In the

Supreme Court of the United States

OHIO BUREAU OF EMPLOYMENT SERVICES, ET AL.,

Appellants,

v.

LEONARD PAUL HODORY,

Appellee.

No. 75-1707

February 28, 1977

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v.	:	No. 75-1707
LEONARD PAUL HODORY, Appellee.	:	

Washington, D. C.,

Monday, February 28, 1977

The above-entitled matter came on for argument at 10:04 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

RICHARD A. SZILAGYI, ESQ., Assistant Attorney General, State of Ohio, 145 South Front Street, Columbus, Ohio; on behalf of the Appellants.

T. PATRICK LORDEON, ESQ., Mahoning County Legal Assistance Association, 804 Metropolitan Tower Building, Youngstown, Ohio 44503; on behalf of the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 75-1707, Ohio Bureau of Employment Services against Hodory.

Mr. Szilagyi, you may proceed whenever you're ready.

ORAL ARGUMENT OF RICHARD A. SZILAGYI, ESQ.,

ON BEHALF OF THE APPELLANTS.

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

This case involves the constitutionality of Section 4141.29(D)(1)(a) of the Ohio Revised Code.

This Section disqualifies individuals from receiving unemployment benefits that is unemployment due to a labor dispute other than a lockout at any factory, establishment or other premises, located in this or any other state, that is wholly owned or operated by the employer from which the employee is or was last employed.

This is commonly referred to in the unemployment field as the functional integrated plant theory whereas you have multiple plants, one employer, and all the plants operate as a single unit to produce one single product or end product.

Plaintiff-appellees represent approximately 1,250 steelworkers who became unemployed as a result of a strike at the wholly owned and operated coal mines of the steel companies which cut off the supply of coal that the steel companies needed

to continue production in Ohio.

Plaintiffs were denied benefits by the Administrator because of our disqualification in our law. There's an appeal pending before the Board of Review in the Ohio Bureau of Employment Services with appellees and their class, and this is pending the outcome of this case.

During the pendancy of the appeal before the Board the appellees filed an action in the federal District Court, Northern District, Eastern Division, in Cleveland, as a class action under 42 U.S.C. 1983 for a declaratory judgment seeking the unconstitutionality of the statute, and also injunctive relief in the way of past judgments.

QUESTION: Was the administrative proceeding pending at the time the case was first brought in the District Court?

MR. SZILAGYI: Yes, Mr. Chief Justice, it was, yes.

Appellees allege that the Ohio statute was unconstitutional on its face and as applied, because it violated the supremacy clause being in conflict with 42 U.S.C. Section 503 (a)(1) and 303 (a)(1) of the Social Security Act.

Additionally, they allege that it was a violation of due process and equal protection clause of the Fourteenth Amendment.

Appellees did not name either U.S. Steel or Republic Steel in the District Court as the party defendants as required under the Ohio statutes as an interested party, since their

funds are drawn against -- if there's payments of unemployment benefits.

Defendants in the court below argued that the case was not a proper case for a Three Judge District Court, and action for injunction damages. During oral argument appellees changed it from money damages , and said that it was benefits.

Plaintiff-appellees failed to exhaust their remedies at law. We argue that the plaintiff and his co-worker had a pending appeal before the Board of Review, and the Court

#126 should not hear it.

Plaintiff-appellees failed to meet the requirements of federal rules of civil procedure 23(b)(3). The class was a definite class;that the plaintiffs were furnished names but no notice was given.

The unemployment compensation laws in Ohio are solely the state's concern, and have not been preempted by the federal government. And we argue that the U.S. District Court shall abstain from the hearing of the case for two reasons: comity, and that they already were in the state administrative process and could go up through the process to the state courts to the federal courts in the normal judicial manner.

The judicial court convened a three judge panel to determine the constitutionality of the statute. The memorandum opinion or order of the three judge court, which is found in the jurisdiction statement of ours on page 48,

held that injunctive relief was proper under 28 U.S.C. 2283, the anti-injunction statute. They said that absention was not proper in the instant case since plaintiff had stated a good cause under 42 U.S.C. 1983.

The Ohio courts had previously ruled on the validity of this statute. Therefore, it would be futile for the plaintiffs to go through the process again.

The court found in the prerequisites to certifications -- that the prerequisites of certification had been met under 23(a) and (b), despite, as I said, that no fact of notice was given. And they said that the operative effect of 4141.29(D)(1) which disqualifies benefits to plaintiffs violates the equal protection and due process clauses guaranteed under the Fourteenth Amendment, and 42 U.S.C. 1983.

We generally argued in oral argument that granting of benefits to workers laid off due to a strike, in a parent company's subsidiary plant, would in effect be subsidizing the union members of the steel workers.

Granting of benefits would place the employer at an unfair disadvantage in negotiations with the unions. If the financial burden of supporting the striking members is shifted from the union's treasury to the State of Ohio, it is conceivable that no concerted effort by the mine workers to negotiate a fair settlement would be pursued until the

employer reached a financial crisis.

The difference between the mine workers of, say, a hundred and maybe five or six thousand steel workers, you can see the impact upon the employer's fund.

The State has a legitimate purpose in protecting the fiscal integrity of its compensation fund. Strikes involving large corporations such as U.S. Steel, the Auto Workers, and other corporate giants, involve many hundreds and thousands of employees which would sometimes last many weeks, further depleting our fund.

QUESTION: Is it clear that the statute in this case does prevent any unemployment benefits to be paid to the respondents?

MR. SZILAGYI: Mr. Justice, the statute, when this case was brought up, did disqualify benefits if it was a wholly owned and operated subsidiary that went on strike that caused the main plant to strike.

