In the

Supreme Court of the United States

GULF OIL COMPANY ET AL.,	)	
	)	
PETITIONERS,	)	
	)	No. 80-441
V.	)	
	)	
WESLEY P. BERNARD ET AL.	)	

Washington, D.C.
March 30, 1981

Pages 1 thru 46

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

GULF OIL COMPANY ET AL.,

Petitioners,

v.

WESLEY P. BERNARD ET AL.

No. 80-441

Washington, D. C.

Monday, March 30, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United states at 10:05 o'clock a.m.

APPEARANCES:

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JACK GREENBERG, ESQ., Suite 2030, 10 Columbus Circle, New York, New York 10019; on behalf of the Respondents.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the United States and the EEOC as amici curiae.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Gulf Oil Company v. Bernard.

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

ORAL ARGUMENT OF WILLIAM G. DUCK, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case is before you on a writ of certiorari to the United States Court of Appeals for the 5th Circuit. The grant of certiorari is limited only to the issue respecting communications. The issue in the case is whether the district court can enter a monitoring order recommended by the Manual when potential abuses of the class action device have actually taken place.

The 5th Circuit held that such an order could not be entered, that it was a prior restraint, and therefore unconstitutional. Before getting into the facts, I would like to briefly state our position. Our position is that under Rule 23 the district court has a unique responsibility to monitor the actions of the parties before it, to protect the interests of absentees, to insure compliance with that fiduciary obligation that attorneys have to the courts in the administration of justice. We submit to the Court that in this case the district court properly exercised its discretion under Rule 23

and more importantly, he properly accommodated the First Amendment rights of all parties in a fair and equitable manner.

QUESTION: Mr. Duck, is the actual order that was entered in the record here somewhere?

MR. DUCK: It is, Your Honor, it's on page 124 of the Joint Appendix.

QUESTION: Thank you.

MR. DUCK: The facts in this case are very simple. The action was commenced on May 18, 1976, as a class action. The plaintiffs sought to represent a group of employees, present and former employees, at the employer's Port Arthur refinery. They also sought to represent a group of applicants for employment nationwide, without restriction as to geographic location. The applicants, the plaintiffs in this case, are being represented by three members associated with the Legal Defense Fund, and two private attorneys, Miss Morrison and Mr. Cotton.

Now, one month prior to the commencement of this action, the employer in this case entered into a conciliation agreement with the EEOC and the OEO. And that agreement provided for back pay awards to about 616 employees at the plant. It's important for the Court to know that the group of individuals who were going to receive conciliation benefits was much smaller than plaintiffs' proposed class.

At the time the employer was served with the complaint, already 430 of the 616 individuals entitled to conciliation benefits had received those benefits, so there was only about 180 people left to sign up.

At the time the employer was served it voluntarily suspended contact with all potential class members and the reason for this is because under Rule 23(e) the employer felt that by settlement it might be interpreted to be approved by the court, and the employer wanted to wait until the action got before the court and the court could get control of the litigation.

Now, four days after suit, just four days after suit, a meeting was called by respondents and attended by three of their attorneys.

QUESTION: When you say "after suit," do you mean after the filing of the complaint?

MR. DUCK: Mr. Justice Rehnquist, that's right; and prior to the time that Gulf was served. It was attended by three attorneys: one attorney, Mr. Thibodeaux, who is associated with the Legal Defense Fund; and two private attorneys Miss Morrison, and Mr. Cotton. In that meeting, as we see from affidavits of opposing counsel that are in the Appendix on page 111, 114, and 117, it was shown that they discussed the issues in this lawsuit, they discussed the conciliation agreement, and they talked about the hazards of fair

employment litigation.

Now, it was disclosed to Gulf by an attendee at the meeting, and Gulf so reported to the court in its brief, that the attorneys also stated to the group not to sign the conciliation agreement, if they had received checks from the employer to send them back, because they could recover double the amount in this by prosecuting this lawsuit. At that point in time the employer was put in a very difficult position. It sought an interim order --

QUESTION: Mr. Duck, let me just be sure I understand, did the affidavits represent that they could recover twice as much in the litigation?

MR. DUCK: No, it didn't, Your Honor.

QUESTION: Where does that show up in the record then?

MR. DUCK: That shows up in our brief to the court where we represented to the court that that had taken place.

QUESTION: And what was the source of that representation?

MR. DUCK: Your Honor, this is outside the record, but one of the attendees, one of the black attendees at the meeting, voluntarily came forward and reported what took place to the employer. It was reconfirmed by the employer, but the individual who made the representations to Gulf would not sign an affidavit for

personal reasons.

QUESTION: Well, what it boils down to is it's not in the record then?

MR. DUCK: Your Honor, we submit for purposes before the court and what the district court had to look at it was part of the record, it was in the brief, it was a representation by counsel.

QUESTION: But a representation you were unable to substantiate?

MR. DUCK: Your Honor, it's our position in this case that the district court must be able to look at everything that's before him when trying to decide whether to enter such a monitoring order. He must look at the entire atmosphere. He shouldn't be required to resolve conficts between attorneys or between --

QUESTION: If you rely on a fact that isn't established as a fact, maybe there's a possibility that that might happen, but you can't really say that the record demonstrates that it did happen.

MR. DUCK: Your Honor, it's really not our position. We are not here advocating -- although we believe it happened -- we're not advocating that the district court should resolve that conflict. We're simply saying that the totality of the situation that the district court looked at at that point in time gave him sufficient discretion to enter this order.

QUESTION: Do you regard that as an essential part of what he would need in order to enter such an order?

