OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, Petitioner, v. ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.; and MASSACHUSETTS WATER RESOURCES AUTHORITY, ET AL., Petitioners, v. ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

CASE NO: 91-261 / 91-274

PLACE: Washington, D.C.

DATE: Wednesday, December 9, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

- X

BUILDING AND CONSTRUCTION :
TRADES COUNCIL OF THE :
METROPOLITAN DISTRICT, :
Petitioner :
v. : No. 91-261
ASSOCIATED BUILDERS AND :
CONTRACTORS OF :
MASSACHUSETTS/RHODE ISLAND, :
INC., ET AL.; :
and :
MASSACHUSETTS WATER :
RESOURCES AUTHORITY, ET AL., :
Petitioners :
v. : No. 91-274
ASSOCIATED BUILDERS AND :
CONTRACTORS OF :
MASSACHUSETTS/RHODE ISLAND, :
INC., ET AL. :

- x

Washington, D.C.

Wednesday, December 9, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at

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10:02 a.m.

APPEARANCES:

CHARLES FRIED, ESQ., Cambridge, Massachusetts; on behalf of the Petitioners.

MAUREEN E. MAHONEY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae supporting Petitioners.

MAURICE BASKIN, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 91-261, Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts and Rhode Island, and et cetera.

Mr. Fried.

ORAL ARGUMENT OF CHARLES FRIED

ON BEHALF OF THE PETITIONERS

MR. FRIED: Thank you, Mr. Chief Justice, and may it please the Court:

This is a case of implied preemption. The court of appeals held that a public owner developing its property may not support a agreement between its construction manager and a council of local unions, an agreement of the sort specifically authorized by sections 8(e) and 8(f) of the National Labor Relations Act.

The Massachusetts Water Resources Authority, one of the petitioners here, is under Federal court order to complete a massive and complicated construction project. The Authority, as any public or private owner with a similar task, has engaged the services of a construction industry specialist, here Kaiser Engineering, another of the petitioners, to schedule and plan the tasks to be

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performed, to supervise the contractors performing those tasks, and to establish a labor relations regime for the project.

Accordingly, Kaiser did propose to the Authority that the labor relations regime here should be one which is quite common on such projects, a project labor agreement, which is an agreement with all of the unions that usually supply crafts to such a project in return for exclusive representational rights for all workers on the projects irrespective of their contracting and subcontracting relations. The contractors and eventually the owner of the project get the benefit of stable costs, stable labor costs throughout the life of the project, and security against the kinds of labor disruptions that are caused by lawful labor activity.

Kaiser proposed such an arrangement to the Authority, which approved the proposal, and accordingly Kaiser negotiated and signed the agreement with the unions here.

QUESTION: At that point I suppose the Authority was bound by the contract?

MR. FRIED: The Authority was not a signatory to the contract.

QUESTION: I know. I know, but they, I suppose Kaiser was its agent.

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MR. FRIED: Well, a great point is made of that. Nowhere is that said. On some copies of the cover of the agreement, and that is reprinted in one of the appendices, it said that this was done on behalf of the Authority, and that of course is quite true. The Authority is the ultimate party that stands to benefit from this. However, it is nowhere stated that Kaiser is an agent, nor is Kaiser, I'm sorry, that the Authority is an agent, nor is the Authority a signatory.

In these connections of course these contracts are read in such a way as to assure their validity, and Kaiser is a sophisticated and a frequent player in this particular arena and of course it had every intention to be bound. It is not at all clear whether the Authority would have been bound by virtue of the contract itself, by virtue of that project labor agreement itself. It is quite clear that Kaiser is bound, it is quite clear that Kaiser is a signatory.

QUESTION: Well, why wouldn't it be bound? Why wouldn't the Authority be bound if they approved in advance the negotiation of this contract and Kaiser had been hired as its, for the purpose of managing labor relations, among other things?

MR. FRIED: Well, perhaps it would have been bound, and if it would be bound it might be subject to

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suit under section 301 to enforce that contract, but that would not in any way affect its validity.

Now, in order to make the arrangement an effective one because of Massachusetts' competitive bidding laws the Authority included adherence to the arrangement as a bid specification. The National Labor Relations Board in another proceeding, the district court in this proceeding, as well as the panel of the court of appeals and the court of appeals en banc all agreed that this was a valid labor agreement under sections 8(e) and 8(f). The court of appeals found, however, that the specific action of the Authority in including adherence to the arrangement as a bid specification improperly intervened in labor relations, and therefore that that action was preempted.

QUESTION: Well, does that turn, that decision turn on whether the Authority was acting as a proprietor or as a regulator?

MR. FRIED: In our view it ought to turn on it. In the view of the court of appeals it does not, and we think that that is a serious mistake. The doctrine of implied preemption in general gives a court of, gives a court the authority to intervene in and to invalidate the action of the state only if what the state has done in some way contradicts a policy of Federal legislation. But

the policy of Federal legislation here is to leave the choice of a project labor agreement open as an option, so that what the Authority did here was not in any way to contradict that policy but in fact to utilize it.

Now, under the Machinists doctrine, which is the specific head of labor preemption on which the court of appeals relied, the rule often repeated by this Court is that a state may not seek to regulate that which the labor laws indicate must remain free for the play of labor market forces. But if a state is not to supply all of its needs directly, if it is to enter the market as a purchaser, then it is inevitable that some line, such as the line between the state as a participant in the market and the state as a regulator, be drawn.

