ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1577

TITLE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., ET AL., Appellants v. AGRICULTURAL MARKETING AND BARGAINING BOARD, ET Al

PLACE Washington, D. C.

DATE March 19, 1984

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ALDERSON REPORTING

IN THE SUPREME COURT OF THE UNITED STATES

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MICHIGAN CANNERS AND FREEZERS :
ASSOCIATION, INC., ET AL., :
Appellants, :
v. : No. 82-1577
AGRICULTURAL MARKETING AND :
BARGAINING BOARD, ET AL. :

- -x

Washington, D.C.

Monday, March 19, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 o'clock a.m.

APPEARANCES:

JOSEPH G. SCOVILLE, ESQ., Grand Rapids, Michigan; on behalf of the appellants.

JOHN H. GARVEY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of U.S. as amicus curiae.

JAMES A. WHITE, ESQ., Lansing, Michigan; on behalf of the appellees.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Michigan Canners Association against Agricultural Marketing Board.

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

ORAL ARGUMENT OF JOSEPH G. SCOVILLE, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This is an appeal from the Supreme Court of Michigan. The issue in this case is whether a Michigan statute conflicts with and therefore is preempted by an Act of Congress.

The Act of Congress is the Agricultural Fair Practices Act of 1967. It was designed by Congress to safeguard an individual farmer's right to join or not to join a cooperative asscciation. It was also designed by Congress to strengthen the competitive marketing system for commodities in this country.

The Michigan state statute is the Agricultural Marketing and Bargaining Act of 1972. In contrast to the federal Act, the Michigan Act imposes a union model on agriculture in the state. It compels unwilling farmers to adhere to the prices, terms, and service fees

of a cooperative association. It compels unwilling purchasers to negotiate with cooperative associations.

Appellants do not contend that the federal Act has occupied this field of regulation. We contend instead that the Michigan Act and the specific provisions of the Michigan Act stand as an obstacle to the full purposes of the federal Act by destroying rights created or protected in the federal Act.

QUESTION: Mr. Scoville, the same might be said of the legislation in California. I am curious to know whether you think that portions of the California Act are also invalid under your view.

MR. SCOVILLE: The California Act, Your Honor, is well distinguishable from the Michigan Act in two very important respects. The California Act does not purport to bind unwilling farmers by the decisions of the cooperative.

QUESTION: Well, they all have to contribute a certain amount of the produce, and they are bound by certain determinations of the group, are they not?

MR. SCOVILLE: Perhaps, Your Honor --

QUESTION: Whether they have joined or not.

MR. SCOVILLE: Perhaps we are not talking about the same California Act. There are two California Acts. One is the California pro rate Act, and the other

is the California bargaining one. I am confused as to which one Your Honor is talking about.

QUESTION: Well, you can address both.

MR. SCOVILLE: The California bargaining Act, which is the one that is analogous to the Michigan Act, the one that directly regulates agricultural marketing and bargainnng, is not at all like the Michigan Act in the two particulars that I mentioned. First, unwilling farmers are not affected at all. Unwilling farmers are free to market their products free from the cooperative. They need not support the cooperative, and the cooperative's decisions have nothing to do with the unwilling farmer.

Furthermore, Your Honor, although there is a duty to bargain to impasse under the California bargaining law, the duty to bargain between cooperatives and purchasers is not so draconian as it is under the Michigan Act. Under the Michigan Act, if a purchaser and a cooperative do not agree a certain time before the marketing season begins, the purchaser must either submit to compulsory arbitration, in which the price and other terms and conditions of trade will be fixed for him, arbitration, or he must buy nothing from any member of the bargaining unit in the state. He is, in other words, thrown out of the state of Michigan for that

particular crop.

In those two important respects, the Michigan Act is much different from the California Act.

The California pro rate law, Your Honor, is a marketing order Act. It is very analogous to the federal Act, the Federal Marketing Agreements Act of 1937. It has nothing to do with cooperatives. A marketing order Act like the federal or California Act tries to control the supply of an agricultural commodity, and the marketing orders, although approved by a majority of farmers, are also approved by an agency of the state of California, and that is the big difference between the Michigan Act here under attack and the federal law in which federal marketing orders are isssued by the Secretary of Agriculture and the California state Act.

QUESTION: Have you identified any other state agricultural marketing Acts which you feel have the same problems as Michigan's?

MR. SCOVILLE: No, Your Honor. As we say in our reply brief, none of the other state bargaining Acts impinges on the rights of non-consenting farmers to the extent the Michigan Act does. For instance, in Minnesota, the Act expressly says that the cooperative may not bargain on behalf of or assess fees against any

unwilling farmer. That is a distinction of great magnitude between the Minnesota Act and the Michigan Act, because the Michigan Act makes unwilling farmers a part of the cooperative in every important economic respect.