MR. DUCK: Mr. Justice Stevens --

QUESTION: Shall we assume it happened or not happened for the purpose of deciding the case?

MR. DUCK: I don't think it's essential for this Court to resolve the conflict either. In other words, I think that the facts --

QUESTION: It seems to me you should not be relying on it here.

MR. DUCK: We submit, Your Honor, that it in fact did happen, that the district court could in fact take that into consideration.

QUESTION: Well, but you can't submit as a fact something and say we don't have to decide whether it's a fact or not?

MR. DUCK: Yes, sir. I would like to submit, Justice Stevens, that here we had a situation that the district court was looking at the fact that the meeting took place, the fact that the affidavit stated certain representations or comments were made to the potential class members in attendance. At that time these potential class members were making very basic decisions about their rights, whether to sign up in a conciliation agreement or whether to join in this lawsuit. And we think those factors weigh just as

heavily as the conflict that exists between counsel as far as what the district court had to do and the action he had to take.

QUESTION: It seems to me there's quite a difference between a lawyer saying that the claim that would be filed would be for an amount twice as much as the settlement or something like that, which presumably might be an accurate description of the claim, and a statement by the lawyer that if we file such a claim we guarantee that you will recover twice as much. And you're suggesting that they said the latter rather than the former?

MR. DUCK: That's true, Your Honor. We do --

QUESTION: It's very possible that a person attending the meeting reporting it might not have the distinction between those two kinds of statements very clearly in mind.

MR. DUCK: Your Honor, it's not our position that any misrepresentation actually took place. It would be impossible to know if it was a misrepresentation until the lawsuit was tried and a final verdict was entered, whether it was --

QUESTION: Well, shall we decide the case on the assumption that there were no misrepresentations at that meeting?

MR. DUCK: No, Your Honor, as I again urge the Court, to look at the entire circumstances that were before

the district court, I submit to the Court that it's not --

QUESTION: You're saying that some things outside the record should be treated as though they were before the district court.

MR. DUCK: Mr. Justice Stevens, I submit to the Court that the district courts acting in their discretion, under the federal rules, decide matters that are before them but may be not technically in the record all the time: motions to compel, discovery orders, all these types of matters.

QUESTION: What kind of an affidavit would be sufficient in connection with -- would an information and belief affidavit be all right, or not?

MR. DUCK: Mr. Justice White, to support the statements that the employer represented to the court?

QUESTION: Yes. If an affidavit that the employer had been informed by so-and-so; this is hearsay?

MR. DUCK: Mr. Justice White, I think that that would again be appropriate for the district court to consider as far as what action he's going to take based upon his discretion.

QUESTION: But that kind of an affidavit wasn't presented, was it?

MR. DUCK: That's true, indeed, Your Honor. We do submit that this case shouldn't turn on exactly what was said

or resolved in the differences between counsel in this case, but look at the total circumstances before the district court, the unique position that he was in when he saw the meeting that took place, when he saw the conflict between counsel --

QUESTION: Of course that -- even if you're right that might not justify the order that was entered; or that if, and even if you're wrong and we -- doesn't mean that the order was bad. Suppose we won't take your -- suppose we judge the case without this claim of misrepresentation, you don't say you've lost the case?

MR. DUCK: Mr. Justice White, we certainly do not. And the reason for that is, consider the type of order that was entered here. This was not an entered, suppressed communication. This order simply monitored what took place in that class action setting. It didn't say you couldn't speak, because the order specifically exempted a number of types of communication.

QUESTION: Suppose in this case that counsel had thought that something he wanted to send out was constitutionally protected and he then sent it out. And then he knew that the order supposedly required that he summarize it, at least, and notify the court that he had sent it out. Suppose he had done that. Would the court of appeals have then held that that counsel's constitutional rights had been

violated?

MR. DUCK: Mr. Justice White, it's our position --

QUESTION: I know, but what did the court of appeals hold? Did it also invalidate the order to the extent that it required reporting to the court a communication that counsel sent out because they thought it was constitutionally protected?

MR. DUCK: Mr. Justice White, apparently it did; it invalidated the entire order. It held that the entire order, and they looked at it, was a prior restraint of First Amendment freedoms, and was unconstitutional.

QUESTION: But there was a provision per -- that counsel would not have been in contempt if he had thought, any statement he thought protected, if he sent it out, he would have been in contempt if he hadn't reported it afterwards?

MR. DUCK: That's true, Mr. Justice White. The exemption said this, that any counsel or party may make a constitutionally protected statement to the potential class members, his only thing he had to do was report it five days later. So this exception really ate up the rule, and it might come to mind, didn't that destroy the purpose of this order?

QUESTION: The rule, actually, was that that he asserted was constitutionally protected, not that it was in

fact constitutionally protected?

MR. DUCK: Exactly, Mr. Justice Rehnquist, that he asserted it. And once he asserts it under the exemption, it is our position that very free communications can take place. If it was -- now, it might come to mind immediately, well, what was the purpose of the order if he could make these kind of communications? And I submit to the Court, the purpose of the order was to monitor and detect, it wasn't to suppress. It allowed the judge --

QUESTION: Do you think the 5th Circuit held that that kind of an order would be a prior restraint?

MR. DUCK: I think they did, Your Honor, in this case. They held that this was a prior restraint of First Amendment freedoms and we think this is a particularly inappropriate case to hold the prior restraint doctrine applicable. We're talking about ongoing litigation and the courts enter orders all the time affecting the basic First Amendment rights of parties and attorneys during ongoing litigation. I was told this morning to be here at 10 o'clock and to speak for only 30 minutes. It might have been I could explain my position better this afternoon after more thought or that I could speak better to you for an hour, I could explain my position better. But the administration of justice requires limitations upon my rights and upon rights of counsel, and that's the kind of right we're looking at here,

is the protection of the ongoing administrative --

QUESTION: Are you saying, are you suggesting that there aren't any constitutionally protected communications in a piece of ongoing litigation? The district court apparently thought there might be.

