

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CALIFORNIA DIVISION OF LABOR STANDARDS
ENFORCEMENT, ET AL., v DILLINGHAM
CONSTRUCTION, N.A., INC, AND MANUEL J.
ARCEO, dba SOUND SYSTEMS MEDIA

CASE NO: No. 95-789

PLACE: Washington, D.C.

DATE: Tuesday, November 5, 1996

PAGES: 1-53

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

NOV 12 1996

Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'96 NOV 12 P2:51

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - X

3 CALIFORNIA DIVISION OF LABOR :

4 STANDARDS ENFORCEMENT, ET AL., :

5 Petitioners :

6 v. : No. 95-789

7 DILLINGHAM CONSTRUCTION, N.A., :

8 INC. AND MANUEL J. ARCEO, dba :

9 SOUND SYSTEMS MEDIA :

10 - - - - - X

11 Washington, D.C.

12 Tuesday, November 5, 1996

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:01 a.m.

16 APPEARANCES:

17 JOHN M. REA, ESQ., Chief Counsel, California Department of
18 Industrial Relations, San Francisco, California; on
19 behalf of the Petitioners.

20 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States, as amicus curia,
23 supporting the Petitioners.

24 RICHARD N. HILL, ESQ., San Francisco, California; on
25 behalf of the Respondents.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF JOHN M. REA, ESQ. On behalf of the Petitioners	3
ORAL ARGUMENT OF JAMES A. FELDMAN, ESQ. On behalf of the United States, as amicus curiae, supporting the Petitioners	18
ORAL ARGUMENT OF RICHARD N. HILL, ESQ. On behalf of the Respondents	27
REBUTTAL ARGUMENT OF JOHN M. REA, ESQ. On behalf of the Petitioners	52

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

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-789, the California Division of Labor
5 Standards Enforcement v. Dillingham Construction and
6 Michael Arceo.

7 Mr. Rea.

8 ORAL ARGUMENT OF JOHN M. REA

9 ON BEHALF OF THE PETITIONERS

10 MR. REA: Mr. Chief Justice and may it please
11 the Court:

12 California seeks reversal of Dillingham because
13 our California law does not relate to ERISA plans. Even
14 if it did, the relationship is one which is under another
15 Federal statute and regulation, the Fitzgerald Act, which
16 ERISA may not modify and impair.

17 I would like to begin with the second argument,
18 because it allows me to talk about the practical effects
19 on apprenticeship of the Dillingham rule.

20 QUESTION: But before you do that, could you
21 tell me, counsel, it seemed to be conceded by both sides,
22 certainly by Dillingham, that this is a plan.

23 MR. REA: The answer, Justice Kennedy, depends
24 on which this.

25 The plan set up by the NESTU union and the

1 employers was an apprenticeship plan under ERISA, and then
2 at the point it got approved it became a registered
3 apprenticeship plan under the Fitzgerald Act.

4 Have I answered your question?

5 QUESTION: Well, are there apprenticeship
6 programs that are clearly not ERISA plans?

7 MR. REA: Yes, Your Honor.

8 QUESTION: And do those exist, or is this -- is
9 that just a hypothetical?

10 MR. REA: No, that's not a hypothetical. Of
11 course, the State doesn't know much about them if they
12 don't come to us for registration. One of the -- well,
13 there are a couple of answers in this record. One of the
14 research studies by the Bureau of Apprenticeship Training
15 estimated that about half of apprenticeship going on was
16 not registered.

17 Secondly, historic under the Solicitor -- under
18 the Department of Labor Regulations any unfunded
19 apprenticeship plan is not covered by ERISA.

20 And finally, historically, apprenticeship was
21 around a long time before ERISA and before there were
22 any --

23 QUESTION: Well, let me just ask this further
24 question. Are there approved and registered --

25 MR. REA: Yes.

1 QUESTION: -- apprentice programs that are not
2 ERISA plans?

3 MR. REA: Yes, Your Honor. We are -- our law is
4 indifferent as to whether they're covered by ERISA, and
5 the Fitzgerald Act has nothing to say about the areas of
6 ERISA concern, funding, money in or money out.

7 QUESTION: But those are the ones that you meant
8 by unfunded? You spoke of unfunded plans a moment ago.

9 MR. REA: Yes. The Secretary of Labor's
10 definition, we use unfunded as shorthand, and our law --
11 if someone comes to us and wants to register a plan or
12 have an apprentice work on public works we don't inquire
13 whether they're ERISA-covered or not. We'll approve him
14 if they meet the Fitzgerald Act standards, which we've
15 incorporated in our State law.

16 QUESTION: What do you mean by unfunded again?
17 Would you clarify that?

18 MR. REA: That there is no trust fund or
19 arrangement by which the employer or a group of employers
20 put in money and then use that to pay for the operation of
21 the training.

22 QUESTION: Is it easier to get certification if
23 you do have funding?

24 MR. REA: We frankly don't care.

25 I mean, historically these plans, certainly the

1 history of the Fitzgerald Act, these plans were being
2 organized during the Depression, when everybody had more
3 time than money, and single employer plans, typically
4 there's no reason, because apprenticeship is so closely
5 associated with work, to go to the trouble of setting up a
6 fund.

7 QUESTION: Well, thank you. That was, I
8 thought, a preliminary that helps me before you address
9 the points you were going to address.

10 MR. REA: One of the reasons, Justice Kennedy,
11 why it's not -- we've asked ourselves the same question.
12 We can't tell how many funded plans there are because we
13 never asked the question in the registration process.

14 The effects of the Ninth Circuit rule that
15 States really have no business insisting that those paid
16 as apprentices under our public works be registered
17 apprentices would modify and impair the Fitzgerald Act,
18 because that act directs the Secretary of Labor to promote
19 standards necessary to safeguard the welfare of
20 apprentices, and to --

21 QUESTION: But the Fitzgerald Act is, you know,
22 I think precatory, isn't it, kind of a feel-good type of
23 thing that doesn't really impose any specific legal
24 requirements on anybody?

25 MR. REA: It doesn't impose specific legal

1 requirements, Chief Justice, because it's a voluntary act,
2 but it's not merely precatory either. It directs the
3 Secretary to promote and invites -- and under that act he
4 invites the States into a partnership.

5 If the Fitzgerald Act merely said, registered
6 apprenticeship is a good and wonderful thing, and that's
7 the policy of the United States, I'd be constrained to
8 agree with you, but it doesn't.

9 It directs the Secretary to promote, and the
10 history shows that they promote and formulate standards,
11 and this particular definition of apprenticeship at issue
12 here through the Fitzgerald Act and through the
13 regulations we rely on both the act, which is somewhat
14 general, and the rather long tail of regulations which
15 have followed from it.

16 We rely on both of those for our Savings Clause
17 argument because it covers Federal law and regulations
18 under those laws.

19 The problem that --

20 QUESTION: Is the California law applicable
21 here? Does it operate just as an incentive for people?

22 MR. REA: Yes, it operates as an incentive.

23 QUESTION: Is it -- does it do any more than
24 that?

25 MR. REA: Yes. It's an incentive to those out

1 there who have a training plan which is --

2 QUESTION: Right.

3 MR. REA: -- sort of organized but not approved
4 to come up to the Fitzgerald Act standards because then
5 they'll be able to not only do our work, but they'll be
6 able to do Davis-Bacon work, but it's also in our interest
7 to do it, and the States owns these buildings, in this
8 case a jail. We're very, very concerned with the
9 competence of the people who do this particular one, and
10 who do our jails in the future. We want to have a skilled
11 workforce available even for such things as wireless.

