ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1484

TITLE WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, ET AL., Petitioner V. GOULD, INC.

PLACE Washington, D. C.

DATE December 9, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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WISCONSIN DEPARTMENT OF :

INDUSTRY, LABOR AND HUMAN :

RELATIONS, ET AL., :

Petitioner, :

v. : No. 84-1484

GOULD, INC. :

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Washington, D.C.

Monday, December 9, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

CHARLES D. HOORNSTRA, ESQ., Assistant Attorney General of Wisconsin, Madison, Wisconsin; on behalf of the Petitioner.

COLUMBUS R.GANGEMI, ESQ., Chicago, Illinois; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(12:59 p.m.)

THE CHIEF JUSTICE: We will hear arguments now in Wisconsin Department of Industry and so forth against Gould.

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

ORAL ARGUMENT OF CHARLES D. HOORNSTRA

ON BEHALF OF THE PETITIONER

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

We are here on an appeal from a decision of the Seventh Circuit. The decision struck as unconstitutional two Wisconsin statutes. The ground of the decision was pre-emption under the National Labor Relations Act.

The statutes in question function together as a single unit to direct the purchasing agent of the State, when purchasing goods for the internal needs of the State, not to buy the goods of violators of the National Labor Relations Act.

Those NLRA violators are defined by our statute as those who have been adjudicated by the federal courts three times in a five year period to have violated the NLRA. The consequence of being an NLRA

violator as defined is that the purchasing agent may not acquire state goods from those violators for a three-year period.

This directive aims only at the state purchasing decisions. It does not direct itself to the purchasing decisions of counties, municipalities or any other political subdivisions of the state.

QUESTION: Mr. Hoornstra, what is the purpose of the statute?

MR. HOORNSTRA: The purpose of the statute, Your Honor, is to spend the state's money on those employers that have exhibited a fidelity to the law and not to spend their money on those who have violated the law.

QUESTION: Did the state ever concede during the course of this litigation that the purpose of the statute was to deter private conduct, namely the conduct of the respondent and companies like it?

MR. HOORNSTRA: Yes. The other side of the same coin, namely, if we're going to reward those employers who are exemplary by giving them our business, we necessarily will decide that we do not want to encourage labor law violations by giving those violators our business.

In either event, it remains a purchasing

decision, where we are buying our goods for our purpose. To shape the issue with some more precision, we want to be able to make the choice, the choice consumers generally enjoy, the choice trading partners in the private sector enjoy when they are engaged in proprietary conduct, to make the decision. We want to give our business to those employers, those companies, that demonstrate the best in corporate America and we would rather not have to hire people who have violated the labor laws.

The holding of the Seventh Circuit --

QUESTION: May I ask on that point, General Hoornstra, does the Wisconsin Legislature define any other groups of ineligible suppliers other than this one?

MR. HOORNSTRA: Yes, Your Honor. We have another statute that prohibits our purchasing department from buying the goods from those that have demonstrated a proclivity to discriminate against minorities, women, and a rather expanded class of protected persons within the equal rights area.

QUESTION: Is that a similar pattern, if they've been found guilty on three separate occasions or something like that?

MR. HOORNSTRA: Basically, without that precise formulary, and without a deference to the

federal machinery since we have co-equal jurisdiction to adjudicate that ourselves. But otherwise, in substance it is the same.

QUESTION: What about violating something like the RICOH statute or, committed a lot of arsons or something like that?

MR. HOORNSTRA: We don't have anything as express, Your Honor, but I think I can say that our catchall statute of rewarding contracts to the lowest responsible bidder, we would regard as a catchall authorization so we don't have to deal with organized crime either. We choose not to, even though they might be the low bidder.

Similarly with an employer --

QUESTION: No other statutory category of ineligible suppliers?

MR. HOORNSTRA: Correct, so we're prepared to lose money on a particular deal if we're dealing with discrimination. We might pay a higher price but as a matter of policy, when we're spending our money what do we want to encourage? Fidelity to law.

We assert that --

QUESTION: These unfair labor practices did not take place in Wisconsin, did they?

MR. HOORNSTRA: That is correct.

QUESTION: And were they by divisions of Gould that are no longer owned by Gould?

MR. HOORNSTRA: Yes.

