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In the

# Supreme Court of the United States

Harold Withrow, Et Al, Etc.,

Appellants

v.

Duane Larkin

No. 73-1573

Washington, D. C.
December 18, 1974

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

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| HAROLD WITHROW, ET AL, ETC., Appellants | : | |
| v. | : | No. 73-1573 |
| DUANE LARKIN | : | |

Washington, D. C.

Wednesday, December 18, 1974

The above-entitled matter came on for argument at 11:06 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MISS BETTY R. BROWN, Solicitor General of Wisconsin, 114 East, State Capitol, Madison, Wisconsin 53702
For the Appellants

ROBERT H. FRIEBERT, ESQ., 710 North Plankinton Avenue, Milwaukee, Wisconsin
For the Appellee

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-1573, Withrow against Larkin.

Miss Brown, you may proceed.

ORAL ARGUMENT OF MISS BETTY R. BROWN

ON BEHALF OF APPELLANTS

MISS BROWN: Mr. Chief Justice and may it please the Court:

This is an appeal from the judgment of the United States District Court for the Eastern District of Wisconsin in which that court declared Section 448(18)(7) of the Wisconsin statutes unconstitutional and preliminarily enjoined all utilization of that subsection of the statute.

This preliminary injunctive relief was granted in an action brought in the district court under the Civil Rights Act by the Appellee whose name is Dr. Larkin against the Appellants who are the members of the Wisconsin Medical Examining Board.

There are three questions in this case.

The first question is whether a district court in granting a mere motion for a preliminary injunction can declare a state statute unconstitutional and preliminarily enjoin all utilization of that statute.

QUESTION: Mis Brown, I -- certainly, it is not my purpose to disturb the planned order of your argument,

but I trust that some time during the course of your argument you will get to the point that the three-judge court order has now been amended and no longer does declare the statute unconstitutional.

MISS BROWN: That is right. Over six months after this appeal was taken and jurisdiction was noted and the briefs were submitted, there was a modification of the judgment and so we also have that situation presently existing in which the Court, instead of saying -- as it orally declared and is included in its decision and judgment that the statute was unconstitutional; it now in the modified judgment said there is a likelihood of success and it also, without any evidence to support this, modified the judgment to assert that there is irreparable harm.

QUESTION: Right.

MISS BROWN: So there has been --

QUESTION: If that were the only judgment we had from the beginning, it would be very clear that this Court would be without jurisdiction in this appeal, wouldn't it?

MISS BROWN: No, I don't believe so, your Honor.

QUESTION: Why, just looking at the language of the now-existing judgment which appears on page 20 of the suggestion of mootness filed here on September 3, it doesn't declare anything unconstitutional. It just enjoins the application of these statutes agains t the Plaintiff,

Duane Larkin, M.D., on the grounds that he would suffer irreparable injury if the statute were to be applied against him and that the Plaintiff's challenge to the constitutionality of said statute has a high likelihood of success.

You don't -- we don't have -- we wouldn't have direct Appellate jurisdiction of any such order as that, would we?

MISS BROWN: We wouldn't be here, your Honor, if that was the initial order.

QUESTION: You couldn't be.

MISS BROWN: But we --

QUESTION: You couldn't be here, could you?

MISS BROWN: Right, but we would have been here because of the content of the decision which would be followed by a final injunctive order and came to the same conclusions which we believe are completely erroneous, namely that there is a violation of due process by the per se possession of investigative and adjudicative powers by an administrative agency.

So that, if the modified judgment had been entered initially, we couldn't be here. But when the final judgment was entered, we would have been.

QUESTION: Well, when, as or if some final judgment were entered declaring the statute unconstitutional, but the --

MISS BROWN: Well, I doubt that there would be any and or if primarily because of the content of their decision, your Honor. They had mad e up their minds.

QUESTION: This may -- the injunction may have been amended but the court had already declared the statute unconstitutional.

MISS BROWN: Yes, your HOnor.

QUESTION: Did they withdraw that declaration?

MISS BROWN: No. The decision is still in effect. It is being cited and it is being followed.

QUESTION: Well, they did amend their judgment of January 31st, 1974, didn't they? That is what this says on the top of page 20.

MISS BROWN: Yes, your Honor.

QUESTION: Well, to that extent they did change their original order.

QUESTION: Let me read you a sentence from 28 USC Section 1253 in order to call my brother Stewart's attention to it. "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying after notice and hearing an interlocutory or permanent injunction."

Now, I take it you meet the -- even if you take it -- the amended judgment is what is before us. It is an amended judgment. Now, it is an interlocutory injunction and then

it goes on to say, "Required to be heard by a court of three judges."

Now, if it meets that test it certainly was an interlocutory injunction.

MISS BROWN: Yes. Yes, it was, your Honor.

So that there was this modification but there is also, of course, other questions here which, in any shape or form, will arise again and do need resolution. And this, of course, is the real question on the merits here and that is, whether the per se, by itself -- possession and exercise by an administrative agency of both statutory powers to investigate and statutory powers to adjudicate is a violation of the due process clause of the 14th Amendment.

QUESTION: I suppose if it is you might have a suggestion in your brief of some impact on the Federal Communications Commission, for example.

MISS BROWN: I think it would have impact, your Honor, on all the administrative agencies, state, federal, local. I think that it has an impact on -- I think that under the broad holding in this case, the federal administrative procedure act is unconstitutional because it does recognize that these various functions which are the basic nature of administrative agencies can exist and be exercised by such agencies.

There is also a third question here which is, I

think is a very important one and that is whether, under the circumstances of this case, the district court had any discretion, any power to grant a motion for a preliminary injunction and if it had any discretion, whether it abused that discretion in this case.