12 It's our -- and the standards under the
13 Fitzgerald Act address those concerns very directly,
14 because they say that the people who will be brought on as
15 apprentices will have a commitment of at least 2,000
16 hours -- this is not just something tinkered together for
17 the plan -- that they'll have related and supplemental
18 instructions so that they'll have some theory behind what
19 they're doing, that they'll be -- most importantly to us,
20 there'll be a fixed ratio of journey-level persons to
21 apprentices, so you don't have two foremen and 35 people
22 named as apprentices --

23 QUESTION: Well, your response surprises me a
24 little. I would have thought you might take the position
25 that it is just an incentive, and therefore there's no

1 occasion for preemption.

2 MR. REA: Well --

3 QUESTION: And yet you're trying to respond some

4 other way. I'm baffled.

5 MR. REA: Well, the question is from who -- I

6 guess I'm responding from the point of view of the State.

7 It's --

8 QUESTION: Well, from the point of view of the

9 State you want to say it's not preempted.

10 MR. REA: Yes.

11 QUESTION: The California law.

12 MR. REA: But from the --

13 QUESTION: And one way to say it is, look, this

14 is just an incentive that we have for people.

15 MR. REA: Well, it's true that it is an

16 incentive --

17 QUESTION: You don't have to abide by it.

18 MR. REA: No one is required to either bid on

19 public works or --

20 QUESTION: Right.

21 MR. REA: -- or to use --

22 QUESTION: Right.

23 MR. REA: And if they want to use unregistered

24 apprentices they have to pay them as a journeyman.

25 From our point of view it's a Good Housekeeping

1 Seal of Approval. It addresses a lot of concerns.

2 From the contractor's point of view, or even if
3 there's an apprenticeship plan back there, ERISA-covered
4 or not, it is just an incentive. It's not an order.
5 There is no law in California, or as far as I know in any
6 other State.

7 QUESTION: But your response to me was, oh, no,
8 it's not an incentive, it's something else.

9 MR. REA: It's an -- it's both an -- from our
10 point of view, it's a quality guarantee. From the point
11 of view of --

12 QUESTION: For anyone who opts to follow it.

13 MR. REA: To do it, yes. But from the point of
14 view of an ERISA -- of an apprenticeship plan, ERISA-
15 covered or not, it is merely an incentive, and if the
16 preemption analysis --

17 QUESTION: But counsel, how do you deal with why
18 we're here, because Dillingham said we are having funds,
19 our funds are being withheld from us. That's coercive,
20 not -- it's not that you can do this if you like, but if
21 you don't do it you won't get paid.

22 MR. REA: The coercive aspect is in the
23 prevailing wage law. We set a prevail -- like most,
24 almost the majority of the States we set a prevailing wage
25 for public works for various reasons, and if you

1 misclassify or mispay someone, we will make you pay the
2 difference in a small penalty. That is coercive, as here.

3 The reason apprenticeship is involved is because
4 when caught with this mispayment the contractor's response
5 was, oh, these are apprentices, so meeting apprenticeship
6 standards is voluntary, but when you get caught fooling us
7 about who the apprentices are, we'll apply the prevailing
8 wage law, as here.

9 QUESTION: You are not -- going back to Justice
10 Kennedy's question you are not agreeing with the AFL-CIO
11 position that the training program is different from the
12 provision, the financial arrangement for gaining the
13 training, so that the training program itself, as
14 distinguished from how one pays for it, is not under
15 ERISA. You seem not to -- you and the Government both
16 seem to reject that argument.

17 MR. REA: That's correct, Justice Ginsburg.

18 QUESTION: And why?

19 MR. REA: The reason we're taking that position
20 is because, although it provides a neat answer in this
21 case, it addresses more -- it addresses larger issues of
22 ERISA jurisprudence than we need to answer, particularly
23 because you'd have the same question about funded-unfunded
24 in day-care centers and legal services plans and we think
25 we've bitten off enough without trying to answer those.

1 The funding-un -- nonfunded distinction in the
2 Department of Labor's definition seems to us to make sense
3 in apprenticeship, without trying to make a broader rule,
4 because apprentice --

5 QUESTION: Well, didn't this Court speak to the
6 issue in part in Massachusetts v. Morash, holding that a
7 State law impacting solely benefits may relate to an ERISA
8 plan, if they're financed by a separate fund?

9 MR. REA: Yes, and vacation fund is fairly close
10 to this case.

11 QUESTION: And that would be pretty much
12 contrary to the AFL-CIO view.

13 MR. REA: Yes. It's --

14 QUESTION: I thought we'd spoken to that.

15 MR. REA: Well, you hadn't spoken to
16 apprenticeship and the verbal formulation of
17 apprenticeship is a little different.

18 I mean, we're not saying that the AFL-CIO's
19 argument is impossible based on pure language it's
20 certainly possible. It just doesn't have any legislative
21 history or serve to explain other sections, and that's why
22 we'd say it's not proven.

23 QUESTION: Are there other cases that involve
24 services? And what's peculiar about this, it's like you
25 mention day care. It's not, you get paid a pension or you

1 get provided with a health insurance package, but it's --

2 MR. REA: It's ordinary work.

3 QUESTION: Is there any other case that
4 addresses that like -- the intera --

5 MR. REA: There's no other case. The only
6 things in ERISA which are in the list of possible benefits
7 provided by an ERISA-covered arrangement that are similar
8 to this are vacations, because they're so much like
9 ordinary work, but apprenticeship or other training, and
10 other training is clearly covered in the same phrase, are,
11 showing up for work, getting assignments from your
12 supervisor, doing those, earning as you go, and that's why
13 it's so closely tied to work.

14 I believe the reasons stated by the Department
15 of Labor and the Federal Register section quoted in the
16 United States brief for using funding was because of the
17 great difficulty in separating out apprenticeship or other
18 training from ordinary work. It's not like the pension
19 that you get after work, or health benefits that you buy
20 in a package and are handed. It's very much integrated,
21 and the only way they really had to keep from federalizing
22 vast areas of American employment law was by saying, well,
23 when it's funded, we'll look at the special ERISA-related
24 problems that funding brings.

25 QUESTION: Because that section 1002.1, when it

1 defines an employee welfare benefit plan, does include in
2 terms apprenticeship or other training programs. There's
3 no way to get around that, is there.

4 MR. REA: There's no way to get around that, and
5 certainly we think it deserves the same treatment as the
6 issue of vacations, that there is a definitional problem
7 that this Court recognized in Morash, and you have to
8 resolve it with the purpose of what Congress wanted to
9 cover in benefit provision arrangements, and the Secretary
10 has I think made the best effort at that.

11 The problems that we have in operation of the
12 Dillingham law touch each of the groups mentioned in the
13 Fitzgerald Act. As to the contractors, those who join
14 programs that meet the Federal standards, they invest in
15 their apprentices, and -- especially in the early years.
16 That raises their labor costs.

