

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: WISCONSIN PUBLIC INTERVENOR, ET AL.,
Petitioners v. RALPH MORTIER, ET AL.

CASE NO: 89-1905

PLACE: Washington, D.C.

DATE: April 24, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WISCONSIN PUBLIC INTERVENOR, :

4 ET AL., :

5 Petitioners :

6 v. : No. 89-1905

7 RALPH MORTIER, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, April 24, 1991

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:04 a.m.

14 APPEARANCES:

15 THOMAS J. DAWSON, ESQ., Wisconsin Public Intervenor,
16 Madison, Wisconsin; on behalf of the Petitioners.

17 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the United States, as amicus curiae, supporting the
20 Petitioners.

21 PAUL G. KENT, ESQ., Madison, Wisconsin; on behalf of the
22 Respondents.

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

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 89-1905, Wisconsin Public Intervenor v. Ralph
5 Mortier.

6 Spectators are admonished to refrain from
7 talking while you're still in courtroom. The Court
8 remains in session.

9 Mr. Dawson, you may proceed whenever you're
10 ready.

11 ORAL ARGUMENT OF THOMAS DAWSON

12 ON BEHALF OF THE PETITIONERS

13 MR. DAWSON: Mr. Chief Justice, and may it
14 please the Court:

15 This case is about whether local units of
16 government are going to be allowed to continue to regulate
17 the use of pesticides to protect the health and safety and
18 environment of their citizens, as they have been doing for
19 a great number of years, and certainly since the Congress
20 enacted the Federal Insecticide, Fungicide and Rodenticide
21 Act almost 20 years ago.

22 The issue presented to this Court is did
23 Congress clearly intend to preempt local governments from
24 regulating pesticides when it enacted FIFRA. The
25 respondents in this case claim that local governments can

1 do nothing, that they're powerless to protect their
2 citizens from pesticide hazards. They claim Congress
3 intended to strip local governments of this power, which
4 includes as much of a power as to simply require the
5 posting of warning signs on adjacent properties to warn
6 citizens to stay away from areas that have been treated by
7 pesticides.

8 I'd like to briefly --

9 QUESTION: Mr. Dawson, can -- just so I
10 understand, there is nothing in the position of the court
11 below that would prevent a State upon the petition of a
12 particular county, for example, from denominating that
13 county as a county in which some special provisions will
14 apply. The State could do it. It doesn't -- the State
15 does not always have to act Statewide.

16 MR. DAWSON: That's true. The State could do
17 that.

18 QUESTION: Okay.

19 MR. DAWSON: And the State does not have to
20 respond affirmatively to such --

21 QUESTION: Well, of course.

22 MR. DAWSON: I'd like to briefly review the
23 ordinance. First the ordinance is not a pesticide
24 registration regulation. It does not seek or require to
25 make expert scientific decision entailed in the pesticides

1 registration process that occurs under FIFRA.

2 Second, the ordinance applies to pesticide
3 spraying of public lands, private lands open to public
4 access, and aerial applications by aircraft. We're
5 talking about protecting areas frequented by people.

6 Third, the ordinance is expressly aimed at
7 protecting private property, drinking water wells, and
8 other areas open to the public, like lakes and streams,
9 hunting grounds, play and recreation areas, and public
10 rights of way.

11 Fourth, the Town of Casey ordinance is a permit
12 ordinance. It permits pesticide use under certain
13 circumstances and it allows the town board to impose
14 reasonable conditions. For example, it can prevent
15 spraying under windy conditions or it can create buffer
16 zones around play areas or school grounds to protect
17 children.

18 True, permits under this ordinance may be
19 denied, but only after consideration of such things as the
20 benefits of the pesticide application, available
21 alternatives, and negative effects of denying the permit.
22 No permit has been denied under this ordinance.

23 QUESTION: Does that ordinance regulate the same
24 things that FIFRA does or the State does under its
25 authority?

1 MR. DAWSON: There could be some overlap, but I
2 think the emphasis here is that this ordinance, and
3 ordinances that have been passed like it, deal with things
4 that FIFRA does not do. FIFRA does not get down into the
5 locality and dictate or provide conditions -- protective
6 conditions for the protection of streams and playgrounds.
7 These are the things that people at the local level
8 understand. Things that people in Washington or even at
9 the State capital are not going to be prepared to deal
10 with the way the Town of Casey --

11 QUESTION: Well, I take it that you wouldn't be
12 satisfied if we held that the only way a locality or a
13 town or a county could act on its own would be if the
14 State permitted it to do so.

15 MR. DAWSON: That's very problematical, because
16 the State may not permit -- I'm sorry -- the State may not
17 --

18 QUESTION: Well, it wouldn't be satisfied to
19 condition your right -- to condition the town's authority
20 to pass this ordinance on -- the State giving it
21 permission to do so.

22 MR. DAWSON: Well, in this case the State has
23 given the Town of Casey permission to pass general
24 ordinances under the police power to protect the local
25 governments.

1 QUESTION: Well, I know in this specific -- what
2 if it delegated to the county its power to regulate
3 pesticides?

4 MR. DAWSON: If it's the kind of power that is
5 the power that they're exercising now, fine. But if it's
6 the time -- the kind of regulation being suggested by
7 respondents that the town is -- has its hands tied to only
8 perform that which the State is going to do, then that's
9 going to be very serious and problematic.

10 QUESTION: So you would not be satisfied in
11 this?

12 MR. DAWSON: I would not.

13 QUESTION: Didn't one of the Wisconsin State
14 courts suggest that the town's ordinance was preempted or
15 at least unauthorized under State law?

16 MR. DAWSON: The Washburn County Circuit Court
17 held that. However, the Wisconsin Supreme Court did not
18 deal with that issue and only dealt --

19 QUESTION: They expressed no view?

20 MR. DAWSON: Simply ruled on the Federal
21 question.

22 The second part of this ordinance is the posting
23 requirement. It simply says that the ordinance allows the
24 town board to require the posting of signs on treated
25 lands to warn citizens of the areas where the public may

1 go so that they can make their own decisions about whether
2 or not to be exposed to those kinds of chemicals.

3 FIFRA really doesn't perform these kinds of
4 functions, nor was it really intended to do that.
5 Respondents attack the entire ordinance. They say the
6 town can do nothing in this area.

7 The place --

8 QUESTION: Are all the things that the town did
9 here or proposes to be able to do, things that, if the
10 State itself were to do it, would be authorized under the
11 FIFRA scheme?