I will turn, if I may, to the facts of this controversy, because I think they show the interest of the appellants very clearly. In December of 1973, the appellee board, acting pursuant to the Michigan Act, certified a bargaining unit for processing asparagus in the state of Michigan. The board defined that unit to include all Michigan farmers who grew a certain minimum quantity of asparagus for sale --

QUESTION: Is aspargus raising in Michigan concentrated in any one geographic area?

MR. SCOVILLE: Yes, Your Honor. It has traditionally been concentrated in the western side of the state.

QUESTION: Like the deciduous fruits? Like cherries and apples?

MR. SCOVILLE: Yes, Your Honor. The same is true.

The board determined that 433 asparagus farmers in the state of Michigan fit into the certified bargaining unit. Thereafter, FLE MACMA, which is a

cooperative, entered into signed exclusive agency agreements with 236 of those 433 farmers, or 55 percent of the bargaining unit.

MACMA then petitioned the appellee board for accredited status under the Act, and MACMA was entitled to a credited status because it had signed exclusive agency agreements with over 50 percent of the farmers in the bargaining unit who themselves produced over 50 percent of the crop in that unit.

In January of 1974, the board accredited MACMA under the Act. Now, under the Act, accredited status has two major consequences. First, MACMA became the exclusive bargaining agent for all 433 farmers in the bargaining unit, whether or not those farmers consented. Second, all purchasers were required to neogiate with MACMA, and were forbidden from negotiating with any individual farmer, including the 197 farmers who did not consent to MACMA representation.

Thereafter, the appellees as plaintiffs -- I am sorry, the appellants, plaintiffs below, began this action in the state Circuit Court to declare the Michigan Act unconstitutional.

Ferris Pierson and Dukesherer Farms, two of the appellants, were two of the 197 Michigan asparagus farmers who did not want to be represented by MACMA and

did not want to pay the 1 and a half percent compulsory service fee on their gross produce. They initiated this action in order to vindicate their right, protected by the federal Act, not to join a cooperative.

The other appellants are purchasers of agricultural commodities in the state of Michigan. They began this action to vindicate their right protected by Section 2304 of the federal Act not to be compelled to negotiate or deal with a cooperative. The Michigan courts rejected appellant's claim of repugnancy between the state and federal Acts, and this appeal followed.

In order to decide this appeal, this Court will have to answer basic questions about the objectives of the federal law. Is one of the objectives of the federal Act to safeguard the right of an individual farmer not to join a cooperative? Is another objective of the federal Act to safeguard the right of a purchaser not to deal with cooperatives? If so, the Michigan Act must fall.

The Michigan Supreme Court admitted as much. It admitted that the existence of such federal rights would be fatal to the Michigan Act. The Michigan court stated in its opinion, which is reproduced in our jurisdictional statement appendix, and I am reading now from Page A-8, "Were we to agree that Section 2304 or

any provision in the federal Act was meant to affirmatively create or protect rights of private dealings between individual producers and processors, we would agree that the state Act must fall, because plainly the state Act conflicts with that result."

The Michigan Supreme Court avoided a conflict between the two Acts by holding that the federal Act did not create an absolute right in a farmer to join or not to join a cooperative, and created no rights in processors. We submit that the Michigan Supreme Court was clearly wrong. The federal Act was expressly designed by Congress to create and preserve federal rights.

I turn first to the rights of farmers under the federal Act. That Congress intended to preserve an individual farmer's right to join or not join a cooperative is plain from the face of the federal Act. Section 2301 is a statement of Congressional policy. It emphasizes the rights of individual farmers, not the rights of cooperatives. Section 2301 says that the welfare of "individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative."

Section 2301 goes on to say, "Interference with this right is contrary to the public interest."

To safeguard this right, Section 2303(a) of the federal Act creates certain unfair practices. The first unfair practice is this. A handler is forbidden to do the following: to coerce any producer in the exercise of his right to join and belong to or refrain from joining and belonging to a cooperative. I emphasize that Congress used the words "right to join and belong to or to refrain from joining and belonging to."

Section 2303(c) likewise prohibits a handler from coercing farmers into or out of membership agreements or contracts of a cooperative or a processor.

It is critical for the Court to realize that the statutory definition of handler includes agricultural cooperatives. In this way, Congress expressly regulated the relationship between cooperatives and unwilling farmers. In Section 2303, Congress prohibited cooperatives from coercing any unwilling farmer to join them.

The Supreme Court of Michigan ignored this important fact. In interpreting the federal Act, it equated the terms "handler" and "processor," thereby excluding cooperatives from the federal statutory definition, and this is at Footnote 7 of the Michigan

Supreme Court opinion.

It was only by making this basic error that the Michigan Supreme Court was able to say that the federal Act affects cooperatives only indirectly. It was only by making this basic error that the Michigan Supreme Court was able to say that the relationship between cooperatives and unwilling farmers was federally unregulated. The Michigan Supreme Court was wrong.