MR. DUCK: Mr. Justice White, it's our position that when you have to resolve the right of the district court to administer his proceeding, that the constitutional rights of parties and of their attorneys become lesser, they must bow to that kind -- it's like Cox v. Louisiana, which extended that right even outside the courtroom, where you said picketing could be limited outside the courtroom, just like the Supreme Court's own Rule 7, which says that clerks cannot discuss matters that are pending before the Court even after they've left the Court.

QUESTION: In the Geders case, though, we did say that there was at least in the federal system a right of a client to discuss a matter with his attorney.

MR. DUCK: That's right, Mr. Justice Rehnquist, and this order specifically allowed the attorney to consult his client. It even allowed potential class members to consult the attorney if the potential class member wanted to. What it really restricted him, what it really looked at, was the ex parte attempt by an attorney to contact the potential class member. And even then they could have done it if they asked

to do so under the exception. It was constitutionally protected; all they had to do was report it to the court five days later.

We submit that because of this, it's inappropriate to apply labels to this situation.

QUESTION: When you say, if they had asked to do so, as I have read the order, they didn't even have to ask to do so. They simply had to report that they had in fact done it.

MR. DUCK: Mr. Justice Rehnquist, you're correct; that is, all they had to do was assert the right. There was no prior approval of the court. You do it and then report it later. That's exactly right.

QUESTION: You would concede, I take it, that any time a rule of a court even dealing with activities of a lawyer in litigation imposes a prior restraint, that it's something that gets very careful examination by the courts?

MR. DUCK: Mr. Chief Justice, no, our position is that especially during ongoing litigation the court must be able to exercise control over the parties and over the counsel. As Mr. Justice Brennan said in Nebraska Press, counsel have the fiduciary obligation not to make communications that redound to the detriment of the accused and which supports the administration of justice. And that's why we think that it's particularly inappropriate to look at this as a prior

restraint case. It's a balancing case, and the interest to be balanced, the court's rights to administer that case, a unique class action case. It's a case where all of the parties are before the court, it's not a 23(b)(3) case where you opt in or opt out. This is a 23(b)(2) case where all those potential class members are right before the court.

QUESTION: Could I ask you this question? This order runs both against the parties and their counsel as I understand it?

MR. DUCK: Mr. Justice Stevens, that's correct.

QUESTION: Do you think the same standards apply to the court's power to monitor communications between counsel and potential class members, as would apply to communications between class members and, say, a friend or a relative who was interested in perhaps joining the class?

MR. DUCK: Mr. Justice Stevens, I'm sorry, I don't quite understand your question.

QUESTION: Well, you pointed out that the lawyer has a special fiduciary obligation both to the court and his clients and therefore that may justify greater monitoring of the lawyer's communications to potential clients or his client. My question is, do you apply the same standard for purposes of analysis in this case to potential communications between a member of the class who is a layman and some one he may know who is a potential person who might be persuaded

to join the class or join the litigation?

MR. DUCK: Mr. Justice Stevens, I don't think the same standard would apply in this case. The order did apply to both counsel and the parties.

QUESTION: Right.

MR. DUCK: This was pre-class certification, so there were no class members. The only --

QUESTION: No, but there were parties, there were multiple parties.

MR. DUCK: There were six parties; yes, sir. So it applied to the six parties and to counsel, but didn't apply to anyone else.

QUESTION: I'm asking, does the same standard apply to those six parties as applies to their lawyers?

MR. DUCK: It does indeed, Your Honor, and the reason for that is because those parties are before the court and they could be used indirectly to accomplish what the court was trying to prevent directly. Once you submit yourself to the jurisdiction of a court, you too have obligations to the administration of justice and a court can tell you if you're going to be a witness or if you're not going to be a witness. The court can sequester you. And that certainly touches on the First Amendment rights of the parties. But we don't call that a prior restraint. We say that it's necessary in order to administer the case.

QUESTION: Why isn't it a prior restraint? What is the source of the court -- just because a person has become a party to litigation, he gives up some First Amendment rights he would otherwise have, you say?

MR. DUCK: Your Honor, in this case --

QUESTION: If he wants to discuss the issues in the case, give a speech, whatever it might be, he can't do that?

MR. DUCK: Mr. Justice Stevens, we don't suggest that the parties or counsel check their constitutional rights at the courthouse door. What we're suggesting here, and this order points out, that still freeflowing communications were allowed. A lot of contact was allowed under this order.

QUESTION: I understand, but anytime a person did give a speech or talk to a friend about the lawsuit or something, he had to summarize that and tell the court about it within five days?

MR. DUCK: Yes, that's true, Mr. Justice Stevens. We contend that that is not an overbroad statement, because as the Manual points out you're, here, you're reconciling again the administration of justice and the control of the court and the protection of those absent class members who had to make very important rights at that particular time, whether they were going to sign the conciliation agreement or whether they were going to join the lawsuit. And any misrepresentation or even inaccuracies that would be given to them

at that particular time could have been extremely detrimental.

QUESTION: Well, the order was certainly a lot broader than misrepresentation.

MR. DUCK: Mr. Justice White, the order --

QUESTION: It barred absolutely truthful communications as well.