12 MR. DAWSON: If I understand --

13 QUESTION: Do you understand my question?

14 MR. DAWSON: I'm not positive.

15 QUESTION: Is everything that the town asserts
16 its ordinance permits things that the FIFRA statute would
17 allow a State to do if the State were doing it at the
18 State level?

19 MR. DAWSON: If I understand --

20 QUESTION: Is that not clear?

21 MR. DAWSON: If I understand your question, I
22 believe the answer is yes. The town may regulate -- it is
23 free to regulate, it is free to do that which the State
24 could do.

25 QUESTION: Well, let me put it another way then,

1 because I guess you didn't understand. I must not have
2 made it clear. As I understand it, the Federal statute
3 allows certain State action with regard to the regulation
4 of pesticides. Isn't that so?

5 MR. DAWSON: Yes, that's correct. 24(a) in fact
6 --

7 QUESTION: And is everything that you argue the
8 town can do here something that the Federal law permits?

9 MR. DAWSON: Yes. And that gets us to the act
10 itself. I think the best place to start with looking at
11 the intent of Congress is the language of the statute.
12 And that's section 24 of FIFRA.

13 24(b) -- I'm going to start with 24(b), because
14 that is the express preemption provision of this act, and
15 it only preempts State regulation with regard to pesticide
16 labeling and packaging. It is specific. That is as far
17 as the preemption goes.

18 We then move on to section 24(a) which is the
19 anti-preemption provision of the act. It's ironic that
20 respondents depend on the anti-preemption provision of
21 this act for the basis of their argument that local
22 governments are indeed preempted. Yet this act says that
23 the State may regulate the sale or use of a federally
24 registered pesticide. It is upon this express language --
25 it is upon the history of this language that respondents

1 go to to make the argument that local governments are
2 preempted. It does not follow that because States are
3 authorized to regulate that local governments are
4 preempted from regulating.

5 QUESTION: Well, that depends upon -- surely
6 that depends upon whether you think that the statute,
7 absent any references to States or municipalities, would
8 have preempted the States. What is your view on that?
9 Suppose none of the sections that specifically authorize
10 States to do something had been included. Would this be
11 the type of a statute that is complete enough that we
12 would say this is the systemic regulation by the Federal
13 Government, and States are automatically precluded?

14 MR. DAWSON: No. No. I --

15 QUESTION: But that would make a difference. If
16 you felt the other way on that -- if you felt that it were
17 that complete a statute, then unless there were specific
18 authorization for States and for municipalities they would
19 be precluded, right?

20 MR. DAWSON: Except that in this case we have
21 24(b) which is a specific preemption provision. I assume
22 your question assumes that 24(b) is still here?

23 QUESTION: Yes. It assumes it's still there.

24 MR. DAWSON: Yes. And I would say that in light
25 of the Congress specifically dealing with preemption and

1 going only this far that the States are free to distribute
2 their power to their local governments, to allow their
3 local governments to continue to regulate in this field,
4 that they in fact are not preempted.

5 QUESTION: I wish people would use this --
6 what's the section number in title VII?

7 MR. DAWSON: It is 136(v).

8 QUESTION: 136(b).

9 MR. DAWSON: Section -- I might also point to
10 --

11 QUESTION: Mr. Dawson, it's completely
12 irrelevant, but where is Casey, Wisconsin?

13 MR. DAWSON: Casey, Wisconsin, is a northwestern
14 Wisconsin town --

15 QUESTION: What county?

16 MR. DAWSON: It's in Washburn County, Wisconsin.

17 QUESTION: I thought I knew the county, but I've
18 never heard of Casey. Where -- is it near Spooner?

19 MR. DAWSON: It's near Spooner. It's just above
20 Spooner about 30 miles above Spooner.

21 QUESTION: 30 miles north?

22 MR. DAWSON: Yes.

23 QUESTION: On the road to --

24 MR. DAWSON: On the road to Superior.

25 QUESTION: Yes. How large a place?

1 MR. DAWSON: There are approximately 400 to 500
2 citizens that live in the town of Casey.

3 QUESTION: Large enough to pass the ordinance in
4 question.

5 MR. DAWSON: Large enough to be authorized by
6 the State legislature to pass the ordinance, yes.

7 There are other provisions in FIFRA that also
8 suggest that Congress contemplated that there would be
9 local regulation. In particular, I point to section 22,
10 which is 7 U.S.C. 136(t) of the act. This act requires
11 the EPA administrator to cooperate with local units of
12 government in securing uniformity of regulations. This
13 suggests that local governments are contemplated to have
14 the authority to regulate pesticides for which the EPA
15 should seek uniformity through cooperation not through
16 preemption.

17 Respondents rest their case heavily on the
18 legislative history of this case.

19 QUESTION: Mr. Dawson, before you get to that
20 --

21 MR. DAWSON: Yes.

22 QUESTION: Did -- has the State of Wisconsin
23 taken a position on this matter? Some States have come in
24 on your side and some States have come in on the other
25 side. Where is the State of Wisconsin in this?

1 MR. DAWSON: The State Supreme Court held in a
2 4-3 decision that the Federal law preempts local
3 governments from regulating pesticides.

4 QUESTION: I understand, but the executive of
5 the State has not intervened in this matter or filed
6 anything as an amicus?

7 MR. DAWSON: That's correct. There appears to
8 be no official position.

9 Going to the legislative history of the act. We
10 started in the House. It's true that the Agriculture
11 Committee voted not to authorize local regulation and that
12 it's intent was to preempt. However, this act, this
13 intention, this desire by one legislative committee does
14 not translate to an affirmative act by the full House to
15 preempt local regulation. Also, on the House floor --

16 QUESTION: This is the House Agriculture
17 Committee you're referring to, Mr. Dawson?

18 MR. DAWSON: Yes, it is. Excuse me.

19 The House debated on the floor also when the
20 bill was -- went to the floor an amendment to Senate 2 of
21 section 24(a), which is the preemption -- the anti-
22 preemption provision, State regulation of general use
23 pesticides. But again it did not really address the local
24 regulation of pesticides.

25 Over on the House side -- I'm sorry -- on the

1 Senate side, the Senate Agriculture and Forestry Committee
2 did intend to preempt local regulation by not authorizing
3 local regulation. The Senate Commerce Committee, however,
4 differed with the Senate Agriculture and Forestry
5 Committee and they did not wish to preempt local
6 governments. And it never really disavowed -- never did
7 disavow its view that FIFRA should not preempt local
8 regulation. Again, the language of the act is what the
9 full Congress voted on.

