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PROCEEDINGS BEFORE

THE SUPREME COURT  
OF THE  
UNITED STATES

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SUPREME COURT, U.S.  
WASHINGTON D.C. 20543

ORIGINAL

CAPTION: ADAMS FRUIT COMPANY, INC., Petitioner V.  
RAMSFORD BARRETT, ET AL.

CASE NO: 88-2035

PLACE: Washington, D.C.

DATE: January 17, 1990

PAGES: 1 - 46

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1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -x  
3   ADAMS FRUIT COMPANY, INC.,   :

4                   Petitioner    :

5           v.                               :   No. 88-2035

6   RAMSFORD BARRETT, ET AL.    :

7   - - - - -x

8   Washington, D.C.

9   Wednesday, January 17, 1990

10           The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11:07 a.m.

13   APPEARANCES:

14   BONITA L. KNEELAND, ESQ., Tampa, Florida; on behalf  
15           of the Petitioner.

16   LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on  
17           behalf of the Respondents.

C O N T E N T S

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On behalf of the Petitioner	3
LAURENCE H. TRIBE, ESQ.	
On behalf of the Respondents	28



1 PROCEEDINGS

2 (11:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next in  
4 No. 88-2035, Adams Fruit Company v. Ramsford Barrett.

5 Ms. Kneeland.

6 ORAL ARGUMENT OF BONITA L. KNEELAND

7 ON BEHALF OF THE PETITIONER

8 MS. KNEELAND: Mr. Chief Justice, and may it please  
9 the Court:

10 This case involves an auto accident in which a group  
11 of migrant workers who were being transported to the fields,  
12 at which time the van in which they were being transported  
13 tipped over because a tire blew and they were injured.

14 The workers were compensated through workers'  
15 compensation benefits. However, after that point, they also  
16 brought suit against the employer based on allegations that  
17 the employer had violated safety provisions in the Migrant  
18 Seasonal Agricultural Worker Protection Act, which is  
19 sometimes known as MSAWPA or AWPA. Since the court below  
20 used the term AWPA, that is the one I will use.

21 The AWPA violations, as to the infractions that  
22 allegedly caused body -- bodily injury were never proved  
23 because the case was resolved in the Middle District of  
24 Florida by way of a -- a partial summary judgment.

25 The Middle District of Florida, looking at the



1 incorporation or the addition of the workers' compensation  
2 remedy into the act and the Department of Labor's regulation  
3 making that the exclusive remedy in cases of bodily injury,  
4 the -- the Middle District gave a summary judgment to Adams  
5 Fruit on those bodily injury claims, as well as the claims  
6 for statutory fines and injunctive relief in that area.

7 What the Middle District did then is swing the pendulum  
8 in one direction completely. In the Eleventh Circuit, the  
9 Eleventh Circuit swung the pendulum back completely in  
10 another direction and reinstated everything to the migrant  
11 workers, not simply entitlement to sue under the statute to  
12 enforce the safety provisions by way of penalties or  
13 injunctive relief, but also to make workers' compensation  
14 only the first step in a two-step process where they could  
15 stack a liability claim for bodily injury damages under the  
16 act above and beyond the workers' compensation relief.

17 And we are here today to argue the narrow issue that  
18 perhaps both courts swung too far in either direction, and  
19 this Court should make the pendulum right again.

20 The narrow issue, as I said, is that when workers'  
21 compensation is provided, as set up by the act itself,  
22 whether AWPA intended to operate workers' compensation as  
23 it normally would operate, as a no-fault recovery, in return  
24 for being the exclusive remedy for bodily injury claims --  
25 BI claims or death. Our position in this Court is that we

1 are not advocating to this Court that the migrant workers  
2 may not sue to get penalties or injunctive relief under the  
3 statute.

4 We are simply saying that the bodily injury claims were  
5 recovered by way of workers' compensation and that is not  
6 part of a two-step remedy that can be stacked.

7 Although the Eleventh Circuit framers --

8 QUESTION: Miss Kneeland --

9 MS. KNEELAND: Yes?

10 QUESTION: -- are you saying there should be some sort  
11 of a set-off for recovery in the other procedure or just  
12 that one completely precludes the other insofar as damages?

13 MS. KNEELAND: What we are saying, as far as bodily  
14 injury claims alone -- these are claims for medicals, and  
15 lost wages and that -- that which is in the field of bodily  
16 injury or actual damages -- that is taken care of by the  
17 alternate remedy which is included in the statute of  
18 workers' compensation.

19 QUESTION: What -- you -- you mean -- the workmen --  
20 that Florida workmen's compensation is included in -- in  
21 AWPA?

22 MS. KNEELAND: Yes, it is. State workers' compensation  
23 is included in AWPA.

24 QUESTION: What do you mean? It's -- it's a --

25 MS. KNEELAND: It just says state, any state.

1 Actually, specifically it's Section 1841 which deals with  
2 the cases of bodily injury or death for workers in transit,  
3 as happened in this case.

4 In Section 1841, the insurance plans --

5 QUESTION: Where do we find that?

6 QUESTION: Whereabouts?

7 QUESTION: Would you give us --

8 MS. KNEELAND: 1841(c), in --

9 QUESTION: Is there a brief where we --

10 MS. KNEELAND: Yes.

11 QUESTION: -- can refer to it?

12 MS. KNEELAND: Yes. Yes, Your Honor. It is actually  
13 set out in full in the Petition for Writ of Certiorari in  
14 the Appendix. However, it would also be here in the Brief  
15 of the Petitioner.

16 QUESTION: It's page 32(a) of the Appendix?

17 MS. KNEELAND: 32(a) in the Appendix?

18 QUESTION: 31(a) -- it begins at 31(a)..

19 QUESTION: That's at the Petition?

20 MS. KNEELAND: Yes, the Petition for Writ of  
21 Certiorari.

22 QUESTION: Certiorari.

23 MS. KNEELAND: And 1841(c) is the only part of the  
24 statute that refers to cases of bodily injury or death. In  
25 fact, it says -- and I am paraphrasing, you can read along



1 with me.

2 The section beforehand requires that you have to have  
3 a liability bond for workers in transit. However, 1841(c)  
4 states that in cases of bodily injury or death, that if an  
5 employer employs migrant and seasonal workers under state  
6 workers' compensation law, and the employer does provide  
7 workers' -- coverage in the case of bodily injury or death,  
8 then no liability policy is required if the workers have  
9 that coverage.

10 On the other hand, --

11 QUESTION: Do you -- do you say that that only applies  
12 to automobile accidents?

13 MS. KNEELAND: What we are saying, Your Honor, is that  
14 that was the logical place to insert it into the statute --

15 QUESTION: In the section entitled motor vehicle  
16 safety?

17 MS. KNEELAND: Yes, Your Honor. Because that --

18 QUESTION: And that -- that's where Congress would  
19 choose to express the -- the general principle that its  
20 monetary remedies are supplanted across the board by state  
21 workmen's compensation? In a section entitled motor vehicle  
22 safety?

