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PROCEEDINGS BEFORE

THE SUPREME COURT

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WASHINGTON, D.C. 20543

UNITED STATES

CAPTION: THE DISTRICT OF COLUMBIA AND SHARON PRATT KELLY, MAYOR, Petitioner v. THE GREATER WASHINGTON BOARD OF TRADE

CASE NO: 91-1326

PLACE: Washington, D.C.

DATE: November 3, 1992

PAGES: 1-53

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 THE DISTRICT OF COLUMBIA AND :

4 SHARON PRATT KELLY, MAYOR, :

5 Petitioner :

6 v. : No. 91-1326

7 THE GREATER WASHINGTON BOARD :

8 OF TRADE :

9 - - - - - - - - - - - - - - - - -X

10 Washington, D.C.

11 Tuesday, November 3, 1992

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10:01 a.m.

15 APPEARANCES:

16 DONNA M. MURASKY, ESQ., Assistant Corporation Counsel,

17 Washington, D.C.; on behalf of the Petitioners.

18 LAWRENCE P. POSTOL, ESQ., Washington, D.C.; on behalf of

19 the Respondent.

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

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 first this morning in Number 91-1326, the District of

5 Columbia v. The Greater Washington Board of Trade.

6 Ms. Murasky.

7 ORAL ARGUMENT OF DONNA M. MURASKY

8 ON BEHALF OF THE PETITIONERS

9 MS. MURASKY: Mr. Chief Justice and may it

10 please the Court:

11 When State Workers Compensation laws were

12 enacted beginning some 80 years ago, an active employee's

13 compensation consisted principally if not exclusively of

14 wages for hours worked.

15 Times have changed. In recent years, an

16 increasingly important component of an employee's

17 compensation is comprised of benefits in lieu of higher

18 wages, including health insurance benefits for employees

19 and their families.

20 In 1974, Congress recognized the importance of

21 nonwage benefits when it enacted the Employee Retirement

22 Income Security Act. In ERISA, Congress imposed a modest

23 level of regulation on virtually all employers who provide

24 nonwage benefits to employees, and it preempted State laws

25 relating to such regulated plans.

1 At the same time, however, Congress expressly
2 declined to regulate employers insofar as they had benefit
3 plans maintained solely to comply with State Workers
4 Compensation unemployment compensation and disability
5 insurance laws, and Congress allowed State regulation of
6 such plans to continue.
7 The issue in this case concerns the intersection
8 of ERISA's preemption and Workers Compensation provisions.
9 The case arises because the District of Columbia amended
10 its Workers Compensation law in 1990 to take into account
11 modern compensation practices by providing some level of
12 protection to employees and their families against a loss
13 of health insurance when employees are killed or injured
14 on the job.
15 The Equity Amendment Act requires all employers
16 who provide health insurance benefits to their active
17 workers to provide equivalent health insurance benefits
18 for up to 52 weeks when their employees are eligible to
19 receive Workers Compensation.
20 The court below ruled that although ERISA
21 permits the States to require health insurance as part of
22 Workers Compensation, ERISA does not permit the States to
23 regulate those benefits in the usual Workers Compensation
24 way by pegging them to benefits employees receive as
25 active workers.

1 The District of Columbia believes that this
2 decision is wrong. It believes that the traditional loss
3 replacement method it has adopted for determining health
4 insurance benefits in its Workers Compensation law no more
5 implicates the concerns of ERISA than with the
6 freestanding law that the court below correctly ruled
7 would clearly be permissible under this Court's decision
8 in Shaw v. Delta Air Lines.
9 In Shaw, this Court unanimously ruled that a
10 State disability insurance benefits law was not preempted
11 by ERISA. In that ruling, the Court explained the
12 relates-to language of the ERISA preemption provision in
13 two ways: first, the Court said that relates-to
14 ordinarily means a reference to or a benefit or a
15 connection with an employee benefit plan. On the other
16 hand, the court said that there may be some State actions
17 that affect ERISA-covered plans in two remote peripheral
18 or tenuous a way to warrant a finding that the law relates
19 to the ERISA-covered plan.
20 For the reasons that follow, we do not believe
21 that the Equity Amendment Act relates to ERISA-covered
22 plans. The act does not refer to ERISA-covered plans.
23 Instead, its reference is employees and benefits. It
24 applies to all employers in the District, including
25 employers who are not subject to ERISA at all. It does

1 not regulate the content or administration of ERISA-
2 covered plans, and it does not require employers to alter
3 in any way their ERISA-covered plans.
4 QUESTION: Is that because you can provide
5 health insurance coverage without having an ERISA plan?
6 You simply buy a policy, group policy for your employees,
7 and that's not ERISA-covered.
8 MS. MURASKY: My understanding is that
9 Governments and churches are exempt from ERISA coverage.
10 All private employers are not exempt from ERISA.
11 QUESTION: So if an employer, say, having 15
12 people simply wants to cover his employees with health
13 insurance and buys a group insurance policy, that's
14 covered by ERISA.
15 MS. MURASKY: Yes. If it is a private employer,
16 he must --
17 QUESTION: Well then, it does seem that the
18 statutory scheme here does impinge on ERISA-covered plans
19 in almost all cases in that the employer's liability must
20 be determined by the contents of the plan, and any time he
21 changes or she changes the plan in any way, the extent of
22 liability under the statute changes. It seems to me that
23 in effect incorporates an ERISA plan into your statute.
24 MS. MURASKY: I don't believe it does, I think
25 for essentially two reasons.

1 First, let us assume that instead of ERISA being
2 passed in 1974 and the Equity Amendment Act being passed
3 in 1990 the reverse was true, and for 16 years the Board
4 of Trade, for example, has been paying health insurance as
5 Workers Compensation because the Board of Trade otherwise
6 voluntarily provides the benefits to his employers. ERISA
7 then is passed, say, in 1990, and suddenly the Board of
8 Trade has responsibilities to the Federal Government,
9 reporting, disclosure, and fiduciary responsibilities
10 insofar as his health insurance benefits for active
11 workers are concerned.
12 But I think this illustrates that although there
13 is some kind of connection, if you will, between our law,
14 because it governs health plans --
15 QUESTION: Yes.
16 MS. MURASKY: And ERISA because it also governs
17 other health plans, in fact it really operates
18 independently of ERISA and is in no way dependant on
19 ERISA.
20 My second answer --
21 QUESTION: Well, it doesn't say that it has to
22 depend on ERISA. The language of the statute is that they
23 are preempted insofar as they may now or hereafter relate
24 to any employee benefit plan. Not to ERISA, but any
25 employee benefit plan described in section 1003(a), and it

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1 doesn't say relate only to employee benefit plans covered
2 by 1003(a), which is the argument you're making, that it
3 covers ERISA-governed plans but it also covers other
4 plans.
5 It doesn't say relate only to such plans, it
6 says relate to such plans, and you must acknowledge that
7 the benefits here are measured by the level of benefits
8 provided in the plans, in ERISA plans, right?
9 MS. MURASKY: They are measured -- the benefits
10 that our law requires are measured by benefits employers
11 otherwise require, and --
12 QUESTION: Including require in ERISA plans.
13 MS. MURASKY: In some cases I will agree the --
14 QUESTION: And the statute says, insofar as they
15 may now or hereafter relate to any employee benefit plan.
16 MS. MURASKY: Well, I think what you're getting
17 to is the meaning of relate to, and I don't think this
18 Court has ever ruled -- it certainly hasn't ruled that any
19 reference to an ERISA-covered plan or any connection to an
20 ERISA-covered plan means that that statute is invalid.
21 What it has done is to preempt laws and only
22 laws that have one or more of the following features:
23 that they regulate the content of a plan, the
24 administration of a plan, a law that interferes with the
25 administration of a plan or calculation of benefits under

