

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

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THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-978

TITLE EXXON CORPORATION, ET AL., Appellants v.  
ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL  
COMPENSATION FUND, ET AL.

PLACE Washington, D. C.

DATE December 9, 1985

PAGES 1 thru 45

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - :  
3 EXXON CORPORATION, ET AL., :  
4 Appellants :  
5 v. :  
6 ROBERT HUNT, ADMINISTRATOR :  
7 OF NEW JERSEY SPILL :  
8 COMPENSATION FUND, ET AL. :  
9 - - - - - :

No. 84-978

10 Washington, D.C.

11 Monday, December 9, 1985

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 1:48 o'clock p.m.

15 APPEARANCES:

16 DANIEL M. GRIBBON, ESQ., Washington, D.C.; on behalf of  
17 the Appellants.

18 MS. MARY CAROL JACOBSON, ESQ., Deputy Attorney General  
19 of New Jersey, Trenton, New Jersey; on behalf  
20 of the Appellees.

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
DANIEL M. GRIBBON, ESQ.	
on behalf of the Appellant	3
MS. MARY CAROL JACOBSON, ESQ.	
on behalf of the Appellees	20
DANIEL M. GRIBBON, ESQ.	
on behalf of the Appellant -- rebuttal	42

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3  
4  
5  
6  
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11  
12  
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14  
15  
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1                                    P R O C E E D I N G S

2    (1:48 p.m.)

3                            THE CHIEF JUSTICE: Mr. Gribbon, I think you  
4 may proceed whenever you are ready.

5                            ORAL ARGUMENT OF DANIEL H. GRIBBON, ESQ.  
6    ON BEHALF OF THE APPELLANTS

7                            MR. GRIBBON: Mr. Chief Justice, and may it  
8 please the Court:

9                            The issue in this appeal is whether a tax on  
10 oil and chemicals imposed by New Jersey in order to  
11 finance a spill fund to be used for the cleanup of  
12 hazardous wastes is pre-empted by an Act of Congress.

13                            As part of the Comprehensive Environmental  
14 Response, Compensation and Liability Act of 1980,  
15 ccommonly referred to as CERCLA, Congress imposed a tax  
16 on oil and chemicals to finance a superfund to start  
17 cleaning up hazardous wastes nationwide. Section 114-C  
18 of the federal Act pre-empts other funds whose purpose  
19 is to pay for response costs, damages and claims which  
20 may be compensated under CERCLA, the key words being  
21 "may be compensated."

22                            This, then, is an express pre-emption case  
23 similar to the Aloha Airlines case that the Court  
24 decided two years ago, and unlike implied pre-emption  
25 cases such as that submitted to you just now, there is

1 no need to inquire whether Congress intended pre-emption  
2 of state action.

3 Here it is undisputed that Congress has  
4 pre-empted some state taxation for cleanup purposes, and  
5 the question is whether the New Jersey spill fund  
6 escapes that pre-emption. It is clear on the face of a  
7 New Jersey statute which was passed in 1977 that the  
8 purpose of the spill fund was to clean up hazardous  
9 wastes in accordance with the National Contingency Plan.

10 Three years later, Congress came along and  
11 passed CERCLA to accomplish the same cleanup purpose on  
12 a nationwide basis. There can be no question,  
13 therefore, that a purpose of the spill fund was really  
14 to do the same thing as CERCLA, to pay claims that after  
15 1980 might be compensated under CERCLA, in the sense  
16 that they are eligible for payment under CERCLA.

17 It is appellant's contention that spill fund  
18 is thus pre-empted because its purpose is to pay costs  
19 of response, damages and claims that qualify for  
20 compensation under CERCLA. In holding that the spill  
21 fund is not pre-empted, the New Jersey Supreme Court  
22 read the statutory language, "may be compensated under  
23 CERCLA" to mean actually paid under CERCLA, rather than  
24 eligible or qualified for payment.

25 This interpretation as we understand it would

1 serve only to pre-empt state funds that are established  
2 for the purpose of paying response cost damage claims  
3 actually paid by the federal government. No state, we  
4 submit, would ever have any reason to impose taxes or to  
5 create a fund for the purpose of paying claims that are  
6 actually paid by the federal government.

7 On the other hand, the interpretation of  
8 114-C, we urge, gives the pre-emption real meaning.  
9 Certainly Congress intended that it was to have some  
10 real meaning.

11 QUESTION: Mr. Gribbon, I think the Solicitor  
12 General in a brief filed with us takes the position that  
13 is neither yours nor the appellee's. I'm not sure I  
14 understand the SG's position. Do you, and would you --  
15 do you plan to comment on it?

16 MR. GRIBBON: I will comment on it right now,  
17 Justice O'Connor. The Solicitor General rejects New  
18 Jersey's view that the pre-emption is limited to claims  
19 actually paid. He goes on to say that the New Jersey  
20 statute is partially pre-empted by the federal statute.

21 He arrives that way by distinguishing between  
22 claims that New Jersey would pay that are submitted by  
23 third parties as against payments made directly by the  
24 state, even for the same purpose, and therefore he says  
25 that the pre-emption is only to the extent that New

1 Jersey honors claims that are submitted to it and it  
2 does not cover direct payments made by the state to  
3 accomplish exactly the same purpose.

4 And, it is that second part where we disagree  
5 with him and feel there is no basis in the statute or in  
6 its legislative history for making this arbitrary  
7 distinction between claims submitted to New Jersey and  
8 work done directly by New Jersey that accomplishes the  
9 same purpose.

10 Actually, the New Jersey statute is very clear  
11 that everything that it pays is put in terms of claims  
12 and compensation, and similiarly CERCLA recognizes that  
13 a state --

14 QUESTION: I don't understand that last  
15 statement. Are you saying that under the New Jersey  
16 scheme all payments would be made to the state itself,  
17 in effect?

18 MR. GRIBBON: All payments made by the state  
19 itself are regarded as payment of claims, because there  
20 is a New Jersey Environmental Department that submits  
21 claims to the Treasurer's Department and the Treasurer  
22 then pays them, so that New Jersey does not recognize  
23 this distinction that the Solicitor General purports to  
24 see between paying claims for third parties and doing  
25 the work yourself. That really doesn't make any sense.