Congress directly regulated the relationship between cooperatives and unwilling farmers. It directly forbade --

QUESTION: Mr. Scoville, I thought their answer to that argument was, it is not the handler, even when you define it broadly, but rather the state of Michigan that has applied the coercion when they talk about that specifically.

MR. SCOVILLE: Your Honor, the Supreme Court of Michigan went further than that. The Supreme Court said that the federal Act was not designed to create any federal right to join or not join a cooperative. It said that the federal Act was designed only to prohibit certain bad acts, certain acts of handler coercion and intimidation, and that Congress was not concerned with the underlying economic right of a farmer to join or not join a cooperative.

In other words, Congress was concerned only that farmers lead tranquil lives, free of coercion, fraud, and intimidation, but that Congress somehow was unconcerned about the basic core economic right of how a farmer may market his or her product, and the legislative history, Your Honor, is replete with discussion and consideration of the economic right to market through a cooperative or market individually, and to limit the scope of the federal Act prohibiting bad acts, and not give protection to the basic economic right protected in the federal Act really renders the Act negatory.

QUESTION: Mr. Scoville, will you state again what you think the definitional mistake that the Supreme Court of Michigan made was and where that occurs in its opinion?

MR. SCOVILLE: Footnote Number 7, Your Honor.

QUESTION: And their error in Footnote Number 7 at Page A-5 of the jurisdictional statement was to use the term "handler" and "processor" interchangeably?

MR. SCOVILLE: Yes, sir, without also recognizing there and then throughout the opinion that "handler" also means "cooperative." For instance, Your Honor, at Page A-14 of the Michigan Supreme Court's opinion, it says FAFDA's producer protections only

indirectly affect cooperative associations as associations. The only way to make that statement is to ignore the fact that cooperatives are handlers and are subject to direct federal restraint in Section 2303.

Elsewhere in the opinion, the Michigan Supreme Court says that the Michigan legislature took a step into a federally unregulated area in restructuring the arrangements between cooperatives and unwilling farmers. The only way to say that is -- the only way to conclude that is to say that the relationship between cooperatives and unwilling farmers is not regulated in the federal Act, and that stems from their basic definitional mistake in failing to realize that cooperatives are handlers under the federal law, and expressly so.

The Michigan Act has a destructive effect on the federal rights that we have just been talking about. The Michigan Act imposes a majority rule on Michigan farmers. Once 50 percent of farmers in a bargaining unit who represent 50 percent of the crop in that unit have signed up with a cooperative, all unwilling farmers are then swept into the cooperative sphere of influence.

Those farmers must adhere to the price and other terms negotiated by the cooperative. Those

farmers must pay the service fee on everything they sell. Those farmers may not negotiate on their own behalf with purchasers, and worst of all, if the cooperative that is representing these people against their will fails for any reason to come to an agreement with a particular purchaser, and that purchaser does not want to go to bargaining arbitration, that unwilling farmer may not sell to that purchaser. In other words, the Michigan law allows cooperatives to totally dominate unwilling farmers.

In summary, if the Court please, the Michigan legislature and the Congress of the United States responded to the same question with different answers. Congress took a careful look at a very narrow question: what shall the relationship be among cooperatives, unwilling farmers, and purchasers, and Congress determined that unwilling farmers would have a federal right to stay free of cooperatives, that willing farmers would have a federal right to join cooperatives.

Congress also determined that purchasers could not discriminate against a farmer because of that farmer's membership in a cooperative, but by the same token, that purchasers could not be compelled to bargain with a cooperative, and I have not had time this morning to talk about the compulsory bargaining provisions of

the Michigan Act in any detail. I refer the Court to our brief and reply brief on that.

The Michigan Act upsets this careful balance. Michigan answers the question differently. Michigan says that the individual right of a farmer must be subsumed by the majority. That is to say, Michigan takes the decision on whether to join a coop away from the individual farmer and puts it in the hand of a majority of farmers in his unit and in the hands of the cooperative association that represents that majority.

The two approaches cannot be reconciled. For that reason, we ask this Court to reverse the Michigan Supreme Court judgment, and to declare that the challenged sections of the Michigan Act are unconstitutional. Thank you.

CHIEF JUSTICE BURGER: Mr. Garvey.

ORAL ARGUMENT OF JOHN H. GARVEY, ESQ.,
ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. GARVEY: Mr. Chief Justice, and may it please the Court, let me begin by saying a word about Justice Stevens' concern. Appellees have contended that the Michigan Act is not preempted by the federal Act in this case because the federal Act only applies to handlers, and Michigan is not a handler.

That observation might be more pertinent if

the claim in this case were that Michigan had violated the federal Act, but that is not the claim. The claim is that the Michigan Act is preempted by the federal Act. For example, Michigan surely could not pass a law consistent with the federal Act forbidding farmers to join cooperatives. That would be inconsistent with the purposes of Section 2303(a) and (c).

For the same reason, Michigan cannot pass a law requiring farmers to join cooperatives, because in Sections 2303(a) and (c) the right not to join a cooperative is guaranteed in the same language as the right to join a cooperative.

