ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1474

TITLE CHARLES R. HOOVER, ET AL., Petitioners v. EDWARD RONWIN

PLACE Washington, D. C.

DATE January 16, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES R. HOOVER, ET AL., :

Petitioner, :

v. : No. 82-1474

EDWARD RONWIN :

- -x

Washington, D.C.

Monday, January 16, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:50 o'clock p.m.

APPEARANCES:

CHARLES R. HOOVER, ESQ., Phoenix, Arizona; on behalf of the Petitioner.

EDWARD RONWIN, Urbandale, Iowa; on behalf of Respondent, pro se.

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General,

Department of Justice, Washington, D.C.; as amicus curiae supporting respondent

C O N T E N T S

P R O C E E D I N G S

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

ORAL ARGUMENT OF CHARLES R. HOOVER

ON BEHALF OF THE PETITIONER

MR. HOOVER: Mr. Chief Justice, and may it please the Court. I believe it is very important for us to keep in mind exactly what this case is about, because many items in the brief deal with issues that are not really here.

I think Judge Ferguson, in the Court of Appeals in the dissent, very distinctly put it in the beginning of that, that this is, in effect, a case dealing with the subject of a male person who has been judicially determined to be mentally unable to engage in the practice of law in the State of Arizona, may still maintain a $2,200,000 damage action under the Federal antitrust laws against the Committee on Examination and Admission of the Arizona Supreme Court for failing to give him a passing grade on the state bar examination.

Looking at what the case is about, we are here contending that on at least four principal bases we should prevail, that is the committee members should not be subject to this kind of action. Three of those are state action items.

The first is that we contend that we are involved in state action as the state, as the sovereign. Secondly, failing that particular test in your view, that we are involved in state action as a subdivision of the state.

Thirdly, failing that, that we would be involved in state actions as a private party, although we do concur with the amicus position of the United States that that is not the case here, we are not private parties, although we certainly that they meet those tests -- that we meet those tests.

Fourthly, that if there is no state action involved at all, then the Noerr-Pennington doctrine would apply insofar as antitrust matters are concerned. The principal basis of the state action doctrine, as an exemption from the antitrust laws, is federalism.

I think something again ought to be kept in mind that taking the case as it is, as a pleadings case, and assuming that the members of the committee did all of the wrongful things that either the complaint alleges or that the briefs infer, the federal antitrust laws are not the basis upon which to redress this matter. There are plenty of remedies available to Mr. Ronwin, to anyone in Mr. Ronwin's position, to in effect have his day in court, to have his merits as a lawyer determined,

to have his claim in effect adjudicated.

In fact, we contend he has done just that by virtue of the fact that his admissions, on the very issues that we are talking about, have previously been determined by the State of Arizona. In other words, these facts were presented to them, and they hae been brought to this Court, not once, but he has gone to the State of Arizona on three different occasions and been turned down, and to this Court, from these three different occasions, on three different writs of certiorari in addition to this case.

So it is not a situation where we are dealing with any man's rights that have not had a fair chance to be adjudicated. This is a case where we are dealing with what very chilling effect on state or state officers, state officials, you have by subjecting them to the pressures and the difficulties of facing a trial on merits and facts for some underlying purposes or reasons under the antitrust laws.

Our view basically is that under Parker versus Brown, which to us is the heart of the case, in fact that this is very much the heart of the case --

QUESTION: Mr. Hoover, may I ask you, assuming, and I know you, of course, deny the allegations in the complaint, but assume that the

examiners did not set the exam schedules on the basis of competence to practice law, but they wanted to set the figure so low that very few new lawyers would be admitted to protect the existing bar from the competition of too many lawyers in the community, and the Plaintiff wanted to challenge that practice, which I assume may not well happen. If he wanted to challenge such a practice, how should he do it other than by the antitrust laws?

MR. HOOVER: First, Your Honor, we very much appreciate the fact that you recognize we deny having done that.

QUESTION: But we must assume it's true.

MR. HOOVER: We must assume it's true for this case because it is a pleadings case.

QUESTION: Right, so how does he challenge it?

MR. HOOVER: How does he do that; exactly the way he did it, and exactly the way that a case, the Met-Ccal case, challenged a state statute in California, that is through some other proceeding in the state courts saying, look, the state should give me a license to practice, and if the method by which I am trying to get there is improper because of a violation of the antitrust laws, then I ought to get my license.

That is exactly an issue that he presented in May of 1974 to the Arizona Supreme Court, and they denied it, and he brought the case here on a writ of certiorary, and in doing so, he took the very same basis -- the very same basis that he contended was the basis of the antitrust claim.

Although he did not present the antitrust claim to this Court in August of 1974, he brought these same grounds here in a writ of certiorari and he said --

QUESTION: Do you argue res judicata?

MR. HOOVER: That is an alternate ground, Your Honor, that has been suggested for the first time in these proceedings in the brief of the amicus United States as a basis that the case could be disposed on if it were returned to the court below.

I am answering your question --

QUESTION: I see.