QUESTION: Are there situations under the Labor Act where an employer has to commit an unfair labor practice in order to get judicial review?

MR. HOORNSTRA: Yes.

QUESTION: You are penalizing that particular employer, aren't you?

MR. HOORNSTRA: Well, permit me first to say that those questions, I believe, are all Fourteenth Amendment questions, not NLRA pre-emption questions. It may be that our statute is subject to infirmity for those reasons, but not for NLRA pre-emption.

Let me turn more directly to the question of whether it's a penalty. In response to Justice O'Connor's question, I think we have to concede that the opposite side of the coin, of the same coin, of trying to reward the best in corporate America, is that you're going to have as an effect the same thing as though a penalty were exacted on the violator.

The effect is the same only in this respect, and it's a narrow effect. That is that they are going to have a lost business profit-making opportunity, but it stops and it starts right there, and I think I can

demonstrate that this is not a penalty within the remedial concept of the NLRA and the machinery of the NLRB by a number of different considerations.

First is, Your Honor, that question wouldn't arise, were a private employer, a private company standing here rather than the State. It wouldn't arise because we instantly would discern a distinction between the economic pain that befalls someone who has lost a customer, from a regulatory penalty.

We can admit the effect is the same in other respects, but there is that distinction, that we would say if a private employer were here, that is an economic pain, not a remedial penalty.

Second, I think that as the holding of this Court in Camden crystallized the meaning of the market participant cases, insofar as the state does act as a proprietor or as a consumer, there can be -- there can be no conflict or interference with the federal regulatory machinery.

Further, this Court in the withdrawal of subsidization cases has held that a penalty is not involved if a sovereign state or the federal government withdraws subsidy for the exercise of even a fundamental constitutional right. I'm referring to the McRae v. Harris, Buckley, Regan line of cases.

Now, obviously we are well within the circumference of that holding. First we are not refusing to subsidize the exercise of a fundamental constitutional right. We are simply declining to enter into a voluntary agreement.

Second, there isn't a fundamental constitutional right involved here. There is, to be sure, a valued right, a very valued right, and that is the right of a consumer to make its choices. It is the right of a proprietor to choose its trading partner. And that is our right.

Finally, in respect to the question, Justice Blackmun, whether it is a penalty, there is this very easy conceptual difference. We are not taking money from a particular company to put it into our treasury. That is what the gist of a penalty is.

We are taking money from our treasury, and the question is which of two companies are we going to spend it on, and that's why we come back to the two sides of the coin analog I used earlier.

QUESTION: Is that really a fair characterization, a choice between -- you have a flat rule that even if there's only one supplier, you just can't buy the goods, independent of if there are a hundred, you can still just -- it isn't choosing between

two, is it?

MR. HOORNSTRA: That's true. I think --

QUESTION: It's legislative prohibition, it's not an individual decision by a purchasing agent. Or, do I misunderstand?

MR. HOORNSTRA: No, you understand correctly, Your Honor, and I think I understand the purport of your question. I think my response to your question as first framed is, our ordinary experiences, we ordinarily have a choice of two or 20 or 50, but you are right. If we were down to a single source supplier our statute would apply in that event as well.

QUESTION: How long has Wisconsin had this statute?

MR. HOORNSTRA: It was passed in May of 1980.

QUESTION: Is a statute of this kind fairly common among the other states?

MR. HOORNSTRA: No.

QUESTION: What brought it about in Wisconsin?

MR. HOORNSTRA: I don't know. I would have to speculate on the political motives and of course, as Your Honor appreciates, we judge legislation and its purpose by what it says.

It is an infrequent occurrence. There are some other parallels in other states, and I think its

infrequency probably accounts for the fact that Congress has not had occasion to address this kind of conduct. But in explaining that, and admitting that, we are saying that Congress did not address it and that, of course, in any pre-emption case is the touchstone, did Congress address this conduct.

We have two premises that underlie our basic argument. One, any private company could do exactly what we have done. It would be free under the National Labor Relations Act to do exactly what we have done. Any private consumer could make exactly this precise choice, and I believe that is conceded by the appellee.

Second, the second premise is, the states enjoy the same rights as any private company when it's doing the same thing, namely making a proprietary choice or a consumer choice. There are two sources for this second premise, because that I want to dwell on inasmuch as the appellee does not concede it.