Appellees also raise a number of other points about how Michigan's Act doesn't actually require membership in an association, and about how Michigan's Act is somehow not preempted because it involves state action. If the Court is troubled by those, I will be happy to respond to them. Otherwise, I propose to spend a few minutes talking about what the purposes of the federal Act are, and how Michigan's Act is inconsistent with them.

The government contends that Michigan's Act is preempted by the Agricultural Fair Practices Act insofar as it requires that unwilling farmers be represented by the accredited cooperative, and requires unwilling

farmers to pay financial support to cooperatives. The federal Act says that cooperatives may not control unwilling farmers in their relations with handlers, and may not force unwilling farmers to join.

The Michigan Act makes a cooperative the exclusive representative of an unwilling farmer in his dealing with handlers, and requires the unwilling farmer to pay financial support. The reason that Congress insisted in the federal Act that cooperative membership be voluntary and the cooperatives not control unwilling farmers dealing with handlers were several. In the first place, that had long been a requirement of the antitrust laws, even before the Agricultural Fair Practices Act was passed.

For example, a cooperative could violate Section 2 of the Sherman Act by engaging in predatory practices against farmers who refused to join. That is the holding of the Maryland and Virginia Milk Producers case cited in our brief. Or, to take a case that is maybe even closer to this case, a cooperative could violate Section 1 of the Sherman Act by agreeing with buyers about the price they would pay to non-members of the cooperative. That is the holding of the Borden case, cited in the reply brief.

The second reason Congress was concerned --

Congress insisted that cooperative membership remain voluntary was that there were some independent farmers who simply were unhappy about paying fees to cooperative associations. Representative Latta said on the House floor, "The fees being charged by these associations are no small matter to the farmer. Some of these associations are assessing members 1 percent of their gross."

So, I think it is important that with the House amendments the farmer still has the right to say no to an association.

QUESTION: Mr. Garvey, is the federal statute here kind of a branch of the antitrust laws?

MR. GARVEY: No, it is not. As I said, one of Congress's concerns in insisting -- the basic purpose of the Agricultural Fair Practices Act is to make it easier for farmers to join cooperatives if they wish by protecting them against coercion to keep them out, but a corresponding purpose of the federal Act is to assure that they don't have to join if they don't want to, and --

QUESTION: And you say Parker against Brown analysis just doesn't apply to this sort of thing?

MR. GARVEY: It has very little to do with this case.

QUESTION: Well, you say it has very little to do with it. Does it have anything to do with it?

MR. GARVEY: I perhaps overstate it. What I mean to say is that because the Agricultural Fair Practices Act has a number of purposes that are unrelated to the purposes of the antitrust laws, that the fact that it is also consistent with the antitrust laws doesn't make Parker against Brown decisive.

QUESTION: Well, you say it is not decisive, but does it have some role to play in deciding whether or not the Michigan law is preempted?

MR. GARVEY: Well, let me try and explain it this way. What the appellees say is, the Michigan statute is not preempted by the federal Act because it involves state action. The very purpose of the supremacy clause is to forbid state action which is inconsistent with federal law. What Parker against Brown says is that there are some kinds of state actions that are not preempted by the Sherman Act, and those have come to be called state action cases, where the state gets involved in fixing prices, but that is not -- To say that this case involves state action only sets up the question about whether what Congress was trying to do is frustrated by what Michigan has done.

In addition to the consistency of the Ag Fair

Practices Act with the antitrust laws, I was about to suggest that there are a number of other purposes that underlie it. For example, the protection of farmers who don't want to pay fees to an association. Another example might be that in the course of the passage there was considerable concern expressed that if farmers had to join cooperatives, buyers of agricultural products couldn't shop around for quality or price terms that were different from those offered by the cooperative.

There was also some sense that competition among cooperatives was beneficial to the farmer, competition among cooperatives for farmers' membership, but that if membership in cooperatives were not voluntary, the decision about what one to join mightn't be made on the merits.

So, because Michigan's Act is inconsistent with those purposes as well as the antitrust theme that underlies the voluntariness requirement, it is preempted by the federal statute even if it might be state action under some Parker against Brown analysis, although I might suggest that it is not. I was about to say that what Michigan's Act does is to authorize private parties, that is to say, farmers and handlers, to set the price in their private dealings at which other farmers may buy and sell their goods.

That is quite similar to the private action -- the non-signer provision in Louisiana's statute that this Court held invalid in Stregman Brothers. It is also quite similar to the California statute which required private parties to set prices in Midcal Aluminum. This Court said that that sort of leaving to private parties about the price at which people should buy and sell was inconsistent with Section 1 of the Sherman Act.

So even if state action were relevant, this wouldn't qualify as state action, but as I say, the Ag Fair Practices Act, while consistent with the purposes of the antitrust laws, also has a number of other purposes which are frustrated by the Michigan Act.

