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COURT OF APPEALS

STATE OF NEW YORK

EMPIRE STATE CHAPTER OF ASSOCIATED BUILDERS, INC., ET AL.,

Appellants,

-against-

No. 101

M. PATRICIA SMITH AND THOMAS D. DINAPOLI,

Respondents.

20 Eagle Street
Albany, New York 12207
April 24, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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David Rutt
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: No. 101, Empire
2 State.

3 Do you - - - do you want any rebuttal time?

4 MR. HOOVER: Three - - - three minutes for
5 rebuttal, Your Honor.

6 CHIEF JUDGE LIPPMAN: Three minutes. Sure.
7 Go ahead, counselor.

8 MR. HOOVER: Timothy W. Hoover, may it
9 please the court, counsel for all the plaintiffs in
10 this matter.

11 The case has - - - this case has
12 significant implications both for home rule and then
13 for various of our clients and contractors, minority-
14 business enterprises, women-business enterprises,
15 out-of-state contractors on the Privileges and
16 Immunities and Commerce Clause.

17 CHIEF JUDGE LIPPMAN: Counselor, let's go
18 to the main issue that was in the case before you.
19 What - - - what - - - the legitimate state interest
20 here. Isn't there a legitimate state interest here?

21 MR. HOOVER: There isn't, and more
22 importantly, in this - - -

23 CHIEF JUDGE LIPPMAN: There isn't a
24 legitimate Wicks Law and its - - - and its - - -

25 MR. HOOVER: No, because it's - - -

1 CHIEF JUDGE LIPPMAN: - - - and its impact
2 is not a legitimate state interest?

3 MR. HOOVER: It's - - - it's not, for this
4 reason, Judge, because we have to step back to PBA I,
5 and the issue isn't if there is one in theory or
6 could be developed. Different than the case that was
7 just argued, and I think this maybe got lost in the
8 mix, at least with the council and not the court, is
9 there's no - - - there weren't any findings - - -
10 forget about hearings, because there weren't any of
11 those here - - - no findings, no Section 1 in the
12 2008 amendments.

13 CHIEF JUDGE LIPPMAN: But we just went
14 through that. You answered the same question we
15 asked your - - - in the case before. Does it say
16 there have to be findings somewhere or do you have -
17 - - the two arguments on the one side is that the
18 presumption - - - that what they do is based on
19 something, and the other argument is they need to
20 have some kind of a more obvious hearings or findings
21 or whatever. What - - - what do you have to support
22 your argument that you need specific findings?

23 MR. HOOVER: PBA I, Judge, which the
24 defendants or the party that was - - - was objecting
25 in PBA I said, look, you know, you don't need

1 findings that necessarily are in the text history or
2 structure of the statute, and really, it can be more
3 of a rational basis-type test.

4 JUDGE PIGOTT: Hasn't Wicks - - -

5 JUDGE GRAFFEO: But isn't the - - -

6 JUDGE PIGOTT: - - - been a bone in the
7 throat of almost every municipality in the state for
8 many, many years?

9 MR. HOOVER: Not - - - that's not part of
10 the legislative record here, but I think generally
11 that's true.

12 JUDGE GRAFFEO: Hasn't the Wicks - - -

13 JUDGE PIGOTT: But there is a state
14 interest.

15 JUDGE GRAFFEO: Hasn't the Wicks Law always
16 been a state matter?

17 MR. HOOVER: And - - - and that's why it's
18 absolutely permissible if the state wanted to change
19 the thresholds to do - - - do so uniformly by general
20 law.

21 CHIEF JUDGE LIPPMAN: Why - - - why does it
22 have to be uniformly? Who says?

23 MR. HOOVER: Because - - - and I'm going to
24 sound like a broken record by getting back to PBA I.
25 I heard several of the counsel on this side keep

1 saying "rational basis". Home rule - - - and I heard
2 a counsel on this side say the court has restricted
3 home rule. Home rule is among the most - - -

4 CHIEF JUDGE LIPPMAN: Okay, but let - - -
5 let's talk policy.

6 MR. HOOVER: Yes.

7 CHIEF JUDGE LIPPMAN: If it's in their
8 interest if they can set a uniform rate, why can't
9 they next say, we've looked at it, the costs of
10 construction upstate, downstate, whatever is more or
11 less, and now we're going to raise it but not
12 uniformly. What, from a policy common-sense
13 perspective, if they had a state interest in setting
14 a uniform rate, why don't I have a state interest in
15 saying, well, we're not making it uniform anymore;
16 we're going to raise it, but it's going to be a
17 different level. What's wrong with that?