In this instant case there were about two thousand
186 employees involved, in Lorain, Ohio, Cleveland, Youngstown, Warren, I believe.

The Board of Review, in half of the cases, found that the employees in the Lorain plant, for instance, were qualified for benefits. Because under some test that they had for -- as far as supplying fuel, they had sort of a 50-50 test, where they said, unless the main plant was receiving or

depending on the subsidiary for more than 50 percent of the coal, it wasn't due to a strike or labor dispute, but it was caused because of lack of fuel. And therefore -- or lack of work. And therefore, the Cleveland/Lorain people did get benefits, which is on appeal by the Steel Company, of course.

QUESTION: But then the claim of these people is also on appeal by them?

MR. SZILAGYI: That is correct, in administrative process.

QUESTION: So it is not clear so far -- it hasn't been finally determined by the State of Ohio --

MR. SZILAGYI: That is correct, that is correct.

QUESTION: -- in the administrative appeal process if these people are deprived of their unemployment benefits, isn't that correct?

MR. SZILAGYI: The final determination hasn't been made.

QUESTION: And their claim in that appeal is what? That --

MR. SZILAGYI: That they are entitled to it since they were involuntarily unemployed. Which is counter to the statute.

QUESTION: Well, yes, but do they say they're entitled to it even under the statute?

MR. SZILAGYI: Well, they say that the statute is

unconstitutional.

QUESTION: Making the same claim in that state proceeding as they are -- as they prevailed in in this federal court proceeding?

MR. SZILAGYI: Mr. Justice, I think they would have to reserve that until they got to the common pleas court. I don't think the administrative -- the administrative agency or the bureau is bound by the Supreme Court decisions and Court of Appeal decisions in Ohio which held the statute constitutional --

QUESTION: Right.

MR. SZILAGYI: And therefore, the issue of constitutionality wouldn't get into it until they got to the next level, common pleas court --

QUESTION: Right.

MR. SZILAGYI: -- Court of Appeals, and possibly into the federal --

QUESTION: But in the administrative proceedings, it was my understanding that they're claiming that even assuming the constitutionality of the statute, they're entitled to benefits under the statute because their employer could have gotten its coal somewhere else.

MR. SZILAGYI: This is an issue that was brought up by the amicus AFL-CIO, I believe. It wasn't appellees contention.

QUESTION: I see.

QUESTION: Do you agree with the AFL-CIO?

MR. SZILAGYI: Well, of course, we would hopefully --

QUESTION: Would you settle for it?

MR. SZILAGYI: I would settle for a reverse -- vacate the judgment and let the state court proceedings go on.

QUESTION: Well, would you agree to their remand? You woudn't agree to that?

MR. SZILAGYI: Mr. Justice, I don't think the remand would be very good, because the district court would still have to wait for the administrative hearings. It's not a de novo trial. The administrative process would still have to go through the Board of Review, and then they could appeal to the state courts. And depending on the evidence in the case, they could rule that they could be entitled to benefits, I don't know. Each case is on a fact by fact basis.

QUESTION: But this statute's now been amended, hasn't it?

MR. SZILAGYI: It's been amended. But we have two other cases, your Honor, that are pending. There's the Lordstown, General Motors, with several thousand people, we have-- which is the Achey case. It's in the Court of Appeals in Ohio. And we also have one in Youngstown in the hospital case, which is relatively minor, two or three hundred employees.

QUESTION: Is there any decision in this case on the

statutory ground or on the conflict ground of the federal statute?

MR. SZILAGYI: There hasn't been any in this particular -- in this instant case in the Board of Review or the lower level of administrative proceedings. But we've had a case in 1963 --

QUESTION: Where does this case come from?

MR. SZILAGYI: This one comes from directly to the district court, which convened a three judge court for the constitutionality.

QUESTION: Now, was the conflict with the federal statute alleged there?

MR. SZILAGYI: There isn't -- yes, they had a -- they said it was in conflict with Section 503 --

QUESTION: Did the three judge court decide that?

MR. SZILAGYI: Well, they didn't say it was in conflict with the federal statute. Because Judge Celebrezee requested to the appellees in the brief -- in fact it's in my brief -- where he specifically questioned appellees and said, is there any federal law that you can tell me that's in conflict with this? And the appellees said, no, they did not have any federal law.

QUESTION: Had there been any complaint made about it? Was that part of the case when it started in the district court?

MR. SZILAGYI: Well, part of -- when they first started the case, they said it was supremacy clause --

QUESTION: Supremacy.

MR. SZILAGYI: -- preemption doctrine --

QUESTION: Yes.

MR. SZILAGYI: -- the due process, equal protection --

QUESTION: So that was in the complaint?

MR. SZILAGYI: That was in the complaint, yes, sir.

QUESTION: But they abandoned that supremacy clause argument?

MR. SZILAGYI: No, your Honor, they have not abandoned it since then.

QUESTION: Well, was it decided or not?

MR. SZILAGYI: I don't think the court spoke to the -- the district court spoke to the supremacy. They just said it was a due process violation.

QUESTION: Well, wasn't it supposed to before it reached the equal protection or due process clause?

MR. SZILAGYI: Well, I understood that -- from the lower court, they just said there was a constitutional conflict on equal protection and due process.

QUESTION: Well, I understand that, but how about a conflict of the federal statute? They didn't decide that?

MR. SZILAGYI: They didn't decide that as far as I know.

QUESTION: Do you object to that or not? Are you complaining about that or not?

MR. SZILAGYI: I'm complaining -- yes, it's part of our brief, that there isn't any federal statute. And unless you have a federal right or constitutional right, fundamental right, a 1983 action isn't proper.

