ORIGINAL

In the

Supreme Court of the United States

BRUCE BABBITT, Governor of the State of Arizona, et al., Appellants,	)	
v.	)	No. 78-225
UNITED FARM WORKERS NATIONAL UNION, on behalf of itself and its members, et al., Appellees.	)	

Washington, D. C.
February 21, 1979

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Washington, D. C.,

Wednesday, February 21, 1979.

The above-entitled matter came on for argument at 1:59 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

REX E. LEE, ESQ., Special Assistant Attorney General of Arizona, 2840 Iroquois Drive, Provo, Utah 84601; on behalf of the Appellants.

JEROME COHEN, ESQ., Post Office Box 1049, Salinas, California 93902; on behalf of the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-225, Babbitt against United Farm Workers.

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

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LEE: Thank you, Mr. Chief Justice, and may it please the Court:

This is an appeal from a judgment of the three-judge district court holding unconstitutional in its entirety Arizona's Agricultural Employment Relations Act.

The invalidated statute is patterned after the National Labor Relations Act. That is, it guarantees employee organizational rights, provides for collective bargaining, a secret ballot election process, it prohibits some twenty separate unfair labor practices, establishes an Agricultural Labor Relations Board, gives that Board authority to adopt rules and regulations, and generally to enforce and implement the policies of the Act.

At the time that this case went to trial, the parties stipulated to twenty cases in which the Act had been applied in some way. Eight of those involved secondary boycotts. Six were election proceedings, and six were proceedings against employers because of unfair labor practices, employer unfair labor practices as defined by the

Act.

The focus at the trial was not on these instances of enforcement, for reasons that I'll develop in just about two minutes. Rather, the great bulk of the evidence at the trial concentrated on expert opinion concerning how the Act would probably be interpreted, and how it would probably operate. The principal issue at the trial was how the election provisions would be applied, and how long it would take to hold an election under the Act, in the view of these experts.

QUESTION: Didn't it go beyond that? Didn't it hypothesize the number of probable, likely situations?

MR. LEE: Yes. And how the Act would be interpreted, given those situations.

QUESTION: First hypothetical facts and then hypothetical, or assumptions about what the Act meant.

QUESTION: Yes.

MR. LEE: Precisely, Mr. Chief Justice. It was built on two hypotheses, one was factual and one was legal. Neither of which, we contend, was within the purview of the district court.

Armed with that kind of a record, the court specifically found constitutionally defective five specific provisions of the Act; parts of four sections out of some sixteen that the Act consists of, including one out of twenty unfair labor practices. And from this determination that five

provisions were unconstitutional, the district court invalidated, struck down the entire statute.

The points of disagreement between the parties are -- in this case are far more numerous than this Court is accustomed to dealing with. Indeed, there isn't even agreement between the parties as to what the number of questions presented before this Court is.

But careful analysis of those briefs reveals that there are at least six propositions advanced by the appellants concerning which the appellees have either not joined issue at all, or the joinder, if attempted, hasn't really meshed; so that the point is effectively undisputed. And fortunately those six propositions, undisputed and undisputable, are dispositive of the case before this Court.

As a consequence, I believe that the most helpful way that I can use my scarce oral argument time of this afternoon is to --

QUESTION: Well, Mr. Lee, --

MR. LEE: Yes?

QUESTION: -- you noticed how prompt the prior counsel were.

MR. LEE: Oh, I noticed that, Mr. Justice White, and I realize there's no constitutional obligation to take all of my time.

QUESTION: Yes.

MR. LEE: I appreciate that.

QUESTION: Yes.

MR. LEE: But when you're dealing with somewhere between seven and ten questions presented, and each of the ten raises many sub issues, there is some problem of allocation, no matter how one attempts to be prompt -- which I assure you I will do.

So I'd like to concentrate on these six propositions.

The first two concern whether this dispute really amounts to a case or controversy at all. The appellees lay great stress on the enforcement stipulation. There are twenty instances in which the Act has been enforced. But the fact that is not disputed is that of the five provisions held unconstitutional by the district court, namely, the sections dealing with election and truthful publicity, binding arbitration, free access to employer facilities, and the provisions making violations a misdemeanor -- not one, not a single one has ever been applied to any of these plaintiffs.

There is -- indeed, the only section that's ever been applied to any one of those five is the election provision, and that's not to these plaintiffs.

Now, there is an attempt by the appellees as to one of these provisions, subsection 8 of the Unfair Labor Practices, the one that prohibits untruthful publicity, to join issue, but they don't really do so.

The fact of the matter is that in one case only, Case No. 2, the Safeway case, there was an allegation in the complaint of a violation of subsection 8. But the Superior Court, the trial court, made a preliminary determination, a threshold determination that the union's conduct in that case was a sufficient compliance with subsection 8 and, as a consequence, it has never been applied.

And we are left with this fact, that of all of those twenty instances, not one has ever been applied to these plaintiffs.

The second point of no real dispute is this, and it concerns the law dealing with this kind of case: I know of no case, and in the six years of this litigation our opponents have not been able to suggest any, in which this Court has approved the consideration in its entirety of a comprehensive regulatory statute, whose provisions raise a variety of separate constitutional questions in advance of, and in the absence of, the application of those provisions to particular individuals.

QUESTION: Mr. Lee, may I just ask a question about your problem here? Supposing the election procedure is so cumbersome and the timing is so bad that they could never have an election, could they ever challenge it?

Because by the whole hypothesis on which their argument is built, it is that they could never get an election in any event; and I think your argument is, "Well, that's just too

bad, we've got an unconstitutional statute here that can never be challenged."

MR. LEE: Let me answer it in two parts, Mr. Justice Stevens. That is an issue, of course, that is applicable only to the election procedures --

QUESTION: Right.

MR. LEE: -- not to the entire Act.

QUESTION: That's an important part of the case.

MR. LEE: But even so, I would feel much more comfortable if at least they had tried to hold an election, and there had been some demonstration, some facts on the record that in fact it takes too long to hold an election. Here there is simply an assumption that it takes too long, an assumption that is entirely unfounded.

QUESTION: Well, that goes to the merits of whether they're right or not. But for purposes of standing and case or controversy, don't we have to assume that there's merit to their argument?

MR. LEE: Yes, we certainly do. But my point, I think, is nevertheless valid. That at the very least, with regard to case or controversy, as it applies to elections, that you have to at least have tried and at least to have shown that in fact there is some -- on the merits, the election issue depends on delay.

QUESTION: Well, Mr. Lee, what issue is it on the

elections with respect to the difficulty in having it? I mean, Arizone didn't have to pass a law giving them any election at all, did it?

MR. LEE: Of course not.

And, in the final analysis, as we point out in our brief, the only thing that they are saying is that whereas before Arizona had no election, now it has an election process, but what they are really complaining about is that Arizona did not go far enough and provide enough protection for associational interests as perceived by the appellees, and there is this case from the Eastern District of Virginia that says very clearly that there is no obligation on any State to do that.

QUESTION: You'd almost have to say the National Labor Relations Act was constitutionally mandated, if one were to say that.

MR. LEE: Well, but you have problems even there. Because the district court and the appellees have both made the statement -- and this is their language -- that the provisions of the National Labor Relations Act dealing with elections and provisions of the AERA dealing with elections are virtually identical.

QUESTION: Isn't there a difference that -- didn't the election procedure make it unlawful to proceed without an election? That is, to have a bargaining representative

voluntarily recognized?

MR. LEE: No, I don't think it ever says that, Mr. Justice Stevens.

QUESTION: Well, does it?

MR. LEE: That's been a point of dispute between us and the appellees all throughout this entire procedure. I find nothing in this statute that says you cannot have voluntary recognition. There is dispute about the bargaining order provision and there is dispute about the voluntariness, but that simply brings us back: We ought not to be here talking about issues of Arizona law. And that's really what is involved there, is issues of Arizona law.

QUESTION: The record doesn't tell us whether any attempt by a bargaining representative, who had not been selected by means of an election, was nullified because he wasn't elected?

MR. LEE: I find none.

QUESTION: So that is hypothetical in that sense, then?

MR. LEE: Yes. This case is here far too soon.