18 MR. HOOVER: What's wrong with it is in a -
19 - -

20 CHIEF JUDGE LIPPMAN: Don't say PBA I
21 again.

22 MR. HOOVER: I won't, Judge, but - - -

23 CHIEF JUDGE LIPPMAN: I'm kidding you. Go
24 ahead.

25 MR. HOOVER: But that informs why I'm

1 answering but - - -

2 CHIEF JUDGE LIPPMAN: I know, but you know
3 what I'm saying. What's the policy reason why it's
4 not state interest?

5 MR. HOOVER: The reason is, first of all,
6 it's not in the legislature - - - the 2008 legislation
7 here. But the answer is the record, and I'm talking
8 about the 2008 legislative record, there's only one
9 line, record, page 256, is there's not anything that
10 suggests that raising the thresholds differentially
11 or at the levels picked - - -

12 CHIEF JUDGE LIPPMAN: The common sense, but
13 - - - but I'm talking common sense.

14 MR. HOOVER: And if I was - - -

15 CHIEF JUDGE LIPPMAN: Common sense tells
16 you that there are different construction costs in
17 different parts of the state. Why is it not a
18 logical extension of state interest to say, well, we
19 think we haven't raised this in a while, it's going
20 to be raised, but we're not going to raise it
21 uniformly? It comes back to the first question I
22 asked you. Does it say somewhere that you have to
23 justify each of the different levels or can it just
24 be, there's a presumption, they're acting on some
25 good purpose or investigation and - - - and - - - you

1 know, and it just - - - state in - - - it's always
2 been state interest, and this is no different; it
3 doesn't change it. Why - - - why isn't that argument
4 a good one?

5 MR. HOOVER: The ans - - - the argument
6 isn't a good one for exactly what you don't want me
7 to say, which is the standard in PBA I - - -

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. HOOVER: - - - but there's - - - but
10 there's a - - -

11 JUDGE GRAFFEO: But, you know, like
12 prevailing wage rates are done regionally, and the
13 legislature is well aware of that. I mean, this
14 isn't the first time there's been differentiation in
15 state policy in terms of construction and labor
16 issues.

17 MR. HOOVER: I'm not - - - and I'm not
18 aware - - - and really what Your Honors' questions
19 are getting to, the second part, the direct and
20 reasonable relationship - - - but I'm not aware that
21 the differentiation in prevailing wage, and I'm not
22 an expert in that, was done by county name rather
23 than pop - - - populations.

24 JUDGE SMITH: But - - - but isn't your
25 stronger argument, the one you just hinted at, that

1 the ratio - - - even if you - - - even if it's - - -
2 there's a State interest in differing - - - and there
3 are differing construction costs, it's - - - it ain't
4 six to one between New York and Buffalo.

5 MR. HOOVER: That's abs - - - well, it's -
6 - - I think it's a very strong argument, Judge.

7 JUDGE PIGOTT: Would you - - -

8 JUDGE READ: Is - - -

9 JUDGE PIGOTT: Would you be hap - - -

10 JUDGE READ: Is that your argument? The
11 problem is there are not findings for 3 million, 1.5
12 million, and 500,000 dollars, that there has to be
13 some kind of specific finding in the record to - - -
14 to not just justify differentiation but those - - -
15 the levels that were picked?

16 MR. HOOVER: I agree with that that it
17 needs - - -

18 JUDGE READ: That's your argument? That's
19 the flaw?

20 MR. HOOVER: That - - - I agree that that's
21 the flaw, but even if the standard here was rational
22 basis - - - and it's not, it's a direct and
23 reasonable relationship - - - the thresholds have to
24 fall - - -

25 JUDGE PIGOTT: All of them?

1 MR. HOOVER: - - - because they're not - -
2 -

3 JUDGE PIGOTT: I was going to ask you that.
4 Let's assume instead of having the 3, they just said
5 1.5 million for everybody. Would you have a problem
6 with that?

7 MR. HOOVER: No, because that would be a
8 general law - - -

9 JUDGE PIGOTT: All right.

10 MR. HOOVER: - - - because it would apply
11 uniformly.

12 JUDGE SMITH: So - - - but let me ask a
13 more basic question. What - - - you say this is a
14 violation of home rule. Obviously, they could have
15 done it with a home rule message, right?

16 MR. HOOVER: It could have been done in a
17 particular way to a particular county with a home
18 rule message, correct.

19 JUDGE SMITH: Well, for this legislation,
20 where did they need the home rule message from?

21 MR. HOOVER: Well, they certainly needed it
22 from Erie - - - Erie County.

23 JUDGE SMITH: Wha - - - why? Erie County
24 is being treated exactly like fifty-three other
25 counties.

1 MR. HOOVER: But it's being treated
2 differentially, and this goes back to - - -

3 JUDGE SMITH: Well, of course, they're all
4 being treated differentially. When they - - - when
5 they authori - - - when they exempted the Buffalo
6 Stadium from the Wicks Law - - -

7 MR. HOOVER: Correct.

8 JUDGE SMITH: - - - giving the - - - giving
9 Buffalo a benefit that no other place in the state
10 got, did they need - - - did they need home rule
11 messages from all the - - - all the counties that
12 weren't favored?