1           QUESTION: Well, I suppose it's also possible  
2 to argue that what the statute means is pre-empted. Is  
3 it, not only things that could actually be paid by the  
4 federal government because it's part of the national  
5 priority list, but sites or damage that are not included  
6 in any national priority list would never be paid by the  
7 federal government and therefore are not pre-empted?

8           Now, what about that?

9           MR. GRIBBON: Your Honor, we would agree with  
10 that interpretation. That's precisely what we say, that  
11 to the extent a claim -- to the extent a response or  
12 damage claim does qualify under CERCLA and can be paid,  
13 then the state is pre-empted from resorting to a tax on  
14 oil and chemicals to pay it.

15           QUESTION: But if there is a site in New  
16 Jersey that isn't on the priority list of the federal  
17 government and of EPA, then you would think the state  
18 could make its --

19           MR. GRIBBON: Could tax chemical and oil and  
20 make a payment, except for sites that are on the  
21 National Contingency Plan, an earlier list where removal  
22 without any kind of approval from EPA can be compensated  
23 under EPA, and a lot of the expenses of the State of New  
24 Jersey are removal expenses.

25           CERCLA distinguishes between remedial and



1 removal, and there is a broader right to the states in  
2 removal. Essentially, I think I'm in agreement with  
3 your statement that the State could create a fund by  
4 taxing oil and chemicals as long as it was for the  
5 purpose of dealing with non-CERCLA qualified matters.

6 New Hampshire has precisely that kind of a  
7 statute, and we've referred to it in our brief.

8 QUESTION: Mr. Gribbon, along the line of your  
9 answers, what if the federal government pays claims to  
10 the state, perhaps would pay. What does the state do  
11 with the money derived from its taxes where the federal  
12 government had paid the claim already?

13 The state raises taxes, and I understood you  
14 to say the taxes are raised to pay claims that the  
15 federal government under the Superfund Act already will  
16 pay. Is that correct?

17 MR. GRIBBON: Yes, that is correct. If they  
18 qualify, if they will go to the federal government and  
19 say, we've spent this money, or this needs to be done  
20 and we qualify for payment, yes.

21 QUESTION: Well, assume that the claims do  
22 qualify for federal payment. Does the state have a  
23 windfall with the taxes it has raised?

24 MR. GRIBBON: Well, to some extent it does.  
25 It has presently in this spill fund an accumulation of

1 \$25 million that it hasn't spent, and it has spent very  
2 heavily -- pardon?

3 QUESTION: Because the federal government has  
4 paid the claims?

5 MR. GRIBBON: It may be because the federal  
6 government has paid 90 percent of the cost of cleaning  
7 up sites in New Jersey. It has spent more money in New  
8 Jersey than it has in any other state, and New Jersey  
9 has benefited from that and it still keeps in its fund  
10 this \$25 million that it's collected from the tax on oil  
11 and chemicals.

12 QUESTION: You said "maybe." I suppose the  
13 record just doesn't show?

14 MR. GRIBBON: It shows the \$25 million  
15 accumulation.

16 QUESTION: Yes.

17 MR. GRIBBON: But to say exactly why that's  
18 there, that's impossible. It shows these two things,  
19 New Jersey participating heavily. Indeed, it says in  
20 its official report, it's among the leaders in  
21 competition for the national superfund dollars.

22 QUESTION: Mr. Gribbon, while you are  
23 interrupted, I'd like to pursue a little further Justice  
24 O'Connor's question about the Solicitor General's  
25 interpretation of the statute in which he says, the word

1 "claims" refers to third party claims against the state.

2 As I understand your response, you are saying,  
3 well, New Jersey treats a claim by its own agency  
4 against the state treasury as a claim. But, does that  
5 necessarily answer the question, what the word "claim"  
6 means in the federal statute?

7 MR. GRIBBON: In the federal statute, a state  
8 is recognized as an appropriate claimant, something that  
9 the Solicitor General overlooked or didn't pay any  
10 attention to. But there isn't any reason why the state  
11 can't be a claimant for Superfund monies in accordance  
12 with the words of the statute.

13 QUESTION: It is sort of a strange way to  
14 write a statute, though, to talk about claims,  
15 compensation for claims, to mean a state compensating  
16 itself.

17 MR. GRIBBON: Well, the New Jersey statute is  
18 written that way, and I think the reason for it is that  
19 there are these two different departments of the state,  
20 the Environmental Department on the one hand which does  
21 the work or that contracts it out and the Treasury which  
22 holds the money. Indeed, in the whole area of  
23 environmental work, claims and compensation have been  
24 used fairly interchangeably with no distinction as to  
25 whether the state does the work directly or the federal

1 government does the work directly, or pays for having it  
2 done.

3 I would just like to say --

4 QUESTION: Mr. Gribbon, if we agreed with your  
5 interpretation of the statute, would all the money ever  
6 collected by New Jersey to put in its Superfund have to  
7 be refunded?

8 MR. GRIBBON: We believe it would, Your Honor,  
9 the reason being twofold: in the first place the  
10 pre-emption goes to the purpose of the statute. New  
11 Jersey never took any steps to change the purpose of its  
12 statute after CERCLA was passed. It could have done  
13 that.

14 Indeed, the New Jersey statute in '77  
15 recognized that there could come along a federal statute  
16 that would be pre-emption and it directed that at that  
17 time there be a review and re-examination. That never  
18 took place.

19 Moreover, the non-CERCLA funds that  
20 expenditures have been made by New Jersey are quite  
21 insignificant, about six percent of the total fund, the  
22 record appears to show at least in the earlier years.  
23 So, we believe that since -- initially, let me concede,  
24 New Jersey could have split the fund.

25 It could have decided, we're going to collect

1 so much for all spills which are not governed by CERCLA  
2 and we're going to collect so much for chemicals which  
3 are not covered. It did not do that, and indeed the tax  
4 rate was originally set to cover all kinds of hazardous  
5 waste, not just oil spills, and that tax rate has never  
6 been changed even though in 1980 the tax would have gone  
7 off through a capping provision in the statute if it  
8 were not for the hazardous waste claims.

9 New Jersey's experience with oil spills was so  
10 favorable that they would have had enough money, were it  
11 not for these hazardous wastes.