We pointed to the Watson and McAdory cases in our brief, that those cases are squarely on point. Those involved comprehensive statutes.

Coming back, Justice Rehnquist, to your analogy to the National Labor Relations Act, that's the analogy of both.

This is a fair description of both of those statutes. Each of them consists of organizational guarantees, collective bargaining guarantees, prohibition of unfair labor practices, the establishment of an administrative agency with power to implement the Act. Now, that's both statutes, in a word.

It is unthinkable that this Court would have permitted any court, Federal or State, to start at the beginning of the National Labor Relations Act, wade through all of its provisions, declare five parts unconstitutional, when none of them had been enforced as to any of the plaintiffs; and then, based on that kind of determination, hold the whole statute unconstitutional.

Now, there are statements coming out of this Court condemning that kind of practice, reaching all the way back from Justice Holmes' day to -- the opinion says February 20th, but I was cautioned by the Chief Justice that it really should say February 21st.

Mr. Justice Powell's opinion for the Court this morning, in Friedman vs. Rogers, it was the same problem. These people who were commercial optometrists said, "We fear that we can't get a fair hearing before a body that is composed substantially of the non-commercial optometrists"; and Justice Powell acknowledged that they were entitled, under the Gibson and Wall cases, to a fair hearing.

But then the opinion goes on to say, in both Gibson

and Wall, however, disciplinary proceedings had been instituted against the plaintiffs and the courts were able to examine in a particular context the possibility that the members of the regulatory board might have personal interests that precluded a fair and impartial hearing of the charges.

In contrast, Rogers challenged that the fairness of the board does not arise from any disciplinary proceeding against cases.

In a word, election cases, the constitutionality of the election provisions ought to be decided in election cases. At least, Mr. Justice Stevens, we would then know if, in fact, there are problems in doing it. Access to employer's facilities ought to be decied in an access case; and unfair, untruthful publicity ought to be decided in a case that at least involves union publicity.

QUESTION: I'm still puzzled, because I've been troubled in the past about procedure for reviewing elections under the National Labor Relations Act, you've got to, you know, win the election and then have it challenged. Supposing they hold an election and they lose, what do they do? How do they get it reviewed?

MR. LEE: Well, I think that at that point at least you would have established factually that there was a delay problem if there is a delay problem; and I think at that point you can come in to federal court.

I'll grant you that the election cases, the election cases do present a unique situation. But here, where you've never even tried, where there is nothing anywhere that shows in fact that there is delay, and where we vigorously dispute that there is a delay problem -- and I'll develop that in just about two minutes -- this is not the kind of case that the Court ought to be deciding --

QUESTION: But you would say, for standing purposes, if they had requested an election and somehow or other they didn't succeed with it, that would solve the problem?

MR. LEE: Well, it would if, in fact, you could show that the factual premise on which your attack is being based was in fact correct. I think the case or controversy would require at least that.

QUESTION: You still sound a little bit like you're saying you've got to win on the merits to have a case or controversy; but maybe you don't mean that.

MR. LEE: Well, this is another of those instances in which there is a very close relationship between the merits and case or controvery.

But I do think that you need to do more than just make the formal application. I think you need to show that the factual predicate of the constitutional issue that you're raising is -- in fact, otherwise you're bringing the federal machinery into play when it may not make a difference.

And that, of course, also closely relates to the abstention question.

I'd like to turn now to a closely related issue, which is the severability question. And here the dispositive realities that have not been disputed are two: The first is that the test for severability, as it has been announced in this Court, is the Champlin test that is cited at page 77 of our brief: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

As I read the modern cases dealing with severability, including, most importantly, Tilton and Jackson, that is the leading statement of the law of severability coming from this Court at the present time. That case is not acknowledged, it's not even cited by our opponents; and I submit that the reason is a recognition that that test cannot be satisfied in this case.

Applying that test, it is nothing short of absurd to say that Arizona's judgments, for example, that there should be collective bargaining for Arizona, for agricultural labor; or that a union should not be permitted to picket the homes of agricultural workers or fine one of its members because he gives testimony before the Board; or that an employer should not be permitted to dominate a union or contribute financial

support or discriminate against an employee because of union activities, and many others, in any way depend on whether there has been an election. Or whether compulsory arbitration is constitutional; or whether there is access to employer facilities, regardless of how you come out on those five issues.

The Arizona Legislature has concluded that Arizona needs an Agricultural Labor Relations Board, and that that Board needs the authority to prohibit 19 out of 20 uninvalidated, unfair labor practices.

The magnitude of the district court there is illustrated by the fact that Arizona is now prevented from controlling unfair labor practices that not even the appellees contended were unconstitutional, including, irony of all ironies, employer unfair labor practices.

Look at the enforcement stipulations. Just about a third of those cases were cases in which the employer had discriminated against his employees because of their union activities. My client, the State of Arizona, has a legitimate interest in preventing that kind of employer conduct. And in those instances where there has been employer retaliation, in bringing into play, on the employees' side of the conflict, the weight of the State to prevent that kind of employer conduct. And the same in the event that the union has taken improper action against its own members.

I come now to the most important substantive question

and that is the constitutionality of Section 1389 dealing with elections. The district court made it very clear that this was its pivotal holding, the most important substantive holding, and this is one of the provisions that was invalidated on the basis of the "evidence"; but the evidence that the court found relevant was not evidence developed in any actual case or controversy.

As the Chief Justice pointed out, it was based on a twin hypothesis: how the Act would work and how it would be interpreted. And it was that hypothetical, not any of the six election cases that have actually been held, it was that hypothetical that was held unconstitutional.

Now, even aside from the obvious case or controversy problem with that kind of approach, what substantively was wrong with this election procedure? And the thing that was wrong with it is that in some instances it might be impossible, the district court hypothesized, to hold an election during the employment peak.

Now, there is no dispute that the problem of how you solve elections during an employment peak is an important one. It is also one whose optimum solution is not readily apparent.

The National Labor Relations Board has adopted one solution to that problem. The California Agricultural Labor Act has adopted another. The NLRB solution is to hold the election during the next employment peak; and the California

procedure -- the California solution is to hold the election rather quickly, to decide only the question of representation. And then, once that's decided, defer all other issues until after the election.

There is absolutely no authority, except the opinion which we ask this Court to reverse, that has ever held that the selection of either of these solutions raises significant constitutional problems.

Now, in that respect alone, the district court's decision is surprising enough. But the absolutely incredible feature of the district court's holding is that it has invalidated an election scheme that permits and indeed anticipates the adoption of either alternative, according to the needs of the particular case. That has never been disputed, it has never been disputed. And even if you assume that one of those or the other could be held unconstitutional, even as a matter of abstract theory the position cannot be taken, that a procedure which permits the adoption of either according to the needs of the particular case is unconstitutional.

There is a statement in the motion to affirm to this effect: that the Act must be nullified in all its provisions and returned to the Legislature to strike a new balance. I find that statement absolutely intriguing. What new balance is to be stuck?

As I read the district court's opinion and the appellees' briefs, the only constitutionally acceptable alternative is the California Act. And yet Arizona law -- this has not been disputed by our opponents -- permits the adoption of the California procedure.

Now, pursuant to Justice White's urging, let me simply take about thirty seconds, Mr. Chief Justice, and just observe this:

First, with regard to the truthful publicity, I think that Friedman vs. Rogers is a valuable additional case that bears on the question of the extent of Arizona's authority to prohibit untruthful speech. And I'm referring particularly to the comments on page 8 of that opinion.

With regard to compulsory arbitration under the Seventh Amendment and substantive due process, our opponents have virtually thrown in the towel. They have an additional argument -- I will deal with that in response, if it needs to be dealt with; I'm not sure what position they take in it.

And, finally, with regard to access to employer facilities, as we point out in our brief that depends on three assumptions. They have not disputed the fact that it depends on three assumptions, and they have really only attacked one of the three. And for these and many other reasons, we submit that the federal district court should never have been involved in this case in the first place, it committed numerous errors,

the most egregious of which was its deciding a dispute that is not a case or controversy; and we submit that its judgment should be reversed.

QUESTION: Mr. Lee, I have two questions I'd like to ask you. Does the record -- and I have not read the enforcement stipulation, but does that or anything else in the record tell us whether there have ever been any successful elections in which unions have been --

MR. LEE: Yes, there have.