23 MS. KNEELAND: Well, Your Honor, that was, at the time,  
24 the major concern of the legislature, the Department of  
25 Labor and the others who discussed this, that they wanted

1 to make sure that these workers who are in transit, because  
2 migrant -- migratory -- most of the accident were occurring  
3 -- and there is a National Safety Council cited in the  
4 amicus brief of the American Farm Bureau which is the  
5 citation for this. Most of the injuries --

6 QUESTION: Well, Miss Kneeland, I thought --

7 MS. KNEELAND: Most of the injuries occurred in --

8 QUESTION: -- I thought this section only dealt with  
9 whether the employer had to have an insurance policy or  
10 liability bond?

11 MS. KNEELAND: Well, Your Honor, that section --

12 QUESTION: Do you find other language in it that deals  
13 with something other than whether the employer has to  
14 furnish an insurance policy or a liability bond?

15 MS. KNEELAND: Well, Your Honor, the language in this  
16 statute refers to bodily injury claims. What it does is  
17 allow the substitution of a workers' compensation remedy for  
18 the remedy of a liability policy.

19 And it seems to make no sense -- there would be no  
20 other reason for the statute to allow the substitution of  
21 that remedy for the liability policy unless it was meant to  
22 be the comparable.

23 QUESTION: Well what about 1854(c) or -- you know --

24 MS. KNEELAND: Yes?

25 QUESTION: -- that it says expressly that you shall

1 have a private right of action and that a court who finds  
2 an intentional violation can award damages?

3 MS. KNEELAND: Yes, Your Honor. 1854(c) sets out a  
4 private right of action for actual damages or statutory  
5 finds or injunctive relief.

6 And what we are saying is that private right of action  
7 is not destroyed by our position. Our position is simply  
8 that the legislature, the Department of Labor, the drafters  
9 of the statute, allowed for an alternative form of obtaining  
10 bodily injury damages through workers' compensation.

11 QUESTION: Well, then it really is quite extraordinary  
12 that it would go ahead and say that the court -- not a  
13 commission, but a court can award damages.

14 MS. KNEELAND: Yes, Your Honor. Because if there were  
15 no workers' compensation remedy permitted, the worker would  
16 have to get a liability bond or a liability policy  
17 instead --

18 QUESTION: You mean the employer.

19 MS. KNEELAND: Did I say employee?

20 QUESTION: Yes, you did.

21 MS. KNEELAND: I'm sorry. The employer would have to  
22 obtain a liability policy or bond. In which case, the  
23 worker, instead of getting the superior remedy of workers'  
24 compensation, immediate recovery, and not having the burden  
25 of proving a violation or that his injuries were caused by



1 a violation, would have his workers' compensation remedy --

2 QUESTION: Yes, but may I ask --

3 MS. KNEELAND: Whereas --

4 QUESTION: May I ask on the -- say they had a policy  
5 of insurance -- they insured for \$50,000, say, and the  
6 employee had a \$60,000 claim. Would the employee be limited  
7 to amount of the policy limits?

8 MS. KNEELAND: Your Honor, I believe that the policy  
9 limits are 100, 300, or 100, 500 --

10 QUESTION: Well, but the statute doesn't require that,  
11 does it?

12 MS. KNEELAND: Yes, the regulations do.

13 QUESTION: Well -- the Secretary's regulations?

14 MS. KNEELAND: There's a regulation, and I'll get to  
15 that too.

16 QUESTION: But supposing the claim then was for  
17 \$110,000? Could -- would there -- would he be limited to  
18 the amount that the insurance -- the required insurance  
19 coverage?

20 MS. KNEELAND: No, Your Honor. But in such case, he  
21 would have to go to court and prove to a court of law that  
22 he is entitled anything at all, even the first penny.

23 QUESTION: That's -- that's right, but --

24 MS. KNEELAND: Yes.

25 QUESTION: -- in the workmen's compensation, supposing

1 he got -- the workmen's compensation recovery was equal to  
2 what the insurance would have been if the employer had to  
3 have insurance, but since he's got workmen's comp he doesn't  
4 need the insurance. Why can't he get more in one context  
5 if he can in the other?

6 MS. KNEELAND: Well, Your Honor, it would make no sense  
7 for this reason. If -- if the drafters had intended him to  
8 get above and beyond workers' compensation, they would  
9 certainly have never permitted farmers to drop their  
10 liability policies.

11 QUESTION: Well, but they can get above and beyond the  
12 liability policy.

13 MS. KNEELAND: What they have done is given the farmers  
14 an alternative and, even in the House report, stated to the  
15 farmer, this is all that is necessary, certainly leading  
16 every farmer to believe that if he did purchase a workers'  
17 compensation policy, that would be a sufficient remedy,  
18 since workers' compensation could go on and on --

19 QUESTION: Well, would you think the farmer believes  
20 that if he buys a \$100,000 policy, that -- that's the extent  
21 that he can possibly be liable?

22 MS. KNEELAND: No, Your Honor. But the act, I believe,  
23 was meant to encourage workers to -- otherwise why would it  
24 be included? -- to encourage the employers to include  
25 workers' compensation and elect to include it in -- in

1 states where it is elected -- elective -- and not to oppose  
2 the legislature in states where it is not elective or it is  
3 mandatory, because it is a far superior remedy.

4 As Arthur Larson pointed out in his very scathing  
5 review of the Eleventh Circuit case below, workers'  
6 compensation is not a remedy that you pick apart and you  
7 offer only the best part of it, and you take away the other  
8 part.

9 It's a remedy that has two sides to it, as though it's  
10 two sides of the same coin. And one is that there is  
11 unlimited workers' compensation for the person who needs it.  
12 It goes on and on and on for what they need, until -- until  
13 it's determined by the workers' compensation law that they  
14 no longer need it.

15 It is immediate. They don't have to prove, in this  
16 case, that the employer violated anything, or that the  
17 violations led to an injury. They get it immediately, and  
18 they get it across the board for any job-related injury in  
19 this case. It's a far broader and better remedy.

20 QUESTION: Well, that is wonderful, but we're just --  
21 we're not debating that. We're just debating whether it's  
22 been provided here.

23 MS. KNEELAND: Well --

24 QUESTION: I mean, that's -- that's a very good policy  
25 perhaps, but has it been provided?



1 Do you think -- do you think, Ms. Kneeland, that --  
2 that it is possible for Congress to make a mistake? Does  
3 Congress ever make a mistake?

4 (Laughter.)