The fact situation -- somewhat briefly, I hope -- is this.

QUESTION: Will you tell us, too, what evidence was taken on this subject or did the court act solely on the pleadings?

MISS BROWN: There was absolutely no evidence in any shape or form which either showed the availability of injunctive relief in this type of case or established grounds for the granting of the motion. There was nothing, no evidence, in the form of testimony, in the form of affidavits, in any shape or form which established that there was no adequate remedy at law, that there had been exhaustion of administrative remedies if applicable, that there would be irreparable harm if the requested relief was not granted, that there was a reasonable likelihood of success on the merits an d that granting the relief would not do undue harm to the public interest which, of course, I think, your Honors, is a big and important concern when we are dealing with state statutes which are aimed at protecting the welfare of the citizens of the state.

There was no evidence on any of these, in any shape or form.

The facts are briefly this: Dr. Larkin, who is the Appellee here, is a resident of the State of Michigan. He applied to the Appellant, the Wisconsin Medical Examining Board, for a license to practice medicine in the State of Wisconsin. He was granted that license in August of 1971 on the basis of the reciprocity provisions between Wisconsin and Michigan.

The Medical Examining Board is a state administrative agency. It is the agency which issues license to practice medicine and surgery. It is an agency also which has a statutory duty to investigate practices inimical to public health and if it finds such practices, to either warn or reprimand the licensees or, if necessary, refer the matter to the district attorney for either criminal prosecution or civil revocation of a license.

The board itself has no power to suspend other than temporarily or revoke the medical license of a doctor. This has to be --

QUESTION: This is on the merits?

MISS BROWN: Yes. Now, this is one of the unique situations in which a professional license can be revoked or suspended other than temporarily only by a court and not by the administrative agency itself. The only power that the

board has is under the statute which the Court here declared unconstitutional, Section 448 (8)(18)(7) and this statute allows the board to temporarily suspend the license of the licensee for not more than three months upon determination that he has engaged in practices which are immoral or unprofessional in nature.

They also have power to extend this for another three months. But that is a maximum of their suspension powers.

Well, Dr. Larkin did get his license on the basis of reciprocity. He very promptly went to Milwaukee, Wisconsin and he rented offices and he did so under an alias. He used the name "Glen Johnson" instead of his own name in renting these offices and he began performing abortions.

He performed these every weekend. He flew in from Detroit to Milwaukee and on Friday, Saturday and Sunday he performed abortions and then he returned to the State of Michigan.

It appears that by february of 1973 -- in other words about a year and a half after he started -- he himself was coming to Milwaukee on only very infrequent occasions and evidence indicated that he was there once between February of 1973 and the date of this federal court activity in the latter part of 1973.

QUESTION: Was the evidence -- the information that

the board acquired in its investigatory process, is that it?

MISS BROWN: Right, sir. The only evidence in this record is in the form of affidavits. Attached to some of the affidavits are various notices and there is also attached the board's findings of fact, conclusions of law and decisions which it arrived at at the conclusion of its investigative hearing and it is in that material which is part of the record attached to affidavits that this material is revealed.

So that he was flying in and performing these abortions over weekends but since February of '53[sic] his abortion business was being carried on primarily by others with a financial arrangement between Dr. Larkin and another doctor.

In June of 1973, the board issued and it mailed to Dr. Larkin a notice of investigative hearing. It was about to perform its duty under Section 448(17) of the statutes to investigate practices inimical to public health.

It sent this notice to Dr. Larkin, told him the -- it included the subject of the investigation, it invited Dr. Larkin with or without counsel to attend, although the investigation was ex parte in character.

QUESTION: I don't know whether it is relevant here, Miss Brown, but if you know offhand, would it be a

violation of the Wisconsin statute of some kind to have a license under one name and carry on the practice of medicine under another name?

MISS BROWN: Yes, sir, it is a violation of the criminal law and --

QUESTION: Apart from the medical problem.

MISS BROWN: Right. There is a statute which makes it a misdemeanor for a medical licensee, under certain circumstances, to use a name other than the name under which he was licensed. There are ifs, ands and buts in the statute but that is the sense of it and, in addition, of course, that is a practice inimical to public health because the patient has no idea who he is dealing with.

It is a sure guarantee against malpractice suits, among other things, which have become increasingly popular when you don't even know who the individual is who is performing services on you.

QUESTION: It may not be a sure guarantee, but it might be a big help.

MISS BROWN: Well, it's a hindrance, anyway.

So the board sent out this notice of investigative hearing and upon receipt of that notice, Dr. Larkin immediately filed a civil rights action in the Federal District Court. In this action he sought initially only injunctive relief. He sought a temporary restraining order,

a preliminary injunction and a permanent injunction aimed at stopping the investigative hearing.

The district court judge denied the motion for the temporary restraining order and Larkin very promptly -- that is, six days later -- filed an unverified amended complaint and in this amended complaint he sought not only injunctive relief but he also sought a declaratory relief.

He sought the declaration that the Wisconsin statutes, SEctions 448(17)and 448(18)(7) were unconstitutional and he asked for the convening of the three-judge court.

There was in the interim some more motions and various affidavits filed but the district court refused to enjoin the investigative hearing and that hearing was held as scheduled on July 12th and 13th, 1973.

QUESTION: Is that the same three-judge court?

Have you been before the same three judges all the time in this proceedings?

MISS BROWN: Yes. That is, the three-judge court was not formed at the time that I am referring to right now. They were formed shortly afterwards.