MR. HOOVER: -- just to give you an example of how he could do it, and in fact he did. And, yes, ultimately, res judicata could dispose of this case, but here is the method by which somebody should raise these issues in a system of federalism. He said that the lack of a preset standard and failure to grade petitioner on his own legal abilities, unrelated to those of the particular group taking the exam at the same time as

Petitioner, constituted a denial of due process and equal protection to Petitioner in violation of the Fourteenth Amendment.

That is in August of 1974 on a writ of certiorari to this Court, which was denied. That is the way to raise the issue, it is to come here and say, look, I wasn't fairly graded.

QUESTION: Suppose that on his very first go-round, when he went to the Arizona Supreme Court, he did present his antitrust claim and said, I should have a license.

MR. HOOVER: And he did, sir.

QUESTION: And the Arizona Supreme Court turned him down. What if, in petitioning here, he had said, the Arizona Supreme Court didn't understand the antitrust point, so they made a mistake. They made a mistake on the antitrust laws. They assumed that it wasn't a violation of the antitrust laws obviously, and they were wrong.

Suppose we had granted that petition for certiorari on a claim like that, what would your -- your argument then here would be not procedure, but it would be that this is state action.

MR. HOOVER: No, my argument would be different, Your Honor.

QUESTION: You would still be saying that it is not -- that your action is state action.

MR. HOOVER: In that case, we would not be dealing with a damage lawsuit that would have the chilling effect on state government activities.

QUESTION: I understand that, but what would your argument be?

MR. HOOVER: That would be -- That would be a very substantial difference. I would contend --

QUESTION: What would your argument be?

MR. HOOVER: My contention would be on the facts, in that situation, that there was no antitrust violation.

QUESTION: You would also say, though, that the antitrust laws have nothing to do with it because we were acting as an agency of the state.

MR. HOOVER: In the instance of what you are talking about, we would contend that we were an agency of the state absolutely. But, in terms of this case, that's a very different kind of situation because he --

QUESTION: Actually, since the Arizona Supreme Court would have been turning him down, that is state action, I suppose.

MR. HOOVER: That is our position because they are the people who make the decisions as to whether

someone is admitted or someone is not admitted, and here we are talking about something that is against the individual members of a committee appointed by the state court as state officers, and as a damage action itself.

We draw a very strong distinction -- excuse me, we draw a very strong parallelism between Parker versus Brown and this case. In the Parker case, the state legislature enacted an act, and the governor appointed a commission.

In this situation, the commission then had a nomination of a committee, and those - and had nominations made to it by, in effect, the people affected, the raisin growers. From those nominations, the committee selected a commission -- excuse me, selected a committee, which then made a recommendation to the commission.

We have a very similar situation here, only it's a higher level item, the Supreme Court, from a list of nominees from the state bar, selects a committee that makes a recommendation to the committee. In our view, we are dealing with a closer to the ultimate seat of the government of the state than even Parker versus Brown was, and we are dealing with something that is statewide. We are dealing with something that is the state acting through the only way the state can act and

that is through various bodies and commissions.

The state cannot be limited to act as a sovereign simply by the legislature or the supreme court, although that's clear that that is acting a sovereign, that is not the only the state should act.

QUESTION: Mr. Hoover, do the bar examiner screen on the basis of anything except legal competence?

MR. HOOVER: Yes, Your Honor. The bar examiners screen on the basis of several items in the rule. For example, someone must be over 21 years of age. Under the rules, as we contend they were involved at the time, you must be a citizen of the United States.

Under the rules that Mr. Ronwin contends in his brief are applicable, you had to be a resident of the state. The residency requirement was eliminated, we feel, for this examination. They also screen on the basis of his showing to the committee that he is mentally and physically capable to be engaging --

QUESTION: How does he show that, Mr. Hoover?

MR. HOOVER: Basically, he shows that simply on indicating a statement of his physical condition and statements from people as recommendations. Until you have other evidence coming in to the contrary, those are

generally accepted on the first round as being the case.

QUESTION: Do you have an interview like some states do for ethics or moral qualifications?

MR. HOOVER: We do have interviews and hearings if something comes up in the course of the examination of the materials that are presented that leave us with pause or concern.

QUESTION: But you don't have an automatic interview?

MR. HOOVER: It is not automatic, but it is -- it does occur when someone is in a situation that they are going to be denied on that basis. But when they are going to be passed on that basis, they are not interviewed.

QUESTION: But of course --

QUESTION: Excuse me, go ahead.

QUESTION: If -- I gather legal competence is determined on the basis of a written examination, is it?

MR. HOOVER: That is correct.

QUESTION: If the applicant passes that, he may nevertheless be denied admission on one of these other factors?

MR. HOOVER: Yes.

QUESTION: Age is simple, of course, he is or isn't over 21, but what about the mental one?

MR. HOOVER: That is exactly Mr. Ronwin's situation, in fact, because he has subsequently taken the Arizona Bar examination on two other occasions, and ultimately on the third one he did pass the examination. He has been denied admission on the mental fitness category after hearings in front of a master, who happened to be a judge, a Superior Court Judge, appointed by the court.

The court said: We take this matter to ourselves, take it out of the hands of the committees, and we will decide it. That issue has been decided, and from that particular decision of the Arizona Supreme Court, a writ of certiorari has also been sought and been denied.

