In the

Supreme Court of the United States

D. LOUIS ABOOD, et al.,

Appellants,

v.

DETROIT BOARD OF EDUCATION, et al.,

Appellees.

No. 75-1153

Washington, D.C.
November 9, 1976

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v.	:	No. 75-1153
DETROIT BOARD OF EDUCATION, ET AL., Appellees.	:	

Washington, D. C.,

Tuesday, November 9, 1976.

The above-entitled matter came on for argument at 11:28 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:

SYLVESTER PETRO, ESQ., 2841 Fairmont Road, Winston-Salem, North Carolina 27106; on behalf of the Appellants.

THEODORE SACHS, ESQ., 1000 Farmer, Detroit, Michigan 48226; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1153, Abood v. Detroit Board of Education.

Mr. Petro, you may proceed whenever you are ready.

ORAL ARGUMENT OF SYLVESTER PETRO, ESQ.,

ON BEHALF OF THE APPELLANTS

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

I represent the appellant dissident school teachers in Detroit who have declined willingly to pay dues to the appellee union.

The appellee Board of Education of Detroit, empowered by the Michigan Public Employment Relations Act, had agreed with the appellee Federation of Teachers -- I will call it the union henceforth -- to discharge the appellant teachers if they refused to pay agency fees to the union.

In other words, what we have here is what is known as an agency shop contract, a contract which makes the payment of fees normally equivalent to union dues a condition of employment. The extraordinary aspect of this case, of course, is that this condition of employment is a condition not of private employment but of public employment, of employment by a subdivision of the State of Michigan.

The teachers brought suit in the Michigan courts, contending that the Board's continuing threat of discharge if

they failed to pay dues to the union constituted an outright per se indefensible violation of their rights under the First and Fourteenth Amendments. They went further and alleged that the Michigan statute empowering the Board to thus condition employment was constitutionally overboard as well.

The case is here because the highest Michigan court to pass on the issue, the Supreme Court of Michigan, having denied an appeal -- while indeed it handed down a decision which is not very easy to state clearly, nevertheless seemed to have dismissed out of hand, no question whatsoever about it, those aspects of the complaint which alleged per se an indefensible unconstitutionality.

In what may be the one clean-cut holding of the case, the Michigan Court of Appeals did say that the Michigan PERA, section 10, authorizing the agency shop, was overbroad insofar as it had to be construed, according to the Michigan Court of Appeals, as authorizing the appellee union to use the agency fees, let us say, in any way the union saw fit subject, of course, to its own constitution and by-laws.

There is language in the opinion of the Michigan Court of Appeals to the effect that it is well recognized that the union in this case engages in political action. The statute does not confine the union's use of the exacted agency fees to only those things which we may call collective bargaining but permits the use of the fees for the kinds of political conduct

in which the union normally engages.

Now, while holding that the statute did permit the union to use the agency fees for purposes other than collective bargaining, including political purposes, the truth of the matter is that the court did not say that the statute was in consequence thereof unconstitutionally over-broad. It is virtually impossible to avoid drawing the inference that if, say, we had been able to skewer the court to the wall and force it to make a comment one way or the other on this issue, it would have said, yes, the statute is unconstitutionally overbroad.

As a great judge once said in another case, the opinion is instinct with that kind of commitment from the Michigan Court of Appeals.

Still, in the face of this broad suggestion of unconstitutional overbreadth, the Michigan Court of Appeals affirmed the dismissal of the teachers' petition for injunctive relief, affirmed the dismissal of the teachers' case completely, for that matter.

Its idea seemed to be that if somehow the teachers managed to get it to commit itself on the unconstitutionality of the statute, they should proceed by an action of one kind or another thereafter to recover from the union the monies previously exacted and used by the union unconstitutionally.

QUESTION: Well, it said in so many words that the teachers would have such an action, didn't they?

MR. PETRO: I don't think you can say that, Mr. Justice Rehnquist. What it said is that the statute could violate the teachers' rights.

QUESTION: Well, if the union -- I thought it said if the union chose to spend monies that it had collected for political activities, the Court of Appeals described political activity, then an action would lie in the Michigan courts against the union to recover.

MR. PETRO: What makes the case so extraordinarily difficult to deal with, when the court says not, that this statute is unconstitutionally overbroad, but says instead the statute could violate the teachers' rights, all it has given us is another law suit, you know.

QUESTION: Well, it thought that the giving of another law suit was a sufficient cure of the overbreadth, if there wasn't any, I take it.

MR. PETRO: Well, we would have to win on the overbreadth argument all over again.

QUESTION: I wouldn't think so.

MR. PETRO: Well --

QUESTION: I mean, you are talking mostly just about nomenclature rather than about the actual issues, I think.

MR. PETRO: Well, our problem is that we were dismissed and we think that we were dismissed in spite of the fact that we had what the Michigan Court of Appeals very largely

implied was a good constitutional claim.

Now, if you are correct, Justice Rehnquist, in suggesting that we won on that point, then of course the denial of relief is inexplicable and plainly incompatible with everything this Court has had to say about violations of First Amendment rights.

QUESTION: Well, isn't the denial based upon the statement of the court that your clients made no allegation that any of them specifically protested the expenditure of their funds for political purposes to which they objected?

MR. PETRO: Well, that is what it is based on, but this is not -- there is no way to ground this holding in the decisions of this Court.

QUESTION: It says therefore the plaintiffs are not entitled to relief on this basis.