QUESTION: Can the state be a regulator just by virtue of its use of its spending power?

MR. FRIED: This Court so held in the Gould case.

QUESTION: Right.

MR. FRIED: And the test is a test which I will draw from what this Court said in the New York Telephone case, what is the scope, purport, and impact of what the state has done. Simply the fact that it uses its spending power is not a sufficient condition to get it out from under labor preemption, of course not.

But in this case the scope, purport, and impact of what the state did was precisely tailored to its needs as a proprietor. It did nothing that a private party faced with the same problems would not have done. It's very striking how narrowly tailored the project labor agreement in this case is to the specific needs of this project.

These agreements often require all contractors coming on the job to be union signatory generally in all their work for the life of the agreement. This agreement does not require that. This agreement only requires that the contractors accept union representation on this job. That is how narrowly tailored the Authority's action is to serve its narrow proprietary interests.

Another way of putting it --

QUESTION: Mr. Fried, suppose a state decides that it wants to assure all its contracts a degree of security so it provides that all state contracting must be done with union contractors. Would that be valid?

MR. FRIED: On an appropriate record with appropriate findings that might be valid, yes, Your Honor. I could not say in a blanket way that under no circumstances would such a, would such a labor policy be invalid. But there is a great difficulty. The difficulty is to show that something that is that comprehensive, that

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reaches beyond the needs of a particular project nevertheless serves proprietary interests. I would not want to say a priori that that showing could never be made. But that showing need not be made here because of the very narrowness of what the state did.

QUESTION: Would you look to the, just the face of the law in question or do we have to investigate the intent of the legislators in each case?

MR. FRIED: The motive inquiry is absolutely unnecessary to such a thing. What's necessary is the purport of the action on its face, and its impact and its scope as it deals with those conditions revealed in the record.

The perfect contrast is with the Gould case. In the Gould case the state was using its spending power, it was talking about how it would make purchases, but it is simply implausible, as this Court said, to connect up what the state did with any proprietary concerns that the state might have had. And that's the sort of inquiry which should be had, and it's an entirely familiar inquiry for this Court. It engages in it in all sorts of contexts without getting tangled up into inquiries into subjective motivation.

Just last term in the context of foreign sovereign immunity the Court distinguished between a

foreign government acting as a regulator for the market on one hand or acting as a, in the Court's words, a player in the market. Now what we're saying is here the Authority was clearly acting as a player in the market.

QUESTION: Mr. Fried, how do you distinguish our holding in the Golden State case?

MR. FRIED: That is a, that is an easier distinction to make because in the Golden State case the state had no proprietary interests in play at all. It was not a proprietor of any of the parties involved or any of the interests or any of the properties involved. So the Golden State case, of which a great deal is made in the court of appeals, seems to us to be really quite irrelevant.

QUESTION: If that distinction is the proper one.

MR. FRIED: Between the state as a market rate?

QUESTION: Yes.

MR. FRIED: Well, we believe it is, and we certainly rely on it, and I would draw the Court's attention to the fact that if there is no such distinction then the Machinists doctrine cuts in a most unpredictable and I would think devastating way into the room for maneuver of a state when it is not supplying its own needs but is acting as a purchaser, supplies its needs by

purchasing them on the market. So I think some such distinction is absolutely necessary.

There is talk in the court of appeals, rather glancing talk, and in the respondents' brief and in some of their amici brief to another head of preemption, Garmon preemption. Now, Garmon preemption deals principally with situations where a state seeks to either supplement or contradict the exclusive jurisdiction of the board. Needless to say, nothing of that sort is present in this case.

It is also, obtains as a form of preemption where the state seeks to limit rights granted under section 7 of the act, and in paragraph 34 of their complaint the respondents, plaintiffs did claim that the rights of workers to be represented or not to be represented by unions of their choice were in some way interfered with by the state's action. But that argument viciously begs the question since those section 7 rights are explicitly qualified by the rights of section 8(e) and 8(f). If 8(e) and 8(f) apply, the workers simply do not have the full range of section 7 rights.

So I think Garmon preemption is really not in play here, and it's understandable that the court of appeals did not rely on it.

QUESTION: Well, let's just assume that arguably

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the argument had some content. Didn't the labor board have a chance to say so?

MR. FRIED: Yes, there was a proceeding brought before the labor board, and that's something that must not be forgotten, that the labor board has held that this is a valid agreement of the act.

QUESTION: With respect to this very agreement.

MR. FRIED: This very agreement. And the district court and the court of appeals quite clearly said yes, we do not quarrel with that assumption.

QUESTION: So their justification for the Garmon preemption has already been satisfied?

MR. FRIED: I would have thought it is taken right off the boards, Justice White. Now, there is a further suggestion that is made and it's a suggestion that seeks to meet my argument about the hamstringing of the state, and that is that what could be done is the state might simply have hired Kaiser as a general contractor. But that would require that this state and many other states for no reason should repeal their competitive bidding laws so that they did not have to let these contracts directly.

If I may I would like to reserve --

QUESTION: Mr. Fried, wouldn't they be able to preserve their competitive bidding laws simply by bidding

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for the construction managers contract, putting that out to bid?

MR. FRIED: But at that point the formalism that would be evoked would be a formalism without any of the advantages of formality because the question would reappear then in the form may the state either require that the general contractor enter this kind of an agreement, suggest it, when the contractor suggests it approve it, and you would get all those questions all over again. So it would be a very intrusive intrusion into the way states do their business on one hand, and it wouldn't get you anything on the other. You'd be left with the same problems all over again, just at a slightly different stage and a slightly different form.