1 a plan, a law that provides -- a State law that provides a
2 cause of action for violating ERISA's provisions governing
3 employee benefit plans, a law that imposes reporting
4 disclosure and fiduciary requirement on ERISA-covered
5 plans --
6 QUESTION: Well, sure, we've never had one
7 that's exactly like this, or else we wouldn't have taken
8 this case, but what you're saying is that it doesn't
9 relate to the plan even though it sets up a scheme in
10 which, when you increase benefits under your ERISA plan,
11 the effect will automatically be, because of the D.C. law,
12 that you must increase benefits under Workmen's
13 Compensation. I find it hard to say that that doesn't
14 relate to the plan --
15 MS. MURASKY: Well --
16 QUESTION: In a fairly close and substantial
17 way.
18 Now, maybe it's a bad idea. Maybe the law
19 shouldn't be written that way, but it does say relate to
20 any plan.
21 MS. MURASKY: I think the fact that certain
22 employee benefits provided to active workers in the
23 District are subject to ERISA doesn't change the
24 relationship between our statute and those benefits.
25 The focus of our statute is really on benefits.

1 Whether they're provided pursuant to ERISA-covered plans
2 or whether they're not, if Congress should decide
3 tomorrow, for example, to abolish ERISA insofar as
4 employee welfare benefits are concerned, our law could
5 still be in effect and it would operate independently of
6 ERISA. I mean, that's part -- it does operate
7 independently of ERISA. Its focus is on benefits.
8 QUESTION: That would be true in the State
9 wrongful discharge action that was before the Court in
10 Ingersoll-Rand. You could say the same thing. The cause
11 of action, the termination tort, preceded ERISA, succeeds
12 ERISA, but while it's in force, it relates to ERISA.
13 MS. MURASKY: No, I think that Ingersoll-Rand is
14 a very different case. In Ingersoll-Rand, this Court
15 emphasized that if ERISA had never been passed, if there
16 had not been this pension plan that was protected by
17 ERISA, the cause of action would not have existed, and in
18 fact what the employee was trying to do there was to use a
19 State common law cause of action to enforce a federally
20 created right, i.e., the right not to be terminated by an
21 employer in order -- so that an employer can avoid his
22 responsibilities under ERISA.
23 Our law is different. It is based upon -- I
24 think you need to look at the common law background of our
25 law. Our law replaces a common -- you know, a tort system

1 in which an employee who was injured on the job, if he
2 could prove negligence and there were no affirmative
3 defenses available, could recover as damages --
4 QUESTION: Well, Ms. Murasky, I thought the
5 court said in the Ingersoll-Rand case that a State law
6 that is premised on the existence of an employee benefit
7 plan covered by ERISA is preempted, and I just don't see
8 how you get around Ingersoll-Rand. Are you asking us to
9 overrule that case?
10 MS. MURASKY: I'm not asking you to overrule
11 that case. Our statute is not premised on ERISA-covered
12 plans. What it is premised on is benefits employers
13 provide otherwise to their active employees.
14 QUESTION: Well, it's premised on a -- to the
15 extent that it's measured by --
16 MS. MURASKY: That is true.
17 QUESTION: The ERISA plan benefits.
18 MS. MURASKY: Well, it is measured by whatever
19 benefits employers provide to their employers, whether or
20 not these employers are otherwise subject to ERISA.
21 But to go back to the Workers -- the common law
22 analogy I was giving you, I think this would -- will make
23 very distinct the difference between the common law action
24 that our statute is trying to replace and the common law
25 action at issue in Ingersoll-Rand.

1 Let's look at a State such as Texas, in which
2 Workers Compensation is not mandatory and employers may
3 opt out of the Workers Compensation system but they're
4 otherwise subject to the common law tort remedies.
5 Everybody who has filed a brief in this case
6 agrees that in a case in which the employer is subject to
7 the common law that Workers Compensation basically
8 replaces, that worker may require, if he's injured on the
9 job, not only his wages but all lost benefits, including
10 health insurance benefits. Everybody agrees upon that.
11 Our statute, what it does, I think, is to make
12 liability attach when there is a work-related injury.
13 Remedy is measured separately, but just as in the common
14 law Workers Compensation law liability attaches if there's
15 negligence, here it simply attaches if there's a work-
16 related injury. We're just measuring a remedy here.
17 Now, if I could follow up, there was a recent
18 district court decision, I think, that may help to answer
19 your question and also illustrate some of the problems
20 that the States are facing in this area.
21 This is a case from Texas -- I think it's called
22 Urene against Wyatt Cafeterias -- in which you had an
23 employer who opted out of the Workers Compensation plan --
24 Workers Compensation law. The law did impose some
25 requirements on employers who opted out.

1 An employee of Wyatt had a slip and fall and was
2 injured. She brought a negligence action against Wyatt
3 Cafeterias and the court -- the employer argued that the
4 common law cause of action was preempted by ERISA because
5 the employer had included in its ERISA-covered plan a
6 provision that governed job-related injuries.
7 The trial court in that case first concluded
8 that this little ERISA plan in effect preempted --
9 preempted the Workers Compensation alternative. On
10 reconsideration, what the court did was to say, look, this
11 is -- you know, since the employer has opted out of the
12 Workers Compensation system, this case is no different
13 from an ordinary tort case and the fact that the employer
14 has tried to, I guess, evade its responsibilities under
15 Workers Compensation law by passing this modest provision
16 in its ERISA-covered plan isn't enough to take it -- you
17 know, the State law still applies.
18 What the court did on reconsideration also was
19 to say that the plan benefits could be considered, but
20 only as an offset to the damages remedies, but that
21 employers cannot set up grounds for the purpose of evading
22 lawful State requirements.
23 But to go back to what I was saying, the Court
24 has never held a law like this one preempted, and it seems
25 to me that the Court should not attribute to Congress,

1 when everyone I think concedes except for the United
2 States -- attribute to Congress an intention of permitting
3 employers to require health benefit -- permitting
4 employers to require health benefits as part of Workers
5 Compensation but then saying that the only way you can do
6 it is in a way that is administratively difficult and that
7 doesn't comport with traditional Workers Compensation
8 principles, and that's what the D.C. circuit has held
9 here.
10 Unless there's further questions, I'll --
11 QUESTION: But you would agree that this is a
12 covered plan, not an exempt plan, so that the analysis of
13 the Shaw case as given in the respondent's brief is
14 essentially correct, would you concede that point?
15 MS. MURASKY: Let me say two things. The Board
16 of Trade's plan, health insurance plan for active workers,
17 is an ERISA-covered plan. However, the benefits that we
18 require pursuant to Workers Compensation can be provided
19 through a separate plan solely for that purpose.
20 QUESTION: Well, but that's different than in
21 Shaw, because in Delta v. Shaw there was an exempt plan,
22 and --
23 MS. MURASKY: Here we --
24 QUESTION: And here there is not an exempt plan.
25 MS. MURASKY: Yes, I think we do have an exempt