17 Every time that they lose a job to someone like
18 Sound Systems, Inc. who's just using temporary installers
19 and calling them apprentices, that discourages their
20 participation in plans. Nothing discourages contractors
21 as much as losing bids.

22 As to the apprentices, the second effect on
23 State jobs where the temporary installers work is, those
24 are jobs on which the apprentices and registered programs
25 can't earn any money and can't learn anything.

1 The biggest problem with keeping apprentices
2 working is getting them enough apprentice work. Those
3 that drop out are unavailable for a contractor bidding on
4 a Federal jail that needs wiring. Those that manage to
5 hang on in spite of not having jobs are just a lot less
6 trained than they would be otherwise.

7 This really discourages the use -- shrinking the
8 pool discourages the use of apprentices on Federal
9 projects.

10 The third problem is that having wildly
11 different kinds of work experience called apprenticeship
12 by two different levels of Government, and under the
13 Dillingham rule there will be State apprenticeship, which
14 can be pulling wires and hanging speakers, and somebody
15 telling you to go to school, and then registered
16 apprenticeship, where you, you know, engage and commit to
17 this long course of study.

18 That confuses the private sector that we rely on
19 to make the system work. The contractors, the schools
20 that train apprentices, and people thinking of going into
21 apprenticeship.

22 The fourth bad effect of the Dillingham rule is
23 admittedly a prediction. For nearly 60 years, the States
24 have been willing to engage in this partnership for high
25 quality standards. We use the definition of apprentice,

1 the Federal Davis-Bacon uses it, all of these Federal laws
2 use it, other laws of ours, like minimum wage, use it.

3 If we can't use that definition, if we're forced
4 to take people like temporary installers as our
5 apprentices, the States will give the job back to the
6 Feds.

7 QUESTION: Mr. Rea, come back to the preemption
8 question. I don't understand why the Federal Government
9 cannot continue to cooperate with the States, whether or
10 not this particular law of California is held to be
11 preempted.

12 All that the act requires is that the Secretary
13 of Labor is directed to cooperate with State agencies
14 engaged in the formulation and promotion of standards of
15 apprenticeship. It seems to me California agencies could
16 continue to set forth standards of apprenticeship. The
17 only question is whether California can consistently, with
18 ERISA, enforce those standards by excluding ERISA plan
19 apprentices from State contracts.

20 MR. REA: Well, we're -- you've asked two
21 questions, and let me take them in reverse order. We're
22 not excluding ERISA-covered apprentices. We're excluding
23 apprentices who don't meet the Fitzgerald Act standards,
24 and we're indifferent to whether they're ERISA-covered or
25 not.

1 But the problem you've put your finger on is, if
2 we preach to the contractors, the apprentices, the people
3 who own buildings, that the way to go is to meet these
4 high Federal standards of apprenticeship and don't
5 practice what we preach, it's a -- preaching is much
6 hindered by hypocrisy.

7 QUESTION: Well, it seems to me you can
8 formulate and promote standards by simply, for instance,
9 prohibiting any company from calling something a, quote
10 apprenticeship program unless it meets certain
11 requirements, which is a good deal short of this. That
12 would promote genuine apprenticeship programs so that
13 somebody doesn't enrol in a program which really doesn't
14 do the job.

15 MR. REA: I suppose it would, but our interest
16 is not only truth in advertising and promotion but also
17 the State's interest, because -- in really getting
18 apprenticeship back for that wage rate, because those are
19 our youth, those are our trainees, and, frankly, that's
20 our jail.

21 The other point I would like to address is, the
22 Dillingham rule really interferes with the interest in
23 uniformity that motivated much of ERISA. What we have is
24 a rule that makes the definition of apprentice on State
25 public works the same as Federal, and ERISA's theory about

1 the need for uniformity was that uniformity promotes the
2 furtherance of benefits.

3 The Dillingham rule does the opposite, because
4 the sound system apprentices here, for example, could not
5 work on a Davis-Bacon job in California or, again, Nevada
6 or anywhere else.

7 I would like to reserve the rest of my time if
8 there are no more questions.

9 QUESTION: Very well, Mr. Rea. Mr. Feldman,
10 we'll hear from you.

11 ORAL ARGUMENT OF JAMES A. FELDMAN

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

13 SUPPORTING THE PETITIONERS

14 MR. FELDMAN: Mr. Chief Justice, and may it
15 please the Court:

16 It's the position of the United States that the
17 judgment in this case should be reversed, both because the
18 State's prevailing wage law does not relate to ERISA plans
19 and because, if it did, it would be saved under the
20 section 114040 -- 1144(d) savings clause.

21 With regard to the relates-to issue, our
22 position is that the general principle is that where a
23 State is regulating an activity, that an employer may
24 carry out through an ERISA plan or may carry out through a
25 non-ERISA plan, and where the State's regulation neither

1 encourages nor discourages, nor prohibits nor requires the
2 employer from doing it by means of the ERISA plan, that
3 the State regulation is not preempted.

4 In that case, it would be most natural to say
5 that the State's regulation relates to the activity at
6 issue, here training programs, and not to ERISA plans.

7 Now, in Shaw v. Delta Airlines, if you look at
8 the last few pages, the last issue that the Court dealt
9 with in its opinion in that case concerned a New York
10 State regulation of disability insurance. It was clear
11 that disability insurance could be offered either by an
12 employer through an ERISA plan, or it could be offered
13 through a non-ERISA plan.

14 The Court held that even for those employees who
15 choose to offer it through an ERISA plan, that that
16 doesn't render -- they can't thereby immunize themselves
17 from the State's regulation. The State's regulation
18 related to disability laws, not to ERISA plans, and
19 therefore the State could continue to enforce those
20 regulations.

21 QUESTION: Now, this argument requires you to
22 establish, however, that not all apprenticeship programs
23 are ERISA plans. Is there some basis for that, other than
24 the funding-nonfunding distinction?

25 MR. FELDMAN: No. I think -- well, the basis is

1 this Court's decision in Massachusetts v. Morash, and the
2 Secretary of Labor's regulations on which that was based.

3 Apprenticeship -- apprenticeship, it's not just
4 apprenticeship, it's apprenticeship and other training
5 programs, and those are ubiquitous in the workplace.
6 Training goes on every day at all degrees of formality,
7 from totally informal to very formal programs in every
8 workplace in the country.

9 Congress did not intend, when it enacted ERISA,
10 as the Court recognizes in Massachusetts v. Morash, it
11 didn't intend to oust the States from their very
12 traditional jurisdiction over their basic employment
13 relationship. That is, the employer gives money to the
14 employee, and the employee does what the employer tells
15 the employee to do, and if that's get trained, then the
16 employee gets trained. If it's do some work and get some
17 training and go attend some courses, then that's what the
18 employee does.

19 ERISA was not intended to oust the States from
20 their kind of very basic and traditional regulatory
21 authority over that.

22 Where a fund is introduced, it introduces a
23 separate risk, as this Court said in Morash, and those
24 cases where separate risk is introduced, then ERISA takes
25 effect, and if an employee --

1 QUESTION: You mean by Federal funding or
2 assistance?

3 MR. FELDMAN: No. I --

4 QUESTION: What are you talking about?

5 MR. FELDMAN: No. What I mean is, where the
6 employer -- where it's not just a question of the employer
7 paying the employee money and the employee goes and gets
8 training or does what the employer says to do, but the
9 employer sets aside a fund and says, I'm setting aside
10 this fund for the benefit of the employees to accomplish
11 such-and-such goals, training, so on, maybe with other --
12 in concert with other employees.