5 MS. KNEELAND: Congress can make a mistake, Your Honor.  
6 But, also, Congress --

7 QUESTION: Because I -- I really can't figure out why  
8 they would want to put an insurance limit, and say don't --  
9 so long as you have insurance up to the amount of your  
10 workmen's comp, --

11 MS. KNEELAND: Well, this bill was drafted --

12 QUESTION: -- that's okay. I can't see why else they  
13 might want to do it except the reason you're giving.

14 MS. KNEELAND: Your Honor, this --

15 QUESTION: But the fact is that they have done nothing  
16 in the statute except to say that you have to have  
17 insurance.

18 Now, maybe they had something else in mind, but it  
19 seems to me they didn't do it. Which is why I ask whether  
20 you are willing to concede that sometimes Congress does not  
21 achieve what it -- what it meant to achieve.

22 MS. KNEELAND: Well, I would say this. Sometimes  
23 Congress can leave a statute with blanks. Sometimes  
24 Congress can leave ambiguities in the statute, in which  
25 case, and in this case, this was an administrative bill,

1 drafted and overseen by the Department of Labor who got the  
2 parties together, worked with them through the negotiations  
3 for 18 months on a daily basis --

4 QUESTION: They should have gotten a good draftsman,  
5 is what they should have done.

6 MS. KNEELAND: Well, Your Honor, these are drafted by  
7 committees and groups that got together to try to form a  
8 consensus bill to please everyone --

9 QUESTION: Well, sometimes when you -- sometimes when  
10 you try to get everybody together, the price for getting it  
11 passed is considerable ambiguity. It satisfies everybody.

12 MS. KNEELAND: Well, Your Honor, in this case the --  
13 the language of the statute is -- is perhaps ambiguous, in  
14 which case, you would defer to the Department of Labor's  
15 contemporaneous regulations, which were passed to -- which  
16 were passed to regulate and administer this bill.

17 And in this case, the Department of Labor, which --  
18 this was a Department of Labor bill -- oversaw everything,  
19 worked with the parties for 18 months before they gave birth  
20 to this bill, which was a very long gestation period by any  
21 means.

22 And included for bodily injury and death a substitute  
23 remedy which -- which brought in, leveraged in, workers'  
24 compensation for migrant workers for anything now -- falling  
25 off the ladder, being plain old klutzy, whatever -- brought

1 this protection into the act for them. And -- and perhaps  
2 should have, but did not, go back to 1854 and modify some  
3 language.

4 Well, Your Honor, the language in the -- in 1854 was  
5 put in in 1974 with no comment. Never -- actual damages was  
6 never defined. When it was discussed by anyone in the  
7 legislative history, it was discussed in the context of  
8 recordkeeping violations, housing standard violations, never  
9 in the context of bodily injury claims.

10 QUESTION: When -- when was 1841 put in the statute?

11 MS. KNEELAND: Oh, all right. Well, what happen was  
12 FLCRA was -- that's the Farm Labor Contractor Registration  
13 Act -- was universally hated and repealed, and AWPA was put  
14 in. It was -- I believe -- it was passed in December of '82  
15 and went into effect in April of '83. It was a brand new  
16 bill.

17 Everyone said the old bill didn't work. Things weren't  
18 happening. Neither side was getting the protections that  
19 were necessary. They wanted to make sure everyone was more  
20 fully protected, and so they added this language and brought  
21 in, for the first time, workers' compensation as an  
22 alternate remedy.

23 QUESTION: So 1841 came into the statute in 1983 and  
24 1854 came in 1974?

25 MS. KNEELAND: By a different -- it was in a different



1 bill and under a different -- probably section or provision  
2 number.

3 But back in 1974, the House and Senate reports both  
4 refer to only statutory fines and equitable relief, nothing  
5 about actual damages.

6 And then somewhere along the line -- and its not really  
7 clear where -- the term actual damages was added before it  
8 was passed. And it was with no discussion; it was just  
9 added at that time.

10 QUESTION: But the meaning is fairly clear, of actual  
11 damages. It suggests no punitive damages, but, you know,  
12 pain and suffering, doctor bills and the loss of income.  
13 That sort of thing.

14 MS. KNEELAND: Oh, yes, Your Honor. You would need  
15 that language because in many cases the farmer is not either  
16 required to provide comp by state law or he doesn't elect  
17 to provide comp, in which case he would only have a  
18 liability policy and the farmer would have to -- excuse  
19 me, the farm employee would have to go to court and bring  
20 suit for these actual damages. So it's necessary that that  
21 language is left within the statute for that purpose.

22 But we are also saying that the regulation drafted by  
23 the Department of Labor, which specifically states where a  
24 state workers' compensation law is applicable and coverage  
25 is provided for migrant and seasonal workers by the

1 employer, workers' compensation benefits are the exclusive  
2 remedy for loss under this act in the case of bodily injury  
3 or death.

4 In other words, the regulation is very specific that  
5 It is only in the case of loss for bodily injury or death  
6 that workers' compensation would be exclusive --

7 QUESTION: What business is it of the Secretary? I  
8 mean, usually the Secretary issues regulation for matters  
9 in which he has a responsibility.

10 MS. KNEELAND: Yes.

11 QUESTION: What responsibility does the Secretary have  
12 in this field to go around pronouncing who can sue in  
13 courts?

14 MS. KNEELAND: Well, Your Honor, in the -- in the first  
15 place, he was given, under several sections of the statute  
16 -- and they are 1861, which is to promulgate rules and  
17 regulations over the entire statute, and 1841(d)  
18 specifically for safety -- health and safety of the migrant  
19 workers, particularly in cases like this where you have  
20 workers in transit -- was given the authority to draft  
21 regulations in order to administer this statute.

22 QUESTION: Regulations, I assume, governing the  
23 individuals who were subject to the act and governing the  
24 officials of the Department of Labor who implement the act.  
25 But regulations governing the courts?

1 MS. KNEELAND: Oh, no, Your Honor. Not regulations  
2 governing the courts, but regulations governing the remedies  
3 that were provided by the statute --

4 QUESTION: Well, that's the courts. The remedies are  
5 judicial remedies and he's issuing a regulation saying the  
6 court shall provide no remedy when there is workmen's comp.  
7 That's what the regulation reads, isn't it?

8 MS. KNEELAND: No, Your Honor. The court says there  
9 is no remedy for actual damages or actually bodily injury  
10 or death damages.

11 The worker can still -- and this is were I feel both  
12 courts erred in not seeing what the -- what the actual plan  
13 was in the dovetailing of workers' compensation was -- was  
14 that for bodily injury claims, workers' compensation was the  
15 alternative provided to the worker.

16 In cases where they wanted to seek through the courts  
17 additional remedies, there is still equitable relief or  
18 statutory penalties.

19 QUESTION: Well, I'm not arguing about the scope of it  
20 right now. I'm -- I'm just -- just questioning what  
21 business the Secretary had to stick his nose into this  
22 matter.

