In the

Supreme Court of the United States

ORIGINAL

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL., Petitioner,	)	
v.	)	NO. 81-202
CLAIRBORNE HARDWARE COMPANY, ET AL	)	

Washington, D. C.

Wednesday, March 3, 1982

Pages 1 thru 57

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:33 o'clock a.m.

APPEARANCES:

LLOYD N. CUTLER, ESQ., Washington, D. C.; on behalf of the Petitioners.

GROVER REES, III, ESQ., New Milford, Connecticut; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in NAACP against Claiborne Hardware.

Mr. Cutler, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF LLOYD N. CUTLER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. CUTLER: Mr. Chief Justice, and may it please the Court, the Petitioners in this case are the National Association for the Advancement of Colored People, and 91 black citizens of Mississippi. They seek reversal of a Mississippi Supreme Court judgment against all Petitioners, jointly and severally, awarding money damages and an injunction because of a civil rights boycott against white merchants in Mississippi.

The Claiborne County boycott began in 1966. At that time, discrimination against black citizens was still severe. The black community, including the local chapter of the NAACP, petitioned to correct these conditions, and participated in a biracial committee appointed by the mayor of Port Gibson, the county seat. When the committee failed to satisfy these grievances, the boycott was started. Its purposes were to end racial discrimination in employment by the merchants and the local governments, and to desegregate the school

system and other public facilities.

In our view, this case raises two constitutional questions. One is whether a boycott of business enterprises in support of a petition for redress of civil rights grievances conducted by non-violent means, such as speeches, marches, distributing leaflets, picketing, and social ostracism, can constitutionally expose all participants to liability for a common law conspiracy and a damage judgment for all business losses caused by the boycott merely because some episodes of violence by some participants were found to be present during its course.

The second is whether, even assuming the constitutionality of such a damage award, all the active participants may be perpetually enjoined from peaceful activities in further pursuit of the boycott.

QUESTION: Do you mean by that, Mr. Cutler, that any damage factor particularly should be focused on the particular individuals identified as connected with violence?

MR. CUTLER: On particular individuals, Mr. Chief Justice, and on the particular portion of the business losses resulting from those acts of violence. Yes, sir.

QUESTION: In other words, you are saying the

particular acts, when and if identified --

MR. CUTLER: Yes, sir.

QUESTION: -- must be shown to have had this consequence on the business losses.

MR. CUTLER: That is correct, Mr. Chief Justice.

We believe the Respondents have sidestepped both of these issues. They have virtually conceded the second issue, the injunction issue.

QUESTION: On that, Mr. Cutler, didn't the Supreme Court of Mississippi say that you had waived that point by failing to argue it?

MR. CUTLER: They said it was moot, Justice Rehnquist. We did argue against the entire judgment below on -- including the injunction, on First Amendment grounds. When the Supreme Court of Mississippi said that the -- we had admitted the injunction was moot, we filed a petition for rehearing saying we had not admitted that, that the injunction was still in effect, and that it was an unlawful injunction for overbreadth, and our petition for rehearing was denied, and the injunction remains in effect subject, of course, to the stay of the Fifth Circuit which will terminate when this Court has passed on this case.

QUESTION: So you contend you did argue the

merits of the injunction in the supreme --

MR. CUTLER: We say we did, and we certainly argued it on the rehearing. There would be no ambiguity about that. We argued --

QUESTION: Was there ambiguity the first time?

MR. CUTLER: We argued the First Amendment invalidity of the entire judgment below in our briefs below.

The Respondents have said they would be willing to delete from the injunction any restraint on peaceful boycott activities, so that seems to be out of the case. As for the first issue, they say that the Court should not pass at this time on whether the First Amendment protects the right to engage in peaceful boycott activities because in their view this boycott was not peaceful and violence was pervasive and central to its success, and to sustain this charge, they go far beyond the actual findings and conclusions of the courts below.

The courts below, we say, did not find violence to be pervasive or central to the success of the boycott, and you will not find those terms or any fair equivalent in their opinions. The Mississippi Supreme Court cited 12 incidents over a period of three years to support its conclusion that "force, violence,

and threats" were "present" during the course of the boycott and were "part of the boycott activity" that contributed to its success, and that this was enough to make all active boycott participants liable at common law for all the business losses suffered by the merchants.

Before I turn to those 12 incidents, I would like to outline our basic legal position in three simple points. The first is that this nation was born out of a series of colonial boycotts against British merchants in support of petitions to the British king and Parliament for the redress of grievances. The need to organize and enforce these boycotts led to the First Continental Congress, and provided the cohesion that ultimately enabled the American colonies to win their independence.

These boycotts were enforced by many of the same methods of surveillance, denunciation, and ostracism used in Claiborne County, and occasionally there were episodes of violence, such as the Boston Tea Party. Thomas Jefferson, John Dickinson, and other leaders of the colonial boycotts regarded them as lawful methods of petition for the redress of grievances, while conceding that the perpetrators of unlawful acts, like the Boston Tea Party, should be held answerable for their conduct, and we maintain that this boycott was a

lawful method of petition, while conceding that if any Petitioner were found to have committed or to have threatened to commit an act of violence to enforce the boycott, that Petitioner would be answerable for the proven consequences of his act.

My second point is that if some acts of violence are interspersed among other peaceful acts, such as meetings, parades, speeches, and even such measures of non-violent enforcement as surveillance, denunciation, and ostracism, as was true of the enforced colonial boycotts, and we sumbit it is the most that was true in Claiborne County, then only those found to have committed the violent acts may constitutionally be held liable for anything, and that even they may be held only for that portion of the merchant's business losses that is reasonably attributable to those violent acts.

While I suppose one could hypothesize a boycott in which no customer would have withheld his patronage, but for the violent acts of the organizers, as Justice Brennan hypothesized in the Gibbs case, so that those who committed these acts would be liable for all the business losses of the merchants, that hypothesis, we say, is very far from the facts of this case, and in the Mississippi Supreme Court, the Respondents conceded that "most of the witnesses" that

they themselves had called to testify had said "they voluntarily went along with the NAACP and their fellow black citizens in honoring and observing the boycott because they wanted the boycott.

My third point is a corrolary of the first two. We submit that no one may be held liable constitutionally merely for organizing or participating in a political boycott in support of a petition for the redress of grievance, or for enforcing it by non-violent means, or for continuing to support it even though some other participants have been engaging in acts of violence.

