ORIGINAL

In the

Supreme Court of the United States

City Of Madison, Joint School District No. 8, Et Al.,

Petitioners

v.

Wisconsin Employment Relations Commission, Et Al.,

Respondents

No. 75-946

Washington, D. C.
October 12, 1976

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, ET AL., Petitioners	:	
v.	:	No. 75-946
WISCONSIN EMPLOYMENT RELATIONS COMMISSION, ET AL., Respondents	:	

Washington, D. C.

Tuesday, October 12, 1976

The above-entitled matter came on for argument at 1:00 o'clock, p.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 P. STEVENS, Associate Justice

APPEARANCES:

GERALD CHARLES KOPS, ESQ., Deputy City Attorney, Madison, Wisconson, for the Petitioners.

ROBERT C. KELLY, ESQ., Kelly and Haus, 302 East Washington Avenue, Madison, Wisconsin, 53703, for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-946, City of Madison against Wisconsin Employment Relations Commission.

Mr. Kops, you may proceed when you are ready.

ORAL ARGUMENT OF GERALD CHARLES KOPS, ESQ.,

ON BEHALF OF THE PETITIONERS

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

I appear here on behalf of the City of Madison, Joint School District Number 8, and the City of Madison Board of Education, the Appellants in this action.

This case is on appeal from a judgment of the Wisconsin Supreme Court.

The Appellants drew into question the validity of a State statute as applied and interpreted. The Wisconsin Supreme Court upheld the statute after specifically considering the Appellants' constitutional challenge.

Thus, this Court's jurisdiction is invoked under Section -- under Title 28, Section 1257, Subsection 2, of the United States Code.

This case presents the question of whether a State labor statute, as interpreted and applied, may constitutionally mandate that certain individuals be excluded from speaking at a public forum solely on the basis of the content of a proposed

speech.

The facts may be briefly stated as follows. The City of Madison Board of Education is a duly elected public body charged with the possession, care and control of the school affairs of the City of Madison School District. The Board holds regular meetings on the first and third Monday of every month. The Board has determined that a portion of each of its regular meetings will be devoted to the receipt of public comment. This portion of the agenda is denoted in the agenda as "public appearances."

At its regular meeting of December 6, 1971, a number of people were allowed to address the Board. Among those was the president of Madison Teachers, Incorporated, the teacher union.

The president spoke and presented a petition to the Board asking for a quick resolution in the current bargaining talks that were occurring. After the president of the teachers' union spoke, Albert Holmquist, another teacher, was allowed to address the Board.

He spoke about an item that was being negotiated between the Board and MTI and presented the results of a survey of the teaching staff that had been circulated within the schools.

After completion of its regular meeting, the Board retired into executive session and discussed the status of the

then current negotiations with the exclusive bargaining representative of the teachers.

At that executive session, they prepared directions for their negotiators, the Superintendent and adjourned.

The following day a negotiation session occurred. The Assistant Superintendent and Superintendent gave the directions or proposal of the Board to the teachers' representatives and discussion ensued.

Discussion concluded with tentative agreement when the teachers accepted the Board's proposal.

Formal agreement was finally ratified between the parties about a week later, on December 14, 1971.

Approximately one month later, Madison Teachers, Incorporated, filed a complaint with the Wisconsin Employment Relations Commission. It alleged the Board of Education committed an unfair labor practice when it allowed Albert Holmquist to speak at its public meeting.

The Wisconsin Employment Relations Commission concluded that the Board's activity at its public meeting constituted a prohibited labor practice and issued the following order:

"The Board shall immediately cease and desist from permitting employees, other than representatives of Madison Teachers, Incorporated, to appear and speak at meetings of the Board of Education on matters subject to collective bargaining

between it and Madison Teachers, Incorporated."

The Commission decision and order were affirmed by the Circuit Court in Wisconsin. On appeal to the Wisconsin Supreme Court, Justice Day, writing the majority decision and noting specifically that "all the parties involved in this case had conceded that speaking in the form of negotiating or bargaining could be constitutionally restricted to the exclusive representative of the teachers."

QUESTION: In that connection, then, Mr. Kops, the Board here is not asserting any claim of its own, is it? It's simply asserting the rights of Mr. Holmquist?

MR. KOPS: I believe that the Board is able to assert the claim not only on behalf of Mr. Holmquist but also on its own behalf.

QUESTION: Have any of our cases ever sustained any constitutional claim that was asserted by a political subdivision of the State against the State?

MR. KOPS: I am not aware of any decision like that. However, Your Honor, in this particular case, the order itself runs against the members of the Board of Education as a subdivision of the State. I don't know of any other case where that has occurred.

QUESTION: Are you suggesting, then, that usually this problem arises when they are on the plaintiff side?

MR. KOPS: Yes. That's correct.

This case is unusual in that the Board of Education, as the public body, is asserting its right to listen and, indeed, its obligation to listen to not only its employees but other citizens. That was the primary reason for adopting the public appearance section of its own agenda, that it could insure that it would receive or provide --

QUESTION: What Federal right are you asserting?

MR. KOPS: The Federal right of free speech, First Amendment.

QUESTION: Of the School Board?

You are representing the School Board?

MR. KOPS: That's correct.

