and clear when it spoke about the right to strike. In fact, this very same section they announced the right, they also announced the qualifications and limitations on that right as to leave no doubt that they had occupied that field.

What Congress did in Section 7 on the contrary talked about a right to collectively bargain through representatives of one's choosing, as Judge Becker noted in his dissent, a rather amorphous way to create an absolute protection.

The second ground for distinction of Hill is that Florida plainly substituted its judgment for that of the worker by requiring affirmative proof of good moral character. Under the New Jersey scheme, there are no prerquisites for functioning as a casino labor union in our state other than filing.

Third, and most significantly, Florida was an out and out attempt to regulate labor unions and their agents. The sole purpose was to require them to license and then additionally to prescribe affirmative qualifications for licensure. Absent in Hill was the compelling state interest that we think New Jersey has demonstrated in this case.

Fourth and last, the operation and application of the Hill statute directly conflicted with the NLRA.

It enjoined a union from operating as such, enjoined the business agent from operating as such. Again, New Jersey's sanction is a dues collection ban designed only to encourage the removal of the disqualified union officer.

Equally unavailing are appellees' efforts to essentially write off DeVeau because of the presence of the compact. Well, he doesn't recognize that four Justices declined to infer a Congressional intent to preempt all state regulation, regardless of the presence of the compact. The compact was brought to Congress in the DeVeau case because it was constitutionally required to approve or at least to be brought to its attention a compact between two states.

And thirdly, of course, DeVeau was not decided on any one factor. It was decided on a number of factors, the most important of which was a weighing, a balancing of the federal and state interests, and that Congress first -- excuse me, the Court in DeVeau first determined that the Section 7 right was not absolute, then engaged in the balancing test.

Thank you very much.

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

(Whereupon, at 1:50 p.m., the case in the

above-entitled matter was submitted.)

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#83-498-G. MICHAEL BROWN, ETC., ET AL., Appellants v.
HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, ET AL.; and

#83-573-MARTIN DANZIGER, ETC., ET AL., Appellants v.
HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, ET AL.

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