1 plan -- the Workers Compensation plan that the employer
2 sets up.
3 QUESTION: Well, but not the one that arguably
4 preempts this statute. The health insurance coverage is
5 not exempt.
6 MS. MURASKY: Well, I think health insurance
7 coverage can be required, either pursuant to -- well,
8 health insurance coverage may be part of either ERISA-
9 covered plans or ERISA-exempt plans.
10 QUESTION: But it's the former in this case.
11 MS. MURASKY: No, I think that our -- the
12 Workers Compensation law here --
13 QUESTION: I'm talking about the employer's plan
14 here in question.
15 MS. MURASKY: The employer's plan here -- as far
16 as I know, the employer's plan here simply provided
17 benefits to active workers. That plan was -- is subject
18 to ERISA's --
19 QUESTION: It is not exempt.
20 MS. MURASKY: That is not an exempt plan, as far
21 as I know.
22 QUESTION: Thank you.
23 QUESTION: To put it in a cruder way, if you
24 lose on the question of whether it relates to, you lose
25 the case, do you concede that?

1 MS. MURASKY: No, I don't. As you know, we --

2 QUESTION: Then I guess I didn't understand your

3 last answer.

4 MS. MURASKY: Okay. We have made two

5 alternative arguments.

6 QUESTION: Well, that's what I thought at first,

7 and then I thought perhaps you were modifying your

8 position.

9 Do you agree that the plan about which -- the

10 relationship to which we are arguing is a plan which is

11 covered by 4(a) of the title?

12 MS. MURASKY: The employer's underlying plan as

13 far as I know is covered by ERISA.

14 QUESTION: Okay, it's covered, and --

15 MS. MURASKY: The Board of Trade is not --

16 QUESTION: All right, if it's covered by ERISA,

17 then it seems to me that if you lose on the relationship

18 argument you have nothing left.

19 MS. MURASKY: Well, we have made two arguments.

20 The first is based on the R. R. Donnelley case and its

21 interpretation of Shaw, and on this Court's description of

22 Shaw in Metropolitan Life, and there the Court seemed to

23 say that when we have a Workers Compensation statute at

24 issue, we have a two-step approach. The first step is

25 whether it relates to ERISA-covered plans, and if so,

1 whether it is a -- whether an employer can comply with the
2 State law by maintaining a plan solely for that purpose,
3 and here --
4 QUESTION: So are you saying that the
5 description, and I'm reading from 514(a) I guess, here,
6 that the two conditions stated in the following
7 description relate to different plans?
8 It says that ERISA shall supersede any and all
9 State laws insofar as they may now or hereafter relate to
10 any employee benefit plan described in section 4(a). If
11 you lose the relationship argument, we're talking about a
12 plan described in 4(a) --
13 MS. MURASKY: Mm-hmm.
14 QUESTION: We agree there -- and not exempt
15 under 4(b). Are you saying that the phrase, not exempt
16 under 4(b), relates not to the ERISA-covered plan but to
17 the requirement of your statute?
18 MS. MURASKY: I'm not certain I understand your
19 question.
20 QUESTION: All right. It seems to me that the
21 description here described in section 4(a) and not exempt
22 under 4(b) relates or is speaking to, is referring to, the
23 same plan. Do you agree with that?
24 MS. MURASKY: The same plan.
25 QUESTION: Right. In other words, there's an

1 ERISA plan covered by 4(a). You concede that if you lose
2 the relationship argument we've got an ERISA plan covered
3 by 4(a).
4 MS. MURASKY: Well, what I would say is two
5 things --
6 QUESTION: Well, let me -- is that correct? I
7 don't want to put words in your mouth, but I think that's
8 correct, isn't it? You concede that if we -- if you lose
9 the relating-to argument, the plan to which this relates
10 is covered by 4(a).
11 MS. MURASKY: I don't, in part because it seemed
12 to me -- well, the second circuit has interpreted Shaw as
13 saying, even though it relates to an ERISA-covered plan,
14 if you have a Workers Compensation law the law treats that
15 differently, and if an employer can comply -- comply with
16 a State law by making a separate plan solely for that
17 purpose, that State law is not preempted.
18 QUESTION: But Ms. Murasky, you have to get that
19 from the statute somehow. I understand your second
20 argument, but I thought your second argument -- I thought
21 the way you get there is that you tie it into the relates-
22 to, and you say it doesn't relate to unless you comply
23 with this two-step process rather than a one-step process,
24 then you have some statutory language you can hang the
25 result on, but once you give away the relates-to point,

1 what other statutory text can you possibly rely on for
2 that two-step process?
3 It's just as though we're going to sit here and
4 announce out of nowhere that despite what the statute says
5 we're going to impose a two-step process. We can't do
6 that -- or we shouldn't do that.
7 MS. MURASKY: Well, I think that certainly this
8 Court in Metropolitan Life described the disability
9 benefits law in Shaw as one that related to ERISA-covered
10 plans, and this Court just as clearly in Shaw said that
11 that statute was not preempted.
12 QUESTION: You need a two-step process.
13 MS. MURASKY: In a two-step process.
14 QUESTION: So -- so it does ultimately go back
15 to the relates-to. You're saying it doesn't relate to
16 unless you comply with a two-step process. That's how I
17 understand your argument.
18 MS. MURASKY: Well, the way I understood it was,
19 even if it relates to, and there -- that it doesn't make
20 any difference if you can maintain a plan solely for the
21 purpose of complying with the law, and that would
22 distinguish Shaw.
23 QUESTION: Why? Why? Where do we get authority
24 to say that, just because we don't like the result
25 otherwise?

1 MS. MURASKY: Well, I think the Court said it in
2 Metropolitan Life and Shaw.
3 QUESTION: Was that an exemption case? It was,
4 wasn't it, Metropolitan Life?
5 MS. MURASKY: Shaw certainly was, and
6 Metropolitan Life was an insurance case.
7 QUESTION: Yes, but even if -- I suppose that
8 some plans that relate to are nevertheless exempt.
9 MS. MURASKY: That some -- some statutes.
10 QUESTION: Some statutes, yes.
11 MS. MURASKY: Some statutes that relate to
12 ERISA-covered plans are nevertheless exempt.
13 QUESTION: Yes.
14 MS. MURASKY: That I think would cover the
15 saving clause things --
16 QUESTION: Mm-hmm.
17 MS. MURASKY: And if you interpret Shaw in the
18 way that the Second Circuit did, that's also true, but I
19 think that maybe the critical thing here is to -- you have
20 to look at the words relate to, and it can't mean every
21 reference and every connection to ERISA-covered plans.
22 For example, State income tax laws -- well,
23 ERISA benefit plans play a huge role in our society now.
24 They have economic consequences that Congress must deal
25 with in laws other than ERISA.