10 The act also had to go to conference committee.
11 There was not complete agreement on the two bills coming
12 out of the House and the Senate. And the House and the
13 Senate conference committee did not address or resolve the
14 dispute over the issue of local preemption.

15 I'd like to reserve my time.

16 QUESTION: Are you -- before you sit down, would
17 you comment specifically on the excerpt from legislative
18 history that's referred to on page 23 of the opposing
19 counsel's brief where they point out that one Senator
20 inserted in the congressional record a statement prior to
21 the vote that the amendments should be understood as
22 depriving local authorities or political subdivisions of
23 jurisdiction. Is that significant?

24 MR. DAWSON: That statement has been given
25 different significance by different courts. That was I

1 believe Senator Allen, the chairman of the Senate
2 Agriculture and Forestry Committee, who stated the view of
3 the Agriculture and Forestry Committee that local
4 governments should be considered to be preempted.
5 However, this by itself does not establish -- the full
6 Senate adopted that view. Simply because a Senator placed
7 that in the record does not indicate that the full Senate
8 agreed with that view. And therefore, there is not a
9 clear intent on behalf of the Congress to preempt.

10 QUESTION: Was there any opposing statement
11 submitted into the record at that point?

12 MR. DAWSON: I'm not aware of any.

13 I'd like to reserve my time, Mr. Justice.

14 QUESTION: Very well, Mr. Dawson.

15 Mr. Wallace, we'll hear from you.

16 ORAL ARGUMENT OF LAWRENCE WALLACE

17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

18 SUPPORTING THE PETITIONERS

19 MR. WALLACE: Mr. Chief Justice, and may it
20 please the Court:

21 Pesticides, even if federally registered and
22 economically beneficial, are poisons. And it is no small
23 matter to conclude that Congress decided by implication
24 comprehensively to preclude local units of government from
25 any regulation of the use of these poisons in the

1 community in order to protect against contamination of
2 wellhead and other drinking waters and against other
3 dangers to the health or safety of persons or animals.

4 It is our view that Congress did not make that
5 determination, even though some members of Congress
6 expressed a preference for that result. It is equally our
7 view that nothing in FIFRA precludes a State as a matter
8 of State law from determining that local governments
9 should be precluded and that all State regulation of
10 pesticides should be centralized in a State agency, or as
11 California prefers in the brief that it submitted, joined
12 by some other States, that local units be enlisted only in
13 aiding in the administration of State laws. FIFRA leaves
14 that determination as a matter of State law up to the
15 States.

16 QUESTION: Have we ever said specifically at
17 this Court that the Federal Government can direct a State
18 in allocating its powers to its political subdivisions? I
19 noticed there were certain statutes cited in some of the
20 amicus briefs on railroad safety and right to work laws
21 where other courts have said that this is an appropriate
22 kind of preemption to find. At least is there some
23 constitutional concern or some constitutional constraints
24 about the Federal Government directing the allocation of
25 powers in this way?

1 MR. WALLACE: We addressed that briefly in a
2 concluding footnote in our brief, Mr. Justice. This Court
3 has not addressed the subject other than in the context of
4 the Federal Expenditure Program in the case we cite on the
5 last page of our brief in the footnote, Lawrence County
6 against Lead Deadwood School District, in which the court
7 held that State law was preempted by a Federal statute
8 which specified how the local units of government would
9 use the Federal -- federally supplied funds.

10 I don't think a constitutional question need be
11 reached in this case. We have addressed it very briefly
12 in that footnote and pointed out that it really does
13 rather little for the preservation of State power for a
14 constitutional holding to specify that, if Congress
15 determines that the Federal program will not work properly
16 if there's a multiplicity of local regulation, it must
17 also preclude regulation by the States themselves even
18 though its preference would be to allow State regulation.
19 That doesn't seem to us to serve any purpose of the Tenth
20 Amendment.

21 This is not the kind of case where anyone claims
22 that this kind of regulation of third party conduct is not
23 something that Congress could exclude the States and local
24 government from altogether. It preempted --

25 QUESTION: Certainly, Congress can give powers

1 to the executive branch and prevent delegation within the
2 executive branch of those powers. It does that all the
3 time. Certain things have to be done by the Attorney
4 General. Certain things have to be done by the President.
5 So if that's any parallel, it's no problem to do the same
6 with respect to the States.

7 MR. WALLACE: That is correct, Mr. Justice. And
8 the --

9 QUESTION: Well, Mr. Wallace, I think -- could
10 you just briefly say what powers do you think these locals
11 are entitled to exercise, absent any express delegation
12 from the State?

13 MR. WALLACE: Well, the extent of delegation
14 from the State is entirely a matter of State law.

15 QUESTION: I know, but say there's no delegation
16 from the State at all, and it's the State -- the State is
17 just silent, although the State enjoys the powers that
18 FIFRA gives it. What powers do the locals have,
19 independent of the State law?

20 MR. WALLACE: FIFRA itself does not impose any
21 limitation as a matter of Federal law on whether the power
22 can be exercised by the State government or its State
23 agency or by a local unit of government exercising home
24 rule.

25 QUESTION: I don't suppose -- don't you -- I

1 don't suppose a local -- locality could regulate
2 pesticides in a manner that the State itself could not
3 regulate.

4 MR. WALLACE: That is correct, and I'm speaking
5 only of regulating the use of pesticides. The -- FIFRA
6 gives very broad authority to the States to restrict the
7 use of pesticides. With respect to that subject, FIFRA
8 provides a floor but not a ceiling on restrictions that
9 can be imposed.

10 QUESTION: And within that area of State
11 authority, the locals can do the same thing absent some
12 restriction imposed by the State.

13 MR. WALLACE: That is correct. This is our view
14 under FIFRA. Much of the policy argument about how this
15 might undermine the policies of FIFRA overlooks the
16 breadth of the delegation of additional State authority to
17 restrict pesticide use. The pertinent statutory
18 provisions appear on page 5 of the blue brief,
19 petitioners' merits brief, under the heading Authority of
20 States, in the middle of the page. These are sections
21 136v(a) and (b) or 24(a) and (b), as one my prefer.

