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IN THE SUPREME COURT OF THE UNITED STATES

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ARTHUR S. LUJAN, LABOR :
COMMISSIONER OF CALIFORNIA, :
ET AL., :
Petitioners :
v. : No. 00-152
G & G FIRE SPRINKLERS, INC. :
- - - - -X

Washington, D.C.
Monday, February 26, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:01 a.m.

APPEARANCES:

THOMAS S. KERRIGAN, ESQ., Van Nuys, California; on behalf
of the Petitioner.
JEFFREY A. LAMKEN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the United States, as amicus curiae,
supporting the Petitioners.
STEPHEN A. SEIDEMAN, ESQ., Los Angeles, California; for
the Respondent.

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CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 00-152, Arthur S. Lujan v. the G & G Fire Sprinklers, Inc.

MR. KERRIGAN: Mr. Chief Justice, and may it please this Court --

CHIEF JUSTICE REHNQUIST: Yes, I think we'll wait just a minute until some of the crowd clears out.

MR. KERRIGAN: Very well, Your Honor.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Kerrigan, you may proceed.

ORAL ARGUMENT OF THOMAS S. KERRIGAN

ON BEHALF OF THE PETITIONERS

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

This case comes on a second time for review before this Court following the initial petition for granting petition for certiorari in 1999, when the Court vacated the decision of the Ninth Circuit, and sent the case back for reconsideration under this Court's decision in American Manufacturers Mutual Insurance Company v. Sullivan.

We argued at that time that the decision of the Ninth Circuit was a radical departure from established

1 principles of constitutional law, and the cases decided
2 under the Due Process Clause of the Fourteenth Amendment,
3 and the Court, we would submit, has only paid lip service
4 to this Court's decision in Sullivan and again renders a
5 decision which compounds confusion in the law and is again
6 a radical departure.

7 The Ninth Circuit again takes the position that
8 any interest or any declaim for payment under a public
9 works contract is a property interest within the meaning
10 of the Fourteenth Amendment. That is a decision and a
11 viewpoint which is contrary to every other circuit that
12 has decided that question, including the Second District
13 and the Court of Appeals in the First and Seventh
14 Circuits.

15 Also, in the Ninth Circuit the position has been
16 for a number of years, as reflected in San Bernadino
17 Physicians Services, that these types of interests in
18 construction contracts, public construction contracts,
19 were not within the concept of property within the Due
20 Process Clause.

21 This Court in Sullivan made it clear that in
22 order to determine that there was a property interest,
23 that a plaintiff had to pass certain minimum standards,
24 had to surmount certain hurdles of pleading and evidence
25 that were never surmounted in this case and it is clear in

1 this case that, to use the language of Sullivan, that
2 plaintiff has never made good on its claim.

3 QUESTION: Mr. Kerrigan, has the California law
4 changed since this case came about?

5 MR. KERRIGAN: There is, as we pointed out in
6 our brief, Your Honor, the legislature has enacted some
7 new laws which --

8 QUESTION: Under the new law, can the State
9 labor department require the withholding by the contractor
10 from the sub?

11 MR. KERRIGAN: There are some instances under
12 the new law where the DLSE, the Division of Labor
13 Standards Enforcement, can require a withholding.

14 QUESTION: But the law at the time this case
15 arose was different, and there was no requirement -- the
16 labor department couldn't require the withholding, is that
17 right?

18 MR. KERRIGAN: Under the law that existed at
19 this time, the only party who is required to withhold was
20 the awarding body, the State agency. The private parties,
21 the general contractor, the prime contractor was not
22 required to withhold. That was a matter within his
23 discretion.

24 Now --

25 QUESTION: Is there any practical instance in

1 which the prime would not withhold? After all, the prime
2 is not going to get paid. What prime would want to keep
3 the underpayment, rather than shifting it to a third
4 party?

5 MR. KERRIGAN: Well, to start with the very
6 obvious, Justice Ginsburg, there would be the situation
7 where the prime doesn't owe any money to the sub. They
8 get the withholding notice, there's nothing to withhold.
9 That's a very obvious example. There are also examples,
10 for instance, where the situation of the subcontractor
11 would be such that if there was a withholding it would put
12 him out of business, and it might be in the interest of
13 the prime contractor not to put the sub out of business
14 because it might jeopardize performance under the
15 contract. That is another example.

16 QUESTION: Do you know if practically these -- I
17 know you -- are possibilities.

18 MR. KERRIGAN: Yes.

19 QUESTION: Practically, has there ever been a
20 case where DLSE has told the prime, we're reducing your
21 amounts by X, where there hasn't been a pass-on?

22 MR. KERRIGAN: That has happened. That does
23 happen. There are long-term relationships in this
24 industry. Some of these people have been dealing with
25 each other for years. There are situations where they

1 could be fixed, where people have trust in each other, and
2 in fact that has occurred, yes.

3 QUESTION: Because there would be a penalty.
4 It's not just that the wages would be withheld, but there
5 would be a penalty imposed, a daily penalty, isn't that --

6 MR. KERRIGAN: There would be. The law requires
7 that.

8 QUESTION: So it could mount up pretty high.

9 MR. KERRIGAN: Depending on the nature of the
10 violation, it certainly could, and some of these
11 violations are very substantial, and the amounts of money
12 are very substantial.

13 QUESTION: Even if there were no statutory
14 provision authorizing the prime to withhold, wouldn't it
15 be true, under the law of contract in, I assume every
16 State, that under the circumstances of this case the prime
17 could withhold anyway, because the contract law is assumed
18 to be made to incorporate whatever positive legal
19 obligations there are, and if there is a positive legal
20 obligation on the part of the sub to pay a prevailing
21 wage, and the sub is not doing it, couldn't the prime say,
22 you are breaching the contract to that extent, and because
23 I can be sued I'm going to protect myself by withholding
24 something from my payment to you?

25 MR. KERRIGAN: That is indeed the case, and

1 that's been the history of the construction industry.

2 QUESTION: He can do it, but he'd be liable if
3 he was wrong about whether the sub was in breach or not.

4 MR. KERRIGAN: He -- absolutely. He would be
5 absolutely be liable.

6 QUESTION: In other words, he'd be accepting on
7 faith the State's determination that the sub was in
8 breach, and if he was wrong about it he'd be liable for
9 damages.

10 MR. KERRIGAN: That's the only way to read --

11 QUESTION: Isn't he also going to have to pay
12 the sub in this case if the State is wrong?

13 MR. KERRIGAN: Absolutely, Your Honor.

14 QUESTION: Sure, so my question is, if the
15 authorization in the statute is a key to a determination
16 that there is State action here, wouldn't the general law
17 of contract be an equal key, even if this provision did
18 not exist?

19 MR. KERRIGAN: I'm sorry, Your Honor.

20 QUESTION: In other words, if this is State --
21 put it another way. Why should we say it is State action
22 when he is doing absolutely -- the prime is doing
23 absolutely nothing more than the prime could do under the
24 general law of contract?

25 MR. KERRIGAN: Well, that's in fact the case,

1 Your Honor.

2 QUESTION: Yes.

3 MR. KERRIGAN: The relationship of the prime and
4 the sub in this industry, and as far as -- and as long as
5 this industry has existed, has been that if there are
6 situations of this kind under custom and practice, the
7 prime withholds.