23 We defer to the Secretary's regulations within the  
24 scope of his responsibility. But how is it the scope of his  
25 responsibility to say what lawsuits the courts will

1 entertain? Which is what the regulation does, does it not?

2 MS. KNEELAND: Well, Your Honor --

3 QUESTION: It effectively says you can't bring a suit  
4 in court, if you have workmen's comp.

5 MS. KNEELAND: No, Your Honor. It said you can't bring  
6 a suit in court for your bodily injury claim.

7 QUESTION: Okay, fine.

8 QUESTION: Ms. Kneeland --

9 MS. KNEELAND: All right. I -- I may not be -- I may  
10 not be answering your question completely, so I will try  
11 again.

12 What I'm trying to say is the statute -- if the statute  
13 is silent or ambiguous on this issue, then the Department  
14 of Labor regulation may fill the gap. And since they were  
15 there and they were the ones that pushed this bill through  
16 and got the people together and were involved all of the  
17 way, you would -- you would see that by adding workers'  
18 compensation, which is understood by everyone to be part and  
19 parcel, a two-way street --

20 QUESTION: You're right, but you're not answering my  
21 question.

22 MS. KNEELAND: All right. I'll try again.

23 QUESTION: Ms. Kneeland, may I get a question in?

24 MS. KNEELAND: Yes.

25 QUESTION: The Solicitor General has not filed a brief



1 amicus in this case, has he?

2 MS. KNEELAND: No, Your Honor.

3 QUESTION: Isn't that rather strange that he isn't in  
4 here defending the regulation?

5 MS. KNEELAND: Well, Your Honor, this is not a case  
6 where the Department of Labor is a party to the suit.

7 QUESTION: Well, I know that, but --

8 MS. KNEELAND: And -- yes -- and Your Honor --

9 QUESTION: It's his regulation that's under fire here.

10 MS. KNEELAND: Yes, Your Honor. And the Department of  
11 Labor has never attempted to withdraw this regulation in all  
12 this time, nor have they been challenged to do so until this  
13 time.

14 The Adams Fruit opinion came out ten months ago, and  
15 the Department of Labor has not made any move to withdraw  
16 its regulation. They have stood by their regulation this  
17 entire time, and they may believe that their regulation is  
18 certainly being adequately and extremely well defended  
19 today.

20 QUESTION: Well, I take it you are defending the  
21 regulation.

22 MS. KNEELAND: Yes.

23 QUESTION: And why isn't he?

24 MS. KNEELAND: Your Honor, there may be reasons why  
25 they have not come in that I am not aware of, but that would

1 be outside of this record. As far as I know, they have made  
2 no move in any way to withdraw the regulation in all of this  
3 time or to indicate in any way that they no longer stand by  
4 this regulation.

5 QUESTION: Did they move to enforce the regulation?

6 MS. KNEELAND: As -- as far as I know. I -- I don't  
7 know that there have been any actions in that regard as well  
8 where they privately --

9 QUESTION: How would they -- how would they move to  
10 enforce the regulation if they wanted to?

11 MS. KNEELAND: I'm not sure I know the answer to that.  
12 I would have to -- I -- I'm afraid I don't know. I would  
13 have to look through the statute again and see if there is  
14 some way that they could move to enforce their own  
15 regulation in the courts. I'm not certain.

16 I would try -- I would like to try to answer the  
17 question that I was unsuccessful in answering the first  
18 time. Okay?

19 The -- the argument that the other side appears to make  
20 is that the Department of Labor tried to sneak this  
21 regulation through and that no one noticed it.

22 And it would seem to me that if this was such an  
23 important aspect of this statute to the migrant worker  
24 groups, that they certainly would have taken note of this  
25 regulation when it first came out and was published in

1 summary form in April of 1983 and also where it was  
2 published in what would be its interim form and comments  
3 were requested for 30 days.

4 There were -- according to the August 1983 Federal  
5 Register, there was no opposition recorded or no comments  
6 about it to the -- to the extent that it was incorrect.

7 And now -- all along for 18 months migrant workers'  
8 groups were actively involved in the drafting of the statute  
9 and actively there for every step of the way as it was  
10 brought together.

11 It would appear that and -- and if this was an error  
12 on the Department of Labor's part, or something beyond the  
13 scope of what they were entitled to do, that would have  
14 certainly raised a -- a tremendous surge of opposition.

15 In fact, this regulation has been on the books for  
16 nearly seven years, and it is only recently that someone has  
17 challenged it. I'm sorry -- I take that back. The -- the  
18 actual regulation has only been challenged once, but there  
19 is one other case, the Roman case, where actual damages  
20 were attempted to be recovered in addition to workers'  
21 compensation.

22 What -- what we're trying to say here is that the --  
23 the drafters had a purpose for putting workers' compensation  
24 in as an alterative. And it certainly would not have been  
25 telling the farmers that they can drop their liability

1 policies and count on their workers' compensation because  
2 I don't believe they would have meant to hang the farmer out  
3 to dry like that.

4 They certainly, if they were -- if this was meant to  
5 afford additional protections to the migrant worker above  
6 and beyond workers' compensation, they could have required  
7 comp, if it's available, and a liability policy above and  
8 beyond that to compensate the workers for additional damages  
9 if they brought claims for actual damages through the court.

10 However, these workers are not deprived of their remedy  
11 under 1854. They can sue to enforce the statute. And if  
12 that means equitable relief or penalties, then -- then so  
13 be it.

14 It is where we come to bodily injury claims that it is  
15 obvious that a group of people who got together and who in  
16 -- in FLCRA, the previous bill, had never permitted the  
17 substitution of workers' compensation -- and this is the  
18 substitution of the remedy -- determined that they would  
19 indeed substitute that remedy.

20 And what we have now are workers, migrant workers, who  
21 are compensated across the board immediately for their  
22 injuries in all phases on the job, anytime they are hurt,  
23 because they have the workers' compensation remedy at their  
24 disposal.

25 Well, the quid pro quo of that is that the farmer wants



1 to have workers' compensation too. He wants this to be a  
2 remedy, an alternate remedy obviously under AWPB because,  
3 number one, he would not be brought into court all the time.  
4 Even if he proved to be totally void of committing any  
5 violations, he would have to hire an attorney and go to  
6 court and so on and so forth, and we have what amounts to  
7 a Federal tort suit then, above and beyond every workers'  
8 compensations claim.

9 We have 19 states where the employer can elect workers'  
10 compensation. In, I believe it's 15 of the states, that's  
11 part of the statute, and in four other states, it is just  
12 permitted.

13 Nineteen states where tomorrow the farm employer could  
14 say, well, I am not getting anything back from my workers'  
15 compensation policies and paying my premiums. I'm going to  
16 have to go out now and purchase a liability policy in  
17 addition, even though I have been told that this is all we  
18 needed.

