OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1538

TITLE ALEXANDRA FISHER, ET AL., Appellants V. CITY OF BERKELEY, CALIFORNIA, ET AL.

PLACE Washington, D. C.

DATE November 12, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

- -x

ALEXANDRA FISHER, ET AL., : No. 84-1538

Appellants :

v. :

CITY OF BERKELEY, :

CALIFORNIA, ET AL. :

- -x

Washington, D.C.

Tuesday, November 12, 1985

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:

JON SMOCK, ESQ., Sacramento, Calif.;
on behalf of Appellants.

LAURENCE H. TRIBE, ESQ., Cambridge, Mass.;
on behalf of Appellees.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Smock, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF JON SMOCK, ESQ.

ON BEHALF OF THE APPELLANTS

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

This case comes before this Court on appeal from a decision of the California Supreme Court. The California court upheld a local price-fixing ordinance adopted without benefit of any authorizing state legislation.

The ordinance plainly in our view places irresistable pressure on the owners of 23,000 private rental units in the city of Berkeley to coalesce and combine in obedience to that ordinance. Berkeley makes it a crime to engage in conduct which federal law commands.

The ordinance is plainly in conflict with both the letter and spirit of overriding policy favoring price competition in the marketplace, a policy mandated by Section 1 of the Sherman Act, the Magna Carta of free enterprise.

We seek reversal of the California decision because it is plainly wrong. The decision is wrong

because it ignores the intent of Congress in the recent enactment of the Local Government Antitrust Act of 1984, an Act that expressly refused to grant the very same exemption sought by Berkeley before this Court, and an Act, I might add, that was not even cited by the California court in its opinion.

The decision is wrong because it validates local anticompetitive action, here naked price-fixing, in the complete absence of any state authorizing legislation. It is wrong because it creates a new and untested rule for the determination of the municipal exemption from federal antitrust policy, ignoring the teachings of this Court in its Boulder and Lafayette opinions.

Indeed, the only redeeming virtue of this decision is its candid admission that it found itself, -- in its own words, "forced to wander off the map without benefit of trail or compass."

QUESTION: What was your allegation when you -- you brought this suit, I take it?

MR. SMOCK: The suit was filed, Justice White, in the Superior Court in 1980 prior to this Court's decision in Boulder.

QUESTION: What was your claim?

MR. SMOCK: The claim was for facial

invalidity of the ordinance.

QUESTION: Because of?

MR. SMOCK: Because of constitutional deficiencies of a number of sorts: due process, equal protection, and several others. We did not at that time specifically raise the antitrust issue.

QUESTION: But you did later?

MR. SMOCK: But we did later, and it was fully considered by the California Supreme Court.

QUESTION: How did you raise it? Did you say that this ordinance violates the Sherman Act?

MR. SMOCK: Not in terms of violation. We raised it in terms of preemption.

QUESTION: Well, I know. But how could it be preempted if it wasn't in conflict with the Sherman Act, if it wasn't violative of the Sherman Act?

MR. SMOCK: We don't believe, Your Honor, that a strict violation is necessary because the policy underlying the Sherman Act is for free competition in the marketplace. Here you have local regulation, adopted without benefit of state authorization, ignoring this Court's test in Boulder, and we believe that that constitutes preemption.

QUESTION: Only the California Supreme Court answered your claim by saying this ordinance didn't

violate the Sherman Act, didn't it?

MR. SMOCK: It answered the claim by saying ther is no violation after it established a brand new, untested, uncharted test, a test never before applied in any antitrust case to our knowledge.

QUESTION: Well, if it thought your claim was that the ordinance violated the Sherman Act, did it have jurisdiction to decide that?

MR. SMOCK: It did, not in the sense of violation, because jurisdiction, as you know, is exclusively in the federal courts under the Sherman Act. So I don't think that it can reach the issue of violation per se, but it was certainly competent to determine the preemption issue because a local enactment, like state legislation, can be considered by state Courts under the preemption concept.

I would respectfully suggest that preemption for this purpose is simply a shorthand expression for a determination of whether the Congress intended to reach the conduct under consideration, and in our view the Congress by the Local Government Antitrust Act of 1984 very clearly and unequivocally intended to reach the very kind of conduct engaged in by the city of Berkeley here.

Indeed, the Committee report of the House

Judiciary Committee is very instructive on that subject, and let me quote: "If Congress were confident that the actions of local government and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action."

In the face of that Congressional action, again not even cited by the California Supreme Court below --

QUESTION: Was it briefed to the California Supreme Court?

MR. SMOCK: The briefing period, Justice Rehnquist, had been concluded and argument already held in May. The Antitrust Act, of course, was considered by the Congress at that time and not adopted until perhaps two months later.

The decision, however, was not filed until December 27th.

QUESTION: Is your criticism of the Supreme Court of California that it failed to find this Act on its own?