QUESTION: There have been some?

MR. LEE: Yes.

QUESTION: Where it has been invoked, and it's not possible to invoke it.

MR. LEE: That's right.

QUESTION: And the second question I had: you commented about the truthful publicity aspect of the statute. Do you have any particular response to the brief of the amicus, the American Federation of Labor and CIO, about the part of the statute that prohibits comment when there's a trade name or something like that, that has part of the people involved with the union and others are not -- you know what I mean.

MR. LEE: The Swing problem.

QUESTION: Yes. Right.

MR. LEE: Very simply this, Mr. Justice Stevens. The Swing case, as you know, arose in your State and it was a

beauty parlor, they lost the election, and then they continued to picket around the Swing beauty parlor. That, we submit, is an entirely different case, because the pressure there was primary. It was around the target of the organizational activity. And it's a very narrow opinion, and Justice Frankfurter makes it very clear that that's all it applies to, is the facts of that case.

By contrast, what we have here, in so far as the second part of sub 8 is concerned, is secondary pressure that is brought to bear. And if the National Labor Relations Act shows us anything, it is the distinction in this respect between secondary pressure and primary pressure.

QUESTION: But again it's strictly informational picketing that they're concerned about, isn't it?

MR. LEE: Yes. But I think the clear message coming from Surbetz?, for example, which has no suggestion that that case was constitutionally faced, is that in so far as secondary pressures, if they are -- unless they go too far, that they will be upheld. Once again this is a fallback position on the case or controversy. We need to know what the facts are. In Swing we had the actual facts of that case, but there is a distinction, I submit, of constitutional dimension between primary pressures, such as were involved in Swing on the one hand, and secondary pressures such as are clearly involved in that aspect of the decision.

QUESTION: But on this aspect of the case, going back to your whole standing problem, you do have a First Amendment issue, and the argument is that the statute in effect is overbroad here, and so, under the classical overbreadth standing doctrine, wouldn't the standing be okay in this case? As to that particular portion of the statute.

And if not, why not?

MR. LEE: Well, I don't believe that this is a proper case for application of the overbreadth doctrine for these three reasons. The leading overbreadth case is Broadrick. Broadrick says that the application of the overbreadth standard depends on the mix of speech and conduct.

Here we don't know what that mix of speech and conduct is, and we won't know until we actually have a case that demonstrates it in the particular instance.

QUESTION: But typically in an overbreadth case you have a facial attack. You never know what the conduct is in the overbroad --

MR. LEE: You do have a facial attack, but you, at least in Broadrick -- Broadrick and his companions at least had engaged in the permissible scope of the activity, that is -- or, excuse me, the prohibitable part of the activity, that is campaigning for their bosses. Here we have nothing.

QUESTION: Well, isn't this, for that reason, closer to California Bankers Association v. Schultz?

MR. LEE: Sure.

QUESTION: Where we refused to pass on the ACLU's claim, because we said: Wait until something happens to you; even though you claim first Amendment violation.

MR. LEE: Of course. And, for that matter, it's like Friedman vs. Rogers, which came out this morning. And, indeed, in the Broadrick case itself, Mr. Justice White cited from the Werzbach? case --

QUESTION: That was the Court doing that.

MR. LEE: Excuse me. That was for the Court.

In his opinion for the Court, Mr. Justice White cited United States vs. Werzbach?, which says that there will be plenty of time, when we have a case that actually affects someone, to --

QUESTION: Do you think this is commercial speech?

MR. LEE: I thought about that this morning as I read Friedman vs. Rogers. I don't think that my position depends on it being commercial speech, but I think that they are at least first, double-first cousins.

QUESTION: It's about wages, isn't it?

MR. LEE: It's about wages, it's about economic issues, and it's about who pays whom how much money.

QUESTION: Well, Mr. Lee, you don't really think -- do you think that to make a case -- suppose I go into court and say, "Here's a law that says I may not speak in the following

manner, and I assert that I desire to speak in that manner, and I think therefore I am being restrained now and I don't want to commit a crime, I want you to adjudicate"; don't you think there's a case or controversy or not?

MR. LEE: At that point you have to apply the Court's opinion in Broadrick vs. Oklahoma. And that depends on several things. One is, you will note that in Broadrick, Broadrick had in fact engaged in the prohibitable component and therefore you could see the mix of speech and conduct in so far, at least, as far as the prohibitable part was concerned. Secondly, there is a caution in the Broadrick opinion that if the statute needs to be interpreted by the State court, then the over-breadth doctrine should be less --

QUESTION: I'm talking about case or controversy now.

MR. LEE: I understand.

QUESTION: Isn't that enough, as I take it it was implicit in Justice Stevens' question, that if it forbid you from speaking and you make the good-faith assertion that "I want to speak this way, and I can't unless I" -- do I have to violate the statute in order to make a --

MR. LEE: It would be easier to answer that question, I submit, Mr. Justice White, --

QUESTION: Does all the defendant have to say, all the Attorney General of the State have to say, "Well, I never

attempted to apply it to them": is that all he has to say to avoid the case or controversy?

MR. LEE: Well, you go back and you pick up Coates vs. Cincinnati and then Broadrick vs. Oklahoma, and that is an issue that has bedeviled this Court. It's been difficult to answer that particular question, as I don't need to tell you, Mr. Justice White.

QUESTION: Well, I know, but then you say that you're hanging most of your case around case or controversy, or not?

MR. LEE: That's a pretty good argument, but it is not most of the case.

QUESTION: I mean, you might be hanging maybe your case around some of the other provisions, but on this provision, on this provision, was there an attack in the complaint on the statute?

MR. LEE: Oh, yes.

QUESTION: On this particular provision?

MR. LEE: Oh, yes.

QUESTION: And that they wanted to speak in this way, and the statute prevented them?

MR. LEE: That they -- well, that -- I don't know that they actually alleged that they wanted untruthful publicity. But --

QUESTION: They'd hardly claim that they wanted to speak falsely.

MR. LEE: Well, I don't think they would have alleged it -- that they would have alleged it. Pardon?

QUESTION: Well, this part of the statute isn't limited to untruthful, is it?

MR. LEE: Excuse me?

QUESTION: This part --

MR. LEE: Untruthful --

QUESTION: This prohibits even truthful statements about this trade name that has people involved in dealing with --

MR. LEE: That is correct. That is correct.

QUESTION: So we're not just talking about untruthful publicity here.

MR. LEE: That is correct. That is the second part of it, yes.

QUESTION: It's very important, too, isn't it?

MR. LEE: And it does.

My only response is that it is a difficult issue whether overbreadth applies to any kind of case. But as I --

QUESTION: Even if there's a case or controversy about this particular issue doesn't mean that there is about any other one in the case.

MR. LEE: Of course. Of course. And that's the big problem, is that they attempted to apply it all across the entire breadth of the statute.

QUESTION: Well, you've lived up to your bargain.

MR. LEE: Thank you.

QUESTION: We didn't.

MR. CHIEF JUSTICE BURGER: Mr. Cohen.

ORAL ARGUMENT OF JEROME COHEN, ESQ.,

ON BEHALF OF THE APPELLEES

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

The attack which the United Farm Workers has made on this statute is in large part a facial attack for overbreadth. We alleged in our complaint that our speech rights were suppressed. There's an enforcement stipulation, which starts on page 79 and goes through page 91. This has happened to us. Three temporary restraining orders, without notice, in the area of First Amendment rights have been granted against us before trial.

The judicial proceedings by which this statute is enforced are found on page 536 of the statute and on page 532 of the Appendix, rather. Any person aggrieved is allowed to go to court and get a temporary restraining order without notice to stop speech activities. The Board -- and that is Section 1393-A and B. That section was invoked by a liquor store. Item 4, Item 7, Item 13, page 84 and 88 of the Enforcement Stipulation, temporary restraining orders were gotten.

The rule that this Court articulated in 1968 in Carroll vs. President and Commissioners of Princess Anne County

is that in the area of First Amendment rights there is no place for temporary restraining orders without notice.