8 QUESTION: Mr. --

9 QUESTION: You would accept that argument?

10 MR. KERRIGAN: Yes.

11 QUESTION: Yes.

12 QUESTION: Mr. Kerrigan, G & G Fire Sprinklers,
13 the respondent here, they are the sub we're talking about
14 here?

15 MR. KERRIGAN: That's correct, Your Honor, Mr.
16 Chief Justice.

17 QUESTION: And did they ever sue in any
18 California court to recover what they claim to have been
19 owed?

20 MR. KERRIGAN: Not only did they not sue, they
21 never submitted any kind of a claim that we're aware of.
22 They never reduced any kind of a claim to writing that
23 we're aware of, and when we talk about a claim in this
24 case we're talking about something that's an abstraction,
25 because G & G never availed itself of any remedies in any

1 California court.

2 QUESTION: May I ask a further question on that?
3 Have they ever represented that they did, in fact, comply
4 with the statutes concerning the level of compensation?

5 MR. KERRIGAN: Never. Never, and there's
6 nothing in the record where they ever made the claim that
7 they complied with the prevailing wage requirements, or
8 any other conditions of the contract. There's nothing in
9 the record, and we've been in front of the Ninth Circuit
10 three times on this, we've been in the district court two
11 or three times, and there's no such claim.

12 Now, one of the other questionable, we suggest,
13 determinations of the Ninth Circuit was that a cause of
14 action, a trial in a court of law was not a hearing within
15 the meaning of due process, that somehow there was some
16 requirement that the hearing had to be an administrative
17 hearing, and we believe that that is contrary to the
18 decisions of this Court in cases like Hudson v. Palmer,
19 and Ingraham v. Wright, where the Court at least in those
20 cases suggested that a trial in a court of law was,
21 indeed, a hearing within the meaning of due process.

22 QUESTION: May I ask you on that question -- I
23 understand they haven't done it, but is there an
24 administrative procedure in which they could have said,
25 here are our books, take a look at it, and we've done

1 everything we're supposed to do, or do they have to sue?

2 MR. KERRIGAN: There is -- certainly that could
3 have been done informally, and there's certainly
4 communications between the parties. There was no such
5 administrative procedure at that time.

6 QUESTION: Is there -- under the amended
7 statute, is there such a procedure?

8 MR. KERRIGAN: There was a temporary regulation
9 put in effect during the course of this appeal that has
10 been utilized prospectively, and there have been a number
11 of hearings under that regulation, but there was none at
12 this time.

13 QUESTION: It's pretty high-handed, don't you
14 think? I mean, the State, without giving the sub even a
15 chance to respond to these allegations simply directs the
16 prime contractor to give the State the money owed to the
17 sub? It's a kind of garnishment, I guess, and that's what
18 makes it a little different from the ordinary contract
19 case.

20 MR. KERRIGAN: Well --

21 QUESTION: The way the statute reads, what you
22 must pay to the State is the money owing to the sub.

23 MR. KERRIGAN: Justice Scalia, we would say it
24 is completely different than a garnishment. We would say
25 there is a spectrum of situations that one would pose in

1 these cases. You have on the far end of the, extreme end
2 of the spectrum cases that like the James Good Realty, the
3 Hawaiian case, where a party was divested of real property
4 interest.

5 You have the Sniadach case, where there was a
6 garnishment, where property is in possession of the --
7 let's say, the subcontractor, and that property is
8 divested and the right is divested.

9 This is a situation where there are two parties,
10 one party claims that the other party is not entitled to
11 the property, or in this case the money, and the other
12 party is claiming that they are entitled to the money. We
13 think it's perfectly reasonable, especially in view of the
14 well-known insolvency of the subcontractors, that for the
15 protection of the workers on these projects, that the
16 withholding is appropriate.

17 And Justice Stevens in Sullivan said, and I
18 think that -- as we said in our brief, I think that
19 philosophy kind of tends to underscore the decision in
20 Sullivan that there is nothing unreasonable if a party in
21 good faith, who has possession of the property or the
22 goods, takes the position that they're going to hold onto
23 that property to preserve the status quo until some kind
24 of a reasonable determination can be made, and we don't
25 think it's high-handed.

1 QUESTION: But the one difference is, as Justice
2 Scalia points out, it isn't the prime that made the
3 decision to do this. It's the State agency, the
4 enforcement agency said, you pay over -- Mr. Prime, you
5 pay over to the State what would otherwise be paid to the
6 sub.

7 MR. KERRIGAN: That's correct, Your Honor, but
8 it isn't like a garnishment, where there is a clear
9 entitlement, property interest in the property or money.

10 Here there's a disputed claim, and that's all
11 there is, and we are saying, based on the disputed claim,
12 we're not going to pay you for the box of ballpoint pens
13 that the supplier gave us. We're going to withhold
14 payment on that.

15 If, every time the State does not pay its bills
16 on time because there's a dispute, a good-faith dispute,
17 and if that's going to be a violation of the Due Process
18 Clause, we don't think that's what was intended by the
19 people who drafted the Due -- the Fourteenth Amendment.

20 QUESTION: Well, I guess there was a good-faith
21 dispute in Roth as to whether the employee could be
22 dismissed or not. That was just simply a contract case,
23 and we said you couldn't do it without a prior hearing.
24 How do you distinguish Roth from the ordinary contract
25 case?

1 MR. KERRIGAN: Well, as this Court has said in
2 Sullivan and almost every other case, the first inquiry is
3 always the nature and extent of the property right, if
4 any, and you can't get to that point in this case or any
5 other case until you've determined that there is a
6 property right within the meaning of the Due Process
7 Clause.

8 QUESTION: And if I have someone who owes me
9 under a contract, I have a valid contract claim against
10 somebody, the State can take that away, and they have
11 taken away property? Surely that's not right.

12 MR. KERRIGAN: Well, we disagree, obviously, on
13 that point. We think the situation is such, because of
14 the interest of the State and because of the workers who
15 would be affected, and because of the notorious insolvency
16 of subcontractors, that it's an appropriate mechanism.

17 QUESTION: The State can -- does not interfere
18 with any property rights when it takes the chose in action
19 that I have against somebody who owes me money? The State
20 can simply take that, and I have no remedy?

21 MR. KERRIGAN: Well --

22 QUESTION: I mean, you're saying it's not
23 property. It is not property.

24 MR. KERRIGAN: It is not property --

25 QUESTION: That's extraordinary.

1 MR. KERRIGAN: -- because, as the Court said in
2 Roth, it's a unilateral expectation.

3 QUESTION: They held it was a property right in
4 Roth.

5 MR. KERRIGAN: Well, that was a different
6 situation.

7 QUESTION: It was a contract claim, is all it
8 was, same as here.

9 MR. KERRIGAN: It was also an individual
10 claiming right under a contract in a whole line of cases,
11 beginning with Goldberg v. Kelly, where there has been
12 expansion in the area of due process claims. If there are
13 no other questions, I would reserve my --

14 QUESTION: Well, may I just ask you this
15 question?

16 MR. KERRIGAN: Yes.

17 QUESTION: I take it you agree that there would
18 be a statement of a property interest if the claim was not
19 merely that they withheld money from me, but they held,
20 withheld money from me under a contract in which I have
21 performed every obligation that I had under that contract.
22 Would you agree that that would state a property interest?

23 MR. KERRIGAN: Yes, we would. We definitely
24 would.

25 QUESTION: I'm not sure.

1 QUESTION: Well, the question wasn't asked you.

2 (Laughter.)