QUESTION: Well, you can raise the issue of conflict of the federal statute in a 1983 action.

MR. SZILAGYI: But there has to exist a fundamental right or statutory right, which there isn't in this case.

QUESTION: You say there's just no federal statute that's relevant to it?

MR. SZILAGYI: The whole Social Security Act since 1935 under Steward, the two landmark cases that this Court decided was Charles C. Steward v. Davis and the Carmichael v. Southern Coal and Coke. Both of those cases held that this was a state-federal plan; there was no collusion on the states to accept the plan; they were free to take it or reject it, and still can; that the only -- there were minimum requirements, that is, the money -- the states got a tax -- the employers got a tax break of up to 90 percent if the state had an unemployment plan. And it's still today that way.

The minimum requirement was that the Secretary of Labor has to approve our plan yearly. The funds can only be used for unemployment. That we have to maintain a fiscal

soundness in our plan. Because if we don't, we not only lose the capital improvement money, but we have to increase either the tax on the employer by way of increasing his rate, or we have to raise the base, or we have to use a combination of all three. And it has to be done in three years.

As you notice, there's probably -- the Court has the initial knowledge that there's 31 or more than 31 states that are already bankrupt. Since I wrote this brief, there were only 8. But there are approximately 31 now or more. And this energy crisis has even caused more of a problem, because Ohio's funds are going to run out probably -- or were going to, if the weather hadn't turned, by March 15th.

QUESTION: Well, has Ohio amended its law now?

MR. SZILAGYI: Yes, it has amended its law. But there is still a disqualification. In Ohio's law, which was amended --

QUESTION: In 1975?

MR. SZILAGYI: '77, January.

QUESTION: '77? Was there one in '75?

MR. SZILAGYI: Let's see: '75. '75.

QUESTION: '75?

MR. SZILAGYI: Yes, which was about three months -- it didn't come into effect when this case was in court.

QUESTION: But how did they -- did they eliminate

the disqualification?

MR. SZILAGYI: They eliminated part of the disqualification. But there's still a disqualification. The elimination was, as in this case -- the language of the statute said that, no individual shall be disqualified -- well, this is the language that is of particular interest in this case -- or other premises located in this or any other state, and owned or operated by the employer, by which he was or is last employed.

Now, that language was taken out. So that the location of out of state or away from the premises would be now -- be paid benefits.

QUESTION: So that the employees involved in this case would have been -- would not have been disqualified?

MR. SZILAGYI: Well, that's the point that hasn't been litigated in the state, and I'll tell you why, Mr. Justice. The statute -- the part that was amended, the rest of it was still the same. And it still has a disqualification. It says that no individual shall be disqualified from benefits unless his employer is a wholly owned subsidiary of the employer engaged in the dispute.

So they take it out and it's still in, in another place, in a different context. So there's still possibly disqualification for involuntary unemployed due to a labor dispute, which hasn't been litigated yet.

QUESTION: In the administrative proceeding that is still pending, what law -- which statute will be applied?

MR. SZILAGYI: The one that I just read --

QUESTION: The amended?

MR. SZILAGYI: Not the amended one; previous to the amendment. The one that disqualifies -- that says that other premises located in this or any other state, and owned or operated by the employer. The functional, integrated theory. The coal miners in West Virginia that went on strike, the Cleveland plants were closed down. That's the statute that the courts decided, and it's before this Court.

QUESTION: The same statute that was before the Three Judge District Court and is --

MR. SZILAGYI: That is correct, your Honor.

QUESTION: -- on appeal here is the one that's involved in the state administrative proceedings that are pending?

MR. SZILAGYI: That is correct, yes.

QUESTION: Could the administrative tribunal apply the new statute? What is the bar?

MR. SZILAGYI: There is no retroactivity application to the statute. They could not.

The central issue that we have here today, at least as far as appellate's feelings are, is that it's more than a question of just adjudicating the rights under a labor dispute

statute. We think that the central issue is the right of the state to formulate its own unemployment programs as it has been since 1935 when the Social Security Act was first --

QUESTION: The law does require that there be annual approval?

MR. SZILAGYI: That is correct.

QUESTION: By the -- is it still the Secretary of Labor?

MR. SZILAGYI: Yes.

QUESTION: And Ohio's plan has --

MR. SZILAGYI: Has been approved.

QUESTION: -- received annual approval?

MR. SZILAGYI: That's correct, yes.

QUESTION: Including the years here involved -- the period here involved?

MR. SZILAGYI: Yes, it's part of our jurisdictional statement as an exhibit, which was signed by the Secretary of Labor.

Appellants contend there's no federal right to unemployment compensation, and the appellees have not demonstrated such a right exists.

Appellees have argued that the Ohio labor dispute disqualification as it appeared in '74-'75 deprived them of due process.

In order to have a constitutionally secured or

protected right, you have to have a federal statute or at least a fundamental right before you reach the due process argument. There isn't any in this case.

390 In Paul v. Davis and Kelley v. Johnson last year decided by this Court, the Court recognized that due process does not extend to every perceived inequality suffered at the hands of the state, but rather applies only where there is involved an underlying federal or constitutional right.

The due process arguments made by appellee can be deemed viable if they can point out some -- some law that would contravene the Ohio state law. Section 503(a) of the Social Security Act, the first section requires approval by the Secretary of Labor, the second section speaks about when due that this Court had when they faced Java -- nothing to do with unemployment benefit eligibility. Section 303 states that payments will be made to the state upon approval by the Secretary of Labor of our plan.