12 QUESTION: May I just ask you one more  
13 question while I have you interrupted, please. I  
14 understand Congress is presently considering legislation  
15 affecting the Superfund. Is there anything in the  
16 present proposals before Congress addressing itself to  
17 this question of pre-emption?

18 MR. GRIBBON: I think the answer to that is  
19 no. Congress is considering it, indeed they're going to  
20 debate it again tomorrow, and they have three bills up  
21 there. All of the bills they are talking about would  
22 significantly increase the amount of money and would go  
23 to a broad-based tax of some sort and would take the  
24 whole burden as it now rests off oil and chemicals.

25 If that were to happen under all these bills,

1 the pre-emption would disappear. The oil and chemicals  
2 would no longer be bearing what was recognized as a  
3 disproportionate burden of the tax, and the pre-emption  
4 would disappear.

5 It's entirely possible, though, that they are  
6 not going to arrive at any kind of agreement and the  
7 present bill would simply be extended and the  
8 pre-emption presumably would continue, although that  
9 remains to be seen, if oil and chemicals continue to  
10 bear the disproportionate burden.

11 On the words of the statute, and it isn't a  
12 big, comprehensive sort of a statute, I will emphasize  
13 only this, that the "may be compensated," particularly  
14 the "may be," reflects the potential and not the  
15 certainty of payment that actually paid. which was not  
16 used, which would reflect -- and by examining CERCLA a  
17 state legislature can determine what kinds of claims  
18 qualify for payment and which don't, and if they think  
19 the need is there, create another fund even by a tax on  
20 oil and chemicals and that, as I say, is exactly what  
21 New Hampshire has done.

22 There are other aspects of section 114, for  
23 example, the exemption from pre-emption and a provision  
24 against double taxation in 114-B, which we submit fully  
25 support our view that looking solely at the statute

1 itself, New Jersey's view strips it of meaning and  
2 doesn't give proper significance to the words that are  
3 used in there.

4 Let me turn briefly to the objectives and  
5 purposes of CERCLA, which we submit fully support the  
6 interpretation of the pre-emption that we urge. This  
7 was compromise legislation jammed through in the 1980  
8 lame duck session with very little in the way of  
9 explanation as to just exactly what Congress meant.  
10 There were, for example, no reports.

11 Accordingly, one has to look at what was said  
12 and discussed during about two years of legislative  
13 gestation that this bill was going through. Two strains  
14 in that discussion, I submit, give real content to the  
15 pre-emption.

16 The first one is about money, where it was  
17 going to come from and how much they were going to  
18 need. They finally decided that a fund of \$1.6 billion  
19 would be enough to make a start on this massive job.

20 Now, this money could have come from general  
21 revenues because all of us in some measure bear some  
22 responsibility for hazardous wastes. It could have come  
23 from a tax on generators. These are manufacturers,  
24 miners, milling people, some 260,000, who directly  
25 contribute to this.

1           Nonetheless, it was decided not to do that, to  
2 impose this tax only on oil and chemicals, some 30  
3 chemicals, with the result that about 400 -- about 900  
4 taxpayers bore the entire burden of the federal waste  
5 program. Thereafter, there was considerable discussion  
6 and concern that those people should not be taxed again  
7 for this purpose, at least for the five-year  
8 experimental period during which CERCLA was to be in  
9 effect.

10           So that, the basic consideration there was a  
11 recognition that oil and chemicals were bearing a  
12 disproportionate burden of the cost of federal waste  
13 cleanup, and that at least for this period when the  
14 federal program was getting itself going and finding  
15 what needed to be done, they shouldn't be subject to  
16 multiple state taxation. They could have been taxed in  
17 all 50 states.

18           The other theme that runs through the  
19 discussions is the need to provide for federal-state  
20 cooperation in order to achieve effectively this  
21 nationwide program of dealing with the waste, and this  
22 involved the states nominating sites and working with  
23 the federal government, and indeed paying ten percent of  
24 the total cost.

25           So, it was necessary, and many legislators



1 suggested that this was going to be difficult enough  
2 with one federal program without having up to 50 other  
3 state programs competing in this prioritization,  
4 competing for human resources and financial resources.

5 So, those two strains, I submit, fully support  
6 our contention that what was intended was that the  
7 states would not put additional taxes on oil and  
8 chemicals for these same purposes, and it didn't have to  
9 do with actual payment but rather with the purpose of  
10 the tax.

11 Now, the New Jersey Supreme Court, in  
12 accepting the actually paid argument, relied almost  
13 entirely on a single incident in the legislative history  
14 of CERCLA, and in a colloquy on the Senate floor,  
15 Senator Randolph, the Floor Leader, did agree in  
16 response to two complicated leading questions from  
17 Senator Bradley that pre-emption extends only to funds  
18 whose purpose is to pay claims actually paid by  
19 Superfund.

20 I submit that in the first place, any court  
21 should be extremely cautious in according very much  
22 weight to such an isolated exchange, particularly when  
23 it strays so far from the words of the statute.  
24 Moreover, it is at least as likely as not, if you look  
25 at the context of that statement, that Senator Bradley

1 in his curt agreement to Senator Randolph, in his  
2 agreement to Senator Bradley, had in mind pre-existing  
3 state funds.

4           These were funds that had collected money  
5 before the effective date of CERCLA, and Senator  
6 Randolph at great length explained that there was no  
7 pre-emption involved there. That money could be spent  
8 however they wanted to spend it. And, New Jersey had a  
9 deep interest in that because it did have such a fund.

10           It should be noted in this connection that  
11 earlier in this colloquy both Senator Bradley and  
12 Senator Randolph referred to pre-emption as extending to  
13 claims and damages compensable under CERCLA, and  
14 "compensable" and "may be asserted" were the terms that  
15 were used most frequently throughout the legislative  
16 discussion, along with this concern to prevent federal  
17 taxation.

18           I think, in answer to Justice O'Connor's  
19 question, I have dealt with an argument New Jersey makes  
20 which appears to be that even if our view of the  
21 pre-emption is accepted, this spill fund should  
22 nonetheless survive. One reason is that it says it has  
23 other purposes, these being the oil spill, particularly,  
24 and as I indicated the purpose is what is important and  
25 they haven't changed the tax rate, and the oil spill

1 expenditures are very, very small.