19 QUESTION: Well, Ms. Kneeland, as a practical matter,  
20 how much would premiums escalate to provide this additional  
21 coverage, assuming there's an offset given in the remedy --

22 MS. KNEELAND: They would --

23 QUESTION: -- if there is a Federal cause of action for  
24 bodily damages and assuming you get an offset for whatever  
25 the state workmen's comp provided? Do you think we are

1 talking about some enormous increase in premium cost?

2 MS. KNEELAND: What we're talking about, Your Honor,  
3 is double -- double premiums, one in a workers' compensation  
4 arena and another in a liability arena.

5 And many of the migrant workers who -- excuse me --  
6 migrant worker employers who are getting both will feel now  
7 there is no necessity to have the one, since they can just  
8 get the other if they are going to be sued anyway. They  
9 probably will elect, in states where it's elective, elect  
10 not to have comp; simply get a liability policy that will  
11 cover everything and pay one premium.

12 And then in other states where workers' compensation  
13 is mandatory, you will absolutely have pressure from the  
14 farm groups on the legislature to say, we have to go out and  
15 get a liability policy anyway. Economically, we would be  
16 paying for two policies just because this is mandatory in  
17 the state. Let's -- let's -- give us the election, or let's  
18 drop the migrant workers --

19 QUESTION: Well, is the premium --

20 MS. KNEELAND: I don't know --

21 QUESTION: -- double --

22 MS. KNEELAND: I don't know.

23 QUESTION: -- when you have an offset?

24 MS. KNEELAND: I don't know that offsets are ever  
25 factored in. As far as underwriting insurance, I don't

1 know. I just know that all premiums in all cases now are  
2 escalating. I've seen in the news -- it's just -- it's  
3 getting to be a greater and greater problem.

4 But what we would like to say is, if this left, -- not  
5 perhaps Eleventh Circuit version or the Middle District  
6 version -- but left to workers' compensation as the  
7 alternative for bodily injury, then you have workers who are  
8 so much better protected in all arenas in the workplace, all  
9 areas. And you would not have the pressure brought on  
10 legislature, such as Florida, to eliminate the workers' comp  
11 requirement.

12 And Florida eliminates workers' comp requirements  
13 whenever pressure is brought to bear, if you look at  
14 Florida's history. Right now, if you have Jones Act  
15 coverage, Harbor Workers, Federal Employee Liability Act,  
16 the Florida compensation statute has eliminated workers'  
17 compensation. There are other areas where it has done  
18 similar things.

19 Your Honor -- Honors, we would say that the superior  
20 remedy --

21 QUESTION: Ms. Kneeland, your time has expired. Thank  
22 you.

23 Mr. Tribe.

24 ORAL ARGUMENT OF LAURENCE H. TRIBE

25 ON BEHALF OF THE RESPONDENT

1 MR. TRIBE: Mr. Chief Justice, and may it please the  
2 Court:

3 Congress expressly created and rather carefully  
4 delimited the private right of action involved in this case  
5 after hearing some quite dramatic testimony about actual  
6 damages in a disaster in Blythe, California where about 50  
7 migrants were maimed or killed in the crash of a single  
8 unsafe vehicle.

9 Now, there was workers' comp available there.  
10 California was the most generous of the states. It didn't  
11 impress Congress. Maybe they made a mistake.

12 But for better or for worse, Congress indisputably  
13 concluded that workers' compensation was an inadequate  
14 remedy and the House report makes absolutely plain what the  
15 language of 1854's predecessor made plain anyway. That was  
16 that they thought an unfettered Federal civil remedy was  
17 indispensable if the law was to work --

18 QUESTION: Well, Mr. Tribe, why -- why do you think  
19 Congress adopted this insurance liability provision? It  
20 is --

21 MR. TRIBE: In 1983?

22 QUESTION: Yes. It is curious because it isn't a good  
23 fit under your theory.

24 MR. TRIBE: Let me turn to that then, Justice O'Connor.  
25 It seems to me one could take the view that its a bad fit,



1 that Congress sometimes makes mistakes and that it's not for  
2 this Court or for the Secretary of Labor to rewrite the law.  
3 I think that would be the correct view.

4 But I'm not so sure that it is all that silly a fit  
5 because the history makes absolutely clear what was going  
6 on.

7 They tried in 1978 to actually make workers'  
8 compensation the exclusive remedy in what was called the  
9 Ireland bill, Representative Ireland of Florida. And the  
10 language of that provision would have been quite explicit.  
11 They were worried not just about being hit with double  
12 insurance premiums but being hit with double liability and  
13 maybe not having an offset.

14 And so the language of that provision specifically  
15 talks about the exclusive remedy provisions of state  
16 workers' comp and would have incorporated that. That was  
17 voted down. Then --

18 QUESTION: Mr. Tribe, could I ask about that? The  
19 Petitioner's reply brief says that that provision was just  
20 like this one.

21 MR. TRIBE: But it isn't, Justice Scalia. I know they  
22 say that. The difference is that it contains the words --  
23 the specific words "exclusive remedy provisions of state  
24 workers' compensation," and says that it shall conform with  
25 that.

1 Those words, exclusive remedy --

2 QUESTION: What shall conform with it? The insurance?

3 MR. TRIBE: The insurance shall.

4 QUESTION: So that --

5 MR. TRIBE: It's -- it's quite possible, Justice  
6 Scalia, that if that had become the law, they would have  
7 then argued that that was enough for Congress to achieve  
8 its purpose, and I think then Congress would have, perhaps,  
9 made a mistake. Because then the purpose was only to  
10 substitute, not just -- the purpose then was to deal with  
11 premiums and double liability.

12 But there is an obvious purpose to the --

13 QUESTION: Well, I -- I think that's significant, that  
14 every -- I'm sorry, you haven't answered Justice O'Connor.  
15 Why don't you finish with Justice O'Connor's question?

16 MR. TRIBE: Okay. And then I will try to get back.

17 In almost every state their are minimum insurance  
18 requirements for vehicle policies. But that doesn't meet  
19 anyone's belief that if they have that insurance, and they  
20 are told you needn't get anymore, that there will never be  
21 liability over and above it.

22 Here the idea was that as business enterprises,  
23 agribusiness should have the freedom to decide to have lower  
24 premiums and to gamble on an occasional big payout, which  
25 is what would happen if they chose to rest with workers'

1 comp as the exclusive insurance coverage they would obtain.

2 If the whole purpose of Congress was as suggested by  
3 Petitioner, namely, a kind of promise to the employer that  
4 they will be immune from any uninsured liability, then I  
5 think it would be incomprehensible, and it would be a much  
6 worse fit, because, as Justice Stevens points out, that's  
7 not what farmers get here.