First, the dormant Commerce Clause cases expressly have held that the states, when operating in the free market, may operate freely and as stated in Reeves specifically, evenhandedness as a matter of federalism, evenhandedness requires that states operate as free from federal constraint as a private company.

So, simply as a general matter of our

federalism, when we're doing exactly what the private sector regularly does and have on our proprietor hat, we have the same freedom.

QUESTION: Of course, that may be true under the dormant Commerce Clause and not true where Congress has affirmatively enacted a law such as the NLRA, I suppose.

MR. HOORNSTRA: Yes, sir. I come to my second source because of exactly that question. The next logical question is, that might be true as a general matter, but is it true in an NLRA situation, and I think the answer is yes.

First, as noted, the private company could do this. Second, there is nothing on the face of the NLRA to distinguish the states acting as proprietors from the private companies. Third, I think this Court specifically has put the states in the position of the protected proprietor and the protected consumer in the NLRA itself.

I have in mind as a lead case the 1959 decision of this Court, Plumbers versus Door County, where one of our -- which, incidentally, is a Wisconsin county, one of our counties was building a courthouse and it was victimized by what we call secondary boycott activity of unions.

The question is, is the state or a political subdivision within that principle of secondary boycott law when it's trying to build its buildings, that it preserves its own freedom of choice of a trader, or is the state, because it's a state or a political subdivision removed from these protections of neutrals in the business economy who are to be free from this kind of union coercion.

This Court clearly held that even though states and political subdivisions are not employers covered by the Act, and even though there is what we call the Garmon pre-emption doctrine, when it comes to preserving the freedom of choice that the secondary boycott law is all about, the states and the political subdivisions enjoy those same benefits.

May I give this example to further illustrate that the states under the NLRA, Justice Rehnquist, enjoy the same prerogatives as though there weren't an NLRA when it comes to proprietary choices. Were Gould's union to appeal to the officials of the State of Wisconsin, please don't do business with Gould because we've got a union labor dispute, that would be protected activity by the union under this Court's Cervette doctrine going back 25 years now, I think.

The reason it would be protected, and the

union could appeal to Wisconsin not to do business with its employer, is because Wisconsin in that circumstance is in the position of a proprietor, a business person making a business choice, and that appeal could be made.

Finally --

QUESTION: Mr. Hoornstra, you surely don't contend the state can have the same latitude as a private purchaser in all its decisions on purchasing, do you?

MR. HOORNSTRA: No, sir.

QUESTION: Because they could say, we won't purchase from Baptists --

MR. HOORNSTRA: Absolutely. I'm happy for the opportunity to respond to that. Our point is very narrow, Justice Stevens. The Fourteenth Amendment inhibits all our decisions, even as a proprietor. That's why one of my early responses to Justice Blackmun's question was, those considerations he raised, we've got to meet under the Fourteenth Amendment but not under the NLRA.

QUESTION: What if they said, we won't purchase from any out of state companies?

MR. HOORNSTRA: I have a real problem with that under the privileges and --

QUESTION: How about even under the Commerce

Clause, for any companies that are engaged in interstate commerce --

MR. HOORNSTRA: I think that would be a negative inhibition on Wisconsin under the Commerce Clause.

QUESTION: They don't really have the same freedom as a private purchaser?

MR. HOORNSTRA: That's correct. So, I want to come back to this point. We have a different set of inhibitions that will restrain us, that won't restrain a private company. But there is nothing restraining us from this decision, just as there is nothing restraining a private company from this decision, and it's this convergence of two distinct capacities that come together here.

QUESTION: Can the state decide that it won't purchase from any unionized company or employer?

MR. HOORNSTRA: The Second Circuit has said yes, and the other side of that coin, it said it can have contracts, the state can have a contract with union printers only. That, Your Honor, remains undecided, in my opinion, under the Fourteenth Amendment.

QUESTION: Well, under your view the state would be free to say, we will not buy from any employer whose employees belong to a union?

MR. HOORNSTRA: Under the NLRA, that's right. But I would have a First Amendment problem, being a state, because of freedom of association rights, and I'd have a Fourteenth Amendment problem but I don't think I'd have an NLRA problem.