There's nowhere that we've been able to find, or as far as we've concerned, that the appellees have been able to find, that applies to eligibility for benefits. There are many disqualifications in the unemployment field. There's -- you're disqualified in some states for benefits if you have to go to a jury. You're disqualified if you're ill. You're disqualified, if you're pregnant within the time frame with limitations. You're disqualified if you have to leave your

job to follow your husband or wife to another state.

So there are many types of disqualifications. You have to first qualify for 26 weeks eligibility of work in most states. You have a one week disqualification. You've got strike disqualifications; labor dispute disqualifications. Some cases have held that lack of transportation, you're disqualified. It's not up to the employer to furnish it.

So there are all kinds of disqualifications --

QUESTION: And every state has a cut off time, you're qualified only for a certain number of weeks?

MR. SZILAGYI: That is correct, your Honor; 26 weeks in most cases. But the time for qualification varies, the monetary amount varies, the earned amount to qualify varies. There are fifty states with fifty different variables.

QUESTION: But every single state has a --

MR. SZILAGYI: Cutoff date.

QUESTION: -- duration.

MR. SZILAGYI: That's correct.

QUESTION: Or limitation.

MR. SZILAGYI: Except where the federal government came in under the emergency with high unemployment a couple of years ago, and they appropriated the money from, apparently, general revenue to make the extended benefits. It wasn't state unemployment funds.

QUESTION: For an indeterminate period?

MR. SZILAGYI: They made it for -- it came up to 65 weeks.

QUESTION: Yes.

MR. SZILAGYI: But that's cut off now because of the on-off indicator that they have. If it reaches a certain percent in the state in high economic unemployment areas, it goes back on. Ohio so far has not been back on it.

QUESTION: In any event even that, there's a terminal point at 65 weeks.

MR. SZILAGYI: Yes. But that's an unusual case. Twenty six weeks is the normal.

Under the Tenth Amendment, our argument is that since the Social Security Act does not decide what benefits are to be paid -- it's left to the state -- that any law that would tell us what to do that would be reserved to the states under their reserved power, police power and general welfare, would be a violation of the Tenth Amendment.

The coverage -- there have been two amendments to the Social Security Act. The 1970 amendments increased the coverage, but nothing was said about benefits. It was just that state and political subdivision employees would be covered; certain types of agriculture workers are now not excluded, unless they're actually on the farm, but their adjacent, peripheral type of work is covered.

In '76, they also expanded the coverage, but that

coverage -- neither the '70 or the '76 amendments have anything to do with this case. It's coverage -- most of it is covered by federal tax. The state gets credit for it. With the exception of the government employees. We question whether that's constitutional under this Court's recent ruling in

462 National League of Cities v. Usery since the state employees and the political subdivisions are exempt from FUTA. So therefore the state gives no credit for that.

And I would expect that this Court might be faced with that challenge one of these days.

QUESTION: Could you tell me if the federal officials have specifically address themselves to whether to not the Ohio type of disqualification is contrary to the federal statute or to federal regulations?

MR. SZILAGYI: Yes, sir, your Honor.

We've got about three areas in that. A recent case that this Court heard, which they denied cert in was Kimbell. In the Kimbell case, I believe this Court asked the Solicitor General to file a position paper, a law memorandum paper. And that was 75-1452, Kimbell versus -- doing business as

477 Furs, Incorporated --

QUESTION: 75-1452?

MR. SZILAGYI: Yes. Versus Employment Security Commission of the State of New Mexico.

QUESTION: Yes.

MR. SZILAGYI: The issue in that case involved a labor dispute, but it's not the same as ours. But I'm pointing it out because the Solicitor General says, it's always been, and still is, a right of a state to determine who is eligible, to what extent benefits are paid, and what disqualifications you're going to have.

QUESTION: But is that as close as you can come to finding something addressed to this specific kind of a disqualification?

MR. SZILAGYI: The Labor Department attorneys said that they've always felt that it was -- that there's no position paper on it. They've never written one.

QUESTION: They've never issued a regulation?

MR. SZILAGYI: Never written a regulation on it, because it's -- all the states have just automatically --

QUESTION: But there are only -- how many states were there with your kind of a disqualification? Only two, weren't there?

MR. SZILAGYI: Well, there's North Carolina that still has it --

QUESTION: Only North Carolina and yourselves.

MR. SZILAGYI: -- under the Abernathy case and ourselves, but there's various variations of that.

QUESTION: Well, I understand, yes.

MR. SZILAGYI: There's all kinds of variations.

QUESTION: But not at other plants?

MR. SZILAGYI: Well, there are some states that don't even speak about -- they just say you're disqualified if you're involved in a labor dispute. They don't even go into fault, no fault, where it's located, or stoppage of work or anything. It's just absolutely denied under a labor dispute.

QUESTION: But does your plan -- did you say your plan had to receive federal approval?

MR. SZILAGYI: Every year.

QUESTION: Every year? And it has?

MR. SZILAGYI: It's an annual approval. It's been approved ever since --

QUESTION: And when did you amend your plan to put in this disqualification?

MR. SZILAGYI: '74. I beg your pardon; I was confused on which amendment you were talking about. In 1963 --

QUESTION: '63.

505 MR. SZILAGYI: -- right after the Abnie versus Ford case. What happened, we always disqualified for this reason. And the Ohio courts, both the Court of Appeals and the Supreme Court have always held the statute constitutional. But it didn't have the words in, at any other location with a wholly owned subsidiary owned or operated by the parent

company.

Somebody challenged the statute, Abnie challenged the statute in 1963. And they got into the word construction of what does establishment mean. Previous to that they meant establishment covered multi-plants.