1 QUESTION: The -- you say -- one of your
2 arguments is that this employer could comply with District
3 of Columbia law by a separate plan, a plan separate from
4 an ERISA plan.
5 MS. MURASKY: Mm-hmm.
6 QUESTION: But to comply with it, that separate
7 plan would have to nevertheless -- the benefits would
8 nevertheless have to be keyed to the ERISA plan.
9 MS. MURASKY: It would have to be keyed to
10 benefits, but let me --
11 QUESTION: And so that separate plan would --
12 the statute would nevertheless relate to the ERISA plans
13 through the separate plan, because of the benefit levels.
14 MS. MURASKY: I think that that's construing
15 relates-to too broadly, and let me just address the
16 concept of plan for a second.
17 It seems to me that plan in the case of an
18 ERISA-covered plan is a plan that complies with -- it's a
19 document, and it's a plan that sets forth the benefits
20 that are being provided to your active workers, it
21 complies with whatever regulations ERISA imposes on that
22 plan, you send it to the Department of Labor, and
23 that's -- that's that ERISA-covered plan.
24 In the employer's Workers Compensation plan you
25 have a separate document in which you set forth the

1 benefits that are required by a Workers Compensation law,
2 and that plan must be subject to the, you know, reporting
3 and disclosure requirements of the State law, but they're
4 too separate documents, and the fact that the benefits in
5 the ERISA-covered document may be the same as the benefits
6 in the Workers Compensation document doesn't constitute a
7 sufficient relationship to.
8 If I may reserve the rest of my time for
9 rebuttal --
10 QUESTION: Very well, Ms. Murasky. Mr. Postol,
11 we'll hear from you.
12 ORAL ARGUMENT OF LAWRENCE P. POSTOL
13 ON BEHALF OF THE RESPONDENT
14 MR. POSTOL: Thank you, Your Honor.
15 Mr. Chief Justice, and may it please the Court:
16 As respondent sees this case, it is simply an
17 issue of whether a State may discriminate against an
18 employer based on the fact that employer gives health
19 benefits to its employees, and the answer to that is found
20 in the ERISA statute. Congress made a decision that any
21 State law that relates to --
22 QUESTION: That's an interesting suggestion, the
23 word discriminate. If they -- aren't the benefits under
24 the plan triggered to the wage rates they pay?
25 MR. POSTOL: The -- no, not --

1 QUESTION: I don't mean under the plan, under
2 the Workmen's Compensation scheme.
3 MR. POSTOL: Yes. Congress --
4 QUESTION: So that if you pay higher wages to
5 your employees you'll have to pay higher benefits.
6 MR. POSTOL: Yes, which --
7 QUESTION: So that's discriminates against
8 employers who pay high wages.
9 MR. POSTOL: But not based on the ERISA-covered
10 plan. What Congress did is -- and it made a conscious
11 decision. It said States --
12 QUESTION: Well, it's anybody who gives health
13 benefits, not just ERISA-covered plans.
14 MR. POSTOL: Yes, but health benefits are an
15 ERISA-covered plan.
16 QUESTION: But you could give health benefits
17 without having an ERISA-covered plan.
18 MR. POSTOL: No, Your Honor.
19 QUESTION: Couldn't you buy insurance for your
20 employees without having an ERISA-covered plan?
21 MR. POSTOL: But that insurance is a covered
22 ERISA plan. The giving of the benefits, whether through
23 self-insurance or insurance, is a covered ERISA plan under
24 section 4(a), so that -- Your Honor is correct. The
25 State -- what Congress did -- and it's sort of neat.

1 What they said was, States, you can do whatever
2 you want in Workers Comp with one limitation. You cannot
3 interfere with, you cannot relate to a covered ERISA plan.
4 So you can judge it on wages, as a circuit court below
5 held, you can say you have to give X number of health
6 benefits, which --
7 QUESTION: Yes, but what if, say, they figured
8 the premiums for the health benefits were $10 an hour for
9 the employees, or something. Could they say that we will
10 treat -- for purposes of Workmen's Compensation we will
11 require that you treat an equivalent of -- raise your
12 salary level that much for purposes of compensating or
13 figuring the Workmen's Compensation rate?
14 MR. POSTOL: I don't believe so, Your Honor. As
15 this Court has held, the analysis -- and the question is
16 essentially does the law still relate to a covered ERISA
17 plan?
18 This Court has held that if it's a general
19 application statute that has only remote or peripheral
20 effect, then it doesn't relate to it, but if you single
21 out the covered ERISA plan, this Court has always held
22 that if you single out the covered ERISA plan the law
23 relates to it, even if it has a good effect. So that in
24 Mackey this Court struck down a State law that acts
25 exempted to cover the ERISA plan from garnishment, because

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1 it singled it out.

2 So that to any extent that the State wants to

3 make liability, whether through equivalent benefit,

4 whether through increasing the average of a wage, to the

5 extent they single out the covered ERISA benefits, there's

6 preemption, and I think the reason for that is, Congress

7 recognized the natural effect, that if in fact you're

8 going to make employers Workers Compensation liability

9 increase, the natural tendency is employer will therefore

10 decrease their covered health insurance.

11 QUESTION: Well, that's the same idea -- they

12 also wouldn't pay higher wages, because they might have to

13 pay higher Workmen's Comp.

14 MR. POSTOL: Yeah, but the connection is direct,

15 and that is that the employer knows, every time I change

16 my covered health insurance, or self insurance, it's going

17 to cost me money in my Workers Compensation scheme, so

18 sure, if it was --

19 QUESTION: If you raise your wages the same

20 thing's true, too.

21 MR. POSTOL: But the wages are -- will be --

22 well, first of all the wages would be a general

23 application statute not specific to ERISA.

24 QUESTION: I think your answer is that Congress

25 wanted to encourage health insurance plans. It didn't

1 want to encourage high wages in particular.

2 MR. POSTOL: Well, the -- yes. Well, I don't

3 know that they dealt with the wages, but they did deal

4 with the health insurance and they wanted to encourage

5 health insurance. I don't know what their view is on

6 wages.

7 So that any State law that specifically deals

8 with a covered ERISA plan -- I mean, Congress made a

9 decision. If they wanted to say, look, any time there's a

10 conflict Workers Compensation always prevails over the

11 ERISA plan, it would have been very easy, they could have

12 just stuck it in to section 514(b), but instead they made

13 a conscious decision, we're going to let Workers

14 Compensation out of our reporting requirements, out of our

15 fiduciary requirements, which made sense because Workers

16 Comp usually has their own laws that regulate those

17 things.

18 But they would not go so far as to allow them to

19 relate to a covered ERISA plan, because to do that would

20 then discourage the employers to give those covered

21 benefits to begin with.

22 And I think it's -- that result is unavoidable

23 from the statutory language. I think as your questioning

24 makes clear, the problem with Shaw is that 1) the Shaw

25 statute did not relate to a covered ERISA plan. It dealt

1 with a disability law and it did not in any way relate to
2 a covered ERISA plan, so it's simply not applicable, and
3 even if the Court would uphold that as Justice Scalia
4 noted, there's nothing in the statute that allows for any
5 type of exception, if you will, to the relates-to
6 language, and again, if Congress wanted to do that, it
7 could have put Workers Compensation in section 514(b), and
8 it did not.