22 The only preemption provision is (b), which says
23 that no State shall impose additional labelling
24 requirements. We're on page 5 here. If we're talking
25 about negative implications, which is the basis on which a

1 preemption claim is made from the text, ordinarily the
2 negative implication would be that unless there is an
3 attempt to impose labelling requirements, there is no
4 other blanket preemption. There may be conflict
5 preemption.

6 QUESTION: But what the other side says, Mr.
7 Wallace, is that you're reading it backwards -- that is,
8 is not a preemption provision at all. It's a permission
9 provision -- that without this provision the act is so
10 complete in and of itself that we would have held the
11 States cannot enter this field. The Federal Government
12 did it very thoroughly, has all sorts of provisions, and
13 all sale and use of pesticides are to be governed by the
14 Federal Government.

15 So this is not a preemption provision. It's a
16 permission provision. It says, despite what would
17 normally be the preemption of this statute, we're going to
18 allow a State to regulate the sale or use. If you look at
19 it that way, it's quite different, and the negative
20 implication is just the opposite.

21 MR. WALLACE: There's rather little basis in
22 what EPA actually undertakes to do in the communities to
23 support that argument. The EPA does not touch upon the
24 subject of posting notices. There are any number of
25 hypotheticals that could be raised with respect to

1 protection of ground water sources from accumulated
2 runoffs. EPA does go into great detail about tolerance
3 levels left on food stuffs from the use of pesticides, but
4 it can't as a practical matter undertake a determination
5 of where runoffs will go and how they will accumulate in
6 sources of drinking water in particular communities. That
7 depends so much on how widespread the use of the pesticide
8 is and where the runoffs will accumulate. Those are
9 matters that require quite specific local knowledge.

10 EPA does not -- it does have directions on the
11 labels of the pesticides so that those applying the
12 pesticides -- at least the purchaser and if the applicator
13 has the original label, the applicator will know what
14 precautions to take. But this doesn't in any way notify
15 other persons who might be affected by the use.

16 EPA does not address the question of whether
17 pesticide application in a child care facility or a school
18 should be restricted to hours when the children are not
19 present. There are just many subjects that EPA does not
20 address, either by regulation or under the statutes.

21 QUESTION: Mr. Wallace, in that connection, if
22 the EPA prescribes a regulation -- I mean a labelling
23 deciding -- describing how a pesticide can be used safely,
24 is there any violation of Federal law if a person using
25 the pesticide chooses not to follow the instructions?

1 MR. WALLACE: The -- they're authorized for use
2 only in accordance with the label.

3 QUESTION: I understand, but my question is
4 whether -- if a person goes beyond, uses it in a way which
5 would violate the labelling instructions, is that person
6 who uses the pesticide subject to any penalty under
7 Federal law?

8 MR. WALLACE: Well, it would -- I don't know
9 what the penalty would be. I just haven't looked into
10 that in preparing the case. It definitely would be
11 something not authorized under the Federal --

12 QUESTION: Because it seems to me the local
13 ordinance here is focusing on the user rather than the
14 labeler, whereas the Federal law tends to focus on the
15 contents of the label and descriptions of permitted use.

16 MR. WALLACE: That is true. That is true. And
17 it is a violation of the Federal law to use the pesticide
18 for a use that is not in accordance with the label.

19 QUESTION: I see.

20 MR. WALLACE: The label requirements are to
21 define the permissible uses, but the States have carte
22 blanche to restrict uses beyond that. The subsection (a)
23 that I was just going to focus our attention on is
24 designed for that purpose and the pertinent committee
25 reports say that this allows additional restriction by the

1 States. And there's nothing in FIFRA with respect to
2 pesticide use that ordains that a State has to allow the
3 use of any pesticide for any purpose. A State could adopt
4 a measure going totally organic and say that no pesticide
5 henceforth will be used in the confines of this State, and
6 nothing in FIFRA would prevent it. And if that --

7 QUESTION: Why does this run off problem that
8 you spoke about before -- why would that have to be
9 handled at the local level?

10 MR. WALLACE: It doesn't have to be. But in
11 many States they choose to repose that authority in the
12 local governments and the --

13 QUESTION: Don't the FIFRA statutory provisions
14 or regulations prevent the use of certain pesticides where
15 they would be likely to get into streams?

16 MR. WALLACE: That is not addressed in the kind
17 of detail that the Safe Drinking Water Act addresses it,
18 which we have cited in our brief. The Safe Drinking Water
19 Act of 1986 is designed to deal more specifically with
20 contamination of wellhead water and other public drinking
21 waters. And that contemplates an active role by local
22 governments, although again it doesn't require the States
23 to repose that authority in the local governments if the
24 States prefer to meet their obligations otherwise.

25 But that -- since an argument of preclusion of

1 local authority, and FIFRA by negative implication is the
2 essence of an argument that if the statute is ambiguous
3 and should be read as containing a negative implication,
4 we think that the 1986 act can appropriately be looked at
5 under the standards of this Court's recent opinion in West
6 Virginia University Hospitals to --

7 QUESTION: You can argue that under the scheme
8 of the statute you really need local regulation. You can
9 make that argument in fact, because it's clear that the
10 States can prohibit local regulation.

11 MR. WALLACE: That is correct. Congress did not
12 require the States to take that route. States vary a
13 great deal in the extent to which they rely on home rule
14 and local governments to perform certain functions. But
15 traditionally, local governments have been very involved
16 in the protection of the health and safety of the
17 community on questions of this kind. And certainly --

18 QUESTION: Thank you, Mr. Wallace.

19 We'll hear argument from you now, Mr. Kent.

20 ORAL ARGUMENT OF PAUL KENT

21 ON BEHALF OF THE RESPONDENTS

22 MR. KENT: Mr. Chief Justice, and may it please
23 the Court:

24 The circuit court of Washburn County, Wisconsin
25 and the Wisconsin Supreme Court found the pesticide

1 regulation enacted by the Town of Casey to be preempted by
2 Federal law, and in asking this Court to uphold these
3 State court decisions, I urge this Court to consider three
4 key factors.

5 First, the statutory language and the
6 legislative history of FIFRA demonstrate a clear
7 congressional intent to preempt local regulation.
8 Congress expressly considered but rejected local
9 regulation. Second, Congress created a Federal/State
10 scheme which is responsive to Federal, State, and local
11 needs. And it did so because Congress recognized that
12 pesticide regulation is more than simply a local concern
13 and must be subject to Federal and State control. But
14 that scheme also allowed -- also allows local needs to be
15 addressed.

