OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: KAREN LIVADAS, Petitioner v. LLOYD AUBRY, CALIFORNIA LABOR COMMISSIONER

CASE NO: No. 92-1920

PLACE: Washington, D.C.

DATE: Tuesday, April 26, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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KAREN LIVADAS, :

Petitioner :

v. : No. 92-1920

LLOYD AUBRY, CALIFORNIA LABOR :

COMMISSIONER :

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Washington, D.C.

Tuesday, April 26, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

RICHARD G. McCRACKEN, ESQ., San Francisco, California; on behalf of the Petitioner.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor General, Department of Justice, Washington D.C.; as amicus curiae, supporting the Petitioner.

H. THOMAS CADELL, JR., ESQ., Chief Counsel, Labor Standards Enforcement of California, San Francisco, California; on behalf of the Respondent.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 92-1920, Karen Livadas v. Lloyd Aubry, California Labor Commissioner.

Mr. McCracken.

ORAL ARGUMENT OF RICHARD G. McCRACKEN

ON BEHALF OF THE PETITIONER

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

This case is a challenge to the policy of the California Labor Commissioner not to enforce the California Labor Code on behalf of employees covered by collective bargaining agreements providing for arbitration.

This case arose on January 2nd, 1990, when the petitioner, Karen Livadas, was terminated by her employer, Safeway Stores. California law requires that upon termination of an employee, the employer must pay all of the accrued wages due to the employee. Ms. Livadas demanded, upon notice of her termination, that she be paid everything she was owed, but her store manager told her that she may not have it; that Safeway would instead mail it to her.

Safeway did mail her a check, which she received

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on January 5th, in an amount which she never disputed was the amount due to her. However, she was not paid when she was due. California Labor Code section 203 provides penalties payable by an employer who so delays termination pay to an employee. Ms. Livadas went to the local office of the California Labor Commissioner to file a claim for that penalty pay. She was entitled, under California law, to 3 days extra pay for the delay in her termination pay.

She went to the Commissioner's office, tried to file a claim. Eventually, she did file a claim on January 9th. Now, the purpose of the penalties provided by California law is to compel the employer to pay on time. In addition to that policy, the California Labor Code has also provided for many years that the Commissioner of Labor has the responsibility to ensure that the penalties are collected, that the law is enforced.

However, in this case the Commissioner, acting pursuant to his policy, decided not to pursue this claim, decided not to investigate it or to submit it either to prosection in court or to a hearing in the administrative procedures of the Labor Commissioner. The reason for that decision was solely because she is covered by a collective bargaining agreement containing an arbitration clause. There was never a question that the amount that she was owed and was paid by Safeway was correct. There was never

a dispute in this case that in any way involved the collective bargaining agreement.

QUESTION: The Labor Commissioner, Mr. McCracken, never defended the policy on the basis that people who aren't covered by collective bargaining agreements really need more help from the State than people who are covered by collective bargaining agreements?

MR. McCRACKEN: No, it was never defended on that basis, only on the basis that the Labor Commissioner felt that it was necessary to take this position in order to avoid problems of labor law preemption. And --

QUESTION: Could he properly have defended it upon the grounds that -- hypothesized by the Chief Justice?

MR. McCRACKEN: I don't believe so, because the -- in this case the question is whether or not a decision can be based upon the exercise of Federal rights, in this case the right to select a collective bargaining representative and have a collective bargaining agreement. I don't believe that the State, however benign its intentions, may classify its services based upon that exercise, and that's what has happened here.

QUESTION: Well that's, at any rate, something you don't have to bite off, I take it.

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MR. McCRACKEN: No, we don't, because it never was raised as a defense. But even if it were, we don't believe that there would -- that would be a sufficient defense to such a classification.

QUESTION: Mr. McCracken, you twice emphasized that there was no dispute about the amount due in this particular case, but the respondent does emphasize -- and I'm looking at page 42 of the brief -- that this is an example of a class of cases, and that in some such cases, at least, there would be a dispute about the amount. For example, it mentions the possibility of a penalty sum and of vacation wages that might involve complex calculations based on the specific provisions of a collective bargaining agreement.

So suppose there were a dispute as to the amount and that dispute turned on what the wage provisions of the collective bargaining agreement meant?

MR. McCRACKEN: Yes. Justice Ginsburg, that situation, we believe, would be answered by the approach described by the Court in Lingle. There are two separate systems of law here, and they can work together. The Court described in Lingle what would happen in that situation, namely that the State claim would be still valid. There would be resort to the collective bargaining agreement and arbitration process to find the answer to

the question whether or not the employer had paid the employee everything that was due upon termination.

This case involves what I consider to be the more common class of cases, which is where there is total nonpayment of the termination pay on the date of termination, as opposed to a partial payment, but there's a dispute about whether it was the correct amount.

Now, under California law, it is only necessary, in order for there to be a willful failure to pay the termination pay, that the employer have intentionally not paid it. And so upon return from the collective bargaining process of the answer whether or not the amount was correct, the Labor Commissioner would then have decided a question of State law, which is whether the intentional failure to pay everything that was due was a willful violation and therefore cause for penalties.

QUESTION: So what it boils down to is you're saying every time you look to Federal law for an answer to a question that arises in a State law action, you don't have preemption.

MR. McCRACKEN: That's correct. Yes, we believe that every time --

QUESTION: Well, is that what you're saying? You would not have preemption even in the case where it's highly questionable what the meaning of the collective

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bargaining agreement is as to entitlement to vacation wages?

MR. McCRACKEN: In the case of termination pay we believe that is absolutely correct, that what would happen here is that the question of whether or not payment had been made on time would always be open for State law to resolve. The question of whether or not full payment had been made is a question to be resolved in the grievance and arbitration process under the collective bargaining agreement, as the Court described in Lingle.

QUESTION: But the two questions are connected. You can't say -- you know, she'll say it hasn't been made on time because you only gave me part of what I'm entitled to.

