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In the

Supreme Court of the United States

CITY OF CHARLOTTE, et al.,

Petitioners,

v.

LOCAL 660, INTERNATIONAL ASSOCIA-
TION OF FIREFIGHTERS, et al.,

Respondents.

No. 75-250

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 CITY OF CHARLOTTE, et al., :
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 Petitioners, :
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 v. : No. 75-250
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 LOCAL 660, INTERNATIONAL ASSOCIA- :
 TION OF FIREFIGHTERS, et al., :
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 Respondents. :
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Washington, D. C.,

Wednesday, March 3, 1976.

The above-entitled matter came on for argument at
11:18 o'clock, a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice of the United States
- 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
- JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

- WILLIAM A. WATTS, ESQ., Office of the City Attorney,
City of Charlotte, 600 East Trade Street, Charlotte,
North Carolina 28202; on behalf of the Petitioners.
- JONATHAN WALLAS, ESQ., Chambers, Stein, Ferguson &
Becton, Suite 730, 951 S. Independence Boulevard,
Charlotte, North Carolina 28202; on behalf of the
Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 75-250, City of Charlotte against Local 660.

You may proceed whenever you're ready, Mr. Watts.

ORAL ARGUMENT OF WILLIAM A. WATTS, ESQ.,

ON BEHALF OF THE PETITIONERS

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

I am W. A. Watts. I represent the City of Charlotte and individual petitioners in this case.

We are here on certiorari to review a decision of the Court Circuit Court of Appeals. That Court has ruled that a municipality must grant union dues check off under the equal protection clause of the Fourteenth Amendment; or, in the alternative, establish certain standards.

The lower courts have found that Charlotte has not established clear and fair standards to differentiate between the denial of dues check off on the one hand, and the granting of such withholdings from employees' pay for such things as Credit Union savings, insurance premiums, and contributions to one charity, to name a few.

Now, we say that by this decision the lower courts have effectively carved out and established a substantive right to dues check off. We say that's a right that has never existed before, because there is no right to dues check off, as

we see it, it has always been viewed as a privilege. And even in the private sector of our economy, check off must generally be secured by bargaining.

Nevertheless, in spite of this, the court has equated the two, and has required some kind of standards.

I think it might be important to the Court that I very briefly recite the facts giving rise to this case. During October of 1973, Local 660, International Association of Firefighters, made up entirely of municipal firemen employees, and five of their employee members, who are officers of the union, brought suit in the District Court for the Western District of North Carolina.

The allegation was that there was a deprivation of rights under the First and Ninth Amendments and under the equal protection and due process clauses of the Fourteenth Amendment.

Now, at the time this action was brought, there were approximately 351 dues-paying union members in the Charlotte Fire Department. This was out of a total of about 543 uniformed firemen.

The Union of course alleged in the complaint that the City's practice was arbitrary and capricious. They claimed also that denial of check off made it unable, made the Union unable to obtain group life insurance, to obtain counsel, and certain other things that the Union desired to do.

Now, on the other hand, the City contended, and tried to show, and we think did show, that the City had established not standards but a policy, a policy of voluntary withholding from employees' pay, and the City contended that the dues check off simply did not conform to the policy which the City had established.

Now, I might mention here that there were actually 14 items which the City permitted to be withheld. But of that 14, 7 of the items were required by statute. I'm thinking of such things as income tax withholdings, and certain other things that either the Federal or State statutes required the City to withhold.

That left 7 items that the City voluntarily withheld when they were not required. One of these was City-sponsored deferred compensation plan, that the City had established as a fringe benefit. And, indeed, we say all of the withholdings were, in essence, a fringe benefit.

An insurance -- insurance premiums; and this again was for a company that the City sponsored, as a matter of fact the City paid part of the premiums. The premiums were -- oh, it was accident, health, and also life insurance.

QUESTION: Was that negotiated, or part of the contract of every fireman, independent of negotiation?

MR. WATTS: It was negotiated with a private insurance company, and the City participated in the program of giving its

employees this protection. And that, of course, was withheld. One of the things that the City withheld.

U. S. Savings Bonds was another. United Way contributions, the one charity that was permitted, and that was available to all employees.

Now, in spite of this, --

QUESTION: Would you say, Mr. Watts, that all of these items, then, were available to all employees?

MR. WATTS: Mr. Justice Blackmun, we would say that all of these were available for all employees within a single work unit, that is, the fire department.

Now, as a matter of fact, the district court found that to be a fact; found that this was the City's policy. And we don't dispute that, we think that is a correct finding.

Now, --

QUESTION: Supposing an employee, one of the firemen, came in and said, "I want you to send twenty dollars out of each monthly paycheck -- ten out of every two weeks, if they paid that way -- to my church"?

MR. WATTS: Mr. Chief Justice, we would say that that would not be possible under the policy that the City had established. The reason we say that that wouldn't be possible -- practical, would be that we all know that there are many, many churches, and you'd have to set up some kind of a withholding for each church, I assume. So that wouldn't conform to

the policy, because we all know that our firemen belong to many, many churches, many religious organizations, many social organizations, many fraternal organizations.