16 And the third point I would like to emphasize as
17 I begin this morning is that the Town of Casey ordinance,
18 the ordinance before the Court, is an extraordinarily
19 broad ordinance. It creates a comprehensive permitting
20 program which is totally independent of any State or
21 Federal program.

22 QUESTION: Are you suggesting by that Mr. Kent
23 that if it were a narrower ordinance it might not be
24 preempted?

25 MR. KENT: I could see that if the ordinance was

1 very narrowly drawn there may be some areas in which it
2 would not run afoul of FIFRA, but that would be very
3 limited circumstances.

4 QUESTION: Local governments in your view are
5 left some authority -- are granted some authority by
6 FIFRA?

7 MR. KENT: As we've set forth in our brief one
8 area would be is if it falls outside of the preempted
9 field. If what you have is a local regulation which has
10 merely an incidental impact on the regulation of
11 pesticides, we don't believe that that would be precluded.

12 QUESTION: FIFRA doesn't occupy the field? It
13 doesn't exhaust the universe of possible pesticide
14 regulation?

15 MR. KENT: Well, in our view, Your Honor, we
16 would -- we believe --

17 QUESTION: Well, if it did, why the locals
18 couldn't do anything.

19 MR. KENT: That's true. Perhaps you've
20 misunderstood my -- or I didn't articulate clearly my
21 answer to the Chief Justice -- and that is if there is an
22 area where the local units of governments are regulating
23 and it has a totally incidental impact on pesticide
24 regulation, that might be permitted. I think the example
25 I gave in the brief was when a town rezones an area from a

1 commercial district to an agricultural district, there
2 will be an impact on pesticide use and regulation by
3 simply the fact that the use is going to be changed for
4 that area. But that's a very incidental impact on
5 pesticide regulation and it would fall outside of the
6 preempted field.

7 I think to get back to the Casey ordinance,
8 what's important to realize is that if this ordinance is
9 not preempted by or in conflict with Federal law, then few
10 is any local ordinances would be preempted. And literally
11 tens of thousands of local units of government across the
12 country would be free to enact almost any kind of
13 pesticide regulation.

14 QUESTION: Well, what is it in conflict with?

15 MR. KENT: We believe that the Casey ordinance
16 is in conflict because it stands as an obstacle to
17 accomplishing the purposes and objectives of FIFRA and
18 frustrates the Federal scheme. We believe that it's in
19 conflict in several significant effects.

20 QUESTION: Well, then would a State law which
21 had exactly the same provisions be subject to the same
22 invalidity in your view?

23 MR. KENT: I do not -- it would not under a
24 field preemption analysis, but possibly --

25 QUESTION: Well, under this statute and on this

1 case?

2 MR. KENT: On -- under a conflict analysis, it
3 could pose those types of problems.

4 If I could explain, I think that if we had a
5 situation where the State of Wisconsin authorized every
6 local unit of government to enact its own pesticide
7 ordinance, you could have sufficient lack of coordination
8 that it could well be in conflict with the FIFRA scheme.

9 QUESTION: Well, what if the State of Wisconsin
10 itself adopted the exact same scheme to use Statewide that
11 Casey -- the Town of Casey adopted here? Would that be
12 preempted by FIFRA?

13 MR. KENT: No, it would not, Your Honor. Under
14 a field preemption analysis, we believe the States under
15 FIFRA do have the authority to regulate this.

16 QUESTION: But wouldn't it be just as much of a
17 conflict with the purpose?

18 MR. KENT: Not, Your Honor, if it was enacted on
19 a Statewide basis. If, for example, what we had was a
20 scheme such as that enacted by the State of California
21 where you have local units of government, in that case the
22 county agriculture commission, that can do certain things,
23 but subject to State review and State supervision. That
24 would not be a problem.

25 QUESTION: Well, it boils down then just to your

1 objection that whatever acts are taken are taken at the
2 local level.

3 MR. KENT: The problem with it being --

4 QUESTION: Isn't that right?

5 MR. KENT: That's --

6 QUESTION: Otherwise you're being very
7 inconsistent.

8 MR. KENT: Yes, Your Honor, the -- we would
9 object to the local regulations for the reason that you do
10 not have the type of coordination that you get on a
11 Statewide level.

12 QUESTION: I assume you would also say Justice
13 O'Connor's -- you responded to Justice O'Connor's question
14 by saying it wouldn't conflict if it were on a Statewide
15 basis. What if it weren't on a Statewide basis, but it
16 was passed by the State legislature? The State
17 legislature passes a law saying the Town of Casey -- in
18 the Town of Casey, the following restrictions on pesticide
19 use shall apply. And it adopts similar laws for other
20 counties. They submit -- they just pump their municipal
21 ordinances through the State legislature. Now, that would
22 clearly be permitted under the statute, wouldn't it?

23 MR. KENT: It would be permitted within the --
24 again, under a field preemption analysis, I do not believe
25 that it would --

1 QUESTION: Well, field preemption is trumped by
2 the provision that says a State may regulate the sale or
3 use of any Federal -- I mean that trumps any field
4 preemption, doesn't it?

5 MR. KENT: No, I believe that looking back, Your
6 Honor, at the way the statute was defined and the
7 legislative history that Congress intended to preempt
8 local regulation of pesticides.

9 QUESTION: This is a local regulation. It's
10 State regulation but not uniformly throughout the State.
11 If they wanted to say a State may regulate uniformly
12 throughout the State the sale or use of federally -- they
13 would have said it. They didn't say that. They just said
14 a state may regulate.

15 MR. KENT: Yes, a State may regulate on less
16 than a Statewide basis.

17 QUESTION: Right.

18 MR. KENT: I think there comes a point at which
19 there very well could be a conflict. I don't think it's
20 approached at this --

21 QUESTION: I don't know why you fight this so
22 hard, because some of us might think it's useful to be
23 able to have different types regulation in various areas
24 of the State.

25 MR. KENT: I --

1 QUESTION: And if you're telling me that that's
2 impossible, you know, I'm not sure you're helping your
3 case.

4 MR. KENT: I'm sorry, Your Honor, I'm not saying
5 it's impossible. And in fact, Wisconsin uses that scheme
6 very effectively. It, for example, allows different
7 restrictions with respect to aldicarb and some other
8 pesticides throughout the State. My only concern with
9 your question is that if Wisconsin simply had a blanket
10 delegation to local units of government which said enact
11 any kind of pesticide ordinance you like and it's okay
12 with us. I could see under that circumstance you could
13 have a conflict with FIFRA. But under this scheme I do
14 not believe such a conflict would arise.