MR. PETRO: This -- the Michigan Court of Appeals demanded of our clients a kind of conduct preparatory to action that has not been required in any First Amendment case that I have ever encountered, and I believe that I have tried to read them all.

QUESTION: But you were attacking a brand new statute, weren't you, where nothing had ever been exacted?

MR. PETRO: Well, there are all sorts of people paying agency fees under that statute. It is only our clients who had refused for a good long while to pay the agency fees. Still

some have refused but others under protest have, because of the continued threats from the Detroit Board of Education to discharge them, they have now been paying agency fees. As a matter of fact, the other side makes a great deal of this, acting as though our clients have disqualified themselves from this suit because they have paid the fees under protest.

Now, it is perfectly understandable that they should do so. Many of them have been Detroit school teachers for a good long while and they are not about to give up their jobs, even though maybe they will get reinstatement at some future time. But they have preserved their rights. Their payments have been under protest. There have been no deliberate waiver.

QUESTION: Well, one of your points here I take it is that whatever the union uses the money for, they may not collect dues from your clients over their objections?

MR. PETRO: At the farthest reach, we insist --

QUESTION: Well, that is one of your issues presented here, isn't it?

MR. PETRO: -- we insist that compelling these teachers to pay one cent to the union --

QUESTION: Regardless --

MR. PETRO: -- for whatever purpose --

QUESTION: Right.

MR. PETRO: -- for whatever purpose -- is a per se violation of their rights of freedom of association and that

this stand is made, an a fortiori one, because it is inconceivable in view of what it is that public sector unions actually do by the common consent of every qualified person who has ever said a word on this subject, everything that public sector unions do is political and ideological in character.

Now, we have presented

QUESTION: I didn't get your answer to Justice White's question.

MR. PETRO: Well, the answer is yes.

QUESTION: Yes?

MR. PETRO: It was an emphatic yes.

QUESTION: Now, let's assume we disagree with you on that, your point is that at least they cannot collect if they are going to use it for political purposes?

MR. PETRO: Well, as I see things, Justice White, to see that would not be any concession on my part because everything that they do is political.

QUESTION: Well, I understand, but what if we disagree with you on that?

MR. PETRO: Well, that is something --

QUESTION: Suppose they are using part of the money for medical benefits or legal benefits or some kind of service to their members and we have just disagreed with you that it is political? Your other point is that they are using some of it

for political purposes?

MR. PETRO: Well, the essential function of a union is to engage in these negotiations of one kind or another with their opposite numbers. Now, it is true, I suppose I should certainly have to withdraw the suggestion that there is no conceivable way in which the unions could spend money non-politically. Dave Beck for the Teamsters used to spend Teamster money on trips to Europe, and I would be hard put to establish this as a political expenditure.

QUESTION: According to who he had with him.

MR. PETRO: Well, that is true, qualification accepted.

QUESTION: Suppose they had a party every Friday night, just a pure social event?

MR. PETRO: Well, once again, the question is --

QUESTION: What about the health facilities the unions have, what is wrong with that? The ILGWU has a very extensive one.

MR. PETRO: Let me say, Mr. Justice Marshall, that all the activities of --

QUESTION: Well, is that bad?

MR. PETRO: I am ready now to concede that all the activities other than those that the union refers to as collective bargaining may putatively be non-political in character. One would have to make an examination of instance

after instance to determine. But as far as those activities which the union has generally been characterizing by the words "collective bargaining" those --

QUESTION: Do you think bargaining for a contract, bargaining about wages would be categorized as political --

MR. PETRO: Yes, I --

QUESTION: -- bargaining with a public bodyj

MR. PETRO: That is correct, and I think that this Court's decision last term in the National League of Cities case puts this proposition beyond any further doubt. And if it is true, as was held in the National League of Cities case, that the determination and the administration of a state or locality's employment practices is a fundamental aspect of the state's sovereignty, and sovereignty is, of course, the political principle par excellence. Then public sector collective bargaining which is explicitly designed to influence and affect, rearrange and displace the sovereign decisions of states and localities in respect of their employment, must of necessity also be political in character.

QUESTION: Well, suppose -- here the Michigan legislature, which presumably exercises its sovereign power in Michigan, along with the Governor, has passed a statute saying there shall be public sector collective bargaining?

MR. PETRO: Yes indeed, and I suppose the Michigan legislature has not for the first time engaged in a

constitutionally dubious piece of conduct.

QUESTION: But do you say that violates the National League of Cities principle?

MR. PETRO: The National League of Cities principle, I think you wrote that opinion, did you not, Mr. Justice Rehnquist?

QUESTION: I did.

MR. PETRO: The National League of Cities case said that the determination of the wages, hours and other conditions of employment is an integral aspect of the sovereignty of a state. Now, if we have a state which proceeds to give away this sovereign authority, what is the situation we find ourselves in? Are states permitted, in light of their duties to their constituents, to the people to whom they owe their ultimate power and position, are states permitted thus to dispense with, to disburse, to share out, to give to this or that private agency pieces of the state's sovereign powers?

I should point out that we are getting into very deep water here. The question of --

QUESTION: If you use "us" as singular, right.

MR. PETRO: Some of us, one of us, for it was not I who raised the question of whether the State of Michigan in passing the PERA had run into conflict with the League of Cities case.

What I have suggested is that in passing PERA section

10, authorizing the agency shop, the Michigan legislature was in trouble with the National League of Cities case, as well as with a number of other decisions handed down last term, most notably Elrod v. Burns. I think Elrod v. Burns is a case which is virtually indistinguishable from this one.

May I proceed, Mr. Chief Justice?