2 The other argument that it seems to make is  
3 that in fact it has refrained from spending money on  
4 certain sites. Now, even if that were factually  
5 correct, and I'll show in just a moment that it is not,  
6 we submit that spill funds should still be stricken  
7 because it is not the manner in which the money is spent  
8 that determines pre-emption, it is the purpose, and the  
9 purpose remains to clean up hazardous wastes, the same  
10 purpose as CERCLA.

11 However, the records that are before the Court  
12 here show that New Jersey did not refrain from spending  
13 on CERCLA sites. \$32 million out of about \$36 million  
14 that was spent have gone to CERCLA sites, CERCLA  
15 qualified sites.

16 Some of that, a small amount of it, about \$2  
17 million, may be New Jersey's portion of the Superfund  
18 expenditures, but that could not be in excess of about  
19 two and a half million dollars. This is all shown, as I  
20 say, in papers that are with the Court. They were  
21 brought in, really, in response to New Jersey's effort  
22 to avoid pre-emption by forgetting about the purpose and  
23 looking to the manner in which the expenditures were  
24 made.

25 I submit that that will not work, because it

1 is purpose that is the key figure here, and even if you  
2 look to expenditures, substantial amounts of money have  
3 been spent on the CERCLA sites.

4 I would like to refer only briefly to the  
5 brief filed by California and seven other states as  
6 amici. I would further look, because I believe it  
7 highlights the narrow issue that is presented for  
8 decision here.

9 As that brief puts it, a number of states did  
10 create funds to supplement and complement federal  
11 Superfund, and that is perfectly permissible. New  
12 Jersey made no such effort. It failed even to abide by  
13 the provision in its own statute which said, if there's  
14 federal legislation, take a look at this.

15 Indeed, during the course of that legislation,  
16 one of the legislators recognized that there was apt to  
17 be, before too long, federal legislation which would  
18 pre-empt dual taxes by the state and the federal  
19 government. But they didn't do that. They continued  
20 right along with their statute, and it appears, and this  
21 is borne out by our description of the 40 other state  
22 funds, in the appendix to our reply brief, that alone  
23 among the states New Jersey has imposed a very  
24 duplicative tax on oil and chemicals that was in the  
25 mind of the framers of the pre-emption provision in

1 114-C.

2 As far as these other funds are concerned,  
3 they all appear to be financed through general revenues,  
4 which is not pre-empted, or in some other way that does  
5 not impose on oil and chemicals the disproportionate  
6 burden which was the essential reason for the  
7 pre-emption written in 114-C.

8 Accordingly, it is our contention that New  
9 Jersey spill fund alone transgresses the pre-emption and  
10 should be accordingly set aside.

11 THE CHIEF JUSTICE: Ms. Jacobson.

12 ORAL ARGUMENT OF MARY CAROL JACOBSON, ESQ.

13 ON BEHALF OF THE APPELLEES

14 MS. JACOBSON: Thank you, Mr. Chief Justice,  
15 and may it please the Court:

16 New Jersey has one of the worst, if not the  
17 worst hazardous waste problem in the country. We have  
18 97 sites, either currently on the national priority  
19 list, or nominated to the national priority list,  
20 maintained by the United States Environmental Protection  
21 Agency. This is a list of the worst sites nationwide.

22 New Jersey not only has more sites than any  
23 other state but has more than ten percent of all the  
24 sites in the country, on the list. Given the extent of  
25 this problem, which actually reaches far beyond the

1 priority sites, those that actually make the list,  
2 because of this problem massive amount of rescurces are  
3 needed to clean up these sites in order to protect the  
4 public and the environment.

5           The New Jersey Legislature responded to the  
6 hazardous substance pollution problem and the threat of  
7 oil spills to the state's coast and tourist industry in  
8 1977 when it adopted the Spill Compensation and Control  
9 Act. The Spill Act provided strong liability provisions  
10 in order to have responsible parties pay for as much of  
11 the cleanup as possible, but it also provided a funding  
12 source for those cleanups where responsible parties were  
13 not available to finance the work.

14           New Jersey relied almost exclusively on the  
15 Spill Act for funding of hazardous substance clean up  
16 from 1977 until Congress adopted the federal Superfund  
17 Act in December of 1980. The federal Act provided  
18 funding for the cleanup of top priority sites  
19 nationwide. Its focus was limited to priority sites  
20 because of the restricted amount of financing that was  
21 made available on the federal level.

22           Given this limited federal financing, Congress  
23 itself recognized that active state participation and  
24 financing were critical to achieve the cleanup goals  
25 envisioned by Congress. Several members of the New

1 Jersey Congressional delegation were actively involved  
2 in the legislative process that led up to the adoption  
3 of the Superfund Act, most notably Senator Bill Bradley  
4 and Congressman James Florio.

5 They were well aware of the state's funding  
6 mechanism and were very concerned about the impact that  
7 the new law would have on New Jersey's ability to  
8 continue its spill fund taxing scheme. Senator Bradley  
9 was especially concerned about the impact that Section  
10 114-C would have on the New Jersey Spill Act.

11 I'd like to read that language of Section  
12 114-C: "Except as provided in this Act, no person may  
13 be required to contribute to any fund, the purpose of  
14 which is to pay compensation for claims for any cost of  
15 response or damages or claims which may be compensated  
16 under this Subchapter."

17 Senator Bradley then questioned Senator  
18 Jennings Randolph who was Chairman of the Committee on  
19 Environment and Public Works which had reported the bill  
20 to the Senate as to the effect of this language on the  
21 New Jersey fund. The New Jersey fund was thus the  
22 particular context for the colloquy that occurred.

23 The gist of the Bradley-Randolph colloquy  
24 which is quoted extensively in the briefs, is that  
25 states may levy special taxes on industry to support

1 hazardous substance cleanups and related costs not  
2 compensated on the federal level, and among the  
3 categories of expenditures from state funds that were  
4 explicitly found appropriate in the colloquy were that  
5 state funds could be used to pay for the ten percent  
6 state share that Superfund requires as a prerequisite  
7 for financing remedial actions on the federal level.

8           They also specifically said that state funds  
9 could be made available for sites that were eligible for  
10 compensation on the federal level but where no federal  
11 financing was actually provided. And thirdly, they said  
12 that state funds were available for cleanup costs at  
13 sites that were initially undertaken by the federal fund  
14 but where the work had to be stopped prior to actual  
15 completion of the work.