The investigative hearing by the board was allowed to proceed. It was not until the board sent notice of a contested hearing -- and those words, "contested hearing" under Wisconsin law have a great deal of significance

because there is a whole array of procedural rights that attach at that point but the board did, operating under another statute -- not the one giving them a duty to investigate -- but operating under 448 (18)(7), which gives them power, limited power to temporarily suspend the license, they did send to Dr. Larkin a notice of contested hearing on the subject of whether his license should be temporarily suspended.

That notice is set forth at length in the brief and as you will note, it very carefully sets forth the issues at the proposed contested hearing.

QUESTION: It is, in effect, order to show cause functionally?

MISS BROWN: Well, it really was more than that. It was really bringing a -- starting up a whole contested proceedings in which the person had the right to be present to testify, to counsel, to have cross-examination of witneses, to a written statement of the issues, to burden of proof on his opponent -- a whole list which I have set forth with statutory reference in one of the footnotes to my brief.

But it was a whole complicated procedure in which there was very careful guarding of procedural rights of a licensee but at the point where he got this notice of a contested hearing, Dr. Larkin's attorney again went into court and

preliminary injunction, et cetera, not of the investigative hearing which was the sole subject of the pleadings in this case, but of the proposed contested hearing on whether his license should be revoked.

In getting this material, the district court without any hearing whatsoever, did enter a temporary restraining order and did grant the motion for a three-judge court so a three-judge court was then convened and the three-judge court held a non-evidentiary hearing on the motion for preliminary injunction; no evidence whatsoever in any shape or form which went to the question of whether a preliminary injunction should issue.

There also was no evidence whatsoever presented -- and quite properly so -- on the subject of the constitutionality of the presumptively constitutional Wisconsin statutes so that the hearing before the three-judge court was oral argument, period, without even a pleading base for the relief being sought.

QUESTION: In the affidavits that you describe that were before the board in the investigation stage, was there any denial by Dr. Larkin of the allegations about practicing -- holding out practice under another name?

MISS BROWN: Before the board, your HOnor, there weren't affidavits. There was actual sworn testimony by witnesses before the board.

QUESTION: But did he deny that?

MISS BROWN: He was invited to attend and he was also invited to come before the board and to inform it of any explanation or any material he wished to present to the board during their investigative hearing and he declined to do so.

His counsel sat through the entire investigative hearing and his counsel did address the board but Dr. Larkin himself never appeared and never informed the board, despite its invitation, of any material which would cast doubt upon or a reflection upon the sworn testimony and other evidence that the board itself took during its investigation.

But the three-judge court, during this argument on preliminary injunction, off the bench declares the statute unconstitutional and it also enjoins the use of the statute not only against Dr. Larkin but against everybody.

It came down with the decision that -- and here I am quoting them --"For the board temporarily to suspend Dr. Larkin's license --" which, of course, the board hadn't done -- "at its own contested hearing on charges evolving from its own investigatinn, would constitute a denial to him of rights to procedural due process. Insofar as the statute authorizes a procedure wherein a physician stands to lose his liberty or property absent the intervention of an independent, neutral and detached decision-maker

conclude that it is unconstitutional and unenforceable."

So in response to the motion for preliminary injunction, they did enter a decision declaring the statute unconstitutional banning all utilization of the statute against everybody and then subsequently they came down with their judgment.

Originally they did this orally. Then they wrote a decision. Then they entered a judgment and in all of these, they declared the statute unconstitutional and enjoined all utilization.

From the judgment so declaring, the Appellants appealed to this Court. This Court noted probable jurisdiction. My brief was submitted. The other side's brief was submitted and the board found itself with this order banning all utilization of the statutes so crippling that the interests of the citizens of the State of Wisconsin were being harmed so the board did go to the three-judge court and ask for a modification so that the injunction would only protect Dr. Larkin and not prohibit the board from utilizing the statute against everybody.

QUESTION: Was there any claim made in the oral argument before the three-judge court that this was a class action?

MISS BROWN: No, no. No, there was no class action aspect to this at all.

QUESTION: Of course, if the statute were,in fact, in law unconstitutional, it would apply to everyone whether you had a class action or not, I assume.

MISS BROWN: Yes. Yes, sir. So that we did ask this modification of the judgment in order to make the preliminary injunctions, as they should properly have been, run only against Dr. Larkin.

Well, the court then took an opportunity to change its judgment in a more -- much more broader way. They did what we asked -- in other words, allowing the board to proceed against others, but they also came up with this fiction about irreparable harm to Dr. Larkin in which there was absolutely no evidence and there was not even an allegation that he would suffer irreparable harm if the preliminary injunction was not ordered -- was not granted.

QUESTION: You mean that to suspend a man from practice of medicine for six months is not irreparable harm?

MISS BROWN: I would submit -- well, in the first place, we don't know whether he was going to be suspended at all.

QUESTION: But he could be.

MISS BROWN: He could be. Right. But we have a situation --

QUESTION: Would that be irreparable harm?

MISS BROWN: It could be irreparable harm in some

situations but I would submit to you, Justice Marshall, that we have some unique facts in this case and that is --

QUESTION: You said there were no facts.

MISS BROWN: There are no facts establishing a base for the issuance of a preliminary injunction. There are facts otherwise and one of the facts is that Dr. Larkin is a resident of the Stat e of Michigan. His license to practice --

QUESTION: Was that before the court?

MISS BROWN: Yes, your Honor.

QUESTION: The three-judge court.

MISS BROWN: Sure.

QUESTION: So they did have some facts.

