ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-896

TITLE PERRY CONSTRUCTION ASSOCIATION, Appellant
v.
PERRY LOCAL EDUCATION ASSOCIATION

PLACE Washington, D. C.

DATE October 13, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

PERRY EDUCATION ASSOCIATION,

Appellant

v. No. 81-896

PERRY LOCAL EDUCATION ASSOCIATION.

Washington, D.C.

Wednesday, October 13, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

ROBERT H. CHANIN, Esq., Washington, D.C.; on behalf of the Appellant.

RICHARD L. ZWEIG, Esq., Indianapolis, Indiana; on behalf of the Appellee.

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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'll hear arguments next in Perry Education Association against Perry Local Association.

Mr. Chanin, I think you may proceed whenever you're ready now.

ORAL ARGUMENT OF ROBERT H. CHANIN, Esq.

ON BEHALF OF APPELLANT, PERRY EDUCATION ASSOCIATION

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

This case arises in a Washington school district in Indiana. Indiana has enacted a statute governing the labor relations of its public school teachers. Like the National Labor Relations Act and the public sector labor relations statutes in other states, it adopts the principle of exclusive recognition.

Under that principle, the union selected by the majority of teachers in an appropriate bargaining unit is authorized and indeed obligated to represent all teachers in that unit, whether they are members of the union or not, in dealing with the school district.

In 1977 an election was held in the Perry Township school district to select an exclusive representative for the teachers. The competing organizations in that election were the Appellant, PEA,

and the Appellee, PLEA. During the election campaign itself, both organizations were treated equally and they were accorded the same opportunity to sell their programs, their activities, and their ideas to the voting teachers.

The teachers voted and chose PEA as the exclusive representative. PEA subsequently entered into a collective bargaining agreement with the school district. Among other things, the agreement gave PEA access to the individual teacher mailboxes, which are name slots which appear in each school building, and to the inter-school mail system, which is a courier service by means of which the district delivers material from school building to school building.

The collective bargaining agreement expressly stated that these rights are given to PEA -- and this is the quote from the agreement -- "acting as the representative of the teachers." And that article went on to deny to other employee organizations, including PLEA, access to those school mail facilities.

The PLEA and two of its members challenged this access restriction as violative of the First Amendment and the equal protection clause of the Fourteenth Amendment. The district court granted summary judgment for Defendants, but the Seventh Circuit

Court of Appeals reversed.

The Court of Appeals held that it is unconstitutional for a school district to distinguish between the exclusive collective bargaining representative and rival unions in granting access to internal communication facilities. This holding, which would invalidate the prevailing practice in public sector labor law throughout this country, is inconsistent in several respects, we believe, with the principles announced by this Court. Its overriding defect, however, is its failure to recognize the distinction that this Court has drawn b etween public and non-public forums in determining the constitutionality of access restrictions.

It is appropriate to begin analysis by setting forth the two standards that this Court has adopted. If the property in question constitutes a public forum, the government's right to restrict access is subject to rather stringent limitations. Generally speaking, it only may impose reasonable time, place and manner restrictions which are content-neutral and narrowly drawn to meet a compelling governmental interest.

A different standard applies if the property is not a public forum. Although we are not suggesting in any sense that government is free to act without

restraint, the test is a less stringent one. The access restriction is constitutional if it is reasonable on the one hand, and is not designed to prohibit access because the government disapproves of a speaker's view or seeks to favor one point of view over another.

It is within this framework that we believe the issue before the Court can be best analyzed, and we believe that issue can be divided into two subsidiary questions. The first is, which of the two standards is appropriately applied to the school mail facilities? Once that is determined, the second question is whether the challenged access policy meets the appropriate standard.

Although the court below found that the school mail facilities are a nonpublic forum, it did not judge the constitutionality of the access policy by the standard that this Court has held applies to such forums. It applied instead the public forum standard and concluded that the policy failed to pass constitutional muster under that standard.

It is our belief that the latter conclusion is wrong in its own right and that the access policy here in question is sustainable even under the more stringent standard. But there is no occasion to reach that question in this case. We submit that the dispositive

flaw in the decision of the court below is its failure to use the proper standard to judge the constitutionality of this access policy to this nonpublic forum.

The Appellees appear to concede this. They make no attempt to defend the analysis or approach taken by the court below. To the contrary, they acknowledge the importance of the distinction between the standards governing access to public and nonpublic forums, and devote much of their argument to an effort to demonstrate that the school mail facilities are a public forum.

We submit this effort fails. Under the relevant legal principles set forth by this Court, most recently last term in United States Postal Service v. Council of Greenburgh Civic Association, it is clear that the school mail facilities involved in this case are a nonpublic forum.

It is well established that certain government property is by its very nature a public forum: streets, parks, highways, and certain analogous facilities which historically have been used for purposes of public assembly and debate. These, I think the reference would be traditional public forums.

Although it may sometimes be difficult to

determine whether a particular facility is sufficiently analogous to a park or a street to be classed as a traditional public forum, again this question is of no concern here. No one is suggesting that the school mail facilities are in any sense like the parks, like the streets, or like the highways. It is conceded that they are not a traditional public forum.