15 QUESTION: Well, that's this case. That's just
16 a general delegation by the State. That's what you have
17 here -- this -- towns can enact ordinances.

18 MR. KENT: Right, and I believe that that is
19 preempted, Your Honor.

20 I would like to highlight a few portions of both
21 the statutory language and legislative history, because I
22 believe that what is important in looking at this case is
23 the Federal/State scheme which Congress in fact enacted.
24 Under that Federal/State scheme only States may regulate
25 pesticide use beyond the Federal Government and that's set

1 forth in section 136v(a).

2 And Congress very carefully defined the term
3 "state" in FIFRA. And it says States means States and
4 certain territories and the District of Columbia. It
5 doesn't say it includes political subdivisions or it
6 didn't even say that the term "state" includes States,
7 leaving it open. It said States means States.

8 We believe that not only is there that specific
9 statutory definition, but that that is underscored by the
10 intentional differentiation Congress made throughout
11 FIFRA. In that legislative scheme, States may do a number
12 of things other than regulate pesticide use. They may
13 issue experimental use permits, certify pesticide
14 applicators, obtain exemptions for emergency conditions,
15 and exercise primary enforcement authority.

16 Political subdivisions, a term also used within
17 the statute -- political subdivisions are only authorized
18 to inspect books and records, cooperate and monitoring,
19 and cooperating in carrying out the chapter, and in
20 securing the uniformity of regulation.

21 To allow the petitioners' view of this statute
22 to stand, this Court would first have to conclude that
23 Congress really didn't mean what it said when it defined
24 the term "states" -- that then Congress really didn't mean
25 what it meant when it used the term "state" and "political

1 subdivision" on a differential basis. And it is only when
2 one disregards those key elements of the statute that you
3 can reach petitioners' provision. And I would submit,
4 Your Honor, that really does violence to both the
5 statutory language and legislative intent here.

6 QUESTION: Well, counsel, in the absence of any
7 legislative history of the type found here, would you
8 think that a definition of the term "state" such as is in
9 FIFRA would normally in another Federal statute preclude
10 the States from allowing their political subdivisions to
11 do the same thing?

12 MR. KENT: Yes. I believe it would,
13 particularly when one construes, not only the definition,
14 but the fact that Congress used the term "state" in some
15 places and then used the term "state" and "political
16 subdivision" in others. There's that intentional
17 differentiation which I think underscores that the
18 definition --

19 QUESTION: Have any cases of this Court or the
20 courts of appeal in other statutes gone off on that
21 rationale, do you know?

22 MR. KENT: Certainly, there are cases which
23 indicate that where Congress intentionally differentiates
24 between terms that that congressional -- that that
25 indicates congressional intent to use those terms

1 differently. I don't -- I'm not aware of any case that is
2 specific to this type of scheme. But as a matter of basic
3 --

4 QUESTION: And you don't normally think that
5 State action includes action taken by local political
6 subdivisions that are authorized by States?

7 MR. KENT: It might or might not. It depends
8 upon the context of the statute, Your Honor. I believe
9 that in some cases, one can either find that in the
10 express terms of the statute or draw that implication in
11 other cases.

12 QUESTION: Well, it's a little hard to find on
13 the face of this statute that the term "state" couldn't
14 include authorized action by political subdivisions.

15 MR. KENT: I think provided that those actions
16 were specifically authorized by the State there would be
17 no problem. But that's what we have here.

18 QUESTION: Well, but it's not a -- trying to
19 tell a State what kind of law it has to pass to authorize
20 action. Wisconsin may pass very general laws that allow
21 cities to take action of this kind.

22 MR. KENT: Yes, but I don't believe that they
23 have really done so here, and again, I think it's not --
24 in this particular context, it's not just the definition
25 of the term "state," but that entire pattern in FIFRA

1 which draws that differentiation. All of the regulatory
2 authorities directed to States. And it's only the
3 subservient cooperative roles that local, political
4 subdivisions can exercise.

5 I would like to turn briefly then to the
6 legislative history which I think is important in this
7 case, because if ever there was a case where there was
8 clear legislative history, I believe this is such a case.

9 First, we have explicit statements from the
10 Senate Agriculture and Forestry Committee, and I quote,
11 "The regulation by the Federal Government and the 50
12 States should be sufficient and should preempt the field,"
13 unquote. But that language doesn't occur in a vacuum.
14 That comes out of a debate that occurred in both the House
15 and in the Senate.

16 And when this matter was before the House, the
17 House had before it an administration proposal which
18 included in what latter became section 136v, a section
19 that said States and political subdivisions. That
20 language was deleted by the House Agriculture Committee
21 when they concluded regulation by the Federal Government
22 and the 50 States should be sufficient and should preempt
23 the field.

24 When this matter went over to the Senate, the
25 same issue was squarely before the Senate. The Senate

1 Agriculture and Forestry Committee adopted the House
2 version and then the Senate Commerce Committee said, well,
3 let's take a look at putting local units of government
4 back into section 136v, sub (a).

5 And the result of that -- there was a -- the
6 Senate Agriculture and Forestry Committee explicitly
7 rejected that amendment. The compromise committee of the
8 Senate that looked at these two committees, rejected that.
9 And then ultimately the version that was adopted by the
10 full Senate was the version that was proposed by the
11 Agriculture and Forestry Committee.

12 And I would submit that this is not a case where
13 we have a compromise or an agreement to disagree or
14 certainly not legislative silence. This was a case where
15 kind was specifically addressed the issue that's before
16 the Court today -- should we include local units of
17 government in allowing regulations beyond FIFRA, and
18 Congress resolved that question by saying no.

19 QUESTION: Mr. Kent, just to make sure I
20 understand it. The statement that you quote on page 23,
21 as I understand what you've just told us was a statement
22 specifically referring to what is now subsection (b).

23 MR. KENT: Subsection 136v.

24 QUESTION: v(b), that's right.

25 MR. KENT: v sub (a) -- v sub (a).

1 QUESTION: I beg your pardon. Yes, I stand
2 corrected.

3 MR. KENT: So that at this point, one not only
4 has to disregard the statutory language -- the definition,
5 the differentiation, but one also has to disregard the
6 fact that Congress expressly considered this question and
7 rejected petitioners' view point.