MISS BROWN: In the form of the proceedings and notices of the board which were attached to affidavits filed with the pleadings and with -- well, some other affidavits. But what I am saying --

QUESTION: You made the statement there was no evidence. You meant there was no oral evidence. There were affidavits.

MISS: Brown: There were affidavits,your Honor, but my point is that they did not relate in any way to whether or not a preliminary injunction could issue in this case.

QUESTION: If the Bar Association took away your

license to practice law for six months, would you consider that irreparable harm?

MISS BROWN: I certainly would if the Bar Association of Wisconsin --

QUESTION: Well, what's the difference?

MISS BROWN: -- did and I was practicing in Wisconsin.

If I was a member of the Michigan Bar and I flew into Wisconsin once in six months, I don't know that the injury would be so great.

QUESTION: Will you come to the facts of this particular case?

MISS BROWN: Well, the facts are, your Honor, that Dr. Larkin had a license to practice medicine in Michigan. At the time of these hearings, he was not coming to Wisconsin, other than on very infrequent occasions.

His operation in Milwaukee was being run by others with whom he shared the fee -- he split fees. He was not personally in the day-to-day business of sitting in an office and having patients come to him for medical service. And he was practicing medicine in the State of Michigan where he was physically present on all but very few occasions.

So that under these circumstances, your Honor, I doubt that they could establish, had they attempted to do

attempted to do so, which they did not do. But I doubt that they could have established the type of irreparable harm which this Court has recently talked about in -- oh, cases such as Sampson versus Murray. There is no way, I believe, that they could have established that.

But the point is, your Honor, they didn't even try.

QUESTION: I suppose his probability of success would depend upon his denial of and refuting the information that was before the medical board.

Could the court make any evaluation of the probability of success on what it had before it without any denial from him?

Could the three-judge court make any judgment?

MISS BROWN: The only thing -- and this, of course, is another very important point -- the only thing the three-judge court did was to issue the decision. There were no findings of fact. There were no conclusions of law as are required by Rule 52.

Now, of course, that rule requires findings of fact and conclusions of law but it gives an alternative. That is, instead of being in that form, it can be in the form of the judgment -- or the decision.

But the decision in this case, which, of course, is in the jurisdictional statement Appendix, contains no

findings of fact or conclusions of law as required by the Federal Rules of Civil Procedure.

QUESTION: That was for a preliminary, was it?

MISS BROWN: Yes, your Honor. Rule 52 does provide that whether it is a permanent --

QUESTION: Did you ask for it?

MISS BROWN: I'm sorry.

QUESTION: Did you ask for a finding?

MISS BROWN: I don't think it is a matter of asking. It is a matter of mandatory duty on the court, your Honor.

QUESTION: But I mean, after they didn't do it, did you raise the point with them? Or did you just come up here and get us to do it?

Did you give them a chance to correct that?

MISS BROWN: I was not trial counsel, your Honor.

QUESTION: Oh, sorry.

MISS BROWN: I am informed that the state, on behalf of the Appellants, there was a motion for judgment made and it was not -- in fact, we had to make the motion for judgment in order to have compliance with the Federal Rules about entry of judgment to start the appeal time running and it was in response to our motion for a judgment that a judgment was finally entered in December.

Before that, they just, you know, issued their

decision and that was it.

[?]

QUESTION: Was the TRO then impaired?

QUESTION: Preliminary injunction.

MISS BROWN: Declaring the statute unconstitutional and enjoining all utilization.

I believe my time is up, your Honor, and I thank you for your attention.

MR CHIEF JUSTICE BURGER: Mr. Friebert, at some point will you touch on Mayo against the Canning Company and tell us what you think that has to do with this case?

ORAL ARGUMENT OF ROBERT H. FRIEBERT, ESQ.,

ON BEHALF OF APPELLEES

MR. FRIEBERT: Mayo against the Canning Company?

QUESTION: Yes.

MR. FRIEBERT: Is that in my brief, your Honor?

QUESTION: I don't know whether it is in your brief, but it is in this case.

QUESTION: And it is relied on very heavily.

QUESTION: Among other things, while from this Court the syllabus is not binding as in the State of Ohio, there is a statement that it is of the highest importance to a proper review in the granting or refusing of a preliminary injunction that there be explicit findings of fact.

MR. FRIEBERT: Yes, excuse me. Yes.

QUESTION: Rule 52-A that Miss Brown was talking

about.

MR. FRIEBERT: Yes, I'd be happy to comment on it immediately, Mr. Chief Justice.

The court is not required to make explicit findings of fact if it takes care of that matter within a written opinion and I believe that the court is taking care of that matter in its written opinion.

A rule, the Federal Rule of Civil Procedure says it can go either way and that is the way they went. They made a specific finding --

QUESTION: When did they do that?

MR. FRIEBERT: Well, I believe that the three-judge court did make an error in its original statement by not saying that there was irreparable injury, although I think that they were saying that without using the magic words.

They indicated he would lose his license to practice and they also indicated he would have a loss of liberty due to the notoriety of having been a person who lost his license, citing appropriate cases from this Court.

So they, without using the magic words, they did make the appropriate findings.

When the state went back and asked for an amendment to the judgment so that they could go after other doctors, I filed a counter request that they make the formal finding.

The court did so. I think that that was their intention all along. So they have used now the magic words, although I think that their opinion did follow and comport with the Federal Rule.

QUESTION: The last one?

MR. FRIEBERT: Yes, the last one coupled -- there are two --

QUESTION: Where is that opinion?

MR. FRIEBERT: The opinion is in the jurisdictional statement, I believe.

QUESTION: The one of a year ago, I believe.

MR. FRIEBERT: Yes.

QUESTION: The December 21, 1973.

