OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: GENERAL MOTORS CORPORATION, ET AL.,

Petitoners, v. EVERT ROMEIN, ET AL.

CASE NO: 90-1390

PLACE: Washington, D.C.

DATE: Tuesday, December 10, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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GENERAL MOTORS CORPORATION, :

ET AL., :

Petitioners :

v. : No. 90-1390

EVERT ROMEIN, ET AL. :

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Washington, D.C.

Tuesday, December 10, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

KENNETH S. GELLER, ESQ., Washington, D.C.; on behalf of the Petitioners.

THEODORE SACHS, ESQ., Detroit, Michigan; on behalf of the Respondents.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90-1390, General Motors Corporation v. Evert Romein.

Mr. Geller.

ORAL ARGUMENT OF KENNETH S. GELLER

ON BEHALF OF THE PETITIONERS

MR. GELLER: Thank you, Mr. Chief Justice, and maybe it please the Court:

Up until 1982, employees in the State of Michigan who reached retirement age with a job-related disability were entitled to collect workers' compensation benefits and retirement benefits, even though both workers' compensation benefits and retirement benefits were intended to compensate an employee of the same exact wage loss. In many cases this allowed retired employees to earn more money after retirement than they would have earned if they had continued to work.

Now, needless to say, this so-called retiree problem was quite costly to employers and was considered by many government officials to be the single biggest liability to maintaining and attracting business to the State of Michigan.

The Michigan legislature responded to this

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problem in 1981 by passing a statute that authorized employers to coordinate workers' compensation benefits with various other benefits provided by employers. Under the 1981 statute, which became effective on March 31, 1982, employers were allowed to offset workers' compensation benefits against the amounts that an employee was otherwise receiving from employer-sponsored wage replacement programs, such as pensions and Social Security.

Now a few years after the 1981 statute went into effect, the Michigan supreme court held in a case called Chambers -- unanimously held that the coordination provisions applied to all payments of workers' compensation after March 31, 1982, regardless of when the employee happened to have been injured.

The court reached this conclusion by relying on the plain language of the 1981 statute, the structure of the statute, and the legislative purpose in requiring coordination of benefits in the first place.

Now, the Chambers decision was immediately attacked by employee groups in the State of Michigan, and efforts were made to overrule it legislatively. Almost 2 years later, in May of 1987, the Michigan legislature passed a statute abolishing coordination of workers' benefits for employees injured prior to March 31, 1982.

But the legislature was not content simply to abolish coordination of workers' compensation benefits prospectively; they went much further. The 1987 statute explicitly announced that the Michigan Supreme Court's decision in Chambers was erroneously decided, had erroneously interpreted the intent of 1981 legislature. And to remedy this perceived error, what the Michigan legislature did in 1987 was to repeal the 1981 coordination provision retroactively and required employers to make refunds, with interest, to all employees whose benefits had been lawfully coordinated during the 5-year period that the 1981 statute had been in effect.

Now, petitioners did not challenge the 1987 statute to the extent that it affected the amount of workers' compensation benefits payable prospectively; but they claimed that the retroactive provisions of the statute violated the contracts clause and the due process clause of the Federal Constitution to the extent that it required employers to go back and reassess their workers' compensation obligations for the years 1982 to 1987 under a completely different set of rules than were in effect during that period of time.

The Michigan courts rejected these Federal constitutional claims, and we have renewed them in this Court.

QUESTION: Mr. Geller, what is the contract exactly that you say was impaired?

MR. GELLER: The contract is the contract of employment between employers in the State and these employees.

QUESTION: Well, if you look back at the original employment contract with people who were hired before 1981 who were injured and put on disability before then, I assume under the terms of the original program, there would be no coordination of benefits.

MR. GELLER: There was no --

QUESTION: That was the original understanding.

MR. GELLER: Well, there was no coordination of benefits at that time, Justice O'Connor. That's correct.

QUESTION: So how can that contract be impaired?

MR. GELLER: I think because the terms of the contract, we allege, Your Honor, are that employers will make workers' compensation benefits to disabled employees in whatever amount is lawful at the -- during the period of time of disability. After all, the amounts that may be lawful will vary in the future based upon what the legislature determines in light of existing events. It may go up; it may go down.

The contract obligation is pay whatever the amount is that is lawful during every subsequent period of

disability, and that was what we -- what we assert was the contractual obligation and the contractual expectation. Now, at the time that these employees became injured there was no coordination, but subsequently there was coordination, and the employers satisfied their contractual obligation by paying coordinated benefits during that period of time.

QUESTION: Well, I think you could certainly argue that the contract was that of the original understanding between the employer and the employees, that they'd get what the law provided when the --

MR. GELLER: I don't think that can be argued in this case because the Michigan --

QUESTION: -- when they were disabled and started receiving the benefits.

MR. GELLER: First of all, Your Honor, I think the terms of the contract are essentially a question of State law. I don't think you can make that argument in this case because we know from the Michigan Supreme Court's definitive decision in the Chambers case that the benefits could go down as well as up, and that would be consistent with the contract.

QUESTION: Well, for purposes of a contract clause assertion, is it purely a matter of State law or is there a Federal law component to what a contract is?

MR. GELLER: There is a Federal law component in determining whether the contract has been impaired. You have to determine, of course, what the contract is in order to determine whether subsequent legislation impairs it.

And what we say is that the terms of the contract here, as is shown by the consistent experience in Michigan under the workers' compensation statute is that the employers are not promising to pay any specific amount in the future. They have promised to pay whatever the amount is that is lawful for subsequent periods of disability, and that's of course exactly what General Motors did here -- and Ford -- between 1982 and 1987.

QUESTION: Mr. Geller, are the respondents in this case members of a class?

MR. GELLER: No, this is not a class action, Your Honor.

QUESTION: So when did each of these people go to work for General Motors and for Ford?

MR. GELLER: They went to work well before the 1981 statute was passed, although they did not become disabled, at least in the case of one of the respondents, until right before the 1981 statute was --

QUESTION: What were the terms of their contract? Was it --

MR. GELLER: It was an at-will.

QUESTION: At-will contract?