3 QUESTION: Thank you, Mr. Kerrigan.

4 Mr. Lamken, we'll hear from you.

5 ORAL ARGUMENT OF JEFFREY A. LAMKEN

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

7 SUPPORTING THE PETITIONERS

8 MR. LAMKEN: Mr. Chief Justice, and may it

9 please the Court:

10 The California Labor Code does not deprive
11 respondent of a property interest without due process for
12 three reasons. First, respondent has not established a
13 present entitlement to payment of money from the State,
14 second, with respect to a cause of action, respondent has
15 not established that it was subject to a deprivation, and
16 third, with respect to any property interest at issue in
17 this case, a lawsuit for the recovery of money allegedly
18 owed, breach of contract or otherwise, is all the process
19 that is due.

20 QUESTION: As for point three, how do you
21 explain Roth? I really don't understand why Roth is
22 different.

23 MR. LAMKEN: Roth is different from this case
24 for two reasons. When the State accorded the individual a
25 for-cause termination contract in that case he had a

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1 present property interest in his employment that the State
2 could not deprive him of without some predeprivation
3 process. Under progress --

4 QUESTION: What do you mean? We were talking
5 about his future employment. He was going to be dismissed
6 for the next year, and it said, you know, we're
7 terminating you. You have year-by-year employment. We're
8 not going to reemploy you next year.

9 MR. LAMKEN: Well, to the extent he could not --
10 there was no property interest in reemployment, the Court
11 held that there was no property interest because he didn't
12 have a guaranteed right to reemployment in Roth.

13 In cases like Loudermill, where the person could
14 not be dismissed and had a guaranteed right to continued
15 employment, this Court said there had to be a hearing
16 before they could dismiss him for cause, and a person in
17 that case, where there is a for-cause termination
18 provision, has a present property interest in their
19 employment, which cannot be taken away from them absent
20 some sort of hearing.

21 QUESTION: What is the difference between a
22 present property interest in my employment and a present
23 property interest in the money that you owe me? I don't
24 understand why the one should be treated differently.

25 MR. LAMKEN: Well, the latter is much more akin

1 to the payments at issue in Sullivan, which progress
2 payments under an installment contract are typically
3 understood to be earned one at a time, as the performance
4 for each installment is performed, and the failure of a
5 party to perform all the requirements in the contract,
6 including in this case the prevailing wage term, is the
7 failure of a constructive condition or, in this case, an
8 expressed condition that would give rise to the
9 entitlement for payment.

10 QUESTION: What if we assume that the
11 subcontractor did not violate the law, everything was
12 fine, the State was just in error. Let's just make that
13 assumption. Would there be some kind of property right in
14 the subcontractor to expect payment under the contract?

15 MR. LAMKEN: No, because one of the rights -- in
16 terms of present entitlement to payment, the California
17 law and the contracts provide that the immediate right to
18 payment doesn't attach in cases of dispute until the
19 plaintiff has proven his entitlement, so in this case the
20 cause -- the lawsuit is the mechanism by which entitlement
21 is proved, so that would not establish a present property
22 interest in immediate payment, but it would certainly
23 establish a property interest in the cause of action for
24 payment.

25 But with respect to the cause of action, we

1 don't believe respondent has suffered a deprivation,
2 because he's never made an effort to assert that cause of
3 action.

4 QUESTION: So California can simply take all
5 choses in action --

6 MR. LAMKEN: No.

7 QUESTION: -- because they don't really exist?

8 MR. LAMKEN: Precisely the opposite --

9 QUESTION: They don't exist until you've proven
10 them in court and California can simply take them?

11 MR. LAMKEN: Precisely the opposite, Justice
12 Scalia. A chose in action is a species of property.
13 However, respondent in this case has not attempted to
14 assert its cause of action, and the State has not
15 purported to exterminate it. Accordingly, there hasn't
16 been a deprivation. Until he attempts to assert his cause
17 of action the State or somebody else --

18 QUESTION: A chose in action is a chose in
19 action before it's asserted.

20 MR. LAMKEN: Right, but it hasn't been --

21 QUESTION: It is property, before it's asserted.
22 You're telling me it's not property until you go into
23 court?

24 MR. LAMKEN: It is property. It just hasn't
25 been -- there's been no deprivation until you go into

1 court and the court says, there's no cause of action, we
2 will not recognize it, and you cannot convert this into a
3 right to payment.

4 The example is, in, for example, Logan v.
5 Zimmerman Brush, the person submitted a claim for payment.
6 that was a property right. When the court -- excuse me,
7 when the agency in that case said, oh, we've moved to
8 slowly, accordingly we're not going to make good on this
9 claim for payment, and anyway, even if you're entitled, it
10 terminated that property interest. It no longer existed.
11 The chose of action was erased, and the person was
12 remitted to a lawsuit for a court action to try and
13 recover damages.

14 In contrast, where you submit the claim, and the
15 court is considering it, or you're sitting on the claim
16 and you have not yet submitted it, the State hasn't passed
17 on whether it's going to terminate it, or whether it's
18 going to respect it. It's simply sitting there, an
19 inchoate cause of action that you have not yet asserted.

20 QUESTION: But it seems to me that what you're
21 doing is combining the analysis of whether there is a
22 deprivation of a property interest with the analysis of
23 whether there is an adequate State process for asserting
24 it, and you have said, I guess your third point is, there
25 is an adequate State process and therefore there has been

1 no denial of due process in this situation. That part I
2 understand.

3 But the fact that you haven't gone to court
4 doesn't seem to me to have any bearing on whether you have
5 a property interest or not.

6 MR. LAMKEN: No, we don't believe you -- when --
7 in the --

8 QUESTION: Then I misunderstood you, I think.

9 MR. LAMKEN: Right. When you have a chose in
10 action, whether you have asserted it or not, that is, in
11 our view, a property interest.

12 QUESTION: You're --

13 MR. LAMKEN: What going to court does is, it may
14 terminate it, or it may cause it to ripen into a right,
15 full right to payment, so in this case, because the cause
16 of action has never been asserted, there's been no
17 deprivation of the cause of action. For example,
18 respondent in this case never sought an assignment of the
19 prime --

20 QUESTION: Okay, then you're saying there's no
21 due process violation for two reasons, number 1, you have
22 never made an appropriate claim. Number 2, even if you
23 had, there is an adequate State process in a right to sue.
24 Are those the two points you're making?

25 MR. LAMKEN: Right. It is in a sense a lot like

1 Williamson County. It's akin to a ripeness argument. In
2 that case, the Court held that there's no taking without
3 just compensation, if you haven't sought the compensation
4 which you claim to be your due.

5 In our view, there is no deprivation of property
6 in the form of a chose of action without due process
7 unless you've asked for the process that's your due and
8 the State has, in fact, said to you, you cannot have
9 process.

10 QUESTION: But that comes very close, as others
11 have suggested, to shifting from the property analysis to
12 the due process analysis.

13 MR. LAMKEN: That, I think, is inherent in the
14 nature of recognizing that a chose of action is a species
15 of property. The chose of action, by its very nature, is
16 recognized and turned into a present right to payment
17 through judicial or administrative process.

18 QUESTION: Well, you -- just to make one thing
19 clear, you do not question the fact that there's State
20 action involved here, and there are property rights.
21 You're just saying there's no violation of the Due Process
22 Clause.

23 MR. LAMKEN: To the extent -- well, to the
24 extent that a chose of action is at issue here --

25 QUESTION: I understand, yes.

1 MR. LAMKEN: -- we think there has been no
2 deprivation here and, based on the post-1998 version of
3 the statutes, we believe that there is State action.
4 Based on the version of the statute that the Ninth Circuit
5 examined, however, we dispute whether a State action has
6 been established.