MR. DUCK: Mr. Justice White, we submit that the order did not in fact bar communications. Again, I'd point out to the Court on page 124 of the Appendix that that order allowed the attorneys to speak to their clients, it allowed potential class members to speak to the attorneys, and allowed any other communication that was constitutionally protected as long as it was reported to the court. It was not restrictive; it allowed freeflowing communications.

QUESTION: Well, I'll just put it again, it purported to affect, or to bar, unless you were going to report it to the court, absolutely truthful communications originating with counsel to someone who was not his client.

MR. DUCK: If, Mr. Justice White, you're entirely correct in this respect, that would only be with regard to solicitation of funds or solicitation of membership. I think I should call the Court's attention to --

QUESTION: Well, would this order bar a communication, a circular put out by (a) a named party to the litigation, or the counsel to the named party to the litigation,

putting out a circular to all potential class members including many people who haven't hired this lawyer, urging them not to take the settlement?

MR. DUCK: Mr. Justice White, such a circular could have been distributed under this order if they had claimed the constitutional right to do so.

QUESTION: I know; that isn't my question. Unless they did report it to the court, that kind of a communication would have been barred?

MR. DUCK: That's correct, Mr. Justice White.

QUESTION: That's all I wanted to know.

MR. DUCK: The order, we believe, was very narrowly tailored to accomplish its intended purpose. It's important, I think, to look at the purpose of the order. It was to detect inaccuracies or misstatements that were sent to potential class members. Respondents urge in this case that there were other reasonable alternatives that could have been used to correct the situation. In fact, they suggest that the disciplinary procedures of the bar association could have been brought to bear and remedial notices could have been sent out. But that obscures the intent of this order. The intent is to find out about it. If the court can't find out about it, he can't discipline the attorney and he cannot sent out remedial notices. And because we're dealing with such a large group of people, hundreds and hundreds of people,

nationwide, the court's going to have to know what's going on out there. Otherwise he can't control the litigation and protect the rights of absent class members.

This Court said, just last term, in Deposit Guaranty v. Roper, that the district court has a responsibility to protect absent class members and to protect the administration of justice by monitoring the actions of the parties before it.

QUESTION: Mr. Duck, may I ask, suppose counsel did assert that constitutionally he was entitled and he sent something out and then within the five days he reported it to the court, the judge looked at it and didn't like the looks of it. Obviously counsel couldn't be held in contempt, he hadn't violated the order. What could the court do?

MR. DUCK: Well, Mr. Justice Brennan, I think under the order the court could do nothing; the individual complied with the order, in that case.

QUESTION: Well, I suppose the court could, if he thought it had misrepresented the facts, it could send a notice of its own out.

MR. DUCK: Well, yes, Mr. Justice White, that's correct.

QUESTION: Or it could permit the employer to send out something?

MR. DUCK: That's true, Mr. Justice White. In response to your question --

QUESTION: Would Gulf have to get the permission of the court to send its own out?

MR. DUCK: Absolutely, sir. The court --

QUESTION: Permission?

MR. DUCK: Yes, sir.

QUESTION: Well, suppose that Gulf thought that constitutionally it was entitled to respond and sent out a response and simply advised the court that it had sent it out? It could do that, couldn't it?

MR. DUCK: Well, Mr. Justice Brennan, the order applied to both sides.

QUESTION: That's what I mean. You didn't have to get permission to send it out, as I understood it. Anything that you wanted to send out that you asserted constitutionally you were entitled to, either side could send it, so long as it filed a copy with the court.

MR. DUCK: That's true, Mr. Justice Brennan.

QUESTION: It seems to be conceded, Mr. Duck, that the order, at least down to paragraph No. 3 thereof -- the copies are almost haec verba -- the proposed order worked out in the Manual, is that correct?

MR. DUCK: That's true, Mr. Justice Stewart.

QUESTION: Where does the Manual model appear, if it does appear, in the papers before us?

MR. DUCK: In the papers? It is in the Appendix,

and it's attached to, it's on page 97 of the Appendix.

If it please the Court, regardless of what action this Court takes in this case, this matter is going back to the federal district court. We submit to the Court that it's going to be very important for the district court to know how to control this litigation. We submit to the Court that there is still a very real possibility that notices inaccurate will be sent to potential class members in this case. We submit to the Court there's still a real possibility that meetings will be called by both sides. And we submit to the Court that the discretionary power of the district court must be affirmed in order to control this type of litigation.

MR. CHIEF JUSTICE BURGER: Mr. Greenberg.

ORAL ARGUMENT OF JACK GREENBERG, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

We submit, first, that the order prohibiting communication with members of the class violates the First Amendment, and second, that those orders were issued in violation of Rule 23 of the Federal Rules of Civil Procedure.

QUESTION: What if Rule 23 had by its terms provided that after the filing of a lawsuit of this kind such an order be entered?

MR. GREENBERG: It did not provide that such an

order be entered. It provided --

QUESTION: Well, what if it did?

MR. GREENBERG: What if it did? Well, then, it would be --

QUESTION: You'd still have your constitutional argument.

MR. GREENBERG: You would still have a constitutional argument; certainly.

QUESTION: But not your second argument, obviously.

MR. GREENBERG: Yes, certainly -- no, we would not have the second argument, but our position is that Rule 23 provides only for the entry of appropriate orders and this is --

QUESTION: What if there were no Rule 23? There would be no class action?

MR. GREENBERG: If there were no Rule 23 or its equivalent, there would be no class action.

QUESTION: Right. And you think the Constitution requires that there be a rule 23?

MR. GREENBERG: Certainly not. No.

QUESTION: But you think a Rule 23 that provided for the entry of an order such as was entered in this case would be unconstitutional?

MR. GREENBERG: Yes, I do. At least insofar as it provided for that.