If I may approach this from the perspective of burdens and presumptions, I want to suggest to the Court that the appellee has the burden here of defending the Seventh Circuit's decision for these reasons. First, it is clear, I believe conceded, that a private company as a general matter could do exactly this and that as a general matter a state can do what a private company can do, absent a Fourteenth Amendment or First Amendment problem.

That being so, and the intent of Congress always being the touchstone in an NLRA pre-emption case, the burden switches to my appellee friend to say where it is that Congress has singled out the state for disparate treatment.

QUESTION: Let me interrupt you again. Supposing Wisconsin had a statute and said, no private company in Wisconsin may buy from a labor law violator. And there's no objection to that, I suppose, except possibly pre-emption.

He's been arguing the market participant at

great length, but what -- would you concede there would be pre-emption there?

MR. HOORNSTRA: I concede I have a problem defending that statute, that I wouldn't have --

QUESTION: It would be a pre-emption problems, wouldn't it?

MR. HOORNSTRA: Pardon?

QUESTION: It would be a pre-emption problem?

MR. HOORNSTRA: Yes, yes.

QUESTION: If there is pre-emption of that, why isn't there also pre-emption where you're the purchaser? Why is the state entitled to different treatment than the private purchaser?

MR. HOORNSTRA: Because in the circumstance you raised, the state is acting as a lawgiver.

QUESTION: But what has that got to do with pre-emption? I understand that's a difference, but why is that difference related to the pre-emption issue, because you're asking, what did Congress intend.

MR. HOORNSTRA: Because the pre-emption issue -- the pre-emption issue turns on where you've got con flicting regulations and when the state acts as a regulator, as a lawgiver in an area acted by Congress, that's what pre-emption is about.

QUESTION: But if the purpose of the statute

is to deter private conduct, why doesn't that bring you in under the pre-emption? Now, if the state's purpose were to insure a steady supply from a supplier who wasn't involved in labor disputes, I could understand your argument. The state would be really concerned with its position as a purchaser.

But, where the state concedes that its purpose is to regulate private activity and to deter certain behavior that is regulated in detail by the National Labor Relations Act, why isn't that different?

MR. HOORNSTRA: Because it's a spending power decision, and that's why I think the significance of this Court's statement in Camden cannot be underscored enough.

QUESTION: But the spending seems to be related to a regulatory purpose as opposed to a purpose devoted to assuring a certain source of supply.

MR. HOORNSTRA: The spending power cases, I submit, say that you may engage in a spending power decision which is not regulation, even though you're serving the same kind of purpose, so long as you're dealing with your buying power.

One example --

QUESTION: You mean, under the dormant Commerce Clause context, and maybe it's different if

you're dealing with the National Labor Relations Act pre-emption question.

MR. HOORNSTRA: It might be, but if our touchstone is the intent of Congress to limit somebody's buying power in trying to influence the conduct of others, inasmuch -- especially, I should say, since we're dealing with a sovereign prerogative of making policy choices for its people, the burden is pretty heavy simply as a matter of the principles of our federalism to show why Congress would want to say to a state, you have to deal with these law violators even if you don't want to.

Federalism itself --

QUESTION: Except that Congress has set up a very broad, detailed Act in this labor field in which it has spelled out what the penalties are and it has structured the Act in such a way that an employer isn't always given an option whether the employer is to be a violator of the Act or not.

MR. HOORNSTRA: That's true, and in no circumstance where those considerations apply do they apply to someone making a purchasing decision, a buying decision. We're talking about from whom we buy our goods with our money for our internal needs, and it's that narrow, and I think that makes a very decisive

difference.

I have no further argument to make. Thank you.

THE CHIEF JUSTICE: Mr. Gangemi.

ORAL ARGUMENT OF COLUMBUS R. GANGEMI, JR., ESQ.

ON BEHALF OF APPELLEES

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

I would like to begin by directing my remarks to the questions posed by Justice O'Connor concerning the purpose of the state's enactment. In the briefs before this Court, I think the state has been somewhat less than clear with respect to what its purpose was in enacting the labor law violator debarment statutes in Wisconsin.

Below, however, the state was quite clear with respect to what its purpose is and I would like to direct the Court's attention to the record in this case.

QUESTION: Do you really think it makes a lot of difference what the purpose of the state was, if we know what the effect of the statute is?