MR. SMOCK: I suspect not that they failed to find it on its own, but in a case in which the issue specifically before them was conflict with the Sherman

Act I suspect and I would suggest that the California court, with its resources, should certainly have been able to be aware of the Congressional action in an area that so vitally affected, in our judgment, the proper decision of the case. And they totally ignored the Act.

They also ignored, in our judgment, the action of the state legislature, for the state legislature has never authorized in any way, shape or form the conduct under consideration here that Berkeley is engaged in. Indeed, the California legislature has adopted a position of precise neutrality on this issue. It has spoken clearly and unequivocally to its neutral position.

The California legislation upon which Berkeley relies, I should add, was planning and development legislation adopted after -- I should like to repeat that. The legislation upon which Berkeley relies was adopted after the adoption of the ordinance here under consideration.

It makes a mockery of chronology for Berkeley to seriously suggest that it relied in any way upon any statutory scheme. In fact, the California Court in an earlier decision, and repeated again in this decision, has identified the authority of the city of Berkeley to

engage in its anticompetitive conduct as the same kind of home rule authority that this Court struck down in the City of Berkeley -- in the City of Boulder case as being insufficient to grant Parker-type immunity to local anticompetitive activity.

We suggest that the decision of the California Supreme Court is wrong. We suggest that it failed to apply the per se rule to strike down price-fixing that has been always applied by this Court whenever it has been faced with a decision involving the fixing of prices.

CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock.

(Whereupon, at 12:00 o'clock noon, argument in the above-entitled case was recessed, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE BURGER: Mr. Smock, you may resume.

ORAL ARGUMENT OF JON SMOCK, ESQ.,

ON BEHALF OF APPELLANTS - RESUMED

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

Throughout these proceedings, Berkeley has never explained why price-fixing by a municipality is any less intrusive upon competition in the marketplace, and Berkeley has never suggested any limits to its assumed authority to fix prices.

QUESTION: Mr. Smock, you said just before lunch that, since whatever California legislation that the city of Berkeley relied upon had been passed after the city of Berkeley's ordinance, it was no good. Do you say that the state could never ratify something that a municipality had done?

MR. SMOCK: Not at all, Justice Rehnquist. I believe it entirely competent for the state of Berkeley not only to ratify action, but to adopt a comprehensive rent control anticompetitive scheme if it so desired. But in the language of this Court, that legislation would require clear articulation and affirmative

expression of an intent on the part of the legislature to substitute a regulatory scheme for our competitive policy.

And because of comity, Congress recognizes the ability of states to engage in economic regulation. But as this Court said in Lafayette, you cannot tolerate and the Congress has not recognized the ability of 60,000-plus units of local government scattered across the country to substitute their judgment for that of the Congress and that of the sovereign states.

The cities are not themselves sovereign, and Congress has never granted to cities -- indeed, just last year it denied cities the very exemption which Berkeley seeks here.

So I do not in the slightest suggest that it would not be competent for California to adopt a regulatory scheme, or indeed to ratify past schemes, but it has not done so. It has instead maintained a position of strict and precise neutrality, and the statutory scheme relied upon by Berkeley here says in its own statutory Section 65589(b) of the Government Code that nothing in that article is intended to authorize or repeal any authority that may exist for local governments to engage in rent control.

Indeed, in Health and Safety Code Section

50,001, the legislature has spoken expressly to an intent to provide for a free marketplace in housing in California. So it is our judgment that California as a state legislative scheme has adopted a policy that is pro-development, that is pro-improvement, that is pro-housing, that the regulatory scheme of Berkeley is in conflict with because California has very clearly adopted a contrary policy.

QUESTION: Mr. Smock, if the Court were to employ a preemption analysis and look for proof that the city ordinance violated the antitrust laws, where is the conspiracy in your view?

MR. SMOCK: Justice O'Connor, we believe that the conspiracy here is exactly the same as that recognized by this Court in the Midcal case. What you have is a local ordinance. In Midcal, of course, you had a state statute, but here you have a local ordinance that vertically imposes upon owners of rental property in California -- in Berkeley, California, a duty to follow the mandates of that ordinance.

QUESTION: In that sense, if you're right it would seem to me that any governmental action would of necessity amount to a vertical conspiracy under our theory.

MR. SMOCK: For the purpose of Sherman Act

preemption or responsibility, I suggest that that is precisely correct, only for that purpose. That is, when government mandates conduct of its citizens you are engaged in a vertical combination of exactly the same type recognized by this Court in Midcal.

But in turn, that vertical compulsion places an irresistable pressure upon those who are compelled by that law to coalesce in a horizontal combination to maintain prices at the level fixed by the vertical compulsion of the city.

QUESTION: You don't think that extends Midcal at all?

MR. SMOCK: Not at all. If I may respectfully suggest, we don't ask for a change in the law by this Court. Rather, it is Berkeley who seeks to change the law and to obtain a decision from this Court that is precisely the same kind of decision that Congress refused to give them in the Local Government Antitrust Act.