MR. McCRACKEN: Yes, Justice Scalia, that is true --

QUESTION: You can't separate the two questions.

MR. McCRACKEN: In that hypothetical case, that would be true. This, of course --

QUESTION: And what would happen in that hypothetical case?

MR. McCRACKEN: We believe that what would happen is --

QUESTION: Preempted or not?

MR. McCRACKEN: It would not be preempted.

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QUESTION: Even though it involves an interpretation of the collective bargaining agreement?

MR. McCRACKEN: The Labor Commissioner would not be interpreting the collective bargaining agreement. The Labor Commissioner would not go into the collective bargaining agreement to resolve the question of whether or not the employee had been paid everything due. Instead, the Labor Commissioner would depend upon getting that knowledge from the grievance and arbitration process under the collective bargaining agreement.

So, for instance, if the employee said I wasn't paid everything I was due and filed a grievance about it, and the resolution of the grievance was either the employer agreed or an arbitrator ruled that, indeed, the employer had not paid everything that was due, that information would then go back to the Labor Commissioner, who would then know, without having to interpret the agreement himself, that, in fact, the employee had not been paid everything that was due upon termination.

QUESTION: So long as there's an arbitration agreement in the collective bargaining agreement.

MR. McCRACKEN: Either an arbitration agreement or some other dispute resolution mechanism.

QUESTION: Or some other mechanism. However, why isn't this valid in all cases then? Why have we gone

through all this trouble of saying that there's preemption? Why couldn't we always say there's never preemption; the State simply has to wait for the dispute resolution mechanism in the collective bargaining agreement to play itself out?

MR. McCRACKEN: The -- in cases such as this, there is no reason for anyone to resort to that process because there was never any dispute under the agreement about what was due.

QUESTION: Well, I'm not talking about cases like this. I'm talking about cases where there is a dispute. Why is this class of case any different from the totality of cases? Why isn't the solution that you've just proposed applicable to all of these cases, so we really shouldn't have had a preemption principle.

MR. McCRACKEN: Well, I think, Justice Scalia, that's taking it to far. I think --

QUESTION: I think it is, but you tell me why it is?

MR. McCRACKEN: Because I think what the Court was saying in Lingle, especially its description in footnote 12 of how to resolve these problems of interplay between the two systems, is that there are many occasions in which it is necessary to get data from the collective bargaining process.

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For instance, in Lingle itself, the -- part of the damages sought by the employee was back pay. Back pay would have to be determined in accordance with the collective bargaining agreement, because it set the rate of pay and such things as vacation and holiday pay and that type of thing. One can't say that the State's tort should be preempted because the measurements of damages for the tort requires some resort to the collective bargaining agreement.

And as I understand, what the Court was saying in that case is that, the collective bargaining agreement, the process still operates, but it operates independently of State law. But what it does is to provide information necessary for the resolution of such questions as damages, and that's all we're really saying in this case.

QUESTION: May I ask, supposing you have a case in which there is no collective bargaining agreement but there is a dispute as to the amount due? Say the employee is fired on Friday, just bing, and there's an argument about whether he worked 6 hours or 8 hours on Wednesday. How does the -- California resolve that?

MR. McCRACKEN: I believe, Mr. Justice Stevens, that what happens is that the Commissioner looks at the employer's payroll records to determine the answer to that question, the same as the --

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QUESTION: And if the player -- the employer has underpaid him, as a based on that, then there's a penalty imposed.

MR. McCRACKEN: If what has happened is that the -- that question, whether there's 2 hours' pay missing, the Commissioner would investigate to see whether the 2 hours were worked and whether the 2 hours were paid, and then would find that there was underpayment, as a matter of fact.

QUESTION: And then impose the penalty.

MR. McCRACKEN: Correct.

QUESTION: But the penalty can't be imposed unless it were willful.

MR. McCRACKEN: Yes.

QUESTION: If the employer had a good-faith doubt, there would be no penalty.

MR. McCRACKEN: Well, the test under California law, Justice Kennedy, is whether the nonpayment was intentional. Willful is equated to intentional under Triad Data Services.

QUESTION: So if he had a good faith doubt, there would be no penalty.

MR. McCRACKEN: That's a matter for the Commissioner to determine as a matter of State law. My view of it, having read the cases, is that if the employer

did have a good-faith doubt, that would be sufficient reason to deny the penalties.

But if the situation were that the employer knew that there was a question about how much pay was due but made the intentional decision not to pay the disputed amount and to make the employee go to whatever measures were necessary in order to recover it, it seems to me it's conceivable that under the Triad Data Services test for willfulness, that that would still be willful, because it was an intentional decision made by the employer. But, again, that is a question of State law and not of Federal law, how willful the decision was.

QUESTION: Yes, but it might bear on how these two acts or how these two conflicting sovereignties bear upon each other in a case where, as Justice Scalia put it, the collective bargaining agreement is not clear.

MR. McCRACKEN: Yes, I can see how it might, because the degree of the employer's good faith would be, in turn, somewhat conditioned by the merits of its argument under the collective bargaining agreement that a certain amount was not due. And I can see that arising in that type of case, where there is partial nonpayment as opposed to total nonpayment. Nevertheless, this is a case, as is usually true, of total nonpayment. And certainly in that class of cases, it is not necessary to

evaluate willfulness or anything of the sort.

We also believe that the way to handle that particular problem, Justice Kennedy, the one of the rare case in which there may actually be some question of contract interpretation that is at least tangentially involved, is nevertheless for the Labor Commissioner to go forward unless it is clear that the matter is preempted. So that the question of preemption, that is whether the claim is substantially dependent on analysis of the collective bargaining agreement, can be resolved by the California courts as -- if the employer raises it as a defense.

QUESTION: Is it true that, as a practical matter, there's very little occasion to have a difference of opinion as to the amount owed?