9 QUESTION: Suppose a State says that all
10 employers who have more than 20 employees must provide
11 health coverage with the following minimum benefits --

12 MR. POSTOL: They could do that, because then
13 there'd be no connection to the covered ERISA plan, and in
14 an employer's mind -- well, first of all, it would meet
15 the statutory language so therefore it would --

16 QUESTION: Well, in each case you'd have to
17 examine the ERISA plan to determine whether or not it met
18 with the requirements of the statute, so there would be a
19 relation --

20 MR. POSTOL: I don't think so, Your Honor --

21 QUESTION: In that sense because under the
22 hypothetical statute you would be immune from liability --
23 suppose there was a punitive sanction for refusal to do
24 this, you'd be immune from liability depending on an
25 interpretation of the ERISA plan. It relates in that

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1 sense, it seems to me.

2 MR. POSTOL: Your Honor, maybe I misunderstood

3 your question. I thought you were referring to the type

4 of statute Justice Wold said would be permissible, which

5 is, you have to give X level of benefits, no mention of

6 the covered -- no mention of your health insurance.

7 QUESTION: You have to give health benefits

8 which meet the following specified minimums.

9 MR. POSTOL: Yes, and the State in its Workers

10 Compensation law specifies what those minimums are.

11 QUESTION: That's not Workers Compensation. The

12 hypothetical is that it applies to all employers must give

13 health coverage --

14 MR. POSTOL: Oh, irrespective of Workers Comp?

15 QUESTION: Yes. General medical coverage for

16 all employers who have more than 20 employees.

17 MR. POSTOL: Then that statute would be

18 preempted, because the giving of those benefits --

19 QUESTION: So a State cannot require that of all

20 employees -- of all employers.

21 MR. POSTOL: Irrespective of work injuries, they

22 cannot. No, you see, they just said you have to give X

23 level of benefits. Giving those benefits is a covered

24 ERISA plan under section 4(a)'s definition, so therefore

25 the law that required it would relate to a covered ERISA

1 plan and therefore would be preempted.

2 Now, if what they wanted to say is in their

3 Workers Compensation law, they said just for work injuries

4 we're going to give X level of benefits, then that would

5 be permissible, because limiting it to work injuries would

6 make it an exempt plan under section 4(b), and if they

7 then didn't tie that level and trigger the liability to a

8 covered ERISA plan, they would be all right.

9 In this case --

10 QUESTION: Do we have to accept that my

11 hypothetical would be preempted in order to rule in your

12 favor in this case?

13 MR. POSTOL: No, Your Honor.

14 QUESTION: What --

15 MR. POSTOL: I really don't think that issue is

16 really addressed in our case. Our case is that we have

17 what as everyone conceded -- the health insurance is a

18 covered ERISA plan, so there's no question as to whether

19 whatever it is out there is a covered ERISA plan. It is.

20 QUESTION: What about a State law that says

21 Workmen's Compensation award shall be reduced by the --

22 there shall be credited against the amount due from the

23 employer for Workmen's Comp the value of any health

24 benefits provided by the worker -- by the employer?

25 MR. POSTOL: Well, I'm afraid to concede that.

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1 I think that would be very problematic for an employer,
2 even though it obviously benefits the employer. This --
3 QUESTION: Well, you have to go further than
4 that. Problematic, or just bad under your theory, isn't
5 it?
6 MR. POSTOL: Well, I guess if I were -- if I had
7 that case and I had to argue it, what I would argue was
8 that while it is -- your hypothetical is it specifically
9 relates to the ERISA plan.
10 QUESTION: Right. It's a Workmen's Comp plan,
11 very reasonably says, well, you know, if a person is
12 getting health benefits that are of great value from the
13 employer, that should be credited against the amount of
14 Workmen's Compensation that the employer has to pay.
15 MR. POSTOL: I think Your Honor is correct, that
16 law would be struck down, because the minute it becomes
17 specific to the ERISA plan, I think preemption by this
18 Court's rulings is mandatory.
19 QUESTION: I think you have to say that if
20 you're --
21 MR. POSTOL: Yes. I agree, Your Honor, as much
22 as it hurts to say so.
23 QUESTION: Tell me again if you've already said
24 it, if this employer adopted a separate plan from his
25 ERISA plan and said this is for the specific purpose of --

1 solely for the purpose of complying with the Workmen's
2 Compensation law of the District of Columbia, now, why
3 would it be preempted?
4 MR. POSTOL: This is Justice Kennedy's
5 hypothetical where --
6 QUESTION: Yes.
7 MR. POSTOL: Well, if they said all employers
8 had to give X level of benefits, those health benefits
9 under ERISA's definition 3(1) and 4(a), those benefits are
10 a covered ERISA plan.
11 In other words, whether the employer does it
12 voluntarily, or the State mandates it, they would come
13 within those definitions.
14 QUESTION: Yeah, but a plan that is maintained
15 solely for the purpose of complying with applicable
16 Workmen's Compensation laws or unemployment compensation
17 or disability insurance laws --
18 MR. POSTOL: Okay, I think it's --
19 QUESTION: Are exempt.
20 MR. POSTOL: Yes. That's it's -- I think your
21 example, unless I'm mixing up, is slightly different than
22 Justice Kennedy's. Your example is --
23 QUESTION: Well, whether it is or not, you get
24 my question.
25 MR. POSTOL: Yes, okay. If, in fact, they

1 limited that health benefits solely to people who are on
2 Workers -- who are injured workers, then I would agree
3 with Your Honor, it would not be preempted.
4 QUESTION: Even though under that plan the
5 benefits would be tied to the level of benefits under the
6 ERISA plan?
7 MR. POSTOL: No. The minute they tie the
8 benefits to the covered ERISA plan -- the minute they --
9 QUESTION: Well, I know, but this -- there's no
10 question that this District of Columbia law is part of the
11 Workmen's Compensation law.
12 MR. POSTOL: Yes.
13 QUESTION: This provision about the level of
14 benefits is part of the law --
15 MR. POSTOL: Yes --
16 QUESTION: And this separate plan is solely for
17 the purpose of complying with that law.
18 MR. POSTOL: Yes, but as this Court held in
19 Alessi section 4(b) saves plans, not laws. Your Honor is
20 correct, the plan -- the benefits that they require is an
21 exempt plan, because they are requiring benefits that are
22 to comply with the Worker's Compensation, but as this
23 Court held in Alessi, the mere fact that the plan is an
24 exempt plan doesn't mean the law that created it is saved
25 from ERISA preemption.

1 Then you have to look at, is that law -- does
2 that law in any way relate to a covered ERISA plan, and by
3 tying the benefits in this case to the health insurance,
4 that law then relates to a covered ERISA plan.
5 QUESTION: Well, if a statute provides that the
6 employer shall provide $10,000, something like that,
7 health insurance for all of his employees, something along
8 the lines of Justice Kennedy's hypothetical, at the time
9 the law is passed there's no plan in existence that would
10 provide for that, is there?
11 MR. POSTOL: No, Your Honor.
12 QUESTION: So the employer has to go out and
13 somehow put together a plan.
14 MR. POSTOL: Yes, Your Honor.
15 QUESTION: And you say that ERISA preempts that.
16 MR. POSTOL: Yes.
17 QUESTION: Preempts the State law. Why?
18 MR. POSTOL: Because the benefits -- whatever
19 benefits the State required, if they dealt with health
20 benefits, then under the definition of 3(1) and 4(a),
21 those benefits that it requires are a covered ERISA plan.
22 In other words, a covered ERISA plan is not defined as
23 merely what the employer voluntarily provides. A covered
24 ERISA plan is simply defined as certain types of benefits
25 that the employer provides, whether it's voluntary or

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1 whether it's mandated.