We don't seek a change in the law. We seek only the fair application of the law as already enunciated by prior decisions of this Court.

QUESTION: While I have you interrupted, may I inquire whether you're also pressing a Section 2 violation under the Sherman Act? Are you or aren't

you?

MR. SMOCK: While we raise the issue, we do not press it here. We think that it is a defensible issue, but we do not press it. Berkeley itself is obviously engaged --

QUESTION: If we didn't agree with you on Section 1, would we have to address your Section 2 claim then?

MR. SMOCK: With all due respect, I don't believe that the Court is compelled to address any of our claims, although we do think that if you were to reject our Section 1 claim that it would be an appropriate case for an inquiry into the Section 2 issue, because in our judgment Berkeley is substituting the owners' pocketbooks for government's pocketbooks, because the city of Berkeley is clearly engaged in the provision of housing in the public sector and we believe that that constitutes --

QUESTION: And you think that the city itself is a competitor and a monopolist?

MR. SMOCK: It is a provider of housing and, while it may well be a competitor, it is approaching or could approach a monopolistic position in the market were it to succeed in its long-term goal of depressing housing prices in the city of Berkeley and, as suggested

by a pamphlet circulated in Berkeley that formed something of the cornerstone for Berkeley's rent control activities by that depression in the market prices would be at such levels as cities could then condemn the property and take over that property at prices lower than market price.

And in that sense, one could impute to Berkeley an intent to engage in monopolistic conduct. I don't think that on this record and on what we have presented that that is a necessary result, but it is certainly one that is conceivable in the confines of this case.

QUESTION: Your preemption argument then is that Berkeley orders what the Sherman Act forbids?

MR. SMOCK: That's absolutely correct, Justice White.

QUESTION: And you call that a preemption argument?

MR. SMOCK: Yes.

QUESTION: But anyway, part of it is that we must say that what the ordinance orders the Sherman Act forbids?

MR. SMOCK: That is precisely correct.

QUESTION: And so this must be either an agreement, a conspiracy, or a combination?

MR. SMOCK: It could be.

QUESTION: It must be to violate it, mustn't it?

MR. SMOCK: To violate it, yes. And we say that that is here and that the evidence is clear under Midcal that there is a --

QUESTION: If that were a violation, you would think that you could sue the landlords for treble damages, for being in a combination or an agreement or a conspiracy.

MR. SMOCK: I think there is absolutely no question whatever that if the Federal Government were to move against the owners in Berkeley --

QUESTION: Even though on pain of criminal penalties they were forced to keep their rent at a certain level?

MR. SMOCK: That raises the different and difficult question of whether the city can act as a --

QUESTION: Well, it's a strange kind of a conspiracy to say this is a conspiracy even though we are forced to do it against our will. We not only don't agree to it, we are up in the Supreme Court claiming we don't.

MR. SMOCK: Yes, I understand that. But that is the same kind of combination that you recognized in

Midcal.

QUESTION: Yes.

MR. SMOCK: Where wholesalers are compelled by state law, against their will, to follow that state law. And I suggest that is conflict. Whether it be called --

QUESTION: I know, but the issue there -- we didn't have to hold that that would violate the Sherman Act. Just all we had to hold that it was or wasn't immune from challenge under the Sherman Act.

MR. SMOCK: And that the state law was preempted by the federal law because of the overriding federal policy which is obstructed by that state law.

QUESTION: Do you have to find that there is a violation before you can find a preemption?

MR. SMOCK: We do not believe so, but if violation were necessary then we believe violation is shown in this case, for the very reason that you found the conflict in Midcal. To the extent that you find a necessity or hold a necessity to find a violation, I think it's clear that you could find a violation here.

QUESTION: I thought that you just said that your preemption argument is that this ordinance is preempted because it orders what the Sherman Act forbids.

MR. SMOCK: Yes, sir.

QUESTION: Well then, mustn't we find that the Sherman Act forbids this?

MR. SMOCK: Yes, you do find that the Sherman Act forbids this. But you find that not just because of the letter of the Sherman Act, but because of the policy, the economic policy that underlies the Sherman Act, which is competition in the marketplace, free competition in the marketplace.

And the activities of Berkeley jeopardize that national economy because it constricts marketplace freedom. The activity involved here, as it does real property, makes the activities involved in Lafayette and Boulder pale into insignificance. Here you are involved in property financing, in construction, in transportation, in products and services on 23,000 rental units in the city of Berkeley.

QUESTION: I don't think you've been completely clear, at least not to my mind, in deciding whether you have to say that the city of Berkeley would be liable in a suit under the antitrust act in order to find that the ordinance is invalid because of conflict with the Sherman Act.

MR. SMOCK: If action were to be brought against the city of Berkeley in federal district court

challenging the Berkeley ordinance on the basis of an antitrust violation, then I think that that action would be successful.

QUESTION: But are there circumstances in which that action would not be successful and still a court could properly say that the Berkeley ordinance is preempted or in some way forbidden by the antitrust laws?