QUESTION: Mr. Garvey, what about a state requirement that the farmers even if they haven't joined the co-op have to contribute a certain percentage of their crop, or a requirement that there is a floor on prices that will affect even those who haven't joined?

MR. GARVEY: Well, you are talking about a different sort of state arrangement. What you are describing is similar to California's pro rate Act to which they draw an analogy. The state is free if it wants to set up a marketing order system for asparagus by which the state would control the collection of

asparagus and maybe even fix the price at which asparagus would be sold, but that is quite a different thing from what is happening in here.

QUESTION: Well, would that pose problems, in your view, under the Federal Ac?

MR. GARVEY: I think not, so long as it is the state that is doing it and not a cooperative association.

QUESTION: Well, then you are back to the state action argument, aren't you, that you just said I thought we didn't need to consider?

MR. GARVEY: Well, it's not simply the fact that the state has passed -- simply because the state has passed this law does not immunize it from preemption. What I was saying is that there is a difference between making farmers do what a cooperative association wants them to do on the one hand and making them do what state law directs through a prorate program.

As Mr. Scoville suggested, the closer analogy to what Michigan has done is not California's pro rate law, with which this Court dealt in Parker against Brown, but California's Cooperative Bargaining Association Act, which only last year was amended to provide for collective bargaining between cooperative

associations and handlers.

That California bargaining law, which deals with cooperative associations, unlike the pro rate law, that California bargaining law does not require representation of unwilling farmers by the bargaining association. The Michigan statute does.

Thank you.

CHIEF JUSTICE BURGER: Mr. White.

ORAL ARGUMENT OF JAMES A. WHITE, ESQ.,

ON BEHALF OF THE APPELLEES

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

The issue in this case, generally stated, is whether the Federal Agricultural Fair Practices Act of 1967 preempts the Michigan Agricultural Marketing and Bargaining Law of 1972.

Section 2305(d) of the federal Act states that the provisions of this chapter shall not be construed to change or modify existing state law, nor to deny the proper state courts of jurisdiction, clear Congressional intent not to occupy the field of farm bargaining, and hence we are presented in this case --

QUESTION: Well, at least to the extent of existing state law.

MR. WHITE: That's right.

QUESTION: And the Michigan Act was not existing at the time.

MR. WHITE: That's right, Justice Blackmun. It was not in existence, but I believe that in reading the Congressional intent from that statement, it was that certainly the existing state law or certainly anything that would not be in contravention of it or contrary to it.

QUESTION: Why do you think the Congress used the word "existing" then?

MR. WHITE: I think it looked at the statute certainly that existed, and found nothing in those statutes that was contrary certainly to the statute, or they would have built in their own contradiction. But I do not read from that further Congressional limitations upon the state to an otherwise act of legislation which was indeed a fulfillment of the overall objectives of the Congress in passing the Agricultural Fair Practices Act.

I think the general purposes of both the federal and the state Act are in the end the same. That was to improve farmers' bargaining power at the bargaining table with processors.

The appellants claim that there are essentially three aspects of the Michigan Act which are

repugnant to the federal Act. Those are essentially the concepts of exclusive bargaining representative, duty to bargain, and the fair share fee. Let's first talk about the fair share fee.

They argue that because under the Michigan statute all growers and farmers that are affected by that or come within the purview of the bargaining unit must pay to the sole exclusive bargaining representative a fee, that this is coercieve of their right not to join. We do not believe that the payment of a fair share bargining fee as part of a collective bargaining system set up by a state is coercive of a farmer's right not to join that organization that may be their sole exclusive bargaining representative.

This Court implicitly seemed to recognize in the recent decision that we have handed down within this past month in Minnesota Community College Faculty Association versus Knight that the payment of a fair share bargaining fee was not coercive of a person's associational right, and although I simply -- I do not cite the Knight case for its decision. That was certainly a First Amendment case.

I do not cite that case for its decision, but I cite it because it seems to me that implicit in the decision of that case is the understanding that insofar

as collective bargaining is concerned, the payment of that fee is not destructive of any associational right, and it seems to me that to some extent even the dissent in that --

QUESTION: Mr. White, certainly there is some analogy, I suppose, to the Section 14(b) of the Taft-Hartley Act and the right to work states versus the non-right to work states. Now, courts in those states have differed, have they not, as to whether the requirement of payment of any agency shop fee by workers who don't want to join the union is or is not prohibited under the --

MR. WHITE: As I understand what you are talking about there, Justice Rehnquist, is the -- I guess the argument of the Solicitor General that under NLRB versus General Motors, that that somehow indicates that there was a Congressional intent somehow not to require anyone to join or not to join when he states that there was -- one was the financial equivalent of the other.

But I do not think that that analogy is appropriate here, because I think that what we were dealing there with was the interpretation of a federal statute which expressly permitted -- first of all, there was pervasive and comprehensive legislation establishing

a collective bargaining plan for workers in interstate commerce, and the question that was raised in that case was whether or not when Congress indicated in Section 8 that they could have a union shop, that they could negotiate -- the union could negotiate the union shop, did that in and of itself preclude the negotiation then of so-called lesser item of agency shop.