Our first four Presidents, all three authors of The Federalist Papers, and many other Framers of the Constitution participated in several boycotts of precisely this kind. They believed them to be a lawful method of supporting the right of British subjects to petition for the redress of grievances, and when they adopted the First Amendment, we submit, they could not possibly have intended to exclude from its protection the very means of petition that they themselves had employed.

Indeed, after the revolution, and at the very time that the Constitution was being ratified, John Jay and Alexander Hamilton were leading a boycott enforced

by similar non-violent means against New York City merchants who engaged in the slave trade, and against newspapers which carried the advertisements of those merchants.

I would also add that we are not -- we don't think this case raises, of course, the issue of whether such boycotts are a wise political tactic, but only whether they are protected by the First Amendment, and we don't think this case presents the issue of the constitutionality of a secondary political boycott against neutral parties, even though colonial history would support that, because these merchants were deeply involved both in their own discriminatory policies and those of the city and county governments, and because the Mississippi Supreme Court adopted a theory of liability which expressly stated it didn't matter whether the boycott was primary, secondary, or anything else.

Nor do we think this case presents the issue of the constitutionality of a boycott that is unrelated to a petition for the redress of grievaces against the government.

Now, I would like, if I could, to come back to the 12 incidents. They are summarized at Pages 28 through 33 of our main brief. In only one of those 12

incidents did the court below find that an identified Petitioner committed a violent act to enforce the boycott. In that incident, Petitioner James Bailey testified that he had trampled the flower garden of a black woman because she patronized white stores, despite his warning not to do so, as she continued to do thereafter.

And the trial record shows, and this trial was -- began in 1973, Mr. Chief Justice, that no one else in the town had ever heard of that incident until Bailey brought it up on the witness stand, and it could not possibly have affected the success of the boycott. Witness after witness was asked, once Bailey said this, did you ever hear of this incident, and they all said no.

There were two other incidents involving acts of violence that were charged to identified Petitioners, but in neither case did the courts below make a finding that the Petitioner, any Petitioner had committed an unlawful act.

QUESTION: I take it, Mr. Cutler, that you are saying that a secondary consequence is not an adequate basis for recovery, that is, that this man who committed this violent act on the local resident in order to persuade her or force her into refusing to deal, that that kind of a secondary consequence is not to be a

basis for recovery. Is that it?

MR. CUTLER: No, I am not saying that, Mr. Chief Justice. If any boycott participant committed an unlawful act, be it violence or any other normal tort or crime, and that incident had the effect of persuading or coercing a substantial number of people not to participate in the boycott and therefore contributed materially to the success of the boycott, we would admit that that individual is subject to liability for the proven damages of the unlawful act he committed.

QUESTION: But then relating it to this particular episode, that would mean only the loss of the custom of this particular woman whose garden was damaged.

MR. CUTLER: Except that she continued to trade at the white stores, as the testimony shows.

QUESTION: That evidence is undisputed?

MR. CUTLER: Yes. The only evidence is Bailey's evidence, and no evidence to contradict that was offered.

QUESTION: In other words, whatever the effort was to persuade her --

MR. CUTLER: That's right.

QUESTION: -- the record shows it did not succeed.

MR. CUTLER: He was asked by -- Bailey was

asked by Mr. Pyles, did she continue to trade at the white stores? Answer: Yes. That is in the transcript.

QUESTION: Mr. Gilmore, was -- rather, Mr. Cutler, wasn't the Gilmore shooting incident identified with one of three of the Petitioners?

MR. CUTLER: The Gilmore shooting incident is the next one I am coming to, Justice Stevens. There were three -- three of our Petitioners who were prosecuted and on a first trial convicted of that offense, but that conviction was reversed because of discrimination in selection of the jury. On a second trial, the jury hung, so there was no jury verdict, and neither the chancellor nor the Mississippi Supreme Court made a finding that the three Petitioners, who of course had denied in their trial any participation, had in fact committed the act.

QUESTION: Taking up your analogy to the Boston Tea Party, if the London merchants could identify only one of the members of the Boston Tea Party, but did identify him, and demonstrated that he had damaged one case of tea, could he be held, in your view, responsible for all the loss of tea?

MR. CUTLER: All the tea on the ship, yes. I think no question. And indeed, you will find in the papers of the First Continental Congress, in the

so-called Address to the British People which accompanied the boycott resolution in the Continental Association, a statement that the perpetrators of the Boston Tea Party may have been guilty of a trespass, and that the courts of Massachusetts Bay were open, but instead of that, the British had responded by restricting self-government in Massachusetts Bay and passing the so-called Intolerable Acts.

QUESTION: Mr. Cutler, how about the threats of violence, if you trade with these stores, I will break your neck, or beat you up, or whatever it is?

MR. CUTLER: Let me come directly to that, Justice O'Connor. I will skip over the others of the 12 episodes. They are covered in our brief, and you will see some of them are not violent at all, and the last of them is the NAACP providing counsel to persons arrested in the course of the boycott activity, but let's go directly to the remark of Charles Evers, who was a leader of the boycott, and an NAACP local secretary at the time.

There was testimony of a remark by Evers in the course of a long speech, "If we catch any of you going in any of them racist stores, we're going to break your goddamn neck." Some of the testimony places that speech both in 1966, or that remark in 1966, when the

boycott began, and also in 1969, in a speech given two days after the shooting of a black youth by a white policeman that had caused great disturbances in the town.

There is no tape, film, or copy of that remark or the speech in which Evers made it in the record, but there is testimony, there is testimony, of course, as I said, and Evers has admitted making the remark, and Respondents have also relied on threats that they read into another speecht that was given on April the 19th, the night after the shooting of the black youth by the white policeman, which is in the record, and on which the Respondents now rely.

We urge you, Your Honors, to read that speech. It is at Page 85 of the Joint Appendix. It catches the flavor and the currency of the moment, and it graphically describes the grievances of the black citizens of Claiborne County 13 years ago. Its main thrust was to persuade the crowd not to engage in violent responses because of this shooting against the "white brothers," as Evers called them, but to persevere with the boycott.