MR. SMOCK: Yes, and that's this action. This action raises the issue in a preemption concept because it is an action coming from a state court, which obviously does not have antitrust liability jurisdiction.

But a state court is fully competent to determine the conflict between a local ordinance and state and federal law. And this Court is fully competent to determine that conflict without finding all of the requisites that might be necessary to find a Sherman Act violation.

We say again, if you should find that you must find a violation, then we think that it's also here. In other words, preemption concepts do not require finding all of the elements of a Sherman Act violation where you have a violation of overriding federal policy, as indicated in the Hines case, where a local ordinance or

a state law stands as an obstruction to the full accomplishment of the purposes under federal law.

QUESTION: Suppose before you brought this suit there had been another suit brought against Berkeley and against the lanilords and it had been ccncluded. It was brought in the federal court, claiming a violation of the Sherman Act. And it was determined that there was no violation. It went up on appeal, it was affirmed in the Court of Appeals, it came here and we affirmed: No violation of the Sherman Act.

You suggest to me that you could still be here?

MR. SMOCK: We could be here on a preemption challenge --

QUESTION: Yes, yes.

MR. SMOCK: -- because --

QUESTION: Because then you would argue that there s a federal policy of competition.

MR. SMOCK: I would respectfully suggest, yes, because the standard for conviction under a Sherman Act charge might well be different from the standard applied by this Court with respect to competing policies, and here you have price-fixing, which is the traditional form of conflict which this Court has traditionally recognized as being a per se violation, if you will, of

the Sherman Act.

But whether called violation or preemption, the real issue is whether Congress intended to proscribe this conduct. And we respectfully suggest that Congress did intend to proscribe the very conduct in issue here by its failure to grant in the Local Government Antitrust Act this kind of exemption that is sought by Berkeley here.

QUESTION: Mr. Smock, if Congress prescribed this conduct it did it in 1890, I think, not a couple of years ago; isn't that right?

MR. SMOCK: I don't believe so, Your Honor, because --

QUESTION: Do you think there was an affirmative prohibition enacted in the recent statute?

MR. SMOCK: We believe that the Local Government Antitrust Act of 1984 constitutes a recognition by the Congress of the activities and cases decided by this Court --

QUESTION: Do you think that statute prohibited anything that was not previously prohibited?

MR. SMOCK: It failed to grant an exemption --

QUESTION: That's not an answer to my question. Do you think it prohibited anything that was

not previously unlawful? And if so, what?

MR. SMOCK: I say that it validated the activities of this Court in its Lafayette and Boulder decisions in an affirmative way, and to the extent that those decisions operated to invalidate local activity that otherwise would have been valid before, yes.

QUESTION: That's a little complex for me. I gather that statute's an integral part of your argument, is that right? You must rely on that statute?

MR. SMOCK: It is not an integral part of the argument because there is no state authorizing legislation adopted by California --

QUESTION: Insofar as you make a federal claim, insofar as you make a federal claim?

MR. SMOCK: Well, insofar as the conflict is concerned, yes.

QUESTION: If you said it was an integral part, you would have to say that our so-called decisions were erroneous under the prior Sherman Act.

MR. SMOCK: I don't believe so at all. I think your decisions are quite correct, and what I'm suggesting --

QUESTION: Then the statute can't -- this new statute can't be an integral part of your argument.

MR. SMOCK: I suggest that the new statute

validated --

QUESTION: It helps you, it certainly helps you.

MR. SMOCK: That it validated the action taken by this Court; that the Congress recognized what the Court had done in Boulder and Lafayette and gave its express stamp of approval by its denying the kind of exemption sought by cities.

If I may, I should like to reserve the balance of my time for rebuttal. Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Tribe.

ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.,

ON BEHALF OF APPELLEES

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

I think it's important to recognize both what the city of Berkeley did and what it did not do in this case. It enacted an ordinance by popular initiative which set a citywide cap on rent increases, a vertical restriction, obviously, by government. And it told elected public officials that they could adjust that cap upward to reflect costs to landlords.

It did not -- and I think this is crucial in comparing the case, for example, to Midcal, about which

the Court has been told today. It did not empower any private groups to set rents or to set prices of any kind.

Unlike Midcal and Goldfarb and Schwegman, there is here no allegation, no proof whatever, of any discrimination, favoritism, collusion, conflict of interest, of the sort that we argue in part 1(d) of our brief could, in light of this Court's decisions in Lafayette and Boulder, create an antitrust problem for municipal officials and for cities.

It did not, in sharp contrast to Lafayette and Town of Hallie and the Jefferson case in this Court, it did not use its economic leverage over any good or service -- sewage or electricity or water -- in order to gain or confirm monopoly power or special privilege. Indeed, until today, when we were told that the city, with one third of one percent even at the most optimistic projection of the housing, might genuinely be a monopolist, I had thought that that argument had mercifully left this case. Surely it's not a serious argument.