QUESTION: The School Board Employment is here.

MR. KOPS: That's correct.

QUESTION: Now, what Federal right is the School Board asserting?

MR. KOPS: We are asserting the right of Mr. Holmquist to speak and our right also to receive the information regarding a matter of public policy, from the citizenry.

In that sense, it is the individual right of Mr. Holmquist --

QUESTION: And which amendment is this you are talking about?

MR. KOPS: That's the First Amendment.

QUESTION: The First Amendment, that you have a right

to listen.

MR. KOPS: That's correct.

QUESTION: You have a right to hear.

MR. KOPS: That's correct.

In fact, a public body, under these circumstances, almost has an obligation to listen. They have created a public forum by the creation of a public hearing section --

QUESTION: Who made it a public forum, the State of Wisconsin?

MR. KOPS: No, the Board of Education created the public forum here by setting aside a part of its meeting to receive public comment, setting up a public hearing at each of its regular meetings.

QUESTION: Well, do you question that the State of Wisconsin, through its Legislature, could have said to every Board of Education in the State, "You will have no public hearing section of your meeting"?

MR. KOPS: I think that the Board of Education can close its meetings.

QUESTION: Well, what if the members of the Board wanted to open it but the State Legislature has said, "You will not have this particular type of agenda on your meeting"?

MR. KOPS: I think that the State Legislature could mandate that, but they haven't done that in this case.

QUESTION: But the Supreme Court of Wisconsin has, in

effect, construed the Wisconsin Labor Relations statute to that effect in this case, hasn't it?

MR. KOPS: Well, yes, but without real, as we suggest, without real substance or backing to the rationale of their decision.

QUESTION: As I understand it, your claim is that assuming that the highest court of Wisconsin has, indeed, construed the law in that way, they cannot construe their own State law in conflict with the Federal constitution.

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

QUESTION: Surely, the Board is subject to the limitations of the First Amendment.

MR. KOPS: They are subject to the limitations in the First Amendment?

QUESTION: They are bound --

MR. KOPS: Yes, of course, they are; as public officials they take an oath.

QUESTION: Does your opposition raise the question of standing here?

MR. KOPS: They raised the question of standing when we sought jurisdiction of this Court. However, this Court has not noted probable jurisdiction and did not reserve the issue of standing for consideration.

QUESTION: Is it argued here now, do you know?

MR. KOPS: It is not argued in the briefs of the

Respondent.

On appeal, the Wisconsin Supreme Court Justice Day, writing the majority opinion, noted that the parties had conceded that negotiation or bargaining for a labor agreement could be constitutionally restricted to the majority representative of the teachers, and indicated that the basic question was whether the activities of the Board at its public meeting constituted bargaining with a minority group of employees.

QUESTION: Mr. Kops, could I ask you one more question?

Suppose the Board had refused permission to Mr. Holmquist to address it. Would it have been subject to a 1983 claim?

MR. KOPS: That is one of the suggestions, I think, that can be drawn and we have drawn that, or concluded that, on the basis of your decision in Wood v. Strickland, that that possibility does arise, although these are not exact facts. In that case, the Court suggested that if the Board of Education knowingly violated the constitutional rights of its students, it may be subject to a personal liability action.

QUESTION: You don't think that Moore v. Alameda County would cut across and against that?

MR. KOPS: I am not certain of that, Your Honor.

QUESTION: There is no question but that the Board can regulate the time, manner and place of presentation of these

things. And if the Board can do it, there is no question but the State Legislature can tell the Board that it has to do it; is there?

MR. KOPS: This is not a regulation of time, place and manner, Your Honor. This is a total and complete prohibition of the exercise of a particular forum on a selective basis.

QUESTION: Well, so your answer, then, to Mr. Justice Blackmun's question is that on these particular facts the Board might have been subject to a 1983 action, given the fact that this agenda had been set aside for public discussion?

MR. KOPS: Yes. Not just this agenda, though. Each and every Board meeting. This was part of its regular meeting, sir. They were bi-month -- or twice monthly.

QUESTION: Twice a month.

QUESTION: But would you think the Board would be subject to a 1983 -- to a claim of constitutional deprivation if it said we are simply not going to have this as a part of the meeting in the future?

QUESTION: No.

MR. KOPS: But let me suggest in response to that, sir, that in those circumstances it would like -- it would be something similar to this: The example of somebody shouting "fire" in the theater and then passing a restriction closing the theater, instead of punishing the conduct. In other words,

I am suggesting that if the public forum is going to be closed, it must be closed to everybody.

The Wisconsin Supreme Court has not said that. It is only closed to a particular group, based on content of what they might say.

QUESTION: The School Board has two meetings, one is public and one is private --

MR. KOPS: No.

QUESTION: -- and in this case, they had a public meeting and they heard both sides on this question involving employment conditions.

MR. KOPS: That's correct.

QUESTION: And then held a private meeting from which everybody was barred.

MR. KOPS: A private meeting of which nobody was a part.

QUESTION: I said everybody was barred.

MR. KOPS: Barred at the executive session. The following day they held a negotiation session. Representatives of the teachers and the Board held --

QUESTION: I thought you said that they left and went into executive session this same night.

MR. KOPS: That's correct. They did, sir.