MR. GELLER: Yes. I think --

QUESTION: When you say lawful, you mean the absolute minimum that could be required by law; is that correct?

MR. GELLER: They satisfied their obligations during 19 -- during the period 19 --

QUESTION: That's what you mean when you say the contract was -- what was lawful at the time.

MR. GELLER: That's right, they satisfied completely their obligations under the existing law during that period of time.

QUESTION: Were they represented by a union? Was there a collective bargaining contract --

MR. GELLER: There was a collective bargaining agreement, yes.

QUESTION: Well, how could it have been at will?

MR. GELLER: The collective bargaining agreement covered terms and conditions of employment --

QUESTION: I know, but I suppose it probably provided that you couldn't be fired except for cause.

MR. GELLER: I suppose.

QUESTION: You suppose that is an at-will contract?

MR. GELLER: I am not familiar with the specific terms. There are people who --

QUESTION: Well, don't say it's an at-will contract if it isn't.

MR. GELLER: I think these employees may have been at-will employees. There are other employees who are not. I don't think it's relevant to the resolution of the case, though.

QUESTION: So the essence of the contractual provision that you are arguing here is that the employers are liable to pay what's required for that pay period?

MR. GELLER: Exactly.

QUESTION: And that contract is based on long tradition and usage in Michigan?

MR. GELLER: Yes. It's based on that. It's based on the fact that workers' compensation is simply one form of compensation that's paid to employees in return for their promise to work. Every other term of the contract, unquestionably -- every other form of compensation, I think we would all agree is pursuant to the contract.

QUESTION: Well, there had been in Michigan some retroactive adjustments of workers' compensation benefits over very minor manners -- matters and reaching back just one legislative session, or is that incorrect?

MR. GELLER: I don't believe so, Justice Kennedy. I believe not.

QUESTION: It had always been prospective?

MR. GELLER: Absolutely. I think part of the problem in this case -- this is an extraordinary -- extraordinary statute. I think it's important to emphasize the extraordinary nature of this statute. Never before in the 75-year history of workers' compensation in Michigan and as far as we know, never before in the history of workers' compensation in any State has a legislature ever gone back, raised the workers' compensation benefits for past closed periods and imposed the obligation retroactively on employers to pay those benefits.

Now the -- and never before in our view has this Court ever upheld a statute of that nature, a purely retroactive statute of that nature.

Now the respondents attempt to defend this statute by trading on an ambiguity in the word retroactive. As Justice Scalia's opinion in the Georgetown Hospital case a few years ago noted, the word retroactive is applied to two quite different types of statutes.

One type of statute is purely retroactive in the sense that it changes what the law was in the past. It

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reached -- it reaches back and alters the past legal consequences of already completed transactions. Now those laws are said to be retroactive in the primary sense of the term.

Now, other more common laws contain elements of both retroactivity and prospectivity. They affect the future legal consequences of past events. These laws are said to be retroactive in the secondary sense of the term.

Now respondents' briefs are full of statements suggesting that the Michigan legislature has frequently enacted retroactive laws in the workers' compensation area, and that this Court has frequently upheld such retroactive legislation.

But all of the instances that they rely on, without exception, involve laws that were retroactive in the secondary sense of the term. In other words, the legislature had from time to time increased or altered the amount of workers' compensation benefits, payable prospectively, although it made those laws applicable to people who were -- who had suffered preexisting disabilities.

Now that's a quite different type of law than we have in this case.

QUESTION: Mr. Geller, may I ask, supposing in 1985 that the Chambers case had been decided the other

way, then the company would have had to come up with the past-due money, but that would have been because the effective date --

MR. GELLER: That would have been on construction of the 1981 statute.

QUESTION: Now, what if the legislature, while the case was pending, had passed this very same statute and said, we don't want the supreme court to make a mistake, so we will say this is what we meant back in 1981 or whatever it was. Would you have the same attack on that statute?

MR. GELLER: I think we would have the same attack, although I think our reliance interest would be marginally weaker because --

QUESTION: Well, there is no difference in the reliance interest. You withheld the money in both cases.

MR. GELLER: Except that here we have a definitive construction of the 1981 statute by the Michigan Supreme Court.

QUESTION: But you are challenging not just payments since 1985 --

MR. GELLER: That's right.

QUESTION: -- but all the way back.

MR. GELLER: I think for the period from 1981 to --

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QUESTION: I don't see analytically how it would be any different if the statute had been passed just before the Michigan Supreme Court had acted.

MR. GELLER: I think we would have much the same arguments. I think our case is even stronger though, Justice Stevens, because we do have a definitive construction in 1985 of this law, and it was only 2 years later that the court -- that the Michigan legislature says the 1981 statute didn't mean that --

QUESTION: Well, there was some prompt reaction.

MR. GELLER: -- but we know for a fact that it did mean what the Chambers court said.

QUESTION: Wasn't there some prompt reaction to the decision?

MR. GELLER: There was a prompt reaction to the Chambers decision, but it wasn't until 19 months later that the statute was passed overruling it.

QUESTION: Would you -- supposing in '87 they just made the new law prospective -- changed --

MR. GELLER: Yes, we would have no challenge to that.

QUESTION: It's just the -- going back to '81?

MR. GELLER: In fact --

QUESTION: Just going back to '81?

MR. GELLER: '81, that's right. In fact, the

1987 law, Justice White, was prospective and retroactive. We have not challenged the prospective aspects of the law.

Let me just say in answer to Justice Stevens question that there was an immediate reaction to the Chambers decision, but the -- the bills that were introduced in the senate and the house of representatives in Michigan did not all provide for retroactive liability.

The bills that were introduced in the senate provided only for prospective changes in the coordination rules, and it was not until 8 days before the bill was actually passed in 1987 that a conference committee agreed to put in this retroactive provision.

Now, the court below gave two reasons for rejecting our contract clause claim. The first reason which took up only a single sentence of its opinion and was not otherwise explained was the assertion that workers' compensation benefits are not contractual and they are therefore not protected by the contracts clause against -- subsequent legislative impairment.