The question then becomes, what do the Lafayette and Boulder decisions mean for an ordinance of this kind? And on this it seems to me that the Appellants are quite elusive. We believe that they

leave this ordinance untouched, because we believe that there is neither monopolization nor any combination or conspiracy that unreasonably restrains trade.

And what we are told is that there is nonetheless some emanation, some policy from the Sherman Act, a pro-competitive policy, against which this ordinance cuts. But I think nothing could be clearer in this Court's decisions than that when one is dealing with so nebulous a federal policy, the preemptive power of Congress would gobble up state and local authority at once if it was enough to show that there was something anticompetitive about a measure.

Justice Stevens' opinion for this Court in Exxon against Maryland made clear: "If an adverse effect on competition were in and of itself enough to render a state statute invalid, the power of the states to engage in economic regulation would be destroyed." Justice Rehnquist's opinion in Rice v. Williams is to the same effect.

So I think Justice White's standard is the only tolerable one: Is it the case that this law orders conduct that the Sherman Act forbids? And I think that the answer to that question has to be no unless one's concept of combination or conspiracy is so extraordinary as to encompass literally any restriction that is

imposed. For example --

QUESTION: Mr. Tribe, if you say that it must have been found in this case that the ordinance violated the Sherman Act, why would the California courts -- where did they get the power to pass on that claim?

MR. TRIBE: Justice White, in this Court's opinion in Rice v. Williams, which came from the California Court of Appeals, that issue was raised in footnote 4 and it was observed that, although the California courts would not have jurisdiction to entertain a lawsuit brought to enforce the Sherman Act, nonetheless when the remedy sought under the supremacy clause is declaratory or injunctive, it is appropriate to ask whether because of direct conflict with the mandate of the Sherman Act there is preemption.

And indeed, it was in that opinion and for this Court that Justice Rehnquist suggested that a facial attack upon a law for conflict with the Sherman Act, because of the breadth of its pro-competitive goals, requires more than a showing that there's something anti-competitive about the measure. It requires a showing that there is in fact a direct violation, though the remedial powers of the state courts would be limited.

When I was listening earlier today to the

argument in the Renton case, it struck me that that would be a perfect example of how unacceptable the contrary theory would be. In that case, this Court heard a First Amendment attack on an evenhanded neutral general ordinance that restricts competition.

It was a First Amendment attack, not a Sherman Act attack. But obviously the law restricts competition and the city didn't justify it by any pro-competitive effect, rather by its concern with the public welfare, transients and the like. Yet, obviously it prevents people from competing with adult fare, competing with that fare with the general fare that is offered in the city.

I would submit that, even if they tried to regulate the prices that adult theaters could charge -- suppose they said that Seattle has had a problem, adult theaters have cheap shows during the late afternoon in happy hour, and we're going to put a cap on those prices. That would be price-fixing, vertically, by government.

I would think that a preemption attack should be rejected. But contrast that with Midcal. That is, suppose the town of Renton allowed private owners of general fare theaters to get together and exclude competitio from nearby adult theaters or to restrict

competition by requiring that they charge at least as much as the prices of the ordinary theaters.

That would be preempted. It would be a combination in restraint of trade, and it couldn't be ratified even by state legislation because, although the state is exempt, it cannot, as this Court held in Schwegman and Goldfarb and Midcal, give a green light to private combinations.

And when we are told by Mr. Smock that that's what this law does because it places, as he put it, irresistable pressure on landlords to coalesce and combine, then we suppose that he's talking metaphorically. They do not coalesce and combine; they follow in lockstep the mandated price cap unless they in public hearing show that they are entitled to a special increase.

It seems to me that if we keep that in mind there is here neither a vertical combination between the city and those that it has the power of law to coerce to follow these prices, nor a holding combination among private parties mandated, encouraged, or authorized by the city.

As far as the vertical combination was concerned, I think the copper weld opinion of the Chief Justice is directly apposite. Just as it is nonsensical

to talk about a conspiracy between a parent and its wholly owned subsidiary when the parent can tell the subsidiary what to do, so to use the language of combination in the Sherman Act to say that there is some kind of combination between the city of Berkeley and the landlords who are directed by the city not to increase their rents faster than a certain publicly mandated rate we think makes a mockery of the language and of the Sherman Act.

And we think that any contrary view would lead to truly absurd results. Suppose the city wants to tell ambulance services that they must not charge more than a certain amount for emergencies. That then becomes a vertical combination between the city and the ambulances.

If the city tells parking garages that they must charge at least a certain floor, that becomes a vertical combination with the parking garages. If it tells taxi drivers that they can't charge any more than a certain ceiling, that's a vertical combination.

We don't think that can be what the Sherman Act conceivably meant, and we think therefore that there is in this case quite manifestly no contract, combination, or conspiracy in restraint of trade, unless one is to say that the social contract itself by which

all are bound to obey the law is a contract in restraint of trade. We don't think that that is what the Congress in 1890 meant.