8 In, let's say, the 14 states where there is no workers'  
9 compensation for migrants, and in the other seven states  
10 where migrants are almost totally excluded, what happens is  
11 that if an employer purchases all the insurance that he is  
12 required under this law to obtain -- and he is required  
13 under the law and the regs to have at least as much as the  
14 Interstate Commerce Act specifies -- he still is exposed to  
15 liability over and above that. It's not a senseless fit.

16 It makes perfect sense in other areas of the law. And  
17 even if I assume, and I am quite prepared to, that given the  
18 precise wording of the Ireland amendment, it too wouldn't  
19 have really achieved the extreme purpose of subordinating  
20 the Federal liability remedy to state law.

21 That amendment was rejected. What we have is something  
22 that even if I assume it's equivalent was at most the  
23 Ireland amendment. We do not, however, have anything in the  
24 statute which departs from the normal tradition by  
25 subordinating the Federal to a state remedy.

1 Now, when Congress wants to do that, it does it in very  
2 specific terms. The Black Lung Act, about which this Court  
3 heard argument just yesterday, was a perfect example.

4 That gives the Secretary of Labor the role of  
5 administering the Federal payout, the Federal relief. It's  
6 not done through judicial action, but it's done through the  
7 Secretary. So, he has some business there and there would  
8 be a way to enforce any rules he made about it because he  
9 is the administrator.

10 And then it tells him -- the act of Congress tells him  
11 to relegate the mine workers to state workers' compensation  
12 if he finds that the state -- the state system provides  
13 adequate compensation.

14 When Congress wants to do that, it knows how to do it.  
15 It did it in Black Lung. It did it in a slightly different  
16 way, as we point out in our brief, in the Federal Tort  
17 Claims Act and in the War Hazards Compensation Act.

18 But every court that has reviewed a Federal statute  
19 which does not incorporate in its language an exclusive  
20 state remedy -- such as, for example, the Jones Act or the  
21 Longshoremen's Act -- has understood that the background  
22 rule against which Congress is writing is a rule which says  
23 that the Federal remedy that you provide is supplementary.  
24 There may be an offset, but it is not suppose to have a hole  
25 carved out of it in every place where a state remedy might



1 be provided.

2 And when that hole is carved, as it was in the Black  
3 Lung Act, it's typically carved in a way that gives the  
4 Secretary the responsibility of deciding whether the state  
5 remedy to which the worker would be relegated is adequate.

6 It would be extraordinary to decide that regardless of  
7 the adequacy or inadequacy of state workers' compensation,  
8 when it is provided then the Federal remedy evaporates. And  
9 that is what this free- floating regulation says, the  
10 regulation, which is untethered, as Justice Scalia pointed  
11 out, to any responsibility that the Secretary of Labor has  
12 in administering this law, completely unhinged from any of  
13 his functions in standard setting or in investigation or in  
14 registration. It just is a pronouncement.

15 That regulation --

16 QUESTION: Mr. Tribe, it is true, though, is it not,  
17 that the available -- if you get workmen's compensation  
18 coverage, you don't have to have any insurance coverage?

19 MR. TRIBE: That's -- that's correct.

20 QUESTION: Even though the Federal workmen's  
21 compensation coverage in a particular case might provide a  
22 recovery of much less than the limits the Secretary would  
23 otherwise provide?

24 MR. TRIBE: Would otherwise -- and that really is an  
25 anomaly, I think, Justice Stevens. That I can't make a lot

1 of sense out of.

2 QUESTION: At least at that extent, the availability  
3 of the state remedy cuts back on some of the Federal  
4 protection.

5 MR. TRIBE: And to that extent, Congress might have  
6 been aware that that was part of what would happen from this  
7 statute. Because, you see, this issue that the regulation  
8 addressed -- the issue of the relationship between the  
9 Federal remedy and state law -- was not one that Congress  
10 was inattentive to.

11 That is, in some instances one might say that Congress  
12 simply didn't think about the interaction between state and  
13 Federal law, left the matter ambiguous, left a kind of gap  
14 for an administrator to fill.

15 Even then, it seems to me, that under this Court's  
16 decisions the role of an agency in filling a gap is limited  
17 to its role in filling gaps about what it administers,  
18 what's in its charge. It's not, as Justice Scalia referred  
19 to in another case, Junior Varsity --

20 QUESTION: No, but it is part of the Secretary's  
21 responsibility to decide how much insurance people have to  
22 carry.

23 MR. TRIBE: That's part of his responsibility under  
24 1841.

25 QUESTION: Right.

1 MR. TRIBE: But deciding how much insurance they have  
2 to carry does not involve regulating the courts in their  
3 remedial jurisdiction. It's one thing to say to the  
4 Secretary, you set standards about safety belts and about  
5 insurance. And it's quite another to say, you, as a member  
6 of the Executive Branch, tell the Federal Judicial Branch  
7 whether to award actual damages.

8 That would be an extraordinary delegation to the  
9 Secretary.

10 QUESTION: No, but I think -- isn't also true that the  
11 Secretary has to confront the fact that a lot of farmers may  
12 not be solvent enough to pay these very large judgments, and  
13 that it really in term -- practical terms is trying to  
14 figure out how best to get the money to the injured people,  
15 and that figuring in the normal case, insurance coverage  
16 would be -- would be the answer or workmen's comp.

17 MR. TRIBE: But unlike the Black Lung law, Justice  
18 Stevens, the Secretary's responsibility here is not to  
19 assure that the economic welfare of these workers is  
20 adequately cared for. That was the reason that Congress  
21 specifically took the economic issue -- damages, both actual  
22 and statutory -- and separated that completely from the  
23 Secretary's enforcement and created expressly a private  
24 right of action.

25 The Secretary sets health and safety standards. And

1 it is true that he's suppose to worry about whether they are  
2 undue burdens. But to say that the Secretary's  
3 responsibility here is, in the large, to make sure that some  
4 system is put in place that best meets the various needs,  
5 economic and otherwise, of the migrants would be an  
6 extremely broad delegation of authority, perhaps  
7 constitutional, but nowhere to be found in this statute.

8 That is, in this statute the delegations of authority  
9 are very specific. 1841(d) delegates to the Secretary of  
10 Labor a power, and indeed a duty, by the effective date of  
11 the law to prescribe what it calls the standards required  
12 for implementing this section. And it says to do it through  
13 regulations promulgated in accord with 1861, which just  
14 absorbs the Administrative Procedures Act.

15 QUESTION: Mr. Tribe, you -- you must admit the result  
16 that's produced is counterintuitive at a minimum. You're  
17 talking about workers who had been disadvantaged workers.  
18 They had been sort of treated as second-class workers,  
19 migrants. They now are in a preferred position.