7 QUESTION: How is there State action? You have
8 a contractor who decides to withhold money from another
9 contractor.

10 MR. LAMKEN: That was what the Ninth Circuit's
11 analysis was, and I would agree with you that that is
12 incorrect. However, as of January 1, 1998, the State has
13 authority to either order the prime contractor to withhold
14 money, and the second thing is that it also exempts the
15 prime contractor from certain penalties if the prime
16 contractor -- and this is section 1775(b)(1) through (4)
17 are the relative provisions, post-1998. It exempts the
18 prime contractor from penalties if the prime contractor
19 withholds money from the subcontractor.

20 When the State threatens penalties against a
21 prime contractor for not withholding, we would believe
22 that is sufficient to establish State action. When it's
23 left holding --

24 QUESTION: Well, I mean, there's obviously State
25 action in the State law. There are books in California

1 filled with State laws, and anyone could complain about
2 any one of those laws, that they violate the Constitution
3 and, indeed, if you had a law governing court procedure,
4 which you thought was very, very, very unfair, I suppose
5 that might violate the Constitution, too, so sure, maybe
6 this is unconstitutional in that sense, but in that sense,
7 what's unconstitutional about it?

8 MR. LAMKEN: I -- Justice Breyer, I think what I
9 hear you asking is, when the State does not take coercive
10 action against the prime contractor and merely enables him
11 to withhold money, I would agree with you, there is no
12 State action. When the State threatens the prime
13 contractor with penalties and coerces them to withhold
14 money, that would be different.

15 QUESTION: So the penalty -- it's the penalty.
16 In other words, they're assessing a penalty of money
17 against a contractor, and they have to have a fair
18 procedure for doing that.

19 MR. LAMKEN: That, I think, is the due process
20 question you're asking, not the State action question,
21 which is --

22 QUESTION: No, no, that would be State action,
23 and it would have to comport with due process.

24 MR. LAMKEN: With respect to the prime
25 contractor, but the subcontractor --

1 QUESTION: Yes, but I mean, don't we have the
2 sub here?

3 MR. LAMKEN: Yes. With respect to the
4 subcontractor, we don't believe that there is State action
5 based on the mere fact that the State authorizes a prime
6 contractor to withhold money, so I think I'm in firm
7 agreements with you, Justice Breyer.

8 QUESTION: Well, it doesn't coerce the
9 contractor to withhold money? I mean, that puts it a
10 little kindly, don't you think? The State is saying, you
11 give us the money that you owe to the sub.

12 MR. LAMKEN: No, on the contrary, Your Honor.
13 The State is not taking money out of the prime
14 contractor's hands. This is money that is already in the
15 State's hands. The State is merely saying --

16 QUESTION: Yeah --

17 MR. LAMKEN: -- prime contractor, you have
18 breached your requirement of ensuring that all workers on
19 this project, all workers, whether yours or a sub's, are
20 paid the prevailing wage.

21 Because you have breached that obligation, we --
22 a constructive condition has failed, and we are not paying
23 you the money that would otherwise be due.

24 QUESTION: Well, they say a little more than
25 that. You have breached it in that your subcontractor has

1 breached it.

2 MR. LAMKEN: Right.

3 QUESTION: And therefore we are withholding the
4 amount that you would have paid to your subcontractor, and
5 you don't consider that to be inducing the prime
6 contractor not to pay off the sub?

7 MR. LAMKEN: We're not withholding the amount
8 that you would have paid your subcontractor. We are
9 withholding the amount that wasn't paid to the workers.
10 We're withholding the amount that is the measure of your
11 breach.

12 QUESTION: I understand. You're --

13 MR. LAMKEN: And we are indifferent --

14 QUESTION: You're withholding a portion of the
15 money that he was supposed to pay to a subcontractor --

16 MR. LAMKEN: No, that the subcontractor has to
17 pay to the workers --

18 QUESTION: -- saying that he doesn't owe it to
19 the subcontractor.

20 MR. LAMKEN: Right, but the State is utterly
21 indifferent as to whether the prime contractor withholds
22 that money from the subcontractor under the pre-1998
23 version, because it's the prime contractor --

24 QUESTION: Thank you, Mr. Lamken.

25 MR. LAMKEN: Thank you.

1 QUESTION: Mr. Seideman, we'll hear from you.

2 ORAL ARGUMENT OF STEPHEN A. SEIDEMAN

3 ON BEHALF OF THE RESPONDENT

4 MR. SEIDEMAN: Mr. Chief Justice, may it please
5 the Court:

6 QUESTION: Mr. Seideman, would you tell us just
7 what your client did after the prime withheld the payment
8 by way of seeking redress, or responding to that?

9 MR. SEIDEMAN: Your Honor, my -- there had been
10 this -- notices to withhold issued on a number of
11 projects, as prime contractor and subcontractor to G & G,
12 and what G & G did is, filed lawsuits under the labor code
13 to seek recovery of its money, and prosecuted those
14 lawsuits.

15 In the declaration --

16 QUESTION: This was in the California superior
17 court?

18 MR. SEIDEMAN: Yes, and in fact in the
19 declaration by DLSE in the district court the -- that they
20 put into evidence, their counsel talks about one of the
21 cases that he litigated. In fact, the depositions that we
22 put into evidence in the district court were taken in
23 the --

24 QUESTION: This was in response to the
25 withholding by the prime in this particular case? --

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1 MR. SEIDEMAN: Well --

2 QUESTION: You can answer that yes or no, I
3 think.

4 MR. SEIDEMAN: No. What happened was, those
5 cases were settled. Then what happened was, and we --
6 what had happened was, we had filed a lawsuit in district
7 court contending the procedure was unconstitutional. The
8 cases were settled. The district court lawsuit was
9 dismissed without prejudice, pursuant to the agreement,
10 and then notices were issued again. We filed this lawsuit
11 after one of the notices, the notice was issued --

12 QUESTION: Did you file anything in State court
13 after this particular notice?

14 MR. SEIDEMAN: No. We never needed to, so we
15 didn't.

16 QUESTION: Well, you'll find out here whether
17 you needed to or not.

18 (Laughter.)

19 MR. SEIDEMAN: No, I mean, we didn't need to to
20 get the money back. We preserved -- we would have filed
21 to the extent we needed to to get our money back.

22 QUESTION: Oh, so you -- well then, you -- what,
23 you got your money back?

24 MR. SEIDEMAN: Yes.

25 QUESTION: As a result of the Federal suit?

1 MR. SEIDEMAN: I -- well, they released the
2 notices to withhold. I can -- that is -- the deal is, he
3 released the notices to withhold.

4 QUESTION: So the respondent has been paid in
5 full, under this contract?

6 MR. SEIDEMAN: Well, there were more notices to
7 withhold issued later by DLSE, after the facts that are in
8 the joint appendix.

9 QUESTION: Well, as far as what is before us,
10 has the respondent been paid in full now?

11 MR. SEIDEMAN: There was one project that was
12 litigated and is still in litigation, that was litigated
13 on a lawsuit by the DLSE. The other two, they released
14 the notices to withhold, and the answer is yes on those
15 two projects.

16 QUESTION: Was the release the result of some
17 order from the Federal court?

18 MR. SEIDEMAN: Well, the Federal court never
19 ordered them to release the notices to withhold. The
20 Federal court just declared that they were
21 unconstitutional, the procedure was unconstitutional, and
22 that any notices were null and void. They -- and then
23 they released the notices.