The remark, the 1969 one, at least, which is the only one there is any real proof of, was made in the emotional aftermath of the killing of that black youth by a white policeman, and you will see from the speech

that is in the record how unjustified the black community thought that shooting was, but most importantly, Justice O'Connor, that there is no evidence that either of these two speeches of Mr. Evers had any effect on the boycott.

The two I am speaking of, April 19th and 21st, 1969, occurred three years after the boycott began and after all the other eleven incidents described by the chancellor had occurred. They couldn't have led to those incidents, and they couldn't have had a major effect on the success of the boycott, which was already three years old.

QUESTION: Did the courts, state courts find to the contrary?

MR. CUTLER: The state court concluded that the black people had believed Evers after quoting that remark.

QUESTION: So the courts didn't agree with --

MR. CUTLER: The court drew a conclusion that that remark had had an inflence, Justice White.

QUESTION: Well, it made a finding of it.

MR. CUTLER: I am not sure you could call it a finding.

QUESTION: Well, it is as much of a finding as yours is. If theirs is a conclusion, yours is, too.

MR. CUTLER: That might -- I would have to concede that, but in support of mine, there were 20 --

QUESTION: Well, your argument is, though, that just on the record their conclusion is unsupportable.

MR. CUTLER: That is correct, but there is a duty, I believe, to which Respondents agree in cases like this for this Court to make an independent examination of the record.

QUESTION: Well, to what extent on a purely factual issue should we go beyond the findings of two courts?

MR. CUTLER: I think in almost all of these constitutional cases involving the exercise of First Amendment rights, Justice Rehnquist, the Court, this Court has gone into the record behind such findings, as in Edwards against South Carolina, and both sides conceded here that you should go into the record that way.

What I want to point out is that 22 black witnesses were called by the merchants and asked about whether they had ever heard of the Evers remark about breaking necks. Sixteen of them said that they had never heard of it at all, and six said they had heard of it only in 1969, three years after the boycott began,

and none of the many black witnesses called by these merchants testified as to any fear of physical violence because of the Evers speeches.

The Respondents have only cited to you four instances in which anyone testified about fear of punishment or discipline, and the context of at least two of those statements shows that they were speaking of fear of denunciation and ostracism.

QUESTION: Mr. Cutler, what do you suppose our standards for reviewing this constitutional fact should be? Should it be clearly erroneous, or we arrive at an independent judgment of the record, or what?

MR. CUTLER: The words of Edwards against South Carolina are that this Court should make an --

QUESTION: Independent judgment?

MR. CUTLER: -- independent examination of the record, but I would submit to you, Justice White, that if you took the 12 episodes on the face of what the two courts below said about those episodes, the facts as they described them, you cannot conclude that what is described in those 12 episodes was pervasive or central to the success of this boycott.

QUESTION: Mr. Cutler, with reference to the timing that you seem to emphasize so much, is it not true that whether we look at the Boston Tea Party, or

prolonged picketing in a union-employer conflict, or a situation like this, that there needs to be frequent exhortation by those sponsoring the boycott, the picketing, in order to keep it going? Isn't that a perfectly normal part of the process?

MR. CUTLER: I would certainly call it a normal part of the process. Unfortunately, there are times when violence becomes part of the process, and none of us are trying to defend that. The NAACP has a very long record against violence.

QUESTION: Well, I was focusing -- wanted you to focus on the fact that some of these people heard about these statements of Mr. Evers, and some did not, and some heard of them long afterwards. There must have been a number of exhortations, including those in the record and many outside the record, to keep a boycott alive.

MR. CUTLER: To keep the boycott going, and there is no doubt there were threats in the sense of Justice Holmes' sense that whether a threat is unlawful depends on what it is you threaten. There were undoubtedly threats that if you went into the white store, your name would be read out in church, you would be denounced, and you would be socially ostracized.

QUESTION: And you say that is a First

Amendment right.

MR. CUTLER: We say that was precisely the function of the Committees of Correspondence formed by the First Continental Congress, and it was -- it is so wrapped into our history that that is a -- not only a boycott, but that type of enforcement of a boycott is a legitimate means of petitioning for the redress of grievances. We do not see how the First Amendment could be read to the contrary.

I think I have just a couple of minutes left, Mr. Chief Justice, and I would like to save that for rebuttal.

CHIEF JUSTICE BURGER: You may reserve.

MR. CUTLER: Thank you, sir.

CHIEF JUSTICE BURGER: And I think we will resume at 1:00 o'clock, and not ask you to divide the argument.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Rees, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF GROVER REES, III, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. REES: Mr. Chief Justice, and may it please the Court, this is a dispute about the facts. Because the facts are so important, I must deal at the outset with a matter that I do not relish getting into.

Petitioners have made it an important part of their case --

QUESTION: Excuse me, Mr. Rees. Is it a dispute about the facts or about the meaning of the facts?

MR. REES: Well, we believe it is a dispute about the facts. We believe it is also a dispute about what the court found. We believe that Petitioners have made a number of statements in their reply brief that make it look as though we simply made false statements about the facts and about what the courts found in our briefs, particularly about the record. We will try to deal with some of these matters in the argument, and if the Court wishes to request a supplemental brief on these new statements about what is in the record, we would be very happy to supply one.

Assuming that the Court does desire a supplemental brief, though, we particularly urge you not to rely on any of the Petitioners' assertions in the reply brief that things are uncontradicted in the record, because -- because those things aren't uncontradicted in the record. We stand by everything that we said in our brief.

Fortunately, most of the Petitioners' assertions about the record are called into question by a reading of the opinions below. The Petitioners say that the boycott was peaceful and voluntary, but the state courts found that it was violent and coercive. The Petitioners say that the NAACP never condoned violence, there is nothing in the record to suggest that they did, but the courts found that violence was in fact promised by the field secretary of the NAACP and that the black people of Port Gibson did not regard this as harmless political hyperbole. Violence was in fact delivered before, during, and after the period of time during which he made his statements.

QUESTION: Is there some finding about how many people heard about the field secretary's statements?

MR. REES: The court did not engage in the kind of factfinding that the Petitioners seem to think that they had to engage in. They didn't say, we find on

Page 12-352 that so and so was scared by Evers.

QUESTION: What did they find? What did they find --

MR. REES: Well, the statement was --

QUESTION: -- about the impact of Mr. Evers' statements?