16           Although Mr. Gribbon stated that there was an  
17 argument that they were talking about state funds  
18 collected prior to the effective date of the Act, that  
19 simply is not borne out on the face of the colloquy.  
20 They did mention in their discussion of the statute that  
21 there would be absolutely no pre-emption whatsoever for  
22 funds collected prior to the effective date of the  
23 federal Act.

24           When they got to the end of the colloquy,  
25 however, they talked about particular exemptions from



1 pre-emption that were available under the language of  
2 Section 114-C. They would have had no reason to talk  
3 about exemptions for funds collected prior to the  
4 effective date of the Act because they weren't  
5 pre-empted at all.

6 In essence, then, the language of Section  
7 114-C was drafted to enable the states to supplement but  
8 not to duplicate the federal cleanup program. Since the  
9 adoption of the Superfund Act, New Jersey has  
10 administered its state program to supplement federal  
11 cleanup efforts.

12 As interpreted and applied, therefore, New  
13 Jersey is using its special tax to finance cleanups  
14 either not covered on the federal level or not actually  
15 compensated by Superfund. Those are the two kinds of  
16 test endorsed by the New Jersey Supreme Court, the New  
17 Jersey fund could be used for items not covered or not  
18 actually compensated.

19 Exxon's assertion that the state has misspent  
20 Spill Fund monies, under our own interpretation of  
21 Section 114-C, is first of all irrelevant and second of  
22 all, it's flatly wrong. The assertion is irrelevant  
23 because it's not part of the record in this case. The  
24 documents that they rely upon were lodged with the Court  
25 by Exxon in recent days, but they were not relied on by

1 the court below.

2 Secondly, this assertion is not necessary to  
3 the decision in this case, and in any event is one that  
4 demands a full factual development in another  
5 proceeding. The Court here is asked to define the  
6 permissible uses of a special state tax in the hazardous  
7 waste cleanup area in light of Section 114-C. This is a  
8 legal issue, not a factual issue, and it had always been  
9 treated as such by both of the parties until Exxon  
10 reached this Court.

11 Once that legal determination is made as to  
12 what uses are permissible under the federal Act, Exxon  
13 may then decide to challenge the state's compliance with  
14 that legal determination. Such a proceeding is not this  
15 case, which was decided on cross motions for summary  
16 judgment on the extremely limited record. Exxon  
17 recognized as early as the state Tax Court that this was  
18 a matter for legal determination and not a factual issue.

19 Beyond that, Exxon has distorted the annual  
20 reports that it has submitted to this Court. Those  
21 reports simply do not support Exxon's contention that  
22 the Spill Fund money has been misspent. They focus on  
23 two different sites, the Chemical Control and the Goose  
24 Farm site.

25 The reports they rely upon were compiled in

1 fiscal years, and the year they point to as being most  
2 -- or the worst violation by New Jersey was 1981.  
3 Fiscal year 1981 runs from June of 1980 -- or July 1st  
4 of 1980 to June 30th of 1981, and a good almost six  
5 months of that period was before the federal Act was  
6 ever adopted.

7           Also, the Chemical Control facility that they  
8 focus on actually blew up in April of 1981. It was a  
9 toxic time bomb that did explode. The State of New  
10 Jersey couldn't wait for the federal government to make  
11 its decision to pass a federal statute. They had to  
12 move in right away in April of 1980 and committed  
13 massive amounts of funds. In fact, they actually wiped  
14 out the existing balance of the fund in 1980, responding  
15 to this particular site.

16           Exxon also doesn't recognize that there was a  
17 start-up period that EPA went through with the Superfund  
18 Act, that there was no national contingency plan, no  
19 list and so forth, until July of '82. Beyond that, New  
20 Jersey did apply for federal funds for both the Chemical  
21 Control and the Goose Farm sites from the only then  
22 available source, which was Section 311-K under the  
23 Federal Clean Water Act.

24           A schedule attached to the last page of the  
25 audit report for fiscal years 1983 and 1984, which Exxon

1 has lodged with the Court, reflects the federal  
2 reimbursement under this program. New Jersey certainly  
3 tried to get the federal government involved in the  
4 Chemical Control and Goose Farm sites and succeeded on a  
5 limited basis.

6 Finally, as the May 1985 report, recently  
7 lodged with the Court by Exxon, notes, a major  
8 settlement occurred in 1984 between the Spill Fund and  
9 the company that had been under contract to the state to  
10 provide cleanup costs for those two sites. Disputes  
11 over the amounts due and owing from that 1980 explosion  
12 have thus led to expenditures in years subsequent to  
13 1980. Exxon's factual argument must thus be rejected as  
14 unsupportable as well as irrelevant to this case.

15 Returning to the real issue at hand, which is  
16 the meaning of Section 114-C, it's important to remember  
17 that Congress did not say that states could not tax --  
18 or could not have special taxes to fund hazardous waste  
19 cleanups. Rather, Congress linked the restriction on  
20 special state taxation to cleanup and damage coverage on  
21 the federal level. They specifically said, to claims  
22 which may be compensated under Superfund.

23 At this point I would like to address what  
24 Exxon claims, there were two major strains of this  
25 legislation. I think they're wrong on both counts of

1 the themes that were important to Congress.

2 Exxon claims that Congress had some interest  
3 in protecting the petrochemical industry from a double  
4 tax. As the Solicitor General points out, Section 114-C  
5 is not limited in any way to petrochemical companies.

6 The language reads: "No person may be  
7 required to contribute to any tax." Even though there  
8 had been some discussion of avoiding a double tax on the  
9 petrochemical industry, particularly in the context of  
10 the Oil Spill legislation which predated the Superfund  
11 Act, in the waning days of the Congressional session  
12 Congress came up with another formulation. They  
13 endorsed, "no person," which would limit a state's tax,  
14 a special tax to support a state fund, not simply a tax  
15 on the petrochemical industry.

16 So, Exxon is wrong on that count. It simply  
17 is not supported by the language.

18 The second thrust of their argument was a  
19 national uniformity argument which we can agree with  
20 only up to a point. There was some concern by Congress  
21 to have a national program. They created the National  
22 Contingency Plan and the National Priority List, and  
23 clearly wanted to have the resources available on the  
24 federal level to set the tone, set the pace for the rest  
25 of the nation.