MR. McCRACKEN: Yes. I think that, in my experience, that is a very uncommon situation, that usually the amount owed on termination is quite clear, as it was in this case, and that is the main class of cases involving termination pay. And, of course, the Commissioner's policy systematically excludes all those claims from the enforcement services that the Commissioner offers the rest of Californians, and that is the problem in this case. It is a -- in our opinion, a straightforward application of Golden State, because

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the --

QUESTION: Suppose we go back to Justice Kennedy's original question, and suppose the California law is clear that these sections, 201 and 203, don't apply to people whose unit is covered by a collective bargaining agreement but only for the particularly needy workers who don't have a collective bargaining agreement governing their employment relationship. There would be no Federal question, would there, if that were, indeed, the California law?

MR. McCRACKEN: No, I'm afraid I can't agree, Justice Ginsburg. I think however the California law is justified, if it draws a distinction in the receipt of State services between those who exercise and those who do not exercise their Federal rights, then that is a 1983 case.

QUESTION: Then you'd say it was a violation of section 7.

MR. McCRACKEN: Yes, a violation of section 7 redressable through section 1983. Section 7, of course, is a somewhat unique section in Federal law in that it gives an unqualified right to employees to exercise the rights described in there -- therein, to select a collective bargaining representative and to negotiate collective. It's a right that is good against all comers.

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It is good against the State, against employers, against unions, and even against the Federal Government.

QUESTION: Well, supposing there's an election held by the Labor Board and a group of employees at a plant vote not to have a collective bargaining agreement. Now, they've exercised their rights under the Federal law just the way that people have who have elected to have a collective bargaining agreement, and yet you say that the State could not, say, treat them the same as people who have never had the opportunity to bargain?

MR. McCRACKEN: We say, Mr. Justice -- Chief Justice, that there is no way the State can take that exercise into account either way, so that if employees had voted not to be represented by a union, that the State could not --

QUESTION: It seems like an extraordinarily broad doctrine. What you're talking about is an equal protection challenge, and it's really -- any rational basis is sufficient to justify State action there.

MR. McCRACKEN: No, we don't see that, Mr. Chief Justice. Under Golden State, the question is whether the State benefit has been conditioned upon the nonexercise of Federal rights, and that is the case here. The only people who receive this benefit from the State are those who have chosen not to exercise their rights under section

7 to select the collective bargaining representative.

QUESTION: Mr. McCracken, would you clear up one thing for me. She has not -- under your theory, has not gotten the benefit of the State's handling of her claim. Has -- does she have any other remedy other than -- does she lose the claim as well as the representation?

MR. McCRACKEN: She could proceed, herself, in court, to enforce the claim.

QUESTION: And if she did proceed in court, would her attorney's fees be assessed against the employer?

MR. McCRACKEN: Yes, if she won.

QUESTION: I see.

MR. McCRACKEN: On the other hand, if she lost, the employer's attorney's fees could be assessed against her.

QUESTION: Oh, I see.

MR. McCRACKEN: So there's -- in addition to the lack of familiarity most workers have with the law and legal processes and the intimidation that many of them feel when approaching that institutions, there is also a good deal of risk, downside risk to an employee who peruses a claim on her own.

QUESTION: She has a find a lawyer who's willing to take a case involving 3 day's pay too.

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MR. McCRACKEN: Yes, to begin with, and a lawyer who's prepared to advise her that she might end up owing more than she sought. So it's not a practical alternative and, in fact, it is very rarely perused, as a result.

QUESTION: Mr. McCracken, can I -- I don't want to eat up too much of your time, but coming back to the Chief Justice's question about whether Golden State has any equal protection flavor to it, is it your contention that even the most rational of bases for treating union employees and nonemployees differently will not suffice to avoid running afoul of Golden State. I mean, what if the State provides, for example, arbitration services, but it says, of course, we don't provide them for people that have one --

MR. McCRACKEN: Justice Scalia --

QUESTION: -- By reason of their collective bargaining agreement?

MR. McCRACKEN: Justice Scalia, I think that in that particular example of arbitration services, the State would not be able to -- would be entitled to do that because, in that case, the -- you would be running directly into section 301 preemption, given the -- how important arbitration is to section 301 and how Federal law completely governs the question of what is arbitrable and how it shall be arbitrated.

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This is a different case. It's like the Fort Halifax case, in that we're dealing with minimal labor standards that don't have anything to do with the collective bargaining process itself. And as far as whether or not there is some type of classification based upon section 7 rights that could be justified on a rational basis test, it's conceivable that there is, although the examples seem, to me, to be very limited.

One such example, conceivably, is a statute such as the one in Fort Halifax, where there was a specific provision made to allow the collective bargaining process to work so that the State law applied until a different result was obtained in collective bargaining. And that, it seems to me, would pass a rational basis test, and a type of classification that could be -- to which that test could be applied.

The difficulty here, of course, is that the State has not given the process an opportunity to work, but rather has denied it materials with which to work, as informed --

QUESTION: Thank you, Mr. McCracken.

MR. McCRACKEN: Thank you.

QUESTION: Mr. Stewart, we'll hear from you.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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

In this Court, respondent appears largely to have abandoned the argument that he was prevented from processing Ms. Livadas' claim by Federal preemption principles. His argument, instead, is that his policy of nonprocessing is necessary to vindicate the State's independent policy of respecting arbitration agreements and holding parties to the terms of their contract. And we think this reflects a fundamental misconception of the role of the labor arbitrator in a collective bargaining situation.

This Court has repeatedly made clear that a labor arbitrator operating under a collective bargaining agreement has power only to enforce the terms of the agreement, and the arbitrator does not have a general authority to enforce the terms of public laws that the parties have not incorporated into their contract.

Consequently, the result of the Labor Commissioner's policy is not that Ms. Livadas will be relegated to an arbitratal forum in order to pursue her claim for penalties. If Ms. Livadas somehow prevailed upon her union to take to arbitration her claim for section 203 penalties, the arbitrator would undoubtedly

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deny relief because the late payment provisions of California law have not been incorporated into the collective bargaining agreement.