QUESTION: Of course, as Justice Stevens asked you, though, we assume that he has been denied because -- it is a pleading stage because he wasn't admitted when he took bar becaus you had a quota.

MR. HOOVER: That is correct. For the purposes of case, that is correct.

QUESTION: It is as though he had been denied admission because you only wanted, let's just take, for instance, 100 lawyers instead of 200 lawyers being

admitted each year, and he happened to be the 101st on the list. That is the way we judge this case, isn't it?

MR. HOOVER: That's correct, that's the status of the pleadings as we see it.

QUESTION: Just one other question following on what Justice Brennan asked.

MR. HOOVER: Certainly.

QUESTION: Is it part of the state policy that the Arizona Supreme Court and these various people administer to limit the number of lawyers for economic reasons?

MR. HOOVER: That's not within the record, and as a matter of fact, that is not the case.

QUESTION: If it is not the state policy, then how can you contend that the policy he describes is mandated by the state?

MR. HOOVER: That is the impact of the policy no matter how much -- If you exclude one person, and any time you deal with qualifications there is a very substantial view that you will --

QUESTION: No, but therer is a very great difference between excluding electricians, because you don't want ten new ones this year, and saying, we won't let any in unless he knows the difference between

getting a shock and not getting a shock.

MR. HOOVER: I understand, Your Honor, but my point is this. Taking the pleadings as they are in this situation, the point that we contend is state action, when done by the state, is that you only need to have a clearly articulated state policy.

That is that the state policy is one which displaces competition with a form of regulation, and when you do that, by definition when you exclude somebody, you will have an anti-competitive effect if those people going to the marketplace have a competitive effect. We have to assume that for the status of this particular pleading. Therefore, the state action comes by the fact that we are doing something that says, here we make a determination and we made a decision.

This is why I emphasized the point earlier that if we were wrong in that, there are other ways for him to have redress, and that you should not put a very chilling effect on state officers in trying to decide these issues by saying, fine, you are going to be subject to very substantial triple damages to be for, apparently, personally.

In other words, there is an excellent article written by Professor Areeda in 95 Harvard Law Review, 435, which I commend to you, and we cite it in our

brief. I think he very clearly points that out when dealing with the subdivision of the state point, the same thing that we are discussing here, and that is that once you start looking behind the authorizations, once you start looking at what might be motives even, because this is apparently what this would lead to, and certainly the court and the law in that case rejected the idea that you look at the motives of the people functioning here.

When you start doing that, you put the state officer in the position of saying, Gee, I had better be very careful that I don't tread on somebody, because if I do and he is displeased, I'm going to have to face being sued in a triple damage action.

QUESTION: Does the professor embrace the Boulder Television case?

MR. HOOVER: The article by Professor Areeda was written at a time that --

QUESTION: Before.

MR. HOOVER: Boulder was then only decided by the Tenth Circuit, and before you decided it, although I contend that Boulder stands for the proposition that home rule is a neutrality in effect, a passiveness upon the state. It's not state action, it's state passivity, and, therefore, Boulder really doesn't have anything to

do with this particular case.

QUESTION: Why wouldn't it be passivity if the legislature or the supreme court of your state gives you authority to do anything you want to or very broad discretion in giving exams and in recommending admission?

MR. HOOVER: I think that's not --

QUESTION: You could go any way of several ways.

MR. HOOVER: I dont' think that's passivity. In other words, in the Boulder case, it just said: Boulder, you are a home rule city and, therefore you can do, as far as we are concerned, what a sovereign can do.

But in this case the supreme court said: Committee, design an examination. Committee grade the examination. Committee recommend to us the people who have passed that examination and who are otherwise qualified under the other items in the rule. That's hardly passive, that is very, very active. That's directing us to do very certain things, and those are the things that we do.

QUESTION: Mr. Hoover, where is there any specification on that?

MR. HOOVER: Where is the specification?

QUESTION: On what type of exam you give, how many, or anything.

MR. HOOVER: No.

QUESTION: Is there anything in writing on this?

MR. HOOVER: No, there is not specificity as to the type of exam to give, other than it has to be a written exam.

QUESTION: Is there any specificity of any kind that I can look at?

MR. HOOVER: No, no, Justice Marshall, there is not specificity as to say that the exam, other than the subjects that have to be on the exam or the subjects now that may be on the exam, other than those subjects, the dates or the time, that is the last Wednesday. But not in terms of the methods in which it is graded. The court has said --

QUESTION: Is there anything in the rules or the instructions that say that you cannot adopt a rule which says that we will only let every third person by?

MR. HOOVER: No.

QUESTION: There is nothing to stop you from doing that?

MR. HOOVER: No, there is nothing in the rules that says, you can't do that. As a matter of fact, the

policy of the committee has been to try to design an examination to judge for minimum competency. That is what it has attempted to do in terms of its efforts, but that is not within the record at this particular point in time.

There is nothing in the rules that say that the exam has got to be so many questions, or you have to grade it this particular way. It gives the committee the discretion to design and put together a test to try to determine the qualifications of an individual to practice law.