And what the Court said in essence as I read NLRB versus General Motors and the Shemerhorn case, cases, is that they will let each state interpret its own right to work law. That is up on each indivdiual state.

QUESTION: Yes, but then certainly the result of that holding is that Section 14(b) does permit states to include within the proscription of a right to work law not only an actual union shop but an agency or agency fee state. Now, I think there is some analogy there to say -- you know, you are saying in effect you are not forced to join the cooperative. All you have to do is pay the same dues as you would have to if you did join.

MR. WHITE: That's right.

QUESTION: Well, that's really why most people don't want to join the cooperative, isn't it? It isn't some highminded belief that they don't want to be

compelled to be a member of something they don't -- they just don't want to pay the fee.

MR. WHITE: I think that even -- that may be, although Justice Stewart pointed out in NLRB v. General Motors that there may be some valid reasons for a person not wanting to join, and he was only talking in the financial sense of them being the equivalent, but it seems to me that this case -- or this Court in the Knight case made it clear in the case that the mere payment of a fee to a sole and exclusive bargaining representative is not coercive of the right to not join or not to be a member.

QUESTION: What is the fee that is paid here? Is there a standard fee for being a member?

MR. WHITE: Yes, it is -- at the current time it is 1 and a half percent.

QUESTION: But is that what members pay?

MR. WHITE: That's right.

QUESTION: So these people who don't want to become members, they just have -- but they pay the same amount as other members.

MR. WHITE: Not necessarily, Justice White. There is a rebate provision under the Michigan Act, and under the Michigan Act the fee has to be solely that which is connected with the bargaining services, and at

the end of the year, the cooperative does and in fact has under this Act rebated amounts to both members and non-members, and indeed the amount going to non -- being rebated to non-members is greater than the amount being rebated to non-members.

QUESTION: What is excluded from the charge to them? What are you rebating? Political activities, or newspapers?

MR. WHITE: Well, our particular organization is not particularly involved in a lot of those types of activities, but other types of activities that would --

QUESTION: Litigation like this?

(General laughter.)

MR. WHITE: Possibly. Possibly. There are other activities vis-a-vis the pure running of the cooperative which are not connected with that bargaining fee, and in fact under the Act the cooperative makes a report to the Agriculture Marketing and Bargaining Board each year, which is again a board appointed by the Governor of the state, and a part of that report must show that amount which has been used for bargaining services and the amount of the rebates to members and non-members, and that is -- must be done pursuant to the express rules of the Agricultural Marketing and Bargaining Board.

QUESTION: May I ask just a curiosity? Do you have any members that are not Michigan farmers? Do they grow asparagus in Indiana, for example?

MR. WHITE: No, this is strictly a Michigan Act. And it does not --

QUESTION: I know the Act is, but I was asking about the co-op.

MR. WHITE: It does not. It does not to my knowledge, and I believe it does not.

QUESTION: But if there were a Michigan farmer who wanted to sell to an Indiana buyer, he couldn't? He would have to go through the co-op and sell only to --

MR. WHITE: No, that would not -- this is not affected by this. It is not affected by this.

QUESTION: I thought --

MR. WHITE: It is only affected by sales in Michigan between Michigan growers who are determined to be within the bargaining unit and a processor doing business in Michigan. It would not affect a Michigan grower selling to someone in Indiana.

QUESTION: So the Michigan statute would not prohibit an individual farmer from selling in Indiana if he wanted?

MR. WHITE: That's right. The bulk of this asparagus is grown down in the southwestern --

QUESTION: But it would prevent him from selling to any processor in Michigan other than the one the bargaining agent made the deal with.

MR. WHITE: Justice White, that has -- our Act has never worked that way, and indeed, under the Michigan Act --

QUESTION: Well, it would prevent him from selling to that processor at a price different from what you negoiated.

MR. WHITE: That is right. That is right. We negotiate a price, but as a practical matter, the way the Michigan Act has worked, in nearly all instances what we do is negotiate --

QUESTION: Are the members --

MR. WHITE: -- a minimum --

QUESTION: Are the members' production controlled by the co-op? Are there allocations?

MR. WHITE: No, there have never been any allocations. There have never been any allocations amongst growers, and we do not under this Act indicate, Grower A, you must deal with Processor X; Grower B, you must deal with Processor Y, something like that. That has not been negotiated. And there may be -- It may raise interesting questions indeed if the Act went that far as to say that indeed you, Farmer A, must deal with

Farmer B. That isn't to say we don't have the right under the Act to negotiate --

QUESTION: Well, you make him pay. What else do you make him do that he wouldn't do if it weren't for this Act?

MR. WHITE: Make him pay the Act, and --

QUESTION: You make him pay the money.

MR. WHITE: Right, and make him abide by the minimum fee that -- we have up to this point --

QUESTION: Yes.