QUESTION: Laid down the ground rules. They barred them from that meeting, didn't they?

MR. KOPS: That's correct. They barred everyone from that meeting.

QUESTION: So they could have barred them from the other one.

MR. KOPS: I am not saying that they could not have, sir.

QUESTION: You mean to say that the open meeting wasn't a negotiating meeting?

MR. KOPS: The open meeting was not a negotiation session.

QUESTION: Well, why did they hear from both sides?

MR. KOPS: Your Honor, they heard from a number of people. They heard from about six or seven people that evening who talked to them on public affairs. This wasn't just a matter that was an open meeting for the purpose of --

QUESTION: Was this meeting called in part for negotiations.

MR. KOPS: Absolutely not, sir. It was a regular, publicly held, Board meeting.

QUESTION: How did it happen that the president of the union was there?

MR. KOPS: The president of the union was there because of the exigency -- exigencies of the current bargaining situation. There were about three or four hundred other teachers at the meeting, too.

QUESTION: They were in there for negotiation and bargaining.

MR. KOPS: No, they were not there to bargain.

QUESTION: Why were they interested in bargaining? You just said there was a bargaining atmosphere; wasn't that your word?

MR. KOPS: No, I didn't say there was a bargaining atmosphere at that meeting.

QUESTION: There was a bargaining what?

MR. KOPS: What I am -- at the -- The teachers and the Board had been negotiating since about January of 1971. This was December and a contract had not been reached. An impasse in these private bargaining sessions had occurred.

These private bargaining sessions, or where the Board sits down with the teachers' representatives, was not this particular meeting. This particular meeting was a regular Board meeting; and at each meeting, whether it was in 1970 or '71, there was a part of the meeting set aside for public appearances.

QUESTION: Was it part of the meeting -- in any other public meeting, was the contract discussed?

MR. KOPS: I do not recall if prior to that year anybody discussed --

QUESTION: The interesting thing to me is that you say this is not negotiating, but you admit that right immediately

after the public meeting there was an executive meeting, followed the next day by a negotiating meeting.

MR. KOPS: That's correct.

QUESTION: And the public meeting had no connection with it at all.

MR. KOPS: No, it didn't. In fact, the bargaining session with the teachers was scheduled before the public meeting. It was a regularly scheduled bargaining session that was to occur the following day with the representatives of the teachers.

I think the public meeting and the executive session and then immediately following a private negotiation session with the exclusive representatives indicates the difference between the forums we had.

At the public meeting, everybody was allowed to speak and the Board was allowed to listen and did, in fact, in this case merely listen.

The following day, at the negotiation session, the Board did not allow Mr. Holmquist there. The teachers were there with Board representatives and were dealing with the matter -- trying to get to an agreement on collective bargaining, on a collective bargaining contract.

So, there is a difference in the forums.

What the State Supreme Court has said is that in a public regular meeting a Board of Education may only selectively

listen to certain people, solely based on content, not even based on their reaction because they had no reaction whatsoever during the public appearance portion of Mr. Holmquist's talk.

QUESTION: Counsel, don't you concede that if the talk constitutes bargaining or negotiation that it may be prohibited?

MR. KOPS: Yes, I do.

QUESTION: Wouldn't that be a prohibition based on the content of what is said?

MR. KOPS: Yes, but not a unilateral discussion as the chairman --

QUESTION: But if it were, you would then agree that some regulation of speech, based on its content, is permissible?

MR. KOPS: That's correct. Regulation in a negotiating setting.

But what occured here and what's so extremely important is that an individual provided information to a public body, and simply by listening he has been found to have negotiated with that individual, doing nothing more.

I think --

QUESTION: Could Mr. Holmquist have done the same thing by letter to the Board?

MR. KOPS: Absolutely. That was one of the strange things about the memorandum that accompanied the Wisconsin Employment Relations Commission decision suggesting that once

the Board found out that Mr. Holmquist was going to talk on a matter subject to collective bargaining, it required him to submit that matter to them in writing.

Now, it seems to me that if you receive information in writing or if you receive it face to face, if you take no other action, all you are doing is receiving information and listening, not engaging in prohibited bargaining conduct.

QUESTION: Did the Labor Board of Wisconsin prohibit you from reading it, From reading from a minority group of a union?

MR. KOPS: No. That is one of the strange things. They do not prevent us from receiving --

QUESTION: You say do not. I said "could not." Couldn't they?

MR. KOPS: I don't see how they could practically do it, sir.

QUESTION: You don't see how the State could stop you from listening to two sides of the labor union dispute when you have one union recognized?

MR. KOPS: Well, this is not really a labor union dispute. I think that Mr. Holmquist could have printed exactly what he said in the newspaper and for the Board to have read that --

QUESTION: I thought you said we were not discussing his right. We were discussing your right?

MR. KOPS: No, we are discussing his right and our ability to raise that right.

Mr. Holmquist's right of free speech --

QUESTION: I have never understood how an employer can raise the right of an employee.

MR. KOPS: Well, in this particular case --

QUESTION: You are not talking about employee and employer.

MR. KOPS: Yes, I am. And the rights of the employee are completely intertwined with the obligations of the employer at the public meeting, because it is a public body.