We believe, and we have gotten into this a little bit already, but this is inconsistent with the undisputed facts concerning the nature of workers' compensation in Michigan and contrary to many cases that this Court construing contractual obligations under the contracts clause.

Now respondents don't deny that their relationship with the petitioners is contractual. They're employees who were working under contracts of employment with Ford and General Motors, and under those contracts of employment they were entitled to many different types of compensation.

QUESTION: But, Mr. Geller, under this argument wouldn't the 1981 act have been retroactive the way you are arguing it?

MR. GELLER: No, the 1981 statute was prospective only. In other words, it only dealt with --

QUESTION: It had adjusted rights that had accrued for already retired employees, didn't it?

MR. GELLER: Once again, it gets to the question we were talking to Justice O'Connor about, what was the nature of the contract? We say that the contractual understanding was that employers would pay for every period of -- subsequent period of disability, the amount that was determined to be the lawful amount to pay for workers' compensation benefits.

Now, the 1981 statute was prospective only. It changed what the lawful amount was in workers' compensation.

QUESTION: It was a lesser amount than it had been before.

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MR. GELLER: It was a somewhat lesser amount, and General Motors and Ford paid that amount lawfully during the period between 1982 and 1987. The distinction --

QUESTION: Mr. Geller, you take the position that these workmen' comp benefits are in effect contractual?

MR. GELLER: We do. We take that position --

QUESTION: And yet the State court found they were not --

MR. GELLER: Well, the State court --

QUESTION: -- part of the contract, as a matter of State law.

MR. GELLER: Well, it's not clear, Justice O'Connor. The State court had a sentence in its opinion --

QUESTION: Well, what if we think that's what they meant, that as a matter of Michigan law, that isn't part of the contract.

Now you want us to find as a matter of Federal law that it is?

MR. GELLER: Yes, and I think you can for two reasons. One is there are many, many decisions of this Court which we have cited in our brief in which this Court has said that whether or not something is a contract and

therefore subject to the protections of the contracts clause is a Federal question. And this Court has in the past disagreed with statements by State courts that things that look like contracts were not in fact contracts.

Secondly, we don't have a reasoned decision of the Michigan Supreme Court explaining why this is not a contract, and in fact, its statement that this is not a contract is inconsistent with prior decisions of the Michigan Supreme Court in cases like McAvoy and Selk, which have said that the obligation of employers under the workers' compensation statute in Michigan is contractual.

So for those two reasons we think that it's a question for this Court to decide.

QUESTION: Mr. Geller, I have this problem. It seems to me that whatever else the contracts clause is meant to do it is certainly meant to protect expectations, and I don't really see that you had any expectations here. As far as you knew, when you went into a contract to pay whatever Michigan shall say you will pay in the future, not just during the term of employment, but even after he leaves employment with a disability, Michigan can kick it up as high as it likes, right -- prospectively?

MR. GELLER: Yes, but I think --

QUESTION: So prospectively, retrospective. I mean, I don't see how any of your contractual expectations

have been disappointed. You had no contractual expectations.

MR. GELLER: I think we -- Justice Scalia, I think there is a substantial difference between the situation where in the future the amount might be increased, might be decreased. We can take that into account in deciding what other types of compensation to pay, how to measure the cost of our product. That's quite different than saying --

QUESTION: There is a difference. There is a difference --

MR. GELLER: Yes.

QUESTION: -- but I am not sure the difference relates to contractual expectations.

MR. GELLER: Well, if you assume --

QUESTION: I mean, it may be a due process claim, but I don't see how it's a contracts clause claim.

MR. GELLER: Well, we also have a due process claim --

QUESTION: I know you do make that. I have trouble squeezing it under the contracts clause, which I usually think is meant to protect, you know, by God, I have a contract, and your contract says nothing but I will pay whatever Michigan says I will pay, and they say to pay more --

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MR. GELLER: Exactly, and Your Honor, that's exactly what the employers in this case did between 1982 and 1987 they paid the exact amounts that Michigan had said they were obligated to pay under their workers' compensation obligations, and they took that into account in making a number of business decisions as to what their expenses were during that period.

QUESTION: Oh, but they didn't know under 1985 that they'd made the right calculation. For 4 years there they were -- I mean, they proceeded perfectly lawfully, but you can't say they were darned sure they were going to win.

MR. GELLER: They weren't darn sure, Your Honor, but they looked at the plain language of the 1981 statute, which draws no distinction between people --

QUESTION: No, but it bumps into a presumption against retroactively reducing benefit --

MR. GELLER: But Your Honor, you have to look at the reason why the legislature in 1981 passed this coordination of benefits provision, and I think the Michigan Supreme Court in Chambers asked that question. They did it because the employers in the State were facing extraordinary obligations to pay workers' compensation as well as these other types of employer-financed benefits.

It would have made no sense to say that the

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coordination provision provided -- applied only to people who had got disabled after 19 -- March 31, 1982, because that would have saved, at least at the outset, an infinitesimal amount of money. The only way that the legislature could have achieved the purpose of the 1981 statue was to make that statute applicable to all payments of workers' compensation payable after March 31, 1982, regardless of when the employees were disabled.

But the employees were willing to take the chance that that was a correct interpretation of the statute. Their reliance was found to be completely justified by the united -- unanimous decision of the Michigan supreme court in Chambers.

QUESTION: Mr. Geller, didn't the '81 statute increase -- although it let the pension payments be offset against the workmen's compensation, didn't the level of workmen compensation payments go up?

MR. GELLER: Not in 1981. They had -- in 1980. In 1980, Justice White, there had been other amendments to the workers's compensation statute. Now the effect of those amendments was that for some class of employees it increased the amount of workers' compensation --

QUESTION: But not for people who were hurt before?

MR. GELLER: No, that's not true, Your Honor.

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In 1980 -- let me say this to begin with. The other side and the Michigan Supreme Court tries to draw a nexus between the 1980 and 1981 statutes, and they have conjured up this notion that the 1981 statute was in fact a way of dealing with the problem caused in 1980, and that it was a trade-off and that people who didn't get benefit increases in 1981 -- in 1980, were not subject to coordination in 1981. There is absolutely no evidence for the notion that there was a nexus here.