QUESTION: Very well, Mr. Fried.

Ms. Mahoney, we'll hear from you.

ORAL ARGUMENT OF MAUREEN E. MAHONEY

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE SUPPORTING PETITIONERS

MS. MAHONEY: Mr. Chief Justice, and may it please the Court:

Before addressing the, some of the specific issues that were raised I'd like to emphasize that the United States and the National Labor Relations Board are here because we firmly believe that the action of the

State of Massachusetts did not in any way conflict with the National Labor Relations policy, and in fact the injunction that has been entered by the First Circuit really seriously interferes with very important policies under that act. And those are really two.

QUESTION: Are you going to by any chance, isn't there a presidential order that has some bearing on this case?

MS. MAHONEY: Your Honor, it doesn't have any direct bearing. You're referring to the executive order that the President signed.

QUESTION: Are you going to speak about it at all?

MS. MAHONEY: I certainly can. I'll address it right now if you'd prefer. The reason that the order does not have any direct bearing on the case is that what the President decided was that for the purchases of Federal construction projects, the purchase of construction services with Federal money, that project labor agreements would not be entered into in order to further what the President viewed as efficient contracting. It did not --

QUESTION: You don't think that has any bearing on this case?

MS. MAHONEY: Well, the reason, Your Honor, that I don't think it does is that the point here is that

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Congress left it to the states to decide when they use their money, when they are the purchaser, how they want to order their labor relations on these projects.

QUESTION: This project doesn't have any Federal funds?

MS. MAHONEY: It has Federal funds that would not be affected by the President's order --

QUESTION: Because?

MS. MAHONEY: -- because there's no retroactivity involved. It was specifically written in a way --

QUESTION: You mean all the subcontracts have already been made in this case? I can't imagine it.

MS. MAHONEY: Your Honor, the way that it works is that the grants that have already been issued can be applied to contracts that have already been entered into --

QUESTION: And all the Federal money, all the Federal money that was going to, that this project was going to take has already been appropriated?

MS. MAHONEY: Well, there is another round of appropriations --

QUESTION: Or at least the Government has agreed to it?

MS. MAHONEY: Your Honor, there is no --

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QUESTION: Has committed itself to --

MS. MAHONEY: There is, there's only one, the appropriations are done 1 year at a time, there is no commitment to do future funding for this project. There are still some '93, FY '93 --

QUESTION: So why wouldn't the --

MS. MAHONEY: Because the funds can be applied to existing contracts and the State of Massachusetts has a number of existing contracts and they are not affected by this order. So both the Massachusetts Water Authority and the EPA are of the view that this --

QUESTION: All right.

MS. MAHONEY: -- in fact would not impact this case. And as a matter of law it really isn't relevant to the NLRA issue because the President was acting pursuant to his procurement authority and isn't constrained in the exercise of that.

QUESTION: In any event the order certainly doesn't eliminate the issue we have before us.

MS. MAHONEY: Oh, not in any sense, and it doesn't really have any direct bearing on it whatsoever other than to just show that purchasers of construction services have the option to decide how they want to order labor relations on construction projects.

I'd like to speak first to the issue of whether

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this is something that Congress would have intended the state to enter into. In this preemption we have the benefit of being able to look at the interests that are at stake here and see that Congress has in 8(e) and 8(f) balanced these very same interests and concluded that the interests of the purchaser in achieving labor peace on a construction project throughout the duration of that project are to be given priority over the interests of suppliers who prefer to do business with a non-union work force.

We don't in any way suggest that those, that the interests of employees and suppliers to work on a non-union basis are not important, they are, but Congress weighed those interests, those interests of doing business in that form against the interests of achieving labor stability, and it included that suppliers, that the supplier's interests had to be subordinated to the preferences of the purchaser.

So here in this case we have precisely the analogous situation. We have the state as the purchaser of construction services having concluded in response to economic forces that it needed a project labor agreement. And there is a factual finding in this case, unlike the line drawing that might occur in some future cases, in this case the district court specifically found that the

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purpose of this agreement was to obtain labor stability due to the fact that the unions have legitimate market power in the Massachusetts area, and that in order to get labor peace it needed to use this arrangement. There was --

QUESTION: Could the state adopt the opposite policy and forbid the use of these union hire, pre-hire agreements by any of its contractors for these projects?

MS. MAHONEY: Yes, Your Honor, I believe that it could, as long as it is acting reasonably in furtherance of its commercial interest, and that really ought to be the inquiry.

QUESTION: But does that import some sort of reasonable judgment as to economic conditions without reference to its judgment as to labor policy, sound labor policy?

MS. MAHONEY: I think that we wouldn't inquire to see whether there was some view about labor policy, certainly many political actors have views about labor policy, but if the decision is one that can reasonably be described as something that would appear to be in furtherance of their commercial interest, and the policy you describe certainly could be. Then it would be fair to conclude that that's the type of conduct, the same kind of commercial activity that Congress intended to permit.

And there really is no good reason to distinguish between the state and the private purchaser in this situation, because as this Court recognized in Abood the interests in labor stability are no less in the public sector than they are in the private sector, precisely the very interests that this Court found in Woelke and Romero and McNeff.

QUESTION: But those interests all transcend labor stability in a particular job.

MS. MAHONEY: I'm sorry, Your Honor?

QUESTION: Well, those interests always transcend the state's interest in labor stability for a particular project.