MR. CHIEF JUSTICE BURGER: You have only a minute or two left. You are into your rebuttal time now, if you wish to save any.

MR. PETRO: My instincts do not permit me to end this abruptly, so I must point out that there are some fatures about this case that need emphasis and need emphasis in connection with the discussion that we have just been having. I shall go over them very rapidly because I do wish to save ten minutes for rebuttal.

Now, the first and I believe the most profound element in this case lies in the distinction between the activities of government and the activities of private persons. Government is one thing and private persons and their activity are strictly another.

There is a great deal made by the other side of the fact that collective bargaining, while collective baraining in the private sector is the same thing as collective bargaining in the public sector. I believe that this lacks as much discernment as would be lacked by a person who said that all the

Fords that roll off the Ford assemblyline are the same, it doesn't matter that one is driven by Sylvester Petro, a private person, and the other is driven by a policeman and is owned by a police force. They look alike but they are different.

The same thing is true, say, of the jet engines that are produced in such numbers. Some go into passenger commercial flights and others go into B-1 bombers or B-52's. You take that same engine, take it out of a passenger plane and put it into a bomber and you've got a different animal.

In the same way, that activity, collective bargaining, which looks as though it is exactly the same in the public sector as it is in the private sector, is a different animal entirely. It is an animal that participates of the political character, of the government that constitutes the employer. And when that collective bargaining thus becomes political in character, to ask or to insist that a public employee, against his will, finance it, it is the same as forcing upon that public school teacher political and ideological objectives which quite obviously cannot be sqaured with the First Amendment of the Constitution of the United States, a clear compromise of the dissident teachers' political, associational and speech rights is present in a case of this kind.

Thank you, and I will --

QUESTION: Mr. Petro, did you write this brief?

MR. PETRO: I am afraid to acknowledge it, after I

am sure every Member of this Court feels that he has been great imposed upon by its length.

QUESTION: Do you think that this case needs 216 pages plus 53 of a responsive brief, 269 pages? We do have other cases here.

MR. PETRO: I'm sorry. I made my apologies and --

QUESTION: And another question I wanted to ask was -- and you don't have to answer this one -- but you might re-read the summary of the argument and my question is whether it complies with our rules as to being a summary of your argument.

MR. PETRO: I shall do so.

MR. CHIEF JUSTICE BURGER: Mr. Sachs.

ORAL ARGUMENT OF THEODORE SACHS, ESQ.,

ON BEHALF OF THE APPELLEES

MR. SACHS: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court:

Perhaps in the remaining few minutes before the recess it would be profitable to indicate what this case does not involve. Clearly, I would suggest on the state of the record and as the case comes before the Court, there is not a political expenditures issue.

Dealing with the question that Mr. Justice Rehnquist asked, the lower court in fact decided favorably to the contention of appellants as to the use of agency shop monies for political purposes and made clear that were such monies to be

expended over their objections, they would indeed have a cause of action.

The complaint was dismissed in the instant case because in fact they had never made any appropriate protest or in any timely fashion. It should be recalled, if the Court please, that this complaint, that is the initial complaint in Warczak, of which Abood is virtually a carbon, was filed prior to the effective data of the Act, and that circumstance was virtually identical to the Hanson case, notwithstanding which the plaintiffs alleged, although not one penny had been collected from anyone, nor of course therefore had one penny been expended, that the union was somehow using the money for political purposes unspecified as to which the plaintiffs objected, and they sought on that account not some remedy discreet and referable to expenditures or alleged expenditures of a political nature, but they sought, as in Hanson, to avoid the obligation of the agency shop clause entirely. They sought no relief whatsoever as to the claimed expenditures, and they did not itemize or specify any specific complaint, if any, which they had.

They incanted a phrasing which presumably was intended to invoke a remedy which would set aside the clause entirely. Moreover, during the entire pendency of the litigation, they have been excused from enforcement of the clause, there has been no discharge of any plaintiff-appellant, there has been

no other enforcement.

The fact of the matter is then that the lower court, after first saying that the statute did not admit, as this Court had interpreted the Railway Labor Act to admit, of the possibility of expenditure or non-expenditure over objections of dissenters, and after saying that could present a constitutional dilemma, avoided the problem entirely by then agreeing with the contention of the plaintiffs and saying, yes, were that to happen, there would indeed be a remedy. We did not cross-appeal on that ruling, that is the fashion in which the matter comes before the Court.

In addition, as we have pointed out in our brief, the union, complying with --

QUESTION: Mr. Sachs, under --

MR. SACHS: Yes?

QUESTION: -- your understanding of the Court of Appeals ruling, would a particular member of the plaintiff group have to object to particular expenditures or could he be -- would it be sufficient for him generally to object to the expenditure of any money for any political purpose?

MR. SACHS: Mr. Justice Stevens, I think under the holding of the Court there would have to be a specific objection, just as this Court stated in the Lathrop case, in the context of constitutional adjudication, such a requirement would be necessary. At least it was necessary in the context

of the complaint there. But I would respectfully suggest that that is academic now, because the union has adopted the remedial process which was recommended by this Court in the Allen case, as a means of facilitating ready restitution of the proportional payments insofar as they might be applied for political purposes.

QUESTION: What happens to the union member who doesn't particularly want to disclose his disagreement with particular union policies or political policies advocated by the union but just doesn't want his money spent for any particular purpose? Is he out of luck entirely?

MR. SACHS: No, Your Honor. Under the internal remedy he need not disclose anything specific. We go on beyond what the appellate decision reported.