MR. REES: The statements that I think are most relevant in the court opinion -- You have 33 pages that say the facts in the record. There are many things in there that I think are findings that they don't think are findings, but the two most relevant statements are that the field secretary of the NAACP promised physical violence on at least two occasions, and that it is evident that black people believed him.

QUESTION: Could you refer -- are you reading from something?

MR. REES: Yes, that's a -- well, that's a paraphrase. I can find it. Just a moment.

QUESTION: What page of the record?

MR. REES: Well, that's not on the -- that's not in the record. That's in the trial court opinion.

QUESTION: Okay, that's in the --

MR. REES: And that is -- I'll get you the page in -- in just a moment. That's on Page 39-B, I believe, in the appendix, in the appendix to the cert

petition. Unquestionably, the word got around --

QUESTION: Mr. Rees, is it correct, though, that at least one of those two statements was in 1969?

MR. REES: One was in 1966 and one was in 1969. It said at least --

QUESTION: Do you rely on the one in 1969?

MR. REES: Yes, we do.

QUESTION: For what?

MR. REES: Well, first of all, we rely on it as evidence to support the many other contentions in the record, that when he said things like that people were going to be disciplined, and when they were going to be chastised, and so forth, that he didn't mean that people were going to come in the middle of the night and call them bad names. Secondly, this was an ongoing --

QUESTION: Did the district court take the view that that was enough? Under the district court's theory of the case, as I understood it, that would have been enough, that fear of denunciation and abuse of that kind would have been enough to -- all that they had to prove.

MR. REES: I think that's true, because the district court believed that a secondary boycott, even though it is for political purposes, was enough for liability. Now --

QUESTION: So the district court did not have to connect the violence, did not have to prove fear of violence in order to sustain the judgment of --

MR. REES: No, they didn't, but they did. They didn't have to, but they did. They made --

QUESTION: Does the 1969 statement -- I don't understand how you can rely on the 1969 statement then.

MR. REES: The problem is that as the Chief Justice pointed out, there aren't many times when the leader of a group like this comes out and says, yes, I am in favor of the violence, and we ought to go ahead and do it, and there was testimony in the record from other people, from witnesses, that they heard him say that if you go into the stores, that you will be taken care of, and you will be disciplined.

In his testimony he said, oh, we just meant we were going to give them a good tongue-lashing, and the Petitioners rely on that in their brief.

Now, I think that the state court used that because it was the most vivid instance. The boycott did continue. In fact, it intensified in April of 1969. The fact that those particular 12 incidents -- actually, we count 15 in the trial court, in three pages of the trial court's opinion, happened before that are irrelevant. The court found that on many occasions

people's purchases were taken away from them, and so forth, and this was an ongoing course.

The Petitioners would have you look only at those three pages in the trial court opinion, and those are the only evidentiary facts that they want to be allowed to be supported, to be supportive of the ultimate conclusion in the state supreme court's opinion that there was the agreed use of violence. We believe that the proper standard of review is that the Court should look at the whole record, should look at everything to see if there was evidence from which a reasonable trier of fact might have concluded the conclusions that the state court in fact made.

You see, on the one hand, they say, well, this is just anecdotal, and this is just sporadic, but on the other hand, when the trial court ties it together and says that unquestionably many black persons had their volition overcome, and they were forced against their personal wills not to trade with the white merchants, they say, oh, well, there is really no evidence to support that, because we can distinguish all of those 12 incidents.

We don't believe that is the proper standard of review. We do think that the threat is relevant both in and of itself, because he did promise to deliver

violence, and that scared people. The boycott continued, and it is our contention that if the design of the boycott, if what the boycott was about was to stop people from going in the stores because they were scared that they would be beaten up and shot at and so forth, that that is enough, and that continued after April, 1969.

And we think it is also very relevant to show that when he said, for instance, earlier, he said, you had better not bother to go get the sheriff, because the sheriff can't sleep with you at night, that he didn't mean that the sheriff -- that people were going to come in the middle of the night and call people bad names. He meant that bad, violent things were going to happen to people. He was trying to instill fear in them, so that they would honor the boycott.

QUESTION: Well, is it your position that by whatever means, a boycott involves the sponsors of the boycott putting fear into some people as a predicate for damages?

MR. REES: Well, actually, we don't believe that. They claim in their reply brief that we concede that if it was a non-violent secondary boycott, that it was protected First Amendment activity. We don't think that the Boston -- that's not true. We don't concede

that. This Court's opinions, you've got different lines of opinions that would suggest different results on that issue. Certainly the labor secondary boycott opinions suggest that this activity, picketing in support of a secondary boycott, is something less than absolutely protected First Amendment activity, because if you can curtail that activity because it foments labor unrest, which was the basis --

QUESTION: Even though not violent?

MR. REES: Yes, even non-violent labor picketing. We don't think that it is necessary for the Court to reach that issue, because the state courts here found that it was violent, and they found that the violence was not sporadic, that it was -- that it was continuous, that it was pervasive.

We think that if you read the 33 pages in the trial court's opinion, where the judge says, these are the statements, the facts in the record, is what it says, that the trial judge would be very, very surprised to learn that he didn't find that violence was central to the success of the boycott.

QUESTION: Well, he said, unquestionably, the word got around that physical harm as well as vilification and ostracism could very well be the lot of any black person.

MR. REES: He also said that unquestionably, in terms of the damage that was caused, he didn't name specific people who were frightened, but he said that the evidence shows that the volition of many black persons was overcome out of sheer fear, and they were compelled against their personal wills to withhold their trade and business intercourse from the complainants. That is on Page 39-B, and that looks like a finding to me.

The -- the Petitioners' contention that these things aren't findings really boil down to, as do all of their other arguments, to the one argument that they really have, which is that this was a civil rights boycott, and civil rights boycotts are entitled to strict scrutiny. I think it is evident from the Petitioners' case that strict scrutiny has replaced banging on the table as what an advocate does when the law is against him and the facts are against him. In this case, it doesn't matter whether the obstacle they are facing is the fact that the Court usually respects the reasonable findings of state courts, or the rule that in a civil case the preponderance of the evidence is the test that is usually used, or the fact that intent can be inferred from conduct, or the very limited First Amendment protection to secondary picketing or to

threats to break people's necks.

In every one of those cases, Petitioners remind this Court that this is a civil rights case, and that there is no such thing as a fact or a finding or a rule of law that can't be avoided by the application of the right level of judicial scrutiny.