And the sole reason that the City had this policy was so that we could grant, or the City could grant withholding as a fringe benefit, if you will, as a convenience to its people, but still keep it under -- in a rational and, oh, I'd say, within bounds.

QUESTION: Well, Mr. Watts, what are the elements in the policy to qualify?

MR. WATTS: The only policy -- the only element, really, was that all the employees within a single unit could participate, could participate in a specific withholding.

In other words, --

QUESTION: I see. So the church thing, because of so many churches --

MR. WATTS: There are so many, Your Honor, you'd have to have so many withholdings --

QUESTION: But United Way, on the other hand, is a single charity.

MR. WATTS: A single charity, available to all the employees. But churches are not. You would have -- no telling how many churches might be involved.

QUESTION: Well, why a dues check off to the same union, why wouldn't that qualify?

MR. WATTS: Well now, there again, dues check off for one union, it's a -- it's not really -- well, let's put it this way, it's a dues type thing. Dues were never permitted to any organization. There might be many unions involved, just as there might be many churches. And we would say that would not conform to the policy. It wasn't available to all the people within the work unit.

QUESTION: Well, do you take the position that the City, as the employer, can establish the categories with or without good reason and say, These are the categories we will deduct, and we will check off none other than these?

MR. WATTS: Yes, Your Honor, we would say that that is a matter of policy that the City Council might -- might --

QUESTION: Well, that's the precise issue in this case, isn't it?

MR. WATTS: This really is the issue. Is it necessary to classify, in this situation?

Now, we would contend that it might be necessary to classify if things were the same. But the next point I'd like to make to this Court is simply this --

QUESTION: Mr. Watts, before you go on to that, --

MR. WATTS: Yes, Your Honor.

QUESTION: -- you referred a moment ago to the district court's opinion, and I notice that the district court, in its opinion, at page A-13 of your Petition, commented that "Desire

to discourage municipal labor organizations would of course be an impermissible reason for refusing to withhold moneys."

Do you have any idea why he said that?

MR. WATTS: Your Honor, I can only answer your question this way: If you will notice, the only citation that the district court or, for that matter, the Fourth Circuit talked about was the Virginia case that involved segregation. And the impermissible objective of bringing about -- or denying integration.

Now, for that reason, it would appear that the district court believed that the City attempted to discourage the union.

QUESTION: Well, certainly the State of North Carolina attempts to discourage municipal labor unions by its statute. Is that an impermissible purpose for the State of North Carolina?

MR. WATTS: Your Honor, we would say not. We litigated that case some time ago in a three-judge court, and this was upheld, this statute was upheld.

QUESTION: Which statute?

MR. WATTS: It's 95-98. No, no, the -- yes, sir, 95-98.

QUESTION: And what does it provide?

MR. WATTS: It provides in essence that because of policy a municipality may not enter into collective bargaining

contracts with a union.

And that, Your Honor, was upheld for what it's worth by a lower court. And we believe that it is a permissible type legislation.

Now, getting back to Mr. Justice Rehnquist's question here, there is not one scintilla of evidence in this record that the City has ever attempted to discourage unions, other than the statutes which control the City.

QUESTION: Well, what if there was? What if there was?

MR. WATTS: I think it would make really no difference, when you get right down to it, unless the City would go so far as to discourage -- as to make it impossible for the union to operate.

QUESTION: Well, what if they forbade it by law?

MR. WATTS: Forbade people belonging to the union?

QUESTION: Municipal employees from --

MR. WATTS: I think we could not do that, Your Honor. I think that municipal employees now have a right to belong to unions.

QUESTION: Under what case of this Court?

MR. WATTS: That's Atkins v. City of Charlotte. That was decided in the -- in the Fourth Circuit, it was a three-judge court.

QUESTION: Well, that's not a case from this Court.

MR. WATTS: It is not a case from this Court, Your

Honor, it's a case from the lower court, and I'll only mention that to you, in citing it, as a reason for my belief that municipal employees may belong to a union.

QUESTION: Do you get your constitutional beliefs from every three-judge district court that happens to hand down a decision around the country?

QUESTION: I suppose you get them from the Constitution, and your answer would be --

MR. WATTS: Well, that is correct, yes, Your Honor. That is correct. That is correct, Your Honor.

I think that it's fairly well established now that employees, municipal employees do have a right to belong to unions. But they have no right to dues check off. That's the point I want to make.

QUESTION: I suppose, if the Atkins case -- while the Atkins case remains on the books, the municipalities within the reach of the Fourth Circuit are bound by it?

MR. WATTS: Your Honor, we would feel bound by that decision. We don't dispute the decision.

QUESTION: Until and unless we overrule it.

MR. WATTS: Unless, Your Honor, this Court should overrule it, and then of course we'd be bound by that.