24 QUESTION: So the release was in response to
25 that order of the Federal court?

1 MR. SEIDEMAN: I would assume it was. I mean,
2 in other words --

3 QUESTION: Well, what would they have to do to
4 comply with the judgment of the Ninth Circuit, I mean, the
5 judgment of the district court, which the Ninth Circuit
6 affirmed? It said, you can't, under -- consistent with
7 due process, hold back this money, isn't that right?

8 MR. SEIDEMAN: They would -- no, they would just
9 have to have a hearing procedure.

10 QUESTION: Right.

11 MR. SEIDEMAN: The --

12 QUESTION: Now, was there an adjudication
13 whether these wages had been paid or not? Was there ever
14 an adjudication concerning whether the prevailing wage had
15 been paid?

16 MR. SEIDEMAN: Well, on some projects there
17 were. On some projects --

18 QUESTION: No, on the ones that are involved in
19 this case.

20 MR. SEIDEMAN: In one case there was. On the
21 other two they dropped the claims ultimately and didn't
22 pursue them. They filed -- in one they filed a lawsuit
23 and they abandoned it after -- it was dismissed for
24 failure of prosecution in the State court.

25 QUESTION: Mr. Seideman, you're going to really

1 have to really enlighten me, because I understood your
2 opponent to answer one of my questions by saying that your
3 client had never claimed compliance with the prevailing
4 wage law with respect to the contracts in dispute in this
5 case. Was he wrong?

6 MR. SEIDEMAN: Yes. We've always claimed
7 compliance. We --

8 QUESTION: Where in the record do you show that
9 you claim compliance with the matters in dispute here, or
10 where in your brief do you -- I didn't know you said it in
11 your brief.

12 MR. SEIDEMAN: Well, on the brief on page 50, at
13 the end, it says, G & G did plead and prove that it
14 disputed the assertion that it violated the prevailing
15 wage law, citing to the joint appendix at 69 and at the
16 191, wherein the declaration by G & G says, it disputes
17 these violations of the prevailing -- that there weren't
18 violations of the prevailing --

19 QUESTION: At page 49 and 50 it says, the
20 withholding was adequately pleaded and proven, but I'm not
21 sure that you say that you had complied with the statute.

22 MR. SEIDEMAN: Yes, the last paragraph.

23 QUESTION: The last paragraph says that. After
24 you get to that -- the last paragraph in your brief, you
25 finally get --

1 MR. SEIDEMAN: Well --

2 QUESTION: That last paragraph says, you proved
3 that you disputed the assertion that it had violated.

4 MR. SEIDEMAN: Well, that's correct. We didn't
5 litigate in the district court whether or not -- we didn't
6 litigate the underlying question of whether or not there
7 was or was not a violation. I mean, our contention in the
8 case, and our contention of the property interest, is as
9 follows.

10 Maybe in a -- let me use an example to try to
11 explain. An awarding body, which can be school district,
12 a city or whatever, makes a determination that payment is
13 due under the contract, so let's say, they say today,
14 payment is due, pick up the check Friday. On Thursday, at
15 that point there is a marketable common law right to
16 property, the right to money due, that has a value.

17 If the payment request was submitted on behalf
18 of the subcontractor, then the payment that's made by the
19 awarding body to the prime contractor passes. It then
20 goes to the subcontractor, so that that property right
21 that exists at that time, there's a property right of the
22 prime contractor and the subcontractor. The prime
23 contractor's right as to that money is of little value.
24 The valuable right is the subcontractor.

25 QUESTION: Well, why is the prime's right of

1 little value?

2 MR. SEIDEMAN: Because he has to turn that money
3 over immediately to the subcontractor, so it wouldn't
4 have --

5 QUESTION: Yes, but he gets a 15-percent
6 override or something like that, doesn't he?

7 MR. SEIDEMAN: Right.

8 QUESTION: I mean, he gets something.

9 MR. SEIDEMAN: I mean -- I mean, it's -- I just
10 mean monetarily. It's a marketable right, and it's a
11 common law property right.

12 Then the DLSE issues a notice to withhold the
13 next day. It seizes that property, and --

14 QUESTION: Whom does the notice to withhold go?

15 MR. SEIDEMAN: It goes --

16 QUESTION: The awarding authority?

17 MR. SEIDEMAN: It goes to the awarding body, and
18 the -- which is not in privity with the DLSE.

19 What distinguishes it from a breach of contract
20 is that -- is, I would say, five factors, that you have
21 regulatory enforcement action enforcing the law, by
22 regulatory enforcement officials not party to the
23 contract, imposing penalties and -- or third party
24 liabilities, taking money due under the contract with no
25 risk of a proprietary loss.

1 QUESTION: Why do you think those take it out of
2 the ordinary contract law that, you know, if the prime
3 owes you money, you're the sub, you have a contractual
4 right to that money, don't you? I mean, if you fully
5 completed work, and there has been no notice that you
6 failed to pay prevailing wages, you have a right against
7 the prime, don't you? At least, certainly when I
8 practiced law you did.

9 MR. SEIDEMAN: You have a right to the money
10 due. That money due is paid by the awarding body. When
11 the notice to withhold seizes the money by issuing it to
12 the awarding body, who I would point out has the same
13 discretion that the prime contractor is said to have --
14 the awarding body has to put aside, if it's a \$50,000
15 notice to withhold, \$50,000.

16 QUESTION: But the prime's -- the sub's contract
17 is with the prime, isn't it? It's not with the awarding
18 body. That's what mechanic's liens are for. If you can't
19 get the prime to pay, you could perhaps have a lien -- I
20 don't know what California law is, but certainly you have
21 a -- your contractual relationship is with the prime.

22 MR. SEIDEMAN: The right of the subcontractor is
23 to receive the money paid by the awarding body.

24 QUESTION: But does the subcontractor have a
25 contractual right against the prime or not?

1 MR. SEIDEMAN: He does up until the time the
2 notice to withhold is issued. Then at that time he does
3 not. At that time, the only right, it's transformed into
4 a new right.

5 QUESTION: But why does he cease to have a right
6 at that time? If he has performed, I don't know why he
7 doesn't have the same right against the prime whether the
8 State has issued a notice of withholding or not.

9 MR. SEIDEMAN: Because the seizure of the money
10 by the State --

11 QUESTION: No, but you're talking about the
12 money as though the money were particular dollar bills,
13 and the subcontractor has a right to particular dollar
14 bills that the prime gets from the State. I mean, that's
15 not the way we analyze contracts.

16 The sub has a right to be paid for the work that
17 he did in accordance with his contract with the prime, and
18 that right is either good or bad quite independent of what
19 is happening between the prime and the State.

20 MR. SEIDEMAN: Well, I --

21 QUESTION: Isn't that true?

22 MR. SEIDEMAN: Actually, it's not, because
23 there's -- the prime contractor has an obligation, when he
24 receives the money from the awarding body, to pay it to
25 the subcontractor.

1 QUESTION: And he has that obligation because he
2 has contracted with the subcontractor to pay him.

3 MR. SEIDEMAN: Correct, and so that when the --

4 QUESTION: Which is true in any situation in
5 which there's a prime and a sub, so what is different
6 about the fact that the prime in this case has contracted
7 with the State?