QUESTION: I should think that the rights of a minority union would be possibly tied in with the employer.

MR. KOPS: Yes, and it's our position that the --

QUESTION: But not the union, itself.

MR. KOPS: Perhaps I didn't understand your question, Justice Marshall.

QUESTION: I am worried about an employer being interested in where the minority position is in the negotiation with a union.

MR. KOPS: A public employer, as a public body, would be always interested in anything that would -- any information that would help him develop his position as a public body in negotiations with the exclusive representative of its employees.

Here, he merely received information and that's all.

Private sector labor relations indicates that an employer may receive information from its employees without violating the Labor Relations Act. In fact, the statutes of Wisconsin and the United States regarding labor relations specifically allow employees to present grievances to their employers and preserve that right.

That kind of communication preserved by statute certainly cannot be forbidden from a public employer to receive at a public meeting, during a portion of that meeting devoted to public hearing.

QUESTION: But it is being denied by the State, your State.

MR. KOPS: Well, the State law, as interpreted and applied, runs afoul of the First Amendment of this Constitution, and I think of the United States Constitution.

QUESTION: If I understand the dissenting opinion in the Wisconsin Supreme Court correctly, its main thrust is that the action of the majority, that is, the action of the law of Wisconsin, denies the right of the School Board to hear all points of view, that that's the thrust of the First Amendment claim.

MR. KOPS: Yes, that is one of the arguments we put forward.

QUESTION: But you are also relying on your ability to assert the third party claim of Mr. Holmquist, I take it.

MR. KOPS: That's correct.

QUESTION: And he was not named as the respondent in the Employment Commission case, was he?

MR. KOPS: He was not named as a respondent.

QUESTION: So if anybody was to raise his rights in this proceeding, I take it it would have to be your client.

MR. KOPS: Absolutely.

QUESTION: So far as this question goes, your case is quite like Kliendienst v. Mandel, is it not? Are you familiar with that case?

MR. KOPS: No, I don't --

QUESTION: Never mind.

MR. KOPS: I believe that this case is probably better in line with this Court's decisions in Mosely and Grayned and Tinker.

QUESTION: So far as the substantive constitutional issue.

MR. KOPS: Yes.

Because it was my feeling that the Wisconsin Supreme Court decision, in this case, was wrapped up in speech, in the speech of an employee at a public hearing of a public body, I felt it would be essential to tell this -- or read to the Court exactly what the employee said. It only took about two and a half minutes. I don't think it is important now, but a review of those remarks, I submit, indicates that Mr. Holmquist,

when he spoke to the Board, was speaking as a citizen and in a citizenship capacity, as opposed to an employee's capacity. He was providing information to both parties regarding the negotiation process, suggesting that there was an impasse that had occurred and a way to provide a catalyst to get over that particular impasse.

The peculiar and obnoxious part of the definition that the Wisconsin Supreme Court applies to negotiation is the premise that you negotiate with somebody when you listen to somebody.

This definition, we submit in our brief, has been rejected as a proper definition in private sector labor relations. We cited a number of cases where the private employers have, indeed, listened or received petitions from their employees.

It is also contrary to the statutory rights in both Wisconsin and Federal labor statutes which preserve the right of employees to present grievances.

Finally, the cases cited by the Appellee, Medo and the Wisconsin Supreme Court, Medo and Emporium, these cases suggest that the character of the underlying conduct in order to find negotiation is more than merely listening.

The definition, as I suggested, of negotiation as meaning merely listening is particularly obnoxious in the public sector because what it does is it forecloses, in this case a

public hearing to a particular individual, simply on the basis of the content of the speech he wishes to make, nothing more. Just the speech.

This undercuts the core value of the First Amendment to free interchange, the unfettered interchange of ideas, ideas only.

If, indeed, the Wisconsin Supreme Court was to appropriately define negotiation, we wouldn't run into the constitutional collision we have in this case.

I think this Court has been emphatic in relationship to the kinds of rights that individuals have in public forum. This was a classic public forum, a school board meeting, an open public hearing at a school board meeting.

In this classic public forum, certainly speech should not be selectively, on the basis of content and the status -- supposed status of an individual -- be abridged.

We submit that, in conclusion, that the definition of negotiation adopted by the Wisconsin Supreme Court must be rejected as inherently unconstitutional, since it does, indeed, undercut our commitment to free and open debate on public questions, since it rejects this Court's holding that teachers have certain constitutional rights and public employers must be responsive to these rights, and finally because it prohibits expression in a public forum, in the absence of a substantive, much less a weighty reason, as required in public

forum matters.

QUESTION: If we should hold, Mr. Kops, that you have no standing -- the Board has no standing to assert the rights of Holmquist, do you then fall back on the First Amendment right of members of the School Board to hear anyone they want to hear?

MR. KOPS: Yes, Your Honor.

Inasmuch as, as public officials, they are charged and have obligated themselves in taking an oath to respect and obligate themselves to implementing the rights of the First Amendment.

I would like to reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Mr. Kelly.