But at the present time we would not contest the fact that any of our municipal employees may belong to unions, we think they have that right. We think they have a right to

join, to conduct union business, to do everything. But we think there's no affirmative duty on the part of the City to deduct their dues for them.

QUESTION: Or to aid the Union in any other way?

MR. WATTS: Well, I think that's right. This is an affirmative type thing. We have no right to -- we have no requirement to do that. But we certainly would not attempt, in any way, to keep the union from operating, to keep our employees from joining, or to keep them from meeting together or doing anything that a union normally does. That's my contention, Your Honor.

Now, going on just for a moment -- if that answers your questions right now -- our first contention here is that this case is really not an equal protection case, when you get right down to it.

Check off of union dues, on its face, is so different from the other items that the City withheld that they're not in the same classification, they're not in the same ballpark, they are very, very different. And we think that the question of classification isn't raised at all.

QUESTION: Well, even if they were the same kind of item as the other items, would it be an equal protection case, as long as you treat all your employees the same?

MR. WATTS: We think not, Your Honor. We think not, Your Honor. But we think that clearly, in this case, for the

reasons that I'm going to try to mention to you, we think that it's not an equal protection case, because there's no classification. That's our contention.

Let's think for just a moment at the differences between union dues check off on the one hand, and, for instance, Credit Union savings on the other.

To begin with, check off is for the benefit of the union. It's a matter of union security. There's a long, long history of unionism in the United States, and the fact that union dues check off is very important to the union as a matter of security. It enables their dues to be readily collected.

Now, that is the first difference that I can think of, and that's a very big difference. Another thing, another difference that I would point out to the Court is that historically and practically check off is a matter of employer-employee relations. That's another difference. Totally different from anything else that the City has checked off under its policy.

Generally speaking, also, as a difference, union dues check off is part of the collective bargaining process. That is another difference.

It's also different in North Carolina cities, because the City is prohibited by State statute from entering into collective bargaining contracts, and we say --

QUESTION: Mr. Watts, it seems to me that you're

arguing that the classification is reasonable, rather than arguing that it's not an equal protection case.

MR. WATTS: Your Honor, I'm just arguing that it's not even a classification question, because it's so dissimilar. In other words, dues check off is so dissimilar from anything else that you just don't have to classify it. It's like apples and oranges. You might classify apples, if you want, as good, bad, or indifferent, or some way, red, yellow; but you wouldn't classify apples and oranges. They are different things.

That, in and of itself, is a classification, and we say that union dues check off is in a class by itself.

QUESTION: Well, as I understood you, in answering my earlier question, Mr. Watts, you said, in any event there's a policy.

MR. WATTS: There is a policy, Your Honor.

QUESTION: And a key element of the policy is that the City is not going to pay at the request of employees to any except that which is a single organization, beyond, in any event, that which by statute you're compelled to check off, income taxes and so on.

MR. WATTS: That's correct, Your Honor, that is a policy.

QUESTION: And that you uniformly apply that policy --

MR. WATTS: We say it is, Your Honor.

QUESTION: -- uniformly apply it because you say you

won't check off for individual churches or for individual clubs, social clubs, because that's outside the policy of requiring a single recipient.

MR. WATTS: That is correct, Your Honor.

QUESTION: And that you apply that uniformly.

MR. WATTS: That is what we say, Your Honor.

QUESTION: And you won't do it here because there may be more than one union.

MR. WATTS: There may be more than one union, and there may be simply members of the firemen who are not --

QUESTION: Even if there is only one union, what does that have to do with the City's rights to say they will check off this and they will not check off for that?

MR. WATTS: We say that this is entirely discretionary, it's a matter of policy. We think there is some place where a municipal governing body must have a right to govern.

QUESTION: Well, Mr. Watts, if your equal protection argument is answered by the answer you've given me, you don't have to reach the second question.

MR. WATTS: You don't, really; no, you don't, Your Honor.

But we say it's there, and we think that the Court might be aware of it. But it's just not a question of classification, although certainly you don't have to reach it.

Now, we might even go on a little step further than

that.

We say that in any event that the City has established a rational basis. Quite simply, the City has a purpose, a very valid purpose, in trying to limit the number of items withheld, and that simply is that the thing can become totally out of hand, you get so many that it's an administrative burden.

Yes, Your Honor?

QUESTION: And there's no takehome pay at all.

MR. WATTS: Well, that's right. It can be just --

QUESTION: You have 14 categories you already withhold?

MR. WATTS: We have 14, but 7 of those, only 7 of them, are voluntary.

QUESTION: There can't be much left of the paycheck if you take out all 14.

MR. WATTS: If everybody participated, this might well be true, Your Honor.

In any event, we think that it is certainly a permissible and a valid objective that the City has to limit, to permit certain withholding and to limit others, to limit numbers. We think that we have done it in about as good a way as we could do it, as the City has.

Now, the -- my honorable opponent here has said, "Well, what you might do" -- in his brief, I believe, he said,

"You might have some sort of a vote or other in a department, and if a majority of the people say that they want something withheld, you might grant that."

