# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE



THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1777

TITLE INTERNATONAL UNION, UNITED AUTOMOBILE, AEROSPACE, ETC., ET AL., Petitioners V. WILLIAM E. BROCK, SECRETARY, UNITED STATES DEPARTMENT OF LABOR

PLACE Washington, D. C.

DATE March 25, 1986

PAGES 1 thru 50

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IN THE SUPREME COURT OF THE UNITED STATES

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INTERNATICNAL UNION, UNITED :
AUTOMOBILE, AEROSPACE, ETC, :
ET AL., :
Petitioners, :
V. : No. 84-1777
WILLIAM E. BROCK, SECRETARY, :
UNITED STATES DEPARTMENT OF :
LABOR :

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Washington, D.C.

Tuesday, March 25, 1986

The above-entitled matter came on for oral argument befcre the Supreme Court of the United States at 11:13 o'clock a.m.

APPEARANCES:

MS. MARSHA S. BERZON, ESQ., San Francisco, California; on behalf cf the petiticners.

MS. CAROLYN B. KUHL, ESQ., Deputy Solicitcr General, Department cf Justice, Washington, D. C.; cn behalf cf the respondent.



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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in International Union v. Brock.

Ms. Berzon, you may proceed whenever you are ready.

ORAL ARGUMENT OF MS. MARSHA S. BERZON, ESQ.,

ON BEHALF OF THE PETITIONERS

MS. BERZON: Thank you, Mr. Chief Justice, and may it please the Court:

In this case, the UAW sued on behalf of its members to overturn a directive issued by the Secretary of Labor that resulted in denying trade readjustment allowance, or TRA benefits, to thousands of UAW members. The UAW requested the district court to decide a single federal question, whether the Secretary of Labor's interpretation of federal law was in error, and if so, to direct the Secretary through his agents to correct that error by reconsidering under a proper standard claims denied under the invalid directive.

The district court agreed with us that the Secretary's directive in fact violated federal law, and that thousands of UAW members had in fact been illegally denied TRA benefits and granted the requested relief.

On appeal, however, the Court of Appeals did

not reach the merits of this controversy, nor did it reach any number of procedural defenses raised by the government, some for the first time in the Court of Appeals. Instead, the Court of Appeals decided the case on an issue that had never previously been raised, principally on this issue, and that is whether the UAW had standing to litigate this case at all.

It is this standing issue that we have brought to this Court on certiorari, principally, and that is before this Court today. If, as we believe it must, this Court reverses on that issue and decides that the UAW may in fact serve as the collective voice of its members in this litigation, then the other procedural issues would be opened on remand in the Court of Appeals.

What this says is that the issue before this Court is considerably simpler than the government's brief might suggest. There is a standing issue, and the remainder of the issues are procedural issues opened on remand in the Court of Appeals, as the government's brief --

QUESTION: Well, Ms. Berzon, you are speaking generally of what you call procedural issues.

Is the question of whether this is a proper use of the declaratory judgment in this situation where

Congress appears to have thought review should go through the state courts, is that what you call a procedural issue?

MS. BERZON: No. That issue which the government is willing to assume in this case, that is, that we do have subject matter jurisdiction --

QUESTION: Well, I don't know how you define subject matter jurisdiction, but at any rate, address yourself to the question I asked you.

MS. BERZON: I think I am, and that is whether in fact there is review under federal question jurisdiction of federal questions concerning Trade Act benefits, or whether the Trade Act itself requires that all such questions be decided in state court, and our answer to that question is that what the Secretary of Labor keeps asserting, that there is something in the Trade Act that requires that the questions be decided in state court, there is simply no such provision. What the Trade Act says in Section 239(d) is that determinations with respect to eligibility for benefits are to be decided in the same manner and to the same extent as determinations under the state unemployment insurance law. That language does not say that the review is to be in state court or under state law. Instead, it sets up a comparative standard.

If you look at the relevant body of comparative law, that is, state unemployment insurance law, one finds a long line of cases in this Court and in the lower federal courts, and one would expect to find such cases, in which there is ordinary federal question jurisdiction to decide federal issues with respect to those benefits, and in fact, if there is any doubt about this, this Court decided in -- a year before this statute was passed with respect to precisely parallel language in 5 USC Section 8502(d) in Christian v. The Department of Labor of New York that there was federal jurisdiction in that case to decide a federal question.

Consequently, Congress has not created an anomaly such as is suggested by the government and sent off to state court issues with respect to a purely federal benefit program where all the money is federal, the administrative money is federal, this set of law that governs this case is federal.

QUESTION: Yet, it is clear that any individual applicant who wants these benefits has to go through the state system. No federal court is --

MS. BERZON: That is true unless and until the applicant wishes to challenge a federal policy directive which would govern the --

QUESTION: Yes, but he still has to go, to get

the money amount of benefits that the statute provides, he has to go through the state system, doesn't he?