MR. GAMGEMI: In the final analysis, Justice Rehnquist, I agree with you that the purpose of the state is irrelevant if the effect is to interfere with the federal statutory scheme.

I believe, however, that the purpose of the

state is of some interest in determining whether or not there is any legitimate state interest in an area of deeply rooted local concern which is of some consequence under the pre-emption doctrine where the federal interest is only of peripheral concern.

QUESTION: And so, then it really turns on what sort of an argument the Assistant Attorney General for the State of Wisconsin makes to the Seventh Circuit?

MR. GANGEMI: Insofar as that is a statement of the purpose of the statute, no, I do not -- in the final analysis I agree with you that the purpose of the statute, the object of the statute, is irrelevant.

It is the effect of the statute and its potential for interfering with the federal statutory scheme that is of, in the final analysis, of utmost importance under the supremacy clause.

QUESTION: Well, then, what if the state is concerned about having steady source of supply of whatever the product is that it's buying, and it doesn't want to buy from somebody who's engaged in labor disputes because it thinks there are going to be strikes and its source of supply might be cut off.

Do you think the State is not free to say, I'll buy from "B" whose employees don't even belong to a union as opposed to "A" who has these problems?

MR. GANGEMI: I believe it depends upon the object of the decision not to purchase. Where the state addresses --

QUESTION: Then it does make a difference what the purpose is, in contrast to what you've just been telling Justice Rehnquist? The purpose makes a difference, in your view?

MR. GANGEMI: It makes a difference only in those cases in which the interference is of a peripheral nature. I don't think in this case, regardless of what the purpose of the state would be, interference with the federal right of appeal which is one of the areas that we have addressed is so clear, so strong that regardless of what the state's actions would be in this case, I feel pre-emption is appropriate.

But in the cases you have posited, which is a hypothetical case that has very little to do with this particular statute, were it not for the interference with the right of appeal, one could at least posit a legitimate state interest, legitimate state economic interest in the propensity towards participation in labor disputes.

Here, of course, the state statute does not even permit such a classification. In this case Wisconsin statute does not on its face, or through any

statement of purpose that we've heard so far, does not limit itself to situations in which an employer engages in a labor dispute where the labor dispute could be perceived by the state as interfering with the performance of the state contract.

The Wisconsin labor law debarment statutes do not even address only labor disputes which result or could be perceived as resulting in an unreliable contractor because he has a history of labor disputes.

QUESTION: Mr. Gangemi, why can't the state adopt something of a prophylactic rule for something it considers a three-time loser in the area of labor law violations? "If you've done it this often, you're just so likely to have additional problems that we don't want to deal with you."

MR. GANGEMI: Because, Your Honor, the Wisconsin statute addresses labor law violations, violation of federal law, qua violation of federal law. It does not at all address nor does it purport to address the underlying labor disputes that may have given rise to unfair labor practices. It makes no judgment with respect to whether those were the types of labor disputes that would -- upon which the state could base a judgment that the contractor was unreliable, had a history of unreliability.

QUESTION: Why does it have to be that precise?

MR. GANGEMI: I think it has to be that precise because there is a very definite interference with the federal statutory scheme.

QUESTION: How does it interfere with the federal statute? You said something about interfering with the federal right of appeal. How does it do that?

MR. GANGEMI: Well, Your Honor, I believe it interferes with the federal right of appeal because this statute does not debar individuals who are unfair labor practice violators.

This statute debars unfair labor pracice violators who have appealed to a United States Court of Appeals and has lost. There are two ways in which an employer can seek review in the Court of Appeals.

One is to directly appeal. The other approach is to allow the -- is to decline to obey the Board's order which is not self-effectuated, and to allow the Board to proceed for enforcement before a court of appeals.

The only difference in those two types of cases, of course, is that the Board in that case gets to choose the forum whereas in the former case the employer does. In both cases, I submit, that is the exercise of a right of appeal by the employer.

QUESTION: And you say Wisconsin statute penalizes the first but not the second?

MR. GANGEMI: No, it penalizes the employer in both cases, Your Honor. If there is a subsequent adverse decision from a court of appeals, that is the only circumstance under which Wisconsin will debar. So, the classification that Wisconsin sets up is not that, we are not going to deal with unfair labor practice law violators, we are not -- the classification they do set up is, we are not going to deal with unfair labor practice violators, violators of federal law, who have appealed to the United States Court of Appeals and who have lost.