20 Had -- had this same accident on this farm occurred to  
21 some of the resident farm hands, their only remedy would  
22 have been the state workmen's compensation. And now this  
23 bill, which one would have thought was at most intended to  
24 eliminate the disabilities that migrants had been suffering,  
25 places them in a preferred position. They can go into



1 Federal courts for damages.

2 MR. TRIBE: Of course, the ability to go into Federal  
3 courts in these circumstances and have a lawyer appointed  
4 for you is quite extraordinary. And Congress did it  
5 knowingly after being regaled with rather dismal stories of  
6 how migrants are badly treated.

7 QUESTION: We -- we don't care about the resident farm  
8 hands?

9 MR. TRIBE: Well, Congress may not have cared about  
10 them quite as much.

11 QUESTION: Workmen's comp is okay for them but the --  
12 but the migrants have --

13 MR. TRIBE: There are --

14 QUESTION: This Cadillac treatment in Federal courts.  
15 I think it's -- it's not --

16 MR. TRIBE: Well, I wouldn't call it -- maybe -- maybe  
17 Chevrolet, Justice Scalia.

18 (Laughter.)

19 MR. TRIBE: The -- the fact is that migrants are  
20 treated differently throughout Federal law. They're not  
21 entitled to the protections of OSHA. They're not entitled  
22 to the Fair Labor Standards Act. They're not covered by  
23 the National Labor Relations Act.

24 On the other hand, they do get preferred treatment  
25 under the Child Nutrition Act. They get preferred treatment

1 under the Food Stamp Act. They get preferred treatment  
2 under the Job Training Act.

3 It would not be unusual for them to get different  
4 treatment here.

5 And in any event, it's not different treatment that  
6 necessarily places them -- I must suggest -- on some  
7 preferred status. That is, they suffer under a great many  
8 other disabilities.

9 When in 1982, after eight years of the original cause  
10 of action, Congress held hearings on how things were going,  
11 contrary to the assertion of the Petitioner, it was not  
12 difficult to find cases where migrants were maimed despite  
13 the private cause of action. There were 116 cases listed  
14 in the September 1982 hearings involving personal injuries  
15 resulting from unsafe vehicles, some of them overturning and  
16 migrants drowning in two feet of water.

17 And in those cases -- about a third of them actually  
18 involved personal injury claims -- the reason the conditions  
19 continued to be bad -- and this is, I think, crucial to  
20 understand what compromise was struck in '82 -- was that  
21 under the old law you could only sue the crew leader, the  
22 transient crew leader, or the farm labor contractor.

23 You couldn't go after the agribusiness, the ultimate  
24 employer. And because you couldn't, it was very difficult  
25 to obtain judgments, and exploitation continued.

1           At the same time, the ultimate employers felt quite  
2           hassled by being demeaned, they thought -- by being treated  
3           as though they were just fly-by-night crew leaders and  
4           forced to register.

5           So the compromise was, we won't make you register, but  
6           we will subject you, as defendants, to this crucial private  
7           cause of action which Senator Hatch who introduced it in the  
8           Senate said was vital and said that there was an assurance  
9           of full actual damages in every case.

10          At the same time, we'll also give something --

11          QUESTION: Excuse me, you -- you don't get the -- if  
12          -- if there's an -- that accident you began your  
13          presentation with, was that an accident that had occurred  
14          on a farm or was that an accident that --

15          MR. TRIBE: No -- no. It would have had to have  
16          occurred while you were being transported to the farm.

17          QUESTION: Right. By a crew leader.

18          MR. TRIBE: On the farm --

19          QUESTION: By a crew leader, not by a private farmer.  
20          And -- and most of the other instances you just mentioned  
21          as to how many there were, what percentage of those were --  
22          were trucks that were being driven by the crew leaders, as  
23          opposed to on the farm of the individual?

24          MR. TRIBE: The -- the crew leader drove one of those  
25          trucks where those kids drowned, Justice Scalia. But the

1 truck's seats were not even attached to the truck, and it  
2 belonged to the ultimate farmer.

3 The farmers in these cases, the growers, would often  
4 hide behind the crew leaders. They would supply an old  
5 dilapidated van without seat belts, with equipment that  
6 wasn't tied down, and under normal principles of law, one  
7 would be able to sue them as the ultimately responsible  
8 parties.

9 But under FLCRA one couldn't do that. So that Congress  
10 broadened the cause of action, so one could reach the  
11 responsible source. But then, in addition to allowing the  
12 ultimate agribusiness not to have to register, it put a cap  
13 on statutory damages of \$500,000, on cumulative statutory  
14 damages in any class action.

15 QUESTION: Well, what about an offset, Mr. Tribe?

16 MR. TRIBE: We think an offset would make perfect  
17 sense. So did Judge Robert Vance for the Eleventh Circuit.  
18 He said that -- and this is the way it's handled in many  
19 other areas, like Longshoremen's and others -- he said that  
20 it is perfectly appropriate for the district court in  
21 deciding what actual damages were suffered to take into  
22 account the fact that they had collected something like  
23 \$120,000 among the -- among the -- I think ten of them --  
24 from the Workers' Compensation Board.

25 We're not suggesting anything like the double dipping



1 or double recovery that Petitioner suggests. But what we  
2 are suggesting is that when Congress goes out of its way to  
3 empower a group of workers, not by giving them Cadillacs,  
4 by giving them access to Federal court, and when Congress  
5 expressly says that they can collect damages in that Federal  
6 court, it is not up to the Secretary of Labor in a  
7 pronouncement about a part of a statute that he doesn't  
8 administer, to rewrite what Congress did.

9 And indeed, you know, as I think about it, this Court  
10 is being asked to rewrite, not only AWPA, but the DOL  
11 regulation itself.

12 Because if I hear her correctly, Ms. Kneeland is now  
13 retreating from the position of her original brief, and she  
14 is now saying that, well, perhaps you shouldn't really  
15 reinstate what the district court did. You should cut it  
16 down the middle -- she describes it in terms of setting the  
17 pendulum right -- and what you should do is allow the suit  
18 for statutory damages, which could still by the way, be more  
19 than was covered by insurance, could still cripple the  
20 farmer, which leaves very little sense in their reading of  
21 1841(c).

22 QUESTION: Well, there's this -- when you say rewriting  
23 what Congress did, of course, the question is what did --  
24 what did Congress do.

25 Is it not -- from the farmer's point of view, is it not

1 possible to look at the whole package and say, well, they  
2 want me to protect these people by buying insurance. It  
3 have two choices. I can either buy ordinary insurance, in  
4 which event I am liable if the -- if the policy is not large  
5 enough. Or I can buy workmen's comp insurance in which, if  
6 it's like it normally is, that will give me full protection.

7         Wouldn't the -- wouldn't the farmer think that was his  
8 choice?

9         MR. TRIBE: But he could certainly buy both. There is  
10 nothing in this law that would lead any farmer --

11         QUESTION: Yeah, but they don't want to have spend any  
12 more money than they have to, obviously. And if they think  
13 the workmen's compensation will (a) be the better remedy for  
14 the worker and also less expensive than buying both, it  
15 seems to me its a possible interpretation of what of  
16 Congress but together.