But let me ask the question whether the Congress in its more recent speaking to this subject in 1984 in the Local Government Antitrust Act worked any change in the law, because I detected some evasion, I think, in response to Justice Stevens' question. But as I get it, their theory is that Congress in 1984 declined to provide a complete exemption to municipalities under the antitrust laws. That is, it declined to overrule or to reverse the impact of Boulder. And therefore we are asking, supposedly, of this Court what Congress refused to give.

In fact, it's absolutely clear, I think, that we are not asking for an absolute exemption or complete immunity for municipalities or their officials. We argue in some detail, citing cases from a great many lower courts in footnote 55 of our brief, that it is entirely possible, when one alleges and shows some combination between public officials and favored companies or franchisees, as in the Houston cable case that has been pending on certiorari in this Court since last December, entirely possible to meet the requirements of the Sherman Act.

Indeed, the language that Mr. Smock quoted from House Report 98-965 I think well states our position. He quoted: "If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it would simply exclude them from the application of the antitrust laws."

QUESTION: What about proof of a conspiracy or a combination between public officials and a tenants organization?

MR. TRIBE: If there were proof of a combination other than the ordinary lobbying effort by tenants -- that is, some claim perhaps that tenants --

QUESTION: Could you ever prove that? I doubt it.

MR. TRIBE: Well, if you couldn't prove it I would think that the Noerr-Pennington doctrine would require that one respect the right of any group in the society -- tenants, landlords -- to organize for a political purpose.

QUESTION: Unless all the council members were tenants?

MR. TRIBE: Well, they were all elected at large, Justice White. And I think that in the Chief

Justice's City of Eastlake opinion an important distinction was drawn between delegating power to some narrow private sector of the economy and passing an initiative measure, which after all this was.

And it's noteworthy that Mr. Smock does not press the claim that one could somehow find a conspiracy between those who won in the political process -- and they weren't all tenants; they were tenants and landlords who both voted for this measure -- and somehow the polity as an entirety.

QUESTION: Well, do you think your case would be weaker -- and I thought I got this from your recent answer to Justice White -- if say four of the seven members of the Berkeley City Council were tenants?

MR. TRIBE: No. No, Justice Rehnquist. I'm sorry if I gave that impression. I don't think the case would be weaker. I think the dramatic effect of their position might be a little less obvious, but the legal position would be absolutely identical. It doesn't matter what the identity of these individuals is.

But let me turn back for a moment, if I might, to the House report, because it directly belies, I think, the argument made by my colleague for the Appellants two pages before the quotation that he reads. Footnotes 24 and 25 of the report are very

explicit:

"It should be noted that the ruling in Professional Engineers" -- which suggested that only pro-competitive policy could be educed to support an anti-competitive measure -- "does not necessarily stand for the broader proposition that private persons and local governments should be treated exactly the same for purposes of antitrust analysis."

And indeed, in footnote 25 the point is made that: "Lower courts are already fashioning special tests for dealing with local government action under the antitrust laws in the face of Boulder."

And in the portion of this report that we quote in our brief, the House is clear that it expects those judicial decisions to continue. So that all the Congress declined to do was to confer blanket immunity, in the face of possible corruption, possible favoritism, possible combinations, to confer blanket immunity on municipalities.

Nor do we urge such blanket immunity. We merely argue that when this Court in Boulder lowered the shield of state action exemption from municipalities it should not therefore be deemed also to have given their opponents the kind of blunderbuss ammunition that is unavailable even against private wrongdoers. That is,

General Motors or IT&T are free to order their economic affairs so long as they do not violate the antitrust laws.

The suggestion that cities should be less free, should always have to act only with competition in mind, despite their very different public purposes, we think is untenable.

And indeed, if I might turn to Boulder itself, this Court in Boulder said that it was holding only that the state's subdivisions in exercising their delegated power must obey the antitrust laws, not that they must always put competition in a market, however exploitative, however incapable of meeting the diverse housing needs of the people, above all other goals.

Now, apart from the decisive absence of any combination or monopolization and therefore any Section 1 or Section 2 violation of the threshold, we do elaborate in our brief the further argument, to which I haven't heard any response by Mr. Smock -- I think it's a rather important argument -- the argument that even if there were the requisite combination or even if that were deemed merely a technicality that this Court could somehow overlook, the usual per se rule for private price-fixing is inappropriate in dealing with local government regulation of the economy, as the California

Supreme Court held.

The reason quite simply is, as this Court recognized in Town of Hallie, the assumption that private enterprise will be modified, will be motivated by private profit and not by the public good is inappropriate in dealing with municipalities.

The situation of municipal action is qualitatively different, and this Court has repeatedly said, all the way back in White Motor in 1963 and as recently as Northwest Stationers just this year, that one cannot mechanically extrapolate per se rules just by using seemingly similar labels.

Now, if I'm right that the existing per se rule about private price-fixing is unavailable to mechanically strike down this kind of ordinance, then there's a very important implication. The implication is one cannot strike it down on its face.