QUESTION: Well, is your complaint, then, that Wisconsin doesn't also include people who have lost before the NLRB but don't appeal to the Court of Appeals?

MR. GANGEMI: No, Your Honor.

QUESTION: What is your -- what is your complaint as to this right of appeal business?

MR. GANGEMI: At the time at which the employer must decide whether to seek review before the United States Court of Appeals, either directly by filing his appeal himself or indirectly by allowing -- by refusing to obey the Board order and allow the Board to appeal the case to the court of appeals, a chilling

effect sets in because the employer knows that if he does that and loses then he will be debarred by state contract, from state contracts.

QUESTION: If he either appeals himself or doesn't appeal and lets the board come against him, in either even he'll be debarred, won't he?

MR. GANGEMI: That is right, Your Honor.

QUESTION: So, how does that in any way penalize his right to appeal? He's treated equally whether he appeals or doesn't.

MR. GANGEMI: No, Your Honor. There are two circumstances under which -- I believe I understand the point of confusion on my part. There are two circmstances under which the Board may seek review itself. One is where the employer declines to obey the Board's order.

In that circumstance, that is the equivalanet of the employer appealing himself. The only difference is that the Board gets to choose the forum. That's just the same as though the employer had appealed himself.

The second circumstance under which the Board will seek court enforcement is even more interesting, I think. In that circumstance there are a limited number of occasions in which the General Counsel of the National Labor Relations Board will seek enforcement of

a Board order, even when the employer is prepared to comply with that order.

Now, if the General Counsel knows, if the General Counsel of the National Labor Relations Board knows that there are statutes like the Wisconsin statute, as they are in fact in Wisconsin, Michigan and a number of other states, knows that if he seeks a Court of Appeals decision, forcing the court order, that he can trigger one of the statutes.

It gives him the power of debarment, a power that was expressly denied to him by Congress.

QUESTION: Well, your right to appeal point is different than your pre-emption point, isn't it?

MR. GANGEMI: No, it isn't, Your Honor. I believe that there are two grounds for pre-emption. One is that it interferes with the federal right of appeal as set forth in Section 7 of the National Labor Relations Act.

Our second basis for pre-emption is the fact that it imposes a penalty. Those are two independent bases on which we seek to have the statute pre-empted. We seek affirmance of the Seventh Circuit's decision in this case.

QUESTION: May I just ask, since you paused, you started to tell us what the purpose for the statute

was in the court of appeals. Have you told us? If you have, I'm not sure I --

MR. GANGEMI: I wanted to underscore the statements of purpose of the State of Wisconsin below, which I think have not been really set forth in the briefs before this Court. Just a couple of examples, is the -- from the very beginning, defendant's brief in opposition to the motion for preliminary relief, which appears in the record at R-8, page 15, Wisconsin said that the Wisconsin statutes simply encourage obedience to law as federally adjudicated.

Likewise, the defendant's brief in support of its motion for summary judgment which appears at R-22 states that: "The state has a deeply rooted policy of discouraging labor law violations, and the state, as a market participator in the purchase of the goods and products, can so restrict its purchases so as not to promote labor law violators as an exception to the National Labor Relations Act pre-emption."

Again, "It" -- meaning Wisconsin at page 18 of this document -- "It will not make purchases from flagrant labor law violators in promotion of its legitimate stated interest of dealing only with companies in compliance with federal rulings. Wisconsin is not engaging in state regulation of private labor

conduct but is merely seeking to influence private conduct already prescribed by federal labor policy." The underscoring of "influence private conduct" is Wisconsin's.

And finally, "Wisconsin has a long history of fostering labor relations consistent with the goals of the National Labor Relations Act, and if in its wisdom the Legislature determined that the state should not make purchases from frequent labor law violators, that is the state's prerogative."

Most telling was the brief in opposition to the plaintiff's motion for summary judgment which appears at R-24. At page 16 of that document Wisconsin said, explaining why it was not bound by what the Congress had done in rejecting penalties under the statute, it said: "Whether Wisconsin was wise in its policy of enacting state debarment procedures for its contracts is not relevant here."