QUESTION: Incidentally, Mr. Greenberg, is Rule 23 the source of the authority for what appears at 97 in the Manual?

MR. GREENBERG: It purports to be as an appropriate order for the conduct of class action litigation; yes.

QUESTION: Under 23?

QUESTION: Mr. Greenberg, in the old days when I used to practice, it was customary in some courts for the court to not exclude witnesses from the courtroom who were planning to testify, but simply instruct them not to discuss their testimony or any testimony they had heard with any other potential witness. Do you think that sort of an order would be a prior restraint?

MR. GREENBERG: No, I don't. I think there is a compelling reason for that order and a similar order to juries. It's a classical kind of thing which is necessary for the conduct of the trial before, occurring right before the judge. So I think that that would certainly be permitted. It is not our position that the judge has no power to enter orders governing the conduct of class actions or other litigation. The judge does have power, but there has to be some reason for it, there has to be some evidence. In a case like this there has to be a hearing and a finding; the order must be narrow. For, example, in the example you gave, Mr. Justice Rehnquist, I don't think an order by the Court would be

upheld if it were in the terms of the Manual, that you are forbidden to discuss with anyone matters tending to reflect adversely upon the administration of justice, or tending to reflect adversely upon any parties; that order would not be upheld, I would hope.

QUESTION: Let me carry this one step further, Mr. Greenberg. Some judges -- I think this Court has never had occasion to pass on it, that I'm aware of, but it is not uncommon in the trial of a case, when a recess is about to occur, for the judge to instruct the witness who is on the stand that during the recess he may not discuss the case with anyone, including the lawyer who is examining him, who might or might not be his attorney. Such orders have been entered with respect both to independent witnesses and party witnesses. Would you think that would be a violation of the First Amendment?

MR. GREENBERG: Certainly not. Entirely permissible and entirely appropriate.

QUESTION: It's not a violation of the First Amendment?

MR. GREENBERG: It is not a violation of the First Amendment, quite different from this case. And as I said to Mr. Justice Rehnquist, I don't think a court would uphold under the First Amendment an order to a witness, do not discuss anything that tends to reflect adversely upon the

administration of justice or misrepresents the status of the case. Of course, a witness wouldn't understand what that meant; no one would. But an order to not discuss this with anyone during the recess, that's, I think, conventional and it would --

As a preliminary matter, we think it important to emphasize certain facts about the record. First, there is no evidence, no evidence that plaintiffs' counsel did or said anything which would constitute violation of any rule of law or any ethical norm or abuse in any other sense. The only evidence in the record on the communications issue consists of three affidavits by plaintiffs' counsel and the handbill which they desired to circulate, which appears on the last page of plaintiffs' brief.

The affidavits describe the meetings of plaintiffs' counsel with the workers at the Gulf plant, and directly contradicted the assertion, the unsworn assertion in Gulf's brief, unsworn even on the basis of information and belief. Mr. Thibodeaux's affidavit on 115 and 116 of the record, which is corroborated by Ms. Morrison's affidavit, states, "I did not at any time during the course of the meeting advise actual or potential class members not to accept the defendant's offer of settlement nor did I say to the assembled group that counsel for the plaintiffs could obtain twice the amount of back pay for the class as had been offered to them

under the conciliation agreement." Unless the --

QUESTION: The Manual suggests, as I understand it, at least, that an order such as this be entered promptly, whether or not there has been any evidence of actual abuse. It's labeled "Prevention of Potential Abuses of Class Action" and it says, "to be promptly entered in actual and potential class action orders unless there is a parallel local rule."

MR. GREENBERG: Our position is that the Manual --

QUESTION: Some courts have done that, have they not?

MR. GREENBERG: Our position is the Manual suggests a course of action contrary to the First Amendment.

QUESTION: Well, Mr. Greenberg, in my earlier question and I think, perhaps, in the Chief Justice's question, the instruction to the witnesses who were presumably going to testify in the future or the interruption of cross-examination by a recess, no finding of fact is made that the witnesses are about to discuss testimony that they have heard, it's just a kind of a hornbook instruction.

MR. GREENBERG: Well, that is in the course of the litigation and directly before the court and is a classical kind of restraint necessary to protect the factfinding process in the conduct of the trial. I could imagine an admonition to a witness not to discuss anything with anyone months before the trial might run afoul of this rule also. I think

it's a question of the circumstances of the particular situation. But in any event, the defendants talk about the record in the case. The record is unequivocal. There is nothing in the record other than flat contradiction of the unsworn assertions in the defendants' brief.

And moreover, plaintiffs' affidavits were filed in June. Gulf was still submitting papers on this issue as late as July 17 and there was ample opportunity to submit contesting or contradicting affidavits or other evidence that they had and they didn't.

Moreover, the trial court made no finding that plaintiffs' counsel had engaged in any misrepresentation or any abuse and indeed, on this record, it could not have made any such finding.

QUESTION: Mr. Greenberg, you don't contend -- or do you? -- that a finding of misrepresentation or abuse of some kind is a necessary predicate for any order of this character?

MR. GREENBERG: We do contend that an order limiting communications, which would have to be a proper order, narrowly drawn and focused -- and the least restrictive order possible, has to be made upon a record of some violation of law or ethical norm or perhaps other abuse, or a clear and present danger that one is about to occur.

QUESTION: So you take a position that there

is no form of order whatsoever that can be entered more or less automatically when a class action is filed pertaining to --

MR. GREENBERG: -- communications with the class?

QUESTION: Yes?

MR. GREENBERG: Not as an abstract proposition; no. I cannot think of one, and counsel for defendants haven't suggested one.