QUESTION: Can he then, to go back to my first question, can he then simply say I don't want you spending my money for any political purpose?

MR. SACHS: Yes, sir, he can.

QUESTION: And what happens then? Does he get all his money back or --

MR. SACHS: No, he would get, in accordance with the remedy of this Court, and as provided by --

QUESTION: There is no remedy by this Court in this case yet.

MR. SACHS: He would get a proportional refund insofar

as any payments expended by the union for political purposes are involved as

QUESTION: How is that to be computed?

MR. SACHS: There is a relationship to total expenditures.

QUESTION: How are you going to compute that?

MR. SACHS: We are going to compute it in the best of good faith and in accordance with the suggestion of the Allen case, Your Honor, and as --

QUESTION: Just tell me in dollars and cents. Say the dues is $50. How much does he get back if he says I don't want you spending the money for political purposes?

MR. SACHS: Well, Your Honor, that would involve a

QUESTION: Say 40 percent of your budget is political, would he get 40 percent back?

MR. SACHS: On Your Honor's hypothetical, if it were 40 percent, there would be a 40 percent refund.

QUESTION: That is the formula?

MR. SACHS: Yes, sir. Obviously, it involves a determination and as the procedure is set out in the appendix, there is a procedure for determination, there is disinterested review, and there is an opportunity to make precisely those formulations, and there was a deliberate intent to make the remedy as expansive and as generous as possible so there would not be problems of this sort.

And so the fact is then, I think I can fairly state to the Court, as the matter comes before you, it does not involve political issues in the sense that the Court dealt with them in Street or dealt with them in Allen. What it seems to me is presented by this case, and the only appropriate question presented by the case, is whether the rulings of this Court, which seems to me are quite clear, in Hanson, Street and Allen and Lathrop, are equally applicable or are no less applicable in the instance of a public employer with respect to its own employees. The case does not involve, contrary to the suggestions of appellants, coercion of membership of any kind. That is not the nature of the obligation. It does not involve coerced support of any views or positions of the union. It does not involve ideological conformity in any fashion. It does not involve suppression of dissent. It does not involve censorship of any dissidents or dissenter's views. None of those matters are involves and, as I have already indicated, it does not involve, under the posture of the case, any political expenditures question. I submit --

QUESTION: It does involve, however, compulsory financial tribute to the union, does it not?

MR. SACHS: It involves compulsory --

QUESTION: Imposed by the state as a condition of government employment?

MR. SACHS: I would respectfully differ with the term

"tribute." There is compulsory obligation of financial support, Your Honor.

QUESTION: Well, isn't that the dictionary meaning of the word "tribute"?

MR. SACHS: Well, sometimes it has a pejorative sense and I would think that inappropriate in this context, Your Honor. There is no question but that there is an obligation of financial support.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

MR. SACHS: Thank you, Your Honor.

[Whereupon, at 12:00 o'clock noon, the Court was recessed until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:00 O'CLOCK

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

MR. SACHS: Thank you, Your Honor, and may it please the Court:

Appellees would suggest that an appropriate evaluation of the central issue which is tenure involves necessarily a consideration of the general Michigan Labor Code which is involved here.

Michigan, like many other states, an extraordinary number, has adopted a comprehensive labor relations code which in central and significant aspects parallels the National Labor Relations Act. And there are numerous of our own State Supreme Court which have indicated as much and have indicated that teachings of the federal act and indeed this Court's interpretations of that act are persuasive in terms of determining the significance and system of the state act.

Part of that system includes not only the disciplinary measures and procedures which were before this Court in the last term in the Crestwood case, involving antistrike provisions, but involve affirmative features dealing with a process of collective bargaining, and in that respect the Michigan statute, like the federal, like the National Labor Relations Act, provies that where employees in an appropriate bargaining unit have by democratic vote of a majority of them selected a

representative. The public employer, basically in the local sector, has a responsibility to bargain in good faith with respect to wage, hours and conditions of employment. The elements of those concepts are, of course, entirely familiar to this Court, and they are essentially of the same meaning in the state court.

An aspect which is critical to an understanding of the state system in dealing with the issues in this case is the proposition that the representative chosen under the Michigan scheme is the exclusive representative, the exclusive representative based upon majority rule. As such, as this Court has said several times, the organization is not a "private organization," it is an organization which is clothed with certain legislative authority in the context of what is involved here, as stated in Steele and Tunstall, it is an organization which has the authority to create and distinguish certain rights for the bargaining unit generally.

QUESTION: Am I mistaken in my recollection that the federal labor legislation excludes governmental employers?

MR. SACHS: No, you are quite correct, Your Honor.

QUESTION: Does the legislative history of that legislation show why?

MR. SACHS: I don't believe so, Your Honor, and I recally cannot answer the Court's question.

QUESTION: But it does clearly exclude them?

MR. SACHS: Yes, sir. Yes, sir. And that, of course, I think is complimentary to leaving such matters to the states, presumably at least that was the essential congressional intent.

QUESTION: Well, it excludes any kind of federal government employees also, didn't it?

MR. SACHS: That is correct. And of course the federal governmental employees have in substantial measure been covered by various executive orders which provided similar kind of bargaining, though not precisely the same as is involved here.

The corollary, it seems to me, which is critical to again the understanding of what is essentially here to the proposition of exclusive representation is that there is a duty of fair representation on the part of the exclusive bargaining representative to all members of the bargaining unit. It is perhaps not by accident that in appellants' entire brief there is not an acknowledgement of the concept of the duty of fair representation or a citation of Vaca or Humphrey or Hines or any of the cases which this Court -- in which this Court has enunciated those familiar doctrines.