ORAL ARGUMENT OF ROBERT C. KELLY, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

This case involves a concept of exclusivity in the public sector of our economy. That concept lies at the core of labor relations in the private sector of the economy and that concept, simply stated, is the right of the majority of the employees in appropriate bargaining unit to select an exclusive representative to deal with their employer as concerns matters of wages, hours and working conditions, not only for the majority but for the entire collective bargaining unit.

QUESTION: Suppose Holmquist had not been a teacher,

just another taxpayer, a steamfitter or a carpenter, or whatever, and he had walked into the meeting, having heard that there was a meeting, and said all of the same things that Holmquist said.

Do you think the State of Wisconsin can forbid the Board of Education to hear him?

MR. KELLY: No, sir. I don't.

Let me say that was not the circumstance here, by a long shot. Mr. Holmquist appeared and announced in specific words when he did appear that he did not appear as a citizen, indeed, that he did not appear as a private employee or an employee of the Board, but that he's employed as a representative of an informal committee of seventy-two teachers in forty-nine schools. A group of teachers, sir, he had organized into an informal minority called "Ecology." He appeared as the representative and agent of a dissident minority union.

QUESTION: Would there be a constitutional difference between a minority of seventy-two and a minority of one? Is that your point?

MR. KELLY: Well, if he was a dissident employee speaking as a dissident employee or a citizen, sir, I assume thi case would not be here. The fact is that if we approach this from the totality of Mr. Holmquist's conduct, he for one month ahead of this particular School Board meeting, organized a minority --

QUESTION: It is critical to your position that he was speaking for persons other than himself.

MR. KELLY: Yes, sir.

QUESTION: You would concede that if he was speaking just for himself that he had a constitutional right to do what he did.

MR. KELLY: That's right, sir.

QUESTION: You also agree that the Board is the proper party to raise Holmquist's constitutional rights.

MR. KELLY: They may do that, sir. We raised the question of the Board's standing in their application to this Court for jurisdiction. And when this Court took jurisdiction, frankly, we didn't proceed with that any further.

QUESTION: Well, with concession -- even if you win, we have to limit the order, don't we?

MR. KELLY: Yes, sir.

Let me again speak to that.

QUESTION: That order, to me, is unbelievable.

MR. KELLY: That's right, sir.

Let me say that the complaint, our complaint before the Wisconsin Employment Relations Commission appears in the record. And the relief we sought in that complaint was as follows:

"That an order issue requiring the Respondents to cease and desist from negotiating now and in the future as

concerns questions of wages, hours and conditions of employment with individual employees or groups of employees."

It is our contention, sir, if this Court finds that Holmquist and the Board were negotiating in a prohibited sense that the case should be remanded for a proper order based on negotiating.

QUESTION: I have great difficulty in finding negotiation in a one-sided statement of two and a half minutes.

MR. KELLY: All right, sir.

Let me say what happened --

QUESTION: Do you see my problem?

MR. KELLY: Yes, sir.

What happened here was the Legislature of Wisconsin saw fit in November, sir, to permit a fair share amendment, or a fair share proposal in collective bargaining agreements.

At that time, Madison teachers submitted its third proposal at collective bargaining. There had been eleven long months of collective bargaining, sir. At that same time, was the same time that Mr. Holmquist organized his campaign to dispoil or mar the collective bargaining position of the majority that was to incorporate a collective bargaining agreement. He prepared some letters. He circulated those letters to all of the teachers in Madison public schools.

He prepared anti-fair share and anti-union literature. He requested from the school district the permission to circulate

that material to the bargaining unit teachers through the school mail, even though the collective bargaining agreement then in existence between the Board and the schools prohibited that.

He asked for and received permission to circulate his anti-fair share material in the schools without regard to working or non-working areas. He furnished the administration or the principals of those buildings copies of his material. They were aware of the material that he had.

As a matter of fact, officers of the union spoke to the Assistant Superintendent of the Schools and asked that they not cooperate in the anti-fair share compaign.

QUESTION: It still brings me to the point of what in his two and a half minutes was different from what he had been saying all along?

MR. KELLY: Well, his position was that he wanted fair share deferred for another year and that's what he asked the Board to do and that's what they did, sir. They went from, immediately from --

QUESTION: Hadn't the Board been told that was his position?

MR. KELLY: Well, let me say --

QUESTION: Didn't they read this material?

MR. KELLY: No, he stated it to them, sir. In a very charged atmosphere --

QUESTION: You said he wanted to circulate it, and all.

MR. KELLY: I don't know who read or -- I know that it was given to principals, sir. During this month period, building up, I know that --

QUESTION: Well, you couldn't stop that, could you?

MR. KELLY: No. We asked that it not --

QUESTION: All you wanted to do was stop his two and a half minute talk.

MR. KELLY: Well, we asked that he not be permitted to use the school mails -- the granting of -- which had been done exclusively to the majority union.

QUESTION: That was in this case?

MR. KELLY: Yes, sir. That was the --

QUESTION: Well, you didn't get any relief on that and you didn't appeal, so --

MR. KELLY: We didn't ask relief. That was part of the totality of conduct that the Board --

QUESTION: I am still having trouble with this two and a half minutes being negotiating.

MR. KELLY: Well, I think, sir, that listening -- negotiations is, I suppose, synonymous --

QUESTION: Do you say the School Board can't listen to it?