8 QUESTION: Did the committee report refer to the
9 particular sub -- sections and subsections you're talking
10 about?

11 MR. KENT: Yes, I believe it did, Your Honor.
12 It was referring to the text of the bill, which would be
13 24(a) and 24(b).

14 QUESTION: Indicating that it was those
15 particular sections or subsections which did preempt it?

16 MR. KENT: Right, that was the Senate
17 Agriculture and Forestry Committee in particular. And
18 what the Senate Commerce Committee attempted to do was to
19 amend that section by including political subdivisions.
20 And that amendment was rejected first by the Agriculture
21 and Forestry Committee and then ultimately their view
22 prevailed in the Senate.

23 I would like to just touch briefly on my second
24 point, which is that the Federal/State scheme which
25 Congress enacted here balances both Federal, State, and

1 local concerns. My first point here is --

2 QUESTION: Excuse me.

3 MR. KENT: Sure.

4 QUESTION: I suppose that if State throughout
5 this whole things means State or any municipality as well,
6 then a provision like -- oh, gad, there's so many
7 different letters here -- 136b(f) which says that the
8 administrator shall, under such regulations, authorize any
9 State to issue an experimental use permit for a pesticide.
10 I suppose that would apply to municipalities, too. Then
11 he can authorize municipalities to issue experimental use
12 permits.

13 MR. KENT: If you --

14 QUESTION: Now, has he done that? Has he
15 authorized any --

16 MR. KENT: Has the State authorized it?

17 QUESTION: No, has the administrator?

18 MR. KENT: I -- not that I know of.

19 QUESTION: Authorized any municipalities to
20 issue experimental use permits?

21 MR. KENT: Not that I'm aware of, Your Honor.

22 QUESTION: But he'd be able to do that if State
23 means both the capital state government and the
24 municipalities.

25 MR. KENT: I believe that would be the logical

1 conclusion of our argument.

2 QUESTION: It's scary, isn't it?

3 MR. KENT: We believe so, Your Honor.

4 To turn to two of the related problems that
5 would result in allowing local units of government to have
6 unfettered decision making in this area, we cited a number
7 of them in our brief and I would like to just highlight
8 two.

9 One is what I've referred to as the so-called
10 gypsy moth problem. If you have local units of government
11 which can restrict pesticides in their area, they would
12 then be able to allow a noxious pest to grow and develop,
13 and then spread onto neighboring jurisdictions. At that
14 point, the neighboring jurisdictions not only have to use
15 more pesticides, but the pest is spread over a larger
16 area. So that --

17 QUESTION: Mr. Kent, we deal with any number of
18 preemption cases here, as you know, every year. And
19 ordinarily if it's thought that there is no preemption,
20 the State and local governments are left in exactly the
21 same position as you say they should not be left in here.
22 Not only is the State free to regulate, but if State law
23 allows, the local unit is allowed to regulate. So that's
24 a fairly normal consequence of a finding of no preemption.

25 MR. KENT: If I understand your point, Your

1 Honor, the -- your point is that if the States are
2 preempted that the --

3 QUESTION: No, my point is that you're saying
4 look at what extravagant things might be -- happen if the
5 various localities regulate this subject. And I'm saying
6 that possibility is opened up every time we hold that
7 there is no preemption by the Federal statute. Not only
8 State governments can regulate, but ordinarily local units
9 can regulate.

10 MR. KENT: That's true, Your Honor. But I would
11 submit that this is a particularly problematic area in the
12 pesticide area, because if a local unit of government is
13 allowed to restrict pesticides in its jurisdiction, that
14 problem isn't simply transferred in the same form to a
15 neighboring jurisdiction. It can be transferred in a way
16 that makes the problem worse -- that the pests grow --
17 that you have a larger area over which to control the
18 pests and the use of more pesticides. So it's actually
19 exacerbating the problem.

20 QUESTION: Why can't the State administrator
21 take care of that problem?

22 MR. KENT: The State administrator could if it
23 was a problem of significant enough Statewide --

24 QUESTION: Well, you're describing one that's
25 significant to adjoining jurisdiction. I think that would

1 be the perfect case for State intervention. In fact I
2 would think the State would be more likely to intervene
3 than the Federal Government.

4 MR. KENT: In a -- I use that example simply to
5 illustrate the general problem. And I would agree that in
6 a Statewide emergency, the State would have the authority
7 to come in and take care of that problem.

8 But where the situation is perhaps even more
9 problematic is where you don't have a Statewide problem,
10 but you have a problem that's a much more regional or
11 localized problem. You have a small farm that happens to
12 cross two jurisdictions, and in one jurisdiction he's
13 precluded from using a certain pesticide to control, say,
14 a certain leaf hopper or mite or something that's
15 destroying his crop. That then gets -- that then
16 transfers to the neighboring --

17 QUESTION: Yes, but that works both ways. Also,
18 if you allow unrestricted air spraying, you can affect the
19 water supply that can go into the next county, too. I
20 think that either use or non-use can cause harm to
21 neighboring jurisdictions.

22 MR. KENT: Yes, but I think that the -- I would
23 agree with that as a general proposition. My point is
24 that the harm actually intensifies as it spreads, because
25 instead of having that same problem in the neighboring

1 jurisdictions of some overspray and drift, what you have
2 is the growth of the pest and a larger problem than you
3 had originally.

4 QUESTION: May I ask you this question?
5 Supposing Wisconsin passed the statute that said, air
6 spray -- whether or not spraying by air shall be permitted
7 in any area shall be determined by the local jurisdiction,
8 period. Then would that allow the local governments then
9 to regulate?

10 MR. KENT: I don't believe so, Your Honor, and
11 for this reason that the statutory scheme and as confirmed
12 by the legislative history here means that it is the State
13 which must be the ultimate regulatory jurisdiction.

14 QUESTION: And that regulatory power cannot be
15 subdelegated to lessor units under your view?

16 MR. KENT: Local units of government can
17 participate in administering and enforcing a State
18 program. So, for example, if --

19 QUESTION: But if the State itself isn't
20 supervising the program, you'd say they could not delegate
21 authority to individual government units.

22 MR. KENT: That is correct. There would have to
23 be continuing State jurisdiction and supervision.

24 QUESTION: Could I ask you then if -- what do
25 you understand of the provision for cooperation where they

1 do specifically refer to local jurisdictions? What kind
2 of cooperation do you understand that to be referring to?