13 QUESTION: But you say if the employer pays out
14 of his own general funds it's not?

15 MR. FELDMAN: It's not, and that's --

16 QUESTION: What's the difference?

17 MR. FELDMAN: The difference is that as the
18 Court -- that was exactly the difference that the Court
19 relied on in Massachusetts v. Morash, and the difference
20 is, where it's just the -- it's impossible to distinguish
21 what's going on from the normal payment of compensation to
22 a worker in return for the worker's normal taking care of
23 his job in the case where the compensation just comes out
24 of the employer's pocket, and moreover --

25 QUESTION: Well, that's a good idea, but where

1 do you get that out of the language of the statute? I
2 mean, are we just giving up on the term relates-to, and --

3 MR. FELDMAN: It doesn't -- I --

4 QUESTION: -- just devising distinctions that
5 we think are useful?

6 MR. FELDMAN: No. I -- actually, I don't think
7 that -- it doesn't really have anything to do with
8 relates-to. What the Court said in Morash was that it has
9 to do with the entire term, plan, fund or program for the
10 purpose of giving vacation benefits.

11 Similarly, in this case it really has to do with
12 the entire meaning of the whole phrase there in section
13 1002, plan, fund or program for the purpose of providing
14 apprenticeship or other training benefits. It's really
15 the exact -- an exact parallel, and let me give an example
16 that's not really that far from this case.

17 Imagine that a hospital --

18 QUESTION: Excuse me. You're saying, even
19 though they use different terms, plan, fund, or program,
20 if it's an apprenticeship or training program, it also has
21 to be a fund?

22 MR. FELDMAN: In order to be a -- it has -- the
23 Secretary of Labor has determined that in order to
24 distinguish between normal workplace, what goes on
25 normally in the workplace and the kind of benefit programs

1 that ERISA was designed to regulate, that the distinction
2 in the case of apprenticeship and other training programs
3 is between funded programs which are benefits of the sort
4 ERISA is intended to regulate and nonfunded programs,
5 which is just the employer hiring the employee.

6 QUESTION: But the statute refers to programs.
7 That statute refers to apprentice programs.

8 MR. FELDMAN: That's correct.

9 QUESTION: It not only refers to programs, it
10 refers to funds separately.

11 MR. FELDMAN: That's right, but also --

12 QUESTION: Fund or program.

13 MR. FELDMAN: That's right, but also the statute
14 throughout and in the pre -- in section 1001 which talks
15 about the purposes of the statute and elsewhere throughout
16 the statute talks -- it's quite clear that the statute is
17 directed towards benefits. It's not directed toward just
18 an employer who decides to get -- to pay an employee and
19 says go and learn how to --

20 QUESTION: But 1002.1 defines employee welfare
21 benefit fund. Where does the Secretary get the statutory
22 authority in that section to make his distinction?

23 MR. FELDMAN: Well, the Secretary does have
24 statutory authority in 29 U.S.C. 1135.

25 QUESTION: What basis in 1002.1 does the

1 Secretary rely on for making that distinction, because it
2 does seem that the definition covers any plan, fund, or
3 program.

4 MR. FELDMAN: The basis in -- the basis is that
5 that term, that entire phrase, plan, fund, or program for
6 the purposes of providing apprenticeship or other training
7 programs itself has to be -- that itself -- that it's
8 really a definition of that whole term, and I will admit
9 that the distinction between funding and unfunded in this
10 case, as in Massachusetts v. Morash, that that's not
11 something you're going to find in Black's Law Dictionary
12 if you look up any of those individual words.

13 QUESTION: Or in the statute.

14 MR. FELDMAN: No, but it is. It is, I think, in
15 the statute, because throughout the statute -- I mean, if
16 you look at section 1001, if you look up even 1144, what
17 the statute talks about is benefit programs, not the basic
18 employ -- payment of wages in return for work.

19 QUESTION: Are you saying that you must give a
20 different meaning to the word program in the first part of
21 the clause than in the second part of the clause?

22 MR. FELDMAN: No. I don't think I'm saying
23 that. I think I'm saying that the entire clause has to be
24 understood with some limitation. If not, it would take
25 over the entire role of just what goes on in the everyday

1 workplace, and that was not Congress' intent. If you look
2 at the wording throughout the statute where it talks about
3 employee benefit programs, and the example I wanted to
4 give was, if you take a --

5 QUESTION: No, I didn't mean --

6 MR. FELDMAN: If you take an internship at a
7 hospital, which is very much like an apprenticeship
8 program, and it's certainly a training program, according
9 to the Ninth Circuit's rule in this case -- and an
10 internship could be organized with a separate, as an ERISA
11 plan, and in our view it could be organized as a non-
12 ERISA training program.

13 Under the rule that California -- that the Ninth
14 Circuit adopted in this case, the State would be entirely
15 disabled from regulating how many interns -- how many
16 doctors you need to supervise interns in a hospital, under
17 what circumstances an intern may -- can assist in surgery,
18 all kinds of things like that.

19 Now, that perhaps is one extreme case, but
20 that's a training program just like the training program
21 in this case, and the need --

22 QUESTION: Would you agree that if you were
23 simply looking at the phrase, plan, fund, or program, you
24 really couldn't make this argument. And your argument
25 depends on saying you've got to read the statute whole.

1 MR. FELDMAN: That's right.

2 QUESTION: And Morash recognized that, and if

3 you don't read it whole this way, in effect you are going

4 to federalize a vast area of State activity which in fact

5 has nothing to do with the -- with kind of the gut notion

6 of administering trust funds.

7 MR. FELDMAN: That's exactly right, and if

8 you -- in the Morash opinion the Court says, you could

9 construe all vacation plans to be ERISA plans. That was

10 clear. You could do that.

11 QUESTION: Just as you could --

12 MR. FELDMAN: But you have to look at it in the

13 context of the whole statute and what Congress was trying

14 to accomplish here.

15 QUESTION: So if that's so, and -- the fact that

16 an employer sets aside a trust fund to buy vacations for

17 his employees does not make all the travel agencies and

18 hotels involved ERISA plans, right?

19 MR. FELDMAN: That's correct.

20 QUESTION: All right. Why isn't the same thing

21 true with a trust fund set up to buy apprenticeship

22 programs? Why, in other words, take the other side of it?

23 MR. FELDMAN: Well --

24 QUESTION: Why is it if you do have a trust

25 fund, pension fund, et cet -- or ERISA plan set up to fund

1 apprenticeship programs, why does that make the program
2 itself an ERISA program, any more than with vacations?

3 MR. FELDMAN: Because -- I think because the
4 training program itself as something that the employer has
5 set up is not going to some outside provider.

6 QUESTION: Well, in other words, if the vacation
7 travel agent happens to be somebody who does the
8 employer's vacation planning, the travel business becomes
9 an ERISA program?