QUESTION: Perhaps you've already answered this, Mr. Hoover. I gather that X number by the results of the examination demonstrate minimum competency. There is no practice of saying, well, only half of those or only three quarters of those will be admitted.

MR. HOOVER: No. In other words, if the committee determines that someone has passed the exam and, therefore, demonstrated minimum competency, that person is recommended on that factor or that portion of the qualifications.

QUESTION: But that is not what is alleged in the complaint.

MR. HOOVER: No, that is not what is alleged in the complaint.

QUESTION: We are arguing the merits not the legal sufficiency of the complaint.

MR. HOOVER: You're correct, but I am trying to answer his question, Your Honor.

QUESTION: But you are answering it on what the evidence will show, and not what the pleading shows.

MR. HOOVER: That is correct. The pleadings contend that we in some manner manipulated the grades to restrict the numbers, and that is exactly the cases here in the pleading stage. It is our contention that that is a wrong, no question about it, but it is a wrong that should not be redressed by Federal antitrust statutes.

QUESTION: It really seems to me that you are in a position where head you win, no matter what happens you win, because is you have a quota policy, you can say that is the state policy, it is state action. If you're willing to say it, but you don't because apparently you don't really have one. If you don't have one, you're going to win on the facts.

MR. HOOVER: Your Honor, in fact the United States in its amicus brief concedes that the state could exactly do that. The state has the power to set such a quota.

QUESTION: The Supreme Court could expressly

do it.

MR. HOOVER: That's exactly right. That is correct. That is exactly what they say in the brief. There is no question that that is proper state action under our view of federalism, and I believe that the amicus pleading --

QUESTION: To depart from the pleading situation, on another hypothetical, I assume that a person could take the examination, get a mark of 99, and then in the later stages it would develop that he had just recently been convicted of stock fraud in violation of the Securities and Exchange Act, and you might then reject him -- reject the admission on that ground, even if he had 99 on the examination.

MR. HOOVER: That is absolutely correct, Mr. Chief Justice.

QUESTION: But that is not this case.

MR. HOOVER: That is not this case in terms of what is here on the pleadings. In fact, that kind of thing, unfortunately, has happened, but it is not this case for the purposes of what we are doing here.

QUESTION: Mr. Hoover.

MR. HOOVER: Yes, Justice Powell.

QUESTION: Rule 28(a) of your bar, quoted on page 7 of your brief, provides that the committee shall

examine applicants, shall recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications, and would only, if not there --

MR. HOOVER: I'm sorry, I didn't hear the last question.

QUESTION: Do you see the rule I am reading from, it is Rule 28(a).

MR. HOOVER: 28(a).

QUESTION: It starts on page 6 of your blue brief.

MR. HOOVER: Yes.

QUESTION: Look over on page 7, the fourth line down, "The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications.'

MR. HOOVER: That is correct.

QUESTION: Do you construe that to mean all applicants who have the necessary qualifications as determined by your committee?

MR. HOOVER: That is correct, Your Honor, and that is the discretion which the rule gives to us in terms of grading the examination.

QUESTION: Is that the policy of the State of

Arizona?

MR. HOOVER: I believe that is the policy of the State of Arizona, Your Honor, yes.

QUESTION: How can you say that you should have won this summary judgment motion.

MR. HOOVER: It's a motion for dismissal.

QUESTION: A motion for dismissal, why should you win that, because it says that he was excluded not because he didn't have the qualifications or the requirements, but just because he was the 101st on the list, that's in his, because to restrict the numbers.

MR. HOOVER: The answer to the question was, is that the policy of the State of Arizona. Yes, that's the policy. The question we have here is --

QUESTION: Well, then you must -- How can you say that you are living up to that policy, if you concede that he was excluded because he would have made too many lawyers.

MR. HOOVER: The purpose of determining whether you can have standing to bring a damage action under the antitrust laws, the question is not whether you can -- whether you did or did not live up to the policy as it may be interpreted, but whether the state can or cannot create such a policy.

In our view, the state can create such a

policy, and in fact our function was the state doing just that. The redress should be in another tribunal in another manner. It should be brought up in the course of appeal to the State Supreme Court and ultimately appealed here, not for a damage action under the Federal antitrust laws. That is basically the heart of our argument in terms of what federalism is.

There is no question that what he is alleging is something that no one should do. We don't contend that it's something that somebody should be permitted to do. What we do contend is that this is the wrong forum in which to resolve it.

QUESTION: Then you don't -- You really can't be contending that it is state policy to do that, then.

MR. HOOVER: What I'm is that the state policy --

QUESTION: To get in the state action exception, you have say, this is our state policy to restrain competition. You just said to me, well, nobody would ever restrain competition this way.

MR. HOOVER: As a matter of fact, that is not our state policy. That is correct, it is not the state policy.

QUESTION: It seems to me that you have a perfect defense on the merits.

MR. HOOVER: I agree with you, we have a perfect defense on the merits. But what I am saying to you is that under the idea of federalism that we should not be forced to go to defenses on the merits and suffer all of the problems that you can get into, because what you suddenly do is put into the hands of the Federal District Judge or a jury the right and the power to second-guess a state official if he has guessed wrong.