The problem that we find, the most serious problem that we find with this contention is that everybody who ever engages in any kind of concerted action, whether it is labor unions or other political groups whose goals are not the goals of the NAACP, or anyone else, believes that he is fighting for his civil rights. Now, the rules, the kinds of substantive rules that they are arguing for here, whether it is First Amendment protection of certain kinds of threats or whether it is ultra-strict standards of review where you have to make the state courts say things in certain words before you have a finding, those are not susceptible of general application.

So if you hold for the Petitioners in this case, the holding will have to rest not on what was done but on the status of those who did it. They say, in fact, we are the NAACP and we do not engage in violence, we do not engage in constitutionally unprotected conduct, and therefore the state courts must have been

wrong, and they suggest a number of devices, a number of strict scrutiny devices, a number of extraordinary tests for determining intent, and so forth, by which the Court might reach that decision. We think that they should fail.

If the court, if the state courts were right about the facts, then they were right about the law. The First Amendment does protect advocacy of opinions. It protects that advocacy no matter how controversial the opinions are, no matter how vigorous the advocacy, but it does not protect forceful and credible threats of violence.

The fact that some of the Framers were willing to countenance 14 or 15 months before the American Revolution certain kinds of actions against the British, indeed, some of them were willing to countenance the Boston Tea Party itself, is no evidence that if you have a Boston Tea Party, or that if you have something that happened in 1773 against the British, that they intended to constitutionalize that, that in 1979 and in 1866 they intended to make that a binding rule on the states and say, you can't prohibit this kind of activity, that is not an adequate constitutional test.

The cases that are cited by Petitioners in their brief, the Watts case, involved a highly

conditional, an expressly conditional threat to kill the President, which was a highly improbable action. There was no evidence that the President had any reason to be afraid that he was going to be killed. In the Brandenberg case, you had 12 people out in the middle of a field at night talking to a television newsman, and saying that if Congress doesn't change its policies one of these years, we might have to consider something called revengence.

That is not what this case was about. There was no evidence that Congress was afraid in that case. This case has nothing to do with abstract teaching. It has nothing to do with the abstract possibility of violence at a hypothetical future time. You had several hundred people in a small town, setting themselves up as the law outside the law. Their leader had espoused on many occasions the philosophy that every race has a right to its own discipline, and the desginated enforcers of the boycott, the court found that the Black Hats, this group of -- a paramilitary organization of 50 young men who watched the stores and who participated themselves in many of the acts of violence were the designated enforcers of the boycott, designated by the NAACP.

Contrary to what the Petitioners say in their

brief, Evers testified that he knew about these people. He said he didn't know about their constitution and bylaws, about whether they were a member of a chapter of a regional organization. He knew they were there. He said that he would -- there was testimony that he had referred to them 100 times as his enforcers. These people had participated in violent acts pursuant to the philosophy that their leader had espoused.

The incident, which was only the most vivid of a number of incidents, where he'd sit across from a row of stores and said, if you go in those stores, we are going to break your damn neck, suggests that this is the kind of case that John Stuart Mill was talking about when he said that an opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob before the house of the corn dealer.

We would like to suggest that Mill was right about freedom of expression.

QUESTION: Do you feel, counsel, that there is specific evidence tying each one of these remaining defendants to these particular incidents?

MR. REES: Well, we do believe that there is

evidence. We believe that there is evidence to support the trial court's findings.

QUESTION: I am asking -- that isn't what I asked.

MR. REES: Yes.

QUESTION: I asked whether you feel there is specific evidence that ties each one of these incidents to these particular remaining defendants.

MR. REES: I do believe that, Your Honor.

QUESTION: And I think that maybe I will take you up on your suggestion that you file a reply brief pointing out where in this voluminous record such evidence is present.

MR. REES: We will do that, Your Honor. We would like to --

QUESTION: Well, did the state courts find that to be the case, or not?

MR. REES: They did. They said that what makes this a conspiracy -- this was the state supreme court. They said, the -- their conclusion, their holding was not --

QUESTION: Well, they didn't expressly tie each incident --

MR. REES: They did not go through --

QUESTION: -- to each of the named people who

were --

MR. REES: No. They did not do that. Now, they said that they -- they said in their holding --

QUESTION: But that is what you are being asked to --

MR. REES: Well, it is going to be a substantial task. I am aware of that. But the Court has asked us to do it, and we are going to go through the 16,000-page record and find all the places that we can find. We would really like the Petitioners to go through two.

QUESTION: Well, it is a substantial task, but I think it is counsel's task, not this Court's task.

MR. REES: You are right, Your Honor. We believe that -- we believe actually --

QUESTION: So far, I get nothing but generalities from your Mississippi courts and from your brief, and I would like something specific.

MR. REES: We will give it to you, Your Honor. In answer to the question about what the court found, they did find that there was the agreed use of illegal violence. Now, that is a conclusion. They said that they had performed an adequate review of the record, and they dismissed 39 of the Petitioners. The Petitioners put themselves in the interesting position

of saying that that means they didn't search the record because they granted the Petitioners' motion to dimiss all of those 39 people for the reasons that the Petitioners said to dismiss them.

We don't think that there should be any such presumption, and we believe that they searched the record. We believe that if the Petitioners -- what the Petitioners did was make in essence a bare no evidence allegation. They said, all these -- all these people did was encourage other people to boycott or picket, and they listed people without any reference, any record references. We believe that what they should have done if they wanted to make a case to get this Court to overrule the lower court finding, was to list every reference to every petitioner in the record and what it said, and then to conclude that there wasn't enough evidence. We will be glad to do that. We think they should have done it in the first instance.

QUESTION: Is it your -- the theory of your case that if concerted action was taken which in fact puts certain identified people in fear and apprehension if they traded with these stores, that that is the basis for liability for damages?

MR. REES: That is a basis for liability for damages. On the question of the conspiracy theory,

first of all, we want to point out that as we think counsel has conceded here, no conspiracy theory is necessary to sustain the state court's judgment against the NAACP. Charles Evers was liable for all the tea on the ship. He did participate in threats of violence. He wanted to injure the business relations of the Respondents by constitutionally unprotected means --

QUESTION: Well, that was the whole object. That was the whole object of the boycott, was it not?