MS. MAHONEY: You mean its interest in have a, peace on that project?

QUESTION: Yes.

MS. MAHONEY: Yes. And that's the interest that Congress said could in fact be brought to bear, that they could insist that the suppliers adhere to a union agreement, or union recognition for that project.

I'd also like to emphasize what the effect is on the non-union contractors.

QUESTION: But the effect goes beyond the project. The effect goes to labor stability in the community at large, does it not?

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MS. MAHONEY: On this particular, in this arrangement?

QUESTION: In this case, yes.

MS. MAHONEY: No, Your Honor, I think that the effect is really that, is to have labor stability on this project.

QUESTION: The state has no interest one way or the other in labor stability or instability in the community --

MS. MAHONEY: I'm sure they would prefer --

QUESTION: -- in its entire economic community?

MS. MAHONEY: I don't think that that's what this policy was attempting to further, and certainly the district court didn't make a finding that suggested that it was and no one has indicated, to my knowledge, that that was in fact a motivation. This is a case --

QUESTION: Ms. Mahoney, how important is it to the Government's position that this, you make a lot of it in your brief, that the state is really just implementing an agreement between Kaiser? What if the state itself had decided to do its own general contracting?

MS. MAHONEY: Your Honor, that would be fine. Under the board's precedents the --

QUESTION: That wouldn't make any difference in your position in this case?

MS. MAHONEY: I think that this case is even easier because it is implementing the agreement of private parties. So to the extent that there is any concern that the state shouldn't be an actor --

QUESTION: But that's not essential to your position?

MS. MAHONEY: No, Your Honor.

QUESTION: You would take the same position if the state itself had been --

MS. MAHONEY: Yes, we would. As long as the state is acting in furtherance of reasonable commercial interest there simply is not a good reason to infer that Congress intended to prohibit this. And related to this, I think that the court of appeals seriously misunderstood the purpose of the Machinists doctrine.

QUESTION: Could I ask you, would it make any difference whether we uphold or strike down 13.1, because that wouldn't necessarily invalidate the contract between Kaiser and the union?

MS. MAHONEY: Well, but the, the only way that it could be binding on the suppliers who are coming in is if it's a term of the agreement between the state or between the --

QUESTION: Well, I know, but the contract says all contractors are going to be bound by the labor

contract.

MS. MAHONEY: Well, Kaiser would have a very difficult time enforcing that.

QUESTION: Why would they?

MS. MAHONEY: Because Kaiser is not going to be the contracting party with the suppliers. Under Massachusetts procurement law the state has to actually enter into the arrangements with the suppliers, so Kaiser really wouldn't have the ability to make those suppliers adhere to that requirement. It's really because of the requirements of the Massachusetts procurement law that it has to be done this way, and the effect of the First Circuit decision is that in Massachusetts you could not have enforceable project labor agreements, or with any teeth.

QUESTION: Well, I would think the union could enforce it against, they could picket everything in sight.

MS. MAHONEY: Oh, they certainly could, they could picket, but the fact is that the way that the court has --

Thank you very much.

QUESTION: Thank you, Ms. Mahoney.

Mr. Baskin, we'll hear from you.

ORAL ARGUMENT OF MAURICE BASKIN

ON BEHALF OF THE RESPONDENTS

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

The arguments you have just heard violate the most fundamental principles of labor law preemption. This Court has consistently held over the years that the cornerstone of the act is the collective bargaining process between private employers and private unions, and that it is off limits for Government to interfere in that process by dictating the outcome of the negotiations. And that's exactly what has happened here.

The MWRA has not only told us, our members, who we have to bargain with, but they have eliminated the bargaining. They have told us the outcome of the agreement and they have eliminated any ability on the part of these contractors to use whatever economic weapons might be available to them. That's the heart of the Machinists doctrine. There can be no more blatant direct interference than what has happened here. And all we have heard --

QUESTION: That's always allowed under 8(e) and 8(f), isn't it?

MR. BASKIN: Only for private employers, a crucial difference. A crucial difference in this case.

QUESTION: That's the issue.

MR. BASKIN: That is the issue, Your Honor.

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What we have heard and what we have seen in the briefs is the other side is saying that well, a private employer could do it, so why can't the Government. The reason is that the Government is different. The reason is that 8(e) does not include Governments within the exceptions that are created for private employers. The plain language of the National Labor Relations Act in 8(d) says, express language, that the Government shall not compel collective bargaining agreements between private employers and private unions.

So where is the exception from 8(d) that's created by 8(e)? It's certainly not in the language of 8(e) because 8(e) does not even refer to state public political subdivisions. So 8(e) is not an exception on its face to 8(d).

They have said well, look at the legislative history of 8(e), it shows that there used to be some of these --

QUESTION: Where will we find 8(d) in your brief?

MR. BASKIN: 8(d) is cited, H.K. Porter is mentioned, the case in which this Court --

QUESTION: I asked you where will I find 8(d) in your brief.

MR. BASKIN: You will find it right next to the

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citation to H.K. Porter. It is also cited on 18, pages 18 and 22 is the reference to H.K. Porter which of course is the seminal case decided by this Court.

QUESTION: Where will I find 8(d), the text?

MR. BASKIN: I'm sorry if the text of 8(d) is omitted. I apologize for that omission, Your Honor.

QUESTION: It is omitted?

MR. BASKIN: And if it's not referred to -- actually it's cited. Page 22 is the cite to 8(d) itself, which is stated in footnote 12, 22. It has been interpreted as an express prohibition. The actual language of 8(d) --

QUESTION: I would think if you're going to rely on 8(d) you would have set it forth in your brief.