But we would respectfully urge this Court that the City Council and the City governing body is the one that has to determine those things. And the fact that there might be some other way of doing the same thing, of limiting the number of withholdings, that doesn't make any difference, because it is a policy matter for the City.

And we say that the Council must be permitted to govern.

Now, I might mention one or two things, too. I would, of course, hesitate to cite district court cases to this Court. However, this very case here, Local 660, has been considered by two district courts that I can think of.

In Strojny v. Rousakis, the district court for the Southern District of Georgia considered this case and commented on it in the decision. Specifically the court there, the district court, declined to follow Local 660 for many of the reasons that I have just enumerated to you.

It was cited -- this case was considered also by the district court in the Northern District of Alabama, and in that case again the district court refused to follow the reasoning of Local 660, saying, among other things, that if -- that this would grant a right to municipal employees that

was not available to even private employees, because private employees have to bargain for things.

So, for these reasons, we say that this is an intrusion on the right of a City to govern itself.

Of course, it's easy to argue, well, the district court has left you an out, all you have to do is make out some kind of standard.

But, Your Honors, what better standard is there than the standard which the City has, a standard which treats everyone alike under the Constitution? We believe that the City Council should be permitted to govern in this case.

Thank you, if there's no other questions.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Watts.

Mr. Wallas.

ORAL ARGUMENT OF JONATHAN WALLAS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Plaintiffs feel that it's important at the outset to emphasize the narrow scope of the district court order, which is now the subject of review in this Court.

The limiting injunction issued by the district court reads as follows:

"So long as the defendants continue," --

QUESTION: What page is that, in the Appendix?

MR. WALLAS: Your Honor, that's at page -- at page --

QUESTION: Just ahead of the Findings, is it, of --
it isn't in --

MR. WALLAS: Page A-14 of the Petition, Your Honor.

QUESTION: Oh. I have it now.

MR. WALLAS: The very last page, I believe.

In paragraph 4. That reads as follows:

"So long as the defendants continue, without clearly stated and fair standards, to withhold moneys from the paychecks of City employees for other purposes, organizations and entities not specifically required by law, the defendants, their agents, successors, employees and any persons acting in concert with the defendants or at their direction are enjoined from refusing to withhold moneys from the paychecks of the individual plaintiffs to be paid to Local 660."

QUESTION: Mr. Wallas, --

QUESTION: Would that be satisfied if the defendants announced that they would not, under any circumstances, allow check off for union dues? That would be clear and explicit. But must it be --

MR. WALLAS: Your Honor, the reason that that would not satisfy it is because it would be a violation of the equal protection clause. Contrary --

QUESTION: And what's your basic authority for that?

MR. WALLAS: Your Honor, if I may start out by

answering that question this way: Contrary to what Mr. Watts has asserted in the Court today, that is, that the standard that the City -- the policy that the City uses is a policy to allow all employees in a unit any deduction -- to allow a deduction where all the employees in a unit can participate.

Now, that --

QUESTION: To a single recipient.

MR. WALLAS: Yes, sir.

Now, that was the policy that Mr. Watts is asserting here today, and he is saying it is a policy that the City has adopted and has followed.

Now, if you will look at page 2 of the Petition, you will see that the first question, which was addressed to this Court, reads:

"Have petitioners, by following a policy of allowing only payroll withholdings which benefit all of its employees, established a rational basis for" et cetera.

Now, the reason that's important is that the district court in this case found, on page A-10, that the practice had been to allow those deductions which were available to all City employees; that would be employees of all the departments in the City, or those programs that were available to employees within a single department. And that would be the Fire Department, for example. To allow deductions that were available in those circumstances.

And since the deduction that we request, that is, reduction for union dues, is available to all employees within the Fire Department, then the court said, Well, you can't deny this deduction, that is, the deduction that happens to run into a labor organization, while you are allowing other deductions that only run into -- only to benefit people in a particular department.

QUESTION: But I thought Mr. Watts said that the -- the constituency of the Fire Department is 500-odd, is it?

QUESTION: 350-some.

QUESTION: About 350 union members.

MR. WALLAS: Well, Your Honor, but the point is that that is the number of members of the Fire Department that have decided to join the union as --

QUESTION: Well, I know, but suppose some of the others wanted to join a different union?

MR. WALLAS: Well, that would be a possibility.

QUESTION: Well, if that happened, then the check off would violate the policy --

MR. WALLAS: But -- but --

QUESTION: -- against allowing it, except where available to all employees to a single recipient, wouldn't it?

MR. WALLAS: It would be available. This union, Local 660, is available to all the employees.

QUESTION: Well, so is the Methodist Church, presumably.

MR. WALLAS: That's correct, Your Honor.

QUESTION: But you wouldn't suggest that if people come in and ask that something be withheld out of their paycheck for the Methodist Church, or for the Fraternal Order of Elks, for that matter, that the City would be obliged to deduct it because it deducts other things like it has done?