10 MR. FELDMAN: No, I don't think that's right,
11 but I do think that raises a -- it would be a slightly
12 different question as why various State regulations of the
13 travel agent wouldn't be preempted, and that --

14 QUESTION: Why isn't it a fairly clear line to
15 say that -- oh.

16 MR. FELDMAN: Thank you.

17 QUESTION: Thank you, Mr. Feldman.

18 Mr. Hill, we'll hear from you.

19 ORAL ARGUMENT OF RICHARD N. HILL

20 ON BEHALF OF THE RESPONDENTS

21 MR. HILL: Mr. Chief Justice, and may it please
22 the Court:

23 If this Court were to affirm the Ninth Circuit
24 in this case, it would not mean the end of apprenticeship
25 as we know it. The parade of horrors laid out by the

1 State is overstated, and I believe it ignores economic
2 reality.

3 QUESTION: Well, wouldn't it mean that in any
4 case like this, for example, in which the employer in
5 effect wanted to exempt himself from the apprenticeship
6 obligations and the wage differential that that implies,
7 he would have a perfect way to do it simply by agreeing to
8 the apprenticeship scheme as part of his contract, then
9 funding his apprenticeship scheme with a trust fund like
10 this, then claiming on your theory that all of the State
11 regulations on apprenticeships relate to the plan and
12 becoming free of the regulations? Why wouldn't it be a
13 perfect ticket to an exemption from what he had agreed to
14 if he thought in this particular instance it was in his
15 interest to do that?

16 MR. HILL: Well, I think there are many ways to
17 take care of those abuses like that. I think the first
18 question is --

19 QUESTION: Under existing law?

20 MR. HILL: Under existing law. I think, for
21 example, the payroll practice regulation deals with a
22 situation where the employer simply agrees to provide
23 training in exchange for payment without establishing any
24 program or plan, and where there is no plan or program,
25 certainly that may fall within the payroll practice

1 regulation.

2 QUESTION: Would that, then, leave your client
3 in the same position that the client is in if the State
4 prevails here, except that he would be in that position as
5 a result of the enforcement of the different statute, the
6 payroll differential statute as opposed to the
7 apprenticeship scheme under the contract?

8 MR. HILL: Well, I think the difference between
9 my client's situation and the one I just outlined is that
10 my client has established a formal plan and program with
11 written standards, with supplemental training, with a wage
12 progression that corresponds to periods of training,
13 and --

14 QUESTION: But he's doing it for the purpose, in
15 effect, of honoring State law or State regulation with
16 respect to apprentices which he now says he's
17 unenforceable against him because he's funding his
18 obligation by an ERISA plan. Isn't that his argument?

19 MR. HILL: Well, I think the reason that this
20 contract --

21 QUESTION: Isn't that your argument?

22 MR. HILL: I'm not sure -- I think the reason
23 that this apprenticeship program was established was that
24 we have this Federal system of creating incentives to
25 comply with apprenticeship programs --

1 QUESTION: No, but why did your client establish
2 the ERISA plan? The ERISA plan was established to fund,
3 in effect, his apprenticeship obligations, and by virtue
4 of having done it by an ERISA plan he now claims that
5 because of the relating-to language there is a preemption
6 which exempts him from the State law that he established
7 the fund to honor. Isn't that his argument?

8 MR. HILL: I think I would put it slightly
9 differently. I think the reason this plan was established
10 was --

11 QUESTION: I would, too --

12 (Laughter.)

13 MR. HILL: -- to comply with Federal standards.
14 The incentive, the carrot, as it were, under the
15 Federal system of apprenticeship is, you get people to go
16 out and create apprenticeship programs and people want to
17 comply with the Federal Fitzgerald Act standards so that
18 they can bid on Federal public works projects and other
19 Federal projects having a Federal purpose.

20 And it's this voluntary system created by the
21 Fitzgerald Act that we want people to go out -- we want to
22 encourage people to go out and encourage apprenticeship
23 programs and plans, and the carrot is that if you do that,
24 and you comply with the Federal standards, then you can
25 bid work for Federal public works projects, you can pay

1 the apprentice rates on Federal projects.

2 QUESTION: Yes, and he does all that, and after
3 he's done it, for whatever reason, he says, this isn't
4 such a hot idea. I don't think I want to honor the
5 apprentice journeyman wage differential for whatever
6 reason, and I can get out of it by claiming an ERISA
7 preemption.

8 That may not be such a great thing for me in the
9 long run, but at least it gets me out of the situation
10 that I'm in now that I don't like.

11 MR. HILL: I don't think that happened in this
12 particular case, because we had the program and the plan
13 in effect. The standards were in place, as conceded by
14 Mr. Rea, when the work was being performed. We had a
15 little difficulty create -- getting the supplemental
16 instruction set up, so the plan was in place when the work
17 was being performed, and the apprentices were being paid
18 in accordance with the plan.

19 They were being paid in accordance with the
20 collective bargaining agreement, and all that happened in
21 this case was that we didn't get the approval from the
22 State until some later point in time, but my client was, I
23 believe, in all respects complying with the plan.

24 QUESTION: But you would be in the same position
25 if the reason you hadn't gotten the approval from the

1 State was, or if the reason for the withholding in this
2 case was that you simply hadn't followed the plan. You'd
3 be in the same position you're in right now, and you would
4 be claiming preemption, and for that reason you would be
5 claiming the illegality of withholding the wages.

6 MR. HILL: Well, if we had not followed the
7 plan, that I think would create a whole different set of
8 problems.

9 QUESTION: No, but I'm saying if you win this
10 case that's the option that you're going to have, or that
11 others -- I don't mean that your client is going to do it,
12 but that's an option that other contractors would have.
13 Isn't that correct?

14 MR. HILL: Well, I think there are several
15 safeguards in place. You have to --

16 QUESTION: Before you tell me about the
17 safeguards --

18 MR. HILL: Okay.

19 QUESTION: -- as a general proposition that is
20 correct, isn't it?

21 MR. HILL: I don't think that is -- I don't
22 think that affirming this case is really going to open the
23 floodgates.

24 QUESTION: Well, but of course it's correct,
25 what he said. Not whether it's going to open the

1 floodgates, but is it correct? It seems to me it is.

2 Isn't your response that you could create such a
3 hypothetical with respect to any provision that could be
4 preempted by ERISA? You could always create a
5 hypothetical that somebody does not want to abide by the
6 State law in question, which would be preempted, need only
7 set up an ERISA plan. Isn't that your response?

8 MR. HILL: I think my answer is yes, as long as
9 you set up an apprenticeship plan that meets the ERISA
10 standard, and that may be very different from the State
11 standard of what an apprenticeship training program ought
12 to be.

13 QUESTION: But does ERISA have any standards for
14 the training program as distinguished from the funding of
15 it? Does it have standards for the quality of the
16 trainers, the number of hours, the -- ERISA doesn't
17 regulate training, does it?

18 MR. HILL: Well, ERISA does not regulate
19 training because I think ERISA really leaves it to
20 employers to -- it doesn't set a minimum set of benefits,
21 so it's really up to the employers to create their own
22 diverse set of training programs.

23 The real safeguards in Federal law are the
24 Fitzgerald Act regulations which --

25 QUESTION: But they -- the State regulated

1 training of apprentices long before there was a Fitzgerald
2 Act, and it's very old kind of State regulation, isn't it?