Rule 65 of the Arizona Rules of Civil Procedure are incorporated to apply to this statute by the face of this statute. Rule 65 provides that a counsel need not attempt notice, he can give reasons why notice should not be required. We say that that's unconstitutional as applied in First Amendment areas.

On page 17 of the reply brief, Mr. Lee suggests that Rule 65 is not appreciably different from the Federal Rules of Civil Procedure. But the Federal Rules do not apply to disputes between employees and employers. The Federal Rules do not apply to Norris-LaGuardia -- do not preempt the Norris-LaGuardia Act, so that many kinds of injunctions against speech cannot issue under the federal rules.

This rule, as interpreted by the Arizona courts, allows for orders without notice.

QUESTION: Mr. Cohen, what happened in those three cases?

MR. COHEN: In those three cases we were picketing, we were picketing the Gallo Wine Company in one of the cases, and the Kennard Liquor Store went to court in Maricopa County, Arizona, without notice, to get a temporary restraining order to restrain our activities.

QUESTION: What happened after they got the order?

MR. COHEN: The order was then dismissed for lack of service. They then went to Maricopa County with the distributor, QV Distributors, and they got another order.

QUESTION: Then what -- well, go ahead. I'm sorry, I didn't want to interrupt you.

MR. COHEN: Oh, okay. And they got another order. That's on page 88 of the Enforcement Stipulation, which restricted picketing. That order was gotten without notice.

QUESTION: But then what happened to that order?

MR. COHEN: That order was dismissed, the case was dismissed --

QUESTION: Has there ever been an order that prevented you from picketing?

MR. COHEN: Has there been an order that prevented us from picketing?

QUESTION: Yes.

MR. COHEN: Of temporary length, yes, which --

QUESTION: For how long?

MR. COHEN: Five days, four days -- I don't think the length matters, because in Carroll the Court said that it's not the duration of the order that counts. In that case there was a provision whereby the order could be dissolved after five days, and the Court said that it's the fact of the prior restraint on free speech, no matter how long, that's invalid.

QUESTION: But if you have a history of another three, say you get twenty more where you get a TRO without notice, and you get them all dismissed as soon as you get into court, as fast as you can get counsel there, do they really have any actual inhibiting effect on your clients?

MR. COHEN: Yes, they do.

QUESTION: If they know they are going to win all these lawsuits.

MR. COHEN: The order is issued. It would be contempt to violate the order until we can take steps to get the order thrown out for some reason. And we don't think that the union or its members should be inhibited for any length of time.

QUESTION: Carroll was a parade, wasn't it?

MR. COHEN: No, Justice Rehnquist, Carroll was a rally.

QUESTION: A rally?

MR. COHEN: And Justice Fortas said that the facts of a public demonstration are the kinds of facts for which an adversary hearing is needed. Then there --

QUESTION: Well, hasn't this Court said that picketing is a good deal more than free speech? In other words, that it's more subject to regulation than straight-out speech?

MR. COHEN: Yes, Justice Rehnquist, but I'd like to

point out that the State Board got an order, which you'll find is Appendix D to the brief, which prevents us from inducing or encouraging the employee or the manager of a retail store from removing his products. That is the language of Section 7 of the Act, which is made, by Section 1392, criminal.

It is criminal to induce or encourage the manager of a retail store to take off the product. If Mr. Chavez, who is my client, the president of the Farm Workers Union, were to send a letter to the manager of the Phoenix Safeway Store, for example, and say, "Please take off all lettuce, because we are on strike at Sun Harvet", that would be inducing or encouraging that manager to remove that product. That is a violation of Section (B)(7) of this Act. It's made criminal by Section 1392 --

QUESTION: And is that in the Enforcement Stipulation that you've been referring to?

MR. COHEN: No, but this is a facial attack, and I think it clearly falls within the shadow which (B)(7) casts over the First Amendment.

In the Enforcement Stipulation on page 80, the Safeway Store did go to court and allege violations of various provisions of Section 1385(B). They got an order restraining certain activities. They pled Section 7.

Now, the trial judge in that case ruled that Section 7 was unconstitutionally vague; but the Board, the

Agricultural Labor Relations Board, on page 81 you'll note, filed a charge alleging violations of Section (B)(6), (B)(7) and (B)(8) and they made us suspend, and we said it's unconstitutional; and the Board said we don't have the prerogative to rule on the constitutionality of our own statute. Which I think points to the fact why we're in federal court.

We have here a problem where the Board can enforce the statute against us, and private parties can enforce the statute against us.

QUESTION: Well, but the Board -- you appeared in Superior Court and Judge Hardy gave you some relief, did he not?

MR. COHEN: Yes, but two years later, despite that relief, if you'll notice, it's on page 85, Section 11, the Board, despite what Judge Hardy did, went in to try and get another order based on Section (B)(7) again. Despite the fact that the Superior Court had said it was unconstitutional two years before.

We argued that, but the Board proceeded under the provisions of 1390(K), which is on page 532 of the Appendix, and asked for o-ders without notice and they got the order which we've appended as Appendix D to this brief.

So there have been -- this is not a hypothetical case. There have been temporary restraining orders issued without

notice. Section (B)(8), Mr. Lee claims that it's never been applied.

Well, if you'll turn to page 102 of the Appendix, you'll find that a judge looked at Section (B)(8) and he looked at the union's conduct, and he said we were in compliance with (B)(8).

Now, I think it's tightrope walking on a verbal tightrope over a constitutional abyss, to say that (B)(8) has never been applied. Because it has not been incorporated in an order doesn't mean that some judge didn't look at the standards of (B)(8) and apply it to our conduct.

In this pertinent language from the Chief Justice in Organization for a Better Austin vs. Keefe, when we talk -- in that case it was a question of whether leafletting that would tend to coerce a real estate broker, because of what was alleged to be union blockbusting, could be restrained. And you said that in cases of that kind there is no room for a test of truth or validity. Which, in further statements of this Court in New York Times vs. Sullivan, when the Court said that administrative bodies, bureaucrats, judges cannot judge the truth or validity of speech. Ever since Thornhill, labor speech has been protected. It's more than commercial speech. We're talking about our rights to associate.

When we boycott and we raise issues of pesticides, we're talking about whether farm workers can have a union.

Farm workers were excluded from the National Labor Relations Act 43 years ago. And all we have is the kind of self-help tools that are implicit in a primary boycott.

This statute makes it a crime for us to speak, unless we speak -- the permissible inducement of an ultimate consumer, Section (B)(8) is prohibited unless it is truthful, honest and non-deceptive, and unless it identifies the product with which we have a primary dispute.

In response to your question, Mr. Justice Stevens, Mr. Lee just said that it does ban some truthful speech. It would ban a statement to say -- if I said, for example: Boycott Arizona oranges, because Arizona growers have sub-standard labor, or because there are no toilets in the field, or because they spray with pesticides and there's not a union contract, I would be committing a crime under Section 1392, I would be committing an unfair labor practice that's enjoinable ex parte and without notice. And Mr. Lee admits that that's restricted.

And that's a classically overbroad statute. And the court did not take extensive testimony on it, because they asked the parties to stipulate.

QUESTION: Well, it's a classically overbroad statutory provision, one of many statutory provisions, isn't it?

MR. COHEN: Yes, it is. Just as (B)(7), I submit,

is classically overbroad as well. (B)(7), by prohibiting all encouragement -- you know, if coercive leaflets cannot be prohibited, how can something that encouraged somebody to do something be prohibited? That's pure oral speech that that language is getting at. Any discussion with the manager of a retail store is criminal activity and punishable by one year in jail and up to a $5,000 fine under Section 1392.

In their brief, Mr. Lee and the growers say, well, maybe this is severable. I don't know that it's severable, because when --

QUESTION: Of course, if you've got a case or controversy with respect to that issue, in terms of your own activity, you don't need to worry about overbreadth, do you?

MR. COHEN: No, we don't. As a matter of fact, I --

QUESTION: I mean, if it's really been applied to you and you want to --

MR. COHEN: It's been applied to us, that's right.

QUESTION: Or if it hasn't been applied to you, you nevertheless have a case or controversy about it and in terms of your own interest you don't need to talk about anybody else's, do you?