13 MR. HOOVER: I don't know the answer to
14 that, Judge, because that - - - that was - - -

15 JUDGE SMITH: But it's ridiculous; I think
16 you'd need fifty-seven home rule messages every time
17 you favor one county.

18 MR. HOOVER: And that's probably why I
19 would speculate that Justice Cardozo's concurrence
20 has carried the day to create this judicially created
21 exception that allows an overwhelming state interest
22 to carry the case.

23 JUDGE SMITH: But the case - - - the
24 Buffalo Stadium doesn't sound like the most
25 overwhelming state interest I've ever heard of.

1 MR. HOOVER: It's not; it's absolutely not.

2 JUDGE SMITH: I mean, let me ask a
3 different question. Suppose you win the case, you
4 invalidate the 2008 legislation. That's what you're
5 suing for?

6 MR. HOOVER: Correct.

7 JUDGE SMITH: So the Wicks Law go - - - cap
8 goes back to 50,000 for everybody? Congratulations.

9 MR. HOOVER: I have to answer that question
10 intellectually honestly, which is we are asking for
11 that, because to do so otherwise would be asking this
12 court to step in and legislate and pick one of the
13 higher caps.

14 JUDGE SMITH: Doesn't - - - don't the
15 questions I've asked suggest that Justice Glownia had
16 a point when he said you didn't have standing, that
17 you aren't - - - your home rule isn't being taken
18 away. The - - - the people that are being singled
19 out are Nassau and New York and those people, who are
20 happy as clams with this legislation.

21 MR. HOOVER: Well, first of all, we have
22 standing and capacity. Erie County isn't happy with
23 the legislation, first of all. It affects our home
24 rule interest giving us an injury in fact and
25 capacity.

1 JUDGE SMITH: Well, your home rule interest
2 is the interest is - - - in not having the state
3 interfere with what you're doing, but they're
4 interfering less the day after the legislation was
5 passed than before, that you were limited to 50,000
6 before; now it's 300,000. You should - - - you
7 should send them a thank-you note.

8 MR. HOOVER: For - - - for purpose - - -
9 and we - - - and maybe a thank-you note would be sent
10 if it was a general law or it was a higher threshold,
11 or there was anything in the legislation that
12 indicated that this would actually be affected. It's
13 not just how the - - -

14 JUDGE SMITH: I can - - - I can understand
15 why you're unhappy. I'm just saying how is your - -
16 - how has Buffalo's right to govern itself, Buffalo's
17 home rule rights, how are they less now than they
18 were before the law was passed?

19 MR. HOOVER: I - - - I can only answer that
20 by saying, Judge, when the state acts by - - - and
21 there's no dispute here before this court that this
22 is a special law and there's differential treatment.
23 That's the only injury that's needed for home - - -

24 JUDGE SMITH: So - - -

25 MR. HOOVER: - - - home rule purposes.

1 JUDGE SMITH: So every - - - every special
2 legislation - - - let's stick to counties for the
3 moment - - - by hypothesis, by its nature, it affects
4 - - - and I'm going to simplify an assumption again -
5 - - - one - - - it affects one - - - it singles out one
6 county, and it differentially affects every county.
7 You're saying that all fifty-seven counties have the
8 right to send home rule messages and all have the
9 right to sue if one county is favored?

10 MR. HOOVER: I think that's a special law,
11 and I'm - - - and if it doesn't - - - it's a
12 difficult question to answer, Judge. I don't - - - I
13 don't know the answer, and I'm not just saying that
14 because it's a hypothetical. It - - - the situation
15 is, though, the state doesn't need to get, in that
16 situation, the fifty-seven home rule messages, if it
17 meets the substantial - - -

18 JUDGE PIGOTT: Let me ask you a question
19 about standing, Mr. Hoover. It - - - and I don't
20 know the geography down here, but let's assume that
21 one of these counties, West Chester or something, is
22 right next to one of the - - - in other words, you
23 got a million-five county next to a three-million
24 county. Now, wouldn't they have a complaint because
25 it mean - - - that means that somebody wants to build

1 a building or something can say I can - - - I can go
2 across the street and build this a whole lot easier
3 than being in your county?

4 MR. HOOVER: There's - - - there's
5 absolutely that complaint, and it's not in the 2008
6 history, but it's part of a debate in 2007, the bill
7 that died in the Senate where an Assemblyperson is -
8 - - from Rockland or Dutchess is complaining about
9 the differential treatment that West Chester gets, 1.
10 - - - excuse me - - - 500,000 versus 1.5.