But that of course is not the end of the matter. Government may by its actions convert what otherwise would be a non-public forum into a public forum, and Appellees contend that that is what has happened here. It is their position as we understand it that the school mail facilities have been converted into a public forum to which they have a constitutional right of access, and because of the existence of that right the access policy before the Court must be judged by the more stringent standard applicable to public forums.

The test to be used in determining whether such a conversion has taken place was also set forth in the Greenburgh case. If the facilities have been preserved for the use to which they are lawfully dedicated or preserved for their normal and intended function, the property remains a nonpublic forum. If on the other hand the facilities have been opened up for more general use, they may become a public forum for

certain groups or for certain purposes.

To apply this test here, the threshold question is to identify the uses for which the school mail facilities are lawfully dedicated.

QUESTION: Speaking of threshold questions, counsel, at some point I hope you're going to address the jurisdiction question. But you do it in your own time.

MR. CHANIN: Mr. Chief Justice, it was not my intention to address it in oral argument. We believe that the point is clear and we have addressed it rather completely in our reply brief, and unless there are questions we're prepared to rely on the reply brief.

Phrased otherwise, the question we must look at it, what is the normal and intended function of these school mail facilities. The Appellees point out that they are basically a communication medium and what they seek to do is communicate, and therefore they are within the normal and intended function.

We submit that is far too broad a formulation. The function must be more narrowly defined if it is to have any meaning. The normal and intended function of a school mail facility is not to carry information by anyone, about any subject. The normal and intended function, as both of the lower courts

recognized, and indeed as Appellees concede in their briefs, is to communicate to the teachers information that involves school business. That is the normal and intended function.

So we must look in this case as to what does the phrase "school business" mean. And in the context that we have before us, it derives meaning from two sources. The first is the inherent function of any school district to educate children. This function would embrace any communications that the school district reasonably concludes are supportive of that mission, that are of relevance and educational interest to the students.

But there is in this case a second source from which the phrase "school business" derives meaning, and that is the Indiana labor relations statute, more specifically the representational duty that that statute imposes upon the union that is designated as the exclusive representative and which requires it to have an effective method for communicating with the members of the bargaining unit that it is both authorized and obligated to represent.

The Appellees admit, as does the court below, that PEA has legal obligations vis a vis the members of the bargaining unit that it does not have.

QUESTION: Mr. Chanin, what does the record show here was the use by others of the mail facilities?

MR. CHANIN: What the record shows, Justice, is that subsequent to the designation of PEA as the exclusive representative in 1977 the mail facilities have been used by PEA in its representational capacity and by the YMCA, the YWCA, the Cub Scouts and certain parochial schools, all organizations which we submit are on their face youth-oriented civil organizations which are engaged in activities that would be of interest and educational relevance to students.

QUESTION: Does the record tell us any more about the specific uses than simply the identity of the users?

MR. CHANIN: No, the record indeed says nothing about the specific uses by PEA or by any of the other groups. It merely identifies those who have had access, and the only groups that have had post-1977 access are the civic youth groups I've identified.

QUESTION: Is it possible to say, Mr. Chanin, whether any group besides -- is it the PLEA is your group's rival?

MR. CHANIN: It is our rival.

QUESTION: Yeah. Were affirmatively excluded in the sense of having sought access and been denied

it?

MR. CHANIN: There is nothing in the record to indicate that.

QUESTION: Does that lead to -- can you then generalize as to what the school district's standard for access to these mailboxes was, or are you left pretty much to having several points and trying to figure out where the line goes?

MR. CHANIN: Oh, no, we have no trouble whatsoever identifying the standard. We think the standard is that the school mail facilities since 1977 have been limited to communications dealing with school business. And we think that youth organizations that wish to communicate about their youth-oriented activities and programs is school business, and we think that an elected exclusive representative with statutory obligations toward the teachers is also school business.

The record indicates no other use post-1977, and we think the standard is clear.

QUESTION: Can you give us some examples of communications from your client to the teachers that would be school business as you describe it?

MR. CHANIN: Not from the record, Justice Stevens, but I can tell you what this union and other

unions typically include in their communications. They send information about the implementation of the collective bargaining agreement, about the settlement and disposition of grievances, about working conditions that they are dealing with the school board about.

QUESTION: And what a stinker the other union is.

MR. CHANIN: Pardon me, sir?

QUESTION: And what a stinker the competing union is.

MR. CHANIN: I think that may come in occasionally. But certainly that is not the purpose for which they were granted use. The purpose for which they were granted use is to perform their functions as a representative of all of the teachers.

From this record there is nothing to suggest that they did anything but that. The contract specifically limits their use to that function. There is nothing in the record to rebut that. It seems to us that if there were evidence to suggest --

QUESTION: Just taking one of your examples, describing the result of a particular grievance between one union member and the school board, I assume, why would that be disseminated to the entire union membership?

MR. CHANIN: Because the resolution of the grievance --

QUESTION: To tell them what a fine job they've been doing?