QUESTION: Not even an order saying, report to the court every time you communicate with potential members or giving just a general --

MR. GREENBERG: Well, I would -- that is indeed in the order --

QUESTION: I realize.

MR. GREENBERG: -- in this order along with many other things, and we suggest that, (a) that it's burdensome, and (b) has a chilling effect upon communication among laymen and between lawyer and client. And so we would say that our position is that --

QUESTION: Well, the members of the class, the members of the hoped-for class were not the clients of these lawyers, were they?

MR. GREENBERG: Well, as a matter of fact, there were six named parties and 34 --

QUESTION: Yes, and there was no -- the order didn't

affect communications between the named parties and their counsel, did it?

MR. GREENBERG: No, it didn't, but it affected communication between the named parties and their fellow workers.

QUESTION: Yes, but they were nobody's clients at that time, were they?

MR. GREENBERG: No, they were nobody's clients at that time. But --

QUESTION: I just wanted to be sure I understood those facts.

MR. GREENBERG: There were six named plaintiffs and 34 formal parties altogether, 28 of whom were not named.

QUESTION: Well, I wonder, Mr. Greenberg, if what you're saying doesn't add up to the proposition that the Court cannot have a prophylactic rule, if it has the effect that they must let the court know what communications are going on?

MR. GREENBERG: That is indeed our position; yes.

QUESTION: Then the rule itself is a violation of the First Amendment, in your view of the case?

MR. GREENBERG: Our position is that the rule suggested by the Manual violates the First Amendment; yes.

QUESTION: Suppose the rule suggested by the Manual was based on some kind of experience by the members of the group that fashioned the rule in the Manual, that there had

been these kinds of abuses in case after case after case, and therefore the time had come when we felt it necessary in the interests of the administration of justice to have a prophylactic rule? Suppose we had something like that?

MR. GREENBERG: Well, first I would like to say that the Manual itself expressly says that the kinds of abuses they're dealing with are rare, and do not occur with any frequency and that is in the Manual itself as a predicate to the rule. Secondly --

QUESTION: Is that in what we have here?

MR. GREENBERG: Yes, we've cited it in our brief and the --

QUESTION: I mean, is it in the Appendix, Mr. Greenberg? I know the Manual is.

MR. GREENBERG: The Manual -- the textual material supporting the Manual's proposed rule is not in the Appendix but it's cited in our brief.

QUESTION: But it was published with the Manual, wasn't it?

MR. GREENBERG: Yes, yes; it was published with the Manual.

QUESTION: Which is a matter of public --

MR. GREENBERG: Yes, I have the pages here.

QUESTION: Which is a matter of public record?

MR. GREENBERG: Oh, yes; yes. It's been published,

and I have the pages here if anyone wants them.

QUESTION: And what's the gist of it? What you just said, that -- ?

MR. GREENBERG: Yes, that's it's minor. It's quite unusual to have the kind of abuse that the rule is dealing with, but nevertheless they feel it's necessary to have the rule. Secondly, if there were pervasive misrepresentation and abuse and overreaching in the sense that it occurred in the Ohralik case, for example --

QUESTION: Before you go on, Mr. Greenberg, don't you think it's important to remember that when this Manual was being set up this was at the beginning of the class action and the frequency or rarity of these occurrences would be something largely guesswork except as to the events beginning with Rule 23, or the use of Rule 23. Isn't that correct?

MR. GREENBERG: Well, yes, the answer is yes and no. It was coterminous with the adoption of Rule 23 as we know it in 1970, but when I went to law school in 1949 we still had Rule 23; it was in a rather different form and the same considerations applied.

QUESTION: And the potentialities of Rule 23 were not immediately recognized by the profession, is that not so?

MR. GREENBERG: Oh, no. I mean, I -- well, all I know is that I was in scores of class action cases and saw many other hundreds of lawyers doing the same thing.

Class actions have been a commonplace under the federal rules at least back to, certainly, to the '40s. And I don't know how far back beyond that, but the rule was then reformulated and refined and embodied new experience not relating to this point and then the Manual was written with regard to this. But we've had class actions for at least 30 or 35 years.

But, returning to pervasive abuse, let's say all lawyers were acting like Mrs. Ohralik, in Ohralik v. Ohio, one perhaps might then think it was necessary to have a prophylactic rule, but in that instance it should be precise, it should be focused at the abuse, it should, unless the violation were epidemic, be based upon a hearing that some abuse of this sort had occurred, and it should not be a prior restraint unless absolutely necessary but be corrective or perhaps punitive, and prior, if that's the only way of dealing with it. But I don't think that's what --

QUESTION: Would you limite abuse to what?

MR. GREENBERG: Misrepresentation, overreaching --

QUESTION: What's overreaching? Different --

MR. GREENBERG: Well, interviewing someone in the hospital bed while in traction and under sedation and contrary to -- that's overreaching; what this Court has held.

QUESTION: Yes. What else?

MR. GREENBERG: Well, I don't know --

QUESTION: Misrepresentation, overreaching --

MR. GREENBERG: Misrepresentation, lying. But I don't think many lawyers do that. In fact, extremely few.

QUESTION: No, what I'm trying to find out, Mr. Greenberg, what would you limit this to?

MR. GREENBERG: If one could adopt such a rule?

QUESTION: Yes, yes.

MR. GREENBERG: Well, I would limit it to bribery, a violation of any law, a violation of some explicit ethical norm --

QUESTION: How about changing the placecards at a charitable banquet so that the lawyer sat next to someone who was looking for a lawyer?

MR. GREENBERG: Well, I personally would find that mildly amusing. I don't know that the --

QUESTION: Well, it's the way the big firms solicit.