MR. FRIEBERT: Yes. I am --

QUESTION: Do you think that one takes the place of findings?

MR. FRIEBERT: I think they make findings. There is nothing extremely difficult about the critical facts in this case. This issue is not as broad as the state would make it. It is not an attempt to declare an entire statutory scheme unconstitutional.

It is an attempt to declare an entire statutory scheme unconstitutional as applied to these very limited factual circumstances.

As such, it would not have the major impact on the

APA and we submit that if the Court were to decide against us, it would have a major impact on administrative proceedings because the Court would then be giving its stamp of approval to an anything-goes situation because this is about as aggravated a mixing of function as one can imagine on the facts and the reason it is so aggravated is because it is not just a question of mixing of functions within an administrative agency which is the way the state would like to paint the picture.

That is not this case. This case involves the same people, the Appellants, the very same people investigating Dr. Larkin by a formal investigation which they characterized in the trial court to be akin to a grand jury investigation.

That is what they told the trial court what they were doing and since they made the representation that they were like grand jurors engaging in an investigation, on two occasions the court, the trial court -- and not a three-judge court, this was just a single judge, refused a temporary restraining order.

QUESTION: Mr. Friebert, who actually does that investigative work? Do they have runners do it or outside investigators or do the members of the board themselves do it?

MR. FRIEBERT: In this instance, testimony was

taken by the board, brought in by counsel, who was the trial counsel in this case. He was also counsel to the board and brought in by an employee but the testimony was taken by these board members themselves and they questioned these people and hence the analogy which they said to the grand jury.

QUESTION: Well, what if they are, right at the conclusion of that so-called investigative procedure, the board had simply suspended the license?

MR. FRIEBERT: I think that that would have been unconstitutional. First of all, I think it would have violated Wisconsin practice because --

QUESTION: You mean, if a board just sits and hears testimony and then decides, that is unconstitutional?

MR. FRIEBERT: Yes. I think without giving notice that that is what they are going to do and giving me an opportunity to cross-examine or respond, I do.

QUESTION: Well, that may be so but it would n't be because of a mixing of functions.

MR. FRIEBERT: Well, it would be, again, in this case because I did not receive notice that that was what they were going to do.

QUESTION: It still wouldn't be a mixing of functions problem. It would be a procedural due process.

MR. FRIEBERT: Correct. Which I consider mixing

a function is a procedural due process problem.

QUESTION: Mr. Friebert, in Arizona, where I practiced, I sat on one of the grievance committees and we would have a session of the committee whereby we would hear a complaint -- in other words, hear a complaining witness and simply decide whether there was sufficient basis to go ahead and notify the lawyer who was being complained against and if we decided that there was no sufficient basis, we'd dismiss it.

If we decided there was sufficient basis, then we would notify him of charges and hold a full hearing.

Now, do you think that violates the three-judge district court's opinion here?

MR. FRIEBERT: The same group would then be the trial people?

QUESTION: Precisely.

MR. FRIEBERT: Yes, I think that that would violate procedural due process.

In Wisconsin, I might add, Mr. Justice Rehnquist, that there is -- with respect to revoking or suspending the license to practice law, the charges are brought to the Supreme Court of Wisconsin, [which] appoints a judge to separately decide the factual matters and then the matter is -- and makes a recommendation so there is a splitting of functions within the Bar in Wisconsin.

QUESTION: That was true in Arizona, too, after the administrative committee got through it went to the Board of Governors of the Supreme Court. But here, I take it, your medical thing goes eventually into court.

MR. FRIEBERT: The medical thing goes eventually, under the way they are moving in this case, to two courts. I should state, at the conclusion of their investigative hearing, they issued formal findings of fact and conclusions of law and in those findings of fact and conclusions of law, they resolved each and every factual question in this case.

That case was then transmitted to the district attorney for further proceedings.

QUESTION: Do you suppose that was partly because there was no contest after the notice?

MR. FRIEBERT: No, I don't.

QUESTION: Dr. Larkin undertook to put in no never denied the charges? That is correct?

MR. FRIEBERT: Oh, Dr. Larkin denies the charges and I --

QUESTION: Did he get notice?

MR. FRIEBERT: I was present and I made a statement as to the reasons why this board -- why these charges on the record that they have before us -- this is not in the record. The hearings were not made a part of the record here but I did appear and I did --

QUESTION: Well, did Dr. Larkin ever appear?

MR. FRIEBERT: No, he did not.

QUESTION: Why not?

MR. FRIEBERT: I didn't -- it was on my advice. I didnt see any reason for him to appear.

QUESTION: So then he didn't dispute anything?

MR. FRIEBERT: Oh, yes, I appeared on his behalf. He appeared through counsel.

QUESTION: Were the other witnesses sworn?

MR. FRIEBERT: I'm not sure. I believe so.

QUESTION: Were you sworn?

MR. FRIEBERT: No.

QUESTION: Well, how could you meet their testimony?

MR. FRIEBERT: Because I made an extensive legal argument --

QUESTION: Legal? I'm talking about factual.

MR. FRIEBERT: Oh, yes, it is a factual argument, a legal argument which appears at footnote 13 of my brief. Now, I would like to state, because I think it is important --

QUESTION: Did he ever deny any of these facts? That is what the Chief Justice was asking.

MR. FRIEBERT: Did he? By testimony? No.

QUESTION: Did you deny them?

MR. FRIEBERT: I denied that they had sufficient facts.

QUESTION: Did you deny the fact that they had as being true?

MR. FRIEBERT: Yes, I denied that they had proved that there was personal knowledge of some of the allegations.