MR. COHEN: Well, I think that as to the clarity of the statute, yes. There may be some other sections in which --

QUESTION: No, I mean talking just about this (B) section.

MR. COHEN: No, that's true. I think we have a case or controversy there. It's been enforced.

QUESTION: I don't think you can suggest -- you wouldn't suggest overbreadth analysis applies to the non-speech sections, would you?

MR. COHEN: Well, I would suggest that in so far as they relate to First Amendment rights, whether they talk about -- whether we're talking about speech in relationship to the manager of a store, or speech in terms of an ultimate consumer, for instance, the access provision. There are findings of fact on the record which the State does not like, but they do not -- they should not be allowed to come here and dispute what the trial court, what the three judges found.

Their own witness, for example, said that there are farm workers who live in migrant camps on company property. Judge Muecke took judicial notice of that, on page 353, he had had a case just before then when one of the growers was litigating with us about where workers lived. And what the trial court found was this statute, Section 1385(C), I believe, prohibits the State Labor Board from requiring the grower to give a union time, materials, information or facilities with which to communicate with workers.

QUESTION: Well, Arizona doesn't have to require a grower to give any time, does it? The Constitution of the United States, conceivably, but certainly Arizona doesn't have

to by statute.

MR. COHEN: I think, Justice Rehnquist, the problem that we have with this statute is that there have been other ways of organizing workers, that were available to farm workers before the statute. We could engage in economic activity, we could engage in the boycott, which was outlawed. They replaced it with an exclusive election procedure, which, as the court found, after extensive stipulations as to peak season and after listening to the testimony of the witnesses, and, after examining the stipulation, there were elections.

They found that it was the -- and by the language, it's the exclusive means of obtaining recognition.

Now, when it becomes the exclusive means of obtaining recognition, and when, as the court found, we have a transient work force with high turnover, we have intermittent, sporadic work, it is impossible to communicate with the workers without having some access to them. And I think we have here a Wrightman vs. Multe argument, in that a private decision by a grower is made. He has access to the workers on his land, in his camp, he can talk to them; but the union is precluded from getting onto his property. I think that's the problem that we have here.

This is like the residential community in Marsh vs. Alabama. This is not like the shopping center cases. These people live there in isolation, and they need to make informed

decisions about whether they should associate with a union.

QUESTION: Well, all the statute does is say that the grower has to give certain access.

MR. COHEN: No. The statute says that the grower is not required to provide any time, any information, any materials or any facilities to allow the union to communicate. This is one of the differences. This Act is not, by the way, patterned after the NLRB.

QUESTION: Well, it imposes on the grower some obligation to give --

MR. COHEN: No.

QUESTION: -- or it empowers the Board to impose some --

MR. COHEN: No, it does not, Justice Rehnquist. The language is on page 515. It says that "No employer shall be required to furnish or make available to a labor organization" -- then if you read on down -- "materials, information, time, or facilities to enable such employer or labor organization, as the case may be, to communicate with the employees of the employer."

QUESTION: What do you think it means by "facilities"? What do you read into "facilities"?

MR. COHEN: I think, in the context of this language, as I think it's very well argued in the amicus brief, it can only mean a place at which we could talk to the workers. They

take away our time and they don't say work time or non-work time, they say "no time, no facilities, no materials and no information".

QUESTION: Well, you still haven't defined "facilities". A building? A room?

MR. COHEN: I think it's "place", I think it means a place to communicate with the workers in this context.

QUESTION: A building?

MR. COHEN: Yes. Labor camp would be a facility.

QUESTION: But if they don't have a building?

MR. COHEN: They are not required to provide us with anything. You know, they don't even have to give us a name, a list of the names and addresses of the employees. And in a migrant situation it would be very important for us to at least -- under the NLRA, for example, the Excelsior rule gives us the names and addresses of the employees seven days after an election.

What this statute says is you can only get the names of the employees ten days after an election.

QUESTION: Well, Mr. Cohen, following up on Mr. Justice Rehnquist's question, supposing you just repealed the statute? Would that be any obligation on the part of the employer to give you any of that information, or any access?

MR. COHEN: I think in that case you would be able to engage -- there would be a general trespass law that would

apply, you would be able to engage in a general case-by-case analysis as to whether there was or was not alternate means of communicating with the workers.

I think what happens here is that --

QUESTION: Well, suppose there wasn't, what would be the source of any obligation? Say I'm an employer, and I don't want you on my property, how could you make me let you on my property?

MR. COHEN: I think the source would be the vitality of Marsh vs. Alabama, and I think that --

QUESTION: Well, are there findings that all employers, or these are all company towns? Is there a finding to that?

MR. COHEN: No, there isn't, there's just a statement that they live in a labor camp on the employer's property. And there are statements that they are migrant workers.

QUESTION: You say that each employer is therefore like a State, every employer's property is like --

MR. COHEN: No, I'm saying that we would then be allowed, in those situations in which the labor camp was enough like the company town in Marsh vs. Alabama, we would be allowed access in those situations.

What I'm saying here is that kind of case-by-case analysis and balancing is prohibited to this Board by this language, and when the Sta-e does that, I think they then

intrude themselves in the process, and they allow the grower, who has total access -- by the way, this is a -- I'd like to just --

QUESTION: Well, this statute just says the Board shall not order you, order access --

MR. COHEN: The Board may not require the enforcement, therefore it's up to the --

QUESTION: Right. Well, if you're talking about case analysis under Marsh v. Alabama, it wouldn't be before the Board, would it?

MR. COHEN: No, but I mean the Board is precluded from making such an analysis under this language.

QUESTION: Well, it wouldn't have any authority anyway.

QUESTION: It's precluded by the First Amendment, if you're right.

MR. COHEN: No, I wouldn't -- why would that necessarily follow? I would think that the Board --

QUESTION: You say if there was no law, then you would rely on the First Amendment; and in order to rely on that Amendment, you have to show that --

MR. COHEN: Yes, that we would have access --

QUESTION: -- the employer is like a municipality, or a State, or a government.

MR. COHEN: Well, I don't know that it would -- I think we'd have to show the need to communicate to those

workers.

QUESTION: No, no. Because so long as the employer is a private person, the First Amendment isn't implicated at all.

MR. COHEN: Yes, but when you take a private decision to refuse to give a labor union information, time, materials and facilities, and then the State decides to sanction that decision, I think then you may have the necessary State action through an analysis, just like in --

QUESTION: Well, on that basis you convert every private --

QUESTION: Yes.

QUESTION: -- every private property owner into State action, as soon as he stands at his gate with a gun and keeps you off his property.

MR. COHEN: Well, if --

QUESTION: And he calls the sheriff and has you put off.

MR. COHEN: You know, Mr. Justice White, time and again in this statute the employer is left free to communicate with those workers, or communicate with that chain store owner, and I think the doctrine of the Mosley case, I think, might apply here. I think what we're saying is that the content of speech is implicitly regulated. The employer can talk to those workers. Or, for instance, in the chain store, the

employer can talk to that chain store owner and say, "Please buy my products, they are grown at -- they're cheaper, because I'm non-union." But we're precluded.

I think the same kind of analysis applies, but I --

QUESTION: Well, that's different. He's gotten into a different issue than the property, just right now.

MR. COHEN: Yes. Well, I'm just pointing out that what they said in the case, if they had said that they think --

QUESTION: You're not suggesting that because there might be a question about the prohibition against talking to merchants, that the property provisions are bad?

MR. COHEN: No, I --

QUESTION: Or that the election provisions are bad. Or that the compulsory arbitration provisions are bad.

MR. COHEN: Well, the compulsory arbitration provision of 1393(B), I don't think is bad for the reasons the district court found it to be bad. We never argued that the Seventh Amendment applied, but I think it's bad as a prior restraint. Because what it says is that upon proper application by a grower, the Board shall grant an automatic ten-day order restraining a strike, a boycott or a threat thereof.

I think what I am saying is that time and again --

QUESTION: You mean every strike that's restrained violates the First Amendment?

MR. COHEN: No, I didn't say that. I say that to

allow the restraining of a strike or boycott without giving us an opportunity -- I'm talking about Section 1393(B) again -- without giving us an opportunity to have notice and be there, that is a prior restraint.