The Michigan case in Chrysler that was just decided previous to that held that they would go to a strict construction on the word, establishment. And they also had the same problem because Ford had multi-integrated plants to produce an automobile. And the Michigan court, supreme court, that establishment was not broad enough to cover another plant.

QUESTION: So Ohio then amended its law --

MR. SZILAGYI: We immediately amended the law so the legislator who -- his original purpose was to disqualify these people -- when it was turned around, and said, now they can get benefits, they immediately went in and changed the law. Which has been approved since '63 by the federal government.

QUESTION: And your law has been approved every year since '63?

MR. SZILAGYI: That is correct, your Honor, it sure has.

The only insight we can get as far as -- of what, at least, Members of Congress feel about this, I have a section in my brief, which is on page 17 -- not the reply brief but

the main brief -- and I think it starts -- well, 17 talks about Mr. Secretary -- it talks about the exhaustion of benefits.

But on page 19 Mr. Dunlop who was asked a question regarding involvement with states deferred to Mr. Weatherford, and he said that we have got to provide a great amount of influence over it by program letters, leadership, guidance, to make sure that the State does develop a program that is sound.

And on page -- that is about the only involvement they got. They give us advice if our fund is running low.

Our time is up.

MR. CHIEF JUSTICE BURGER: Very well.

I overlooked announcing that Mr. Justice Rehnquist, who is unavoidably absent due to illness, reserves the right to participate in all of these cases on the basis of the entire record and the tape recording of the oral arguments.

Mr. Lordeon.

ORAL ARGUMENT OF THOMAS PATRICK LORDEON, ESQ.,

ON BEHALF OF THE APPELLEE.

MR. LORDEON: Good morning, Mr. Justice Burger. Good morning, Mr. Justices, Mr. Szilagyi, co-counsel, fellow citizens:

Briefly stated, we think this Ohio statute negates the whole purpose of the Federal Unemployment Compensation Act founded in 1936 at a time when I was just toddling around

and most of you gentlemen understand better. And I ask you to try to recall back -- what it was like back in the 30's and remember why that statute -- you as members of the jury can do that. You don't have to forget your common sense as we say to jurors, and with all due deference and respect.

This case -- Mr. Szilagyi is talking about and the State has talked about administrative procedure, administrative expertise comes through in the presentation. I would also point out to this Court that the members of the lower Three Judge Court, particularly the Honorable Judge Celebrezee, was an Assistant Attorney General for the State of Ohio, Bureau of Employment Services, before his elevation to HEW where he became the Secretary of HEW in the Kennedy Administration. And he was in a position to be knowledgeable of these statutes to be administering for the whole United States, not just Ohio. He was the man who decided this case. We have judicial expertise here. Judge Thomas Lambros was a common pleas judge before he was elevated to the bench and decided many unemployment cases, and that appears in the record. And the Court knows this through its administration of those judges and those courts. These are matters which you can take judicial notice of if you like.

Briefly, we would like to point out that are few what we would call inaccuracies in the statements of fact. The State asserts that the Ohio statute as passed in '36 is

essentially the same as the Ohio amendment which we are attacking in 1961. And it lived until 1975, a period of 14 years. It is not essentially the same.

Prior to 1961 had Mr. Hodory and his group applied, they would have received benefits. In 1961 there was -- or 1963, excuse me, there was no other -- there was only one other state than Ohio that excluded under these circumstances, and that was North Carolina which passed this severe exclusion in 1961. Up to that point, all of the states were -- would have allowed benefits at this point.

Furthermore, the State relies upon a case in support of a proposition of law that Michigan statutes are somewhat like Ohio statutes, and characterizes that as a the law of Michigan.

We, we point out as we do at page 57 of the brief, Chrysler versus Smith, 297 Michigan page 438, was expressly overruled in Park v. Appeal Board of Michigan, 355 Michigan 103. And that appeal appears in our brief. And that case is not good law for anything.

QUESTION: Would these employees get compensation today in Ohio?

MR. LORDEON: Well, the Attorney General says no, but most expressly by the statute, they would.

QUESTION: Well, let's assume they would. What is at issue in this case? Just compensation for a past period?

MR. LORDEON: Yes, this compensation is for a past period of time for which they were denied benefits. Mr. Hodory and his group applied November of '74. And the case is still in the administrative proceedings still today. It hasn't got to the first level step hearing. Mr. Hodory went to the counter and he received a denial.

QUESTION: Well, this is being -- the administrative proceeding is being deferred pending resolution of this case?

MR. LORDEON: It began to be deferred by the State after the Three Judge Court issued their decision in --

QUESTION: Well, maybe you would have had a decision by now if you had not brought the Three Judge Court case.

MR. LORDEON: There was nothing to preclude Ohio from going ahead with this case, your Honor. We have been in Federal court, and in other state courts -- and in state courts, and they have gone ahead and decided -- processed the case right through the administrative procedure without holding it in abeyance. I don't believe Ohio is holding it in abeyance. Ohio is not complying with when due. They are not processing claims and moving them along. And the Depa t-ment of Labor reports -- and they oversee Ohio -- show this. Ohio is way far behind.

Not only is this statute unconstitutional; they're a little slow.

QUESTION: You don't disagree, do you, that the

Ohio plan has received annual approval since '63?

MR. LORDEON: No, but we find that this case is not like the Turner case. The Turner case which involved pregnancy disqualification, the Turner case had received annual approval as well, and this Court has not --

QUESTION: Well, have the federal officials addressed themselves to this particular kind of exclusion or not?