MR. WALLAS: Your Honor, I think that under -- that that would not be required by this order, and that's why I read the order right now. I think that what the City has to do is simply establish some reasonable standards, to apply to every --

QUESTION: Well, let me ask you a question about that order. Because I noticed, as you read, as you read from it, that you seemed to put some stress, and perhaps Judge McMillan did, too:

"So long as the defendants continue, without clearly stated and fair standards" -- what is it in the equal protection clause that requires "clearly stated and fair standards"?

MR. WALLAS: I think what the judge is saying there, that the City has to establish a rational basis for their actions, a rational basis furthering a legitimate State goal. I don't think he means anything other than that.

QUESTION: Well, you mean, then, that the City, in deciding perhaps on a somewhat shooting-from-the-hip basis what to check, what to permit check off and what not, must

adopt a policy to justify its various decisions that would presumably support a court upholding it?

MR. WALLAS: I think that on this record they are required, because they -- on this record they did not do what they -- their practice was not what their policy was.

At the beginning of the litigation we filed some Interrogatories, and Interrogatory No. 4 -- in Interrogatory No. 4 we asked the City to state the criteria which they used to decide which withholding to allow and which withholding not to allow.

And when they answered that Interrogatory on page 14 of the Appendix, they didn't set forth any criteria, they just said, "This is what we do."

Later on in the litigation, in an affidavit filed by the City Manager and an affidavit filed by the Personnel Director, they said, "Our policy is to allow those deductions which every employee within the City can avail themselves of."

And Judge McMillan then looked at those things that they actually allowed, that is, those deductions of the 14, and we argued to the court, and it's obvious from the record, from the Answers to the Interrogatories, that there were certain deductions that could only -- that were allowed that only employees of a certain department could benefit from.

And our argument to the court was, Well, if that's really the practice of the City, what they do, then we think we

should be able to avail ourselves of that benefit."

QUESTION: But, Mr. Wallas, suppose the 350 firemen said they wanted to give their money to the First Methodist Church of Charlotte, and the others said no?

MR. WALLAS: Your Honor, I think -- the reason that I read the order that I did was --

QUESTION: Well, I mean, obviously that would be within the guidelines, and they wouldn't allow it, would they?

MR. WALLAS: They would not allow that. I think Mr. Watts made it clear that they would not allow that deduction.

QUESTION: And the difference between that and this case is what?

MR. WALLAS: The difference in that case -- I'm not sure there is a difference in that case. But the point is --

QUESTION: Well, you said that one was all right.

MR. WALLAS: Pardon me, Your Honor?

QUESTION: You said if they all want to give it to the Methodist Church, but it wasn't the whole bunch, it was just a percentage of them, you wouldn't -- it would be all right for them to deny it.

MR. WALLAS: I think that they are free to develop some standards where they could deny that type of deduction. They are also free to -- they are probably free to develop some standards where our deduction would be allowed -- dis-allowed.

QUESTION: Why do they have to develop any standards at all? It seems to me that if they come in and recite the history of what they've done and Judge McMillan says, "In fact you're not telling the truth; it's not what you say you've done, this is what you've really done." He's got a right to measure what they really have done against the demands of the equal protection clause.

But I don't see anything in the equal protection clause that requires the announcement or promulgation of standards in order to make it easier or harder to attack the thing in court.

MR. WALLAS: Well, Your Honor, like I say, I think that's really saying you've got to establish a rational basis for your actions. The court is saying, What the evidence in this case shows is that you're saying -- as Your Honor points out -- you're saying one thing and doing another.

And that's just not permissible, because what you're doing or may be doing is letting the benefits of withholding, which is simply the use of the City's computer in this case, to flow to certain organizations and entities, while prohibiting that flow to this union.

QUESTION: But then you say, it seems to me, that what you have done in practice violates the equal protection clause because it's totally irrational and there's no rational basis for justifying the distinction.

You don't say that until you promulgate clear standards what you've done violates the equal protection clause.

MR. WALLAS: Well, what the court is saying is that until you change your practice, then you're in violation -- then you must do this.

QUESTION: Yes, but what if the court says, Look, you give us -- you've given a reason for this -- for distinguishing between check offs for unions and others, but that reason is a very bad reason; it's unacceptable. But we can think of a very good one, the court says; for example, you just don't want to encourage unions.

Now, whether you think so or not, that's, as far as the court is concerned, that's a perfectly justifiable reason. Now, maybe you don't think you're following it, but, nevertheless, we can't strike it down, because we can imagine a basis for this classification.

MR. WALLAS: Your Honor, I would concede that the City of Charlotte can discourage unions, per se. What they cannot do is violate the equal protection clause in doing that.

QUESTION: Well, I know, but they say, The reason we don't check off for unions is that we do not want to help unions.

MR. WALLAS: Well, --

QUESTION: And that checking off dues helps unions.