It not only goes to strikes, however, it goes to boycotts or even a threat of a boycott.

So I think the argument that I'm making is that when you look at the statute as a whole, then I think we have to --

QUESTION: You mean every ex parte injunction against a strike violates the First Amendment?

MR. COHEN: I think an ex parte injunction, without notice, against picketing does violate the First Amendment, because it's a burden. When you look at the breadth of the regulation, the burden that you would be imposing on counsel is not a very great one. As a practical matter, that counsel knows, he's preparing his papers to enjoin the union. We're not saying he has to have formal notice, it could be formal or informal. They know the pickets are there. They can give somebody notice. Pick up the phone. It doesn't stop him from preventing -- from presenting his papers, excuse me. But what it does do, it allows him to present the facts without having participation by the union.

And I think there are two reasons in a strike picketing situation or a boycott situation where you need the notice. First, the facts in these matters are always

susceptible of various interpretations, and you need both sides there to have a balanced presentation of the facts. And, second, we need to be there to narrowly tailor and pinpoint that order, so that we don't unnecessarily encumber the First Amendment.

QUESTION: Mr. Cohen, I don't want to interrupt your chain of thought, but I want to ask you two questions about the election procedures, if I may.

MR. COHEN: Yes.

QUESTION: First of all, you said that the election was the exclusive means of obtaining recognition, as I understood you.

MR. COHEN: Yes.

QUESTION: The district court's opinion at A-26 of the Jurisdictional Statement points out that, "Before an election can be held, the union must first demand and be denied recognition by the employer."

When I read that, I assumed that if the employer had granted recognition, that then they could have proceeded -- that then that would have been adequate to enable the union to represent the employees.

MR. COHEN: But, Mr. Justice Stevens, I'm referring to the unfair labor practice section A(5), that nothing in this article shall be construed as requiring an agricultural employer to bargain collectively until a representative of

his agricultural employees has been determined by means of a valid secret-ballot election.

What I'm saying is that voluntary recognition, I think, is a precondition; but there are other ways of getting recognition. For instance, what the NLRA has, card checks, or the use of economic power. See, I think farm workers now are in the same situation that railway workers were before 1927, or all other workers were before Jones & Laughlin.

The election procedure is the only way we can force an employer to recognize.

QUESTION: What about a strike?

MR. COHEN: No. A strike can be enjoined. If you would take a look at Section 1385(B)(12), it's another one of those sections --

QUESTION: So a recognition strike would be unlawful under the statute?

MR. COHEN: Yes. What happens is an employer in that case could file a petition under 1389(C) and claim that a claim was made on him, at that point all picketing becomes criminal and illegal under Section 1385(B)(12). And --

QUESTION: How about the strike itself? The picketing would be illegal, but would the strike itself be illegal?

MR. COHEN: The strike itself could not be used to gain recognition. We could not strike in that situation, unless

we had asked for a majority vote, and we don't even know what the provisions for the majority vote would entail in that case.

By filing the petition, the employer stops our activity.

QUESTION: He stops the picketing, but does he stop the strike, too, necessarily? You say, you know, half the people won't go to work.

MR. COHEN: Well, that's not clear, Mr. Justice Stevens.

QUESTION: That is not clear?

MR. COHEN: I don't think that's clear.

QUESTION: And one other question on election, if I may. Do you agree that there have been some unsuccessful elections?

MR. COHEN: No, there's only -- there's been one election. The elections are also in the Enforcement Stipulation. But I think if you look at the Enforcement Stipulation, it bears up the district court's findings of fact, namely, that the election procedure is unworkable. The history of the cactus election is an illustrative one. By the time the hearings had been gone through and set, the peak season had expired -- as a matter of fact, the employees had left. So that the Teamsters Union, which filed for the petition, withdrew the petition.

QUESTION: But you do agree the record shows at least

one successful election?

MR. COHEN: Yes, it does. But, as Mr. Lee says in his brief, he says that in about 22 percent of the cases in the citrus, the election procedure might be workable.

What we're saying is that we think that we have a right to associate in an effective and meaningful way. And when you have, as your exclusive means of constraining an employer to recognize you, a procedure which, after extensive findings of fact as to the length of season in the grapes, which is three to five weeks, the length in the cantaloupes is three to five weeks, the district court finds is unworkable; they are saying, on the one hand you may have it, but it's unworkable and we can't achieve our goal.

QUESTION: Well, do you think, if a State has a statutory provision regulating labor management relations, and one of the provisions is: by the way, we don't believe too much in collective bargaining, and the employer need not recognize any collective bargaining representative, although unions are certainly legal and they can go about their business all they want to, of trying to coerce the employer into recognizing them; but as far as the law is concerned, the employers are under no obligation to recognize any collective bargaining representative. Would that be unconstitutional?

MR. COHEN: No. I think what amounts to an unconstitutional restraint on us in this case is that we --

QUESTION: Well, how about my example?

MR. COHEN: I don't think it would. I think we only have a constitutional right to attempt to get that employer to recognize us and bargain with us.

QUESTION: Well, yes, certainly the State is nicer to you in this case than in the one I --

MR. COHEN: No, Mr. Justice White. Our point is that they are not, because what have they done to us? They have taken away our right to communicate with the public. That's being criminal.

If we picket, and the employer files a petition without, by the way, the protections of the NLRA, which says that if the engineers have petitioned against themselves, that is not a bar; (B)(7) is not analogous to (B)(12). They have deliberately left that out. They stop our picketing.

If we use the procedure, by the time we get to a vote, if we could, as the district court found, it has taken too long. We can't get access, because the Board cannot engage in -- we have a disagreement here, but I think that if we examine and analyze the statute, the fact that there may be workers out there in the labor camp during the campaign, we may need to talk to them, because they may move on. We can't get to the workers. We can't talk to the public. We have an unworkable election procedure.

And, by the way, when you look at Sections 1384 and

1385, you find that even if we were to get there, it's also criminal to coerce or threaten or restrain an employer to bargain about what the Act broadly characterizes as management rights. And management rights in this statute are defined to include such subjects as discharge for cause, it includes seniority -- I'd like to get the language, because I think it really reveals how unlike the NLRA and how oppressive this is to us. We can't bargain about hirings, suspension, discharge or transfer of employees.

QUESTION: You don't suggest that that's unconstitutional by itself?

MR. COHEN: I'm saying that all these things taken together amount to what I think is the test: Is it a substantial restraint on our right to associate?

And I think when you make an unworkable exclusive election procedure the only way to force an employer to give recognition, when you take away our --

QUESTION: You don't claim any constitutional right to have a collective bargaining representive that the employer will recognize, do you?

MR. COHEN: What we claim is the right --

QUESTION: I take it you, just a while ago, said you didn't have any such right.

MR. COHEN: I think what we have is that right which, in the railroad case in 1927, I believe, and in Jones &

Laughlin, any farmer could still have that right. We're still back in that jungle. And I think we have the right to associate together, to try to improve our wages, hours and working conditions.

And what I'm trying to say, and it's a lot different talking here than it is on Gavalon Street in Salinas, California, and I know I'm not saying it as well as I should; what I'm trying to say is that everything that we do, if we try to boycott it's made criminal, if we talk to a manager of a store, which has been our traditional tactic, and we still desire to do it, it's made criminal and you can enjoin it. If we try to talk about pesticides, if we try to talk about things mentioned in 1384 and 1385, we can't talk about it at the table.

If we try to have an election procedure with the limited resources that we have, the time runs out on us. So, even those sort of pre-law rights that all other workers have, we'd rather have those than a law which forces us, as the court said, this law is a perversion of the stated goal in the procedure. The stated goal is to give us the freedom to organize. This law doesn't do that. It creates a barrier to that.

That, I think, is the gist of our argument. At every step, everything that we've tried to do, we lose out. And there's unrebutted testimony in the record, from pages 397

to 400 of the Appendix, that we lost contracts after this law was passed. The membership declined. The wages and benefits were adversely affected. That the numerous lawsuits and temporary restraining orders not only directly affected us -- and here's where I think maybe I misspoke myself earlier, Mr. Justice White -- but it has a chilling effect on our supporters.

I'd like to give you an example of that. Maybe we should talk about that, because --

QUESTION: Well, is this in relation?