QUESTION: Are those cases applicable here?

MR. SACHS: They are by borrowing by the state courts the Michigan court --

QUESTION: But not directly?

MR. SACHS: Not directly, no, Your Honor.

QUESTION: Has the Supreme Court of Michigan ever adopted that rule?

MR. SACHS: Yes, Your Honor, in a case called Lowe v. Hotel and Restaurant Employees Union, has essentially adopted the authorities expressed by this Court, and indeed in a more recent case by the State Court of Appeals called Handwerk, the court has said that the requirements of the state statute maybe perhaps are more strict than those imposed by this Court and allow less discretion perhaps in terms of the bargaining agent's authority to discontinue a grievance short of arbitration than this Court might permit.

In any event, the significance is that there is a very serious burden and a very serious responsibility imposed upon the bargaining agent to represent all, including the plaintiffs in this case.

There has been no challenge in this complaint or in this argument by appellants, and indeed there is a disclaimer to the concept of exclusive representation, and so that is not an issue before the Court. And therefore I would suggest that an appropriate corollary of the authority of the bargaining agent, indeed this Court has said virtually there is such a corollary on the part of the bargaining agent to speak for all, is to represent all fairly, and therefore that means that those who, whatever their exposition here, challenge the

procedure of the statute, nevertheless have called upon the services of the organization which is required fairly and without any discrimination to render services and no claim has been made --

QUESTION: Who determines in this context what is political and what is non-political?

MR. SACHS: In this context, Your Honor?

QUESTION: Yes, well, under -- who would determine what portion of the union's expenditures were for political purposes and would be subject to refund?

MR. SACHS: Well, if Your Honor is inquiring as to internal procedure, the procedures established in the first instance by the union subject to a review by a disinterested panel.

QUESTION: Who is that?

MR. SACHS: To be appointed by the organization and by definition required to consist of disinterested citizens.

QUESTION: But the applicant for a refund would have no voice in choosing that panel?

MR. SACHS: Not under the procedure constituted, Your Honor. Obviously, if the procedure is defective --

QUESTION: How was that procedure constituted, just by the union or by the statute or by the court's interpretation or what?

MR. SACHS: No. That procedure, Your Honor, was

adopted internally by virtue of union resolution, the union thought, following the recommendations of the court.

QUESTION: And what does it include within the terms of political?

MR. SACHS: The term, Your Honor, I think is broadly defined to refer to political issue and ideological issues of a controversial nature that are only incidentally related to collective bargaining.

QUESTION: But does it generally -- does everything fall within political other than the services of the union in negotiating and administering the collective bargaining contract?

MR. SACHS: Your Honor, there hasn't been an application yet, there hasn't been any instance for its explication. This would come at the conclusion of the calendar year. The intent, certainly from the language, is to be expansive, as I stated earlier, in answer to Mr. Justice Stevens' question, to be generous in that regard, so there would not be any bona fide question as to matters which are appropriately categorized as political, would be subject to appropriate refund. There is no dispute in that regard.

QUESTION: Assume the member or the applicant does not get what he thinks he is entitled to and disagrees with the union's determination of what is political, may he go to court?

MR. SACHS: I would presume so, Your Honor. The

procedure doesn't say so, but I would presume so, and certainly the --

QUESTION: Would there be a cause of action for him in state court?

MR. SACHS: Yes, sir, I would think so.

QUESTION: At least that is your understanding?

MR. SACHS: Yes, sir, that is my understanding.

QUESTION: What about those non-political expenditures that are also non-beneficial to the appellants, I would think social expenditures or conventions, publication expenditures, travel expense and, if you will, organization elsewhere?

MR. SACHS: Your Honor, those matters are really not tendered by this record and I would suggest just as this Court felt it appropriate in Street and in Lathrop to indicate that there ought to be appropriate record to determine where the appropriate line is to be drawn, so it ought to be here.

The rebate procedure does not speak to the points of which Your Honor speaks, nor do I understand the lower court's decision to do so. But, on the other hand, I don't understand that issue really to have been tendered, and it seems not to have been a focus of the litigation at any stage. I think the important --

QUESTION: Mr. Sachs, on that very important point, I understand you generally are taking the position that the rebate procedure is not ripe for decision at this stage?

MR. SACHS: Yes, sir.

QUESTION: Is it not also perhaps true that the statute itself isn't really before us because the Court of Appeals, as I read the opinion, held that it did not apply to existing contracts, it didn't have retroactive effect, and don't we have a prior contract involved in this litigation?

MR. SACHS: In a technical sense, that is true, Your Honor, though in fairness I must say that there have been a sequence of contracts which in general tenor have repeated the same thing. But the contract which was initially involved here was a contract of many years ago.

QUESTION: But the litigant before us doesn't have standing to attack this statute, as I piece it altogether, am I right in that?

MR. SACHS: Well, I have to say again in fairness that that point as such has not been raised, but Your Honor is quite correct --

QUESTION: But is a jurisdictional point?

MR. SACHS: Yes, sir.

QUESTION: And would it not require us to dismiss this appeal and have the case come up where someone else was involved?

MR. SACHS: I would think so, Your Honor. I think it is not appropriately here, but again I don't want to mislead the Court.

QUESTION: Wall, I understand that you are not relying on it, but we have a duty to satisfy ourselves.

MR. SACHS: And we have not raised the point, but the contract is long since gone, although there were a succession of later contracts.