Consequently, the result will be that Ms. Livadas lacks a remedy within the State system and lacks an arbitral remedy as well. The consequence of that is that Ms. Livadas, and workers like her, will be deprived of State law protections that are available to all other employees within the State. That seems to be precisely the result that this Court discountenanced in Metropolitan Life, when the Court said that a regime which would exclude unionized workers or workers covered by collective bargaining agreements from the reach of State minimum standards laws, would be incompatible with the policies animating the NLRA.

Second, I think that the kind of discrimination that is effected here, that is an exclusion from State law benefits for workers who are covered by collective bargaining agreements is precisely what was at issue in this Court's decision in Nash v. Florida Industrial Commission. The plaintiff in that case was an individual who had been denied unemployment compensation under Florida law because she had filed an unfair labor practice charge with the NLRB. This Court held that that was a violation of her rights under the NLRA, and stated that

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the State of Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw State benefits from persons simply because they cooperate with the Government's constitutional plan.

Here, also, Ms. Livadas is being denied State benefits otherwise available on the ground that she exercised her Federal right to participate in collective bargaining. I think Nash makes clear both that individuals who exercise section 7 rights may not be penalized by the States for doing so, and makes clear, as well, that the penalty may take the form of a withdrawal of benefits that would otherwise be available under State law.

And, finally, we believe that section 1983 is an appropriate vehicle by which Ms. Livadas can vindicate her Federal rights. This Court has made clear, in Golden State, that State action which interferes with the operation of the NLRA may form the basis for a section 1983 action. And, indeed, we think this is a much clearer case for 1983 relief than was Golden State. Here there's no need to infer from the structure of the act a Federal right.

Section 7 of the NLRA states explicitly that employees shall have the right to engage in collective bargaining and to join unions. And to the extent that the

State's action penalizes Ms. Livadas for exercising that right, section 1983 provides an appropriate remedy.

QUESTION: Mr. Stewart, that's easy for you to say.

(Laughter.)

QUESTION: But it must be admitted that our law on preemption is hard to figure out, at least as applied to the concrete facts of particular cases. And what the Commissioner is arguing is, you know, cut me a little slack; at least where there's arguable preemption, I ought to be able to proceed in a reasonable fashion without being subjected to a 1983 action.

Is it your contention that whenever he makes a mistake as to whether there's preemption or not, he's subject to being sued?

MR. STEWART: Well, if the mistake is simply that he reasonably believed that what he was doing is legal, that amounts to a claim of good-faith immunity which has no application to official capacity suits. If he's making the claim that he reasonably and in good faith believed that what he was doing was required by Federal law, we think in this case there's no need to reach the issue of whether that could furnish a defense.

Because this Court, in Lingle, cited as the example of when State authorities could interpret the

collective bargaining agreement the situation in which it was necessary to look to the CBA in order to determine wage rates, and thus to calculate a penalty under State law. So even if there was a good faith defense of the sort that you postulate, it couldn't be applicable here.

QUESTION: Well, this case is easy, but the Commissioner is going to have to decide what he's going to do in the future, if he loses this case. Or is he going to be able to proceed in the fashion he did here at least where there is a dispute as to the amount of wages due?

MR. STEWART: Well, clearly this Court may reach cases in the future in which a State official has operated on the basis of a preemption theory which was reasonable at the time, but turned out to be wrong. But there's certainly no basis for the respondent's argument that even though what he did may have been unreasonable, nevertheless he ought to be protected because a case may arise in the future in which the conduct was reasonable.

QUESTION: I understand, but just tell me what we do in the future when he was reasonable but wrong, what happens?

MR. STEWART: I -- with respect, Your Honor, I don't think I'm authorized, on behalf of the Government, to take a position on that. We are not -- I am not aware of cases either rejecting or accepting the theory that a

reasonable belief that what one was doing was required by Federal law can furnish a defense to what would otherwise be a Federal violation. It is quite clear, in the context of official capacity suite, that a reasonable belief simply in the legality of one's actions is not a sufficient defense.

QUESTION: Would you say, then, there was a basis for a reasonable belief for the cases in which the amount due requires interpretation of the collective bargaining contract?

MR. STEWART: Well, if there were a situation in which the employer paid upon termination and the dispute was whether the employer had paid all the wages due, we think that'd be a different sort of case, because it would be a necessary step in Ms. Livadas' claim for penalties.

QUESTION: Well, would it be the kind of case about which Justice Scalia inquired that you are unprepared to answer? Would that be the kind of case where there might be good faith, although wrong reliance on a preemption notion?

MR. STEWART: We think, in that context, the arbitrator -- the Labor Commissioner would be entitled at least to defer his proceedings until the arbitration processes had run their course. As Mr. McCracken pointed out, even if the arbitrator determined that there had been

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a violation of the collective bargaining agreement and the employee was entitled to additional wages, it wouldn't necessarily follow that the employer was subject to penalties, because the employer might have had a reasonable good faith belief that all wages owed had been paid.

QUESTION: You're telling me that deferral of the Labor Department coming in, this -- the position here is if it requires interpretation of the collective bargaining contract, then the Department of Labor, California Department, never comes into the picture at all.

MR. STEWART: Well, what -- again, what we think is unreasonable about the California Labor Commissioner's policy is that it applies even when there is no dispute as to whether the CBA has been breached, even where all parties agree that the wages due under the contract have bee paid and the only question is whether an independent State law duty to pay them at the time of termination --

QUESTION: Well, we understand that. That's this case. But I think Justice Ginsburg is asking you about the case -- she's still on her hypothetical where there, in fact, was a dispute as to the amount. Do you acknowledge that the Commissioner may be authorized not merely to defer, but to stay out in the good faith belief

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that it preempted?

MR. STEWART: First of all --

QUESTION: Or not authorized.

MR. STEWART: Not authorized, that's correct.