There's no suggestion that the 1981 statute was tied to the 1980 statute, but let me say this --

QUESTION: So that -- you say that the workmen's compensation payments that were due to -- after 1981, that were due to employees who were hurt before were the same as the workmen's compensation payments for employees who were hurt after 1981?

MR. GELLER: The obligation to coordinate was exactly the same and people who were injured prior to 1980 did get an increase in benefits in 1980.

QUESTION: You didn't answer my question. The workmen compensation payments were at the same level for both classes of people?

MR. GELLER: No. No, they may or may not have been. There was a different system in place for calculating workers' compensation benefits after -- for

people who were injured after 1982 and in some cases it increased benefits and in some cases it didn't.

But my view is that there was --

QUESTION: How about those hurt before 1981?

MR. GELLER: People who were hurt before 1981 were entitled to get supplemental workers' compensation benefits under a statute passed in 1980, and some of these benefits were very substantial and led to increases of up to 85 percent in their benefits. And those workers' compensation benefits, Justice White, those supplemental benefits, were not subject to coordination.

So it is not the case that people who are injured prior to 1982 were much worse off in terms of the amount that they collected than people who were injured after 1982. But the salient point is that there is no nexus because the 1981 and 1980 statutes, and there was not a tradeoff.

Now if we are right -- let me see if I can explain why we think workers' compensation benefits in Michigan are contractual by just using one hypothetical here. If the Michigan statute had said every employer who enters into a contract of employment in the State must include the following terms in the contract, and they thereafter set out the terms of the workers' compensation package, I think it would be easy for everyone to see why

that became part of the contract.

Now, what we suggest is that the situation in Michigan was indistinguishable from that. What the State of Michigan has said is that if you wish to enter a -- into a contract of employment in the State, you must offer your employees at least the following compensation in cases of job-related disability --

QUESTION: Would you say the same thing about a minimum wage statute, that that's contractual too?

MR. GELLER: Mr. Chief Justice, we would. If an employer and an employee entered into a contract to pay the minimum wage in return for work and if 5 years later the State decided that the minimum wage had been too low and raised it retroactively, we suggest that there would in fact be a substantial -- in addition to due process challenge -- contract --

QUESTION: So that all this government regulation of conditions of employment become contractual really --

MR. GELLER: No, Your Honor, I think many regulations are in fact just that, a regulation of the employer, and it's irrelevant whether the employer has contracts of employment or whatever. But the workers' compensation scheme is quite different. There must under Michigan law be a contract of employment. The employer is

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not obligated to pay workers' compensation except in return for work that is done by that employee. It is one form of compensation.

Every other form of compensation works its way into the contract, and we say that that is the case with workers' compensation as well.

I might say that if the State of Michigan could do this, it could decide for example that the minimum wage law, as the Chief Justice suggested, was too low during the period 1982 and 1987 and it could pass a statute retroactively increasing the amount of minimum wage and make the employer pay the difference with interest, which is what happened here.

QUESTION: No, but this is -- workmen's compensation is a little different because you got a private -- anyway, supposing they added a new kind of injury they hadn't included and said that we've just learned that there are a lot of injured former employees of the automobile companies out there who were injured by a certain kind of exposure to something in the plant and we therefore want to retroactively have compensation for them. Would that be permissible?

MR. GELLER: I think it might well raise problems under the contracts clause, although the reliance interest --

QUESTION: It would be pretty close to the coal miners' case, wouldn't it?

MR. GELLER: But you know the Turner Elkhorn case, Your Honor, which was not, of course, a contracts clause case, was a law that was retroactive in the secondary sense only. It did not go back and impose new obligations for past periods of time. All it said is that henceforth you have to pay workers' compensation to a particular category of employees.

So it was not at all like the -- that's why I said earlier, this is an extraordinary type of law, and I don't know that this Court has ever, ever upheld a decision -- a statute of this type.

QUESTION: But if seems to me if you have contracted to pay whatever Michigan law says in the future, even after the person has left your employment, that's what you say the contract is -- we'll pay whatever Michigan says in the future -- why can't you have promised to say we will pay whatever Michigan says we should pay in the future including, if Michigan changes its mind and goes back and decides that we should have paid more for some earlier period.

MR. GELLER: If there --

QUESTION: I mean, if you buy into some of Michigan law --

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MR. GELLER: Well, because I think --

QUESTION: -- why can't you buy into all of Michigan law --

MR. GELLER: It's a question --

QUESTION: -- in which case there's no contracts clause violation.

MR. GELLER: It's a question, Justice Scalia, of what the contractual expectations are. now if there had been a history of that sort of legislation, I think that there would be a stronger argument. But as I was saying --

QUESTION: There always has to be a first time.

MR. GELLER: Well, I think the question is whether on the first occasion, that it can be imposed retroactively, in light of the reliance interest.

Now even if we are wrong in our contracts clause challenge, let me spend a few minutes on the due process clause, because the due process clause independently imposes substantial limits on the State's ability to retroactively enact civil legislation.

And once important -- once again, I think it's very important to distinguish between the two types of retroactive legislation mentioned earlier. There are many cases of this Court upholding legislation that was retroactive in the sense of imposing future legal

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consequences on past events.

All of the cases that respondents rely on, such as Turner Elkhorn, fall in that category. But the Court has taken a quite different approach when dealing with statutes that are retroactive in this primary sense, statutes that change the law in the past, that changed the past legal consequences of past events.

In that type of case, the Court has upheld retroactive statutes against the due process challenge in only two situations that we are aware of. Now, the first situation which usually arises in tax cases, is where Congress has imposed a short period of retroactivity to prevent people from rearranging their affairs to evade pending legislation. The Gray case is a good example of that. That's certainly not our case here. We are not dealing with a short period of retroactivity to evade pending legislation.

Now, the second type of case involves so-called curative legislation. The Court on several occasions has upheld retroactive statutes that cured inadvertent technical defects in prior legislation -- the Heinszen case, for example, where there was a tariff in effect, but there was a technical defect in it, and Congress reenacted the tariff and made it retroactive to the date of the original tariff.