MR. CHANIN: The resolution of a grievance that arises under a collective bargaining agreement does not have one-on-one impact. What it will usually turn on is the interpretation of a phrase or a provision in a collective agreement which has widespread impact on the entire bargaining unit.

We think this Court has recognized on numerous occasions that at the very least, and we believe it's probably broader than that, the legitimate functions of a representative organization are collective bargaining, contract negotiation, and contract administration.

QUESTION: What would happen if Congress passed a law which said that the NEA shall have the authority to send its mail with a frank on it and denied that to all other organizations?

MR. CHANIN: I think that law would be unconstitutional, Your Honor.

QUESTION: And the difference is what?

MR. CHANIN: The NEA does not hold in that context this special status vis a vis the constituency to who that franked mail would go. What we have here is

a union, the PEA, which was not chosen for unreasonable or arbitrary reasons to have this access privilege. It competed under a state law, under the principle of exclusive recognition, and it won. And the only reason that it has been given access which has been denied to other unions is because it won.

Now, the PLEA will have an opportunity at an appropriate time under the Indiana statute to challenge the PEA. And if it wins and becomes the exclusive representative, it will have those legal obligations and we assume that it will have the access privilege.

QUESTION: Well, it'll be a fair fight, won't it? One of them has free access and the other one doesn't.

MR. CHANIN: That is not the fact, Your Honor. The Indiana law makes it clear --

QUESTION: I'm not talking about Indiana law.

MR. CHANIN: Well, I would like to just focus in on the fight, sir. When that fight takes place -- and by "fight" I mean the representation election -- then both organizations that compete are guaranteed equal access to all communications facilities.

QUESTION: Does that give them the right to use those boxes?

MR. CHANIN: They will be during the

representation campaign.

QUESTION: Now where'd I get that from?

MR. CHANIN: That's in the record. In 197 --

QUESTION: Where? Where is that in the record?

MR. CHANIN: It is in the request for admissions, the responses. It is also in the affidavit submitted by the school board, and it's also a matter of Indiana law established in the Pike decision, which is attached in our jurisdictional statement.

The law in Indiana is that exclusive privileges of access are available only during the insulation period. The insulation period is after a union has won the election and until it may be challenged under state law. In most cases that is for two years.

In the election that took place in '77 there was equal access, and if there is another election there will be equal access again.

QUESTION: Mr. Chanin, state law just allows it?

MR. CHANIN: State law requires equal access.

QUESTION: Yes, but during the insulation period state law doesn't require unilateral access. Only it simply permits it to be bargained.

MR. CHANIN: That is correct, it allows it as a bargainable matter.

QUESTION: I sure wish you could point that out in the record, or do I have to go look for it?

MR. CHANIN: I can point it point.

QUESTION: Okay, I'll find it, if it's there.

MR. CHANIN: Let me, if I may, get back to the point --

QUESTION: While you've been interrupted already, just to clarify, is the school board a party or was it a party below?

MR. CHANIN: The school board was a party in the district court and the Court of Appeals. It has not joined in the appeal to this Court.

QUESTION: Does the school board have any interest in your prevailing?

MR. CHANIN: I'm sure it does.

QUESTION: What is the interest of the school board that's at stake?

MR. CHANIN: We would like to believe that its interests are that we prevail, that what we are seeking here is to sustain a provision which we believe and which this Court has indicated contributes to labor peace, to labor stability, and to a more rational relationship.

QUESTION: But the provision in dispute was adopted by the board at the request of your client, was it not?

MR. CHANIN: It was adopted through collective bargaining, in the give and take of collective bargaining.

QUESTION: And is there any reason why, had the union not been interested in preventing your rival union from having access, is there any reason to believe that the school board independently would have concluded that this was a desirable provision? And if so, what reason would motivate it?

MR. CHANIN: I think there is reason to conclude that, although I can't look into the mind of this school board. I might suggest that Congress has concluded that it is a good thing to limit it to the exclusive representative and has built that into the law governing labor relations of federal employees. The new Civil Service Reform Act in 1978, picking up on Justice Rehnquist's question, does not merely authorize preferential access, it mandates it. It makes it an unfair labor practice to allow a minority union to use federal government facilities when there is a recognized organization.

So I think, at least as a general answer, here

is a presumably objective body, the United States Congress, which concluded that that contributes to a more stable system of labor relations.

QUESTION: Well, even if the school board weren't all that happy to have either union in there, I suppose it has some interest in keeping use of the teachers' mailboxes by outside groups at a minimum. You have forced it in effect to give you access, but perhaps it would just as soon limit it as much as it could.

MR. CHANIN: I expect that's true. We have forced it, I think, in two ways: through collective bargaining and because we presumably persuaded it that we have legal obligations which this enable us to perform more effectively.

QUESTION: In the course of the bargaining and in the development of this rule, was your claim in the bargaining, your demand, that your organization have access and your rival organization not have access, or simply that your organization have access

MR. CHANIN: I only know, Your Honor, and the record only indicates what came out of the bargaining. What came out of the bargaining was the double-sided limitation.

QUESTION: The exclusive access.

MR. CHANIN: The exclusive access, yes.