MR. LORDEON: Yes, some of the federal officials have, particularly Congress. Congress has stated, and as we pointed out in the brief, in various Senate and Congress Committees on the purpose of the statute have pointed out that no person should be denied unemployment compensation benefits where he is involuntarily unemployed in a strike in which he participated in at his plant is going on.

QUESTION: Is this a case where they decided it on statutory grounds?

MR. LORDEON: Well, we raised the statutory grounds, your Honor, and we argued them below, and we asked the Court to address themselves, and they didn't feel that -- they went on due process and equal protection.

QUESTION: Well, are they before us?

MR. LORDEON: Well, certainly --

QUESTION: And if so, how.

#628 MR. LORDEON: -- in light of Knapp v. Ohio, if the Court wanted them here, we believe they could be here. Because

I believe, if I remember Knapp correctly, there were issues presented to this Court back in 195? by counsel and the Court decided it on grounds other than were argued before the Court.

QUESTION: Are you familiar with the normal rule that the courts address themselves to statutory grounds first?

MR. LORDEON: Yes, we are, your Honor. That's why we plead them in the lower court.

QUESTION: And that you don't get to the constitutional ones until you pass up the statutory ones. And this Court passed up the statutory and went to the constitutional --

MR. LORDEON: Well, this Court -- the lower court felt that the unemployment statute, federal unemployment statute enacted in 1936 and as amended, did not completely preempt state -- some state modifications; that they felt that the modifications made here by Ohio went -- were too severe under dues process and equal protection.

But we urged Knapp, we argued it -- I mean, excuse
#644 me, we argued Java at this court, we --

QUESTION: Well, are you going to argue the constitutional point here, the one that the court decided?

MR. LORDEON: Yes, we are.

QUESTION: Before you move to that, in answer to my brother White, you said, yes, the federal officials have

spoken, particularly the Congress has spoken. And you said that's in your brief. What part of your brief, where in your brief?

MR. LORDEON: Well, at page 30 of the brief, your Honor, we begin, we talk about the history and provisions of the labor dispute disqualifications.

QUESTION: What is the language of the federal statute upon which you rely?

MR. LORDEON: Well --

QUESTION: As you pointed out in your complaint, you alleged that this was impermissible under the federal statutory law. And what provision of the federal statutory law do you rely upon?

MR. LORDEON: Well, it Title 26 of the United States Code, Section 3304, I believe, that the Secretary of Labor is only to fund and process those states' programs that are proper to ensure full payment of benefits. Also, we rely on the 42 U.S.C. Section 501, which is 303 of the Act --

QUESTION: That's on page 10 of your brief.

MR. LORDEON: And that particular statute refers to when due, that the Secretary should only approve those programs under which will ensure the full payment of benefits to those eligible when due.

QUESTION: That was what was relied upon in the Java case?

MR. LORDEON: Yes. And -- yes. The other Section is 26 U.S.C. 3304(a)(10).

QUESTION: And that uses the word, proper.

MR. LORDEON: Proper, right. And we're saying this is not proper.

QUESTION: Although the Secretary of Labor has found that it is.

MR.LORDEON: Right. And he also found that in the Turner case.

What we're saying is, the Java case, as we told the lower court and as we argued, did not primarily or specifically deal with procedure versus substantive. This Court wasn't talking about the standards to get locked in on these categories, as Mr. Marshall points out in Murgia v. Massachusetts where we have a two tier approach for equal protection classifications. We feel that this Court was speaking out for the purpose, the fundamental purpose, of the Unemployment Act, when Chief Burger said that those involuntarily unemployed. Well, Chief Justice Burger, in delivering the opinion of the Court in Java clearly indicated that the purpose of Congress in enacting the unemployment compensation program was to provide a substitute for wages lost during a period of unemployment not the fault of the employee, 402 U.S. 130.

And in this case, we are saying that the Ohio disqualification bears no relationship to any legitimate

state purpose. It has no rationale behind it. Therefore, it must fail. And it must fail on constitutional grounds, and it must fail because it is in conflict with the fundamental purpose of the Congressional statute as passed by Congress in Title 26 --

QUESTION: Mr. Lordeon, in your constitutional argument in which you rely on the equal protection clause, what are the classifications that you say the statute makes that are improper?

MR. LORDEON: Well, number one, your Honor, the statute denies benefits to people who are generally -- the statute starts out in Ohio -- what we're talking about is at page 26 in the appendix, O.R.C. 4141.29, Eligibility and qualification for benefits.

It says, each eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment. Well, that's a recognition of the fundamental purpose of Congress. Fault appears no less than 11 times in the Ohio statute. We talk about fault in the involuntariness. And we equate that with fault in the federal statute. It appears in the Congressional purpose. It appears in the customs and traditions of the peoples of the United States, in Anglo Saxon countries, and this statute was adopted from the English statute of 1911.

QUESTION: Well, is your classification, then,

between those involuntarily unemployed and those not involuntarily unemployed? Is that what you're saying?

MR. LORDEON: Yes, that would be the broad class.

QUESTION: Well, what do you do about a case involving only one plant in which, say, the people who run the heating, the boiler plant, or something like that, go on strike and everybody else has to stay home? Could the State deny unemployment compensation working in the same plant where the strike occurred, but who had no control over the inability to work?

MR. LORDEON: Your Honor, we treat that in our brief, and briefly stated, we're not dealing with that, but to be answering your question quite properly and politely, we would indicated that no benefits for strikers -- we're in agreement with that. We feel that striking is involuntary unemployment.

QUESTION: No, my question doesn't relate to strikers. My question related to other employees in one plant where some small number of employees are able to close down the entire plant.