The fact is that its views are different from Congress's on this matter. I think it's obvious, therefore, that the purpose of this statute is not merely the state declining to do business.

It has to be recognized that the purpose of that declining to do business is not some legitimate state economic interest but merely to seek enforcement

of federal law. This is also clear from the statute itself, again addressing myself to Justice O'Connor's questions and points.

This statute is not limited to current labor disputes between an employer and a union where the state makes the judgment that this labor dispute will interfere with the performance of the contract. Thus, the state in that type of situation could make the judgment that the labor dispute might affect performance and therefore the state would have a legitimate economic interest in the statute -- in the labor dispute which may underpin the statutory violation.

QUESTION: In your view, could the state adopt a policy of honoring every lawful union request to boycott the products of an employer whose employees are on strike, just make that a state policy?

MR. GANGEMI: I do not believe that it could be made a state policy. I think there is a world of difference between the situation that Mr. Hoornstra posits, where because of a particular labor dispute between a union and an employer, the union members havea free speech right to appeal to the state, to cease doing business with the employer.

That is a far cry from enacting a statute which prohibits doing business with a particular

classification of employer. I suggest that that is more like Section 8-E of the National Labor Relations Act which prohibits private traders from entering into agreements with the union, to cease doing business with some third party.

That situation is very much akin, I think, to the passage of a statute which prohibits the dealing with a particular classification of employers. And what does the state tell us when we mention Section 8-E under the National Labor Relations Act?

It says, "We are a state. We are exempt from the National Labor Relations Act." The state is trying to have its cake and eat it too. On the one hand it says it is a private trader andon the other hand it hides behind the fact that it is a state and therefore exempt from the National Labor Relations Act.

QUESTION: Mr. Gangemi, what if under Justice Stevens' hypothesis put to General Hoornstra, the State of Wisconsin has a statute prohibiting any contracts for supplies with any firms who have been convicted of violating RICOH.

Would you say that is pre-empted?

MR. GANGEMI: I am not familiar with the pre-emptive -- precedents on pre-emption of RICOH. I only --

QUESTION: I'm not sure there are any.

MR. GANGEMI: I don't think there are. It depends on whether or not the RICOH legislative scheme was supposed to provide an exclusive remedy, an exclusive federal regulation of the types of violations that constitute a violation of RICOH.

The National Labor Relations Act is different. Let's assume that RICOH -- strike that. The National Labor Relations Act is an extensive and complex, integrated regulatory scheme established by the federal government in which the federal government decided to occupy the field, this Court has held time and again, in order to avoid these local attitudes and local approaches to labor problems and labor disputes.

Therefore, the states have repeatedly been held not to have a right to interfere with the federal statutory scheme.

QUESTION: But we've never extended that to simply purchasing by a state as opposed to regulating, have we?

MR. GANGEMI: I believe this Court has made it quite clear under, first of all McCulloch with respect to pre-emption generally, McCulloch versus Maryland, and Garment under the labor law pre-emption. I believe this Court has made it quite clear that the method or the

mode adopted is of absolutely no relevance as to whether or not there should be pre-emption because the issue is not whether the state uses a particular method or mode.

The question is whether that method or mode, regardless of what it is, interferes with the statutory scheme established by the federal government. In Garment, for example, the Court in that case was presented with a situation in which the State of California merely sought to provide civil damage remedy for illegal picketing, that which was admittedly illegal under the National Labor Relations Act.

QUESTION: But that's a form of the state regulating a labor activity.

MR. GANGEMI: All right. I believe that there is no difference, however, Your Honor, between what the state would like to call participation in the market and regulation in the final analysis. Let us address the arket participant exception because I think it becomes clear from that.

When a state is -- the market participant exception to the dormant Commerce Clause is premised upon the concept that the state, acting in its own economic self-interest, can use its treasury for the benefit of its own citizens. That is the one theme that is consistent in every market participant exception case.

In fact, the legitimate state interest to be served by the exercise of the spending power in those cases is favoritism. But once you take the market participant exception and its limited recognition of the fact that within the dormant Commerce Clause there is a difference between direct regulation and indirect action, once you take the market participant concept outside the dormant Commerce Clause, you lose completely tht legitimate state interest that underpins the market participant exception of acting in one's own legitimate economic self-interest, spending for the benefit of one's citizens who fund that treasury.