11 So, Judge, I - - - coming back to your
12 question, because it is an important one, that's not
13 this case. That's not a satisfactory answer, but
14 that's why there's the substantial state interest, so
15 you don't have to have a flood of home rule messages.
16 And whether Erie County would have standing in that
17 kind of case, whether Erie County would have standing
18 in a situation where New York City, it boosted up to
19 three or ten million, I don't know the answer to the
20 question. What I do know, and getting to the second
21 part of the test, it's not rational basis; there has
22 to be a direct and reasonable relationship.

23 JUDGE SMITH: Do you - - - do you think you
24 would have standing to sue if - - - if Erie County
25 had not been mentioned in the legislation at all and

1 all they had done was increase the caps for - - - for
2 the three or four, or whatever they are, favored
3 counties?

4 MR. HOOVER: I may not or Erie County may
5 not, but Erie County would then have a probably or
6 substantial equal protection claim in that it's being
7 treated differentially, and we do have that equal
8 protection.

9 JUDGE SMITH: County's people that may need
10 the Equal Protection Clause?

11 MR. HOOVER: I understand, Your Honor, but
12 there has to be some remedy, I think. You - - - I
13 think the court's jurisprudence has said you can't
14 ramrod special laws or fifteen different - - - you
15 know, one special law justification with a whole
16 bunch of other things. That's the point I'm trying
17 to make.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.
19 Thanks.

20 MR. HOOVER: Thank you.

21 MS. OSER: Good afternoon, Your Honors.

22 CHIEF JUDGE LIPPMAN: Good afternoon,
23 counsel.

24 MS. OSER: May it please the court. I
25 think there are some very serious standing questions

1 here. This court has never permitted a political
2 subdivision to veto a special law enacted to address
3 the concerns of another, but I think you can avoid
4 those standing questions by simply upholding these
5 amendments as reasonable.

6 JUDGE PIGOTT: Erie County - - - Erie
7 County is saying, here's a big computer company that
8 wants to come in and build a building, and they said
9 we're going to do it except you've got a big problem;
10 you got a half a million dollar ceiling, and we're
11 going down to West Chester, because we can build it
12 down there, we don't have to worry about these
13 things, because they got a million and a half.

14 MS. OSER: You're saying Erie County is
15 unable to find contractors to bid on its contract?

16 JUDGE PIGOTT: We're saying that in order
17 to avoid the Wicks Law, they want to go to West
18 Chester instead of - - -

19 MS. OSER: They, the contractors?

20 JUDGE PIGOTT: - - - instead of Erie. Yes.

21 MS. OSER: Well, I - - - there's no - - -
22 there's no reason to think in this - - - from what we
23 - - - this is a facial challenge to a statute that
24 counties are having difficulty getting people to - -
25 - to respond to - - -

1 JUDGE PIGOTT: No, no. Facially - - -

2 MS. OSER: - - - bid solicitation.

3 JUDGE PIGOTT: I'm saying facially. I'm
4 making a hypothetical that says there's no findings
5 here, no - - - I mean, everybody - - - somebody
6 decided that - - - that we want people to build in
7 New York City and we want them to build in West
8 Chester. We don't want them to build in the fifty-
9 five upstate counties. So what we're going to do is
10 we're going to make it easy to build in the downstate
11 and make it harder to build upstate, and that will
12 solve that problem and - - - but those findings
13 aren't there, is the argument, if I understand it
14 right.

15 MS. OSER: You're assuming a sort of
16 malicious motive that's not documented in the
17 legislative history?

18 JUDGE PIGOTT: There's no documentation in
19 the legislation - - -

20 MS. OSER: Right. Well - - -

21 JUDGE PIGOTT: - - - is my point.

22 MS. OSER: - - - what - - - what we have
23 here is a - - - is amendments to the Wicks Law that
24 have - - - that has been on the books for a century.
25 This is an area that the state - - -

1 JUDGE PIGOTT: No question, state interest.

2 MS. OSER: - - - has not only regulated but
3 - - - but occupied.

4 JUDGE PIGOTT: No question.

5 MS. OSER: This is not an area where - - -
6 where localities have - - - this is not an area of
7 shared jurisdiction - - -

8 JUDGE PIGOTT: Right.

9 MS. OSER: - - - something that you were
10 talking about in the - - - in the earlier case. So
11 there really isn't much local interest here. All
12 you're looking for - - -

13 JUDGE PIGOTT: Well, could they - - - could
14 they have left it at 50,000 for Erie?

15 MS. OSER: Well, I think - - - this is what
16 I will take from PBA I: when the court said that - -
17 - that a measure should reasonably serve the - - -
18 the stated state concern, it was making sure that
19 that - - - that is a way of making sure that the
20 legislature was actually exercising the power that is
21 reserved to it in Section 3 of the constitution to
22 act in matters in state concern. So it need - - - we
23 need to know that it's intending to act in that
24 matter, and we need to see that it is actually
25 serving that matter so - - -

1 JUDGE SMITH: So you're - - - I mean, if I
2 understand you, you're saying there's a - - - there's
3 a point at which a disproportion between the Wicks
4 Law limit and Erie and New York City would invalidate
5 the legislation.