QUESTION: You don't have faith in our Federal judicial system.

MR. HOOVER: I have equal faith in our state judiciary.

QUESTION: Sure.

MR. HOOVER: And that is where this should be, because in that context the answer is, fine, we simply admit Mr. Ronwin because you did something you shouldn't do, and that's that, and he is admitted, if that would be the case, as opposed to saying, you had better watch out, because if you're not careful somebody will sue you for a very substantial amount of damages and you're going to have to go and defend that, and worry about the impact of that on your financial statement that's pending, if you're trying to borrow money, and all those sorts of things.

QUESTION: If you have deviated from the state

policy -- Suppose you did deliberately deviate from state policy as it seems to have been alleged in the complaint. I don't know about antitrust liability, but you wouldn't think that you should be deviating from state policy?

MR. HOOVER: No, I don't think we should be deviating from state policy, but if we are not subject to the state action exemption, then what we are doing is clearly covered by Noerr-Pennington, because we are making a recommendation to the state that is ultimately the authority, the supreme court, that somebody be or not be admitted. That particular grounds is another grounds from which we should not have to face on a pleadings basis an antitrust claim in the United States District Court.

I would like to reserve the remainder of my limited time for rebuttal, if I may.

CHIEF JUSTICE BURGER: Very well.

Mr. Ronwin.

ORAL ARGUMENT OF EDWARD RONWIN

ON BEHALF OF THE RESPONDENT

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

One question was the rules in effect. in the reply brief, the petitioners are arguing that the rules

that we are arguing about are not rules of "pleadings practice and procedure." But I recommend that if you read these rules which are attached, I believe, to the first petition for a rehearing in the Ninth Circuit by petitioners, you will find that they deal precisely with pleadings practice in this judicial proceeding of determination of how you get into the bar. They tell you how to challenge the grades, how to challenge any othr part of the examination, et cetera. They are clearly pleadings practice rules. The Arizona Supreme Court simply did not follow its own rule on how to amend its rules.

Secondly, the standard, whether we take Mr. Hoover's idea of what the rules are or mine, the standard was nevertheless 70. They preset a standard of 70. I aver in the complaint that they told us before the exam that 70 was the passing grade. They admit in their answer, at paragraph 3, they admit that, yes, we told them that 70 was the passing grade.

They are attempting in the reply brief now to deny that that's allegation of a preset 70. It seems to me that if you tell people before an exam that 70 is the passing grade, you are presetting the standard. So I think that they are in error in that attempt.

QUESTION: Do you mean to apply that

proposition even it developed later that the person was not a citizen of the United States or was not 21 years of age.

MR. RONWIN: No, sir, I am not.

QUESTION: You've got to meet all of the qualifications, would you not?

MR. RONWIN: Yes. I am just speaking about the grading part. That is really the only issue here. I am a citizen of the United States. I am obviously over 21, et cetera.

Now, I'd like to make clear that I am, one, not asking to be admitted to the Arizona State Bar, that's a different argument and it's going on in different ways and, two, I dispute that the evidence will show that they have not violated the clearly articulated policy of the Arizona Supreme Court.

Arizona did not, as petitioners claim, "replace competition with regulation" by creating the scheme to measure competence of bar applicants, that is, by creating a scheme to examine them. What they did there was create a scheme simply to determine who was qualified from who was not qualified. But they did not tell the bar examiners to determine the numbers that are to be admitted as a result of the examination. That's the guts of what we're arguing about.

QUESTION: In other words, Mr. Ronwin, it's your allegation that the bar examiners purposely restricted the number of lawyers allowed?

MR. RONWIN: Your Honor, I don't -- I'm not making any determination as to their intent.

QUESTION: I am asking, are you alleging that?

MR. RONWIN: Yes, that they did do this, yes. They used the examination, the grading system so as to determine the numbers to be allowed, rather than to determine competence by the way they did it. They may not have even been aware that they were doing it because it was kind of a complicated mathematical scheme this scale scoring business. So they might have been unaware of what they were doing, but that's what they were doing.

When I told them so, they said, Ronwin, you are not mentally and physically able to practice law. I am obviously physically able.

QUESTION: What you are saying that they did -- Perhaps I misunderstood you. Did you say you are not alleging that they purposely did this to restrict the number of those admitted?

MR. RONWIN: I am alleging that they did do this, and I didn't make any -- I don't believe I alleged

whether it was purposeful or not. I am just saying they did do it. Of course, it is purposeful in the sense that they went out and did it. So just what degree of purposefulness on their part, I can't say at this point.

QUESTION: I take it you do allege that in advance they had some idea about how many they wanted to admit.

MR. RONWIN: That automatically came out when they picked the raw score equal to 70. See, if they were going to grade on the 70 scale, Your Honor, then they would be grading each examination somewhere between zero and 100 each question. Then at the end they'd have a bunch of questions with 55, 75, or 95, and then whatever system they wanted to use. Maybe they wanted to give one question double weight, another question single weight, that would be up to them. But somehow they would come out with 75 -- 70 rather, as the passing grade, and those below would not pass and those above would.