MR. BASKIN: Yes, Your Honor, and I would apologize for that omission except that the statute has been interpreted by this Court a number of times and by reference to H.K. Porter it was felt that it was set forth for the Court. It was only raised as the alternative to what we have heard from the other parties that 8(e) is somehow a great exception that is created to permit this type of activity.

I just want to go back to that point, that 8(e) is created only as a, something to deal with relations between private employers on a voluntary basis and unions.

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It says nothing about public employers. If one looks at the legislative history of 8(e) one will find no reference to a union only project agreement imposed by a public employer.

And I would like to address some of the questions raised by the Court about the status of the MWRA with regard to this agreement. The fact is the MWRA's participation was indispensable to the enforcement of this agreement. In the affidavit of Mr. Fox I believe you will notice, this was the MWRA's own official, that, and the affidavit of the Kaiser people. They admit that they told the unions up front that the agreement could not be enforced without the MWRA's approval. That was established from the outset. It's a matter of state law.

This area is pervasively regulated by Massachusetts law, and what does Massachusetts law say? It says there must be free and open competition, the exact opposite of what the state agency has achieved here. Instead the MWRA went ahead and approved this and then put the bid specification into place. Without 13.1, we have just heard from the Solicitor General, the agreement could not have been enforced.

So to pretend that this is an agreement between private parties is simply to ignore the facts of the case.

QUESTION: Are you arguing that the negotiation

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of the contract between Kaiser and the unions was also preempted since it was on behalf of the agency?

MR. BASKIN: The effect of that negotiation, yes, we do. To the extent Kaiser is acting on behalf of the agency and the agreement was essentially null and had no effect, it is really two sides of the same coin, Your Honor.

I should also note it has been made reference that the NLRB somehow approved this agreement. The NLRB has never looked at this agreement. The general counsel of the NLRB in an advisory memorandum opinion, in which he was told that Kaiser was not acting as the MWRA's agent, a false assumption, failed to issue a complaint. It has been stated in numerous cases that has no precedential authority whatsoever.

But we did not pursue the NLRB avenue because we don't view this as an unfair labor practice. We view this as a situation of preemption, that is that the state is interfering with the careful balance struck by Congress in the National Labor Relations Act. And the starting point --

QUESTION: You have never argued Garmon preemption?

MR. BASKIN: We have raised both Garmon and Golden State Machinists type preemption.

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QUESTION: So you're going both tracks?

MR. BASKIN: We are going both tracks, Your Honor. Section 7 rights are also being affected here, an area that's arguably, certainly is protected by the National Labor Relations Act. And again the response that we've heard is that 8(e), 8(e) somehow permits this intrusion on the section 7 rights, and again 8(e) only permits it for private employers. That is what is crucial to the case.

So both tracks are --

QUESTION: 8(e) uses the term employer.

MR. BASKIN: Yes.

QUESTION: It doesn't say private employer.

MR. BASKIN: Employer is defined in section 2(2) of the act, which is referenced, and all sides admit that the MWRA is not an employer. It's not even a question of ambiguity.

QUESTION: Not an employer as defined in 2(2)?

MR. BASKIN: Right. And that's the only way that which 8(e) could use the term employer, so this is simply not a question that the other side has attempted to debate. They have attempted to say instead that one should make an analogy to 8(e).

But when one has the starting point that this Court has established and that Congress established, then

with that starting point that interference by the Government is not permitted, then it's incumbent on them to come forward with more than analogies. It's incumbent on them to come forward with language, statutory language that somehow creates the great exception, the radical exception that they are attempting to promote here. Because it is truly radical.

If you open the door for this type of conduct by the state agencies, with all of the many procurement activities that the states and the Federal Government go through, it will create a huge hole in the preemption doctrine. And that's what this Court recognizes in the unanimous opinion in the Gould case.

QUESTION: Well, I suppose the argument on the other side is that you also create an enormous hole in the ability of the Government to contract itself instead of letting things be done by the private sector. If it's acknowledged that (e) and (f) is really necessary for these massive construction projects to be done, by not permitting (e) and (f) to apply to the states you essentially are saying that this all has to be done by private enterprise and the state cannot undertake it.

MR. BASKIN: There are two answers to that, Your Honor. First is it's not a large hole at all. We have not raised any objection about the state establishing all

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kinds of conditions, whatever they deem necessary to complete their project on time. It is done all the time with all kinds of stabilization agreements.

The only very narrow thing that is prohibited is for them to tell contractors that they must have a union agreement and thereby force their employees to join unions, which is not something that is in fact necessary to achieve the completion of the job.

But perhaps the best place to look is to the statute and to what Congress said. Congress made no attempt to create this special exception for the states. And in fact the uniform state law based on the state court decisions that we did cite in our brief and were not responded to by the other side, in the 1950's was this was beyond the pale for state governments to engage in this kind of activity. The several activities when it was raised to the state court they said no, you cannot as a state discriminate on the basis of union activities.

And presumably Congress, aware of that law, uniform law throughout the states, made no effort to change the law in the National Labor Relations Act. It seems likely then, the legislative history shows, that Congress meant for the situation to stay exactly as it was and as it has been for the years since.

Because notwithstanding these arguments that we

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have seen in some of these briefs, these types of project agreements are quite rare in the Government sector, and they are not all that common in the private sector. We represent an association that performs work on hundreds of thousands of projects around the country, next to unions, working with unions, and some non-union, some mixed, and these projects manage to get built.