QUESTION: My question is, did you deny that they were true?

MR. FRIEBERT: I denied that some of them, yes, I denied that the so-called unlicensed physician was unlicensed and I told them that he was a licensed physician at all times in South Korea according to my understanding.

They knew that he was a licensed physician in Georgia and Wisconsin allows --

QUESTION: That's not statutory.

MR. FRIEBERT: Yes, it is statutory, but they didn't show that fact.

QUESTION: Is it a question of fact that he was operating under an assumed name?

MR. FRIEBERT: I denied that, yes, I --

QUESTION: How could you deny it?

MR. FRIEBERT: Just because he signed the lease Dr. Larkin and hit the papers in Milwaukee in October of 1971. Everybody knew who he was.

QUESTION: I'm not worried about hitting the papers.

You made it a legal argument and that is all you made.

Am I right or wrong?

MR. FRIEBERT: And I challenged that they did not have all the facts, yes.

QUESTION: But you didn't question the facts?

MR. FRIEBERT: I was not given an opportunity to cross-examine witnesses, and I had no subpoena powers.

QUESTION: Were you denied the opportunity to produce witnesses?

MR. FRIEBERT: I had no subpoena powers in the hearing.

QUESTION: Did you produce witnesses?

MR. FRIEBERT: No.

QUESTION: Could you have produced Dr. Larkin?

MR. FRIEBERT: Possibly.

QUESTION: Possibly?

MR. FRIEBERT: Possibly. It was not my advice. I saw no purpose in it.

QUESTION: I thought you said you didn't want him.

MR. FRIEBERT: I did not want him,yes.

QUESTION: All right.

QUESTION: Mr. Friebert, what do you consider is before this Court as of today?

MR. FRIEBERT: I consider the major issue before this Court is as to whether an administrative agency can

combine each and every function of investigation, of accusatorial and decision-making all within the same persons.

These are the -- the Appellants had all of these roles and sought to -- they were not restrained when they were investigating. They have never been restrained from charging. It is when they propose to be judges of their charges that the federal three-judge court -- or it is stepped first to federal district court sitting singly and then the federal three-judge court, does not have the sweep of a statement of counsel.

This is not -- as a matter of fact it is totally anathema to the --

QUESTION: May I interrupt you a minute?

MR. FRIEBERT: Excuse me.

QUESTION: You aren't quite answering the question I had in mind. I, perhaps, was not clear, that two orders that were entered in this case that had been discussed here today, the one of December 21, 1973 and the subsequent one of '74, July the 25, I think.

Do you consider both of them to be before us? Or, if not, which one?

MR. FRIEBERT: I think they are both here. I really view the subsequent order as a modification but really more of an explanation of what they had said previously.

If they really said that in their opinion, if the

point was missed, it has been cleared up.

That is how I viewed the subsequent order.

If, of course, it is only the first order, well, then, I think a reversal could be done in one sentence to tell then to do what they did subsequently and then we are no further along.

QUESTION: The problem is, if I may say so, in their first action of December of 1973, they held this statute unconstitutional.

MR. FRIEBERT: Yes.

QUESTION: Now, in July of 1974, they seem, at least, if one can read the English language, to have retreated from that position and simply said that the Plaintiff's challenge to the constitutionality of the statute has a high likelihood of success.

Now, that certainly is inconsistent and those orders say different things.

MR. FRIEBERT: In fact -- and if the Court views only the first judgment as up here, it is automatic, they should not have declared a statute unconstitutional in a preliminary injunction.

QUESTION: Oh, no, I don't agree with you at all.

MR. FRIEBERT: I think the case law is clear on that, that their finding that they have to make is a high probability of success in the preliminary injunction stage,

unless they are combining the preliminary injunction with the final judgment which they could have done but did not do.

QUESTION: I thought, though, the law was it is sufficient to issue a preliminary injunction, that you find a high probability of success.

But, surely, if you want -- if the court wants to go further than that and say, this isn't just a high probability of success, it is a 100 percent thing in our eyes, I would think that they are perfectly justified at the preliminary stage of saying, this is unconstitutional and argument won't change our minds on these legal points.

MR. FRIEBERT: Well, this Court has said it in Mayo and I don't wish to dispute in not asking for the overturning of Mayo. I think that that was an error by the three-judge court which was corrected.

But it doesn't get us along the road much because it would go -- they would go back down and they would do what they did and the same basic issues remain.

QUESTION: What was the ground for your filing this document on this September 3rd suggestion of mootness?

MR. FRIEBERT: If that was the issue before the Court, whether they should not have issued -- if the court felt that the reason it noted a note of probable jurisdiction and ordered its oral argument was because they made a finding of

unconstitutionality, then that issue is moot because they have subsequently corrected that situation and furthermore, if the Court felt that they were in error for not making an explicit finding of irreparable injury, they have now done so, so that is the reason we are here and those two issues are moot.

The underlying issues are not really mooted except that I think and it is our position that the settled law of the -- and I believe it is the settled law -- is that you cannot combine within the same person all of the functions of accusing, investigating and then proposing to be the judges --

QUESTION: Do I understand you do not think that this amended judgment raises the question as to the predicate of our jurisdiction to review either judgment?

MR. FRIEBERT: It is just that it seems like such a waste of time to --

QUESTION: Waste of time or not, if we don't have jurisdiction, we don't have jurisdiction, whatever may be a waste of time.

MR. FRIEBERT: Oh, I think you have jurisdiction under the circumstances and appeal --

QUESTION: Even if we are to take the only judgment before us as the amended judgment?

MR. FRIEBERT: Oh, yes.