8 MR. SEIDEMAN: In the case of a subcontractor,
9 what is different is that when the -- when a notice to
10 withhold seizes the money due to the awarding body --

11 QUESTION: In other words, you say seizes the
12 money due, what you mean is, it's a notice that they
13 refuse to pay under their contract with the prime.

14 MR. SEIDEMAN: Your Honor, that's not actually
15 what's happening here, because the party to the contract
16 is the owner of the property, which in these cases was a
17 public entity. It can be a private entity under public --

18 QUESTION: So in other words, you're
19 distinguishing between the State and the public entity.

20 MR. SEIDEMAN: Absolutely.

21 QUESTION: Okay.

22 MR. SEIDEMAN: They're not in privity.

23 QUESTION: Okay.

24 MR. SEIDEMAN: And in fact the --

25 QUESTION: Well, this is where -- I mean,

1 exact -- I enter into a contract to have my house built,
2 but the prime is going to have subs. I say, when you get
3 to the garden, I don't want any of those gardeners walking
4 with their muddy boots in the house, and so here's what
5 happens. If that gardener, landscape gardener has people
6 with muddy boots, and they walk around the house, some
7 money is going to be withheld from your progress payment,
8 including \$50 worth of liquidated damages. Got it? Yes,
9 they got it, everybody's got it.

10 MR. SEIDEMAN: Correct, Your Honor.

11 QUESTION: No problem. But now the State enters
12 into that exact same contract. How does that change
13 anything? Contract disputes are not property under Roth,
14 Zindeman, et cetera. I would have thought that was
15 Hornbook, and so what's different about this?

16 MR. SEIDEMAN: Well, it changes -- first
17 practically, and then legally. What changes practically
18 is that when you don't pay in the hypothetical you take a
19 proprietary risk. If you don't pay, then you're subject
20 to potential losses imposed by the contractor who doesn't
21 pay.

22 If an owner, like an awarding body, like a
23 school district or whatever, says I'm not going to pay
24 you, they take the proprietary risk.

25 You take -- they take a proprietary risk. You,

1 as a contractor, can generate a lot of leverage to prevent
2 baseless refusals to pay by an owner. You -- when the
3 DLSE as an enforcement agency seizes money, you have no
4 leverage and no ability to generate leverage.

5 QUESTION: Well, you've lost me -- I -- my --
6 you've got my example in mind of the muddy boots.

7 MR. SEIDEMAN: Okay. The difference --

8 QUESTION: Now -- and the muddy boots has \$50
9 liquidated damages in it, and by the way, I write into the
10 contract too, I don't care about the boots. It's my Aunt
11 Ella who cares --

12 (Laughter.)

13 QUESTION: -- and so all this is going to be run
14 by her, and she's going to be the one who decides. Now, I
15 guess I could write that in, too.

16 Now, I'm just saying how does it differ --

17 MR. SEIDEMAN: It --

18 QUESTION: -- because we happen to have the
19 State here, and we don't have Aunt Ella, we have the labor
20 department, and we don't have exactly a progress payment,
21 but it's pretty analogous. What's the difference?

22 MR. SEIDEMAN: It differs if getting the muddy
23 boots -- if the muddy boot problem is a violation of the
24 law and, rather than you saying, under the contract, I'm
25 asserting the muddy boot problem, the enforcement official

1 from the building department, let's say, issues an order
2 and orders you not to pay the contractor, and you now
3 cannot pay pursuant to that order, then the order by that
4 official, we would contend, is a deprivation of property.

5 QUESTION: No, I know that's what you're
6 contending and I agree with you totally that there are
7 those differences. We don't have Aunt Ella, we have a
8 person who is called the labor department, and it's quite
9 true that she doesn't say it formally, they do it formally
10 in an order, and it's true that the contracting party is
11 the State and not a private person.

12 But again, if we accepted your view that it
13 makes a difference, then all these building contracts
14 would suddenly become State action under Roth, Zindeman,
15 et cetera. Every claim like that would end up in court
16 under some kind of constitutional analysis. I've never
17 heard of anything like that.

18 MR. SEIDEMAN: I think the difference, Your
19 Honor, is that in the circuit court cases that dealt with
20 the question of whether there's a property right, they
21 were dealing with the question of a different right, a
22 right that never existed at common law, and it's not a
23 marketable right. The question they were addressing was,
24 is the right that the other party won't breach the
25 contract now a property right based on the status of a

1 contract with the Government? That's a different property
2 right than the --

3 QUESTION: Go ahead. Finish your answer, Mr.
4 Seideman.

5 MR. SEIDEMAN: -- than the common law right to
6 the money due.

7 QUESTION: You say you did -- you could have
8 sued in the State court for this, I gather, because you
9 did in other cases. You could have sued the prime saying
10 it was wrong to withhold my progress payment?

11 MR. SEIDEMAN: You could sue under the labor
12 code.

13 QUESTION: Well, you could sue somewhere under
14 California law?

15 MR. SEIDEMAN: You could have a lawsuit where
16 the money is held until all appellate rights are
17 exhausted.

18 QUESTION: Well, and I gather you did have such
19 a lawsuit, did you not, in California State courts?

20 MR. SEIDEMAN: On other cases? Yes, we did have
21 lawsuits.

22 QUESTION: You sued the prime?

23 MR. SEIDEMAN: No.

24 QUESTION: Who --

25 MR. SEIDEMAN: We sued the awarding body.

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1 QUESTION: You sued the -- and why did you not
2 sue the --

3 MR. SEIDEMAN: We -- but it's -- the awarding
4 body is a nominal party. The DLSE defends the case as a
5 real party in interest, so you're really litigating with
6 the DLSE.

7 QUESTION: Why didn't you sue the prime
8 contractor?

9 MR. SEIDEMAN: The prime contractor has a
10 defense under the labor code. As long as that notice to
11 withhold is pending --

12 QUESTION: No, but I'm sorry, a moment ago, if I
13 was following what you were saying, you were telling us
14 that you had, in fact, pleaded and it was, in fact, the
15 case that you had performed everything that you were
16 obligated to perform under your contract, so if that is
17 so, why didn't you simply sue the prime contractor in a
18 State court saying, I've done everything I have to do,
19 give me my money?

20 MR. SEIDEMAN: If a lawsuit is not filed under
21 the labor code within 90 days of completion, then the
22 seizure, the notice to withhold becomes permanent, so that
23 if you're the subcontractor, and you're the one suffering
24 the loss because it's been passed through to you, if you
25 don't endeavor to protect that right in general, in the

1 prime contractor suit, then the prime contractor clearly
2 would have an absolute defense to your lawsuit under the
3 contract because he --

4 QUESTION: Why would the prime contractor have a
5 defense to your lawsuit merely because the prime
6 contractor has lost his defense to the Government's
7 withholding?

8 MR. SEIDEMAN: Well, either way --

9 QUESTION: That's what I'm not following.

10 MR. SEIDEMAN: If the prime contractor files the
11 lawsuit under the labor code, then so long as that lawsuit
12 is pending, he has a defense under the labor code, and
13 generally because --

14 QUESTION: Even if you sue him in a contract
15 action in California, and you prove what you have
16 represented to us you could prove, i.e., that you
17 performed everything you were obligated to perform,
18 including paying the prevailing wage, even though the
19 findings were that you had proven all of that, the prime
20 contractor still would not be liable to you under the
21 contract, because it was engaged in a dispute with the
22 State?