As this Court held in Rice v. Williams, to strike down a law on its face under the antitrust laws, despite all the myriad applications it might have, one needs to have a clear enough per se rule to be able to say that in all of its applications with confidence its anticompetitive effects will not be justified by the legitimate range of benefits one might consider.

What that in turn means is that it's only

after a series of as-applied attacks to laws of this kind that it would be appropriate to formulate the per se rule without which facial invalidation is unacceptable.

Now, such as-applied attacks might occur. I trust that if this Court reaffirms Boulder, says that there is no blanket exemption for municipalities, it will nonetheless have room, as the Fifth Circuit did in the Affiliated Capital Corporations case involving favoritism to certain cable companies, friends of the mayor, it will have room to entertain case by case particular instances of anticompetitive municipal behavior.

And after a time one might formulate for those situations appropriate per se rules, let's say a rule requiring competitive bidding across a broad range of cases, but only after a series of as-applied challenges. We have here a facial challenge that is not only a challenge bereft of conspiracy, but a challenge bereft of any showing of unreasonableness.

But it seems to us that the judgment below must in any event, even if we were wrong completely about conspiracy and wrong about the per se rules, it must in any event be affirmed, because the city of Berkeley, contrary to what you heard from Mr. Smock, is

in no sense serving a purely parochial interest of its own in passing this ordinance.

Of course it is concerned with its own citizens, with the aged, with students, with the disabled, with people who might otherwise be vindictively evicted from their apartments. But it is concerned, as it said in the very preamble to the ordinance, it's concerned with these things in order to discharge its duty under state law to make sure that every segment of the community is adequately housed.

Now, I think this Court was misled by Mr. Smock when he said that that duty was created in 1980. Surely, as Justice Rehnquist suggests, even if it was it would be competent for the legislature to ratify retrospectively what the city had done.

But the fact is that the relevant language giving every municipality in California an obligation somehow adequately to ensure that its people are housed, that language goes back to Section 65302 of the Government Code, enacted in 1967. It's been repeatedly amended, but the critical language has not been materially changed.

Now, that's five years before the original version of this ordinance was passed in 1972, and when that original version was passed in order to discharge

this state-created obligation both houses of the California legislature ratified what the city of Berkeley had done in that earlier version of this law.

Now, it is said in the Appellants' brief that this Court should disregard that ratification because the state legislatiure just did it absent-mindedly, mechanically; they ratified everything. But surely principles of federalism mean that one cannot disregard a legislative act of two houses of the state legislature on the ground that it's something that one would have automatically expected.

In any event --

QUESTION: So this is basically a zoning statute, though, talking about what kind of master plan cities shall have?

MR. TRIBE: Well, it's a development and housing requirement, and it's somewhat ambiguous as to the kinds of elements that must be included in the so-called housing element of the plan.

But the legislature itself I think has made clear it's understanding of the breadth of this law, because in 1980 when the law was again being considered, it was considered at the same time as the California electorate was being asked -- and it was called Proposition 10 -- to cut back on the rent control power

of municipalities, power that the state's highest court said that they had inherently under the home rule authority as of 1976 when the Berkenfeld decision was rendered.

So in 1980 the people of California are asked in Prop 10 to take back that power. While Proposition 10 was pending, the state legislature, in passing technical amendments to the planning provisions which as of 1967 had imposed these duties upon the municipalities, explicitly said in Section 65589, to protect the state's law, as I would understand it, from the possibility that Proposition 10 might pass, said that nothing in this planning law shall be construed to either add to or subtract from the rent control authorities of cities.

In other words, the legislature was recognizing that such authority already existed. If it should be removed by Proposition 10, then it was not meant by the legislature that this planning obligation would mandate rent control.

But the legislature has been clear for a long time that it's up to each municipality whether to meet the housing needs of all sectors of the economy and the population by rent control or in some other way. In that sense, the case is on all fours with Town of

Hallie.

That is, here, as in Town of Hallie, the city of Berkeley is left free either to take this specific kind of, if you want to call it, anticompetitive measure, although we think its net impact on competition has never been demonstrated, either it may take that measure or, if it doesn't, it must do something else to assure that the housing need of the people are met.

The foreseeability test of Town of Hallie does not require that the state direct municipalities as to the choice of means, and when the rent control method was ratified by the legislature when first used in 1972, when the state's highest court four years later said you don't even need to ratify it because it's one of the general powers of a municipality, and when four years later the state legislature acknowledges expressly that this is one of the municipality's means by which it may meet a state-created duty that goes all the way back to 1967, it seems to me entirely foreseeable and therefore state-authorized.

QUESTION: Well, Berkenfeld wouldn't help you by itself, because that's just like the Town of Hallie.

MR. TRIBE: That's right, Berkenfeld by itself wouldn't do. But as part of this chronological chain, it shows complete foreseeability.