QUESTION: Why?

MR. FRIEBERT: I think because the statute allows appeals from preliminary injunctions.

QUESTION: What statute?

QUESTION: Only preliminary injunctions entered on the grounds of unconstitutionality.

MR. FRIEBERT: Yes, and there is that injunction -- oh, I'm sorry --

QUESTION: Well, the amendment wipes out the finding of unconstitutionality, doesn't it?

Is there any predicate of preliminary injunction on the basis --

MR. FRIEBERT: No, I believe that --

QUESTION: -- of a finding of unconstitutionality?

MR. FRIEBERT: -- Mr. Justice Brennan, I believe the statute allows an appeal from a preliminary injunction restraining the enforcement of a statute which this --

QUESTION: Is founded on a =-

MR. FRIEBERT: Constitutional defect but it certainly does

QUESTION: Well, there isn't any.

QUESTION: Well, this judgment doesn't rest on that.

MR. FRIEBERT: It certainly does -- I don't have the statute before me. I believe that an appeal from a

preliminary injunction to this Court is available from a holding of a preliminary injunction restraining the enforcement of a statute of statewide application which is this situation.

QUESTION: Required to be heard by a three-judge court.

MR. FRIEBERT: Yes, that's it.

QUESTION: Or required to be heard by--

MR. FRIEBERT: Which is that Stat situation, by definition. So I think we are here.

QUESTION: And there was no other reason for the three-judge district court's enjoining of the statute in this case than its serious doubt about its constitutionality, was there?

There was no independent basis for the court to enjoin?

MR. FRIEBERT: No. The independent basis awaits further discovery on the first cause of action which is that our assertion, which we would intend to prove if and when we get back, if necessary, that the board is biased against abortionists.

I would like to clear up something which is, first of all, Miss Brown stated that the complaint did not challenge the suspension authority of the board.

That is just not true.

The complaint -- the amended complaint at paragraph 3 challenges the authority of the board under 448(18) to suspend the license and temporarily suspend the license and at paragraph 3, refers back to the paragraph preceding for its reasons and one of the reasons stated is without being afforded a trial by jury or by persons other than his accusers.

The complaint -- the amended complaint very clearly raises this issue and that amended complaint was in court before the board decided to try and take his license away for six months so we were in the courthouse before that.

Secondly, the charges against Dr. Larkin do not relate to his professional competency and I think that that is very important.

There is no exigent circumstances in this situation. The charges against him are all for past practices which they allege occurred and which we deny or assert are not offenses and are protected.

They have to do with some kind of fee-splitting which, if you read the Wisconsin statute on it, it is incomprehensible.

It has to do with the alleged use of a different name which the Wisconsin statute does not prohibit until there is a prior finding by the board that this would work

to the detriment, no prior finding was there and it has to do with using an unlicensed physician, or physician unlicensed in Wisconsin.

QUESTION: Now, you say this was denied.

By what process or means was this denied?

MR. FRIEBERT: By the board.

QUESTION: No --

MR. FRIEBERT: I'm sorry.

QUESTION: -- you said that Dr. Larkin -- Mr. Larkin whatever he is, denied these things. How did he deny them?

MR. FRIEBERT: In my appearance on his behalf before the board in which I told them and made these arguments to them and which I think also demonstrates that at least -- well, I'd rather not state.

I made both statements as contained in footnote 13 to the board.

And finally, the use of unlicensed physician, unlicensed in Wisconsin, there are two, there is a factual defense, one -- two factual defenses.

One, he was licensed in another country and under a prevailing opinion of the Attorney General, a doctor unlicensed in Wisconsin who is licensed elsewhere can practice in conjunction with a Wisconsin doctor.

Secondly, that an unlicensed doctor or person can practice medicine in the state of a medical emergency

which is our opinion. It was created by the very board themselves due to their extensive harrassment over a period of two years of persons in Wisconsin who engaged in the practice of abortions despite rulings from the Eastern and Western district of Wisconsin declaring the Wisconsin statute unconstitutional.

Dr. Larkin had to get his his own restraining order because of the public duress by these Appellants and the public threats by the Attorney General of Wisconsin, the District Attorney that they might not mind the orders of the Federal District Court.

But those points have nothing to do with his professional competency so there is no medical emergency in the picture to require such a drastic fast movement and I think that those factors are extremely important towards -- in determining a way due process allows faster activity.

Certainly one of the factors would be whether there is an urgent situation.

In fact, the suggestion for mootness demonstrates some urgent situations which the board felt they needed relief from. That was in the case of two alcoholics and one narcotic addict doctor and for them, they just wanted to suspend their license, even though they were a hazard to the community, to the state in general and they indicated

for them there will be rehabilitation available because they would not seek revocation.

For an abortionist in the scene and a situation who may have used or allegedly used the wrong name on occasion or signed a lease under the wrong name or used the doctor unlicensed in Wisconsin or engaged in fee-splitting which we dispute and deny, there is no hope for rehabilitation.

So, apparently, drug addicts and alcoholics get greater protection.

QUESTION: Any statute in Wisconsin against signing your alleged name on a lease?

MR. FRIEBERT: No. You can use, under Wisconsin common law, I believe you can use any name and you don't have to achieve a formal name change.

MR. CHIEF JUSTICE BURGER: We will resume after lunch.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:02 o'clock p.m.]

AFTERNOON SESSION 1:02 pm.

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Friebert. You have a few minutes left.

MR. FRIEBERT: Thank you, Mr. Chief Justice.

I should like to pcint out in continuation that there really are no facts in dispute.