QUESTION: Now, the SG has filed something with us indicating that your union may have to pay postage, isn't that right?

MR. CHANIN: Your Honor, yes, they have, they have. What they have contended is that allowing one of the two facilities here -- we have school mailboxes and inter-school mail system. The Postal Service takes the position that for the school district to cary union mail in its inter-school mail system without postage is a violation of the Private Express Statute. I just might mention --

QUESTION: So this exclusive privilege may not be worth much in the future?

MR. CHANIN: Well, I think that is an overstatement, I would like to believe, of what they say. First of all, their basic --

QUESTION: Is this really before us?

MR. CHANIN: Pardon me?

QUESTION: I took it all that the Solicitor General might have wanted was a footnote in the opinion disavowing any --

MR. CHANIN: At best it is a footnote. We think they're wrong, and if they're right it has no relevance. That's basically how we view it.

The Appellees do not even contend that by

allowing PEA to use the school mail facilities to perform its representational functions it has gone beyond school business, and their case for conversion is not based on that use. Their case for conversion to a public forum is based on three other alleged uses.

They contend first that PEA has unfettered use, that it has not been limited to access solely to perform its representational function.

There is nothing whatsoever in the record to sustain that assertion. The contract upon which the access right is based specifically says "acting as the representative of the teachers". The record is totally silent in the face of that statement. If there were any evidence to indicate that PEA was granted or has used the school mail facilities for any other purpose, it would be Appellees' burden to produce that evidence, and they have failed to do so.

The Appellees next assert that numerous non-school-connected organizations have been allowed to use the school mail facilities, and their quote is, "for purposes wholly unrelated to official school or educational concerns". That is the YMCA's, the Cub Scouts, et cetera, which we have spoken to.

Let me, if I may, just put this in a context, because much of what has been said takes it out of the

way it must be viewed. It's important to emphasize what is involved here. Although this case arises in an educational setting, it does not invole academic freedom, textbooks, students' rights. It is a labor relations case. The Plaintiffs are a labor union and two of its members, and they seek to use the school mail facilities to promote their organization and to increase its membership.

The Appellees' papers are filled with references to the marketplace of ideas and monopolistic control of access media. They conclude their motion to dismiss by stating that if this decision, this policy, is struck down PEA will be forced to compete in the marketplace of ideas solely on the strength of their ideas and program.

We did compete in the marketplace of ideas. We competed during the representation election, and with equal access we sold our ideas and our programs. And that's why we have access and they don't. Now, if they want to challenge us again we'll compete again, equally and without preference, in the marketplace of ideas. And if they beat us, they'll have access.

But to suggest, as they do, that this competition must go on continuously, and even more, that the school board has to make its facilities available to

force that competition, is not only unreasonable but it is the very antithesis of labor peace and stability.

I would like to reserve any remaining time.

CHIEF JUSTICE BURGER: Mr. Zweig.

ORAL ARGUMENT OF RICHARD L. ZWEIG, Esq., ON BEHALF OF APPELLEES, PERRY LOCAL EDUCATION ASSOCIATION

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

This case raises the question of the constitutionality of a collective bargaining agreement between a teachers union and a school district which grants the teachers union exclusive access to the school's internal mail system and compels the school district to deny that right to another teacher organization, while at the same time the school district is permitted and in fact does allow numerous other organizations and individuals to use that system for whatever purpose they deem appropriate.

The Metropolitan School District of Perry Township consists of 13 schools, and in each school there is a set of mailboxes which has a teacher's name written above them. This internal mail system and the mailboxes which are part of it has been in place for a number of years, and for a number of years outside groups, individual teachers, the Perry Education

Association, and the Appellee here, Perry Local Educators' Association were granted simultaneous and equal access to those facilities.

QUESTION: Are you going to leave the issue of jurisdiction to your brief, as your adversary has?

MR. ZWEIG: I would be glad to comment on the question of jurisdiction.

QUESTION: I wish you would.

MR. ZWEIG: The Perry Education Association has attempted to invoke this Court's appellate jurisdiction on the basis of 28 United States Code Section 1254. They state that the Court of Appeals for the Seventh Circuit held an Indiana statute in essence to be unconstitutional.

In point of fact, what the Court of Appeals held was a paragraph in a collective bargaining agreement between the school district and Perry Education Association violated the Perry Local Educators' Association's rights under the First Amendment. Indiana law does not treat that contract as either an ordinance or a statute. Rather, it treats it simply as a contract.

Indeed, Indiana law limits those bodies which are permitted to enact statutes or ordinances. Those limitations are placed by the Indiana General Assembly

and the Indiana Constitution, and nowhere is a school district given the authority to adopt an ordinance.

QUESTION: Supposing an Indiana school district adopted, outside of the labor context, a regulation saying that no black armbands shall be worn in the school by the students. Would you say that was not appealable here under the same circumstances?

MR. ZWEIG: We would say that is appealable, because that would be a unilateral action by the school district, as opposed to something that was the result of a collective bargaining process.