MR. WALLAS: Well, that, Your Honor, I think is

singling out an unfavored group for -- and denying to them benefits --

QUESTION: But you can't say there isn't a rational basis for it, you may say it's an unconstitutional basis; --

MR. WALLAS: Right.

QUESTION: -- but it's pretty rational, isn't it?

MR. WALLAS: Absolutely. It may very well be rational, and the test, of course, is: Is this a rational -- that postures a legitimate State interest?

QUESTION: All right, or a legitimate. Now, you're down to the legitimate end. You think the City must help the union by checking off, or it will violate the First Amendment?

MR. WALLAS: Your Honor, we don't think you have to reach that question in this case.

QUESTION: Well, you do. We just were there. We just reached it a minute ago.

MR. WALLAS: Well, Your Honor, most of the equal protection cases involved -- or a lot of the equal protection cases in this case, like the Mosley case, the Emumoto case, involved, First Amendment freedoms are involved, but you take, for example, Mosley. Now, that case could not be decided -- or would not have been decided in favor of the plaintiff in that case, as I understand Justice Marshall's opinion, without the equal protection clause.

That is, this Court has clearly said that picketing

can be limited by time, place, and manner -- reasonable time, place, and manner rules. And in that case there was a rule. As I recall, only union picketing was allowed. And this Court said, Well, you just can't -- you can't allow picketing for one group and not allow picketing for other groups; it was an equal protection argument.

And that's the argument we're making here.

QUESTION: But you're comparing unions with bond purchases and insurance premiums. You would have a much stronger case on equal protection, as I see it, if there was a so-called house union, a company union, unaffiliated with any other union, and 150 men in the Fire Department belonged to that group, and 350 belonged to this union of yours, and they allowed the check off for the one union but not the other. Then you might have an equal protection case.

But you're undertaking to compare union check off with bond purchases and insurance premiums.

MR. WALLAS: I think what we're comparing is the fact that certain benefits are flowing in different areas.

Now, I would -- the benefits flow to seven different organizations or groups of employees who happen to opt for those deductions. And under the policy of the City, that Mr. Watts, in his argument, said is their policy, that is that all -- if an option is available to all City employees, then the City will avail them; well, our option is the same. And we

think that those employees within the Fire Department, who want benefits to flow to their union -- all it is is a simple computer operation. I think the district court's opinion and the record makes it clear that this is not -- we're not asking to burden the City --

QUESTION: Now, there's only your union there now, but suppose, as the Chief Justice has suggested, that some of the other firemen organize another union, and then they want to have the check off to their union. And --

MR. WALLAS: The City is --

QUESTION: No -- is not the City then in a position where it has to violate its policy which, as I understand it, is to permit check off only where there's a single recipient? In other words, you make a contract with an insurance company for group insurance premiums, and you pay it to a single insurance company. All employees who take advantage of it, if they want to, pay it to a single insurance company.

But where you've got two unions, that's not the situation, is it?

MR. WALLAS: Well, I don't understand --

QUESTION: Well, isn't that what the situation here is?

MR. WALLAS: Well, the City -- again, Your Honor, the reason I read the injunction that I did, the City is free to adopt a policy that may make it --

QUESTION: No, but I thought you agreed earlier -- perhaps I misunderstood you -- with what Mr. Watts has told us. Namely, that the key to their check off policy is that there may be, as to all participating employees, a payment to a single entity, either an insurance company, United Way, as the case may be. But that that --

MR. WALLAS: Well, my understanding was that he said as long as all the employees in the department could avail themselves of that --

QUESTION: No. And when they do, they check off -- what's checked off is paid to a single, identifiable entity. United Way, insurance company, and the like. That's what I understood him to say.

Isn't that the policy?

MR. WALLAS: Well, --

QUESTION: And isn't that what you pointed out to us that the district court found to be the policy?

MR. WALLAS: The policy is whether the members of that particular department can avail themselves of that deduction. And as we said in our brief, there are a whole lot of different bases that the City could set up for --

QUESTION: Well, tell me this: Does the record show whether, as to any of the 14 -- well, I guess it's only 7, because 7 are check offs required by law, I gather; income taxes and that sort of thing -- but as to any of the 7 which are not

check offs required by law, under the City policy, is any check off paid to more than one recipient?

MR. WALLAS: Well, each check off, of course, is for one --

QUESTION: I know, but in the Fire Department, for example. A check off is allowed for insurance premiums. To whom do the insurance premiums go? A single insurance company.

MR. WALLAS: I believe that's correct, Your Honor -- no, I believe that's incorrect.

QUESTION: Oh, is it?

MR. WALLAS: I believe that there are in -- of the -- in the Fire Department, there's a Firemen's Benefit Fund, and there's also a medical insurance and life insurance fund. So the firemen --

QUESTION: I know, but what each -- but all firemen are eligible to have check offs for either entity.

MR. WALLAS: That's correct.

QUESTION: And so that if the --

MR. WALLAS: And all firemen are eligible to check off to a union.