3 MR. KENT: I would see that in two respects,
4 Your Honor. The first is the type of cooperation that
5 might come up in the context of where the State decides to
6 regulate a pesticide with respect to a particular local
7 area, as Wisconsin does, for example, in saying in certain
8 counties we have additional restrictions on the pesticide
9 aldicarb. There you would want to have some contact and
10 cooperate with the local officials in, you know, setting
11 up the monitoring and in administering that program.

12 QUESTION: I see.

13 MR. KENT: I think another way of looking at it
14 would be the California model. The California model says,
15 we will allow local units of government to do certain
16 things, and there's a specific delegation to those local
17 units of government, but the State retains control. A
18 decision by, for example, the county Agricultural
19 Commissioner to issue a special use permit in California
20 is subject to specific review by the State in the State
21 Administrative Procedure Act.

22 Under the California scheme if a local unit of
23 government proposes a specific regulation for its area,
24 the State will allow that to happen provided there is an
25 express approval by the State. Now, that type of a scheme

1 really allows the purposes of FIFRA to be served, because
2 it brings to that scheme not only the State expertise but
3 the type of coordination that you would have on a
4 Statewide level. And it really -- it serves to provide a
5 Statewide perspective so that some of the most parochial
6 problems can be then vetoed by the State effectively. So
7 it's that State control which we think is key here, and
8 what Congress was intending to do as it set forth in the
9 statute and the legislative history.

10 I would like to highlight again and perhaps
11 clarify some of our earlier comments with respect to the
12 conflict issue here. And I believe that the conflict that
13 we're talking about with respect to this ordinance is not
14 necessarily -- although it could be an impossibility-type
15 conflict where the Federal Government says X and the local
16 unit of government is saying Y.

17 Our concern with this type of ordinance is much
18 more in that it frustrates the Federal scheme in several
19 respects. The Federal scheme was designed to provide
20 coordination and cooperation. This ordinance, which
21 requires -- which establishes an independent regulatory
22 scheme, operates wholly outside of any State program. If
23 this particular ordinance was allowed to stand, local
24 units of government would be free to enact whatever they
25 want, and the goal of coordination would be lost.

1 Second, I think that this type of ordinance
2 presents the same type of problems with effective use of
3 pesticides that we've talked about earlier. There is a
4 problem of parochialization, that the local units of
5 government concerned with their own narrow interests may
6 inadvertently be ignoring the larger State or regional
7 interests.

8 And as a practical matter, having this type of
9 ordinance by a unit of government with the least technical
10 resources we believe thwarts the congressional purpose
11 that there by effective pesticide regulation managed by
12 those units of government which can bring the effective
13 and efficient regulation of pesticides to bear, to have
14 the technical resources to do that.

15 That if this ordinance is allowed to stand,
16 where the conflict arises, then, is in a case where you
17 then have the burgeoning of literally tens of thousands of
18 these types of local ordinances where you would have one
19 jurisdiction requiring a permit for 60 days prior to use,
20 as the Town of Casey has done here. Then in the next
21 township, 6 miles down the road there's not a permitting
22 scheme, but there is a very elaborate notice and posting
23 scheme. And then the next 6 miles down the road, you have
24 another type of ordinance that, say, perhaps requires a
25 review of the pesticide re-registration process or

1 something on that order.

2 Congress among other things in its concern with
3 coordination, was also concerned about burdens on
4 interstate commerce. And I think many of the amicus
5 parties which have filed briefs here today have
6 highlighted those. And to just give you one example of
7 where that could be a problem, I would submit the utility
8 rights of way or rail corridor problem is an excellent
9 example. A railroad or a rural electric cooperative in
10 northern Wisconsin which crosses several hundred miles
11 would have to submit to regulations -- a different set of
12 regulations every 6 miles as it goes across the State
13 under this type of ordinance.

14 QUESTION: May I ask one question about this
15 ordinance?

16 MR. KENT: Yes, Your Honor.

17 QUESTION: Is there any other regulation of
18 aerial spraying in Wisconsin other than ordinances of this
19 kind?

20 MR. KENT: There is a regulation under the
21 Wisconsin Administrative Code, Ag 29. There are certain
22 restrictions on spraying, and in fact, there are certain
23 limited advanced notice provisions as part of that State

24 ** --

25 QUESTION: But this is more restrictive than

1 that regulation obviously?

2 MR. KENT: Right, considerably more restrictive.

3 And again our concern here ultimately is with the
4 multiplicity of these types of regulations could
5 effectively preclude any use of pesticides by these
6 governments.

7 In concluding, I would just like to note that
8 congressional intent we believe remains the ultimate
9 touchstone here. And we believe Congress established a
10 coordinated Federal and State program. And it provided
11 that States can regulate use and defines States to
12 preclude local governments. It underscored the different
13 roles between States and local governments, allowing
14 States to cooperate and participate in those State
15 programs.

16 And I think as the words of the statute say, in
17 carrying out the provisions of this chapter, they can
18 assist in a State program. But they cannot we submit
19 under this statute and this legislative history be
20 involved in a case where they can do so wholly independent
21 and without regard to the State program or the Federal
22 program.

23 QUESTION: Thank you, Mr. Kent.

24 Mr. Dawson, you have 1 minute remaining.

25 REBUTTAL ARGUMENT OF THOMAS DAWSON

1 ON BEHALF OF THE PETITIONERS

2 MR. DAWSON: Mr. Chief Justice, and may it
3 please the Court:

4 First, I'd like to come back to a question that
5 Justice Souter raised regarding Senator Allen's activity
6 on the floor of the Senate, and I may have misspoke. I
7 want to refer the Court to the Solicitor General's brief
8 on page 20 in which it makes very clear exactly what
9 happened. There Senator Allen inserted an explanation of
10 the bill as it appeared in the original report of the
11 Committee of Agriculture and Forestry, which included that
12 paragraph concerning the authority of local governments
13 from the initial report. Thus, he did not read it into
14 the record while on the Senate floor.

15 And the fact is that the Senate -- the dispute
16 that existed between the Senate Agriculture and Forestry
17 Committees as well as the Commerce Committee was never
18 resolved. That dispute was never resolved in the passage
19 of this act. This act went to a conference --

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dawson.

21 The case is submitted.

22 (Whereupon, at 12:05 p.m., the case in the
23 above-entitled matter was submitted.)

24

25

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: 89-1905

Wisconsin Public Intervenor, et al., Petitioners v. Ralph

Mortier, et al.

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

BY *Raymond H. Hartzel*
(REPORTER)

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