MR. KELLY: Well, not to the extent that they allow themselves to be influenced to change their bargaining position, sir.

QUESTION: If a stranger had made the same remarks that Holmquist did, a Madison taxpayer said, "I just don't believe in this fair share proposition."

Now, you concede the Board could have changed its posture and reliance on that sort of --

MR. KELLY: Yes, sir. I doubt they would, sir.

What happened here was we had --

QUESTION: What they would have done isn't the issue. The question of Justice Rehnquist is: Could this taxpayer, as I tried to discuss before, just any other person come in and say these things and could any law of Wisconsin stop that utterance and stop the right of the Board to listen to it?

MR. KELLY: No, sir. They could not.

If the Board heard that at a public meeting and they were interested in that they could hear it.

QUESTION: What is the Board complaining about?

Are they not complaining that they have been forbidden to hear?

MR. KELLY: We take the position, sir, that they did more than hear, that they negotiated.

QUESTION: Mr. Kelly, does not paragraph 1 of the order prohibit more than negotiation?

MR. KELLY: The order of the Commission does, sir, and that's unfortunate.

QUESTION: Do you concede it is too broad to be constitutional, then?

MR. KELLY: Yes, sir, I do. And that's why we asked that and I am asking now that if this Court finds that there was, indeed, negotiation and that Holmquist's conduct, therefore, was negotiating and was not entitled to full First Amendment protection, that the remedy be to remand the case with instructions to enter an order consistent, for example, with what we asked for in our complaint, that the Board not negotiate with the minority, sir.

QUESTION: But in your brief you ask that the judgment of the Wisconsin Supreme Court be affirmed.

You are retracting from that.

MR. KELLY: Yes, sir.

To that extent, if the Court would find that there was, indeed, bargaining, that that be the remedy, sir.

QUESTION: Well, does your position now mean that terms such as "bargaining" and "negotiation" become issues of Federal constitutional law? That this Court must find that either there was or there was not bargaining?

MR. KELLY: Yes, sir. It is my understanding that the exclusivity doctrine, at least in the negotiating and bargaining areas, as I understand it, sir.

QUESTION: Mr. Kelly, maybe I don't correctly understand what your Supreme Court held, but as I read the opinion of

majority, the majority found that there was, indeed, an invasion of First Amendment rights here. --

MR. KELLY: Yes, sir.

QUESTION: -- They found there was but they said that this order was justified -- perhaps, it is overbroad, as you now concede -- on the ground under the clear and present danger test. There was involved a State interest, namely, that bargaining should be limited to the majority representative.

MR. KELLY: Yes, sir.

QUESTION: And to that extent, this order was justified to prevent that invasion of the State interest.

MR. KELLY: That's right, sir.

QUESTION: Wasn't that it?

MR. KELLY: Yes, sir.

QUESTION: Applying the clear and present danger test.

MR. KELLY: Yes, sir. Dennis v. United States test.

QUESTION: Now, if an ordinary taxpayer walked in there and said, "I don't like," as Mr. Justice Rehnquist was suggesting to you, "I don't like these kinds of contracts and I am speaking for myself and 142 or 232 other citizens who signed this petition and we are just telling you, the Board, you shouldn't make this kind of a contract."

Do you regard that as negotiating?

MR. KELLY: No, sir. I do regard it as negotiating, sir, when a minority is organized just as any minority union

would be, with the purpose of upsetting or disturbing the majority position, which they successfully did here.

As I have said, or would say, what happened here was Mr. Holmquist asked -- Let me say this, that after eleven months of negotiating here, sir, there were thirteen issues left unresolved. Just eleven hard months of negotiating. One of the issues, a major issue, was fair share, and a second major issue was the binding arbitration of teacher dismissals and non-renewals. They were both key issues.

And the Board had been firm on both of those for eleven months. The Board at one time had unofficially indicated that they would consider granting fair share, but that they would in no way grant binding arbitration.

Mr. Holmquist specifically asked, in his remarks, that the fair share be deferred for a year. Immediately after hearing him in public session and asking to receive his petitions, the Board went into executive session. And in that executive session, they discussed ongoing negotiations with the Madison teachers, that which had been going on for eleven months.

And during that discussion they passed a resolution. And that resolution was that we will now grant, for the first time, binding arbitration, but we will not grant fair share.

It is our position that listening, in that extent, allowing themselves to be influenced by the minority, those

people interested in wages, hours and conditions in that school district, was, indeed, bargaining.

QUESTION: What if the Wisconsin Legislature, instead of passing a little NLRB in effect for public workers had passed a law saying that we think stability in labor relations in the public sector will best be produced by having absolutely no union and no school board is free to even discuss the matter of a union with any of its employees.

And Mr. Holmquist, or his counterpart, had gotten up at a meeting like this and said, "I think we ought to have a union in this school." And then action was taken against him for making this sort of a speech.

Do you think the Supreme Court of Wisconsin would be upheld here if it said that, true, there was an infringement on his First Amendment right, but the public policy of this State is that there aren't going to be any unions, his speech had a tendency or was in imminent danger of producing a counter-valence of that policy and, therefore, we will sanction his punishment.

MR. KELLY: No, sir.

I guess what I see in this case and have seen, sir, is that --

QUESTION: You say, "No, sir."