QUESTION: I know, but does not -- but the recipients in each case are just a single for each check off; is that right?

MR. WALLAS: Well, Your Honor, that's correct. There are a whole variety of options, but each --

QUESTION: But you can't make a charitable contribution except to the United Way. Isn't that right?

MR. WALLAS: That's correct, Your Honor.

QUESTION: If you had two or three, they wouldn't allow the check off, as I understand Mr. Watts' description of the policy.

MR. WALLAS: That is not what I understand the policy to be. My understanding of the policy is that if it's available to everyone in the department, then they allow it. And that's what I understand the judge found.

QUESTION: Does the City bargain with the union?

MR. WALLAS: No, sir.

QUESTION: It may not.

MR. WALLAS: It may not bargain --

QUESTION: It may not?

MR. WALLAS: Well, the law -- the statute says they may not enter into a collective bargaining contract or agreement.

QUESTION: But the union may talk to the City about working conditions?

MR. WALLAS: There's nothing in the statute to prohibit that, Your Honor.

QUESTION: And it does.

MR. WALLAS: I think -- at least at some point -- there's nothing in the record about that. It is my under-

standing, is that the City will talk to an employee as an employee, but refuses, really, to talk to an officer of the union as an officer of the union. That is, if I'm the president of the union and I want to come in and represent my union, the City will say, "Come on in and we'll talk to you as an employee."

QUESTION: Well, they must have talked in this case, as a union, but --.

MR. WALLAS: Well, I think we presented a request, and it was denied; in that sense, there was a colloquy (?) if that's considered acceptable, Mr. Justice White.

QUESTION: Was that within the exception, that the person presenting it was an employee of the Fire Department? A union officer who was also employed, as distinguished from a bargaining agent who didn't work for the City?

MR. WALLAS: Well, the individual employees in this case have presented it as an individual -- both as individuals and -- have brought this action both as individuals and as officers of the union. I'm not sure that -- I'm not sure I understood your question, Mr. Chief Justice.

QUESTION: I think that covers it.

MR. WALLAS: We would contend that this case, as I said before, fits the traditional equal protection mold. That is, that just as the City does not have to build a municipal auditorium, it does not have to create a public park, it

does not have to necessarily allow the use of their computer to hand out, or to allow withholding.

But once it does, it can't discriminate against certain disfavored groups in favor of certain favored groups.

QUESTION: Well, what if the City -- what if some of the firemen wanted to ask their Elks dues be checked off, and made the same argument your people do, that anybody in this town can join the Elks; and the City says, No, it's just sufficiently different from these other kind of things we're checking off, we won't do it.

Do you think the Elks could come in and make the same claim your people have?

MR. WALLAS: Yes, I think they might be able to. But I think that the importance --

QUESTION: Does that bother you at all?

MR. WALLAS: It doesn't bother me, because the district court order makes it absolutely clear, and the Court of Appeals order makes it doubly clear, reinforces the district court order, that the City can establish some guidelines, some standards, and apply them equally to everybody, and as long as it does that, and there's some rational basis furthering some legitimate purpose, then --

QUESTION: Okay, but those are two separate inquiries. The first is whether the City has promulgated written standards or not; and the second, whether what it does

in fact either is justified by it on a rational basis, or whether a court can conceive of any rational basis for doing it.

Now, don't you think the Elks case could be said -- put to one side, regardless of whether the City has written standards, on the ground the City just doesn't have to do that sort of thing?

MR. WALLAS: I think that under their present policy they may have to do it. But --

QUESTION: And then they've got to give it to the Moose, too, don't they?

MR. WALLAS: Yes, Your Honor.

But they can always set up reasonable policies.

QUESTION: And the Knights of Columbus.

MR. WALLAS: We have suggested in our brief some possible bases they could use. There are many other bases that we think could be used.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day].

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Wallas, you may continue.

ORAL ARGUMENT OF JONATHAN WALLAS, ESQ.,

ON BEHALF OF THE RESPONDENTS -- Resumed

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

I'd like to address myself now to the question that Mr. Justice Brennan was asking. Assuming, Mr. Justice, that the policy is the one that you have set forth -- and again I would contend that the policy is not that -- but assuming that the policy is to allow only one charity deduction and only one insurance company deduction, we would contend that we fall within that policy. Local 660 is the only union that has come forward and said that it was willing to represent these firemen.

We are open to all firemen. In that sense, we contend that we are within the policy, as we understand it, the policy being that as long as an organization is open to all members of a particular department, then you're within the policy.

QUESTION: Mr. Wallas, the equal protection clause, of course, reads that no person shall be denied the equal protection of the laws. Now, this is not a law, it's not a

regulation. In fact, your argument, I take it, is almost that it was a non-policy, it was just a series of very random decisions that may or may not be rationally justified.

Does any -- every single governmental decision of that sort come within the equal protection ban?

MR. WALLAS: Your Honor, I don't know if I can address myself to every single -- to your question and say -- and state affirmatively that every single decision that is made by a governmental body falls within that.