2 QUESTION: Where did that definition come from?

3 MR. POSTOL: Section 31 of ERISA and 4(a), which

4 Your Honor I believe is nicely set out in the Government's

5 Appendix.

6 So that that definition is not key to whether

7 it's voluntary or not, it simply says, if you give certain

8 benefits, one of which is health benefits, and the

9 employer provides them and it affects interstate commerce,

10 then that is a covered ERISA plan.

11 QUESTION: And then therefore the State cannot

12 mandate something like that.

13 MR. POSTOL: That's correct, Your Honor.

14 QUESTION: Mr. Postol, do you agree that the

15 plan in question here is maintained solely for the purpose

16 of complying with a State Worker's Comp law?

17 MR. POSTOL: Yes, Your Honor.

18 QUESTION: Despite the fact that it provides by

19 keying the health benefits it provides something which it

20 need not necessarily provide in order to comply with the

21 Worker's Comp law.

22 MR. POSTOL: Yes. The plan itself is maintained

23 solely for Worker's Compensation, so that plan that the

24 benefits of law requires is an exempt plan, and for that

25 reason, if they simply said we had to give $10,000 a month

1 for injured workers, then that would be permissible, but
2 the minute that a --
3 QUESTION: In other words, it's purpose rather
4 than particular requirement that -- rather than the
5 mandatory nature or nonmandatory nature of any particular
6 benefit which is dispositive in your view.
7 MR. POSTOL: Well, I think it's -- it's not the
8 purpose, it's that they tie -- they trigger the liability
9 and they tie the amount of the liability to a covered
10 ERISA plan.
11 QUESTION: Well, that goes to relating to,
12 doesn't it?
13 MR. POSTOL: Yes, but that's the point. The law
14 relates to a covered ERISA plan. The plan they require is
15 an exempt plan, but by defining what that exempt plan is,
16 their definition of it in the law is based on what the
17 covered ERISA plan is and therefore it relates to a
18 covered ERISA plan.
19 QUESTION: You're saying that the law relates to
20 two plans, it relates to this plan that is created in
21 order to comply with the law, which is an exempt plan, and
22 the fact that it relates to that makes no difference.
23 MR. POSTOL: Yes, Your Honor, that's exactly --
24 QUESTION: But it also relates to the ERISA-
25 covered plan in that it's -- the level of benefits that it

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1 demands are key to that --

2 MR. POSTOL: Yes.

3 QUESTION: And that relationship subsists

4 despite the creation of the exempt plan.

5 MR. POSTOL: Yes, Your Honor, and if I could

6 address the relates-to aspect of it, because obviously

7 there are some questions on that --

8 QUESTION: What would be the effect of agreeing

9 with you that this law is preempted? What would an

10 employer pay under the -- would the Workmen's Compensation

11 law then have -- tell the employer what he has to pay if

12 an employer -- if an employee is injured on the job?

13 MR. POSTOL: No. I think what would happen

14 is --

15 QUESTION: They'd have to get a new law.

16 MR. POSTOL: Well, not -- not really, Your

17 Honor. First of all, the District of Columbia makes it

18 sound as if this is a tradition. The fact is, 43 States

19 don't do what the District of Columbia does. Six States

20 incorporate the health benefits and average with the wage,

21 and three States -- I just learned that Rhode Island has a

22 similar law as the District of Columbia and Connecticut --

23 have this equivalent benefit.

24 43 States have found no problem with not giving

25 a remedy for lost health benefits. Congress has similarly

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1 in the Longshoreman's Act in Potomac Electric. This Court
2 held that there is no remedy for lost fringe benefits,
3 Congress then amended the Longshoreman's Act. Not only
4 didn't they include health benefits, they explicitly said
5 we agree with Potomac Electric and we want to make sure
6 it's not changed.
7 So that it's not a traditional remedy. I don't
8 think that affects the outcome of this case, whether
9 traditional or not, but I think that's an important point
10 to make, and for two reasons. One is that most States
11 realize that, you know, if you pay people enough money not
12 to work, they won't work, and secondly Worker's
13 Compensation is a compromise system, and that is, employer
14 gives up all its defenses, but in return it only gives a
15 limited remedy.
16 Every Worker's Compensation statute does not
17 allow anything for pain and suffering. If I wanted to
18 make -- if I wanted to give a complete remedy, I would,
19 but more importantly, Congress made a decision, and their
20 decision was that worker's compensations would not take
21 precedence over our protection of a covered ERISA plan.
22 QUESTION: Well, if you win -- if you win, I
23 suppose when an employee is injured on the job he will or
24 will not be covered by the existing plan.
25 MR. POSTOL: Well, as a practical matter, Your

1 Honor --

2 QUESTION: Yes.

3 MR. POSTOL: What will happen is that if an
4 employee wants to continue his health insurance, he will
5 continue it for 18 months under COBRA, but he will have to
6 pay the premium, and that also goes to this question of
7 does this law relate to a covered ERISA plan, and it seems
8 to me our best argument is simply plain English, that to
9 say, you know, if you have a statute that triggers
10 liability and bases the liability on the covered ERISA
11 plan, it has a connection with a reference to, but
12 Congress itself agreed with that, because they enacted
13 COBRA.

14 COBRA is part of ERISA, and COBRA provides for
15 continuation of health benefits, and that was the point in
16 the Government's amici brief in support of us, that there
17 could be little question that this law relates to a
18 covered ERISA plan, because Congress clearly showed that
19 by enacting COBRA. The difference is, Congress wanted the
20 employees to have to pay for the benefits, whereas the
21 District of Columbia would rather have the employers pay
22 for it.

23 QUESTION: What if an employer had a health plan
24 in which he gave the employees an option of either
25 participating in the plan or receiving a wage increase

1 equivalent to the amount necessary to pay the premiums for
2 that kind of health coverage? Could the District treat
3 that portion of the salary as part of the standard for
4 determining compensation under Workmen's Compensation?
5 MR. POSTOL: Well, Your Honor, as we mentioned
6 in our footnote, and I believe it was page 35, footnote 7,
7 it's conceivable you could try to enact a general
8 application statute, so --
9 QUESTION: No, no, I'm not talking about -- I
10 understand the general application statute. I'm talking
11 about, say in the employer's plan, instead of itself
12 paying the premiums for health coverage it gave the
13 employee the option of taking the amount of the premium as
14 additional wages so the employee could buy his own health
15 coverage, if they did that, could the District treat that
16 additional increment of wages as part of the standard for
17 determining compensation?
18 MR. POSTOL: Your Honor, I believe the amount --
19 it depends on how they word their statute. If they
20 specifically said --
21 QUESTION: No, no, this is -- the statute is
22 exactly as it is now.
23 MR. POSTOL: Oh, as it is now?
24 QUESTION: Yeah.
25 MR. POSTOL: And could they then take that --

1 QUESTION: Well, no, I guess you're right, you
2 have to change the statute, sure.
3 MR. POSTOL: If they single out Worker's -- the
4 ERISA-covered benefits, they lose. There's no way they
5 can do it.
6 QUESTION: Well, my -- do they or don't they, in
7 my hypothetical, where the employer gives the employee the
8 option of taking increased wages or letting the employer
9 use the same economic benefit to buy health benefits?
10 MR. POSTOL: If -- it depends -- if the statute
11 said, you get two-thirds of any value you get from
12 employer --
13 QUESTION: The statute would say, regardless of
14 which option the employee takes, that amount will be used
15 in the standard for computing benefits.
16 MR. POSTOL: But -- and specifically refers to
17 an ERIS -- health benefits.
18 QUESTION: Well, it refers to the kind of hybrid
19 that I've just hypothesized.
20 MR. POSTOL: I think then it would be
21 preempted --
22 QUESTION: You think it would be.
23 MR. POSTOL: Because it specifically deals
24 with --
25 QUESTION: Even for those employees who took the

1 wages.