QUESTION: But supposing the school district held intense hearings and heard all sorts of groups on this black armband question, and one group demanded one thing and one demanded another thing, and the school board finally came out and said, this is the way we resolve it. Is that all that different from this? I mean, it's the school board that finally grants the access, not the union.

MR. ZWEIG: We would say that that is a different situation. The situation which you posit we believe is more synonymous with what happens in the legislative process generally, where hearings are held on bills that are presented both to Congress and to state legislatures, and ultimately it's the legislature

that adopts that ordinance unilaterally or that statute unilaterally.

And that's not the case in this instance, where you have one party negotiating with another party and the result of that is a contract. And indeed, we think that the case centrally relied upon by the Appellants, the King Manufacturing case, does make that distinction. That case talks about what a statute is and what it declares is that a statute is a unilateral enactment by the legislative body.

QUESTION: How was the contract approved?

MR. ZWEIG: It was approved at an open school board meeting.

QUESTION: So it took a legislative act to approve it?

MR. ZWEIG: In one sense of the word it was a legislative act.

QUESTION: Well, it was, wasn't it?

MR. ZWEIG: Except that under Indiana law that wouldn't be considered to be a legislative act. It is the result of a collective bargaining process which requires adoption by the school board. To that extent it would be a legislative enactment. But we think there is a difference.

QUESTION: What if the school board in advance

passes a resolution at one of its meetings that, our negotiators are authorized to agree to an exclusive use provision in the contract?

MR. ZWEIG: If that went through the appropriate process and so on and that was a regulation that was adopted, yes --

QUESTION: That's all we know, is that they adopted it and authorized it. Do you think that would be a legislative act?

MR. ZWEIG: That might be a legislative enactment.

QUESTION: Well, do you think it's different, do you think it's different if after the fact the school board approves it?

MR. ZWEIG: We do think it's different.

QUESTION: How? Why?

MR. ZWEIG: We think it's different because it is the culmination of a process where two parties are negotiating over a point. It is different than a legislative enactment where there is a lot of debate and ultimately it's only the legislators who have the authority to pass the statute or the ordinance.

QUESTION: But is the process any different in the advance authorization than in the subsequent ratification?

MR. ZWEIG: The process is different in the way the system sets up the --

QUESTION: You think the school board has a little less in the way of options in the second situation?

MR. ZWEIG: The options I think are much more great in the collective bargaining process, probably, than in the legislative enactment process.

QUESTION: Well, what if you're right? What are we supposed to do about it?

MR. ZWEIG: We would ask this Court to find that there is no probable jurisdiction under that statute --

QUESTION: And do what?

MR. ZWEIG: Consider this case as a petition for a writ of certiorari.

QUESTION: And then decide it?

MR. ZWEIG: Decide whether or not to take the case, initially to assume jurisdiction over it.

QUESTION: Would you say then we should dismiss the appeal and then deny cert, is that it?

MR. ZWEIG: Yes, that's what we are suggesting.

QUESTION: Or, having heard it, dismiss it as improvidently granted?

MR. ZWEIG: Yes, under either form.

In terms of the substantive issues presented by this case, there are some points about which we do agree. The first is that the First Amendment does apply to the issues which are raised by this appeal. So much has been stated by this Court in Tinker versus the Des Moines Independent School District and by Pickering versus the Board of Education. That much we all agree.

We all agree also on the fact that this exclusive access policy does limit our rights of free speech and assembly under the First Amendment.

QUESTION: You do agree, don't you, that in the federal context that this exclusive use of the exclusive representative is fairly usual?

MR. ZWEIG: It is fairly usable certainly in the military area --

QUESTION: Usual, usual.

MR. ZWEIG: Usual, in the military area. I do not personally know if it's fairly usual within all federal agencies. That is not disclosed by the record.

QUESTION: Do you agree or not that 5 U.S.C. 7116(a)(3) provides for, is a general provision requiring exclusive use by bargaining agents

MR. ZWEIG: I have to frankly say that I'm not personally familiar with that particular statute.

QUESTION: Well, if it is, it certainly is a Congressional declaration.

MR. ZWEIG: Yes. Yes, sir.

The basic point of departure for the decision before this Court is whether or not that internal mail system which was established by the Perry Township School Board is a limited public forum, and this Court has set out what the test is for a limited public forum or a public forum generally. That's set out in Grayned, where the Court said that we must inquire as to whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

The school board in this case has already determined that PLEA's use of that system -- PEA's use of that system, before 1978 in any event -- was compatible with the uses for which that system originally was developed, and that is to facilitate communication between teachers.

Furthermore, this Court in Tinker implicitly acknowledged a public school is a form of a public forum, not in the sense of the national mall, not in the sense of the streets and the parks, but for certain purposes it is a limited public forum; and that speech within that forum can be limited by the state only

insofar as it will materially and substantially disrupt the education of students and the system generally.

QUESTION: Sometimes schools allow political candidates to come and make speeches in the evening in many states. Do you think when they do that they must either let all candidates come or not permit any to come?

MR. ZWEIG: I think that a school district which allowed, for example, the Democrats to come in and speak to the teachers would be hard-pressed to deny any other political group access to those, to the facilities for the purposes of --

QUESTION: Just hard-pressed?