In the suggestion of mootness at page 12, I have reprinted the brief presented by these Appellants to the trial court in which they distinguished Larkin and make a flat statement.

"The Larkin case was, of course, on its facts unique in that the board investigated charges and then proposed to hold a contested hearing on those charges."

t And thus we have the total combining of functions situation --

QUESTION: Did the board recommend to the district attorney that he file specific certain kinds of charges against you?

MR. FRIEBERT: Yes.

QUESTION: And in accordance with the statute, they may so-called "prefer charges" with the district attorney. Is that it?

MR. FRIEBERT: Correct, Mr. Justice White and they have done that --

QUESTION: Well, you don't -- I would suppose that

is your easiest case to argue.

Maybe you have got a hard case no matter what, but it is easier to argue it if you put that in it, isn't it?

MR. FRIEBERT: That they have already done that, yes, they have.

QUESTION: And then if they want to proceed to a contested hearing themselves.

MR. FRIEBERT: Well, under the statute, they have made findings of fact and inclusions of law prior to the issuance of the preliminary injunction which resolved each and every fact situation, factual matter which they proposed to -- and submitted that to the district attorney and then they then proposed to hold a hearing to suspend on the very same charges.

They go to the district attorney because the district attorney either can commence criminal charges -- I might add that he has decided not to do that -- or to revoke.

Revocation proceedings in Wisconsin are judicial proceedings prosecuted by the district attorney.

And even at the end of a revocation proceeding, the trial judge does not have to revoke. He can suspend the license. So the only punishment that might ever have been achieved by -- in this situation -- might be the proposed

suspension by the board.

QUESTION: When you say the district attorney decided not to prefer charges, is there anything in the record that supports that?

MR. FRIEBERT: No. But it was stated on oral argument to the three-judge court.

QUESTION: Perhaps the district attorney , like others, is just waiting for the outcome of this case.

MR. FRIEBERT: No, on the original case?

QUESTION: We don't know that. This case we are arguing today.

MR. FRIEBERT: No, the district attor ney stated that he would only pursue revocation proceedings and they haven't proceeded, I might add, but that was the position that he had taken.

Now, this does not then imply anything with respect to infringement upon the APA because if the APA had been involved, this kind of situation never would have occurred.

QUESTION: Has the district attorney taken any action at all, either for revocation or on the criminal charge?

MR. FRIEBERT: No. He has just -- he has made that public statement, the one I just indicated, which was that he would not pursue criminal charges, but would only

pursue revocation proceedings.

QUESTION: And is the situation the same? I know this is outside the record, but I am curious as to Dr. Cannon.

MR. FRIEBERT: No, I don't know of any subsequent activity with respect to Dr. Cannon subsequent to the Supreme Court's decisions on the abortion cases.

I don't know whether he has been investigated or not, though. There was substantial activity with respect to this board despite restraining orders entered by Judge Doyle in the Western District of Wisconsin and even after restraining orders were entered, this board proposed to take his license away because he was administering abortions which is unprofessional conduct according to 448(18).

Now, the situation as far as this is concerned with this kind of totality of integration of activities is no way to justify it.

This does not involve economic regulation like the FTC or the SEC.

There is no urgency in the situation because there is no assertion that he is a bad doctor.

QUESTION: Well, you say it doesn't involve economic regulations. Certainly it is regulating somebody's way of making a living, isn't it?

MR. FRIEBERT: Yes. I mean the agency is not

dealing with economic regulation in the same manner as the FTC does so that a decision or a mingling, a submingling within their area of expertise might be allowable under due process because we are talking about economic regulation.

QUESTION: Well, aren't we talking about economic regulation here, too?

MR. FRIEBERT: The economics of Dr. Larkin's right to make a living but not in the same sense as the FTC regulates the economy or the charge given to them by Congress and therefore, that the due process might allow a certain amount of intermingling with respect to an agency like that which is not the situation here.

QUESTION: Well, since you mentioned the Federal Trade Commission, isn't this some of the alleged conduct found by the board, that is, his setting up an office under a false name something like misbranding?

MR. FRIEBERT: No, that lease and all of those situations are, you know, it seems to say that Dr. Larkin was not a known person and that he was a fly-by-night doctor, so to speak.

In October of 1971, everybody in the State of Wisconsin knew about Dr. Larkin. He was on the front pages of the paper and everybody knew where his clinic was.

He closed down because he thought he was being threatened with prosecution despite the Babbitt's decision.

In December of 1971 we commenced an action in the federal court for a restraining order against Mr. McCAnn, the district attorney and the attorney general and we received a restraining order in December of 1971 --

QUESTION: Yes, but he has never denied the board's determination made on sworn testimony that he opened an office in Milwaukee under a false name.

MR. FRIEBERT: I don't think that is their charge. Their charge is, he signed a lease under a different name and that -- the man is signing a lease, there is no way that people did not know that that was Dr. Larkin's clinic and we talked about him not being available to answer civil litigation. Everybody knows that that was Dr. Larkin's clinic. There is no showing or statement on that at all.

I might add that 448.02 (4) does not prohibit a doctor from practicing in Wisconsin under an assumed name that might add that. It only prohibits it in any instance in which the examining board after a hearing finds that such -- practicing under such changed name operates unfairly competed et cetera. So it is only in instances after board action. This is -- and that section was added in after -- because the statute used to be a flat prohibition and then they put that in taking away the flat prohibition.

So it is not illegal in Wisconsin. And so they really come under or try to bring them under the catchall,

engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests, which is another issue in the case which we haven't brought up and which a three-judge court mentioned, namely, that that is void for vagueness.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 1:09 o'clock p.m., the case was submitted.]