2 MR. POSTOL: Yes, Your Honor, and I think it

3 really goes back to this Court's decision in Mackey that

4 if you -- if a State specifically has a law that

5 specifically deals with an ERISA-covered plan, that's the

6 end of the discussion. It doesn't matter if it's a good

7 law, a bad law -- I mean, Mackey was a good law for ERISA-

8 covered plans.

9 QUESTION: What about a district law that taxes

10 the receipt of health benefits, would that be preempted?

11 MR. POSTOL: Yes, Your Honor. I mean, I think

12 the only exception besides insurance and securities --

13 QUESTION: What about one that gives a company a

14 deduction for paying health benefits, a tax deduction? Is

15 that preempted?

16 MR. POSTOL: I'm afraid yes, Your Honor. I

17 think to the -- Congress made a decision, no State law,

18 good, bad, indifferent, can relate to -- which is defined

19 as having connection with or a reference to -- a covered

20 ERISA plan. I mean, they could have written a statute

21 that says, well, you know, the good laws we'll allow, the

22 bad ones we won't, or if it has an effect or it deals with

23 administration, but they chose not to.

24 Your Honors --

25 QUESTION: Don't any number of States have laws

1 which measure compensation by including in part of that
2 compensation the benefits an employee receives?
3 MR. POSTOL: In Worker's Compensation.
4 QUESTION: No, no.
5 MR. POSTOL: No.
6 QUESTION: Standard health plans. In other
7 words, many States have laws in which they measure the
8 income of the employee by including, I had thought until I
9 heard the answer to your question, including benefits
10 received from employee plans --
11 MR. POSTOL: I don't --
12 QUESTION: And under your view, all of those
13 statutes are preempted.
14 MR. POSTOL: Your Honor, I'm not sure -- well,
15 two things.
16 QUESTION: Maybe I'm wrong in my hypothesis --
17 MR. POSTOL: Yeah, I'm not sure --
18 QUESTION: But I had thought --
19 MR. POSTOL: I'm not sure you're right in your
20 assumption, and secondly, it depends how they tax it. If
21 it's a general, across-the-board tax that says any value
22 you get from employer is taxed, they don't single out
23 ERISA benefits, then I think you end up with a general
24 application statute that has a remote --
25 QUESTION: Well, why? I thought the whole

1 theory of your case is, is that if you have to look at the
2 provisions of the plan in order to calculate your tax
3 liability, it automatically relates to the plan and it's
4 preempted.
5 MR. POSTOL: No. Well, I think if you --
6 QUESTION: That's your whole argument.
7 MR. POSTOL: No. Our point is, if you single
8 out the ERISA plan for -- covered ERISA plan for special
9 treatment, then there's preemption.
10 But for example, in Mackey they had a
11 garnishment law. Obviously, you can't garnish the --
12 QUESTION: Well, but that isn't quite consistent
13 with the answer that you gave to me and to Justice White
14 and to the Chief Justice when we asked whether or not
15 there could be a statute which is a generally free-
16 floating statute which says you must provide the following
17 health insurance benefits. You say no, that's preempted,
18 because you have to look at the plan --
19 MR. POSTOL: Well --
20 QUESTION: And that seems to me inconsistent
21 with the answer you just gave me now about the tax
22 hypothetical.
23 MR. POSTOL: No, Your Honor. Maybe I need --
24 obviously, I need to clarify that.
25 If -- the general -- the statute creating

1 benefits, the benefits themselves are a covered ERISA
2 plan, so the State is saying you must provide a covered
3 ERISA plan, basically, therefore it's preemptive.
4 If it was across-the-board tax law, they're just
5 saying we're taxing everything in sight, we're not giving
6 you any special treatment pro or con to an ERISA statute,
7 I think then you get to the second question, is the effect
8 remote or peripheral, and if the effect is remote or
9 peripheral then the statute stands.
10 But to the extent the State does not single out
11 the ERISA plan for any special treatment, they're okay.
12 Now, the fact is that they may swallow it up, or -- you
13 know, may -- or may once in a while touch upon it. Then
14 you get to the second issue, is it remote or peripheral?
15 QUESTION: Well, in the statute before us, the
16 measure of the employer's liability depends on a
17 calculation based on the plan.
18 MR. POSTOL: Yes.
19 QUESTION: Which is why you say it relates.
20 MR. POSTOL: Yes.
21 QUESTION: I submit that the same happens in the
22 hypothetical tax statute, where for some employees to
23 figure their tax they have to calculate the benefits they
24 receive from the plan. I don't see the difference.
25 MR. POSTOL: Well, I think the difference is,

1 Your Honor, that they only dealt with health insurance
2 benefits. In other words, they didn't say all benefits
3 that the employer gives -- two-thirds. They said, we're
4 going to have special treatment of covered ERISA plans,
5 and so we're going to give this special benefit based only
6 on those employers who give a covered ERISA benefit.
7 It's not that you have to look to the plan,
8 because there clearly are some general application
9 statutes that you have to look to the plan, and yet it's a
10 general application statute. It may have a peripheral
11 remote effect. It's that they singled it out for special
12 treatment.
13 Now --
14 QUESTION: Now -- now --
15 MR. POSTOL: I would submit that even if they
16 hadn't singled it out, we'd probably end up with the same
17 result, because, you know, the health benefits are so
18 great a part of the package the employer gives that if you
19 simply said, give two-thirds of all benefits, you would
20 have more than a remote or a peripheral effect.
21 QUESTION: Well, I --
22 QUESTION: Mr. Postol --
23 MR. POSTOL: Yes, sir.
24 QUESTION: It isn't as clear to me as it is to
25 you apparently that 3(1) includes in its definition of

1 plan the situation where the State simply says you shall
2 provide $10,000 health insurance benefits to each and
3 every employee.
4 I think you could read that definition as
5 dealing with plans that were already -- the State's effort
6 to affect somehow a plan that was already in existence. I
7 don't think it necessarily covers something simply created
8 by the State.
9 MR. POSTOL: Your Honor, I think the definition
10 simply says certain -- these types of benefits and then
11 section 3, 4(a) then says if employer provides these,
12 so --
13 QUESTION: Section what?
14 MR. POSTOL: 4(a).
15 QUESTION: Well, you say it's clear to you. It
16 isn't to me.
17 MR. POSTOL: Well, Your Honor, I will say this.
18 It doesn't matter for our case, because I don't think
19 there's any dispute that health insurance is a covered
20 ERISA plan, so I don't think this Court --
21 QUESTION: Well, but if you're wrong on that
22 point, a State statute which simply brings into existence
23 a benefit isn't the same as a State statute that's dealing
24 with a plan which already confers benefits.
25 MR. POSTOL: Sure, Your Honor, but in our case