We put, in the record is a stabilization agreement that shows how the Maryland harbor tunnel was built with no union only requirement in it. So the fact is that the states could achieve their legitimate objectives if they have them in connection with procurements without getting into the illegitimate sphere of prohibited interference with the collective bargaining process.

Again, as long as the Court recalls that that is the basic principle of preemption, that the states should stay out of dictating collective bargaining agreements, everything else from this case logically achieves our result.

QUESTION: What is the stabilization agreement?

MR. BASKIN: Oh, a stabilization agreement may be a discussion about certain terms that should apply --

QUESTION: Well, it's more than a discussion if it's an agreement, so what --

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MR. BASKIN: Absolutely. It's the results of the discussion --

QUESTION: Tell me what the agreement is.

MR. BASKIN: Well, in particular --

QUESTION: Between whom and whom?

MR. BASKIN: It typically is between the contracting agency and all the parties who are going to participate in the contract. It might deal with such things as resolving disputes about how the project is being built --

QUESTION: What about wages?

MR. BASKIN: It might deal with wages. Of course many states have prevailing wage laws.

QUESTION: I suppose that's what they really want to stabilize, isn't it? Wages.

MR. BASKIN: Well, but in fact our issue, we do not take --

QUESTION: Is that right?

MR. BASKIN: No, not -- well, that is one thing but it's not the most --

QUESTION: Well, does it stabilize wages or not?

MR. BASKIN: Yes, it very well may. And we don't object to that. That is not the -- this is a prevailing wage job. By state statute there is going to be a set wage, and so that part of it is not necessary,

there is no need for an agreement to achieve that.

QUESTION: So a subcontractor for example agrees that we will pay no more wages than X, is that it?

MR. BASKIN: Yes.

QUESTION: And despite a demand by the union to negotiate otherwise?

MR. BASKIN: Well, the --

QUESTION: Is that right?

MR. BASKIN: Not necessarily.

QUESTION: Is that right?

MR. BASKIN: No. No, Your Honor, that is not necessarily what a stabilization agreement calls for.

QUESTION: Does it ever?

MR. BASKIN: Does it ever? A stabilization agreement could call for a certain wage rate. If the union cares to negotiate a higher wage rate the Government will certainly accept that, it just won't pay for it. So that's really how those agreements can work. But as I say, wages is not the issue in this case because it is governed by a state law that is already mandating what the wages are.

And I think it's also important to understand that if this were simply dealing with some peripheral aspect of labor relations we would not be before you, there would not be an issue. The Court has already said

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that certain items, like unemployment insurance and the like, are permissible for the state to go after. But here they're going after the entire collective bargaining process. That makes it fundamentally different from any case, fundamentally worse than any case that has been before you before. And the parties on the other side have not seen fit to acknowledge that grave difficulty from the outset of their case, and it's crucial to the outcome.

QUESTION: I suppose you would be making the same argument even if this agreement didn't call for membership in the union?

MR. BASKIN: Yes. Membership in the union is not the critical feature. It is a, it follows automatically from the fact they required us to sign the agreement. And these agreements already had the language in them. We weren't permitted to negotiate about how many days it would take for someone to have to join the union, that's already established. So by signing the agreement we are in fact being forced to have our employees who have not voted for or chosen the union to sign up with the union in order to perform in this Government project. And that simply cannot be.

So what we have here is with the starting point of the interference, direct, uncontested interference with the bargaining process, in fact elimination of the

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bargaining process. The only excuses for that that we have heard are that private employers can do it, that's irrelevant to the analysis, that there should be a proprietary distinction as opposed to regulation, this Court unanimously said that was not a pertinent analysis where there was the type of interference that we have here, and I should add that this in fact is a regulation. It's at least a mixture of proprietary action and regulation.

If one looks at the Massachusetts state law definition of regulation which is cited in the amicus brief filed by the Utility Contractors Association at page 19, a regulation under state law is a requirement imposed by an agency to implement the law enforced or administered by it. And that's what has happened here.

QUESTION: But what has that got to do with the Federal definition?

MR. BASKIN: Well, because this is an action of the state agency it is certainly an appropriate place to look as to whether or not --

QUESTION: Well, the definition is a Federal question, isn't it?

MR. BASKIN: Yes, and whether or not this is regulation or proprietary action is, what I'm simply suggesting is that it is not an open and shut case as to

whether or not this, I don't believe there is a Federal definition of what constitutes such a regulation in this particular context. It would seem to be an appropriate place to look.

But we don't rely on the fact of whether or not it's a regulation or a proprietary action. It's clear to us and it was clear to this Court that state agencies can't claim the license by, because of proprietary actions to interfere in the collective bargaining process.

If there are no further questions.

QUESTION: I believe it was in the petitioners' brief the facts of Golden State were recast so that if the City of Los Angeles in the hypothetical case were the purchaser of taxicab services and the taxicab company was undergoing a labor dispute, it was submitted that certainly the city could take its business elsewhere. Do you agree with that conclusion?

MR. BASKIN: We do not agree with the conclusion the way they phrased it, and in fact we are, we responded to it in our brief. And the response is that the city would be free to get the service provided, and it would be free to insist that the Golden State people provide the service or they would have to look elsewhere. But in Golden State and here, here they have not given us the opportunity to perform.

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QUESTION: Well, suppose they said you're in a labor dispute and therefore it's beyond contradiction that you can't provide the service that we want, and we're taking our business elsewhere.