But the dramatic effect of the Appellants' argument is that not even explicit state authorization would save local zoning, local rent control, local economic regulation, if their theory were right, because after all, as they themselves point out, Schwegman and Goldfarb and Midcal all were cases where there was direct state authorization.

And if one could analyze as a vertical mandate by obscure analogy to the resale maintenance cases, one could analyze any economic regulation telling private parties how to behave in the economy to an irreconcilable and irresistable pressure to coalesce and combine, then it would follow that no amount of explicit state authorization could save rent control, could save any local control of the economy.

Now, the Sherman Act, passed in 1890, cannot have had that intention. And when Congress in 1984 declined to provide complete immunity from Sherman Act violations to municipalities and municipal officers, it cannot have suddenly done what the Congress in 1890 failed to do.

So for three completely independent grounds, the judgment of the Supreme Court of California we think is correct. It's correct because there is no conceivable combination or conspiracy in restraint of

trade here. It's correct because there is no facial showing under an appropriately available per se rule that any restraint that might exist is unreasonable in light of the legitimate public purposes that it serves. And it's correct because, even if there were an antitrust violation, it is a violation so obviously foreseeable by the entire legislative scheme of the state of California that unless this Court were to overrule its recent unanimous decision in Town of Hallie, the decision below would have to be affirmed.

Thank you very much.

CHIEF JUSTICE BURGER: Mr. Smock.

REBUTTAL ARGUMENT OF JON SMOCK, ESQ.,

ON BEHALF OF APPELLANTS

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

This Court has never in its 90-year history of interpreting the Sherman Act created exceptions to price-fixing. It has always looked to Congress. As this Court said in Maricopa, it is for the Congress to make exceptions to that rule.

QUESTION: Mr. Smock, have we ever held that price-fixing in violation of the Sherman Act occurs when no private party makes a decision on what price shall be charged?

MR. SMOCK: I respectfully suggest that in Midcal --

QUESTION: It authorized the filing by a wine producer of a price list that everybody else had to follow.

MR. SMOCK: But it was enforced by state legislation.

QUESTION: I understand, but I'm asking if there's any price-fixing case that does not involve private conduct by somebody who could be said to have violated the Sherman Act?

MR. SMOCK: Only with respect to the adoption by a state legislature, as in Midcal, of a scheme regardless of how fixed. In our judgment, the city of Berkeley is wrong in its analysis with respect to the fact that prices are not fixed by private persons here. There is not a rent control board that fixes a price other than a rollback price to a base rent that in its --

QUESTION: Can any private person here fix a price that governs one of his competitors?

MR. SMOCK: It does not govern one of his competitors. However, all are forced to coalesce in combination to maintain the price which is compelled upon them by local ordinance.

QUESTION: Yes, but only for the individual properties.

MR. SMOCK: I beg your pardon?

QUESTION: Only for the individual properties.

MR. SMOCK: Only for his individual properties.

QUESTION: Yes, so that they don't -- there's no uniform price set for rental units.

MR. SMOCK: There is a uniform price set by the city, by having rolled back prices to a May 31 --

QUESTION: But the prices are -- a great variety of prices between individual units, I suppose.

MR. SMOCK: There are price differentials.

QUESTION: You don't say -- there isn't a uniform price for every 100 square feet of rental space?

MR. SMOCK: Not at all. But the fact that price is tampered with has always been considered by this Court to be an improper function unless permitted by express Congressional Act. And we suggest that that is not appropriate for the city of Berkeley to engage in price tampering.

Price has been the central nervous system of the economy. Price competition is the hallmark of the

national economy, and price competition is destroyed here.

QUESTION: And I suppose you'd say the same, just doing it another way, if they just limited the profit?

MR. SMOCK: Absolutely. You cannot control the way in which a private entrepreneur approaches the marketplace with respect to price because it destroys competition. What we have in effect is a regulatory declaration by the city of Berkeley that says: Competition is inappropriate in our city; we choose to march to our own drummer and we will not pay attention to the national economic policy dictated by Congress in the Sherman Act.

QUESTION: Mr. Smock, would you make the same argument about taxi fares?

MR. SMOCK: Absolutely. Taxi fares are inappropriately set by a municipality unless authorized by state legislation.

QUESTION: Minimum wages?

MR. SMOCK: I beg your pardon?

QUESTION: Minimum wages?

MR. SMOCK: Minimum wages, unless set by Congress, as this Court has recognized in Garcia, and that is a perfect example of the appropriate way in

which persons who are adversely affected should proceed. Take their case to Congress and make their case, as the cities and counties did following this Court's decision in Garcia, and as the cities and counties did following this Court's decision in Boulder. And what they wanted, Congress did not give them.

And I respectfully suggest that the California decision should be reversed. Thank you.

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

(Whereupon, at 1:46 p.m., argument in the above-entitled case 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:

#84-1538 - ALEXANDRA FISHER, ET AL., Appellants V. CITY OF BERKELEY, CALIFORNIA, ET AL.

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BY Paul A. Richardson

(REPORTER)