Actually the issue before us is whether this was the proper case for the application of the clear and present danger

test, isn't it?

MR. KELLY: That's right, sir.

QUESTION: That's all it is.

MR. KELLY: That is right, sir.

QUESTION: Well, isn't that the issue that would be presented by the hypothetical my brother Rehnquist, has just posed to you?

MR. KELLY: Not as I understood him. Maybe I didn't understand him.

QUESTION: I intended the way Mr. Justice Brennan understood it.

Supposing the clear and present danger to stability of labor relations in Mr. Holmquist's remarks arose not from the fact that he was negating the idea of only majority representative bargaining, but that he was coming at it from quite a different point of view. He was urging unions where the State had said there will be no unions.

Do you think that kind of a decision, suppressing him for that reason, could be upheld?

MR. KELLY: In the balance, I don't think that that would be a violation of the clear and present danger test. What I feel -- In other words, what I am saying is, sir, that exclusivity has recognized the right of the majority and the reason that is permitted, an invasion of free speech, at all, is to prevent the dangers of relative chaos in labor relations.

It is my feeling, and it is our position, that when there is a majority union present in this kind of circumstance and a minority union or a minority group is allowed to organize and to work against its position, and undermine its position, that would lead to chaos in the labor relations sector, sir.

QUESTION: Mr. Kelly, suppose that Mr. Holmquist, rather than appearing before the Board, had published an advertisement in the morning paper the same day of the Board meeting, the advertisement being specifically addressed to the Board and consisting of precisely what was said in the two and a half minute statement to the Board. Could your Commission have moved against Mr. Holmquist? Could it have enjoined further advertising? Would this be analogous to the statement before the Board itself?

MR. KELLY: No, sir. There, again, I think it is in the balance. The fact is that --

QUESTION: No, sir, what?

MR. KELLY: No, sir, they could not move against Mr. Holmquist.

QUESTION: In other words, he could advertise all he wanted in the newspaper?

MR. KELLY: Yes, sir.

QUESTION: Even on behalf of a group of minority teachers?

MR. KELLY: That is correct, sir.

QUESTION: Mr. Kelly, I have some difficulty understanding what we are saying when we talk about clear and present danger.

Speech may be prohibited if there is a clear and present danger of what? Is it clear and present danger that the Board might not accept the union's demands, or is it clear and present danger that the union may no longer be in a position to speak for the majority?

MR. KELLY: That's one, sir. The other thing I could see, for instance --

QUESTION: Well, which is it here? I don't want a lot of examples. What is your position here?

Curtailment of speech is justified because there was a clear and present danger of something.

MR. KELLY: Of chaos in the labor relations in Madison, Wisconsin, because in the collective bargaining process the majority union was not going to obtain a collective bargaining agreement.

QUESTION: By chaos, you mean the Board would not accept the union's demand.

MR. KELLY: Yes, sir, and that might lead to, as it has in some --

QUESTION: So any time that speech might persuade the Board not to accept a demand, that could be prohibited?

MR. KELLY: Well, sir, I think it's -- not from the citizenry, but from a dissident union, a dissident union group, yes, sir.

QUESTION: Well, what difference does it make if it is a dissident union? If any individual creates a clear and present danger of the evil that you describe, why can't the speech be prohibited?

MR. KELLY: Well, I expect, sir, that in a practical sense, it is the minority union that creates the clear and present danger rather than some individual citizen. It is the minority union working within the majority that has the clout to do that, sir.

QUESTION: By clout -- No, you simply mean that they may persuade the Board not to go along with the majority's request.

MR. KELLY: Whatever that causes by undermining the relationship that that minority has with the majority and the inability of -- to have peaceful labor relations in that community, sir.

QUESTION: It seems to me you are saying that any argument can be prohibited if it is apt to be successful.

MR. KELLY: No, sir, I am not. I guess I am saying that I feel that the conduct of these folks in their totality was bargaining and that collective bargaining is restricted to the majority representative.

QUESTION: You say "these people." You only have the conduct of one man.

MR. KELLY: Well, as a representative of --

QUESTION: He said he was. There is no proof in his record that he represented anybody.

MR. KELLY: Well, he filed a petition or --

QUESTION: Said he did.

MR. KELLY: He proposed to file a petition that night, that he had 417 signatures.

QUESTION: It might have just been nonsense.

QUESTION: As a matter of law, he could not speak for these people if there was another exclusive bargaining representative. Isn't that perfectly clear?

He could not bind anyone in the union.

MR. KELLY: No, sir, he couldn't bind them but he could spoil a union's position, any more than in the private sector of a union working with the employer can undermine and upset the union's collective bargaining position.

QUESTION: He can do anything but speak at that Board meeting.

MR. KELLY: I beg your pardon, sir.

QUESTION: He can do anything except speak at the Board meeting.

MR. KELLY: No, sir. I think he can do anything but collectively bargain, in the labor relations sense, with that

Board.

QUESTION: But the sanction runs against the employer, doesn't it? It doesn't run against him.

MR. KELLY: Yes. And that's --

QUESTION: That's the reason all these hypothetical questions about what could you do to Mr. Holmquist --

MR. KELLY: Our position was, sir, that the Board in listening to him and in aiding and abetting him was collective bargaining with the minority.