1           However, they did allow states quite a bit of  
2 leeway. If you look at Section 114-A of the Act, it  
3 explicitly states that the states may add whatever  
4 requirements they want in regard to hazardous substance  
5 response actions.

6           In addition, Section 104 of the Act requires  
7 extensive state participation throughout the cleanup  
8 process.

9           QUESTION: May I just interrupt a moment.  
10 Don't those provisions just generally apply to state  
11 action that might well be financed from general revenues?

12           MS. JACOBSON: Section --

13           QUESTION: Section 114-A, for example, doesn't  
14 that just apply to state action that could well be  
15 financed by general tax revenues instead of from the  
16 special fund?

17           MS. JACOBSON: I don't believe it's limited to  
18 just --

19           QUESTION: Maybe it's not limited, but at  
20 least it would be effective.

21           MS. JACOBSON: It would be effective as to  
22 those, yes.

23           QUESTION: Because, I have to confess, this  
24 language, does the New Jersey Spill Fund provide money  
25 to clean up damages that could be compensated under the

1 federal Act?

2 MS. JACOBSON: Not as interpreted and applied  
3 subsequent to the adoption of Section 114-C. Since  
4 Congress adopted that statute, the State has  
5 administered the Act in accord with our interpretation,  
6 which allows for the supplementation of the federal  
7 program but not the duplication of the federal program.

8 The way that this is applied on a practical  
9 basis is that the State has maximized its use of the  
10 federal program and we feel that the actual compensation  
11 test enunciated by the New Jersey Supreme Court, when  
12 given a practical application, forces us into the  
13 federal program to take advantage of whatever  
14 opportunities are available to us on the federal level.

15 It does place a restriction on us because the  
16 site, for example, is on the national priority list.  
17 New Jersey has to pursue federal funding for that site,  
18 and if it is still realistically eligible for such  
19 compensation the State could not fund that site.

20 QUESTION: What do you mean by "realistically  
21 eligible"? I guess there are priorities, and a lot of  
22 sites are eligible that may not actually get any money.

23 You say they are not realistically eligible  
24 unless they get the money, is that it?

25 MS. JACOBSON: While there is a possibility, a

1 reasonable possibility that the money will be  
2 forthcoming -- for example, if EPA says to New Jersey in  
3 regard to a particular site, it's on the national  
4 priority list but we don't have enough money to go  
5 around, therefore we cannot fund this site, at that  
6 point the state could step in and use its state fund.

7           Before that, if New Jersey wanted to upset  
8 federal priorities, for example, or if they wanted to  
9 fund a cleanup that was not consistent with the National  
10 Contingency Plan, or assuming one that -- where they  
11 disagreed, suppose there were two alternatives under the  
12 Plan and EPA endorsed one and New Jersey endorsed a  
13 different cleanup, under those circumstances we would  
14 have to use general revenues because there was a source  
15 of federal funding that was available to us if we had  
16 gone along with the federal plan, with the federal  
17 program.

18           QUESTION: Would you explain to me once, I  
19 know you have got it in your brief but I have a little  
20 trouble following it, why isn't 114-C duplicative of  
21 114-B under your present argument?

22           MS. JACOBSON: Well, it comes right out of the  
23 argument I've just made. Section 114-C limits New  
24 Jersey from spending its special tax for sites that are  
25 realistically eligible, where there is some good chance



1 that we are going to get financing.

2 QUESTION: Well, if the chance is good enough  
3 so that you actually get the money, then 114-B would  
4 prohibit the --

5 MS. JACOBSON: 114-B and also 114-C. There is  
6 some overlap. 114-B goes directly to whether --  
7 prevents double compensation, and that has a greater  
8 applicability than 114-C because it prevents double  
9 compensation from any source.

10 If a claimant had gotten a tort remedy, for  
11 example, or an insurance recovery, it would prevent  
12 recover --

13 QUESTION: Are you defending the decision  
14 below and all of its ramifications?

15 MS. JACOBSON: We have taken the actual  
16 compensation part of the decision below and have given  
17 it what we feel to be a practical application, and so we  
18 start at the same thing.

19 QUESTION: Didn't the court below say that New  
20 Jersey is pre-empted only in those instances where  
21 Superfund actually pays something?

22 MS. JACOBSON: They use the terms "actual  
23 compensation."

24 QUESTION: Do you defend that?

25 MS. JACOBSON: We defend the actual

1 compensation test as given in a practical way.

2 QUESTION: Any other claim, New Jersey may go  
3 right ahead as long as Superfund hasn't actually paid  
4 even though there is a realistic chance that it might?

5 MS. JACOBSON: We would differ at that point.  
6 The New Jersey Supreme Court didn't put any flesh on the  
7 bones of the actual compensation test, and when we  
8 looked at the test and were faced with the problem of  
9 implementing it, we felt that the court had not  
10 recognized the important state role.

11 QUESTION: So, you do request us to put quite  
12 a gloss on -- if we agree with you, we must put quite a  
13 gloss on the New Jersey Supreme Court's opinion?

14 MS. JACOBSON: A gloss in terms of how you  
15 practically apply it, yes. You take it beyond what they  
16 have said.

17 QUESTION: Do you think we are in a position  
18 really to do that? Did you make this kind of an  
19 argument in the New Jersey court?

20 MS. JACOBSON: Yes, we have made this argument  
21 from --

22 QUESTION: I would have thought you would have  
23 made the argument that they bought.

24 MS. JACOBSON: We think this is just an  
25 extension of their argument and one, frankly, that gives

1 it a practical application. We don't see it as being --

2 QUESTION: It's a narrowing of their argument,  
3 isn't it?

4 MS. JACOBSON: It goes beyond their argument.

5 QUESTION: It sounds to me like -- the New  
6 Jersey court, it seems to me, gave the State of New  
7 Jersey much more freedom than you say, that you now ask  
8 for.

9 MS. JACOBSON: Except, the New Jersey court  
10 did not address how the test was to be applied, although  
11 they did suggest at page 35 in the Appendix to the  
12 Jurisdictional Statement, that Congress contemplated  
13 that the federal government would attempt to deal with  
14 the problems of the most seriously affected sites and to  
15 allow states to maintain a compensation fund or to use  
16 general revenues should they choose, to conduct their  
17 own cleanup efforts on those sites not receiving  
18 Superfund compensation.