23 MR. SEIDEMAN: I don't believe the court would
24 even, frankly, hear the issue.

25 QUESTION: No --

1 MR. SEIDEMAN: They would say, until the labor
2 code lawsuit is decided --

3 QUESTION: -- but I'm asking you a question
4 about California law. Are you saying that that is
5 California law, that you can prove your case and, because
6 your prime is having a dispute with the State, you still
7 would not be awarded your damages?

8 MR. SEIDEMAN: Yes. That's the law. That is
9 the law.

10 QUESTION: That is the law of California?

11 MR. SEIDEMAN: That is the law under the labor
12 code. The exclusive remedy to seek recovery of the money
13 held is the labor code procedure --

14 QUESTION: Well --

15 QUESTION: That's --

16 MR. SEIDEMAN: The labor code says the money can
17 be withheld by the prime contractor from the
18 subcontractor, so that --

19 QUESTION: That's controverted. I am sure the
20 other side says that the code does not eliminate any cause
21 of action that the sub has against the prime. Now, is
22 there a dispute between the two sides on that issue?

23 MR. SEIDEMAN: Well, the difficulty, Your Honor,
24 though, is that the problem here, the due process problem
25 that we addressed in the courts below, is that when you

1 have enforcement officials who are issuing these notices
2 to withhold, that they can issue in any amount as they
3 deem fit, in which they have no proprietary risk in doing
4 that, so it's not like dealing with a party to a contract.

5 QUESTION: No, but please come back to my
6 question. You are contending that you had no cause of
7 action against the prime, that any cause of action against
8 the prime for his breach of contract with you was
9 suspended by the labor code.

10 MR. SEIDEMAN: With regard to this withholding,
11 yes.

12 QUESTION: Well, you have -- you've answered
13 these questions with some qualification. You say, you
14 couldn't do it under the labor code. Could you do it
15 under any branch of California law?

16 MR. SEIDEMAN: No. What I meant is, as to the
17 withholding of money, that --

18 QUESTION: Could you answer my question yes or
19 no? Could you have sued the prime alleging that you had
20 fully complied and had paid required wages in -- under any
21 provision of California law?

22 MR. SEIDEMAN: No.

23 QUESTION: What provision of the labor code
24 eliminates that? I mean, it's rather crucial to your
25 case. What provision is it?

1 MR. SEIDEMAN: 1729.

2 QUESTION: 1729. That's --

3 QUESTION: Does your answer assume that the
4 prime has made an assignment to the sub of the prime's
5 right to receive the money?

6 MR. SEIDEMAN: It assumes that the -- well, yes,
7 in a sense. It assumes the prime contractor --

8 QUESTION: I mean, that's the way it works,
9 isn't it? When the prime withholds, the prime generally
10 assigns to the sub the right to litigate for the money
11 with the agency, with the contracting agency.

12 MR. SEIDEMAN: Right. If the prime contractor
13 forfeited their right under the labor code, then it would
14 be a different situation.

15 QUESTION: I thought your position on your brief
16 was that there was no guarantee of the assignment, that
17 one of the reasons why you said you had no remedy is that
18 the labor code gives the prime contractor a right to seek
19 the money that's being suspended, and the labor code
20 itself doesn't give any right to the subcontractor, and
21 therefore you said that there's no remedy guaranteed you
22 under the law, I thought was -- that was the position you
23 took in your brief.

24 MR. SEIDEMAN: What we're saying is that the
25 seizure of the money means that it takes you years to take

1 that money back.

2 QUESTION: Well, there is a provision, though,
3 in the labor code allowing a prompt hearing with the labor
4 commission, or commissioner, to deal with this problem of
5 the withholding.

6 MR. SEIDEMAN: Your Honor, there -- I -- there
7 was no provision -- there is no provision other than some
8 regulations that were adopted in -- temporary regulations
9 in response to this lawsuit.

10 QUESTION: Well, what about section 1742.1? It
11 says the labor commissioner shall, upon receipt of a
12 request from the affected contractor or subcontractor,
13 within 30 days of the assessment, afford the opportunity
14 to meet concerning the assessment and, upon request,
15 provide a hearing and so forth and so on. Did you -- did
16 the subcontractor here ask for a hearing?

17 MR. SEIDEMAN: There's no such procedure that
18 exists. That procedure that is being referred to is
19 either of the statutes that are not in effect yet, or I
20 believe -- it's -- 1742.1 --

21 QUESTION: There was no provision for a hearing
22 in effect at the time this case arose?

23 MR. SEIDEMAN: There was absolutely no right to
24 a hearing. There's no right to a hearing that exists in
25 any statute other than what hearing rights they have said

1 they're going to implement in July of this year.

2 QUESTION: Uh-huh.

3 MR. SEIDEMAN: There was no -- and our
4 contention --

5 QUESTION: But there was none for you at the
6 time?

7 MR. SEIDEMAN: No hearing rights of any kind, no
8 right of any -- the only way to know the basis of the
9 notice to withhold is to file the lawsuit, subpoena the
10 DLSE records, subpoena them to a deposition, and discover
11 on what basis they asserted this notice to withhold.
12 There's no other right to any information. There's no
13 other right to anything. That --

14 QUESTION: Would you tell us where we could find
15 section 1729? I can't find it in the blue brief -- 108?
16 1727 is there, but I don't see 1729.

17 QUESTION: It goes from 1727 to 1741.

18 QUESTION: Page 108 of the petition for cert.

19 MR. SEIDEMAN: But the point that I wanted to
20 make is that the fundamental due process problem here,
21 which is also what, in their first petition and in other
22 briefs, the DLSE has stated what they call the critical
23 failing, the real injury that occurs here, and what we
24 believe is the due process problem, is that you have
25 enforcement officials seizing this money -- whether it's a

1 prime contractor or subcontractor, you're in the same boat
2 with an assignment or a prime contractor, they can seize
3 money in any amount. There's no type of hearing.
4 There's --

5 QUESTION: 1720, 1729 says that it's lawful for
6 the contractor to withhold if the subcontractor has failed
7 to comply with the terms of this chapter. Now, if you
8 have paid wages, you presumably have not failed to comply
9 with the terms of the chapter.

10 MR. SEIDEMAN: And whether you've paid it is
11 determined in this labor code lawsuit that's provided for.

12 QUESTION: Well, but that, this section 1729
13 doesn't say that.

14 QUESTION: You're saying --

15 QUESTION: Go ahead.

16 QUESTION: I'm sorry, Chief. No, I take it --
17 you're saying that, I take it, that the reference that the
18 language on account of failure simply refers to the reason
19 given by the State for withholding, as opposed to the fact
20 of failure or nonfailure.

21 MR. SEIDEMAN: Well, right, and in either event,
22 even if you had the right to sue the prime contractor, you
23 still have the problem that you have enforcement officials
24 that can cut off your payments without any hearing right,
25 and --

1 QUESTION: Oh, I grant you that, but I mean,
2 what we were trying to get at is, whether you had a cause
3 of action that you could assert in a California court, and
4 your answer is, no, I don't, because even if I prove to
5 the court's satisfaction, the fact-finder's satisfaction
6 that I have paid the prevailing rate, so long as the prime
7 can show that the State is with -- or the public authority
8 is withholding payment because the State claims I didn't,
9 that is a defense. That's your position.

10 MR. SEIDEMAN: Well, yes, and therefore that's
11 why I don't think the court would even litigate --

12 QUESTION: But Mr. Seideman, what were the suits
13 that you brought? I'm looking at your brief, at page 3.
14 You refer to prior cases, and you say, a State court
15 ordered G & G and DLSE to mediate, and a settlement was
16 reached. There must have been some procedure that you
17 were availing yourself of under State law and State court.
18 What was it?