There's no problem in that type of case because it doesn't destroy any reliance interests. Such laws can't upset any settled expectations because they in fact reaffirm what everyone always thought to be the law.

On the other hand, this Court has said that retroactive laws that represent changes in legislative policy can't be imposed retroactively because of the fundamental unfairness of imposing new rules of conduct on people who've had -- who've engaged in past completed transactions under different rules of law. And the classic case for this type of retroactive legislation is the Forbes Pioneer case, where the case tried to enact a toll and make it retroactive 4 years to a time when a ship had passed through the canal thinking that there was no toll.

Now, with these as the relevant categories, we think it's easy to see where the 1987 statute falls. The State of Michigan in its brief concedes the 1987 statute was plainly just a change in legislative policy, was not a curative law intended to remedy an inadvertent defect. It changed the law during a 5-year period of the past. There were many, many settled transactions during that 5-year people that were completely upset --

QUESTION: Had the legislature passed resolutions earlier saying they had never intended the

result that the supreme court of that State --

MR. GELLER: Yes, in 1982, Justice O'Connor, the legislature had passed a resolution saying they didn't intend the 1981 -- but there are two things to be said about that. First is, those resolutions had no retroactive -- aspects to them. They were intended to operate only prospectively.

And second and more importantly, in 1982 the legislature defeated a bill -- defeated a bill that would have amended the 1981 statute to make it apply only to people who were injured after March 31, 1982.

So I think that's another reason why the employer --

QUESTION: That's probably because it wouldn't have taken care of the people from '81 to '82, isn't that right?

MR. GELLER: Perhaps not, but it would have taken care of a large percent of the people.

Your Honor, if there are no further questions, I'd like to reserve the balance of my time.

QUESTION: Very well, Mr. Geller.

Mr. Sachs, we will hear from you.

ORAL ARGUMENT OF THEODORE SACHS

ON BEHALF OF THE RESPONDENTS

MR. SACHS: Mr. Chief Justice, and may it please

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the Court:

The appeal to the contract clause is an extraordinary one, particularly in that it does not avail the petitioners at all, and I think it's important to get the facts and history straight.

Mr. Romein and Mr. Gonzalez, like other employees or former employees similarly situated, had worked for decades for these employers. During the entire time of their employment and other similarly situated employees the Michigan workers' compensation statute forbade, expressly prohibited any kinds of setoffs or coordination, as it is currently called.

These respondents, Mr. Romein and Mr. Gonzalez, worked through their course of employment until Mr. Romein was disabled in 1977 in serious injuries. I misspoke myself, Mr. Romein. Mr. Gonzalez was disabled from silicosis in 1981. Through all of these decades until the moment they were injured and became disabled Michigan law expressly prohibited any kind of setoff or coordination.

During this time, moreover, contrary to petitioners' statements, there was not a statement under Michigan law that there was a contract of any variety. There are several Michigan cases, they are cited in our brief, in which the court said precisely the opposite.

And indeed, ironically, when General Motors

argued to the Michigan Supreme Court in the Chambers case, it made precisely the argument that Michigan did not respect workers' compensation as an aspect of contract. And we have appended the General Motors' brief in the Chambers case as appendix A to our own brief here, showing that General Motors's position at that time was diametrically opposite to the position asserted here.

The Michigan Supreme Court had never -- I'm about to overstate it. Prior to 1943 the Michigan statute was elective. After that time it was compulsory and then in the recent cases of the court, the court recognized that it was compulsory. Employers had no options to modify this law at all. They could not agree to any changes. They could not vary anything. There was no right of contract. There was no mutual assent. There was no knowledge required.

And with respect to the characterization by the way that this was at-ill contract insofar as these employees are concerned, that was, of course, not the case. These employees were members of the UAW bargaining unit --

QUESTION: I suppose the people who were complaining were already retired and not employees any longer.

MR. SACHS: That is precisely correct, Your

Honor, because what --

QUESTION: And I suppose the union probably didn't have any interest in what GM did to these former retirees.

MR. SACHS: I wouldn't go that far, with all due respect to Your Honor --

QUESTION: It must not have been a bargainable issue.

MR. SACHS: It was not a bargainable issue, and under the law of this Court it could not have been a bargainable issue because once these employees retired, they ceased to be employees by definition. And accordingly when the 1981 amendments occurred, these were no longer employees who would have had any employment contract into which to incorporated the workers' compensation, quotes, "contract."

So the argument is extremely paradoxical. The claim is made that we have a contract. What's the contract? Well, the contract you are told is anything the legislature says in the future. Now, that's a --

QUESTION: I think the claim is that it was the prior contract, that the term of the prior contract when they were employed was that the employer would pay to them in the future whatever the then-applicable Michigan law required.

MR. SACHS: I understand that, Justice Scalia.

QUESTION: And it makes sense, whether you accept it or not.

MR. SACHS: Well, Justice Scalia, of course, I don't accept it, and of course there is nothing in the Michigan case law or the Michigan statute which supports any such interpretation. The courts -- the Michigan court has rejected generally the notion that there is any kind of contract.

It certainly therefore did not upset -- accept a subset, a promise where there is no promise at all that employers will be obligated to accept anything that comes down the pike in the future. That's the last thing in the world the legislature would have intended or that employers would have been agreeable to.

So that when in 1981 the, quotes, "coordination" was agreed to as a part of a general accommodation of values by the legislature and policy judgments are made on the one hand to increase workers' compensation benefits prospectively, in part to be financed through the resources of the coordination, but dealing only with future injuries, that is a determination made in the legitimate policy judgment of the Michigan legislature, not as a matter of contract, but obviously in the exercise of its police powers regulating the workplace in this

important area.

This Court recognized in 1917 that this was the legitimate exercise of police powers of the State to protect the serious interests that are involved.

QUESTION: Suppose they did with the minimum wage. Suppose Michigan just said, we have had a few years of good prosperity, the auto companies are doing pretty well, we're going to say that the minimum wage you should have paid 5 years ago is going to be raised and you should pay everybody in cash the difference. Is that lawful?