QUESTION: Mr. Stewart, you're here as an advocate, and you're perfectly free to disclaim any responsibility for the Government supporting your view, but I think you are obligated to answer questions about hypotheticals.

MR. STEWART: I am here only in my capacity as an assistant to the Solicitor General, and I --

QUESTION: You're here because leave was granted you to argue pro hac vice.

MR. STEWART: Thank you, Your Honor.

QUESTION: Answer the question.

MR. STEWART: I have been told that I'm not authorized to represent on behalf of the United States.

QUESTION: Very well.

Mr. Cadell, we'll hear from you.

ORAL ARGUMENT OF H. THOMAS CADELL, JR.

ON BEHALF OF THE RESPONDENT

MR. CADELL: Thank you. Mr. Chief Counsel, may it please the Court:

I think, initially, I should point out that it has never been the position of the State of California

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that we took the action that we took in this particular case because we were precluded by Federal law. We took the position that we took in this particular case because the Labor Commissioner, and the courts in the State of California, are precluded by State law from taking that action.

State law has -- as pointed out in our briefs, has a provision in the Posner case, which is cited in our briefs, and that stands for the proposition that the word "application" has a meaning under State law, and that if one has to turn to the -- excuse me just a moment -- any controversy that arises -- this is at page 22 of our brief:

"Any controversy under a collective bargaining contract which requires, first, a determination that the contract does or does not define the rights or duties of the parties in an existing situation as subject to arbitration, if the agreement provides for the arbitration of the disputes that arise out of that contract."

Here, the right and the duty are found in Labor Code Section 203. This is a remedy section. The right to recover those wage -- the right to the penalty, which, as set out in the statute, is a penalty where it says that the wage rate is to continue. In order to determine the wage rate, we have to look to the contract, because it's

the right of the employee to receive that wage rate.

QUESTION: Yes, but that section you've quoted to us reads -- the provision -- the sentence from Posner reads: "Any controversy under a collective bargaining contract which requires" --

MR. CADELL: It would --

QUESTION: But there's no controversy here. They're in agreement as to the amount due.

MR. CADELL: I suggest, Your Honor, that in our estimation, under California law, the controversy arose as to -- the controversy in issue here is what is the penalty which must continue. The State of California finds no problem with Justice Kozinski's determination, and the district court's determination, that anyone could look at a calendar and tell that she was paid 3 days later than she probably should have been paid. What our problem is is how do we determine what the penalty is that's going to continue. In this particular case --

QUESTION: Well, excuse me, is that penalty provided by the collective bargaining agreement?

MR. CADELL: The penalty is found in the collective bargaining agreement. One of the questions that was asked here was how we would -- if there was no collective bargaining agreement, how we would determine what the wage was that was to continue as a penalty. The

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answer Mr. McCracken gave was that the Labor Commissioner would look at the payroll records. We wouldn't look at the payroll records; we'd look at the contract of employment between the employer and employee.

QUESTION: You really have me confused. Isn't the penalty provided by California law.

MR. CADELL: Yes, sir.

QUESTION: And not by the collective bargaining agreement.

MR. CADELL: No, the penalty --

QUESTION: So all you have to know what the wages -- is what the wages are, right?

MR. CADELL: Yes, Your Honor, but --

QUESTION: And if the parties agree about the wages, there is no controversy and this sentence doesn't even come into play.

MR. CADELL: But, Your Honor, we don't know whether there was a controversy or not here. We don't -- Safeway was enjoined in this action. We don't know whether Safeway agrees that that was the correct pay or not. As the Chief Justice asked --

QUESTION: You will always presume that there is a controversy concerning the collective -- that involves the collective bargaining agreement. You feel authorized to do that, to simply always presume that there is some

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controversy, unless you know otherwise, involving the CBA. That seems to me unreasonable.

MR. CADELL: Your Honor, we feel that in order to -- under the State law, in order for us to take and decide this particular issue, we would have had to applied the collective bargaining agreement, the terms of the collective bargaining agreement. The wage rate: which wage rate was to be applied? There were eight different wage rates that were set out in the collective bargaining agreement. There's a vacation pay provision.

QUESTION: Well, what would you have done if there were no collective bargaining -- what if she was a nonunion employee, how would you find out the --

MR. CADELL: We would go to the contract of employment between the employer and the employee.

QUESTION: Supposing it's an oral -- you know, just an oral -- at will oral contract, what do you do?

MR. CADELL: Well, just as another other trier of fact would do, Your Honor. We would ask the parties. It would -- it might become a question of veracity by one or the other as to what the true rate of pay was, but it would be -- it would be possible to determine it.

QUESTION: Your opponent has more or less represented to us that normally there's no big deal about figuring out how much is correct. Is that your

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experience?

MR. CADELL: No, Your Honor. In 20 years of experience with Division of Labor Standards Enforcement, I do not find that that's the -- that's my experience.

QUESTION: In most cases there is a dispute about the amount.

MR. CADELL: There is a dispute as to the amount.

QUESTION: In most cases.

MR. CADELL: In most cases, yes, Your Honor.

QUESTION: In this case there was not.

MR. CADELL: In this case as far as we know there was none.

QUESTION: Well, the court of appeals opinion certain says in -- I presume it's correct, unless there's some reason to dispute it, that Livadas does not dispute the amount of the check.

MR. CADELL: Livadas does not -- Ms. Livadas does not dispute the amount of the check, Mr. Chief Justice, but we don't know what Safeway would have done --

QUESTION: Well, but Safeway sent her the check, so presumably they don't dispute it.

(Laughter.)

MR. CADELL: Well, as a matter of fact, even they had -- even Ms. Livadas had a problem in determining

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what exactly her final pay was.

QUESTION: But she's not disputing that.

QUESTION: You're asking us to go behind the statement of the court of appeals that she didn't dispute the amount of the check and say perhaps she did?

MR. CADELL: No. No, Your Honor.