MR. ZWEIG: I think it would be a violation of the First Amendment.

QUESTION: Do you say, Mr. Zweig, that your case depends on our agreeing with you that this is a limited public forum? Suppose we don't?

MR. ZWEIG: We don't believe it's essential that the Court determine that it is a limited public forum. As the Court in Bellotti held, even where there is not a public forum, that unless there's a compelling state interest in limiting a particular speaker to speech, that a state has no business silencing a particular speaker on any particular issue.

And in this case there are no compelling state interests which have been proven or even suggested by the Appellant or the school district.

QUESTION: Well, I thought what they suggest was that this is in the interest of labor peace.

MR. ZWEIG: They suggested that --

QUESTION: That's certainly a state interest, isn't it?

MR. ZWEIG: It certainly is, Mr. Justice Brennan. But they suggested that only in the courts below. They have not reasserted that here, and presumably the reason they haven't reasserted it here is that at no time from 1973 forward, when PEA first became the exclusive bargaining representative, has there been any incident of labor disharmony or strife between PLEA and PEA. There's just no evidence of that whatsoever.

The second --

QUESTION: Well, the federal contract bar rule for a period of whatever it is now is certainly imposed just across the board, without regard to whether there might be disharmony or friction in that particular employment situation. Do you think that the state or the school board in this case would be unjustified in saying, we're not going to look into individual examples of whether or not there's harmony or disharmony, we just

think this is a good policy and we're going to adhere to it?

MR. ZWEIG: I think the school board and the state -- strike that. Just the state can make the determination that a two-year period where there will not be permitted any challenge to the exclusive bargaining status of a group, is a legitimate state interest and maybe compelling. It offers the opportunity to allow the majority union to solidify its status, to get its foot in the door, to get itself planted, and to do those things which are important for an exclusive bargaining representative to do.

QUESTION: Mr. Zweig, there is contrary authority to your position, is there not?

MR. ZWEIG: Yes, in the lower courts.

QUESTION: Including two Courts of Appeals.

MR. ZWEIG: Yes.

QUESTION: Do you cite those cases and try to distinguish them at all?

MR. ZWEIG: We think those cases are simply wrong. On their facts they are similar to this case.

QUESTION: But you don't even say that in your brief. You don't cite them.

MR. ZWEIG: We do not cite those cases in our brief. We acknowledge, however, that there is the split

of authority within the circuits, and we contend that the decisions by the Second Circuit and the Sixth Circuit are simply wrong because they don't elevate the interests under the First Amendment to the point where they're supposed to be as we see it.

In essence, those courts held that the First Amendment rights being asserted were de minimis.

QUESTION: I take it if your union has access to the system it would use it, in large part at least, to point out the deficiencies in the representation by the PEA, would it not?

MR. ZWEIG: That might be one purpose for which we'd put the system.

QUESTION: What else would you use it for?

MR. ZWEIG: We might also use the system to communicate our ideas about issues that come up in the day to day operations of the schools, whether it be with respect to --

QUESTION: Well, I take it what you want to persuade the teacher constituency is that you'd be a better representative of theirs than is PEA; would you not?

MR. ZWEIG: In part. But it might also be to influence the members of the PEA --

QUESTION: That would certainly set up a not

too pleasant atmosphere for the school board, would it?

MR. ZWEIG: We don't believe that it would, and we base that upon the facts of this case. Prior to the time that this exclusive access policy was enacted, both PEA and PLEA had access to that system. And during that time there was no incident of labor strife.

We do not believe that there is any basis in the record to project that there's going to be labor disharmony or strife.

QUESTION: There was no exclusive representative during that period?

MR. ZWEIG: There was an exclusive representative during that period, and that exclusive representative was PEA.

QUESTION: Well, one way to stop it would be not to let either one use it.

MR. ZWEIG: We believe --

QUESTION: And that would be legal, wouldn't it?

MR. ZWEIG: Yes. We believe that the school district could make the choice to close the system down to both groups, yes.

QUESTION: And that's what it does during the campaigning --

MR. ZWEIG: That is what it does during the

campaign.

QUESTION: -- during the campaigning period.

MR. ZWEIG: Contrary to what my opposing counsel has indicated, during the period of the campaign both groups are denied access.

QUESTION: That's on page 20 and 21 of the appendix.

MR. ZWEIG: That's right. It's request for admission 31, I believe.

And the reason for that is probably that the communications system is a very effective system of communicating ideas between rival unions and their potential constituents, and what the IEERB board, the Indiana Education Employment Relations Board, is trying to do is equal the access of the two parties to the teachers within the system.

QUESTION: Mr. Zweig, as I understand your argument, though, you urge that there was a public forum created by virtue of the action in letting the Y and the Boy Scouts and so forth use it. So your position would be even if the school denied access to PEA that your organization would be entitled to access, right?

MR. ZWEIG: That is true. To the extent that the school system opens up that forum to anybody, to individuals, individual teachers, as in this case, to

comment on matters which concern the school, we think that we should have the same access rights that they have, because after all, as this Court has held in Abood, the issues which are presented to the teachers and to the school system are largely political.