19 So, they did recognize the national priority  
20 scheme by the federal government, and --

21 QUESTION: Do you agree, may not a state be a  
22 claimant under the Superfund program?

23 MS. JACOBSON: The state is the claimant under  
24 the Superfund program for natural resource damages  
25 only. We agree with the Solicitor General that when you

1 use "claims" in a technical sense as a term of art under  
2 the Superfund Act, that a state's own response costs are  
3 not claims.

4 You don't have to go through the claims  
5 process set forth in Section 112, for example.

6 QUESTION: Suppose a state goes ahead and  
7 cleans up a site. May it make a claim on Superfund?

8 MS. JACOBSON: The federal fund has not been  
9 operated that way by EPA. They do not operate on a  
10 reimbursement basis. They operate on a contractual or  
11 cooperative agreement basis in which the state must  
12 agree up front to provide ten percent of the costs of  
13 any remedial action.

14 So, it's not a reimbursement program.

15 QUESTION: I see.

16 QUESTION: May I ask while you're interrupted,  
17 too, do you agree with your opponent that really only  
18 New Jersey statute is at issue in this, that he contends  
19 that your statute is unique in having this special  
20 fund. Is that correct?

21 MS. JACOBSON: Relying upon the review of  
22 state statutes that Exxon has included in its brief, our  
23 statute does seem to be different from other statutes.  
24 That may be a timing -- there may be a timing issue in  
25 there, in that ours was adopted in 1977. In fact, in

1 many ways it was the model for the federal Superfund Act.

2 And, this litigation was brought almost on the  
3 very heels of the adoption of the statute, so other  
4 states were put on notice, beware, you may run into some  
5 litigation if you adopt the same kind of statute New  
6 Jersey has.

7 Interestingly, though, if you look at their  
8 review the majority of the statutes are financed by some  
9 sort of special tax or fee, either on waste generation  
10 or licensing or so forth, so that states have relied  
11 upon special funds, some sort of dedicated fund, as the  
12 way to provide their share of federal -- of the federal  
13 cleanup program, and also whatever falls outside of the  
14 federal cleanup program.

15 If you look at the two schemes, the federal  
16 and the state schemes, it's helpful in finding out what  
17 the State of New Jersey is able to do under the  
18 statute. Under the Superfund Act and the National  
19 Contingency Plan, the Superfund may be used to finance  
20 up to 90 percent of the cost of cleanup at sites on the  
21 national priority list.

22 States must pay ten percent of the cost or  
23 more, depending on whether they owned or operated the  
24 particular site in issue. States are also responsible  
25 for maintenance costs at sites. If a site is not on the

1 national priority list, however, it's not eligible for  
2 federally financed remedial action.

3 Superfund may also be used to finance  
4 emergency removal actions in acute situations such as  
5 where you have acutely toxic substances or fire, or  
6 explosion is threatened, or public drinking water  
7 supplies are threatened. These emergency actions may  
8 continue for six months or until \$1 million is spent,  
9 whichever comes first.

10 Those two, this emergency removal and the  
11 long-term cleanup action, those two areas form the heart  
12 of the federal Act. Given that federal coverage, what  
13 is left for New Jersey?

14 Actually, quite a lot, if you look at the  
15 state scheme in relation to the federal scheme. First,  
16 in regard to remedial actions, the states are  
17 responsible for ten percent of the share of the costs,  
18 and perhaps even more.

19 Since that is not eligible for compensation on  
20 the federal level, that is something that's clearly an  
21 appropriate area of state fund expenditure. Both the  
22 Bradley-Randolph colloquy and some further legislative  
23 history from Congressman Florio in the House debate,  
24 support this, although Exxon has never conceded this  
25 point.

1           Beyond that is the issue of petroleum spills.  
2 Exxon has conceded that the state may use its special  
3 tax to finance the cleanup and removal of petroleum  
4 spills and related damage claims. They tend to make  
5 this -- or claim that this is a peripheral purpose of  
6 the New Jersey fund, but if you look at the statute  
7 itself and the legislative findings, it's crystal-clear  
8 that the state was very concerned about petroleum spills  
9 because of our beaches, the tourist industry, and so  
10 forth.

11           Having a contingency plan available in case  
12 there is a catastrophic occurrence in regard to  
13 petroleum is thus an essential part of the New Jersey  
14 fund.

15           The New Jersey fund also provided coverage for  
16 property damage. Although Congress debated the  
17 possibility of covering property damage, they decided at  
18 the last minute to exclude it from coverage under  
19 Superfund, so that's another area that the New Jersey  
20 fund may be used for.

21           Beyond that, the New Jersey fund may be used  
22 for administrative costs, personnel, equipment  
23 expenditures, and things of that nature. All of these  
24 areas are significant, and are those areas not covered  
25 on the federal level. Consequently, they may

1 appropriately be the subject of a state fund.

2           Interestingly, Exxon started out in this case  
3 saying that we could use our fund for very few of these  
4 purposes. In fact, even in the jurisdictional statement  
5 at page 8 they suggest that the only possible use of the  
6 state fund is to pay for prepositioning costs which are  
7 mentioned in the second part of Section 114-C.

8           It was clear from the legislative history,  
9 however, that this use, prepositioning and equipment  
10 cost, was simply illustrative and not exclusive.

11           Another area that has been ignored by Exxon  
12 are the regulations contained in the National  
13 Contingency Plan relating to eligibility. Those  
14 regulations provide -- and as they have been interpreted  
15 by EPA, provide that eligibility for Superfund financing  
16 is done on a case by case basis because of the limited  
17 funding involved.

18           Exxon talks about eligibility and  
19 compensability, but it never gets right down to the fact  
20 that what may be compensated by Superfund is to be  
21 determined by EPA on a case by case basis because of the  
22 realistic funding limitations faced on the federal level.

23           It is this opportunity to supplement the  
24 federal fund in cases where Congress has not been able  
25 to cover the area that gave rise to the actual



1 compensation test that was endorsed by the New Jersey  
2 Supreme Court and that we have already discussed.

3           One other important factor is to realize that  
4 this pre-emption language came out of the oil spill  
5 context where it had a very different effect. In the  
6 oil spill context, when they first debated pre-emption,  
7 the Congress was contemplating a program that was much  
8 more comprehensive, be it in a limited sphere, than the  
9 Superfund program.