QUESTION: Well, then --

MR. CADELL: We're asking -- we're asking the Court to go behind the court of appeals decision to look at the problem that faces this -- the State of California and other States where we --

QUESTION: Okay. But then you're asking us to say there are going to be lots of other fact situations coming up where there were -- would be disputes about the amount, but in this case there simply wasn't any dispute as to the amount owed, I take it.

MR. CADELL: Not on the record, Your Honor.

QUESTION: Well, not on the record and that's what courts go by, is the record.

MR. CADELL: I understand, Your Honor.

(Laughter.)

MR. CADELL: That's true. There is no -- there is no dispute on the record as to what her wages were. She claimed her wages were $13 and some cents an hour. We have -- we don't have Safeway's determination as to what

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those wages were.

But I might point out, Your Honor, that I think you -- Mr. Chief Justice, you asked the question what would happen if the wage rate that was paid was only half of the amount that was due, how would we determine what the amount was? We'd have to go to the collective bargaining agreement to determine what the amount was. This case cannot be decided in vacuum; it has to be decided looking at all of the situations.

This is a California --

QUESTION: Mr. Cadell, I -- it seems to me that even if we adopted a rule, which might be a reasonable rule, that the State can treat these matters in the generality so that it need not be the case that every single -- every single dispute in which it does not provide assistance is one in which there would have been preemption. But at least we might say the general category has to be a reasonable category that the State has collected together. In this category of cases, it is very likely that there will be preemption and therefore we won't provide assistance.

Even if we adopted that rule, this case doesn't come within it. I mean, the State has just said whenever there's a collective bargaining agreement, period, we will assume that the dispute involves interpretation of the

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collective bargaining agreement. And that's just -- that's simply unreasonable.

MR. CADELL: Justice Scalia, we looked at it from the point of view that we would have to. It would be absolutely necessary for us -- our Deputy Labor Commissioner looked it from that point of view, and I look at it from that point of view. We would --

QUESTION: Mr. Cadell, the position -- your position about what California law is is less than clear to me, and it seems to have somewhat shifted, so let's go back to the first base. Is it clear that 201 and 203, the basic right to be paid and to be paid on time, the basic right stated in those sections applies to all workers, whether they're subject to collective bargaining contract or not?

MR. CADELL: They're -- yes, Your Honor, that would be true.

QUESTION: And those are mandatory provisions that must be paid to every worker, is that so?

MR. CADELL: That would -- subject to the provisions of section 203, that it would be willful, a willful failure to pay.

QUESTION: So we're only talking about who enforces, then, whether the wage earner -- if she's under a collective bargaining agreement, she will have to come

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to court on her own, but if she's not under a collective bargaining agreement then she gets the Commissioner to take care of her claim?

MR. CADELL: Justice Ginsburg, I think you narrow it too far, if you will. I believe what this is is where she's under a collective bargaining agreement and there is an arbitration clause and we feel, that is the division or the court in California feels that we would have to apply the terms of the collective bargaining agreement in order to reach the amount of the penalty, those are the three ingredients which must go into it.

QUESTION: Well, let's take her case where there's nothing to interpret in the collective bargaining agreement. You won't bring her claim, but you say that her right to this pay is guaranteed by State law. How does she enforce the right?

MR. CADELL: Well, Your Honor, number -- I would disagree with your categorization that the right to the 203 penalties is guaranteed. It's not.

QUESTION: If there's -- if there was willful. We'll assume the terms of the State law are met. I'm just trying to find out the difference between the rights of someone who is under a collective bargaining agreement and the rights of one who is not. You seem to say the difference is purely procedural, that they both have the

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same substantive right to be paid on time and to get penalties if there's been a willful violation.

MR. CADELL: Your Honor, it's our position that we would -- one would have to look to apply -- under California law, and this is a California Statute, the Labor Commissioner was following California procedural rules and that's the procedural rules which were given to us. And that if the rights and the duties --

QUESTION: But I'm trying to find -- before we get to the procedure, is the substantive right of all workers the same? That is, to be paid on time and in the event of a willful failure to pay on time, to get a penalty payment. Is the substantive right the same for all of the people, so that we're -- the only difference we're talking about between collective bargaining and noncollective bargaining is how you enforce that substantive right?

MR. CADELL: I'm not so sure that in California, that the substantive right would be clear across the aboard.

QUESTION: Well, please tell us what the substantive right of the employees -- what their substantive rights are, because we'll get terribly confused if we don't even know what California's position is on that.

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MR. CADELL: I understand, Your Honor. You have categorized -- as I understand it, Justice Ginsburg, you have categorized the right to the penalty under section 203 as a substantive right.

QUESTION: Well, let's start with 201.

MR. CADELL: There -- all right, the right to be paid in a timely manner, that right -- that right exists, but that right may be enforced, by the Division of Labor Standards Enforcement, by other means than by the penalty under section 203.

QUESTION: But the substantive right is enjoyed by persons, whether they're under a collective bargaining agreement or not. All employees get that substantive right, is that correct?

MR. CADELL: That's not quite so, Your Honor. There are a number of exceptions to section 201 of the Labor Code, and I think they're set out in our brief, in --

QUESTION: Do they -- do any of them turn on collective bargaining versus --

MR. CADELL: None of them.

QUESTION: Okay.

MR. CADELL: None of them turn on collective bargaining.

QUESTION: Then the substantive right in 203 to

a penalty in the event of a willful failure to pay is any distinction as far as the substantive right, made on the basis of collective bargaining agreement or not.

MR. CADELL: I believe there is, Your Honor. I believe that that's -- that's exactly what the second sentence of section 229 of the Labor Code, the section that's really at issue here. It's the second section of 229 that provides that except as -- that the provisions which would allow an individual, even if they did have an arbitration clause in their employment contract, to enforce the provisions of sections 200 through 243, is not allowed if the -- if the employment is pursuant to a collective bargaining agreement which contains an arbitration clause, and it is necessary to either interpret or apply the terms of the collective bargaining agreement.