MR. GREENBERG: I have not been privileged to travel in that company so I don't know that I --

QUESTION: My knowledge is only hearsay.

MR. GREENBERG: Have I answered your question, Mr. Chief Justice?

QUESTION: Well, you've addressed it.

MR. GREENBERG: We would like to and I believe I've done this in court, call attention to the sweeping, vague, and onerous nature of the order prohibiting communication. It was full of language like "including but not limited to

the following." Communication which "tends" to "misrepresent." It dealt with "impressions tending" to "reflect adversely."

Indeed, the only -- I had a lingering memory that I'd seen the word tendency in some First Amendment case and it took me a long time to find it, and there it was in Bridges v. California. And in Bridges v. California, the Court dealt with the issue of a tendency. Rule -- it says, "The basis for punishing the publication as contempt was by the trial court said to be its 'inherent tendency' to interfere with the orderly administration of justice in an action then before a court for consideration."

In accordance with what we have said on the clear and present danger cases, neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression. And so, this is the kind of language and communication that the order prohibited.

QUESTION: Mr. Greenberg, your time is running. Are you going to get to the significance of the exception?

MR. GREENBERG: Yes, or -- there were two exceptions: one is you might apply for permission to communicate in advance; and the other is, you might communicate if you had a constitutional belief that you could not be restrained in prior fashion and then you'd have to within five days file it with the court.

As to applying in advance, as to the parties, I think it's simple. I don't think a layman, a worker at the plant, would know how to apply. He'd have to go to counsel. It would become an absolutely impossibly cumbersome method of dealing with it. So far as counsel is concerned, counsel in the ordinary course of preparing a case interviews, sifts, checks facts, rejects assertions. To have to go back and forth to the court all the time would be nearly impossible. To have to report to the court what was said, in our experience, the two questions most frequently asked by a client whom you're interviewing in this kind of case is, one, is how much do you think I'm going to get; and two is, what do you think of the judge?

As to the first question, it's --

QUESTION: How about, what's it going to cost me?

MR. GREENBERG: What's it going to cost me? In this particular case it was being handled by a charitable organization and it would cost him nothing. Unless counsel had a flattering opinion of the judge, he'd be extremely reluctant to impart it to his client because then it would have to be filed with the court. And, indeed, all sorts of things that he might be saying with his client -- and if the client wanted to report that a certain foreman had done something, or there was some practice in the plant, or that you ought to speak to so-and-so and he'd give you the proper information,

that would have to be filed with the court. The whole thing would really not only impede First Amendment rights but -- since I don't have much time to discuss it I'll go into my Rule 23 argument -- make it impossible for counsel to conduct the class action proceedings in a way commensurate with his fiduciary responsibility to the class. He would have to -- he has to find out about typicality, the numbers of people, the relationship between the common claims and the claims that are peculiar to particular class members, and whether he would be an adequate representative to the class or the class be split into subclasses, does he have a conflict with a particular class member because of some other litigation? And in order to have to keep going back and forth to this judge who did not answer the one request for distributing the handbill and to interview the class for 35 days until the time that it would do any good had expired, would be so onerous a burden that counsel's hands would be handcuffed and rather than be an adequate class representative he would be a completely inadequate class representative.

And so that's my response concerning the exceptions to the rule. The exceptions are no exceptions at all. There's a chilling effect which makes it impossible for counsel to function effectively. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF THE UNITED STATES ET AL. AS AMICI CURIAE

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

What Mr. Greenberg has just said supports our contention that the order was an inappropriate one under Rule 23. We agree with 21 of the 22 judges who sat on the en banc court in that regard and we believe the judgment of the court can and should be affirmed on this nonconstitutional ground.

QUESTION: But we don't ordinarily take cases just to decide whether it was a proper abuse of discretion, and proper discretionary review by the court of appeals, do we?

MR. WALLACE: No, Mr. Justice, but in this case the constitutional issue on which the Court granted certiorari is so closely interrelated with the question of what should the courts appropriately order under Rule 23 that the same guidance can be forthcoming from this Court without necessarily basing that guidance on a constitutional holding. That's our point. The guidance really wouldn't differ that much.

Class actions have played an important role in the enforcement of federal civil rights laws and of other statutory and constitutional rights and this Court has recognized that they constitute a form of constitutionally protected freedom of association and petitioning of the Government for redress of grievances. And the Court --

QUESTION: We don't ordinarily think of -- or do you

suggest we should think of the suits brought in federal courts as exercising the right of petition for grievances?

MR. WALLACE: Well, I believe that underlies many of this Court's decisions, Brotherhood of Railroad Trainmen v. Virginia and NAACP v. Button, and some of the others on the development of class claims, that this is a form of peaceable petition. Many of those arose at a time when many persons were advocating getting the assertion of civil rights out of the streets and into the courts where grievances can be redressed by the Government.

QUESTION: So, as I understand it, Mr. Wallace, unlike Mr. Greenberg, you would say that some form of class action is constitutionally required?

MR. WALLACE: I believe that's the implication of those decisions of this Court, all of which have been based on constitutional grounds and in particular, the Court has recognized a substantial measure of constitutional protection for communications involved in the development of the class claims.

QUESTION: Well, couldn't you sever it there and say that the Constitution extends its protection to generating interest in filing in court and so forth, but not to the actual -- beyond the complaint stage?

MR. WALLACE: Well, I think what the Constitution protects beyond the actual complaint stage differs. I agree

with that. That does create some change, but it seems to me that the recognition most recently in the Primus case in this Court of the constitutional protection for communications involved in the development of the assertion of class claims of this sort goes far toward deciding this case, whether or not the case itself need be decided on constitutional grounds.