MR. REES: That's right. No, but he wanted to do it by constitutionally unprotected means. You see, their contention is that if some people only wanted to do it by protected means, then if it is a First Amendment right to have a secondary boycott, they are protected, and if it is a First Amendment right, and if in fact there were people who were just out there exercising their First Amendment rights, then they have got a good case.

But Charles Evers wasn't one of those people, and Charles Evers was acting in his capacity as field secretary of the NAACP. Even under the statement that the ACLU recommends -- pardon me, the standard that the ACLU recommends in their amicus brief, which is Section 876 of the Restatement of Tort Second, the joint tort feasors section, Evers was a joint tort feasor, and

Evers was responsible for all of the damage that the people who were participating in this movement that he was participating in did because he took himself out of the First Amendment, and he intended for people to be injured in the way that they were injured.

QUESTION: Mr. Rees, may I interrupt you with a question on that point? Do you concede that there was some voluntary participation in the boycott, or do you deny that?

MR. REES: Well, almost. Of course there was. The Petitioners themselves --

QUESTION: Do you say that Mr. Evers is liable for the business damage caused by the voluntary participation in the boycott?

MR. REES: We don't think that is a constitutional question. That -- what they are --

QUESTION: That is hardly an answer to my question.

MR. REES: Well, yes, we do.

QUESTION: You do.

MR. REES: We think he is liable. We think that they are attempting here to constitutionalize not only the law of conspiracy but the law of damages. They cite a number of --

QUESTION: Well, now, just push it to the

extreme. Supposing there were 1,000 people who participated in the boycott and refused to purchase anything. One of those persons refused because he was afraid his neck would be broken. The other 999 all say, I would have done it no matter what Mr. Evers says, because I believe in the objectives of the boycott. For how much would he be liable, the whole 1,000?

MR. REES: No, only what you could prove in that case. You see --

QUESTION: But I thought you said he would be reliable for the voluntary participation as well.

MR. REES: Well, but what I was -- the reason that I think there's a distinction is because the rule of damages that the state courts and that courts routinely apply that also reflects the rule in the Restatement of Torts is the substantial factor test.

Now, there was only one boycott here. There was one set of damages. What you would be requiring if you said to the state courts, you have to go back and figure out how much damage there would have been if it had been violent -- non-violent and peaceful and voluntary instead of violent and coercive, is, you are asking the courts to indulge in a hypothetical --

QUESTION: No, no, that is not fair, because you admit it was partially voluntary. You are not

saying, if it were one or the other. I think you have said on your own presentation to us that it was partially caused by violence and partially by voluntary agreement.

MR. REES: We do not -- we do not agree that it was substantially voluntary. They use a line in the brief to say, well, most of the -- most of the witnesses testified. That's --

QUESTION: Well, assume it is substantially violent. Are they nevertheless liable then for the voluntary --

MR. REES: Well, according to the labor cases, they cite a number of statutory labor cases --

QUESTION: Well, I really want to know the theory, you understand what the theory of the court below was.

MR. REES: I think that in that case, that if there were a few people, and if they put on evidence that -- if they had put on evidence of the amount of -- the general damage was -- there was one boycott, there was one corpus of damages that would be very, very difficult to sever, and in all the other cases that we have been able to find, including the labor cases cited by Petitioners, when that is the case, there is no requirement that the courts sever the damages.

In the Mead case that we cite in our brief, the court says, the requirement that something have contributed materially and substantially is enough to prevent windfall recoveries.

QUESTION: So if it is 10 percent caused by violence and 90 percent voluntarily, I suppose 10 percent is substantial and material, then they are 100 percent liable.

MR. REES: I think it might be.

QUESTION: That would be your --

MR. REES: I don't know what percentage I would cut it off at. Certainly 10 percent would be on the margin. We don't think that that question is really presented here. What they really want is, they want to send it back to the trial court and say, even if you find that there was violence, and even if you find that certain Petitioners were chargeable with the violence, you see, this is a separate issue, of course, from can all the Petitioners be charged, even if you find that a certain person was chargeable with the injuries to business relations that were caused by the violence, what you want is, you want to send it back to the trial court, and you want to ask them to do not only a hypothetical head count of what would have happened if it hadn't been peaceful and voluntary, you also want

them to go over the psychological vectors within each mind of each individual black person in Port Gibson.

There were some people, and they cite in their brief, they say, well, people were afraid of having their names called out, or they basically agreed with the boycott, then the same witness in another place in his testimony -- frequently these were the Petitioners themselves -- they said, oh, yes, I was afraid. One of the people who said that -- who the Petitioners cite as having been afraid of nothing more than having their name called out and being embarrassed also says that she had heard that people had been physically -- she had heard that they would take your packages away from you and destroy them, and she didn't want that to happen to her.

So, you've got mixed motives on the part of lots and lots of people. I don't even know, as they point out with an exclamation point in their reply brief, one of the Petitioners himself bought a car at a store. He was encouraging other people to boycott and doing things like that, but he did buy a car at a white-owned store, and his car was destroyed.

So, I think it would be very, very difficult, and the rule -- the Petitioners have a very curious attitude toward labor cases, because when a labor case

construing the National Labor Relations Act would help them, they say -- they treat it like it was a First Amendment case binding on the states. On the other hand, in a case where -- for instance, the Ramsey case, where this Court held that you can prove conspiracy, you can prove an implied conspiracy in a labor context by a preponderance of the evidence, that you can draw inferences from conduct, which is how the conspiracy was found here. In that case, they say, well, that is a labor case, not a civil rights case.

Now, it is exactly the other way. They've got it exactly backwards. When the NLRA provides a substantive or a procedural protection for labor unions that is not required by the First Amendment, you can't use that as though it were a First Amendment case, and that is what they try to do on this damages issue. On the other hand, when this Court holds that something is permitted, that conduct can be penalized in a labor context, it strikes me that the burden is on the people who are trying to distinguish that case to come up with a distinction, and I don't think it is enough just to say that this is a civil rights case.

QUESTION: Let me take you back to a factual question. What is the population of this town?

MR. REES: Several thousand. I think it was

7,500 -- 27 -- it has grown quite a lot, actually. It was 2,700, and now it is 8,000, or something like that.

QUESTION: Well, at the time of these events.

MR. REES: 2,700, I think, is a -- I can check that for you. I don't have it right now.