QUESTION: Well, let's say that it isn't necessary because there's no dispute about -- the check for the wages due on firing are paid, and the employee says that's the right amount, now I just want 3 extra days' worth.

MR. CADELL: Your Honor, I think what this -- what that would mean is that the Supreme Court of the United States would be called upon to interpret California law. It's our position that in the event that Ms.

Livadas --

QUESTION: I'm just asking you what -- you to tell me what the California law is, not for the Court to interpret it. I'm trying to understand what the California law is, so then I can determine intelligently this Federal preemption or not question.

MR. CADELL: Yes.

QUESTION: But I'm trying to learn from you what California law is, and I've not yet grasped it.

MR. CADELL: I'm sorry, Your Honor. California law provides that if -- in the event that it's a willful failure to pay, that a penalty arises. However, section 229 of the California Labor Code, we feel, the second sentence of section 229 precludes the Labor Commissioner, procedurally precludes the Labor Commissioner -- we feel precludes the State courts from going forward and determining what the penalty is, because that penalty has to -- it's necessary to either interpret or apply the terms of the collective bargaining agreement.

QUESTION: Mr. Cadell, let me ask you a practical question. Suppose this Court should decide that the Commissioner would be able, lawfully, to decline to provide representation if it interpreted that second sentence -- which says: "This section shall not apply to claims involving any dispute concerning the interpretation

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or application of any collective bargaining agreement."

If it interpreted that sentence to mean that it shall not apply to claims involving any dispute, as opposed to claims that are undisputed as in this case, suppose we were to say it would be okay in that event, so that the only cases you don't provide representation are cases where there is a real dispute about the amount due, could you live with that?

MR. CADELL: As a practical situation, Your Honor.

QUESTION: As a practical matter, would it be implementable?

MR. CADELL: I don't think so, Your Honor.

QUESTION: Why not?

MR. CADELL: Because I believe that -- I believe this Court is looking at the term "dispute" as emanating -- as being the word of the claimant. If the claimant comes to us, in good faith perhaps, and says, here, I'm entitled to 2 weeks of pay, and here's what I make per hour, we would have to take that case, we would have to go through our whole procedure, our whole administrative procedure, and perhaps at the end, or during the hearing our trier of fact, our hearing officer, may very well find that Safeway Stores or the employer disputes that particular --

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QUESTION: But, surely there must be something short of a full administrative hearing that would enable you to find out whether the person's claim as to what rate they were being paid per hour is or is not disputed by the employer?

MR. CADELL: Your Honor, our --

QUESTION: Well, --

MR. CADELL: -- Procedure --

QUESTION: Are you telling me there is -- that if someone comes into you and says I was making $8 bucks an hour at Safeway.

MR. CADELL: Right.

QUESTION: That the next step would be a full-fledged administrative hearing, even though perhaps Safeway, if it were contacted, said -- would say, yes, she was making $8 an hour?

MR. CADELL: Well, we would --

QUESTION: Can't you answer that question yes or no?

MR. CADELL: Yes. The answer would be yes, if we -- if Safeway said that she was making $8 an hour, then there wouldn't be any dispute, would there, under those circumstances. But, Your Honor, that's not the system that we implement.

QUESTION: Well, maybe that's one of the

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problems here.

(Laughter.)

QUESTION: I mean, your procedures don't involve getting a hold of Safeway and finding out if this sum is disputed.

MR. CADELL: Our procedures involve a letter to the employer outlining the fact that a claim has been filed. If there is no answer to that letter, which I could not guarantee that there would be an answer to that letter, then a full-blown hearing is held, an administrative hearing.

These administrative hearings, Your Honor, are not -- they should -- so there's not any misunderstanding, our hearing officers hold approximately four per day, so it's not as if there's a long trial. It's generally rather short, but it is an administrative hearing. We handle somewhere around 17,000 of them per year, with a rather limited staff.

QUESTION: I take it you have process to require them to show up for the hearing.

MR. CADELL: We send out the notice of the hearing. If they fail to appear, the decision is based on the evidence obtained from the claimant.

QUESTION: Well, but do you have process? Do you have the authority under California law to order them

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to appear?

MR. CADELL: We could subpoena them in, Your Honor, but we find that that would be less than effective, because we'd have to go out and serve subpoenas. We can notify --

QUESTION: Wait, but you have -- you have no process to require them to answer.

MR. CADELL: No, no. The statutory scheme does not require that they answer. However, they take a terrible chance by not answering, because at the administrative hearing the employer -- the word of the employee is taken as the best evidence. It's all -- it's the only evidence we have. But either -- then it could be -- that matter can be appealed de novo by either side, either by the employee or the employer, to the appropriate court, depending on the amount -- jurisdictional amount of the claim.

QUESTION: Does your customary notice specify the amount claimed?

MR. CADELL: Yes.

QUESTION: So that if they're -- if the employer would recognize that it's probably correct, they would not answer and that would be the judgment in that amount, or something like that.

MR. CADELL: If that were so, Your Honor, yes.

But in most cases where it is waiting time penalty only -- now this is only -- this is a case which involves only 3 days of waiting time penalties. Very truthfully, most of our cases involve 30 days of waiting time penalties. That's the cap. Because there's been a dispute as to the amount owed, and the employer does not pay until well after the 30 days has expired. But the 30-day limit is put in section 3 -- 203.

But in this particular case, whether or not Safeway would have, in this particular case, even bothered to show up, I really don't know, Your Honor. But I submit to the Court that if Safeway or any employer -- if the Labor Commissioner took a case which was on the cusp, so to speak. In other words, it could be -- under the -- by applying the preemption principles which Ms. Livadas requested the Labor Commissioner adopt, instead of using the California procedural rules.