QUESTION: In other words the number -- Are you alleging that the number who came cut with the 70 was just coincidentally the number that they decided that year to admit?

MR. RONWIN: Yes, I think, when they picked

the raw score, they themselves admit in their reply brief, they were automatically picking the numbers that were to be admitted. That's where the wrong came in.

QUESTION: They must have been doing it knowingly, then.

MR. RONWIN: I don't want to make that determination at this point, because it's a --

QUESTION: How can you win your case without that?

MR. RONWIN: I know they deliberately graded the way they did. Now it's for the court to decide just how purposeful it was, I think.

I want to point out that first there's a question of what test should apply, and I had urged Met-Cal in the brief, which has got the two prongs, the clearly articulated and affirmatively expressed prong, and the supervision prong.

I wish to point out that the petitioners have relied heavily on being state agents and state officials. But as this court has said itself in Golfarb, being an agency for limited purposes doesn't create an antitrust shield when they use their powers for anti-competitive benefit of their members. Likewise, in City of Lafayette, Met-Cal, and I think in Boulder, too, the court has said that being a state

agent or official is not a per se exemption from Sherman Act liability.

As far as just what kind of a test, the reason both the petitioner just indicated that he agrees with the clearly articulated prong, but the supervision is needed, I think, for this reason. If you don't have the supervision, then it will not -- you are not certain that the sovereign is the one who has declared the clearly articulated and affirmatively expressed requirement, because part of that clearly articulated and affirmatively expressed requirement is that it be the sovereign declare it. These people are not the sovereign.

If you keep making the sovereign larger than you have now, its legislature and supreme court, then this could go down to no one knows where. If you have a good cut-off point, they are not sovereign. Therefore, I suggested as a supervision -- Of course, you don't watch everything they do, but when a board, a state board takes an action where they -- where they know or ought to know that this action is going to be anticompetitive in an economic sense, then it seems to me they have a duty to report to the sovereign, whether it is the legislature or, in this case, the Arizona Supreme Court, and get that court to declare clearly, a

clear articulation and a firm expression, yes, we approve this new type of action that you are taking. That is why you need supervision. It doesn't have to be watching every pencil that they push.

Lastly, I also indicated I think you should add something to the test and that is the states, the sovereign units ought to justify why they are engaging in this anticompetitive activity, because you have called this, the Sherman Act, the Magna Carta of free competition. You know that it is an ideological linchpin in our argument with the Eastern bloc. What's more, a congressional statute is being overridden by state action.

It seems to me that when those factors are involved, certainly the state sovereign units ought to justify either by a compelling interest or by a rationally related interest why they are replacing competition with some anticompetitive scheme.

Scale scoring, as I indicated before in my brief and as you find in those statistics I give in the appendix, it certainly doesn't equalize anything. Had they stuck, I think, with a reasonable -- with the 70 standard, they probably would have experienced about -- a much higher pass rate at the time I took the exam.

I also want to indicate that the Feldman case

was raised, and I don't think that it is applicable here. No judgment of the Arizona Supreme Court is being attacked. Under current --

QUESTION: Mr. Ronwin, are you admitted anywhere to practice?

MR. RONWIN: Yes, in Iowa.

QUESTION: In Iowa.

MR. RONWIN: Yes.

QUESTION: And you want to move to Arizona, or you have moved to Arizona?

MR. RONWIN: No, I just feel -- Well, I do have some people I know down there. I wouldn't have any problem getting work down there, but I want to circulate between the two states. I like cold weather and I like hot weather.

Getting back, the Feldman case doesn't apply because I am not attacking a state judgment. As a matter of fact, what I am attacking is the complaint of conduct by the petitioners that the Arizona Supreme Court is officially not aware of. Furthermore, I'm seeking monetary damages which is not within the Arizona Supreme Court's power to give me. Lastly, exclusive jurisdiction in antitrust actions rests with the Federal District Court.

In my last five minutes -- I would like to

alsc mention. I think that under the Fifth and Fourteenth Amendments, the right to be -- to follow a profession is a personal right under your decisions, Lynch, and Green versus McElroy, et cetera. I, therefore, that any examination given for admission to any kind of a profession or occupation has to be an individual -- an exam that determines your individual ability. Scale scoring autcmatically, as they admit, rests on taking the grcup's achievement. Therefore, I think you violate the Fifth and the Fourteenth Amendment when you use any kind cf a game of that sort.

Lastly, I would like to raise one point with this ccurt, which I didn't raise in the briefs, and others haven't raised it. I think all members of the court, as well as the petitioner, the amicus and myself originally thought the state action exemption was a perfectly legal doctrine.

I thought abcut whether it was or not because in my brief I have this notion about overriding a statute of Congress. I have ccme to the ccnclusion, and I hope perhaps you'll agree with me, that is is unconstitutional, because I think you did in effect was this. Yeu say it in Parker and you say it in Boulder, that the reason you have the state action exemption is in the interest of federalism.

Federalism comes out of the Tenth Amendment, basically, and that prohibits the states from doing whatever is prohibited in the rest of the Constitution. We have a supremacy clause which prohibits the states from overriding a statute of Congress.