Indeed, under Indiana law -- and I'd refer the Court to the collective bargaining statute, Indiana Code 27.514 and 5. There are a number of items in there which the majority union is allowed both to bargain for and to discuss with the school system, and many of those issues, such as budget appropriations, such as class size, such as selection, assignment and promotion of personnel, are largely political questions.

And what the school board has done by adopting this restrictive access policy has been to give one side of those debatable public questions a much better position with respect to advocating its point of view than another organization. And we contend that it has done so without any compelling reason whatsoever.

QUESTION: Well, your outfit could certainly mail to the teachers who are represented by your opposing labor group its views at their home address, couldn't it?

MR. ZWEIG: It could do that, but there are two problems with that.

QUESTION: Treated as junk mail?

MR. ZWEIG: Pardon?

QUESTION: Might it be treated as junk mail?

MR. ZWEIG: I don't believe so.

The two significant problems with that are that we don't get the list of teachers and the addresses of teachers until November of the school year, so that during the critical period of time when we need to speak with teachers, a critical period of time --

QUESTION: When is that critical period of time?

MR. ZWEIG: Early on during the school year.

QUESTION: Why is that critical?

MR. ZWEIG: Because when new teachers come in we would like to have the opportunity to speak with them, to talk about the issues which are presented to the school system?

QUESTION: To kind of organize them in a way?

MR. ZWEIG: In a way, to at least give a contrary point of view to that being expressed by the majority union.

So we can't use the United States mail system effectively before that list is given to us, whereas PEA can immediately begin to transmit its messages the day that the school doors open.

Secondly, we think that there is a much greater burden placed upon our exercise of free speech than that being placed on PEA by virtue of the fact that we will have to pay 20 cents a letter and they will have to pay nothing, and in addition to that will be able to use school personnel to get those messages to the teachers.

QUESTION: Mr. Zweig, in the USPS versus Council of Greenburgh case, the Court held that the United States mail system did not require us to have a compelling state interest test applied to any restrictions placed on the use of the U.S. mails. Why is the mail service of the school district any different?

MR. ZWEIG: We think it's different because the private mailboxes which each of us has in our home are not, in terms of the court, a public forum. And the difference is that in that instance nobody else is granted access to those mailboxes except for the United States Postal Service. In that instance the Postal Service does not allow the Democrats to use the system, the mailboxes, or the YMCA's or the parochial schools or anything like that, as we have here.

And what the Court said in that case is that they had no occasion to be concerned about that because

it was an equal exclusion of all people from the system, whereas in this case it is a very selective exclusion of people from the system.

QUESTION: Did I understand you to say that if you prevail here, the school board would be at liberty to deny both unions access to this?

MR. ZWEIG: We think that the school board can deny both.

QUESTION: Even though it continues to permit the Boy Scouts and these others that are allowed to use it to use it.

MR. ZWEIG: Given the entrance of other people, other outside organizations and individuals to the system, based on that we would say we should have the same access.

QUESTION: So that what you're saying is if you prevail, if the board is to exercise the option of closing down the system, it will have to close it to everybody.

MR. ZWEIG: Yes. It's all or none proposition from our point of view.

QUESTION: May I ask whether the school board members are elected by the public?

MR. ZWEIG: Yes, they are.

QUESTION: Is there anything in the bargaining agreement that would prevent the union from taking a position of favoring or disfavoring a candidate for election to the school board?

MR. ZWEIG: No. But we wouldn't have any opportunity to do that within the mail system. But the collective bargaining agreement itself is silent on that question.

QUESTION: It's silent?

MR. ZWEIG: Yes.

QUESTION: So at least in theory the union could take a position?

MR. ZWEIG: In theory the contract doesn't prohibit them from taking that position.

QUESTION: Did the school board participate in this case at the district court level?

MR. ZWEIG: The school board did participate at the district court level, and they did participate in the Court of Appeals to the extent that they essentially joined in the position taken by PEA. They have not reasserted those positions in this point, and instead has left it to PEA to articulate and promote the so-called compelling state interests which are posited to justify this restrictive access policy.

QUESTION: Would you take the same position if the school board denied use to all organizations except PEA?

MR. ZWEIG: Yes. We would take the same position, and the basis --

QUESTION: You mean letting -- if the school board thinks it's got a good reason to let its collective bargaining representative communicate with its teachers, so it lets that organization and that organization alone communicate with the teachers. You think that makes it a public forum and lets you in?

MR. ZWEIG: We believe that because of the nature of the communications within that system, which are largely political, that -- and we base that upon Abood and the City of Madison cases, as well as what is articulated under Indiana law as the subjects of bargaining and discussion.

We believe that we -- that it would be wrong for the school district to exclude one group of teachers which is as vitally concerned with the result of any discussion --

QUESTION: Well, did you get any schoolteachers to join you in this suit?

MR. ZWEIG: We do not have any schoolteachers other than those who are represented by the Perry Local Educators' Association.

QUESTION: May I ask a question about your opponent's argument? He says, and I think quite properly, that you changed your position from that adopted by the Court of Appeals; that now you seem to

rest entirely on the conclusion that this is a public forum.