But by adopting the preemption principles such as that was found in the footnote, in footnote 12 in Lingle, if the Labor Commissioner were to make a decision which said that yes, in fact we do have jurisdiction, there'd be no reason in the world why Safeway Foods or some other employer could not come in, remove the case to Federal court, and go on from there. On the other hand, if we were to find that no, in fact, we do not have

jurisdiction, there'd be no reason why a union employee, through their own attorneys, could not come in and take the same action that was taken here.

We're -- I believe the term "Hobson's choice" was used in the briefing, and I submit to the Court that the Labor Commissioner and the State of California and, I think, the labor commissioner or the States in general, are faced with a "Hobson's choice." We're faced with the position of not knowing which way to go. And absent a bright line --

QUESTION: But that's -- that's -- I have had a problem understanding what California law is apart from preemption. Maybe I can get at my difficulty this way. Suppose there were no Federal preemption doctrine at all, not in the picture at all. We have 201, 203, and 229. What happens to Ms. Livadas' claim with California law as the only law in the picture? She's in a unit covered by a collective bargaining contract, she hasn't been paid the day she was fired, she's paid 3 or 4 days later, what are her rights under the California Code and how does she enforce them?

MR. CADELL: I think, Your Honor, that Ms. Livadas has no case through the Labor Commissioner. We are precluded by section 229, the second sentence. And, frankly, I believe that the courts in California are

precluded from granting that remedy because of the way the California law is written.

QUESTION: So you say that Federal --

QUESTION: But does that mean -- go ahead.

QUESTION: -- Federal law has nothing to do with This. The result, what happened to Ms. Livadas happened strictly as a matter of California law. She has no right to have the Labor Commissioner represent her, period.

MR. CADELL: I believe that's right, Your Honor.

QUESTION: I don't understand why that is true under California law, because under California law the Labor Commissioner's disability turns on the existence of a dispute, and you don't even find out whether there is a dispute. All you've got to do is require a response to determine whether, in fact, there is a dispute about interpretation or application. And if the answer is no, as apparently it was or would have been no in this case, then under your own law you will go ahead, represent her, this problem will not arise.

MR. CADELL: But that's under California law, Your Honor.

QUESTION: That's right.

MR. CADELL: Yeah.

QUESTION: And you have been telling us that under California law you are precluded from doing what

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this particular claimant wants.

MR. CADELL: Yes.

QUESTION: And I don't see why this record even establishes the predicate, under California law, for the position that you're taking?

MR. CADELL: Your Honor, I think if there was an error in interpreting the California Supreme Court and it's application -- and whether or not the application would apply in this particular case, it's a question of California law. And as Judge Rymer --

QUESTION: Well, it's a question of California law, but it puts you in the position, it seems to me, of taking across the board -- in every case, without determining the existence of a dispute or not, it puts California in the position of running afoul, I would suppose, of the -- of footnote 12 in Lingle, which attempts to draw the line between what it is appropriate for a State to do and what it is not appropriate for a State to do in terms of Federal labor policy.

MR. CADELL: But we look at footnote 12 in Lingle, Your Honor, as drawing the outside boundaries of where the State may go as far as preemption is concerned. We don't look, or we didn't look at any rate, at the preemption principle set down by this Court as delimiting the State Labor Commissioner's right to set its own

jurisdictional --

QUESTION: So 229 preemption is not coextensive, in your view, with 301 preemption.

MR. CADELL: No, it's not. It's not inconsistent with, we don't believe, but it's not coextensive with.

QUESTION: Let me ask you this. Can the parties in a collective bargaining agreement waive the provisions of the California law on prompt payment?

MR. CADELL: No, I don't believe they can, Your Honor. I believe, though, that they could, in fact, provide for that particular problem coming up, that the remedy would be to take it to the Labor Commissioner. I believe that's possible.

QUESTION: Could they provide that the remedy is not to take it to the Labor Commissioner, but to arbitrate it?

MR. CADELL: Yes, they could do that as well.

QUESTION: Mr. Cadell, your -- I don't know what your authority for your description of California law is. The only California court case you cite to us is -- on this issue, any way, is Howard, and Howard doesn't say what you say it says. Howard also uses the word "dispute." The circumstances of the case at bench involved a dispute concerning the application of a CBA.

MR. CADELL: Your Honor, in the citation on Howard -- I don't have my -- you'll see where Howard is citing from Posner v. Grunwald. And they talk about the fact that they also have the --

QUESTION: And the quote --

MR. CADELL: It's at page 22, Your Honor.

QUESTION: The quote from Posner says "any controversy under a collective bargaining contract."

MR. CADELL: Yes, Your Honor. And our position is that the controversy is the amount of the penalty that's required to be paid.

QUESTION: But that's not under the collective bargaining contract.

MR. CADELL: No. But the controversy -- the right to it arises under the -- the right to receive that wage rate and the duty to pay that wage rate arises under the collective bargaining agreement.

QUESTION: There's no controversy on that. The only controversy is whether the penalty is due, and that's a controversy under State law apart from the collective bargaining agreement. I don't know. It seems to me that -- I would feel that I'm slandering the California Supreme Court if I accepted as California law what you tell us is California law. Now, maybe it's the -- maybe it's the Commissioner's interpretation of California law,

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but I'm --

MR. CADELL: Justice Scalia, as an aside I've had 20 years with the Labor Commissioner. On two occasions -- one occasion myself and another occasion one of the attorneys that work for me had -- went into court on this very issue, on -- concerning an arbitration agreement with a collective bargaining agreement and everything else and attempting to collect the 203 penalties. In both instances we were asked the same question; isn't this an application of the collective bargaining agreement. So it's not simply the Labor Commissioner --

QUESTION: Thank you, Mr. Cadell.

The case is submitted.

(Whereupon, at 11:09 a.m., the case in the above-entitled matter was submitted.)

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KAREN LIVADAS, Petitioner v. LLOYD AUBRY, CALIFORNIA LABOR COMMISSIONER

CASE NO.: 92-1920

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

BY Ann Mari Federico

(REPORTER)