Another justification, perhaps, is that the Sherman Act does not apply to the states. I think that doesn't give you the concomittant right to declare that the states can therefore take actions which override the Sherman Act.

If it doesn't apply, that ends it, it doesn't apply. But there is no lawful right, you see, to then let the states through this "state action exemption" override a statute of Congress. That result has been that you have amended the Constitution by the State action doctrine, and Article Five of the Constitution does not allow this court to have any say in the amendment process.

In fact, not even Congress, I think, has the right to allow a state to override its own statute because that again would be an amendment of the supremacy clause. Only after two-thirds vote and three-fourth ratification by the states can you get that done.

I thought I would throw that out for the

consideration of the court because I'm sure it would want to consider the lawfulness of the state action exemption itself.

Thank you.

CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE AMICUS CURIAE SUPPORTING RESPONDENT

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

Whether the complaint in this case should have survived the motion to dismiss is the procedurally narrow question before the court, but in the view of the United States a somewhat broader perspective than the immediately presented context of bar examinations helps to illuminate the proper resolution of that question.

It is not uncommon for the states to have dozens of boards or commissions with authority to license or to regulate particular trades or professions, and these boards are often comprised, as in this case, exclusively or predominantly of individuals who are themselves engaged in the trade being regulated.

Some of these boards pose dangers of the imposition of guild type restrictions on competition that quite frankly are of considerably more significance to our competitive economy than the question whether an

artificially reduced additional number of lawyers was admitted to practice after a particular bar examination.

In recent years, the enforcement activities of the United States in this area have focused primarily on rules adopted by these boards prohibiting competitive bidding, or prohibiting advertising, or otherwise restricting methods of solicitation of business. One of these enforcement actions of the Federal Government has resulted in a reported case.

It was an action that we brought against the Texas State Board of Public Accountancy which had adopted a rule that a public accountant shall not make a competitive bid for professional services. That rules was restrained by the District Court. The decision was upheld by the Fifth Circuit, reported at 592 F.2nd 919, and this court denied certiorari at 444 U.S. 925.

We have brought a similar action against the Mississippi State Board of Registration for Professional Engineers and Land Surveyors in which cross-motions for summary judgment are being held in abeyance pending the decision in this case.

We also filed a civil antitrust suit against the Alaska Board of Registration for Architects, Engineers, and Land Surveyors, which also had adopted a

competitive bidding ban. We have negotiated a consent decree in that case which will require elimination of that ban.

We have filed in April of last year a civil antitrust suit against the State Board of Certified Public Accountants of Louisiana which had adopted a rule restricting advertising and solicitation, and that case is scheduled to go to trial later this month.

The cases that have actually been filed represent only a part of the enforcement activities we have engaged in in this area. Many times, our investigations have led to the rescission of rules of this kind. For example, in 1982, the West Virginia Board of Accountancy rescinded bans on competitive bidding and solicitation when it became apparent that we would file suit if they did not do so.

Now, all of the rules that I have just referred to were adopted pursuant to general enabling statutes which authorized these boards to adopt rules to further professional ethics, and otherwise gave neutrally phrased authority to the boards. But there is also a danger that more specific statutory authority to deny licenses or to prohibit practices for statutorily specified purposes can be distorted into anti-competitive uses.

We gave one hypothetical example in our brief of a board to determine whether restaurants meet health and sanitation requirements, and the possibility that it might for anti-competitive reasons refuse to license a restaurant even though it had no basis for thinking that there was any health or sanitation problem.

Another example might be hypothesized from the face of the Maryland statutes dealing with savings and loan regulation. The State of Maryland has filed an amicus brief in this case taking a position similar to ours.

One of the things provided in their statute is that a board of savings and loan association commissioners, consisting of a majority of members engaged in the business, will monitor, and approve or disapprove certain kinds of new practices proposed by institutions practicing in that field in order to determine whether the innovation proposed might undermine the financial stability of the particular savings and loan.

One could see the temptation that there might be in a board of that sort to reject a competitive innovation by a competitor in the field even though there was no basis for thinking that that innovation would in any way undermine the financial stability of

that competitor.

These hypothetical possibilities and the real cases that we have brought are a bit reminiscent of one of this court's classic antitrust decisions that in the Fashion Originators Guild case. The difference is that unlike the situation in Fashion Originators Guild there is no need to aggregate the market power and to exercise that power, if power conferred by the state on a group of people in the business can be distorted into anti-competitive uses.

QUESTION: Mr. Wallace, could I put a hypothetical to you, I'm sure you have thought about it. What about a state law school. It is common knowledge, of course, that law schools establish scores below which one does not pass. Are you arguing that a state law school that does that arguably would be in violation of the antitrust laws?

MR. WALLACE: Only if there could be a showing that there was no reasonable objective basis on which the restrictions that they --

QUESTION: That hasn't been shown in this case, has it?

MR. WALLACE: No, but that is the allegation in the complaint which we have to assume is true.

QUESTION: But every law school would be

subjected to suit if a complaint like this were filed against it -- every state law school?