17         MR. TRIBE: That Congress perhaps entrapped farmers  
18 into buying too little insurance and that, therefore, this  
19 Court should find some way in the language of this  
20 statute --

21         QUESTION: We don't like to construe --

22         MR. TRIBE: -- to do what Congress knows how to do --

23         QUESTION: We do not like to construe the statutes as  
24 traps for people who didn't really fully understand them.

25         MR. TRIBE: But I don't -- I think to be -- to be

1 honest, Justice Stevens --

2 QUESTION: At least I don't.

3 MR. TRIBE: -- the trap for the unwary theory doesn't  
4 make me bleed a lot when the damages are made available only  
5 when after a full trial you've proven intentional violation  
6 of AWPA.

7 We're not talking about liability that strikes from the  
8 blue. We're not talking about no-fault. We're not even  
9 talking about negligence.

10 Moreover, these are sophisticated people. I mean  
11 agribusiness -- I simply cannot believe that they thought  
12 that this law which says not a word about eliminating the  
13 Federal cause of action --

14 QUESTION: You cannot believe they thought it said what  
15 the Secretary thought it said.

16 MR. TRIBE: It seems to me very implausible that the  
17 Secretary thought it said that. The Secretary thought it  
18 gave him power to promulgate that.

19 QUESTION: The Secretary, it should be added, was the  
20 moving force behind this legislation --

21 MR. TRIBE: Well, in '82 --

22 QUESTION: This -- this was the Department's bill.

23 MR. TRIBE: In '82, Justice Scalia. In '74 when the  
24 cause of action was put in place, there was an interesting  
25 colloquy between the head of Wages and Hours in Labor and

1 Representative Ford, essentially the patron saint of the  
2 migrant worker community in Congress since 1974, in which  
3 the Department of Labor was asked, aren't you better off  
4 with this private cause of action. Doesn't it take some of  
5 the burden off of you? And at that point Landis said, you  
6 know, I guess you're right.

7 There's no reason for Labor to resist having this  
8 private cause of action. It does make it somewhat  
9 mysterious why the regulation was promulgated, but not so  
10 mysterious why the Solicitor General is not here and why  
11 the Department of Labor hasn't defended this provision.

12 That is, this is not something that relates to the  
13 Labor Department's responsibilities. If this regulation is  
14 disregarded as obviously ultra vires, it doesn't interfere  
15 with any day-to-day responsibility of the Department of  
16 Labor. It doesn't increase their burdens one bit. It  
17 simply carries out what Congress chose to do.

18 And in this statute, Congress was very specific about  
19 the relationships between Federal and state law. It said  
20 that state law would not be fully preempted, because 1871  
21 says that states can add responsibilities on top of the  
22 Federal.

23 It specifically absorbed one defense from state law.  
24 Namely, if you're defined as a labor organization under  
25 state law, then you can't be sued under this private cause



1 of action.

2 In addition to that, it empowers the Secretary to  
3 delegate administrative functions to state agencies in  
4 Section 1863. But it says that the Secretary of Labor shall  
5 not delegate rule-making authority.

6 In other words, AWPA clearly spells out a certain model  
7 of cooperative Federalism. And that model bears no  
8 resemblance to the wholesale absorption of state law which  
9 is accomplished by this regulation.

10 And you notice not only is the Solicitor General not  
11 here, the State of Florida is not here. Florida, like other  
12 states, does not purport to treat the exclusivity of  
13 workers' comp as bearing on your right to recover from  
14 another legal system.

15 That was the holding of a Supreme Court of Florida in  
16 1970. And this Court, in the context of the full faith in  
17 credit clause, reached a similar conclusion in Thomas v.  
18 Washington Gas Light in 1980.

19 That is perhaps why the States of Texas, California and  
20 Massachusetts, which are the only states this Court has  
21 heard from, have basically taken the position that what the  
22 Secretary of Labor did was to create a kind of hybrid  
23 chimerical contraption which had no resemblance to what the  
24 states wanted to, and which in fact hijacked the states'  
25 laws, turned them to a purpose the states didn't have in

1 mind. They weren't trying to kick people out of Federal  
2 court.

3 So the current posture this Court is asked to accept  
4 far from a perfect position of a pendulum, involves writing  
5 a very strange hybrid law, that would not be recognized as  
6 Florida's choice, or as Congress' choice or perhaps even as  
7 the choice of the current Secretary of Labor, which it seems  
8 to me is not a Federal judicial responsibility.

9 QUESTION: It would put a lot of pressure on those  
10 states that now do not provide workmen's comp coverage for  
11 migrant workers to do so.

12 MR. TRIBE: Well, that theory --

13 QUESTION: Which has some advantages to migrant workers  
14 beyond -- beyond this -- this field we're talking about.

15 MR. TRIBE: If that were an appropriate policy  
16 objective for a court to pursue in construing a statute, I  
17 suppose one would have to think about that harder. But as  
18 I have thought about it so far, I think it cuts the other  
19 way.

20 Their examples in the first two footnotes of their  
21 reply brief where they talk about Texas and Florida, somehow  
22 suggest that states really are going to be pressured one way  
23 or the other by the change.

24 But the fact is that Texas, which they give as their  
25 initial example, has come before this Court in its amicus

1 brief to say that it wants to have the supplementary  
2 availability of Federal relief for migrant workers.

3 Now, of course, if the Federal relief is withdrawn --  
4 the relief that Congress provided -- states might be under  
5 pressure to do all sorts of things. But that would be a  
6 reason to cut back for the Secretary. Suppose the Secretary  
7 of Labor said, I think workers' comp is great. I want to  
8 pressure states to provide it.

9 So I say that if it's a small farm that's the  
10 defendant, and if the migrants are not hurt beyond a level  
11 of \$20,000, and I'll set that as a minimum, the Federal  
12 cause of action should be eliminated.

13 That would put a lot of pressure on the states. But it  
14 would surely be beyond his authority and it would not be  
15 consistent with this law.

16 QUESTION: No, I -- I suggest it just as an  
17 explanation of what Congress perhaps had in mind, not that  
18 the Secretary could achieve it. But it would be -- it would  
19 be an intelligent objective of Congress.

20 MR. TRIBE: I suppose it would. I suppose it would.

21 If there are no further questions, I think I'll --

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tribe.

23 The case is submitted.

24 (Whereupon, at 12:00 noon, the case in the above-  
25 entitled matter was submitted.)

## 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:*

No. 88-2035 - ADAMS FRUIT COMPANY, INC., Petitioner V. RAMSFORD BARRETT, ET AL

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

BY Alan Friedman

(REPORTER)



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