QUESTION: And the Court of Appeals did hold that the statute did not apply to the contract in this record?

MR. SACHS: That is correct, and remanded in that respect and that aspect of the case has not been brought here by anyone and does not remotely involve any issues which have been tendered here by either side.

QUESTION: So we are really being asked to review some dicta in the Court of Appeals opinion?

MR. SACHS: I think that might very well be the case, Your Honor, and especially dicta which under the view of the appellees comports very carefully with the prior pronouncements of this Court.

QUESTION: I don't know that I completely follow my Brother Stevens' suggestion. It is that since the Court of Appeals held that the statute did not apply to the contract in effect, is that it?

MR. SACHS: That is correct. The Court of Appeals did --

QUESTION: And under those circumstances, there is no standing in this case?

MR. SACHS: I don't know if it is a standing question, Your Honor, and again we have not raised the point that I understood Mr. Justice Stevens to cast in terms of a jurisdictional question, and I have not addressed that matter.

QUESTION: Well, jurisdictional in the standing sense, as I understood it.

MR. SACHS: Perhaps, Your Honor, that the point -- again, none of the parties have addressed it and the court has not addressed it as such. What the decision in this respect of the lower court was that the statute did not have retrospective application.

QUESTION: And therefore did not apply --

MR. SACHS: That's correct.

QUESTION: -- to the contract in this record, is that it?

MR. SACHS: Yes, Your Honor.

QUESTION: Well, there is certainly a case of controversy between the two, between the employee and the union. I mean, the cause of action was or his claim was that the agency shop clause in the collective bargaining agreement was invalid, wasn't it?

MR. SACHS: That is correct.

QUESTION: And so there is certainly a -- he has got a stake in the controversy, he doesn't want to pay the fee, isn't that right?

MR. SACHS: Yes, sir.

QUESTION: You wouldn't say that it is an Article 3 case or controversy point?

MR. SACHS: Again, I have not raised the issue. The only point --

QUESTION: Well, that is jurisdictional though?

MR. SACHS: Yes, sir.

QUESTION: But this question is just whether he has standing to attack the statute?

MR. SACHS: We have not raised a standing defense.

QUESTION: I know you haven't, but suppose that he had refused to pay under this collective bargaining agreement.

MR. SACHS: Yes, sir.

QUESTION: Would he be fired?

MR. SACHS: After the conclusion of this litigation, presumably he would be.

QUESTION: Let's suppose this statute had never been passed.

MR. SACHS: Yes, sir.

QUESTION: Would he have been fired?

MR. SACHS: I don't know, because in light of the prior adjudication, Your Honor, the state court, the state Supreme Court has held that there was not an appropriate statutory basis for the establishment of an agency shop clause, therefore presumably there would not have been one and therefore

there would not have been a firing.

QUESTION: Well, I take it then that you were defending -- you are the ones who were relying on the statute?

MR. SACHS: Yes, Your Honor.

QUESTION: Not the plaintiffs?

MR. SACHS: That's correct.

QUESTION: So you are the ones that raised the statute?

MR. SACHS: That's correct.

QUESTION: Otherwise you would have lost under the prior --

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

QUESTION: Thank you.

QUESTION: But the federal statute that you now concede in view of the holding of the Court of Appeals that the statute does not apply?

MR. SACHS: I concede that the court indicated that the statute --

QUESTION: It held that it did not apply.

MR. SACHS: -- did not have retroactive application.

QUESTION: But doesn't apply to this case. So you have no defense on the statute, and there is no statutory question before us, isn't that correct?

QUESTION: Well, the statutory question is basically one of state law. We wouldn't interpret the Michigan statute.

Their claim, as I understand your opponents' claim, is that the compelled deduction of dues violates their First Amendment rights under the federal Constitution.

MR. SACHS: Yes, sir.

QUESTION: Your response is that it doesn't. The way it came up to the Michigan state courts was that the Michigan courts said, yes, there was sufficient statutory authorization for you to do that, and in addition we find there was no constitutional violation.

MR. SACHS: That is correct.

QUESTION: Well, counsel, isn't it true that the compulsion for the deduction as to the contract is solely based on the contract, there is no statutory authorization for the deduction?

MR. SACHS: There was no deduction. In that respect, Your Honor, I have to indicate that both parties sought rehearing below and then clarification as to what the purpose of the remand was with respect to the retroactive period, since there had been no compulsion, since there had been no collection, we could not understand what the point of it was, and I to this day do not understand what issue remained on that score, but it was not framed in the terms that Your Honor is now questioning me.

QUESTION: Let me put it this way: Had there not been -- if the Court of Appeals had said the statute is totally

void, it had never been passed or something like that --

MR. SACHS: Yes, Your Honor.

QUESTION: -- it was held that it doesn't apply to this contract, then you would not have been able to compel the deduction because of an independent state ground reason, isn't that correct?

MR. SACHS: Yes, entirely independent state ground reason.

QUESTION: So there really is no federal question before us is what I am saying, there is no compulsion now for a deduction as to these particular litigants?

MR. SACHS: As to that past period, that would be so, subject to the point that Mr. Justice White has raised and that we acknowledge fairly, that --

QUESTION: The part of the claim of the plaintiff, wasn't it, in his complaint, was that it was unconstitutional for the collective bargaining agreement with the state to compel him to contribute to the union activities?

MR. SACHS: That is correct.

QUESTION: I mean it didn't -- that claim didn't depend on whether there is a statute or not?