6 MS. OSER: Well, if, in the name of
7 providing relief, the leg - - - the threshold went
8 down, that - - - in other words, if we were
9 disserving the stated purpose, we'd have a problem,
10 or if in the name of relief, we provided a threshold
11 so high that we effectively gave an exemption, we - -
12 - we would have - - -

13 JUDGE SMITH: But - - - but what - - -

14 MS. OSER: - - - a PBA problem.

15 JUDGE SMITH: So why - - - why is giving
16 New York City six times the level of Buffalo not a -
17 - - not a fault of the same kind? I mean, very hard
18 to imagine - - -

19 MS. OSER: Because these thresholds - - -

20 JUDGE SMITH: - - - that construction's
21 costs - - -

22 MS. OSER: Because - - -

23 JUDGE SMITH: - - - are six times as high.

24 MS. OSER: Because these thresholds are not
25 so out of bounds, of such a different order of

1 magnitude to cast doubt - - -

2 JUDGE PIGOTT: How do we know that?

3 MS. OSER: - - - on whether the legislature
4 was acting - - -

5 CHIEF JUDGE LIPPMAN: How do we know that
6 with no findings?

7 MS. OSER: Well, we don't have mathematical
8 findings; that's - - - that is true. But let me say
9 this - - -

10 CHIEF JUDGE LIPPMAN: Why shouldn't you put
11 in some indication - - - why shouldn't - - -

12 MS. OSER: Well - - -

13 CHIEF JUDGE LIPPMAN: I understand there's
14 a presumption - - -

15 MS. OSER: Yes.

16 CHIEF JUDGE LIPPMAN: - - - that - - - that
17 everything happens in the normal course, but why - -
18 - why shouldn't you give some sense of how you got -
19 - - how the legislature got to - - - to this point?

20 MS. OSER: What the governor said publicly
21 - - -

22 CHIEF JUDGE LIPPMAN: It may be - - - maybe
23 the six times is - - - maybe - - - I mean, I don't
24 know, but maybe the six times is of such a proportion
25 that it - - - that it shows that you really - - -

1 can't possibly be a legitimate state interest.

2 MS. OSER: What the - - -

3 CHIEF JUDGE LIPPMAN: It's a punishment or
4 something. Maybe - - - maybe six times is enough.
5 How do we know that when there's no indication
6 whatsoever as to why you're doing it?

7 MS. OSER: What the governor said publicly
8 was he was looking to exempt roughly seventy percent
9 of projects statewide. And when you think about
10 that, it's - - - it's reasonable to assume that not
11 only - - - not only are costs higher downstate so
12 that comparable projects, you know, cost more - - -

13 CHIEF JUDGE LIPPMAN: I know, but I think -
14 - - but you could make that assumption that costs are
15 more downstate - - -

16 MS. OSER: Okay. And labor - - - we - - -
17 the labor costs and the - - -

18 CHIEF JUDGE LIPPMAN: - - - but how do - -
19 - but again, how do we - - - let's take the six times
20 example. How do we know that's not off the charts
21 and outrageous and, you know, just can't be, when you
22 - - - when you're just doing it with absolutely no
23 indication of why?

24 MS. OSER: In addition to looking at
25 comparable projects, we're not simply looking to - -

1 - we're not looking at the cost of comparable
2 projects - - - projects, excuse me, because the goal
3 is not just to ensure that comparable projects are
4 exempt, but to ensure that a similar percentage of
5 projects are exempt. And it's reasonable to assume
6 that downstate has more high-end projects so - - -

7 JUDGE PIGOTT: So you're saying we can
8 stunt the growth in Erie County by making it harder
9 to build there and so we'll give them the lower
10 threshold, and New York City where - - - which we
11 like, we'll let them - - - we'll let them build more
12 - - -

13 MS. OSER: No, but we've raised - - -

14 JUDGE PIGOTT: - - - by making theirs three
15 million dollars.

16 MS. OSER: We've raised the threshold ten
17 times.

18 JUDGE PIGOTT: Well, no, what I'm saying is
19 it's - - - it goes back to the findings again. I
20 mean, you're making it sound like - - -

21 MS. OSER: Right.

22 JUDGE PIGOTT: - - - those poor people up
23 in Buffalo, they're not developing, so we're not
24 going to give them anything; the city is, then they
25 deserve this three-million-dollar break. Buffalo

1 doesn't, Syracuse doesn't, Rochester - - -

2 MS. OSER: Well, and the other piece - - -
3 the other piece of this puzzle is that these
4 thresholds is one provision of an overall package.