3 MR. HILL: Well, it -- certainly within the last
4 30 or 40 years there was some regulation of
5 apprenticeship, but it's this conjunction of regulation of
6 apprenticeship and prevailing wage legislation that has
7 only come into existence within the last 20, 30 years.

8 QUESTION: The definitions section mentions
9 along with apprentice programs day-care centers and
10 prepaid legal services. Training programs and day-care
11 centers, the fact that it's an ERISA program wouldn't mean
12 that the quality standards imposed on day care by the
13 State are removed, would it?

14 MR. HILL: That's a hard question. I don't
15 think it would.

16 QUESTION: Well then, that's what -- I'm
17 struggling with this statute that lists them in a row,
18 training programs, day-care centers, prepaid legal
19 services, and at least it seems incredible to me to
20 believe that you could set up a day-care center and escape
21 all the State regulations, quality controls on that, if
22 you put it under the head of ERISA, so why should it be
23 different for training?

24 MR. HILL: Well, I guess one of the things
25 that's different about apprenticeship is that we have this

1 system, this voluntary system that the Federal Fitzgerald
2 Act regulations set up the standards that one must meet in
3 order to gain Federal approval, and I think it's that.
4 It's the incentive of complying with that system that
5 makes this case -- makes apprenticeship unique among
6 employee welfare benefit plans.

7 QUESTION: Why isn't it easier to make a
8 different kind of classification and in effect respond to
9 the problem that Justice Scalia raised that in theory you
10 could oust any State regulation by forming an ERISA plan?

11 And the answer to the classification I have in
12 mind is, if the ERISA plan is in fact funding what is a
13 requirement of a traditional area of State regulation,
14 which I dare say apprenticeship is, the regulation of day-
15 care centers is, and so on, just as the regulation of
16 hospital rates could be, then the fact that there is an
17 ERISA plan does not so connect the plan to the area of
18 regulation as to require preemption. Why isn't that the
19 answer here?

20 MR. HILL: Well, I guess my response to that is
21 that the connection in a case like this is that the
22 employers have set up a plan and a program that -- with a
23 detailed set of standards and wage progressions, and what
24 the State is attempting to do is to regulate that and tell
25 the employers they may not comply with the plan that they

1 have set up, and once that plan has been interfered with
2 in that way, you are interfering with the congressional --
3

4 QUESTION: No, but you're not interfering with
5 the plan if the object of the plan is to fund whatever you
6 are required or permitted to do by or consistent with the
7 traditional State regulation.

8 It seems to me that your argument is circular,
9 and both Justice Ginsburg's question and my question are
10 basically saying, there's got to be a limit to what is
11 connected to or related, and that limit is established by
12 looking for certain areas of traditional State regulation,
13 and if the effect on the ERISA plan is incidental to that
14 regulation, as it would be when a plan is set up simply to
15 fund the regulation, then you don't have preemption.

16 Why isn't that the answer? Why isn't that the
17 key to this case?

18 MR. HILL: I think there are a couple of
19 responses. First of all, as I read the cases, if ERISA
20 preemption is express, as I believe it is in this case,
21 then we don't need --

22 QUESTION: Well, how can you say it's express in
23 this case unless you -- maybe you do -- say that there
24 cannot be such a thing as an unfunded plan which does not
25 fall under ERISA? I take it that is your position. Every

1 plan, even unfunded plans, is an ERISA plan within the
2 meaning of the statute.

3 MR. HILL: I -- well, I think my position,
4 although you may not need to reach this in order to get a
5 result in this case, my position is that every plan or
6 program to create apprenticeship is covered by ERISA
7 whether it's funded or unfunded.

8 QUESTION: Right. That's what I meant, and
9 don't you have trouble under Morash?

10 MR. HILL: I don't believe I have trouble under
11 Morash. As I read that case it was limited to the
12 situation where a single employer was paying vacation out
13 of its own general assets, and I believe the Court said
14 that we would have a different situation if a group of
15 employers had set up a separate trust fund to pay vacation
16 benefits for a larger group of employees.

17 QUESTION: But under your analysis, as I
18 understand it, you could have a single employer setting up
19 a -- an apprentice program with its own standards. That
20 would be an ERISA plan, and it would preempt.

21 MR. HILL: I believe that's possible as long --

22 QUESTION: That's your -- I think that's your
23 theory, is it not?

24 MR. HILL: That is my theory. As long as there
25 is a genuine plan or program and not something that's

1 simply --

2 QUESTION: Well, it's genuine. It just provides
3 standards that differ from those that California and the
4 Secretary of Labor would require.

5 MR. HILL: That's right, and I --

6 QUESTION: And it still would preempt.

7 MR. HILL: I -- that is my theory.

8 QUESTION: Yes.

9 QUESTION: What would be the reason for Congress
10 wanting to regulate under ERISA an unfunded apprenticeship
11 plan?

12 MR. HILL: Well, I think that we can imagine an
13 unfunded -- I guess in Morash I think the Court dealt with
14 by saying that where there is a risk different than simply
15 the risk of employment, and one can imagine a
16 apprenticeship program or plan which has detailed
17 standards, detailed training requirements and those sorts
18 of things which happens to be unfunded, and I believe that
19 the congressional intent is to regulate those sorts of --

20 QUESTION: Well, wasn't Congress' concern in
21 ERISA, granted, you repair to the statute to determine
22 that in the first instance, the insolvency and failure to
23 put together enough financing for these various plans?

24 MR. HILL: I think that is one of the risks that
25 we are concerned about when you have these multiemployer

1 funded plans. You also have the risk of, or have the
2 concerns with the administration of detailed plans, and I
3 think that risk, the desire for administrative integrity,
4 would attach to some unfunded plans.

5 Disclosure requirements can apply to unfunded
6 plans as well as funded plans.

7 QUESTION: What would you disclose about an
8 unfunded plan?

9 MR. HILL: Well, there may be very limited
10 disclosure requirements, but you may have to disclose who
11 is administering the plan, what the relationships of those
12 people are to the participating employers, what the
13 standards are, how one gets training, what kinds of
14 things, what a person must do to complete the
15 apprenticeship, so the disclosure may be limited, but
16 there may be some disclosure.

17 QUESTION: Mr. Hill, you heard counsel for the
18 State say that there are without question unfunded plans
19 out there. They don't happen to have the number. But I
20 take it, then, you're willing to accept the consequence
21 that if you're right, ERISA regulation is due for a
22 potentially very significant expansion, because they're
23 not -- ERISA isn't regulating any of these plans now.

24 MR. HILL: The logical extension of my position
25 is that ERISA will protect many different varieties of

1 training and apprenticeship programs, other than the type
2 of program we have here before -- in this case.

3 QUESTION: So you're -- I mean, ERISA has not
4 been doing what it should have been doing on your theory.

5 MR. HILL: And -- I think that's partly correct.
6 I would agree with that, and I would say that this is
7 inherent in the structure of ERISA and the Fitzgerald Act,
8 because --

9 QUESTION: What about a training program that
10 the employer would offer, say, that we need to have a
11 healthy workforce so we're going to have this gym
12 facility, this health club, and that's -- and then could
13 they then say because it's under ERISA we want to be
14 relieved of all these State requirements that -- these
15 safety, and enough space, and all that, we don't have to
16 worry about that because it's an ERISA plan and its State
17 regulation is preempted?