MR. SACHS: The answer to your question, Your Honor, would depend upon all the facts and circumstances under due process scrutiny --

QUESTION: I know --

MR. SACHS: -- not under contract scrutiny. And the issue there for example, to expand on --

QUESTION: I don't want to argue with you. Are you going to deal with the due process arguments later?

MR. SACHS: Yes, I will. If --

QUESTION: You will answer this question then.

MR. SACHS: I hope to, Your Honor.

What happened when the judgments and accommodations were made in 1980 and 1981, contrary to the suggestion of counsel, was not that there was any fat increase of benefits for the workers who were already

retired. There was a nominal so-called supplemental increase, payable by the State, not by employers, which by case law has been generally inapplicable to virtually everybody who might otherwise be affected and is insignificant in its application.

But let's take the history a little further so we get this factual context straight. What happened was in 1982, when General Motors and Ford, apparently alone, took on this aggressive posture of trying to interpret the statutory amendments as other employers were not doing, including their competitor Chrysler, to say that this was retrospective as to people who were injured prior to 1981, the legislature responded with resolutions which said that it was never the intention of this legislation to deal retroactively as to these people who were previously injured.

And I do not recall the history that counsel recites that there was a failure in the legislature to enact new legislation. There was no reason for the legislature to enact new legislation. They enacted the resolutions.

Then, throughout the entire administrative process which followed, throughout the entire lower court judicial process that followed, the position of General Motors and Ford were consistently and universally

rejected. It was not until the Michigan Supreme Court spoke in 1985 that General Motors prevailed and it prevailed again, on arguments diametrically opposed to the arguments which are being made here.

There was immediate revulsion, and I don't think that's an overstatement, to the decision that the court had reached because it was --

QUESTION: Immediate revulsion on the part of whom?

MR. SACHS: On the part, I think, of people generally, certainly on the part of the legislature, on the part of the former Governor who had sponsored the coordination proposition in the first place, the administrative officers who had administered it and had sponsored it as well, as far as the public generally.

And indeed, the author of the opinion in Chambers concluded within weeks, following on a motion for rehearing, that the methodology of the court was wrong and that she had erred and she acknowledged harsh and unforeseen circumstances. This is part of the decision in the Chambers case in terms of what was then a denial of rehearing.

Now contrary to the suggestion that there is a 2-year period as I heard counsel say, what immediately happened was that it within weeks, there was legislation

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which was introduced into the house. By January of 1986, within 4 or 5 weeks after the introduction of that legislation, it had passed the house of representatives in Michigan, which did exactly what the law ultimately enacted did.

So -- and what was involved there, counsel decries understandably the retroactivity, but what the legislature was seeking to correct was retroactivity, because this was the first time in some 75 years in the history of the Michigan statute that there ever had been a cutback in workers' benefits, whether retroactively or prospectively.

He errs, with all respect, when he says there has not been -- there had not been, rather -- retroactive legislation or amendments to the workers' comp act affecting employers. They are assembled in footnote 1 of our brief. The Court had several times spoken retroactively in a primary sense, as well as a secondary sense, in making adjustments where there was a conclusion that such adjustments were necessary.

And the Michigan court, in the Lahti case and the Rookledge case and several other cases mentioned there, had acted in that form. So that what this was all about, to make a long story short was that --

QUESTION: Those were upward adjustments?

MR. SACHS: I beg your pardon, Your Honor?

QUESTION: Those were upward adjustments, the primary retroactivity cases?

MR. SACHS: Yes, Michigan Supreme Court.

QUESTION: Upward for how long?

MR. SACHS: Oh, I'm sorry. I misunderstood your question, Your Honor.

QUESTION: Excuse me, retroactive for how long?

MR. SACHS: There were -- can I be more specific, please? First of all, there was an increase in compensation periods for health and welfare benefits. That was the Lahti case. There was originally a 24-month limit. The court extended that to later times.

The Selk case involved retroactivity regarding previously unpaid interest on workers' compensation award. The Rookledge case, which we discuss in the footnote, dealt with the issue of whether an injured worked had to make a binding election as to whether to accept workers' compensation or, alternatively, to sue a third party tort-feasor.

QUESTION: Well, did any or all of those statutes you mentioned have the effect of reopening past pay periods?

MR. SACHS: There isn't -- no, not as such, Your Honor, because there is no such thing under the Michigan

statute as a closed period. The statute through all of the decades involved here --

QUESTION: Did it require a retroactive calculation and payment for past months?

MR. SACHS: No, because, Your Honor, there never had been an occasion before --

QUESTION: Then why do you say there was primary retroactivity in the sense that the petitioner's counsel describe it?

MR. SACHS: As I was just starting to explain, in the Rookledge case, for example, where an election had previously been required as between accepting a workers' comp benefit or suing a third-party tort-feasor, the legislature declared that that election was no longer required by an amendment to the workers' compensation act. And the Michigan Supreme Court construed that to be retroactive to causes of action which arose prior to the amendment, thereby reactivating a claim which had previously been waived.

So that in --

QUESTION: That didn't require any increased payments on the part of the employer --

MR. SACHS: No, Your Honor, that's correct, it did not.

This was the first time --

QUESTION: That would be simply like waiving a statute of limitations, which we have held is permissible.

MR. SACHS: No, Your Honor, it was -- I've -- yes, I know you have so held, but what it is, what the court had said in the earlier cases was that the election was a fatal one, not statute of limitation, but a permanent and irrevocable election, and the court in effect reinstated a claim that did not previously exist.

More pertinently to the present circumstances, the reason why the action was taken here and had in the legislative judgment, which I suggest is the dispositive fact, had to be taken here was that this was the first time in 75 years where the legislature, at least as construed in the opinion in the legislature, misconstrued by the Michigan Supreme Court, had reduced benefits. And the only way that could be dealt with if it was going to be rectified was responding to the particular action which had occurred.

What I was starting to say earlier, Justice Kennedy, was that section 831 of the act, which existed through all of this period, said that, quotes, "Neither the payment of compensation or the accepting of the same by the employee or his dependents shall be considered as a determination of the rights of the parties under this act."

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So that there could be no claim of reliance, the act expressly foreclosed that possibility because payment itself or the receipt of benefits was nondeterminative.