5 JUDGE PIGOTT: Right.

6 MR. HOOVER: Right? And so there are other
7 provisions here. There was a concern about
8 protecting subcontractors from - - - from bid fraud.
9 We want to preserve competition even at the
10 subcontractor level. And so in raising these
11 thresholds, the legislature provided for alternative
12 protections to subcontractors, requiring general
13 contractors to submit sealed bids of the names - - -
14 sealed names of the names of their subcontractors' -
15 - -

16 JUDGE PIGOTT: That's usually done anyway,
17 isn't it?

18 MS. OSER: - - - agreed-upon amounts and
19 not changing those amounts except on approval of the
20 project owner. That isn't what was happening.
21 General contractors are squeezing subcontractors and
22 pocketing the difference to the detriment of the
23 project to - - - to - - -

24 JUDGE PIGOTT: But that's not - - - is that
25 the issue in this case?

1 MS. OSER: But - - - but - - - well, no,
2 no. I'm saying that these thresholds represent a
3 balancing of interest, and those interests may - - -
4 may impact different regions differently, as well.

5 Then, of course, this - - - this threshold
6 also gave another form of relief, the ability to opt
7 out, if - - - if the purposes of the competitive
8 bidding laws could be served through use of project
9 labor agreements. So - - - so this is a package
10 deal, and you know the way legislation works; it's a
11 compromise. So it's a little - - - not - - - it's
12 not even clear that it's proper to isolate the
13 threshold - - -

14 JUDGE PIGOTT: Well, I - - - I guess the
15 point is - - -

16 MS. OSER: - - - and demand that those be
17 specifically reasonable.

18 JUDGE PIGOTT: Pardon me. I - - - I think
19 the point is, without findings to say Buffalo - - -
20 that upstate ought to be treated differently - - -

21 MS. OSER: Um-hum.

22 JUDGE PIGOTT: - - - it shouldn't be
23 treated differently.

24 MS. OSER: With - - - I'm sorry. Without
25 findings?

1 JUDGE PIGOTT: That it should be treated
2 differently, it shouldn't be.

3 MS. OSER: I agree, but - - - but there's a
4 sense of the - - - the sponsor's memos from the
5 identical bill as introduced the year before said
6 they were looking to take account of geographical
7 differences, and it's reasonable - - - and that - - -
8 including higher labor costs, higher real estate
9 costs downstate. That's common sense, right?

10 JUDGE PIGOTT: Well - - -

11 MS. OSER: But I will say that if the court
12 is - - - is unpersuaded about the actual numbers and
13 the thresholds, then the - - - at very most, give the
14 state the opportunity to - - - to demonstrate it on a
15 record in this proceeding.

16 JUDGE PIGOTT: I think Mr. Hoover probably
17 corrected my geography, but if Rockland is next to
18 West Chester, is - - - is it true that there's a - -
19 - there's going to be a million-and-and-half gap
20 there?

21 MS. OSER: Well, you're talking about an
22 issue in under and overinclusiveness. That doesn't
23 necessarily - - - that doesn't make it irrational.

24 JUDGE PIGOTT: No - - - well, I mean, with
25 no findings.

1 MS. OSER: I'm sorry?

2 JUDGE PIGOTT: I mean, it doesn't make it
3 irrational, but there's no findings. There's nothing
4 to say it's rational or irrational. It's just saying
5 you cross a road and you save yourself a million and
6 a half bucks.

7 MS. OSER: Yes, that's true. I mean, we
8 were - - - we loosely - - - I think the labor cost
9 data that was put in the record was there to - - - to
10 demonstrate a - - - the reasonableness of grouping
11 these counties in three: New York City, New York
12 City immediate suburbs - - - you know, whenever you
13 draw a line, there's some arbitrariness at the line.

14 CHIEF JUDGE LIPPMAN: But let me - - -

15 JUDGE GRAFFEO: If the disparity bothers us
16 - - -

17 MS. OSER: Um-hum.

18 JUDGE GRAFFEO: - - - what are you
19 suggesting as a - - -

20 JUDGE READ: An alternative.

21 JUDGE GRAFFEO: - - - remedy for us?

22 MS. OSER: Well, this was a motion to
23 dismiss, right? So if the court finds it shouldn't
24 have been granted, then the case can proceed and the
25 state should have an opportunity - - - could - - -

1 could - - -

2 JUDGE READ: You're going to say you could
3 put in evidence?

4 MS. OSER: Could put in evidence to show
5 that these thresholds exempt roughly seventy percent
6 - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but your basic
8 - - -

9 MS. OSER: - - - of projects statewide.

10 CHIEF JUDGE LIPPMAN: But your basic
11 argument is - - -

12 MS. OSER: Yes.

13 CHIEF JUDGE LIPPMAN: - - - that you don't
14 need findings - - -

15 MS. OSER: That's correct.

16 CHIEF JUDGE LIPPMAN: - - - and that if you
17 make the statements and it - - - basically backed up
18 by common sense, that's okay, right?