18 MR. HILL: Well, this sounds very close to what
19 the Department of Labor is attempting to prevent through
20 their payroll practice regulation, because if a single
21 employer just says, I'm going to establish a health plan,
22 and I pay for it out of my general assets --

23 QUESTION: Well, let's say a group of employers
24 do it. They get together and they say, we're going to
25 have this facility, and all our workers will use it, and

1 we're going to fund it out of a plan, and so State, please
2 don't tell us about how much space we need between
3 machines, and the quality of what -- the equipment.

4 MR. HILL: That is a difficult question, I
5 concede, because if you take that to the logical extent, I
6 suppose a program, a plan could be created for that
7 purpose, and it's probably unlikely to happen in the real
8 world because employers don't want to go --

9 QUESTION: But it could happen, certainly, with
10 the day care, which is in that same string.

11 MR. HILL: I think that is to some extent a
12 risk, and I think it's perhaps inherent in Congress' --

13 QUESTION: How about legal services? They're
14 all together, and if you're saying that they can't touch
15 training because it's under an ERISA plan, and it's listed
16 right in the statute as such, but so are these other
17 things, so why would training be more untouchable than a
18 day-care center, prepaid legal services --

19 MR. HILL: I'm --

20 QUESTION: -- my health club?

21 MR. HILL: I'm not sure I can draw that line. I
22 suppose that in the real world employers are much more
23 likely to join together to create apprenticeship and
24 training programs than they are to join together to create
25 health clubs or legal --

1 QUESTION: Day-care centers is not so unusual.

2 MR. HILL: And --

3 QUESTION: But the only problem I have with that
4 argument, you say it's the same whether it's a single
5 employer or a multiemployer under your reading of the
6 statute, and if you read it literally, you're dead right.
7 I mean, we said that in the vacation case, but we say you
8 can't read this statute literally. It just doesn't make
9 any sense. That's the problem.

10 (Laughter.)

11 MR. HILL: And --

12 QUESTION: It could -- this -- any employer
13 could preempt all the health regulations for day care, a
14 whole host of State regulations, if you read everything
15 literally.

16 But you're saying, well, maybe we don't have to
17 read it literally when we get to day-care centers, but
18 then why do we have to read it literally with respect
19 to --

20 MR. HILL: Well --

21 QUESTION: -- apprentice programs?

22 MR. HILL: I concede that's a problem, and I
23 think it is possible to decide this case in my favor
24 without reaching this larger issue of what -- how far
25 ERISA applies to apprenticeship programs, because this, in

1 fact, was a multiemployer-funded apprenticeship program,
2 and perhaps the decision can be limited to that.

3 QUESTION: Well, how? I mean, why wouldn't it
4 be quite arbitrary on your theory to limit it to that?

5 MR. HILL: Why --

6 QUESTION: Just as it seems to me it would be
7 equally arbitrary to -- in answer to Justice Ginsburg to
8 say that we'll draw the line before ERISA gets to the day-
9 care centers. If we accept your theory, we -- you know,
10 we've got to go the whole hog.

11 MR. HILL: And I think what I'm suggesting is
12 that in this particular case it may not be necessary to
13 draw that line. There may be a future case --

14 QUESTION: No, but how? How do we do it,
15 because it seems to me the answer to Justice Ginsburg's
16 question on day-care centers is inevitable. As I
17 understand you correctly, the answer to Justice Stevens'
18 question, even when you get to the single employer
19 schemes, is inevitable. How are we going to draw this
20 line that you want us to draw?

21 MR. HILL: I feel it's a difficult line because
22 ERISA does not define that line, the regulations do not
23 define that line, and my best response is that in this
24 particular case virtually all the parties, save and except
25 the AFL-CIO, have conceded that this particular

1 apprenticeship program is governed by ERISA.

2 QUESTION: Well, some of the Government's
3 argument is based on the distinction between funded and
4 unfunded and, of course, if -- you would win, I take it,
5 if we adopted that approach because your client's plan was
6 separately funded.

7 MR. HILL: It was indeed, Mr. Chief Justice.

8 QUESTION: If --

9 QUESTION: It was separately funded?

10 MR. HILL: Yes. The employer --

11 QUESTION: And yet the Government's position is
12 that because of that, there is no preemption.

13 MR. HILL: I frankly have a difficult time kind
14 of understanding the logical -- logic of that argument.

15 QUESTION: Well, I guess they rely in part on
16 this Court's holding in Morash and in part on the
17 Secretary of Labor's regulations and determinations, is
18 that right? That's how they draw the line --

19 MR. HILL: I believe that's their position --

20 QUESTION: -- between funded and unfunded.

21 Now, how do you respond to the reliance on the
22 Secretary's regulations and the Morash decision?

23 MR. HILL: Well, I think my first response is
24 that this was -- the regulation itself, the payroll
25 practice regulation is limited to provisions of training

1 out of an employer's general assets, and we don't have
2 that situation here because we have payments into a
3 separate trust fund and that fund is part and parcel of
4 the larger program.

5 I think the second distinction between this and
6 the Morash case is that Morash was limited to payments by
7 a single employer out of its general assets. We have a
8 large group of employers in this particular case.

9 And in response to the larger argument made by
10 the Government, it is that once you concede that this
11 particular apprenticeship program is governed by ERISA,
12 then I believe the logical conclusion is that California's
13 law relates to that plan because it is regulating how
14 those apprentices are going to be paid and trained.

15 QUESTION: So at bottom you say the statute, the
16 ERISA statute itself does not permit drawing that
17 distinction that the Government would draw.

18 MR. HILL: Yes.

19 QUESTION: All right. Let's assume that you're
20 right and we don't draw that distinction. Let me then go
21 to the last part of your answer to Justice O'Connor and
22 say that it then follows that the preemption is going to
23 occur.

24 Why does it follow that preemption is going to
25 occur, whether we're talking about funded or unfunded

1 plans? Why does it follow that preemption is going to
2 occur if we are nonetheless concededly in an area of
3 traditional State regulation which we have already held it
4 is assumed that Congress did not intend to obliterate
5 under the guise of ERISA? Why does the preemption follow?

6 MR. HILL: Well, I have several responses to
7 that. One is, where we have express preemption I don't
8 think we need to get into the question of what is
9 traditional State regulation.

10 I think beyond that we need to look at the
11 express language of the Fitzgerald Act regulations,
12 because that goes to the question of --

13 QUESTION: But without leaving out the
14 Fitzgerald Act, it's the related to. It was in your
15 colloquy before with Justice Souter.

16 MR. HILL: And --

17 QUESTION: So let's forget about, it's a plan.
18 It's an ERISA plan. Is --

19 MR. HILL: I think there are several additional
20 responses in that regard. I think the California statute
21 specifically refers to apprenticeship plans, and it --
22 that's one. It attempts to regulate the substantive
23 content of apprenticeship plans by dictating how much
24 employers can pay people, how much -- and how training is
25 to be provided.

1 QUESTION: Well, then it seems to me that you're
2 saying that there will be no end to related to, that if --
3 that no State law is ever going to survive, whether it is
4 a subject of traditional State regulation or not.

5 The same conclusion, it seems to me, would have
6 to follow, for example -- assuming there were no
7 distinction between funded or unfunded plans, the same
8 conclusion would have to follow with respect to hospital
9 rate regulations, wouldn't it?