MR. LORDEON: Well, there are states that have that kind of disqualification.

QUESTION: Well, do you contend that --

MR. LORDEON: And they have an escape clause.

QUESTION: My question is, do you contend that

disqualification is unconstitutional?

MR. LORDEON: Yes, we would. And we do so in our brief. We feel there ought to be an escape clause, and it doesn't take much of a --

QUESTION: So you really don't rely on the fact that the coal mines are in another state?

MR. LORDEON: Certainly not.

QUESTION: The mere fact that it's involuntary?

MR. LORDEON: Certainly not. We feel that fundamentally if the people were participating in the strike or they were supporting it in some fashion, this can be easily discovered by the state. The state has alternative means of doing this when people come up to the counter, after they're allowed the cross the line that says, thou shalt not step across, this can be gotten into at the preliminary stage.

As a matter of fact, 20 years ago I worked at U.S. Steel as a foreman there. And when we terminated people -- and they still do today -- they were given a little card, they handed in their materials, they handed in their equipment, they were checked out. The reason for their discharge was put on a multicopied tear apart that gave the reason right there why they were being discharged. And most of the time it was terminated for lack of work, reduction of force. So there's no burden on the state.

And the employee takes this to the state offices.

And they rely on that. And it's a business record.

And so it's really not a evidentiary problem as the state puts forth.

QUESTION: Going back to what you told my brother Stevens was your basic equal protection claim, i.e. the distinction between voluntarily unemployed and involuntarily unemployed, every state statute is shot full of provisions that deny to involuntarily unemployed people unemployment compensation. For example, everybody after his 26 weeks runs out, or whatever the number of weeks is, who remains involuntarily unemployed, no longer gets unemployment benefits, just to take one example.

Everybody -- there's a waiting period in every state, isn't there?

MR. LORDEON: Certainly.

QUESTION: And during that period he's involuntarily unemployed and doesn't get benefits. All of the exempt employees, the agricultural workers, the domestic workers, and all those people are involuntarily unemployed, and they do not get benefits. So that distinction just does not -- unless you say that all those provisions -- and I've only mentioned a few illustrative examples -- all of those provisions are unconstitutional.

MR. LORDEON: Well, the farm workers and the other people that you mentioned, they are not in the eligible class.

QUESTION: Well, neither are these people.

MR. LORDEON: The steel workers -- yes, they are in the class.

QUESTION: Under the Ohio statute, these people aren't either.

MR. LORDEON: If Mr. Hodory worked for an employer who was a steel manufacturer and didn't receive U.S. Steel --

QUESTION: All right, I will accept --

MR. LORDEON: -- he would have been paid.

QUESTION: We can accept that distinction.

MR. LORDEON: And what I'm saying is that --

QUESTION: But how about the waiting period, or how about the period after 26 weeks? Those are all matters of state law?

MR. LORDEON: They are not eligible at that time, your Honor.

QUESTION: Neither are these people as a matter of state law, that's the point.

MR. LORDEON: Well, going into it, Mr. Hodory is eligible to apply for benefits. He's eligible to go see about it.

QUESTION: Anybody's eligible to apply. I'm eligible to go down and to apply. I hope I'd be turned down very promptly.

MR. LORDEON: Well, there may be a rational basis

for a one week waiting period. That maybe not be long enough. The employer may issue a call back. There may be a rational basis for this. I have no problem with that.

But to exclude people who are involuntarily unemployed, through no fault of their own, once they're in the class where the employer has done something. This statute goes to what the employer has done. This employer is United States Steel, which the Court knows is vertically integrated from the Mesabi Range over in Europe to mines in West Virginia and Kentucky which we're talking about. And this employer was involved in a labor dispute.

Mr. Hodory and his group were not involved. They're innocent bystanders. They were in another union. Some of them probably weren't even in the union yet, working at the plant. They're the UMW, they're not involved. It's miles away. And they're being excluded for something not that they have done, not that's their fault, something that's their employer's fault, something their employer has done. Their employer has called the shot. He's the one that has laid them off. It's a new twist in the law, it's respondeat inferior: respond for something your employer has done, rather than respondeat superior.

QUESTION: Well, in every case, by definition, it's the employer who has terminated the employment, isn't it?

MR. LORDEON: No, no, sir, no your Honor. An

employee can walk away. He can terminate the employment.

QUESTION: Unless -- but he doesn't get it if he's --

MR. LORDEON: Well, if he just walks out the door and says, I'll see you, he doesn't get it either.

QUESTION: No.

MR. LORDEON: So he can call the shots.

QUESTION: Yes, but he doesn't -- then he's not eligible, is he?

MR. LORDEON: No, sir.

QUESTION: So eligibility in every -- almost every case, at least, depends upon the employer's action in terminating the employment?

MR. LORDEON: Yes, sir. And this statute --

QUESTION: So that surely is not a constitutional distinction. Because you've got to have a -- you're pointing out that in this case it was the employer --

MR. LORDEON: Right.

QUESTION: -- who terminated the employment.

MR. LORDEON: My point is that this statute --

QUESTION: My question is, isn't this true in every case?

MR. LORDEON: No, I've answered that, but -- this statute was tailored in Ohio, and they have another one -- the only State like it was North Carolina. If this Court rules in favor of Ohio in this case, you necessarily overrule

51 other jurisdictions, the other states, and District of Columbia and Puerto Rico. They have to be all wrong.

QUESTION: The question is whether this is constitutionally tolerable --

MR. LORDEON: Yes.

QUESTION: -- not whether the other states violate the constitution by not having this same law. The question in this case is, is this statute constitutionally tolerable.