If I may, I want to zero in on the extraordinary proposition that's urged by General Motors and Ford, under contract clause theory they say, that what the Michigan legislature has said not only is workers' compensation a contract when the Michigan law is quite to the contrary, but also it's a contract which accepts anything that occurs down the road.

That, I would suggest, reduces the contract clause claim to utter incoherence. The theory of -- the original brief's theory was that there was a contract clause claim because it's supposed to incorporate all of this other external law.

But that is the existing external law. One doesn't incorporate law that comes down later and make a contract claim theory. Then in turn, when these injured workers ceased to be employees there is no employment contract into which to incorporate their claim. And if, then, the claim is that the contractual theory is that we accept anything that comes down later, that reduces us all to nonsense because ultimately what they are saying is, as phrased in your question, Justice Scalia, the last enactment is what the employer has promised long ago to

abide by.

Well, that hardly is the notion or concept or purpose of the contract clause, which is supposed to, in petitioners' view and at least in the history, to give some confidence in terms of reliance and expectation. There is no expectation; these petitioners can hardly claim to be able to plan their affairs if they are going to be vulnerable to whatever the Michigan legislature does much later.

QUESTION: Mr. Sachs, the petitioner in his argument said he thought his strongest case was the Forbes case, and in the petitioners' brief that case is mentioned three times. You do not mention it at all in your brief. Do you have any response to it?

MR. SACHS: I don't think Forbes is applicable here, Your Honor. Forbes was simply a case of retroactivity without any equitable justification -- increasing tolls several years earlier. That's not the case that we have here. What we have here is a specific response to a judicial decision deemed to be misconstrued, and whether or not accurately misconstrued -- and we suggest that it was -- correcting harsh and unexpected developments which occurred.

Now, that's a classic case in which retroactivity has occurred. The classic instance, indeed,

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are the Portal-to-Portal cases, decided by hundreds of courts. Hundreds -- literally hundreds of Federal courts, hundreds of Federal judges, unanimously saying that in that instance it was perceived that the decision of this Court in Mt. Clemens Pottery upset settled expectations as the interpretation of the Fair Labor Standards Act.

And there, General Motors and Ford led the litigants in reaching back, to use their phrase, 9 years to correct what was perceived to be a misconstruction of the Court with unexpected consequences.

QUESTION: That was an act of Congress, wasn't it?

MR. SACHS: That was an act of Congress, but in terms of due process analysis, which concededly was involved there, there was found to be no problem --

QUESTION: And it never came to this Court?

MR. SACHS: Well, this Court denied certiorari hundreds of times and as one court said, well, customarily, denial of certiorari imports nothing as to the meaning on the merits. The assertion, at least of that appellate court was that when it's denied hundreds of times, perhaps it has some greater significance.

Learned Hand, among many other distinguished jurists, found no difficulty in the conclusions reached. And again, General Motors and Ford were arguing exactly

the opposite.

Moreover, Your Honor, in terms of due process analysis, and I do want to be responsive to Justice Scalia's earlier question, it seems to me that the holdings and the reasoning of Turner Elkhorn and of PBGC and Sperry, as well as the Portal-to-Portal cases, conceded -- the latter, concededly, not by this Court, are really dispositive here.

There has to be a way, and it has been recognized repeatedly in the decisions, to deal with errors which occur along the way or with conditions which were not anticipated and require attention. The black lung cases are a classic example. That --

QUESTION: Mr. Geller says they are not retroactive in the same sense as these.

MR. SACHS: I would concede that, Your Honor. They were not retroactive in the sense of being curative, but that makes the point. There, this Court upheld legislation where there was plainly a change in policy by the Congress.

The Congress concluded that because of the long period of latency of the black lung disease, the prevalence, the seriousness of the problems which were not apparent, it made appropriate sense in terms of the adjustments of the benefits and burdens of economic life

to use the court's phrase, to impose liability, not as a matter of contract, but as a matter of the judgment of the Congress in that instance to impose liability on employers with respect to what these employers called completed transactions, namely employees who have long since terminated their employment but for whom an obligation is imposed.

PBGC said essentially the same thing. There was retroactivity there, not only in the so-called window period of a few months before the enactment of the multi-employer pension plan amendments act, but also in effect, imposing liability going back decades as to employers who had never assumed pension liabilities at all in the sense of having to fund what were theretofore unfunded liabilities.

So that in Turner Elkhorn and in PBGC, we have not curative, but straight retroactive legislation as to which there is no problem. This Court has found no problem.

QUESTION: So your answer to the minimum wage one is that's okay. You can --

MR. SACHS: The answer to the minimum wage is that it is not necessarily okay. The retroactivity might or might not be acceptable, dependent upon the purpose that it may be perceived by the legislature in reaching

that conclusion.

Just as the legislature may make judgments, Your Honor --

QUESTION: They decided they didn't give them enough money, that's all. They decided we should have given them more money.

MR. SACHS: I think that may be questionable under those circumstances if there is not more involved. There is obviously minimum scrutiny. There has to be deference. Under the Court's holdings, there is a presumption of constitutionality, and all of that is at play.

But then one has to inquire as to the circumstances under which that may be done. There may be, there conceivably can be circumstances where there can be that retroactivity. There may be circumstances where its inappropriate. This Court found in Spannaus an inappropriate circumstance --

QUESTION: Are you equating the contract clause with due process --

MR. SACHS: No, Your Honor. I --

QUESTION: When you said there was minimum scrutiny, are you talking about the due process clause?

MR. SACHS: Yes, Your Honor.

QUESTION: Not the contract clause.

MR. SACHS: That's correct.

QUESTION: But Spannaus was a contract clause case.

MR. SACHS: You're absolutely correct, Your Honor. Of course, when this Court has applied the elements of energy reserves and come to the question of legitimacy of public purpose and the appropriateness of the means applied, there has been a deferential standard, and therefore some minimization of scrutiny in those circumstances, particularly in an extraordinarily, highly regulated area such as workers' compensation.

There is a particular need in the area of workers' compensation to be able to deal with retroactivity, just as the States have to be able to deal with it, just as Congress did it in the black lungs case. As medical science developed, as increasing problems are realized in terms of the latency of diseases and prolonged development, there has to be an ability to relate back and to deal with those.