10 MR. HILL: Well, I didn't read the Traveler's
11 decision that way. I think this really goes to the
12 question of what you intended by that decision. I read
13 that to be a fairly limited decision which applies to a
14 specific classes of cases where ERISA preemption is not
15 obvious.

16 QUESTION: But I think your -- the only point
17 that I'm trying to make is, or that I'm trying to
18 understand is that I think your theory of preemption does
19 not accord any significance to the fact that some areas of
20 State regulation which do not regulate trust funds as such
21 are traditional areas of State regulation which Congress
22 presumably did not intend to preempt, and I think your
23 argument assumes that that really is not a distinction
24 that we can make.

25 MR. HILL: I think it's very difficult to make

1 that distinction, given the express language of ERISA.

2 QUESTION: May I ask another question? This
3 case deals with the character of the training and the
4 compensation, whether you can pay the apprentice less than
5 the prevailing wage and all.

6 Supposing we had a safety-related problem that
7 a -- that the State required wearing helmets on the
8 construction jobs or something for apprentices, and the
9 ERISA plan said no such thing should be required, would
10 the preemption apply to such regulations as well, in your
11 view, as well as economic --

12 MR. HILL: I don't think it necessarily would
13 apply because that wouldn't be inconsistent with what the
14 apprenticeship program provides.

15 QUESTION: No, but they say -- the group of
16 employers drafted an apprenticeship program that said they
17 shall wear a different kind of safety gear, less
18 protective of the employee than the State regulation
19 required. Would that preempt the State regulation, and if
20 not, why not?

21 MR. HILL: Well, that's certainly a more
22 difficult question.

23 QUESTION: It's really the same question, I
24 think. It's safety instead of money. That's the
25 difference. And I don't know why if you preempt the

1 prevailing wage rate you don't preempt everything else.

2 MR. HILL: And I suppose the only difference
3 about safety is that that is really not an integral part
4 of ordinary apprenticeship programs, but I'm not sure
5 that's --

6 QUESTION: No, but I don't know why it couldn't
7 be. They couldn't say they'd have to, you know, take
8 special care with people who are unfamiliar with the
9 hazards of the workplace, and so forth.

10 MR. HILL: It is possible that apprenticeship
11 programs will have safety standards.

12 QUESTION: Does the California regulation in
13 question here deal at all with the way the apprenticeship
14 plan is funded?

15 MR. HILL: I don't believe that the labor code
16 provision makes any distinction between funded or unfunded
17 plans.

18 QUESTION: But I mean, does it attempt to
19 regulate the funding itself, the way the employer pays in,
20 or the kind of reports he has to make in connection with
21 what he pays in?

22 MR. HILL: I don't believe there is.

23 QUESTION: Might not that be a possible
24 distinction, that if the State regulation doesn't deal
25 with the funding aspect, then perhaps it doesn't relate

1 to?

2 MR. HILL: Well, again, if -- regardless of
3 whether we have a funded or unfunded plan, if the State is
4 telling the apprenticeship program they can't comply with
5 their own standards, in our view there is preemption, and
6 I think that's what happened in this particular case.

7 QUESTION: But why doesn't that help --

8 QUESTION: You wouldn't let the State decide,
9 for example, that employers shall not -- shall not have
10 vacation plans other than a certain type, would you?

11 MR. HILL: No. I believe that that --

12 QUESTION: Don't you think that would be
13 preempted by ERISA, and that doesn't relate to the
14 funding.

15 MR. HILL: Once you get to the point that a
16 vacation plan is covered by ERISA as opposed to being a
17 Morash-type payroll practice, then yes, that is my
18 position.

19 QUESTION: Can -- why doesn't it help to cut
20 through the morass just what the Chief Justice said, which
21 is, we make a basic distinction between the funding
22 mechanism, which is the heart of ERISA, and that which the
23 funds are used to buy, and once you get into the second
24 category, the question of whether a State statute relates
25 to ERISA depends. It all depends.

1 If it's pensions, that's just money that's being
2 paid out, and it would be harder for the State to survive.
3 If it's day-care centers, or vacations, that's at the
4 other extreme, very, very distant, and this seems more
5 like the other extreme.

6 But that basic distinction, why isn't that
7 really the key to this?

8 MR. HILL: My best response to that is that the
9 statute does not make that distinction between the
10 funded -- the funding aspects of an apprenticeship program
11 and all the other aspects of the program. I think that
12 requires a judicial gloss on the statute which just isn't
13 apparent from the explicit words of the statute.

14 QUESTION: Of course, you could have said the
15 same thing about Morash. You don't challenge Morash, do
16 you? You don't ask us to reexamine that case, do you?

17 MR. HILL: No. I -- my position is this is a
18 different case because it involves many employers, it's a
19 funded program --

20 QUESTION: Yes, and involves pension -- I mean,
21 apprentice rather than vacation.

22 MR. HILL: And I believe it is possible to limit
23 this decision to funded apprenticeship programs like we
24 have in this particular case, although that is not the
25 position that I'm advocating here. Nevertheless, that may

1 be a way of deciding the case.

2 In conclusion, I think the point that -- about
3 ERISA and the Fitzgerald Act is that it creates a
4 voluntary system for promoting apprenticeship. Employers
5 are encouraged to create apprenticeship programs with the
6 carrot of being able to participate in Federal public
7 works projects. When the State --

8 QUESTION: You could call it that, or you could
9 call it the stick of not being able to participate in
10 public works projects. I mean, that's -- whether it's a
11 carrot or a stick is surely in the eye of the beholder,
12 don't you think?

13 MR. HILL: Thank you, Your Honor.

14 QUESTION: Thank you, Mr. Hill.

15 Mr. Rea, you have 1 minute remaining.

16 REBUTTAL ARGUMENT OF JOHN M. REA

17 ON BEHALF OF THE PETITIONERS

18 MR. REA: Then I think I have one point and one
19 suggestion.

20 The one point was, counsel referred to their
21 plan as a genuine plan or program, and certainly after
22 they got their act together and they found that school in
23 February, we did approve the program. Work went on
24 between October and February without it.

25 But ERISA under the case of Donovan v.

1 Dillingham permits preemption if you just have a plan
2 that's covered by ERISA. It doesn't have to comply with
3 anything, and I can write an ERISA plan under the Donovan
4 case with intended beneficiaries, no particular amount of
5 funding, intended training, in about 5 minutes. There's
6 no guarantee that things would come up as well as they
7 finally did in this case.

8 The suggestion was on the issue on which you
9 were pursuing the Solicitor, which is, what's the sense of
10 this funded-unfunded distinction? Obviously, I can't
11 speak for the Secretary of Labor, but it seems to me that
12 a logical line is this.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rea.
14 Your time has expired. The case is submitted.

15 (Whereupon, at 11:01 a.m., the case in the
16 above-entitled matter was submitted.)
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

CALIFORNIA DIVISION OF LABOR STANDARDS ENFORCEMENT, ET AL.,
PETITIONERS V DILLINGHAM CONSTRUCTION, N.A., INC, AND MANUEL J.
ARCEO, dba SOUND SYSTEMS MEDIA
CASE NO. 95-789

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

BY Don Mari Federico

(REPORTER)