19 MS. OSER: That's right, because - - -

20 CHIEF JUDGE LIPPMAN: I mean, that's - - -

21 MS. OSER: - - - this is an area - - -

22 CHIEF JUDGE LIPPMAN: - - - essentially
23 your argument.

24 MS. OSER: - - - of state concern where - -
25 - where the legislative power is unlimited,

1 unrestricted by the constitution.

2 CHIEF JUDGE LIPPMAN: And it nowhere, no
3 case law, no anything says you got to make findings?

4 MS. OSER: Findings as to the specific
5 provisions, no. What the case law says is we want to
6 make sure that the state was intending to - - - the
7 legislature was intending to exercise the power
8 reserved to it, and then we want to make sure that
9 the legislation reasonably addresses that - - -

10 CHIEF JUDGE LIPPMAN: Okay.

11 MS. OSER: - - - so that we see that it was
12 really exercising that power.

13 CHIEF JUDGE LIPPMAN: That - - - that's
14 your argument, basically.

15 MS. OSER: Yes, Your Honor.

16 JUDGE SMITH: Could - - - could I ask you
17 to address the apprenticeship program and why - - -
18 why isn't that a discrimination against out-of-state
19 contractors?

20 MS. OSER: The way the apprentice program
21 wor - - - the way the provisions work here is if a
22 project proceeds pursuant to a project labor
23 agreement, whether the employer has their own program
24 or not doesn't matter. They're using the apprentice
25 program of - - - of the union. And any employer can

1 do that. The unions can't discriminate.

2 JUDGE SMITH: How - - - I mean, I have
3 trouble - - - maybe I don't know enough about
4 apprenticeship - - -

5 MS. OSER: Um-hum.

6 JUDGE SMITH: - - - programs, but when I
7 read the statute, it makes it look as though the
8 employer has to have its own.

9 MS. OSER: No, it has to participate - - -

10 JUDGE SMITH: That you have to grad - - -

11 MS. OSER: It has to - - -

12 JUDGE SMITH: It says that you have to
13 graduate apprentices and have at least yea many in -
14 - - in the program.

15 MS. OSER: These are - - - I admit it's not
16 the most beautifully drafted provision there, but
17 these are provisions that make sure that the
18 apprentice program is not only approved but is up and
19 running now; it's functioning. So we need to make
20 sure there's someone in it and someone has recently
21 graduated.

22 JUDGE SMITH: I'm - - - I'm a contractor -
23 - -

24 MS. OSER: They apply to the union.

25 JUDGE SMITH: I'm a contractor in

1 Pennsylvania. I got a job in Binghamton. I want to
2 try to comply with - - - with this section. What do
3 I have to do?

4 MS. OSER: Well, if the project - - - this
5 - - - this only applies if the project is proceeding
6 - - -

7 JUDGE SMITH: Yeah, okay.

8 MS. OSER: - - - pursuant to a project
9 labor agreement.

10 JUDGE SMITH: Okay.

11 MS. OSER: So - - - so you're going to
12 accept that union as the collective bargaining agent
13 for your workers and you got now available to you the
14 - - - the apprentices of that union's program which
15 is good for you - - -

16 JUDGE SMITH: So - - - so I have to - - -

17 MS. OSER: You don't have to pay them as
18 much.

19 JUDGE SMITH: So I'm - - -

20 MS. OSER: It's a benefit to you.

21 JUDGE SMITH: But I'm dependent on the
22 union's favor to do that?

23 MS. OSER: No, they can't discriminate
24 against you.

25 JUDGE SMITH: They can't?

1 MS. OSER: They can't discriminate against
2 you.

3 JUDGE PIGOTT: But you have to take their
4 union apprentices?

5 MS. OSER: Yes, and that's a benefit to
6 you; you have their whole hiring - - -

7 JUDGE SMITH: Wait, wait, wait.

8 MS. OSER: - - - their lower-cost
9 apprentices available to you.

10 JUDGE SMITH: The New York guy doesn't have
11 to use the union apprenticeship program.

12 MS. OSER: Yes, in a project labor
13 agreement, they're going to hire - - - usually the
14 project labor agreement is going to require that they
15 hire a certain percentage of workers out of the union
16 halls.

17 JUDGE SMITH: And does that - - - is that
18 the same thing as using their apprenticeship program?

19 MS. OSER: Yes, I believe so. But by the
20 way - - - by the way, there isn't - - - you know,
21 there's an allegation here that - - - that employers
22 are required to have their apprentice programs
23 approved by the state. Under Labor's regulations,
24 there's also reciprocity, that New York will
25 recognize out-of-state programs that are approved out

1 of state. That's in - - - that's in DOL's
2 regulations. And if there's a problem with the
3 apprentice program and the way DOL runs its program,
4 then the problem is the apprentice program
5 provisions, not 222.