QUESTION: I was just trying to get the proportion of people who participated in this thing. You said very few, but very effectively, but I think you also said there were 50 or 60 of these so-called Black Hats, the monitors, the --

QUESTION: There were several hundred people who participated in the boycott. There was evidence of deep division within the black community.

QUESTION: You mean participating militantly or because they were put in fear, as you --

MR. REES: Their largest meetings -- oh, no, more than that participated because they were in fear. Almost everyone participated because they were in fear. I mean, very, very few black people shopped at these white stores during that time. At first, there were a lot. One of the -- The secretary of the NAACP, Lesco Guster, testified that at first there were quite a lot of boycott breakers, and that the list was very long that they called out, and after a while there were not very many at all.

One of the -- there was a division within the black community, and we think that is what this really was about. We think that one group in the black community -- one of the demands, for instance, was that you had to appoint Negroes to the board of education, and they had to be Negroes acceptable to the Negro leadership. Many of the black people who -- the black people who did testify, who had the courage to testify that -- what happened to them in the trial, they had -- they tended to have philosophical or personal reasons not to want to go along with this other leadership, which happened to be the leadership of the NAACP, and it was those people who were primarily compelled.

I only have a few minutes remaining, and I would like to deal a little bit more with the conspiracy issue, because I do think that that is a problem, although not in terms of holding the NAACP. Agreement was inferred from conduct in this case. Nobody testified that he specifically approved of the violence, but those petitioners who were not members of the Black Hats organization saw the Black Hats on the street. They participated in weekly meetings which were the decision-making meetings about how the boycott was going to be run.

Those people, who were the principal source or

a principal source according to the trial court of the pervasive fear in the community that caused the success of the boycott were the desginated enforcers of the boycott. It seems to me that after the pattern had been established, after you have seen enough times people on the street taking people's names, and sometimes destroying their packages, and then those names are called out, and then bad things happen to those people, and you hear Charles Evers and other boycott leaders saying that these people have to be chastised and disciplined and whipped and taken care of, and they are in fact chastised and disciplined and whipped and taken care of, at some point agreement to what is going on can be inferred from the conduct of somebody who has the right and the power to control that activity. That is --

QUESTION: Do you need to succeed on this submission to hold any of the people against whom judgment was entered?

MR. REES: No. Well, yes, we need to succeed on that contention, I think, to hold many of the 91 people.

QUESTION: For everybody except Evers, or not?

MR. REES: Not for everybody. Well, Evers, I think James Bailey, who ruined the flower garden --

QUESTION: Well, everybody except the NAACP,

or the NAACP and Evers?

MR. REES: If our statement is not right --

QUESTION: About the conspiracy.

MR. REES: -- that you can infer conspiracy from agreement, you would have to hold only those who were shown personally to have approved of the fear of violence aspect of boycott enforcement, and they -- they are arguing for a very high specific intent requirement.

QUESTION: Well, anybody who actually engaged in violent conduct.

MR. REES: Well, engaging in it would obviously be the best evidence that there would be, and you would have Charles Evers liable, you would have the NAACP liable on the respondeat superior, the fact that he was acting as their -- as their paid agent and spokesman. You would have, for instance, James Bailey, the member of the Black Hats who destroyed the flower garden.

QUESTION: But just take Bailey for a minute. What evidence is there that that caused any loss of patronage to anybody? I understood that the woman whose garden was trampled went ahead and continued to buy from the stores in question, and that no one else knew about it. So how would that incident prove any liability?

MR. REES: James Bailey testified that he was

a -- this would be evidence of his approval of the pervasive -- of his specific intent to damage the business relations of the merchants.

QUESTION: Supposing he had that intent, but did he in fact cause any damage by trampling this garden?

MR. REES: Well, I think that causation wouldn't have to depend on that act, once you had shown his intent.

QUESTION: But you can hold him liable absent a conspiracy theory, I thought you were saying.

MR. REES: No, but it would be a joint feasor theory.

QUESTION: Joint with whom?

MR. REES: Joint with everyone else.

QUESTION: Well, it could be a two-man conspiracy.

MR. REES: We know -- we know that these acts were done. Usually the way that conspiracies work is the way that this one worked, which is, people do things in the middle of the night, and it is hard to identify exactly who did them.

QUESTION: But here we know what happened. He admitted it.

MR. REES: No, but he would be liable also as a joint tort feasor, since he had committed a tort as

part of this movement with everybody else. He would be liable for all the damage that was caused as part of that campaign even for other acts that he did not, in which he did not in fact participate. It would not be realistic for him to say, oh, well, I approved of fear and violence as a way of getting Mrs. Butler not to participate, but as far as getting all the other people to participate, it would have been very bad for fear of violence to be used --

QUESTION: You are saying that that is just evidence, could be evidence --

MR. REES: Of his intent.

QUESTION: -- that he sat down with Evers and they both agreed, here's our plan, and let's use violence as much as necessary.

MR. REES: Well, that is even more specific than I think --

QUESTION: Well, I know, but it is evidence. It is evidence of --

MR. REES: It is evidence of the fact that he intended to injure the relations, he with these others.

QUESTION: But as soon as you say that, it seems to me you are back to your conspiracy theory, and I thought you had said you didn't need the conspiracy theory as to him.

MR. REES: Well, no, no, I don't think that is a conspiracy theory. That is why I was reluctant to -- I couldn't react very well to Justice --

QUESTION: Well, what is the joint tort if it is not conspiracy?

MR. REES: Well, the illustration that the Restatement of Torts gives, for instance, is that five people go into a house, and one of them does one tortious thing, and they all do five different tortious things. You don't need to prove that they sat down in a room and agreed that they were all going to do them. That is, I guess, a kind of conspiracy theory, using the word generically, but it is not covered by the law of conspiracy, and the ACLU, for instance, who don't like conspiracy theories at all, recommend that as the rule that this Court ought to apply to joint tort feasors.

QUESTION: Yes, but there your example is, five people jointly destroyed some property. Here one man jointly destroyed -- singly destroyed a flower garden.

MR. REES: Well, I was -- I was hypothesizing that they did five different things. One destroyed one piece of property, and one -- I think they say A chokes somebody, and B ties him up, and C steals something, and D destroys something. They would be different items of

damages, but that would be sufficient evidence that there was a common plan.

CHIEF JUSTICE BURGER: Your time has expired now, Mr. Rees.