Do you agree that if it is not a public forum that you lose?

MR. ZWEIG: Again, we would articulate that to the extent that the system is used for political purposes, we should have the same opportunity to speak on those political issues as anybody else. We say that in the facts of this case the Court has -- strike that -- that the school system has opened up that system for all --

QUESTION: Well, I understand you are arguing it's a public forum.

MR. ZWEIG: Yes.

QUESTION: Are you arguing separately, as I understood the Court of Appeals to hold, which is quite different from the argument, that even if it's not a public forum, you nevertheless are entitled to prevail under some neutrality approach?

MR. ZWEIG: Yes. We would also adopt that position on the basis of --

QUESTION: And you think that position survives the Postal Service case --

MR. ZWEIG: Yes. And the reason I say that is in the Postal Service case -- I presume that's the

Greenberg case --

QUESTION: Greenberg, yes.

MR. ZWEIG: The Court made a strong point of the fact that the mailboxes there and generally in the country are not open to selected groups to use; that is to say, the Postal Service doesn't attempt to distinguish between individuals and organizations who may gain access to their private box and exclude some and grant access to others.

So we don't believe that the Greenberg decision is in any way contrary to the position that we're asserting in this case.

QUESTION: Counsel, I understood you to say earlier that you perceive this to be a limited public forum. It's certainly not the classical public forum. Are you claiming it's a limited one or an unlimited public forum?

MR. ZWEIG: We are claiming it is a limited public forum.

QUESTION: Well, I think you should make that clear. This is not like a street.

MR. ZWEIG: This is not like a street. It's not like the parks. It is --

QUESTION: It is not even like the university in the Widmar case we had here last term, is it?

MR. ZWEIG: We think it's similar to the Widmar case.

QUESTION: But there were over a hundred organizations allowed to use the building in that case.

MR. ZWEIG: But in this case there is no evidence that anybody other than PLEA has been excluded. That is the only group that's been excluded. Other groups have been granted access, and the school system has adopted no rules --

QUESTION: Well, you have to be careful with "excluded." Has any other one asked to be?

MR. ZWEIG: We are not familiar with any group which has asked to gain entrance --

QUESTION: Well, that doesn't mean excluded, does it? You have to first ask in order to use the word "excluded."

MR. ZWEIG: During the course of the proceedings in the trial court we attempted through discovery to determine who had been granted access and who had been denied access and a number of other issues; but our discovery was cut off on a motion filed by the appellants in this case, and so we didn't have an opportunity to develop that particular point.

QUESTION: Did you win or lose in the district court?

MR. ZWEIG: We lost in the district court.

QUESTION: Did you raise the lack of discovery as an issue on appeal?

MR. ZWEIG: Yes, we did.

QUESTION: Did the Court of Appeals pass on it?

MR. ZWEIG: No, it did not. It did not rule on that. It determined that the facts were sufficient to show a clear First and Fourteenth Amendment violation.

QUESTION: You really couldn't urge that as an alternative ground for affirming the judgment of the Court of Appeals, I suppose, because if it were found that the discovery were inadequate, it wouldn't be an affirmance, and the judge would send it back --

MR. ZWEIG: That's correct. The point is that PEA has complained that we haven't shown a number of facts, but the stark reality is that we were prevented from showing those facts by virtue of the proceedings in the district court.

Because the speech which is within the school district is, in our view, inherently political, we believe that it is an error as a matter of law for the school district to exclude one side of those political views and allow another side in.

Now, the appellants in this case also have claimed that because of the alternative channels of

communication available to us that our First Amendment right is in essence de minimis, and in that sense they followed Memphis, AFT and Connecticut, AFT cases, the Second and Sixth Circuit cases.

But the only opportunity to get to that issue is if it is shown that the restriction here is a reasonable time, place and manner restriction. And it's our suggestion that the restriction here is not that because it is content- and viewpoint-based, and it is, therefore, under the control and precedents of this Court per se, unreasonable.

Additionally, the alternative channels of communication alleged to be available to us are really not very availing and they're not equally effective. They suggest that we can use the intercom system, but that is available only when school was out and the teachers are dispersed to the various activities or to their home.

They suggest that we can use the bulletin boards, but in point of fact the record shows there's only one bulletin board, and that's at the Burkhardt School in all of the Perry Township schools. And they suggest that we can use the meeting rooms. We suggest that that's not a very effective alternative either, because if we can't tell the teachers what the meeting

is about and we can't indicate the time and place of the meeting, that the fact of the meeting rooms being available is really not availing.

Thank you.

CHIEF JUSTICE BURGER: We'll resume there at 1:00.

(Whereupon, at 12:00 p.m., the case was recessed for lunch, to be reconvened at 1:00 p.m., the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Just a moment, counsel, if you will.

Mr. Chanin has waived his rebuttal, unless the Court has any questions. If not, thank you very much, Mr. Chanin.

(Whereupon, at 1:00 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: Perry Education Association, Appellant v. Perry Local Education Association No. 81-896

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BY _____

(REPORTER)