MR. LORDEON: We understand. And our contention --

QUESTION: But you just submitted that if we decide against you in this case, we will invalidate the laws of 49 other states. That's certainly not true. You don't mean that, do you?

MR. LORDEON: By implication, why certainly.

And Ohio's new statute would be overruled. It would be granting benefits.

QUESTION: Well, I just can't let you say that. What you're saying, Mr. Lordeon, is that those statutes would not be constitutionally required. But if we hold this statute is permissible, it has no effect whatsoever on those statutes. The legislature can still have the statute it now has.

MR. LORDEON: Oh, yes it would. Because Ohio -- basically this Ohio amendment is anti-labor legislation. It can't be interpreted as any other way. It is a tax break for

employers.

QUESTION: But are you suggesting that anything that we hold the constitution permits will be adopted because Ohio is basically anti-labor and all its policies are anti-labor, is that what you're saying?

MR. LORDEON: And I use the word, anti-labor, advisedly. It's just a short hand expression.

Yes, and you can see it in this case. You'll notice that in this case the Chamber of Commerce has filed a brief opposing appellees. U.S. Steel has filed a brief opposing appellees. Republic Steel has filed a brief opposing appellees. And they talk about the effect --

QUESTION: Well, you're not suggesting they make the policy for the State of Ohio, are you?

MR. LORDEON: I think the Court is aware that these people are working on this question right now in this, and a lot of other cases.

QUESTION: The AFL-CIO filed a brief and didn't agree with you either?

MR. LORDEON: No, because I think -- the question underlying the surface here is whether or not benefits should be paid to strikers. And that case is -- the Drassenower case which is waiting petition for cert in this Court right now. And that is not our case. We are not dealing with strikers.

And there's lobbying going on in the country in the various legislatures, and in this case there is lobbying. And the issue that comes in here by way of the back door is really brought in by the employers and the Chamber of Commerce and the AFL-CIO, because what they are talking about is the payment of unemployment benefits to strikers by state unemployment compensation funds.

And in New York, where the Drassenower case -- which is awaiting some activity by this Court, involves a situation where the New York statute allows benefits to strikers who are directly participating in the strike at the site after a seven week waiting period.

And the CIO is pushing for Drassenower all over the United States without fault. And the Chamber of Commerce and the steel companies are saying, we don't want to have to pay benefits for people who are striking us directly because, number one, it violates neutrality. We don't want to have to pay the benefits of people who are striking against us. And they're directly involved in that. And they're saying that this would be subsidizing a labor dispute.

As far as Mr. Hodory and his group is concerned, that is not the case for this Court.

QUESTION: Are you finished with the legal protection argument? Because I haven't caught it yet.

MR. LORDEON: I'm sorry.

QUESTION: Your equal protection argument, which is what the court decided. Have you finished discussing that? Because I don't understand your position.

MR. LORDEON: Well, in this particular case, we have a group of employees who were denied benefits under the statute that sets up a class of individuals who are deemed to be disqualified from receiving benefits where their participation in a strike hasn't been shown.

The state, in this case -- there's no real substantial state purpose for the passage of this statute, and it doesn't present any legitimate interests of the state. It furthers no substantial interests of the state.

The arguments put forward in favor of this are, one, that it destroys the fiscal integrity of the state. If you allow these people to collect benefits, it would overwhelm the state's unemployment compensation fund. As it stands now, there's 237 million. In this case we're talking, according to the state, maybe 770,000. That's not going to deplete the fund. And Ohio, by its own amendment of the statute, has recognized this. So the Ohio legislature is not worrying about depleting the fund.

Number two, we talk about neutrality, that somehow this would upset the employer-employee bargaining process whereby if benefits are paid to these steel workers in Ohio, that somehow this will affect the outcome of the mineworkers'

strike in the West Virginia and Tennessee.

And as the District Court shows, there's no evidence in the record to this. It hasn't been shown. And we don't think it can be shown. The employer could care less, at this point.

QUESTION: Your point is, this narrow class is different from all the others who get unemployment. Is that your inequality?

MR. LORDEON: We're saying -- yes, and there's no reason to discriminate against them, because they are alike all the other people. They are involuntarily unemployed through no fault of their own. And if they're involuntarily unemployed, that's arbitrary and capricious. And if it's arbitrary and capricious, it's unconstitutional, and they ought to have the benefits.

QUESTION: What about all of the others that they don't allow to collect unemployment? YOu're not talking about those? You're talking about those who do collect.

MR. LORDEON: We're talking about those who do collect, right. And we're talking about the fault. The group that the Unemployment Compensation Act was passed for in '36. It was passed at a time when there were programs set up -- and it's in the Social Security Act. And this Act must be looked at as a total. There was something in there for people who could no longer work, the old people. There was

something -- Social Security as we know it today, and the law has been amended quite a bit. There's something in there for those involuntarily unemployed. And we have welfare programs. And they're all something different.

And unemployment is regarded as receiving something as dignity, and as Chief Justice -- excuse me, as Justice Rehnquist has pointed out to us, that unemployment is an earned right. And it's not based on need. It's based on an earned right of the employee. And the purpose of giving this money is so that he can maintain his dignity and go out and look for a job. And to provide for a substitute for wages while he is looking for a job.

And we agree with Justice Rehnquist; it's an earned right. And we think anytime anyone is denied unemployment benefits when they're involuntarily unemployed in this case, that is an invidious discrimination. It subverts the whole purpose of the Act. It's just a -- it's just tax relief for employers.

Thank you.

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

[Whereupon, at 11:04 o'clock, a.m., the case in the above-entitled matter was submitted.]