Our basic point on this is that while Rule 23 does prescribe certain safeguards against unfairness in the use of class claims and authorizes the district courts to enter orders that are appropriate for standing upon those prescribed safeguards, the basic purpose of Rule 23 after all is to permit the assertion of class claims and the maintenance of class actions. And for an order to be appropriate under the rule, therefore, it must not unduly interfere with the assertion of the class claims and the development of the class suit. And it must --

QUESTION: So, do I understand correctly then that you would assert that Sample Pretrial Order No. 15 of the Manual is contrary to Rule 23?

MR. WALLACE: Well, that's the conclusion we have come to. It's also the conclusion that the 3rd Circuit has come to in two cases cited by the court below, and it's the conclusion that 21 of the judges below came to. I think the 3rd Circuit actually articulated this part of the argument with greater relation to the purposes of Rule 23.

QUESTION: Are you really saying that a preventive or prophylactic rule inherently runs into the First Amendment because it will reach some cases unnecessarily?

MR. WALLACE: Well, we don't say there's no room for prophylactic rules. This one is too sweeping. As we put the argument, it unduly interferes with the assertion and development of class claims, which is the basic purpose of Rule 23. It's to enable persons to assert and develop their class claims. And any order to be appropriate under the rule has to be formulated with that in mind and with sensitivity to the constitutional rights that have been recognized in this Court's cases. That's the failing of the rule here and of the proposal.

QUESTION: Mr. Wallace, under Rule 23, do you think it would be appropriate for the judge simply to require that counsel for both sides submit copies of all communications with class members and potential class members?

MR. WALLACE: Well, when you say "copies," Mr. Justice, that suggests written communications.

QUESTION: Right. I'm talking, not about any prior restraint, but just copies after they have been sent.

MR. WALLACE: It's difficult for us to take a position on a hypothetical. I think that in order for it to be appropriate, it would likely have to be related to certain topics such as settlement proposals, the kinds of things that

have caused sensitive problems to arise and possible abuses of the class action to have arisen. There are other communications that are part of the work product of developing the case, that --

QUESTION: What about communications soliciting support, inviting people to join the class? It'd be perfectly all right, wouldn't it?

MR. WALLACE: Well, written -- it's a sensitive area. It is a constitutionally protected area under the Primus decision.

QUESTION: Well, let me ask you a question about the First Amendment. Would you suggest, if we reach that question, that we apply the same standard of review that is applicable to what might be called a genuine prior restraint such as in Nebraska Press?

MR. WALLACE: What's involved here is a form of prior restraint.

QUESTION: But it's limited and you might focus on it in this regard, it's limited to a pending litigation and to counsel before the Court in Nebraska Press, a more classic type of prior restraint. You have a vast public interest involved and you also have people who are not necessarily before the Court.

MR. WALLACE: Yes, all of those are factors to take into account. I don't think I can improve on the approach

that this Court itself adopted and it was succinctly stated by Justice Black for the Court in the United Transportation Union case against the Michigan Bar. I'm looking at page 581 of 401 U.S., saying that "a decree must relate specifically and exclusively to the pleadings and proof" -- which wasn't true in that case any more than in this case. "If not so related the provision because of its vagueness will jeopardize the exercise of protective freedoms. This injunction, like a criminal statute, prohibits conduct under fear of punishment. Therefore we look at the injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment it should be struck down."

This suggests that at least there should be some specificity about an area of particular potential abuse unless an order has been formulated on the basis of findings that abuse has occurred, which requires some remedial constraint, which is not the situation here.

It seems to me that the Court has been sound in adopting that approach under the First Amendment. While there are some differences between that case and this one, the approach seems right to us and there is a problem of overbreadth and vagueness in this order, as in that one.

QUESTION: Let me just follow up with Justice Powell's question, if I may. What about an order entered immediately when the class action is filed which simply said,

if any written communication is sent out to all potential class members or fleet of class members describing the pros and cons of joining the class, class action, and the pros and cons of accepting the settlement that's now available, a copy shall be filed with the court. Would that violate the First Amendment in your judgment?

MR. WALLACE: I don't know that I can take a firm position but it certainly is far less of a problem than this order, and less of an intrusion into the ability of counsel to develop the case through interviews, oral communications, learning of --

QUESTION: What would be the argument against such an order? Presumably, the author would expect it to become -- he's not going to write these and, you know, carry them in secret pouches or anything, I don't suppose. There are usually a couple of hundred class members around. Just a routine filing with the court, you think, might violate the First Amendment?

MR. WALLACE: Well, I'm certainly not asserting that it would. Your question really isn't before the court.

QUESTION: Your cocounsel would take the position that it does, as I understand it. He says, no order unless there's a finding of abuse, and apparently you share that view?

QUESTION: But how can the court determine whether

or not there has been abuse, unless it has access to what has been sent to potential class members?

MR. WALLACE: Well, it can through the hearing of evidence.

QUESTION: But it may not have any cause to suspect.

MR. WALLACE: Well, in this case, one of the parties made assertions of abuse but didn't present any substantiating evidence. But the abuse that was asserted was not in the form of a written communication. Nor is it likely to do a great deal of good if only written communications are to be monitored. Other communications could be calculated so that the written communication would appear innocuous.

MR. CHIEF JUSTICE BURGER: Very well. Do you have anything further, Mr. Duck?

MR. DUCK: Mr. Chief Justice, we stand on our brief and our oral argument. Thank you very much.

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

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

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-441

GULF OIL COMPANY ET AL.

V.

WESLEY P. BERNARD ET AL.

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BY: Gail T. Wilson