MR. SACHS: Well --

QUESTION: But as to that claim, didn't the Michigan court hold that he was right, apart from this later statute?

MR. SACHS: Well, the court said that the contract

and the statute I think were essentially one issue. I don't think the plaintiffs attempted to disassociate the contract from the statute. Their First Amendment claim was that there were statutory action involved.

QUESTION: But you relied on the statute --

MR. SACHS: Yes, sir.

QUESTION: -- and say that the reason that this is now valid is because there is right to a refund?

MR. SACHS: Not the --

QUESTION: Now, whether or not the Michigan statute was in existence or not, this petitioner's claim was rejected, and part of his claim was that collecting a fee to support union activities was unconstitutional?

MR. SACHS: That clearly was the claim, Your Honor.

QUESTION: That still is his claim right here, his number one claim.

QUESTION: Without regard to what use it may be applied to?

QUESTION: Statute or not, that is part of his claim right now, right?

MR. SACHS: I presume that is so, Your Honor.

QUESTION: It is the Detroit School Board that is making the deduction to bring into play at least the claim of First and Fourteenth Amendment rights.

MR. SACHS: The fact of the matter is, Mr. Justice

Rehnquist, that the Detroit School Board, as the appellants before you, is not making a deduction, there has been no deduction because there has been a stay of the enforcement as to all of these appellants.

QUESTION: But the fact that something is stayed pending review here doesn't moot it for the reason, I take it?

MR. SACHS: No, I want to be clear, stayed in a contractual sense, not by virtue of any court action. The contract itself provided that during the pendency of litigation there would not be enforcement and therefore the plaintiffs have not been under any compulsion and they have not, as I sought to state in my opening remarks, ever -- they have never sought to challenge the expenditures as such, they sought to address, as plaintiffs did in Hanson, the collection as such.

QUESTION: Mr. Sachs, I still don't follow your colloquy with my Brother White. Didn't you tell us earlier that the Michigan Supreme Court said that this very contract between the school board and this union was invalid for want of statutory authority?

MR. SACHS: Your Honor, the Court I think in its opinion did not distinguish and speak to this contract as such.

QUESTION: Oh, I thought you referred to some earlier opinion of the --

MR. SACHS: There is an earlier case not involving these parties, Your Honor.

QUESTION: All right, not involving these parties, but a contract between a public body and a labor union?

MR. SACHS: Yes, Your Honor.

QUESTION: With an agency clause in it?

MR. SACHS: Yes.

QUESTION: And there held that the agency clause was unenforceable, invalid, and whatever?

MR. SACHS: For purely statutory reasons.

QUESTION: All right, wouldn't that not apply if this statute is not applicable to the particular contract we have got involved here, then where is there any First Amendment issue?

QUESTION: The petitioner's claim was overruled or was rejected by the Michigan Supreme Court, by the Michigan court, wasn't it?

MR. SACHS: Yes.

QUESTION: And that included a rejection of his First Amendment claim, with or without a statute?

MR. SACHS: That is correct. I hope I have answered the Court's questions on the point.

QUESTION: Well, at least the federal question here, doesn't it?

MR. SACHS: Your Honor, I am not sure. I don't know what time is now left. May I --

QUESTION: I would think a federal question involved

in a case of -- this contract contains unenforceable provision that must be as if there never was such a provision, on some state law ground. That doesn't meet the issue here.

QUESTION: The petitioner should have won then, but he didn't, did he?

MR. SACHS: Your Honor, on that point, the court did remand with respect to an appropriate remedy as to the retroactive period. That is not before this Court.

QUESTION: You mean in the appellate court?

MR. SACHS: Yes, Your Honor.

QUESTION: I take it it couldn't have overruled the prior Supreme Court opinion?

MR. SACHS: No, of course not, and it didn't presume to do so. It was acting not on the basis, Mr. Justice Brennan, of the earlier opinion, but on the basis of the intervening statute enacted I think in 1973 which at that point sanctioned such agreements as this and did so expressly, so there was no longer a question of a statutory basis for the action which was taken.

QUESTION: Both parties petitioned to the Supreme Court of Michigan for review and it was denied?

MR. SACHS: That is correct. The appellants petitioned on the grounds which they would bring here; we petitioned because we simply could not understand the purpose of the remand since there really was nothing that was not moot,

and since there had been no compulsion we could not understand what was viable for purposes of any remand and indeed the appellants seemed to join with us in that quandary as to what the purpose of the remand was. But in any event, that is not before this Court and has not been presented.

I would simply want to emphasize that it seems that in light of the precedents of this Court, on no basis, considering the parallel pattern of the Michigan statute to that of the federal statute, there is any genuine First Amendment issue of speech or association involved. We are really back to the -- if the questions are here, we are back to those initial questions, and it seems to me that the issue is what this Court characterized in the last term in the black lung benefits case, Usery v. Elkhorn, as a legislative act adjusting the burdens and benefits of economic life, and that is all that is involved in this. And such a statute, it seems to me, comes to this Court with a presumption of validity, and it is for the plaintiffs, not for the defendants, to justify it. There are no First Amendment implications involved.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Petro, do you have anything further? You have six minutes left.

ORAL ARGUMENT OF SYLVESTER PETRO, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. PETRO: Thank you, Mr. Chief Justice, and Honorable

Associate Justices:

I think thoroughly without any intention, Mr. Sachs has completely misled us all concerning the posture of this case. It all goes back to the Smigel decision by the Michigan Supreme Court, holding that in the absence of an authorizing agency shop provision in the Michigan PERA, no public employer could as a matter of statute or a power enter an agency shop contract. Clear?