What we're saying here, and what I understand the City has asserted, is that they have unfettered discretion to decide which withholdings to allow, and which withholdings not to allow.

Because they have a policy within which we fall, and yet they say, We're not going to allow your deductions.

QUESTION: What is the City claimed it had an unfettered right to schedule meetings with various employee groups at any time of the day it wanted to, and it invariably scheduled meetings with non-union groups, say, in the middle of the afternoon and invariably scheduled the meetings with the union groups at 7:30 in the morning. Is that the kind of governmental action that, if you could show it was discriminatory, would invoke the equal protection clause?

Or is there some threshold below which the courts just don't inquire?

MR. WALLAS: I don't know where the line is. There may be a threshold below which the courts inquire, but don't have to -- don't have to inquire. But it seems that if the City in that instance was making its -- designing its policy to treat union members as union members in one way, and everyone else in another way, that that would fall -- would have a policy that would have to fall under the equal protection clause.

QUESTION: Let me try another hypothetical.

Suppose it was a general practice, without being formalized in any standards, for the City of Charlotte to allow the firemen in the Fire Department to have social gatherings of their social organization of firemen in a public place. And then the union demands the same kind of facility for union meetings. The City answers, "No, we don't want to encourage or help your union." They put it right on top of the table. "We don't want to encourage your union or any union, and you can't have it."

Violation of equal protection?

MR. WALLAS: Your Honor, I think -- you said a social gathering of some Fire Department employees on the one hand, I take it --

QUESTION: To which all Fire Department employees are involved.

MR. WALLAS: -- and then a business meeting of the

union on the other hand. If it was a social gathering of the union -- what I'm saying is there may be a distinction between the type of meeting that you're having --

QUESTION: Well, make it a social gathering of the union.

MR. WALLAS: Okay. If you make it a social gathering of the union, then I would say that denying that to the union, because it's the union, would be a violation of the equal protection clause.

?

That, the cases -- Numotco is a park. If everybody else can use the park, the Jehovah's Witnesses is allowed to use the park unless the State, in that case, can show a compelling State interest why that should not be allowed.

Similarly in this case --

?

QUESTION: Numotco is not an equal protection case, was it?

MR. WALLAS: I believe it was, Your Honor. I believe it was -- it was a First Amendment case.

QUESTION: Yes.

MR. WALLAS: But I believe the equal protection clause, just as Justice -- it's one of the cases that Justice Marshall relied on in Mosley.

QUESTION: More like Mosley v. Chicago.

MR. WALLAS: Yes, sir.

QUESTION: And maybe it was both.

MR. WALLAS: I believe it was both.

That's my point, is that there are First Amendment rights that may exist, but this Court in many cases has said that these rights are not -- that there are limitations on these rights, and when limitations are imposed, the equal protection clause comes in to make sure that they are not imposed in a discriminatory way.

Our contention is that the City's position that they have the unfettered right to deny the withholding benefit to the plaintiffs in this case is a violation of the equal protection clause.

The court below did not say -- and I think this is important; in fact it specifically says to the contrary -- it does not say that a dues check off is an absolute right, that there's any per se right to check off. The check off only is required in this case on this record, because we fall within the policy that the City has been following consistently.

And importantly, as I tried to emphasize at the initial part of my argument, the City is free if --

QUESTION: Would your argument fail if there were a rational basis for an exception from the policy?

MR. WALLAS: I think it would, Your Honor, and --

QUESTION: Well, what about Mr. Justice White's question that -- is it a rational basis for the City to say they don't want to encourage unions?

MR. WALLAS: I think not, Your Honor.

QUESTION: That's not a rational -- that's irrational.

MR. WALLAS: I think -- I may have misunderstood one of the Chief Justice's questions, I think he may have asked me -- I'm not sure whether the State could legislate and say, "We're going to allow all withholdings except those that go to a union, because we're opposed to unions." And I think that falls right in with the equal protection analysis that we've tried to present here.

QUESTION: Is it because it's irrational? Or because you need a compelling State interest to make that exception?

Which is your position?

MR. WALLAS: Because it would be illegitimately attacking this union because it was an unfavored group.

Then we would be talking more about the First Amendment question that Justice White raised.

QUESTION: In other words, it would be so illegitimate it couldn't be done, no matter what the reason, is what you're saying?

MR. WALLAS: Well, we would be then in this Court invoking the First Amendment right of association, which was invoked in the Atkins case, to attack the sister statute of 95-98; that is, 95-97, which made it a criminal offense for a

fireman to be a member of a union. And that was attacked in the Atkins case, and that, of course, failed on -- fell on First Amendment grounds.

And I think that the statute or the policy would also have to fall on First Amendment grounds, if the union was picked out as one group, and all other groups were allowed withholding.

If there are no other questions?

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Watts?

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

We will waive any rebuttal or any remaining time that we have.

Unless the Court has some questions.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:09 o'clock, p.m., the case in the above-entitled matter was submitted.]