There equally has to be an ability to deal with the problems which arise in terms of the imperfect expression in the legislation or where harsh and unforeseen consequences occur, as occurred here.

The briefs of the United States amicus in this case, the brief of the Council of State Governments'

amicus in this case develop I think extremely well and at length --

QUESTION: The way -- I mean, I don't know what you mean by there has to be some way to solve the problem. Michigan could have solved the problem. They could have taken Michigan funds and paid these people more money. They could have said, gee, we made a terrible mistake, it's our fault, here, here is some more money. The only question is whether this employer should be hit with it, that's all.

MR. SACHS: Your Honor, that is correct. That was an option, but it was not a required option, which is the key.

QUESTION: Tell me it's necessary in some absolute sense to correct and dispose --

MR. SACHS: No, I am not suggesting in an absolute sense, Your Honor, but I am suggesting that in the legislative judgment as to what was moral and to correct terrible injustice here and terrible hardship and a thoroughly unexpected development, the legislature deemed it appropriate to do all that it did do, which was to restore the status quo ante.

It recreated the original expectations, if there were expectations, of everybody affected. It imposed no greater liability on Ford and GM than they had any

legitimate right to expect in the first place. The relief granted was surgically tailored --

QUESTION: Mr. Sachs, isn't the Chambers opinion of the Supreme Court of Michigan a pretty fair characterization of what they had a legitimate right to expect?

MR. SACHS: Your Honor --

QUESTION: That's the opinion of the highest court in the State saying what the legislature meant.

MR. SACHS: It was -- the Michigan Supreme Court applying a rule of construction and no more, has, by its own acknowledgement, concluded that because the legislature had not adequately indicated an intention not to apply to previous injuries, that the act would not be construed to exclude the application to those injuries.

QUESTION: Well, that's just a long way around of saying, they construed the law and -- as to what the law meant and they are the final authority.

MR. SACHS: Not the final authority, with all respect, Mr. Chief Justice, because then there is another case before the Michigan Supreme Court, namely this case. And in the interim the Michigan legislature has spoken, and the Michigan legislature --

QUESTION: You're talking then about another law, not the law that the Michigan Supreme Court construed

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in Chambers.

MR. SACHS: I am talking now about the current law, Your Honor.

QUESTION: Yes.

MR. SACHS: And my point is, that when the Michigan Supreme Court, having seen what the legislature did in 1987 and concluding that as a matter of State law, whether the Michigan Supreme Court like -- deemed that consistent with its own ruling or not, concluded that as a matter of Michigan law, the legislature had the right to repair the damage that was done the first time.

QUESTION: But that's quite a different point than saying Ford and GM had no expectations whatever based on the 1982 statute, because the Supreme Court of Michigan wouldn't have construed that statuted; it conformed them.

MR. SACHS: Clearly, Your Honor, they had no expectations based on the Chambers decision, which didn't come down until 1985, the last day in 1985. For all the years preceding that, every expression, legislative, administrative, and lower court, was contrary to their position. So there could have been no claim of reliance. They knew as well that all of their competitors, that the rest of industry and others, interpret it differently.

So they -- whatever view they were asserting was a controversial view and not based on any expression by

the highest court. The decision to which Your Honor relates again, only came at the end of 1985, some 16 months before the new legislation was adopted and only a few weeks before the house spoke.

So there was never a period when General Motors and Ford had any legitimate reason to believe that this matter was final until the legislature indeed finally spoke.

Prior to December 1985, this was a matter that was highly contested, with every authority dealing with the matter rejecting their view. Afterward, the legislature in one house had spoken, the matter was in ferment, and finally the legislators -- the legislature spoke, with the Michigan Supreme Court concluding that they had the authority to do so.

This is, in the final analysis, a matter of State determination, the exercise of its judgment. Counsel began by talking about whether the legislature originally had authority to reach this accommodation? Of course it did. It could have concluded that there should be offset, it could have concluded, as it had for decades before, there should not be offset.

It made that judgment. It made that judgment in the exercise of its police powers. Counsel points to workers' comp, but under the theory of contract which they

urge, they would have to, in quotes, "incorporate OSHA laws, EEO laws, labor laws, minimum wage laws, ordinary labor laws." There is no law which effects the workplace which under their theory would not be incorporated. And where does that lead?

That, under a contract theory, under their theory, there is absolutely no distinction between contract and due process. That's not the law of this Court. It's not the law of Michigan. It has not been the law anywhere, and there is no justification for that position.

For those reasons, unless the Court has questions, I would conclude.

Thank you, Mr. Chief Justice.

QUESTION: Thank you, Mr. Sachs.

Mr. Geller, you have 1 minute remaining.

REBUTTAL ARGUMENT OF KENNETH S. GELLER

ON BEHALF OF THE PETITIONERS

MR. GELLER: Just a few things, Mr. Chief Justice.

To begin with, Mr. Sachs claims that he is unaware of the fact that the legislature in 1982 defeated a bill that would have made the 1981 statute applicable only to people injured after 1982, but I would refer the Court to page 43-A to the appendix to the petition,

footnote 24, where that -- the defeat of that bill is mentioned.

Secondly, Mr. Sachs spent almost none of his time on the due process clause today. The Chief Justice asked him about the Forbes case. What he said about the Forbes case is that this Court held that statute unconstitutional because it was not rational, but it was plainly rational to require people to pay for passage through a canal. Why should they get -- why should they go through a canal for free?

The statute was struck down, not because it wasn't rational to charge people for going through a canal, but because the statute completely destroyed reliance interests of people who had gone through the canal thinking that it was toll free. That's why it was struck down.

And the basic notion of due process is fundamental fairness and one of the basic notions of fundamental fairness is notice, and that's what we are arguing for here today.

Now we claim that General Motors --

QUESTION: Thank you, Mr. Geller.

MR. GELLER: Thank you, Mr. --

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:06 p.m., the case in the

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above-entitled matter was submitted.)

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EVERT ROMEIN, ET AL.

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

BY Michelle Saunders

(REPORTER)