MR. WHITE: -- made him abide by the minimum price for, say, asparagus that we have negotiated with the processors.

QUESTION: Is that all? What other --

MR. WHITE: That is essentially it.

QUESTION: What other pressure on them is there?

QUESTION: What if he could get a higher price?

MR. WHITE: Well, the way the Michigan Act has worked, and this has exactly happened several years, we negotiate a minimum price, and then because of the vagaries of the market or weather or such, the farmer hauls his asparagus to the processor, and they can pay more, and they have paid more.

QUESTION: But could you not in your contract specify a specific price? Legally you could.

MR. WHITE: I think --

QUESTION: As I read the statute, you could.

MR. WHITE: In my opinion, legally we could, and I do not think that that offends any concept set forth in the federal Act. I think this is what we have to look at. Whatever one may think of collective bargaining in general, the question here is, is there anything in the Federal Agricultural Fair Practices Act that is intended to preempt the states from passing a collective bargaining scheme which entails the concepts of fair share fee, duty to bargain, and having an exclusive bargaining representative.

We do not find that. Now, the appellants argue that the disclaimer language found at 2304 which is denominated by the Congress as a disclaimer of intent to prohibit normal dealing somehow establishes a federal right on the part of processors not to have to deal with any, and I think that what the appellants consistently ignore is the first four words of that disclaimer, which says, "Nothing in this chapter shall prevent."

QUESTION: Of course, the Solicitor General doesn't take that position, does he, that the federal Act was designed to confer a right on the part of the

processors to be --

MR. WHITE: The Solicitor General does not accept that argument, that particular argument, but the appellants strongly claim that that is some kind of right. And I think the important thing as I see it is those words, "Nothing in this chapter shall prevent." What they are saying is that within this legislation, Congress is not doing this, is not setting up a federal bargaining Act, not requiring this. It does not say that the states may not do that.

QUESTION: Well, Mr. White, do you agree that one purpose of the federal Act was to protect the right of an individual farmer not to join a cooperative marketing association?

MR. WHITE: It was intended to prevent any improper pressures on behalf of handlers.

QUESTION: Well, yes or no to my question. Was one purpose of the Act as reflected in the legislative history and the language of the Act to protect the right of an individual farmer not to join an agricultural co-op?

MR. WHITE: Answering yes or no, I would have to say that was one of their intentions, yes.

QUESTION: All right. Then do we have to look at the Michigan Act as a whole to determine whether it

provides what amounts to coercion to farmers to join the co-op?

MR. WHITE: I think we can --

QUESTION: Is that what we really have to focus on?

MR. WHITE: I don't think that the Michigan Act does that certainly insofar as the requirement to pay the fair share.

QUESTION: But you agree we have to answer that question.

MR. WHITE: I think you do in light of what the -- the plain wording of the --

QUESTION: All right, and then in answering the question, don't we have to look at the whole package of what the Michigan Act does to the farmers to determine whether it is coercion, not just break it down, well, does the fee alone do it, or does this alone do it? Don't we have to look at the whole thing and answer whether that amounts to coercion?

MR. WHITE: It seems to me that you have to look as to whether anything in the Michigan Act amounts to handler coercion, and I think that important from our standpoint is the fact --

QUESTION: And the co-op is defined as a handler under the terms of the federal Act.

MR. WHITE: That's right.

QUESTION: Although the court in Michigan didn't acknowledge that in its opinion.

MR. WHITE: With that, I guess I would have to respectfully disagree with the appellants that the Michigan Supreme Court did not recognize that. For example, at A-10 of the jurisdictional statement, there is a statement by the Michigan Supreme Court within their opinion. It says, "While 2303 makes it unlawful for a handler to coerce a producer to join and belong to association, it does not forbid the state from requiring exclusive representation of individual producers where a producer majority sees fit."

Now, the first words of that, where it says, "2303 makes it unlawful for a handler to coerce a producer to join or belong," there was a tacit -- there was a recognition that they understood that the federal Act included a definition of handler -- they wouldn't have made that statement, because they can assume the processors weren't going to coerce them not to join.

The other thing is, I disagree with Mr. Scoville's statement that Section 7 is any type of a clear indication that the Michigan Supreme Court did not understand that the federal Act --

QUESTION: You mean Footnote 7?

MR. WHITE: Excuse me, Footnote 7 at A-5. The statement -- Footnote 7 reads, "For ease of reference, we use the term 'handler' and 'processor' interchangeably in this opinion. Although in a way not germane to our disposition of the issues, there is a technical difference between the two."

I think they absolutely -- they recognized the difference between the Michigan and the state Act in that the federal Act stated that a cooperative was also a handler for the purposes of that Act, but they were saying insofar as our determination is concerned, we do not think that that is determinative of our decision.

So I believe that they did recognize the difference. I think that what the state of Michigan -- the Supreme Court of the state of Michigan was recognizing is the same thing that Congress recognized in the passage of this Act, and that is the vulnerable position that the individual grower finds himself in dealing with the process.