QUESTION: If you want to redraw the Board's order, how would you redraw it?

MR. KELLY: Pretty much in the terms that we originally asked for it, that the Board cease negotiating with the minority union, sir.

QUESTION: I have great difficulty in finding that they negotiated. I still -- let me put it this way -- I am not saying -- I learned long ago not to say it never happened -- but I have never heard of a negotiating session of two and a half minutes.

MR. KELLY: No, sir.

QUESTION: It takes that long to say how do you do.

(laughter)

MR. KELLY: Negotiating --

QUESTION: Well, that's what you called negotiating.

MR. KELLY: No, sir. I am calling the totality of

the conduct negotiating.

I think negotiating is a very sophisticated and very subtle process that is influenced by many things, by what people see, by what they hear as well as by what they say, indeed by body language. I take the position that negotiating can take place not only at the collective bargaining table but that it can take place in the hall or on the street, wherever people see each other, and particularly in negotiations as I know them, in Madison, Wisconsin, that take a year to achieve a collective bargaining agreement, sir.

QUESTION: Well, then, you say the School Board can negotiate every place except the public meeting. That's where I get all confused.

MR. KELLY: No, sir. I say they can't negotiate with the minority union at any place or time.

QUESTION: Well, they can read the newspaper.

MR. KELLY: I don't think putting that in the newspaper is negotiating, sir.

QUESTION: What is negotiating? That's what I am trying to say. I got the two and a half minutes. Now, what other negotiating did the School Board do with this man?

MR. KELLY: The School Board, through its agent, aided and abetted him to pass his material around to the bargaining unit teachers through the teachers' mail boxes.

QUESTION: That could have been stopped.

MR. KELLY: Well, it was all part of --

QUESTION: Did anybody ask that that be stopped?

MR. KELLY: Yes, sir. They went and spoke to Mr. Mathews, the --

QUESTION: Well, did anybody take any proceeding in any body to stop him?

MR. KELLY: No, sir, they did not.

QUESTION: The only proceeding was to stop him from making this two and a half minute speech.

And that, I submit, is all that is before us.

MR. KELLY: Well, I --

QUESTION: Do you agree?

MR. KELLY: No, sir, I feel that what's before you is whether the conduct of the parties, the Board, in its totality, was collective bargaining. If it was, then we are entitled to have it limited to the majority representative. If it was not, sir, then it was First Amendment area and there could be an order prohibiting it or not an order prohibiting it.

MR. CHIEF JUSTICE BURGER: Mr. Kops, you have four minutes left.

REBUTTAL ORAL ARGUMENT OF GERALD CHARLES KOPS, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. KOPS: Mr. Chief Justice, I just have about three points.

One, I believe Mr. Justice Marshall is correct. The totality of the conduct is not before this Court. What is before this Court is the Wisconsin Supreme Court's definition of negotiation. That definition of negotiation creates an unconstitutional intrusion, in our view, with the First Amendment rights. And, in that sense, a mere remand of the order, without instructions that such a definition creates that constitutional intrusion, would be unfortunate in the Appellant's view.

Mr. Kelly, apparently, has retreated from the position that the order ought to be affirmed. Let me suggest that the totality of the bargaining conduct, the totality of the conduct that Mr. Kelly suggests is bargaining cannot be sustained. What occurred was a circulation of a petition in non-working areas on non-working times in the school. This was found by Justice Day in the opinion.

If we take a look at your decision in the NRLB v. Magnavox, this Court has recognized that communication between employees at the work place in non-working areas in non-working times is something that is permissible under Federal labor statutes. That communication is important in order to prevent intrenchment of the majority representative. So that aspect of the totality of the conduct is inappropriate for consideration here.

QUESTION: But the fact that it is permissible under

Federal labor statutes doesn't mean that the State of Wisconsin has to allow it under State labor statutes, does it?

MR. KOPS: That's correct, but to suggest that to allow it was before the Court, or that issue was before the Court, is not correct. The only issue before the Wisconsin Supreme Court was the issue of negotiation.

The other way, supposedly, that the Board aided and abetted Mr. Holmquist, was to allow the use of mailboxes. I suggest the Board of --

QUESTION: May I ask you a question?

Even if you are all wrong about whether this was bargaining or not -- or put it another way -- even if we are concluded by that holding of your Supreme Court that this constitutes bargaining, isn't there still a question here whether the First Amendment would permit that kind of prohibition at a public meeting?

MR. KOPS: Yes. And I think --

QUESTION: Are you arguing that, too?

MR. KOPS: Yes, we are arguing that and I didn't get a chance to devote any time to it in the oral argument but I believe we adequately cover it in our brief, or attempt to.

One final word.

Mr. Kelly and myself have been accorded by this Court an opportunity for now almost an hour to engage in colloquy and question and answers and yet I don't believe there is any member

of this Court or anyone in the courtroom who would believe that what Mr. Kelly and I were doing was negotiating with this Court with regard to the order or its decision.

That's essentially what Mr. Holmquist did. He talked to the Board of Education and nothing more.

Thank you.

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

(Whereupon, at 1:54 o'clock, p.m., the case in the above-entitled matter was submitted.)