10           They were looking at a program to take care of  
11 all future spills into navigable waters, and cover all  
12 related damages of the kinds that Congress deems could  
13 be accomodated with the funds to be made available.  
14 When they shifted the concept into the Superfund area,  
15 they broadened the coverage in the sense of applying to  
16 abandoned sites. It no longer was a question of taking  
17 care of future spills, but all the sites that had  
18 already been polluted, and recognized that they could  
19 only address this on a priority basis.

20           Therefore the federal coverage, in a sense,  
21 shrank to what they actually could cover and thereby  
22 expanded to what the states would be able to use a  
23 special state tax for.

24           If you look at the legislative history that  
25 comes out of the Oil Spill bills, the House was very

1 definite in saying that the pre-emption was limited in  
2 nature and was not meant to displace the states. States  
3 were expected to have state funds to use to supplement  
4 the federal program, and that's essentially what we say  
5 Congress intended when they adopted the Superfund  
6 measure, to allow the states to supplement although not  
7 to duplicate federal cleanup efforts.

8           Although New Jersey has not taken legislative  
9 action to change its spill fund, one of the reasons for  
10 that is that this litigation has been pending for the  
11 last four and a half years and in the course of that  
12 time the state fund has been administered consistently  
13 with the position that we have taken in this litigation,  
14 so the fact that the state statute recognized that a  
15 federal Act would be adopted, certainly is not at all  
16 dispositive of the issue before this Court.

17           When you look at the legislative history of  
18 this particular provision, when you look at the language  
19 of the provision which relates the limits on state  
20 taxation to coverage on the federal level -- I mean,  
21 when you look at the purpose of the statute as a whole,  
22 of promoting cleanups in New Jersey and elsewhere, it is  
23 inconceivable to us that Congress could have intended to  
24 wipe out the new Jersey Spill Act tax.

25           The wiping out of the tax would mean that the

1 state would have to delay cleanups, perhaps eliminate  
2 cleanups, go back to the drawing board to come up with a  
3 new tax, and where you have a dedicated tax you don't  
4 have to compete with general revenues for much needed  
5 cleanup dollars.

6 In any event, this was a decision made by the  
7 New Jersey legislature that cleanup should be done by  
8 the oil and chemical companies and those people who  
9 benefited from the substances rather than from the  
10 general taxpayers.

11 If there are no further questions, I'll  
12 conclude the argument for New Jersey. Thank you.

13 THE CHIEF JUSTICE: Very well.

14 Mr. Gribbon, do you have anything further?

15 MR. GRIBBON: If you please, Mr. Chief Justice.

16 ORAL ARGUMENT OF DANIEL M. GRIBBON, ESQ.

17 ON BEHALF OF APPELLANTS -- REBUTTAL

18 MR. GRIBBON: May if please the Court, let me  
19 make clear that it is our position that this is a  
20 question of law. The case was put to the courts below  
21 on motions for summary judgment as to what the proper  
22 meaning of Section 114-C was.

23 Our view of it differs from that of the New  
24 Jersey District Court and it also differs, as Justice  
25 White pointed out, from the view that the State is now

1 putting up here. We do regard that as a question of  
2 law, as to just what Congress meant in enacting 114-C.

3 The figures that it referred to came into this  
4 case in response to New Jersey's defense of, don't look  
5 to the purpose, look at what we did with the money. And  
6 that is a basic difference between them.

7 We believe that pre-emption clearly goes to  
8 purpose, and really has nothing to do with the manner in  
9 which the expenditures were made. So, we made the  
10 alternative argument that based on New Jersey's own  
11 official records, it was clear that they had not limited  
12 their expenditures to non-CERCLA qualified sites, and  
13 that is all that the legal issue is about.

14 Lest there be too much concern for New Jersey  
15 being hobbled in its efforts to do something about  
16 hazardous waste, this is a very small pre-emption that  
17 Congress felt necessary when it put the whole burden of  
18 the federal waste cleanup program on oil and chemicals.

19 It has nothing to do with general revenues. I  
20 believe that Justice Stevens pointed out, they can spend  
21 their general revenues any way they want to. It has  
22 nothing to do with money that they can borrow, and New  
23 Jersey has borrowed \$100 million and has it sitting up  
24 there, which it hasn't used.

25 So, it really is a very modest inroad into

1 what they might do and it was put there clearly, as the  
2 legislative history will show, because Congress was  
3 concerned about duplicative taxes, not just New Jersey  
4 but any other state, on oil and chemicals, which largely  
5 out of expediency had been made to carry the whole  
6 financial burden of the federal waste program.

7 QUESTION: Mr. Gribbon, on that, right on that  
8 point, in your view could they have a special fund  
9 raised from the oil and chemical companies just to  
10 finance their ten percent share of --

11 MR. GRIBBON: I think they could.

12 QUESTION: But that's hard to square with the  
13 language --

14 MR. GRIBBON: That doesn't qualify. They  
15 can't get that ten percent from the federal government  
16 under CERCLA. That has to be paid by the state.

17 QUESTION: But if you're looking at the  
18 purpose of the money, it's to clean up things that are  
19 eligible.

20 MR. GRIBBON: Legislative action frequently is  
21 not complete, and this was done in an awful hurry. For  
22 example, the language is broader than oil and chemicals,  
23 as counsel has pointed out.

24 Our position there is that the legislative  
25 history is so very clear that the only thing they were

1 worried about was the duplicative tax on oil and  
2 chemicals. That would probably be a decision that the  
3 Court would arrive at.

4 And by the way, Justice Stevens, counsel  
5 conceded that there was a certain amount of overlap  
6 between 114-B and 114-C. There is so much overlap there  
7 that 114-C isn't necessary. 114-B takes care of the  
8 double taxation problem which they would like to limit  
9 114-C to.

10 THE CHIEF JUSTICE: Thank you, counsel. The  
11 case is submitted.

12 (Whereupon, at 2:40 o'clock p.m., the case in  
13 the above-entitled matter was submitted.)  
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CERTIFICATION

Anderson 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:

#84-978 - EXXON CORPORATION, ET AL., Appellants V. ROBERT HUNT,

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ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, ET AL.

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

BY Paul A. Richardson

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