Outside of the dormant Commerce Clause, that rationale ceases to exist and the market participant exception becomes an unrestricted principle.

QUESTION: What if the Wisconsin statute had been framed in terms of employers who three times within the last five years have been subjected to strikes of more than six months' duration and it was limited to contractors who were going to bid on jobs in Wisconsin?

MR. GANGEMI: If the object of the statute, it seems to me, were directed at the labor dispute and not at an unfair labor practice qua unfair labor practice --

QUESTION: We don't care who started the strike, we just don't want to deal with employers who

have long strikes, with contractors.

MR. GANGEMI: I think that presents a far closer case than the case at bar, because at least in that case the state could argue that it has a legitimate economic self-interest in not dealing with an employer that has a lot of labor disputes because it's concluded, it's determined, that individual is an unreliable contractor

But it's important to note, Your Honor, that in this case this statute makes no such classification, provides and permits of no such distinction or judgment. Indeed, the court of appeals said that the very fact that this statute did not provide for any administrative determinations of that type only underscored the penal nature of the statute, and by penal I mean debarring an employer for a violation of law, not because of any economic consequences to the state or within the state, but simply because there was a violation of federal law.

The instant case provides an excellent example of what I mean. Gould did not commit any unfair labor practice in connection with the performance of any state contract. Gould did not engage in any labor dispute that was connected to or related to any contract with the State of Wisconsin.

Gould did not have a history of, or the divisions with which the State of Wisconsin was dealing, did not have a history of labor disputes which would affect or might be deemed to affect the ability of Gould to perform its contract. In fact, the divisions with which the State of Wisconsin was doing business were not even those that were found to be guilty of the unfair labor practices which resulted in Gould's debarment.

Indeed, the divisions which Gould -- of Gould which committed the unfair labor practices were divested by Gould prior to the time of the debarment, although I don't mean to suggest that was the reason for that.

And, all of the unfair labor practices which resujlted in Gould's debarment had been remedied with the exception of one, by the time of the passage of the law and that one was remedied prior to any debarment of Gould under the statute. There was, in fact, no labor dispute conduct that the state could look at and say, this will affect the performance of these contracts and therefore we have a legitimate self-interest, economic self-interest, in not doing business with this particular employer.

They debarred Gould because Gould was an unfair labor practice violator, expressly for the reasons that they have admitted below. They want to

encourage compliance with the National Labor Relations Act by debarring those who have engaged in violation, regardless of the nature, extent, duration or type of violation, without any state economic interest to justify that involvement or concern with the labor conduct of the particular employer.

I have already addressed the right of appeal issue. I would like to spend some time focusing on the penal aspect of the statute.

This, and lesser federal courts, have repeatedly recognized that the National Labor Relations Act is remedial in nature, and that it eschews any reliance upon penalties. This Court and lesser federal courts have repeatedly recognized that even the provision of additional remedies under the National Labor Relations act by states for conduct that amounts to a violation of the National Labor Relations Act would interfere with the federal statutory scheme.

In Garner, in Garmon, in Lockridge, in Jones and in Farmer, this Court has so said. A fortiori, if the state imposes a penalty for violation of the National Labor Relations Act, it is definitely interfering with the federal statutory scheme.

Affirmance in this case entails -- which is what we see -- entails a very narrow holding.

Affirmance does not entail any further incursion of state sovereign rights beyond that which has already been declared to be the limitations on sovereignty dictated by the Supremacy Clause itself.

Reversal, on the other hand, would entail the creation of a major new exception to the Supremacy Clause which has never heretofore been recognized by this or any other federal court. It is no accident that the state finds it necessary to rely upon the market participant exception to the dormant Commerce Clause.

Make no mistake about it, what the state seeks is the creation of a major exception to the Supremacy Clause. That is what they have called it before. That is what reversal would require.

If there are no further questions, thank you.

THE CHIEF JUSTICE: Anything further, counsel?

MR. HOORNSTRA: I have no further argument to make, Your Honor. I am, of course, available for any questions.

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

(Whereupon, at 1:47 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

#84-1484 - WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, ET AL., Petitioner V. GOULD, INC.

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

BY Paul A. Richardson

(REPORTER)