It seems to me that the appellants' argument, to accept the appellants' argument that this federal Act intended to prevent the states from enacting in effect a collective bargaining model for growers just stands on its head 70 years of Congressional history in doing whatever they could to encourage collective action by

farmers.

Going back to the Clayton Act, exempted provisions of the --

QUESTION: Mr. White, is it not true that the Michigan statute is unique? It is the first one that has had this particular feature.

MR. WHITE: I think it is, in that regard, Justice Stevens, the Michigan Act is unique. It is the only one of its kind in the country at this time. That's right. But starting back with the Clayton Act of 1914, where farm organizations along with unions are exempted from the operation of the Sherman Act. The Capper-Volstead Act of 1922 further clarified that agricultural cooperatives were free from the restraints of the antitrust laws. The Agricultural Farm Credit Act of 1933 established banks for cooperatives.

Then we have, of course, the Agricultural Fair Practices Act --

QUESTION: Don't you agree, Mr. White, that FATHPA, if I may use that term, did also ensure some rights for the individual farmers as against the cooperatives, the freedom from coercion?

MR. WHITE: Yes. I think that 2303(a) protects the farmer against coercion by a handler, which includes -- which under the federal Act includes both

the cooperative and a processor, from coercion to join or not to join, but I think it is important -- look at -- we talk about legislative history, if I could for just a second here. Looking at the Senate Agricultural Committee report, they make it absolutely clear what was intended to do.

When the state -- in the report of the Senate Agricultural Committee in suggesting passage of this Act, the federal Act, says, "The fact is clear that an association of producers which has obtained the voluntary membership of a large number of farmers deserves the respect and recognition by handlers of agricultural products."

The House Committee report stated, "This legislation is necessary in order to give farmers and their marketing associations new and greater market power." It seems to me that we have years of Congressional encouragement of farmers to enter into collective action so as to protect themselves.

This Court certainly was not unaware of the plight of the farmer. For example, in the National Broilers case, this Court clearly recognized the plight of the individual farmer. Justice Blackmun indicated in that decision, "Farmers were seen as being caught in the hands of processors and distributors who because of

their position in the market and their relative economic strength were able to take from the farmer a good share of whatever profits might be available from agricultural production. By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods, and to deal with processors and distributors."

Now, there again, this isn't determinative. That was a Capper-Volstead case, and the extent to which the Court would permit the extension of the Capper-Volstead protection to cooperatives. But I think throughout this we have recognition by the courts and by Congress of the vulnerability of the farmer, and I understand that the National Food Processors and American Food Institute very well may not want to deal with cooperatives, but to say this federal Act which was in effect very narrow in scope and was intended to protect farmers had as its intention to divest the states of their right to pass meaningful collective bargaining things for farmers is just --

QUESTION: You are saying it was intended to protect groups of farmers, not individual farmers.

MR. WHITE: I think it intended -- the federal Act intended to protect both farmers and farmers working

through their cooperatives. It seems to me that any way you look at it, what the appellants are arguing here is that they intend to take an Act which was intended to be a shield against improper processor --

QUESTION: Mr. White, you have already said, though, that if the Michigan law required the farmer to join the cooperative, become a member, that would be contrary to the federal Act. You have already said that in answering Justice O'Connor, but you say if all you do is make him pay everything, almost everything a member would, and also be bound by the collective bargaining result, like a member would, the mere fact that you don't issue him a membership card protects the state Act.

MR. WHITE: That is not --

QUESTION: Don't you think it's --

MR. WHITE: That is not coercive evidence. Coercion is coercion by the state, and it is not coercion by a handler.

QUESTION: But you do concede then that that is coercion, the kind of coercion which if done by a handler would be contrary to the federal Act?

MR. WHITE: No.

QUESTION: I didn't think so.

MR. WHITE: No, I do not -- I certainly in no

way would concede that that would be the case, but it seems to me that what they have taken here is an Act which was intended to be a shield against improper conduct and turned it into a sword with which to divest the farmers of their right to collective action.

QUESTION: Well, they can have it if they wanted it. Any farmer can be part of this collective action if he wants to.

MR. WHITE: That's right, but in order to make a collective scheme meaningful --

QUESTION: Work, you have to have coercion.

MR. WHITE: The duty of -- the duty to bargain, fair share membership fees are --

QUESTION: If you won't do it voluntarily, you are going to do it under the hammer.

MR. WHITE: Otherwise you get the sweetheart deals that -- the types of sweetheart deals that the testimony brought forth in this trial and in the legislative hearings both before Congress and in Michigan, the House of Representatives and the Senate, in passing these two Acts.

Thank you.

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

(Whereupon, at 11:59 o'clock a.m., the case in

the above-entitled matter was submitted.)

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#82-1577-MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., ET AL., Appellants v. AGRICULTURAL MARKETING AND BARGAINING BOARD, ET AL.

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