MR. BASKIN: And if they conditioned their finding on our settlement of the labor dispute that would be impermissible, because that is what Golden State held. If they said we have to make, we need transportation provided or we need the project built, show us that you can provide the service, then that would be permissible. Here they haven't given us that opportunity, and for them to say that -- of course we have no labor dispute at all, but for them to say that we think it's a priori that with a labor dispute you won't be able to finish, that simply cannot be done because then they are directly interfering with the bargaining process.

QUESTION: Well, can't the state base its purchasing decision on likelihood and probability? Suppose the state makes the determination that there's a very, very strong possibility of labor instability with a particular contractor. Don't they have the option to stay away from that particular contractor?

MR. BASKIN: Because Congress has established the rules for labor relations, and for exactly that reason, that it should not be something that every state

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and local government gets into. It's not the state or local government's business how the contractor establishes relations with its employees. If the contractor can't perform because of that dispute, then the state has the right to go elsewhere.

QUESTION: But suppose the state makes the reasonable judgment that in all likelihood performance will be impaired by reason of the contractor's labor policies? Is the state then not free to take its business elsewhere?

MR. BASKIN: It is conceivable that the state could make such a reasoned judgment based on hearings and actual facts being provided to the state independent of a simple blanket policy that those who don't have unions cannot perform. That's possible that that could happen. But here there were no hearings. There in fact are no facts before you, even in the affidavits, that this project cannot be performed. There are only statements that it was inconvenient or somewhat annoying to have to establish the necessary reserved entrances and debate with people about how certain things should be accomplished. No actual statement or finding of fact, certainly in no proceeding, that this type of project could not be performed.

Instead what we have is a blanket exclusion of

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non-union contractors, and I might add a blanket statement to the union contractors that they are bound by these agreements whether they are disadvantageous to those contractors or not. And when those agreements come up for renewal, a tremendous leverage given to the unions in that area because of the Government's interference with the bargaining process.

QUESTION: But why can't a state make a judgment that this is a long-term project and we don't want this project disrupted?

MR. BASKIN: Well, ironically the 8(e) argument we have heard is that it was designed for short-term projects rather than long-term projects. But the state can take other actions to prevent disruption. The bidding statute that this state is operating under requires that a bidder demonstrate that it is qualified to perform. And all the states have procurement laws that are designed to promote open competition, at the same time guaranteeing to the states the ability to get their jobs done.

So the states already have that power, they already have that right, and Congress has said that they cannot achieve those ends not only because they're not necessary but because it interferes with the Federal scheme. And in fact it would become a constant abuse of the Federal scheme. We have not only seen it in this

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particular case, we have this $5 billion central artery project right behind it, and there is nothing in the briefs or the arguments of the other side that is going to stop this from applying to a $15 million project on a power line or any number of other situations.

It will bring the courts into making this decision on a case-by-case basis, I suppose, about when has the state demonstrated a significant need to avoid disruption. Well, it's not supposed to make that determination, the state agency, based on the labor relations policies of the contractors. That's the fundamental issue in this case.

The state has many other ways of achieving its legitimate goals, but it's not a legitimate objective to exclude the majority of the construction industry that happens to be non-union, as is in the briefs. Only 20 percent of the union members in this, of the workers in this country are union members. Somehow projects are getting built, and in fact they are getting built because they can be done with mixed use projects, it can be done without local government interference in the collective bargaining process.

QUESTION: Mr. Baskin, two questions. If what you say is true, how do you explain the enactment of 8(e) and 8(f)? I mean, what --

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MR. BASKIN: They work.

QUESTION: Congress was deluded to believe the opposite of what you have just told us?

MR. BASKIN: No, Congress felt a need to encourage and adjust the relations between private employers and unions. That's of course the National Labor Relations Act. It only applies to private employers and unions. And if they were so concerned about the ability of public owners to have this privilege that the NWRA seeks, then they surely would have passed the public owner privileges act that would have allowed the kind of interference that's going on here.

QUESTION: Yeah, but generally they wouldn't allow private employers, generally, to coerce union membership this way either, would they?

MR. BASKIN: Well, they made this one exception because of statements that were made and hearings that were held about the need for this in the private sector.

QUESTION: Right. So they must have disagreed with what you have just been saying, that it's not very, really very necessary.

MR. BASKIN: They made that finding based on the need for voluntariness, and they were quite specific about it. This is not a Government coerced function but a voluntary relationship in the private sector, and based on

the big difference between the private and the public sectors. They could count on market forces to dictate to these private contractors when it's good or bad. Those forces don't apply to a public entity that has got taxpayer dollars.

QUESTION: And which may have political motivations besides.

MR. BASKIN: Exactly.

QUESTION: Would it be your position, suppose a private individual who was not an employer within the meaning of the act had an arrangement with an independent contractor that the contractor, general contractor could not employ union labor in building his house.

MR. BASKIN: It certainly would not raise a Federal preemption issue. That's in fact the question --

QUESTION: Would it be valid under the --

MR. BASKIN: Whether it would be valid under 8(e), he must be an employer in the construction industry. On the other hand, whether the act would even apply to that situation because he is not an employer would be a different question to which I just don't have any definitive position.

QUESTION: Why does the fact that the state isn't included as an employer under 8(e), why does it follow from that that there is preemption? I thought the

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predicate for preemption was that, at least one of the predicates, a Machinists preemption is that the Government, the Congress has decided that this whole area should be unregulated.