MR. COHEN: In the overbreadth. I'm saying, what happens when someone looks at a statute that says I can't induce or encourage a manager to ask him to take the goods off. That has been directly used against us. We have lost boycott support for that. And there's testimony to that effect.

QUESTION: Mr. Cohen, what about the fact -- if I understood Mr. Lee correctly -- that one-third of the unfair labor practice proceedings have been against the employers for discriminating against employees engaged in union contracts -- conduct. That can't be harmful to you, can it?

MR. COHEN: No, we're not saying that that's harmful to us; we're saying that, on balance, if there's a careful reading of this Act, that it really doesn't sugar-coat the pill. I mean the pill is there, and it is going to kill us. Because if so many of our economic tools are stripped from us,

-- and by the way -- that it just doesn't balance, doesn't make the difference. That election was a consent election, and it was in a dairy where there was year-round employment. And I think that further illustrates the point that we're trying to make.

The State has made an issue of abstention in this case, and I'd like to say that, in anticipating what Mr. Lee might say on rebuttal, that I don't think abstention would be proper here, because the language that we're challenging in the area of First Amendment rights is very clear. It clearly prohibits truthful speech. It clearly prohibits us from talking -- talking to people. This gets nowhere near Tree Fruits, where the issue was whether you were picketing a store.

In your dissent, Mr. Justice Stewart, you said if there were no available ways of communicating with the store, then you might not be able to ban picketing. This bans always communicating with the store. And I think it's clear on its face.

There are a number of defects, not our fault. I know the brief is long, but I think the issues, each issue in and of itself, with the exception of the access issue, is fairly simple and straightforward. We don't think you can ban truthful speech. We don't even think you can ban false speech, because you need robust debate in this society, especially in a labor dispute.

There's concurrent jurisdiction between the Labor Board and the Superior Court. That means that we are in a procedural maze. And, as an examination of Items 2A through 2F of the Safeway series of litigation shows, even as Justice Rehnquist's question illustrated, even though the Superior Court had appellate review, in effect, over that Board, they continue to enforce an unconstitutional statute after that.

There's no certification procedure here, so there is no fast way of getting a resolution. I think Congress gives us the right under Section 13 -- I mean 1893, I forgot the name of the statute, to file for our federal constitutional rights in federal court; and that's what we've done. And I don't think that we need to go to State court.

QUESTION: Well, do you contend that every one of the provisions of this Act is unconstitutional?

MR. COHEN: No, we --

QUESTION: Then how do you justify the district court's order enforcing -- enjoining its enforcement in its entirety?

MR. COHEN: Well, I think it --

QUESTION: I guess you can no longer ever proceed against an employer?

MR. COHEN: I think it hinges on whether or not it's separable or not. And I think that content of the Legislature should be examined. The Legislature did not adopt --

QUESTION: Do you think a federal court is the best place to examine that, as opposed to a State court?

MR. COHEN: I think when it's clear on its face, yes. The grower intervenors, in paragraph 2 of their motion to intervene, characterized this as a comprehensive statute to totally regulate, that had as its basis that for that regulation, an unfair labor practice chapter, a criminal section -- and the criminal section --

QUESTION: Well, the grower intervenors aren't the Arizona Legislature.

MR. COHEN: No, but the Arizona Legislature did not put a separability clause in, even though the National Labor Relations Act has one, and I think that does say something about their intent.

They looked at a general scheme, and they deliberately left it out.

QUESTION: Isn't there a Section 1 of the Arizona Revised Statutes a general severability provision?

MR. COHEN: But I think that that general severability provision would not apply to a more specific statute. When the Legislature constructed the statute -- I think when you --

QUESTION: Why would you have a general severability provision that says "any statute enacted in the future by this Legislature will be considered severable"? Why would you

say that failure to include a specific severability provision in a subsequent Arizona statute wasn't covered by the general severability section?

MR. COHEN: Mr. Justice Rehnquist, that's a very good question.

QUESTION: Well, I think it is, too.

MR. COHEN: I have an answer to it, though; all right? And my answer is this: they were looking at a general scheme for labor legislation. That general scheme was the National Labor Relations Act. That National Labor Relations Act contained a severability clause. They left it out. I think that says something more immediate --

QUESTION: Well, they didn't need it. They didn't need it. You haven't answered that: why did they need one?

MR. COHEN: I think they did need it to make their intent clear.

QUESTION: I know you do, but you haven't told us why.

MR. COHEN: Well, Mr. Justice White, if you read this statute and look at, for instance, their inhibitions on boycott, they say in their declaration of policy that it is a State policy that there is a need to inhibit a boycott.

Now, I claim, and I think upon examination you'll agree, that you cannot ban truthful speech, that you cannot ban all discussions with the manager. So if all the inhibi-

tions disappear, do you think that the Legislature would let Cesar Chavez and the Farm Workers run around unfettered and boycotted -- and boycott people? I don't think they would. I don't think they would. I think that the prohibition -- I think by giving an employer the right to ban picketing upon the filing of a petition, that he himself could engineer, I think if they struck that down, if you struck that down they wouldn't want it to stand. I think if you took out the procedures -- how can the procedures of this Act, 1390(K) and 1392(A) and (B), which, as we've said over and over again, provide for TRO's without notice in the area of First Amendment rights, you take out the enforcement procedures, would the Legislature allow it to stand?

I think it depends on what sections are found unconstitutional, I guess is the answer.

QUESTION: Well, what if the court had found only one -- only the compulsory arbitration provision was unconstitutional?

MR. COHEN: [Laughing] Then I think that --

QUESTION: Then are they not severable or severable?

MR. COHEN: In and of itself?

QUESTION: Yes.

MR. COHEN: Maybe notseverable.

QUESTION: Well, where would you get that? Out of Section 1?

MR. COHEN: No, I'm assuming that you're correct in your analysis --

QUESTION: Well, I just assume one section declared unconstitutional. Then would the entire statute fall?

MR. COHEN: It would depend on the section.

QUESTION: I said, it's compulsory arbitration.

MR. COHEN: Well, I would rather characterize it as --

QUESTION: I know you would, but how about compulsory arbitration?

MR. COHEN: No, I don't think it would.

QUESTION: Well, why not?

MR. COHEN: Well, I'm --

QUESTION: Wouldn't you have to go to Section 1 that --

MR. COHEN: Mr. Justice White, I am assuming that what Justice Rehnquist says is correct. I would not like to make that assumption, however. I think that -- I don't think that it applies in this case. I think they were designing a statute. And when you look at the declaration of policy, you see what they were trying to do: they were trying to stop strikes, they were trying to stop boycotts. So I guess it depends on what is struck down.

QUESTION: So it's your position that all the unfair labor practice sections are now -- should have fallen with these five sections, all of the unfair labor practices?

MR. COHEN: I think the whole statute should --

QUESTION: Against the union, against employers, against everybody.

MR. COHEN: That's -- I think in the --

QUESTION: No more elections.

MR. COHEN: The election procedure was found unconstitutional, as impressed upon agriculture.

QUESTION: No more anything.

MR. COHEN: At the heart of the statute, yes, if the election procedure falls, I think the district court is right, the rest of it must fall. If the boycott procedures fall, I don't think the Legislature would have allowed it to stand. That's right.

Because I think what they were trying to do is balance our power against their power.

QUESTION: Oh, no, the National Labor Relations Act started out with just unfair labor practices against employers.

MR. COHEN: Yes.

QUESTION: Well, what do you mean, if you shut down the unfair labor practices against unions, why would you strike down the ones against employers?

MR. COHEN: Are you assuming the presence or absence of the election procedure in that question?

QUESTION: Either way.

MR. COHEN: I think without an election procedure

you have no statute.

QUESTION: Now, the district court seemed to have some sort of a general remand, not literally but pretty close to it, to the Legislature to try again to come up with a more balanced statute. Now, I gather you agree -- let's get that clear -- that the Legislature might say: No, in the light of the district court opinion, this is just too difficult. And wipe the slate clean, no Act at all. They could do that, couldn't they?

MR. COHEN: Well, they could, Mr. Chief Justice.