MR. WALLACE: It's not inconceivable. The petitioner is arguing that the remedies must be restricted to remedies under state procedures and in the state courts, but that argument seems to me foreclosed by the court's decision in the City of Boulder which upheld an antitrust complaint for an injunction where the charge was that restraint of trade was undertaken by public officials and was not pursuant to a policy adopted by the state sovereign.

QUESTION: Would it be inappropriate for a state law school to decided, as I think some have, that it wishes to have a higher quality of students and require a higher grade of performance before it gives the accolade of a degree?

MR. WALLACE: I rather doubt it. I haven't focused, and I certainly have not discussed with my colleagues this particular issue, but that would not foreclose persons from going to law school that did not have such high academic standards.

It might actually provide that individual with a better opportunity for a legal education at a pace that would be more suitable for his talents. It would not foreclose the possibility of his entering into the

practice of law. So long that there were no deception involved, it wouldn't be a very credible case that there was an antitrust restraint.

QUESTION: Many states, I think, still admit people to practice who may not have graduated from a law school, but other states do not, and law firms, certainly the law firms I am familiar with are not going to hire someone who failed to graduate from an accredited law school.

MR. WALLACE: They don't have to have graduated from that particular law school.

QUESTION: True.

MR. WALLACE: There is not the same opportunity to --

QUESTION: You have to find one that has a low standard of quality.

MR. WALLACE: There is not the same opportunity to restrain competition that is involved here. That is our point in viewing the issues presented in this case in perspective.

The mere fact that this is a board of public officials does not mean that all of their activities ipso facto are immune from antitrust regulation. That seems to us to follow a fortiori from the decision in the City of Boulder because if that was true of elected

officials responsible for the general welfare of the community alleged to be acting in conformity with the state statute, it has to be true for these part-time public officials alleged to be acting contrary to the mandate given the by a state statute.

The dissenting judge in the ccurt below distinguished the City of Boulder case on the ground that city officials could be mcre parochial. But frcm the standpoint of antitrust concerns there is a greater parochialism in a group of public officials composed of individuals with a common ecnomic interest than the fact that there may be a geographically restricted point of view abcut the general public welfare.

There is a clearly stated state policy that the board here claims to be following and that is to administer a bar examination that measures for competence and to report to the state supreme court who demcntrated competence cn that examination and who did not. And, if objectively lcoked at, what the board did in any way reasonably furthers that policy, then they have performed within the immunity in our view.

We do not regard it as a proper inquiry for the courts tc determine what their motivations were, so long as their actions objectively fell within that grant of authority that is a restraint that had to be

contemplated and authorized by the state supreme court in conferring discretion on the board to act anywhere within that range of authority. But the allegation in the complaint here is that they imposed an artificial limit on the number who could pass the exam in a manner unrelated to competence.

It seems to us that that is an allegation that they went beyond the specifically articulated state policy, and an allegation that has to withstand a motion to dismiss the complaint, even though it is quite possible that a case like this can be resolved at the summary judgment stage, without an extensive trial.

The fact that the report that they make to the state supreme court is in the form of a recommendation, seems to us to be a formal distinction from other licensing boards that really does not preclude the possibility of the imposition, through distorting the state given authority, the imposition of a trade restraint of some significance to antitrust policy, if they know that the report that they have been asked to give will generally be followed, and that report seems to be a report on who demonstrated competence and who did not, but has actually been used for other purposes, and that is what the complaint alleges.

CHIEF JUSTICE BURGER: Mr. Hoover.

REBUTTAL ORAL ARGUMENT OF CHARLES F. HOOVER

ON BEHALF OF PETITIONERS

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

I have but one point that I want to make in rebuttal, and that is to the United States' position. Concerning the broader aspects of this case, and the cases that he cited, it is my understanding that these cases are all injunction cases. I committed to you earlier Professor Areeda's article, and let me read to you the last sentence of that particular article.

He says: "Having left this question open in Lafayette, the Surpeme Court may come to agree that antitrust liability may vary according to the remedies sought, and that certain factual situations may be sufficient to establish liability for injunctive purposes, but not for triple damage or criminal sanctions."

If this were an injunction case, I personally would stipulate the relief, because we have already done exactly what that relief would be, that is, we have told the Supreme Court that for the examination portion, Mr. Ronwin has passed. Consequently, that would not be remedies that would be of any concern, and that fact is in the record of this court.

QUESTION: Why didn't you tell him before?

MR. HOOVER: Why didn't we tell him before, because he didn't pass before.

QUESTION: Why has he passed now and he didn't pass before?

MR. HOOVER: He has taken the exam three times, Your Honor, and he passed it on the third attempt. When he took it the last time, which was in the summer, I believe, of '82, we told him that he had passed the exam. They decided not to admit him on other grounds.

QUESTION: Right.

MR. HOOVER: So if it were an injunction case, I would have no problem, and I think that is the heart of what Professor Areeda is saying to you, that this is not the place to redress through damage actions these kinds of activities.

Thank you, Your Honor.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

CERTIFICATION

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#82-1474 - CHARLES R. HOOVER, ET AL., Petitioners v.
EDWARD RONWIN

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BY Pierce Hammond

(REPORTER)