Now, after that decision, the Michigan legislature proceeded immediately to pass the statute wanting as of the time of the Smigel decision. Now, observe very carefully, Honorable Justices, it was after the passage of that enabling agency shop provision that the contract in issue in this case was entered by the parties. If this does not establish a federal question, then I don't know what a federal question is.

The contract involved in this case was entered by the parties after the passage of the 1973 Michigan PERA section 10. Now, since I have only three minutes left, let me proceed immediately to what I --

QUESTION: Mr. Petro, may I just ask, why then in the Court of Appeals opinion did they discuss the issue of retroactivity?

MR. PETRO: This was involved -- you are going to destroy all my time now -- this was involved in the question of whether or not a contract then in existence, a contract prior

to the one subjudice, should be applicable to the plaintiffs in that case, not this one. This is a new ball game we have.

QUESTION: In other words, the contract in the record before us is different from the contract in the record before the Court of Appeals --

MR. PETRO: That is correct.

QUESTION: -- and nevertheless we are reviewing that decision?

MR. PETRO: No. An aspect of the contract involved in the Warczak case was controlled by force of precedent, not by force of judgment, in the Smigel decision. This Court held only that as to that period -- you know, these period were employees throughout that period, throughout that period involved in the Smigel case, throughout the period involved in this Abood-Warczak case. Now, the question was whether or not they were going to be affected by the Michigan PERA amendment in 1973 which -- the language of it is relevant here.

The Michigan PERA speaks in terms of reaffirming its favoring an agency shop. It is a sort of, if I may say so without antagonizing the Court, a kind of a shell game by the Michigan legislature, designed to establish retroactively the validity of the agency shop PERA passed in 1974. And the only thing that this Michigan Court of Appeals, from which we are appealing, did with respect to that was say no, there can't be no retroactive --

QUESTION: Was this case filed in '69?

MR. PETRO: Pardon?

QUESTION: Was this case filed in '69?

MR. PETRO: This particular case?

QUESTION: Yes, sir.

MR. PETRO: In 1969, yes.

QUESTION: So the '73 Act applied in '69?

MR. PETRO: No, it applied as of the time when the case came back up to a contract -- the contract that these parties are bound by, if they are bound by it at all, is a contract entered by the parties after --

QUESTION: Before '69?

MR. PETRO: -- no, after '69, in '73 -- what was the date -- October 1973.

QUESTION: Is that contract in this record?

MR. PETRO: This contract, yes.

QUESTION: The '73 contract is in this record?

MR. PETRO: Yes, it is in the record. Let's see -- see the record brief in support of claim of appeal in Michigan Court of Appeals, April 11, 1974, at 512, appendices D and G, letter from Theodore Sachs to Honorable Charles Kaufman, Michigan Circuit Court, October 19, 1973, enclosure.

Mr. Justice Marshall, there cannot be any doubt whatsoever that the contract involved in this case is a contract post-dating the Michigan PERA amendment, the constitutionality

of which we are challenging, no doubt whatsoever. This is the contract in issue in this case, not the one that was the subject of the Smigel decision and which by virtue of the Smigel decision --

QUESTION: What has Smigel got to do with this case? Is Smigel in it?

MR. PETRO: Smigel is the decision in which the Michigan Supreme Court stimulated the legislation that is involved here. Had the Michigan Supreme Court not decided in Smigel that the state and local authorities were without power to enter agency shop agreements, we should probably never have had this statute.

QUESTION: Did you bring Smigel up here? You didn't have anything to do with it, did you?

MR. PETRO: No. Smigel is not my case, no.

QUESTION: Well, how does it get in this one?

MR. PETRO: Well, it provides the background for the Michigan PERA amendment. The Michigan agency shop statute was passed because the Michigan legislature found that it could not have agency shops in public employment without specifically authorizing them.

Now, I beg the Court for two minutes in order to make what I think is the final point that must be made. May I have them, please?

MR. CHIEF JUSTICE BURGER: Go ahead, respond, if that

is in further response to Justice Marshall.

MR. PETRO: The fundamental deficiency from the point of view of the First Amendment in this case is that the union intends to have, to put it most mildly, forced loans from the teachers in order to use those forced loans to promote political causes to which the teachers must be presumed in view of their general objection, the teachers are opposed to them.

Now, there is no way that forcing people to support political causes to which they are opposed can be squared with either the First Amendment or this Court's uniform decisions thereunder. Mr. Justice Brennan --

QUESTION: You are merely restating the arguments you made before, so we have that argument.

MR. PETRO: Well, it goes to the rebate procedure. The rebate procedure is nothing but --

QUESTION: You have covered that sufficiently, counsel.

MR. PETRO: All right.

QUESTION: I want to add something which my Brother Blackmun said about this case. You filed a 216-page brief here and I address this not as a criticism to you primarily but as an observation to the bar. In this case, there are 600 pages of material filed with us, which means that if every case heard today had been treated the same way, the members of this Court would have had 2,400 pages to read, not including the

cases and other authorities cited, which we do read. And I think in a sense you may have done a favor to the Court to furnish an Exhibit A for why we should activate a rule limiting the briefs in this Court to 50 pages unless the Court grants special leave.

MR. PETRO: I pray the Court's indulgence for just one word.

QUESTION: I need no response to that. I am simply making that observation to the bar generally as well as to you because you filed a 216-page brief when 75 pages easily would have done it.

MR. PETRO: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:33 o'clock p.m., the case in the above-mentioned matter was submitted.]

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