MR. REES: Thank you.

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

ORAL ARGUMENT OF LLOYD N. CUTLER, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. CUTLER: Mr. Chief Justice, the chancellor of the trial court found that Claiborne County had a population of 10,900 persons, only 2,500 of whom were white, and the chancellor used that to deduce that the white merchants were especially vulnerable to a boycott. So it is 7,500 people who were supposed to have been intimidated by violence and threats of violence in order to make this boycott the success that both courts below found it was.

The theory of the trial was to call, in addition to the sheriff, a series of black persons, and to ask them whether they were intimidated, and whether they had heard of particular acts of violence, or whether they had been victims of acts of violence, and as I mentioned to you earlier, in the Mississippi Supreme Court, these Respondents said, and this is in

our reply brief, most of the witnesses that they themselves had called testified they voluntarily went along with the NAACP and their fellow black citizens in honoring and observing the boycott because they wanted the boycott.

And regardless of how one might read this record, the way the Mississippi Supreme Court read the record citing the 12 episodes that I have referred to, including the Evers threat, was that violence was force, violence, and threats, and the word "threats" is ambiguous because it may also refer, as some of the witnesses said, to threats of denunciation and ostracism, but taken even as threats of physical violence, were present during the boycott. Present is the theory. If it is present, that is enough on a conspiracy theory. And that this presence was "part of the boycott activity" that contributed to the boycott's success.

So, on the words of the Mississippi Supreme Court, there is nothing like a finding that violence was pervasive or that it accounted for all the success or even most of the success. It was part of the activity that contributed to the success.

On the question of parsing out which parts of a mixture of lawful conduct and unlawful conduct have to

be separated in assessing causation and damages, in constitutional cases, this Court has been very clear several times that it is the duty of the trial court to separate those factors out. In Pennington, you sent the case back because there was a mixture of an antitrust conspiracy to put the small coal mine operators out of business, and protected lobbying efforts to get the Secretary of Labor to establish a regulation that would help put them out of business. You said no damages could be assessed for the protected effort.

In Gibbs, Mr. Justice Brennan announced a similar rule because there the damage had resulted in part from legitimate protected picketing activity and in part from improper activity.

In Berkey, an antitrust case that the Second Circuit has just decided, deciding a number of your cases, they separated out damage to an antitrust plaintiff to distinguish between the effects of legitimate competition and the effects of the unlawful act. It is a perfectly standard way of going about this sort of a problem.

I had thought the issue of primary and -- whether this was a primary or secondary boycott was out of the case and that if peaceful, the Respondents did not challenge it. I take it now the Respondents

continue to challenge whether boycotts, peaceful boycotts are constitutionally protected. I would remind you in that connection about Thornhill against Alabama, which expressly protects primary boycotts and picketing with the purpose and effect of persuading people in a labor dispute not to patronize the employer.

And in Alabama against NAACP, Justice Harlan said for this Court that when Alabama tried to throw the NAACP out of Alabama for a series of alleged unlawful acts, including the boycott of the Montgomery busing system, he said that even if one assumed that such an act, a boycott could be validly -- could be charged as unconstitutional under a valid statute, he expressed great doubts as to whether that could be done, that you could not have a valid statute in those circumstances.

QUESTION: Mr. Cutler --

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

QUESTION: -- may I ask you a question or two? Mr. Chief Justice?

CHIEF JUSTICE BURGER: Yes, go ahead.

QUESTION: Does the First Amendment principle on which you rely apply to any group that engaged in this sort of activity? There was some suggestion that you were arguing that it applied only to a civil rights

boycott.

MR. CUTLER: For this case, Justice Powell, I think you only need go so far as to say it applies to petitions for the redress of grievances in support of fundamental constitutional rights. Whether it applies to any boycott seeking some change in governmental policy one could leave for another day, although I do think the colonial history supports even that, and I would remind you once more that contrary to what my friend has said, not only do we have colonial history, we have Alexander Hamilton and John Jay, two of the authors of The Federalists, the very time the Constitution was being ratified, leaving the boycott --

QUESTION: Mr. Cutler, how about a labor boycott? Would you apply the same principle?

MR. CUTLER: In Thornhill --

QUESTION: A secondary boycott?

MR. CUTLER: A labor boycott was protected under the First Amendment as a primary boycott in Thornhill. Secondary boycotts, you have protected in Tree Fruits where it involved only one product, but because it was a labor dispute and you recognized the Congressional interest in avoiding the spread of labor strife, you have drawn the line at a secondary boycott against all the products of a neutral employer.

Indeed, I would remind you, these defendants were in no sense -- plaintiffs, I mean, in no sense neutral.

QUESTION: Mr. Cutler, does it make any difference to your case whether this is or is not a secondary or primary boycott?

MR. CUTLER: It really does not, Justice Powell.

QUESTION: That was my understanding. But you would apply the same principle to any group asserting a fundamental constitutional right.

MR. CUTLER: If you would put that to me -- a fundamental constitutional right. Yes, sir.

QUESTION: Yes. I would like to ask you a practical question as a lawyer. Let's assume a case you had about 100 people who picketed a store for a week, and there were, say, three acts of violence during that period. You could identify those three people. The store did no business for a week. How would you go about proving that even the three who engaged in acts of violence caused any loss of business?

MR. CUTLER: Did you say -- yes. I take it you are saying they were identified people, Justice Powell, who committed the acts of violence.

QUESTION: Yes. You identify three people in

the course of a week, there were three acts of violence. Obviously, you wouldn't want to hold innocent people liable. But would there ever be any recourse, provable recourse?

MR. CUTLER: I think, Justice Powell, that is a -- could be a legitimate jury question to decide how much of the loss of business was caused by the act of violence, and as Justice Brennan hypothesized in the Gibbs case, if you've got a situation as grave as Meadowmore, where violence was in fact pervasive, a jury could conceivably find, or a factfinder could find that all of the damage resulted from the violence.

QUESTION: And if there were $100,000 worth of damage, X percent of it could be assigned to those three people?

MR. CUTLER: Or if you had -- I could change your example from three to three a day, it could be the entire $100,000. A jury could find that.

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

(Whereupon, at 1:41 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL v. CLAIRBORNE HARDWARE COMPANY, ET AL. #81-202

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BY Irene Hammond

Received
3/10/82
3 P.M.