6 JUDGE SMITH: Well, but it's clear on the
7 face of the regulations that an approved apprentice
8 program has to have New York facilities, right?

9 MS. OSER: If it's an approved program in
10 New York, but New York also - - - there's reciprocity
11 - - - will recognize the programs of out of state.
12 This is 12 N.Y.C., Part 601 of - - -

13 JUDGE SMITH: So are you saying - - -

14 MS. OSER: - - - of Labor's Rights (ph.)

15 JUDGE SMITH: - - - that if I - - - that my
16 Pennsylvania contractor can - - - can run a little
17 apprenticeship program in Pennsylvania and bid on a
18 New York job?

19 MS. OSER: Yes.

20 JUDGE SMITH: What says that?

21 MS. OSER: Well, there - - - there are
22 regulations that - - - where the state recognizes - -
23 - has reciprocity and will recognize an - - - a
24 program approved out of state.

25 JUDGE SMITH: Well, you - - - do you know

1 the citation offhand?

2 MS. OSER: It's 12 N.Y.C.R.R. Part 601.

3 CHIEF JUDGE LIPPMAN: Counsel, anything
4 else?

5 MS. OSER: I don't think so.

6 CHIEF JUDGE LIPPMAN: Okay. Thank you,
7 counsel.

8 MS. OSER: Thank you.

9 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

10 MR. HOOVER: Yes, Your Honor. There's no
11 standing or capacity issue. Black Brook addresses
12 that, and the only way there would be here is if the
13 court decided to overrule Black Brook.

14 JUDGE PIGOTT: But for the fact - - - isn't
15 it true - - - I mean, you're trying - - - as Ms. Oser
16 points out, you're trying to get a legislation
17 through, the legislation ends up the way it does.
18 It's better for your client, better for Erie County
19 than what was on the books yesterday, and you're
20 suing to get - - - to do that so that you will be in
21 worse shape than you are today, why?

22 MR. HOOVER: Can't - - - can't agree that
23 it's better, Judge, because - - - set aside that
24 there's nothing in 2008 to - - - to show that it will
25 be better. If you look at what's in 2007, there - -

1 - there's one hearing on it. And what that - - - the
2 people say in that hearing, the guy from - - - excuse
3 me - - - the assemblyperson from Watertown, the
4 newspaper people from Binghamton, is 500,000 wouldn't
5 get you a house up here.

6 So there's no indication that Erie County,
7 Monroe County or Dutchess County gets any relief. Of
8 course, Dutchess County is across from West Chester.
9 And again, these are the stats that the Department of
10 Labor put in on the motion to dismiss; they're not
11 part of the '08 record. Starting at record 260,
12 Dutchess and West Chester have equivalent costs in
13 construction factors. In some years, Dutchess is
14 higher.

15 So to say that, well, you can look and you
16 can guess that one to three or one to six is
17 reasonable - - - rational is not the test - - -
18 there's no basis to make that judgment under the
19 court - - - court's home rule jurisprudence or to say
20 that you can uphold the statute. If - - - if the - -
21 - the relief is not to go back for discovery. If the
22 - - - the legislature wants to go back at it like
23 they did in PBA II, find a substantial state
24 interest, document it in the course of the record,
25 and justify the differential treatment, they're

1 certainly free to do that.

2 JUDGE PIGOTT: The net result though is
3 you're going to end up with a 50,000-dollar gap
4 instead of a half a million.

5 MR. HOOVER: Well, the - - - the court has
6 the option to, although I'm saying I'm advocating for
7 it has to be struck. My opponent in their brief
8 suggested that one of the remedies you have is that
9 you can excise the language that creates the
10 differential thresholds. I want to be honest about
11 what I'm asking the court so I'm not advocating that,
12 but Ms. Oser, in her brief, says that's one of the
13 options you can do, and the court - - -

14 JUDGE SMITH: So what are you - - - what
15 are we - - - if you excise the language that creates
16 the differential threshold, is that by bringing you
17 up or by bringing the big ones down?

18 MR. HOOVER: That - - - that's why I'm not
19 advocating, Judge, that this court do that, and I
20 don't - - - I don't want to suggest that we're asking
21 you to legislate and fill in the gaps that exist from
22 '08. So I don't know the answer to that. I suppose
23 the Court, following its excised jurisprudence, could
24 do one or the other.

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 Thanks.

2 MR. HOOVER: Thank you very much, Your
3 Honors.

4 CHIEF JUDGE LIPPMAN: Thank you, both.
5 Appreciate it.

6 (Court is adjourned)

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I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Empire State Chapter of Associated Builders, Inc., et al. v. M. Patricia Smith, et al., No. 101 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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