1 we already -- the health insurance is not -- the covered
2 health insurance is not something the State mandated, so
3 in other words, to come under Your Honor's hypothetical,
4 the State would not only have to first have the law they
5 now want, but they'd also have to have another law that
6 says we are requiring this health insurance. What they
7 are relating to is a voluntary health benefit plan.
8 QUESTION: I can see your point there, but it
9 seems to me that your answer to the hypothetical about the
10 State law requiring furnishing of insurance ben -- or
11 health benefits to every employee is not nearly as clearly
12 correct as perhaps some of your other positions.
13 MR. POSTOL: All right. Well, Your Honor, I
14 think my only point then would be that it doesn't matter
15 for the disposition of this case, because what they are
16 relating to is a voluntary health insurance which everyone
17 agrees comes under 3(1) and 4(a).
18 QUESTION: Let me just go back, because I'm not
19 quite sure what your position is. Could the District in
20 your view pass a statute requiring all employers to
21 provide health insurance for people on Workmen's
22 Compensation?
23 MR. POSTOL: Health -- in defining the level of
24 benefits --
25 QUESTION: Let me just -- the statute just says,

1 every employer in the District must provide certain
2 minimum health insurance coverage for its employees who
3 are receiving Workmen's Compensation.
4 MR. POSTOL: Yes, they could enact such a
5 statute.
6 QUESTION: They could do that. But why wouldn't
7 that be mandating an ERISA plan, because --
8 MR. POSTOL: Because --
9 QUESTION: Every health insurance covered plan
10 is an ERISA plan.
11 MR. POSTOL: Because that plan is only to comply
12 with a Worker's Compensation law, and therefore it's under
13 that plan.
14 QUESTION: Oh, I see, so that comes within the
15 exception. Okay.
16 MR. POSTOL: Yes, and it's -- I mean, where they
17 went wrong in this case is they wanted to tie the benefits
18 to the covered ERISA plan, and that's the great mistake of
19 this case, because what they will do then is encourage
20 employers not to provide those health insurance benefits
21 to begin with.
22 QUESTION: Although you say that they can do
23 that so long as they only link it to -- didn't mention
24 health insurance benefits specifically. I find that a
25 curious thought. If they had just said, hey, pay to the

1 disabled employee one-third of all benefits of all sorts
2 received from the employer --
3 MR. POSTOL: Oh, that's a different question.
4 Then --
5 QUESTION: I thought you said that that would be
6 okay.
7 MR. POSTOL: No, Your Honor. Again, if I --
8 footnote 7 in our brief, page 35, deals with that, and
9 what I said there was, that's a closer question, because
10 if could -- if they just said one-third of all benefits,
11 now I've got a general application statute, but then the
12 second question is, is the effect only remote and
13 peripheral, and I'm not so sure it is, and I would
14 certainly argue, if I had that case, that it isn't,
15 because unlike a tort remedy, where a tort remedy 1) is
16 very infrequent, it's not very predictable, and 2) it's
17 not the employer who pays a tort remedy, it's a
18 tortfeasor.
19 With Worker's Compensation, I know I'm going to
20 have those work injuries, I know how frequently they're
21 going to occur, and I pay for them as employer, so while
22 it's a closer question, I'd still be prepared to argue
23 then that was preempted, but for a different reason -- not
24 because it singled out the ERISA statute, but because it
25 would be a general applications statute, but then we get

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1 to the second part of the test, and that is, is it remote
2 or peripheral, the effect.
3 QUESTION: Yeah, but where it's different from
4 this case is that in this case you can say that it does
5 affect ERISA plans because an employer would be
6 disinclined to increase the amount of ERISA benefits.
7 MR. POSTOL: Yes, absolutely.
8 QUESTION: Whereas --
9 MR. POSTOL: But I'm not even sure that's part
10 of the test, because the remote and peripheral, if you
11 will, saving clause only deals with general application
12 statutes.
13 This Court has always said once it's specific,
14 once they single out ERISA coverage, it doesn't matter if
15 the effect is good and bad. The good and bad test only
16 comes -- or remote peripheral only comes about -- okay.
17 QUESTION: Thank you, Mr. Postol.
18 MR. POSTOL: Thank you, Your Honor.
19 QUESTION: Ms. Murasky, you have 3 minutes
20 remaining.
21 REBUTTAL ARGUMENT OF DONNA M. MURASKY
22 ON BEHALF OF THE PETITIONERS
23 MS. MURASKY: Thank you, Your Honor.
24 First of all, I'd like to point out that the
25 Equity Amendment Act does not single out ERISA-covered

1 plans for special treatment. It treats ERISA-exempt and
2 ERISA-covered plans in the same fashion, and in this
3 respect it does differ from the statute that this Court
4 considered in Mackey, or the exemption to the garnishment
5 statute.
6 The only place in which our Worker's
7 Compensation law does mention ERISA-covered plans is of
8 course in the provision of our law that permits Worker's
9 Compensation benefits to be integrated with benefits
10 provided under ERISA-covered plans, and that statute is
11 cited at page 9, note 9 of our reply brief.
12 No one has suggested that this aspect of the
13 statute, which does specifically refer to ERISA-covered
14 plans, is preempted by ERISA.
15 2. I think in this case the Board of Trade is
16 using ERISA as a sword to invalidate valid Worker's
17 Compensation laws and not as a shield. If we were to
18 abolish our Worker's Compensation system and allow
19 employers to be sued based on a showing simply of
20 negligence, and we could even eliminate the affirmative
21 defenses that an employer otherwise would have, all
22 employees who could -- who were injured on the job in the
23 District of Columbia and who could establish negligence,
24 or I suppose we could even employee a standard of strict
25 liability, each one of those employees could recover as

1 part of his damages not only wages lost and the cost of
2 treating the injury or illness, but the value of health
3 benefits lost. Our Worker's Compensation merely reflects
4 that. It imposes liability when there's a work-related
5 injury, and the remedy is measured by what an employee
6 otherwise receives.
7 The last point I would like to -- two other
8 points. There's some suggestion here that somehow our law
9 is invalid, our amendment is invalid because it's somewhat
10 innovative. The Court rejected a similar argument not
11 only in Metropolitan Life but in the 1988 case of Goodyear
12 Atomic Corporation against Miller.
13 That case is also interesting because it
14 involves a Worker's Compensation law and an unusual one
15 that was applied to the United States itself pursuant to a
16 congressional enactment. I think that case establishes
17 two things: Congress' great deference to the States in
18 managing their own worker's Compensation plans, and that
19 innovative Worker's Compensation laws are not prohibited.
20 Finally, if I could just mention COBRA for a
21 moment, the United States has argued that COBRA affects
22 this Court's analysis in two ways. One is on the relates-
23 to point. It says that because COBRA affects ERISA-
24 covered plans by this continuation of coverage --
25 QUESTION: Thank you, Ms. Murasky.

1 MS. MURASKY: You're welcome, Your Honor.

2 CHIEF JUSTICE REHNQUIST: The case is submitted.

3 (Whereupon, at 11:01 a.m. the case in the above-

4 entitled matter was submitted.)

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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:

District Of Columbia V Washington Board Of Trade

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BY Ann-Marie Federico

(REPORTER)