19 MR. SEIDEMAN: We were suing under the labor
20 code, it's a labor code lawsuit that you're allowed to get
21 the money back. The problem, the due process problem --

22 QUESTION: Under what section? I -- you're
23 just --

24 MR. SEIDEMAN: 17 --

25 QUESTION: You're making it so difficult for us

1 because the sections aren't attached to the brief. We
2 don't understand what you're alleging. Under what section
3 of the labor code?

4 MR. SEIDEMAN: 1731 through 1733.

5 QUESTION: And that allows you to file a suit.

6 MR. SEIDEMAN: Yes, and if you're a
7 subcontractor --

8 QUESTION: Against whom? Against whom, the
9 labor department?

10 MR. SEIDEMAN: Well, no. It's nominally the
11 awarding body, but the real party in interest is the DLSE,
12 who defends the lawsuit.

13 QUESTION: Well, is that not adequate
14 post-deprivation relief, even if you assume there's some
15 State action and some problem?

16 MR. SEIDEMAN: No, Your Honor.

17 QUESTION: Why?

18 MR. SEIDEMAN: Because when you have a seizure
19 by enforcement officials, something is forfeited for a
20 violation of law, the Court has stated in prior cases that
21 there needs to be some type of a right to at least a
22 prompt post-deprivation hearing to determine if there's a
23 basis of probable validity for the seizure.

24 QUESTION: Well, here's a right to a
25 post-deprivation proceeding. You say it isn't

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1 sufficiently prompt?

2 MR. SEIDEMAN: Right, because all of the
3 money --

4 QUESTION: Why?

5 MR. SEIDEMAN: Because even if it's completely
6 baseless, the DLSE action, completely meritless baseless
7 action, the procedure is, all the money is held until the
8 completion of the lawsuit and appellate rights, so they
9 can hold money for 3 years.

10 QUESTION: Could the prime make the same
11 argument, constitutional argument that you're making on
12 behalf of the sub?

13 MR. SEIDEMAN: We contend we are -- we've always
14 contended we are a prime contractor and a subcontractor.

15 QUESTION: All right, so whether he's a prime or
16 a sub makes no difference for purposes of the argument
17 you're presenting to us here?

18 MR. SEIDEMAN: Exactly.

19 QUESTION: Well, if you don't like it, don't
20 enter into the contract. I mean, aren't all these terms
21 of the contract?

22 MR. SEIDEMAN: No, Your Honor.

23 QUESTION: If you don't like the terms, don't
24 enter into it.

25 MR. SEIDEMAN: Actually, no. Your Honor. None

1 of the --

2 QUESTION: Isn't it -- under California law they
3 don't incorporate the law into the contract? I've never
4 heard of that.

5 MR. SEIDEMAN: Well, yes. Yes. In that sense,
6 all of --

7 QUESTION: All right, so they're all terms of
8 the contract, so the answer is, you have a claim, you
9 think -- or you get the money, they think you don't. They
10 set up some procedures, you don't like them -- sorry.

11 MR. SEIDEMAN: On all contracts there are, Your
12 Honor, laws that one has to comply with, including these.
13 There are safety laws --

14 QUESTION: Thanks, Mr. Seideman.

15 Mr. Kerrigan, you have 4 minutes remaining.

16 REBUTTAL ARGUMENT OF THOMAS S. KERRIGAN

17 ON BEHALF OF THE PETITIONERS

18 MR. KERRIGAN: Thank you, Your Honor. Thank
19 you, Mr. Chief Justice. I --

20 QUESTION: Would you mind telling us just what
21 post-deprivation remedy, if we assume there is some
22 problem here, was open to the respondent subcontractor?

23 MR. KERRIGAN: There were a number, Your Honor.
24 There was, for instance, the remedy under 1733, which is
25 the labor code section. That section says the contractor

1 or its assignee may bring a lawsuit within 90 days.

2 QUESTION: Is he an assignee automatically,
3 because he's the subcontractor?

4 MR. KERRIGAN: There is a case that came down --
5 it came down since this case was first argued, which
6 says -- it's called J & K Painting. It's in our brief,
7 but I would refer you to footnote number 7, which seems to
8 suggest that they would be an assignee in law if the
9 assignment wasn't given.

10 QUESTION: That's how I would read it, too.

11 MR. KERRIGAN: And as a matter of reality, there
12 is no reason for the prime contractor not to assign. The
13 prime contractor doesn't want any part of this suit. They
14 have no economic interest in --

15 QUESTION: Well, don't -- please continue to
16 answer.

17 MR. KERRIGAN: Yes.

18 QUESTION: I want to know -- the big allegation
19 is, they have no adequate post-deprivation remedy, and
20 their lawyer, as I understand it, is saying it would take
21 3 years to reach closure on it, so what is your response?

22 MR. KERRIGAN: That is not the case, Your Honor.
23 There is a stop-notice provision. The stop-notice
24 provision is in the code. It was referred to on page
25 36-37 of our brief. That provides for a very summary

1 hearing. The G & G type contractor files a stop notice
2 with the State, the State withholds money from the prime
3 contractor, and there is a hearing in a very short period
4 of time.

5 In addition --

6 QUESTION: When I was reading that provision, it
7 wasn't clear to me that it applied in this situation
8 anywhere -- was there any finding about what that stop
9 order, and some other suggestions you had, would do?

10 MR. KERRIGAN: There are --

11 QUESTION: I thought that the law itself said
12 that this is the only remedy that the remedy of the prime
13 or its assignee suing was the only remedy, was the
14 exclusive remedy.

15 MR. KERRIGAN: No, it is not, Your Honor. It is
16 not the exclusive remedy, and J & K --

17 QUESTION: Wasn't there some -- aren't there
18 some words in the labor code to that effect?

19 MR. KERRIGAN: The -- again, referring to J & K
20 Painting --

21 QUESTION: Well, that, you told us, says that
22 the assignment is deemed in law to have occurred.

23 MR. KERRIGAN: It also said it is not the
24 exclusive remedy, because it does not address all of the
25 evils that --

1 QUESTION: But isn't there something in the
2 labor code involved in this very complex of statutes that
3 says that that action by the prime or its assignee is the
4 only remedy?

5 MR. KERRIGAN: I believe what you're referring
6 to, Justice, is the provision in the statute that says no
7 other issues will be considered than the issue of the
8 entitlement to the money. It is not the exclusive remedy,
9 and there are -- one of the things that the Ninth Circuit
10 said is, well, there aren't a lot of cases involving these
11 subcontractors in a public work situations under the law
12 of contracts, under the law of stop notices.

13 The reason is, is because there's almost always
14 an assignment, and the action proceeds under 1733, and --

15 QUESTION: I think she's referring to 1732,
16 which says, notwithstanding any other provision of law,
17 and then jumping to the end of it, and suit on the
18 contract that is against the awarding for alleged breach
19 thereof and not making the payment is the exclusive remedy
20 of the contractor or his or her assignees, and you say
21 that means him, with reference to those wages or
22 penalties.

23 MR. KERRIGAN: Well, the J & K Painting Company
24 case says to the contrary, Your Honor, and we would submit
25 it on that. We would submit -- that's our case.

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Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr.
Kerrigan. The case is submitted.

(Whereupon, at 12:01 p.m., the case in the
above-entitled matter was submitted.)