MR. BASKIN: Right. Unregulated by the Government.

QUESTION: Well --

MR. BASKIN: Unregulated by the Government.

QUESTION: Usually though it's, the Federals keep their hands off as well --

MR. BASKIN: Exactly.

QUESTION: -- under Machinists.

MR. BASKIN: Exactly.

QUESTION: But they didn't. They regulate this whole area by 8(e) and 8(f).

MR. BASKIN: But only for the relationships between private employers and private unions.

QUESTION: Have we ever, do you think we have held before that Machinists preemption, it's sort of like sovereign immunity? You have to, the Government intends to regulate only where it says so, and otherwise the state may not copy what the Government does?

MR. BASKIN: Well, what Machinists says and what Golden State said was there was a free zone around the collective bargaining process. That's the point. And so

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the reason why it's important that 8(e) doesn't create a special exception for the states is because it has already been established that they cannot coerce employers --

QUESTION: 8(e) and 8(f) say that, certainly it doesn't say that there is a free zone around collective bargaining.

MR. BASKIN: It certainly does not create any new Government power to impose collective bargaining. 8(d) and H.K. Porter and Machinists and Golden State, they all say the Government can't coerce collective bargaining. Does 8(e) create an exception from that? No. 8(e) regulates only in the sense that it creates a voluntary, it permits, it permits conduct --

QUESTION: But Congress did not create a free zone for collective bargaining in the construction industry.

MR. BASKIN: Yes, it did. It created a free zone from Government interference for collective bargaining. Not -- we're not suggesting a free zone from private discussions of collective bargaining or private agreements or private economic weapons. In fact the Court has said those should be protected too, and we're comfortable with that. If this were a private agreement between an employer in the construction industry and the unions we would not be before you. But here the issue is

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can the Government step in and become a party to the negotiations, and in fact those exact words were used in Golden State and the answer was no.

We urgently plead that the same answer be achieved in this case.

QUESTION: What's the text of, as best you can recall it, of 8(d) that you rely on?

MR. BASKIN: 8(d) says that no employer shall be obligated to accept an agreement agreed to, a specific agreement with the union. And that has been interpreted in H.K. Porter to mean that the Government shall not require any employer to adopt a union --

QUESTION: Only by reason of preemption. I mean, there's nothing in 8(d) that says specifically that no state shall require any such agreement.

MR. BASKIN: Well, in fact.

QUESTION: It's just that it says no employer shall be compelled to do so, and then H.K. Porter says that means --

MR. BASKIN: By the Government.

QUESTION: -- that shall not be compelled by the Government either.

MR. BASKIN: By the Government. And this Court relied expressly on 8(d) in the Golden State case to say that means both the Federal Government and the state

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government. Certainly if the National Labor Relations Board can't do it, how can it be that the states could do it? The answer is that it cannot be.

Thank you.

QUESTION: Thank you, Mr. Baskin.

Mr. Fried, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF CHARLES FRIED

ON BEHALF OF THE PETITIONERS

MR. FRIED: Thank you, Mr. Chief Justice. I didn't exaggerate. Mr. Baskin has said so. The position of the court of appeals and the position for which we argue does mean that states developing their property, alone among developers of property, are unable to choose project labor agreements. That is his clear position.

QUESTION: But what's your answer, Mr. Fried, to his argument that 8(e) and 8(f) speak in terms of employer, but 2(2) defines an employer as to exclude the state?

MR. FRIED: Well, 8(e) and 8(f) impose prohibitions and then lift those prohibitions in respect to the construction industry. The prohibitions which are imposed speak of employers. Therefore Mr. Baskin's argument that states are not employers really is an argument that says that the very prohibitions which are lifted by the construction industry provisos also do not

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apply. The point of the definition of employer to exclude states is to leave state labor relations greater scope, not lesser scope.

So I think that the argument on the basis of section 2 really moves in entirely the opposite direction as to the state law --

QUESTION: Except he asserts that what has been done here violates not just (e) and (f), but (d) --

MR. FRIED: Well --

QUESTION: -- which doesn't hinge, doesn't necessarily hinge upon the term employer, does it?

MR. FRIED: 8(d) does, I will admit, rather surprise me, its entry into the case. But 8(d) had to do with the NLRB seeking to impose a term between two contesting parties. But of course the Authority here is not imposing a term between two contesting parties, it is a purchaser. The Government, indeed the Federal Government, that's why we have this executive order, the Federal Government also purchases construction services, and in the course of so doing terms are, quotes imposed. And that surely doesn't violate H.K. Porter. I think H.K. Porter is entirely in apposite here.

QUESTION: I notice that the definition of employer excludes a labor organization, but then it says except when acting as an employer.

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(Laughter.)

MR. FRIED: Well, I think that refers to the situation where a, where a labor organization --

QUESTION: I'm trying to help you.

(Laughter.)

MR. FRIED: Thank you so much. That is one of the funnier pieces of the act, and it relates to a situation where the, for instance where the labor organization hires people to perform clerical services or things of that sort.

QUESTION: Well, you say that the state here is just acting in its proprietary capacity.

MR. FRIED: That's correct.

QUESTION: And it's in effect hiring people, I suppose.

MR. FRIED: No, it, it's hiring Kaiser.

QUESTION: Yes.

MR. FRIED: And it's hiring the contractors. It is not hiring any laborers on the project.

I thank the Court for its attention.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fried.

The case is submitted.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)

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Case No: 91-261/91-274

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

BY Lora M. May

(REPORTER)