We're not saying that a State can't experiment. What we're saying is that they --

QUESTION: I'm just asking my question: Can the Legislature say, These judges have confused this issue so much that we'll just wipe the slate clean and we'll repeal the entire statute; and we aren't going to enact any new statute.

MR. COHEN: Yes, they could do that. Yes, they could.

QUESTION: Is that what you want?

MR. COHEN: Well, I -- we're not questioning -- we're not saying that the California Act is constitutionally mandated or the National Labor Relations Act is constitutionally mandated; we're saying that when you look at the inhibitions, first on the speech to consumers, then on the access to workers, and speech to workers, we're saying that it's

unconstitutional. That it falls below that ground floor, under which a State can't experiment. That's what we're saying.

I think that I'd like to sum up by saying, first, that as to all the sections, I don't think we need actual enforcement as to each and every section, to have a case or controversy to allow this Court to examine those sections. Those sections as to which we have actual enforcement happen to be the most blatantly unconstitutional sections. I think that's clear.

The threat of enforcement, we are in a much stronger position than the doctor in Doe v. Bolton or the teacher in Epperson or the vendor of real estate in Linmark. This is designed to hit our activity. Broadrick doesn't apply here, because these activities are speech activities within -- not within the legitimate sweep of the statute, it's not conduct. So I think that we have the right to ask that each and every section be examined, not only under threat of prosecution but because the criminal section makes this an overbroad criminal statute. Because each and every violation of every section of this statute is a crime.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Lee?

MR. LEE: Yes, I do, Mr. Chief Justice, would you like me to go ahead at this time?

MR. CHIEF JUSTICE BURGER: Yes, we'd like to let both of you get back to Utah and to Arizona; the climate is much better there.

REBUTTAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LEE: Well, I appreciate that courtesy, Mr. Chief Justice.

May I simply point out that most of my friend, Mr. Cohen's argument has been directed to portions of the statute as to which there is no record, were not presented in either the questions presented in the Jurisdictional Statement nor in the Motion to Affirm. There are no findings of fact. There have been no even determination by the district court. And, as a consequence, those issues come before this Court at this time for the first time.

And that, aside from everything else, whether that amounts to case or controversy or simply good judicial procedure, does not make sense.

Most of Mr. Cohen's argument has been directed toward the TRO procedure, (B)(7), (B)(10) and (B)(12).

Let me turn, however, very briefly to those and give my response. So I say that, a fortiori, this not being a case or controversy as to those issues that the district court did decide, it certainly is not a case or controversy as to those issues that the district court did not decide, and

were not included as part of the questions presented in the jurisdictional papers.

First, with regard to TRO's. This has been the principal procedure objection that has been raised all along. But let me isolate the issue very precisely. I agree with Mr. Cohen that Rule 65 of the Arizona Rules of Civil Procedure is made a part of every one of those TRO proceedings.

Rule 65 of the Arizona Rules of Civil Procedure is identical to the Federal Rules. There are only two differences. One has a comma where the other one doesn't; and one says "and" where the other one says "or".

Carroll did not say that under no circumstances can there be temporary restraining orders without notice. The rule in Carroll is identical to the Federal Rule 65.

So that what my opponents are in effect asking this Court at this time is to hold Rule 65 unconstitutional, including the Federal Rule, and they are also asking that Carroll be overruled.

Now, with regard to the (B)(7) argument, that case, as this Court will recognize, simply reverses, for Arizona purposes, the Servette? case that came down in 1964, and makes it all right to -- or makes it a secondary boycott, in effect, to induce, encourage and so forth management employees.

Now, there was -- I looked at Servantes as recently as this morning -- there is no hint of a constitutional basis

for the Servetto holding.

Mr. Cohen is very creative, and I'll grant you that if you take his interpretation of that statute, that when you say those oranges have been treated with dangerous pesticides, don't buy them, that that raises serious First Amendment questions; I couldn't agree more.

But I vigorously disagree that that's what that statute means. And I think that for the first time in this Court, when it has never been considered by the lower court, when there is no record on it, and when there is nothing anywhere in that Enforcement Stipulation that has even a hint of that kind of enforcement of (B)(7), that this is the time to be applying it.

Now, with regard to (B)(12) and this prohibition of organizational activities after an election has been filed, the real fear there -- (B)(12) is simply a counterpart of the Federal Rule that says where you had an election, or where a petition has been filed within 12 months, then further picketing and organizational activity is prohibited.

The fear is that that will be used for an improper purpose. And I concede fully the possibility of its being used for an improper purpose. Just the same as in Friedman vs. Rogers, there was the possibility of an improper hearing being held. But if it were used for that purpose, then it is very clear that under a combination of 1383 and 1385(A)(1),

it's an unfair labor practice, and there would be a defense to it for that reason and that reason alone.

And, as a consequence, this conjuring of defects, all of which combine to exercise in effect on associational interests, that is management's right to boycott talking to the manager of the store, talking about pesticides, are illusory in this case. They depend again on hypothesis, on speculation, and they are hypotheses and speculations with which we vigorously disagree.

Now, in that regard, look at Tree Fruits. There is no question that in Tree Fruits, just as the amicus says, this Court went to great lengths to construe that statute in such a way as to save it. And it did so -- in fact, in reading out that language, "except picketing", that is contained in the 8B(4)(2)(b) proviso, it did so because of its First Amendment concern.

Now, a decent respect, we submit, for comity within the federal system, and for the respect of one judicial system for another judicial system, indicates that the same approach ought to be -- or the same deference ought to be accorded to the Arizona courts.

QUESTION: By doing what?

MR. LEE: By permitting in the -- excuse me, by permitting in the B(8) context, Mr. Justice White, an opportunity -- well, in all of the context -- for the Arizona

courts to say what their statute means.

In every instance this (B)(7) and the (B)(8) depends on how you read the statute. Similarly, the election provisions --

QUESTION: So you're talking about it may be just a Pullman extension?

MR. LEE: That's exactly what I'm talking about.

QUESTION: Saving the federal question.

MR. LEE: That is exactly what I'm talking about.

QUESTION: Do you have a certification procedure in Arizona?

MR. LEE: There is not, Mr. Justice Blackmun; there is not.

Finally, --

QUESTION: What happens if there are, say, ten or twenty of these cases where an employer runs in, gets a TRO from a county judge or some place, and then after they educate him on the law, they get it vacated and there's never any appeal to the Supreme Court? And they say that's more or less what's been happening that there is a practical deterrent that they can't violate those injunctions during the few days they are outstanding.

MR. LEE: Well, if that's a defect, Mr. Justice Stevens, it's a defect in Rule 65 of the Federal Rules, because that's exactly what Rule 65 permits.

QUESTION: Well, Rule 65 isn't specifically directed to First Amendment protected activity, is it?

MR. LEE: Well, except that --

QUESTION: Or at least arguably protected.

MR. LEE: But Carroll said that you have to get -- you have to give actual notice except when there's some kind of compelling reason that you can't. That is the Rule 65 rule, so that Carroll in effect, in a First Amendment case, affirms the Rule 65 approach.

There is nothing in this Appendix, nothing, or anywhere in the record, that indicates that in fact there was any impropriety, any failure to observe Rule 65 or any failure to attempt -- there is simply nothing on it, as to what the facts in those cases were.

This is just not the case to be deciding the constitutionality of Rule 65, which is necessarily what you have to decide.

QUESTION: The problem, as I understand the burden of Mr. Justice White's question, is: how does the Supreme Court of the State really get to construe this statute? As long as it's on the books, it does have some deterrent effect, I suppose, on First Amendment protections.

MR. LEE: I would think that in a case in which I go into court, I get a TRO against Mr. Cohen, and then he immediately goes before the Arizona Supreme Court on a special

writ, which that statute provides, and attempts to dissolve it, because I violated his constitutional rights. Mootness would not be a problem because it's the kind of thing that is capable of repetition yet evading remand.

QUESTION: Of course, if you're right about case or controversy, why, you probably couldn't get in the State courts either. So I suppose before we get to abstention, we have to rule against you on the case or controversy?

MR. LEE: Yes. And I vigorously urge you not to do that, Mr. Justice White.

And on that happy note, I will conclude my argument.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:15 p.m., the case in the above-entitled matter was submitted.]

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