MS. BERZON: In this instance, the relief did, for reasons related both to the fact that the UAW was the plaintiff and I think took proper regard for the state system and for the administration of the district court, decide only the single federal question and remand all claims back to the administrative system. But that's the same thing that would have happened had the case gone up in a state court, the state --

QUESTION: Yes, but what you're saying is that these players can split off one issue in the question of whether they are determined to get benefits, all the other issues going through a state court, and have the federal court decide that by a declaratory judgment.

MS. BERZON: This is not a declaratory judgment. There is an injunction here. The Secretary of Labor --

QUESTION: Well, okay. By an injunction, which is an even more extraordinary remedy.

MS. BERZON: Because the reason for that is that what we are challenging is not an action by the state. It is an action by the Secretary of Labor. The Secretary of Labor in this case requires that the states follow its statutory interpretations. In this instance,

in fact, while -- this is a particularly inappropriate case to be contending that we ought to have stayed in the state administrative system because what happened here is that while these claims were in fact pending before the appeals body in California, for example, the government wrote a letter directly to the Appeals Board, not to the agency in general, but to the Chairman of the Appeals Board, and told the Chairman of the Appeals Board that if the Appeals Board decided in favor of the claimants, that the, first, that the Federal Government would pay, second, that the state was going to have to pay out of its own funds, third, that the state's entire unemployment insurance system could be decertified with enormous tax consequences for the employers in the state.

To say that under those circumstances we are to sit there and continue to deal with the state administrative system which has been completely biased by the Secretary of Labor asserting itself --

QUESTION: Well, do you -- are you suggesting that the validity of the Secretary's directive just wasn't -- that just wasn't an open issue in the administrative proceeding or in the state courts?

MS. BERZON: I'm saying as a functional matter in the administrative proceeding it was not an open

issue because the Secretary's own regulations, as exemplified by these extraordinary --

QUESTION: Well, that may be so, but what if you -- you can get into the state court, can't you?

MS. BERZON: We could get into the state court.

QUESTION: And wouldn't -- couldn't you say to the state court this administrative denial of benefits should be overturned because the Secretary's directive is invalid under the statute?

MS. BERZON: But there is no --

QUESTION: What -- just answer.

MS. BERZON: I'm sorry.

QUESTION: Would that be -- would the state court entertain such a claim?

MS. BERZON: The state court would entertain such a claim at the same time --

QUESTION: Well, why shouldn't you, why shouldn't you pursue your remedies through the state system, like 239 suggests you ought to?

MS. BERZON: Because, because the statute does not say -- our position is the statute does not say that we ought to. The statute says that we are to do the same thing we would do in a state -- with respect to a state unemployment.

QUESTION: Well, that's your version of 239, I agree with you.

MS. BERZON: I think the language is really quite clear. If -- the language is a determination under the applicable state law, and that determination is a state unemployment -- is a determination under the state unemployment insurance law, but it is almost designedly so, and in fact, since it was passed after Christian, a year after Christian, in which this Court entertained a case precisely parallel to this one, it seems to me difficult to maintain that Congress had in mind complete exclusion of ordinary federal question jurisdiction in this regard.

To return, then, to the --

QUESTION: Ms. Berzon, may I ask what you think the district court had in mind by telling the litigants that the state courts then would reprocess the claims? Does that mean the state agencies have to grant benefits, or --

MS. BERZON: No, not at all.

QUESTION: -- or are various defenses open, and do you envision that the Court had in mind then an application in individual cases of the requirements to obtain benefits?

MS. BERZON: Absolutely, that what the Court

had in mind was that this issue was now to be decided in favor of the claimants.

QUESTION: With individualized adjudications.

MS. BERZON: Exactly, and that's why we make the --

QUESTION: And statutes of limitations being applicable and administrative procedure exhaustion and so forth and so on?

MS. BERZON: As to administrative exhaustion and to statute of limitations, in both cases, our basic position is that there is nothing about the joint litigation here that, the organizational representation that changes the rules that would otherwise be applicable. But the rules that --

QUESTION: So those defenses would be open in the individual adjudications?

MS. BERZON: With one comment, and that is that in this instance the Court of -- the government expressly waived an exhaustion defense, and we would maintain that the district court's finding of futility is one that would have to be respected, for the circumstances that I outlined earlier with respect to what in fact happened here on exhaustion, and with respect to the statute of limitations, there was a waiver there as well because there was no affirmative

defense pleaded in that regard.

The important thing for the present purposes, however, is that neigher exhaustion nor the statute of limitations problems affect the standing of the UAW to prosecute this case, and the reason is that there are individual members of the UAW who exhausted, there are individual members of the --

QUESTION: Well, what about those who had exhausted, if they went back after this judgment, Court of Appeals judgment, went back to the state system, might they be met with a res judicata defense?

MS. BERZON: The only individuals to whom that is -- with respect to whom that is the case, and which we agree is the case, are the very, very few individuals --

QUESTION: Well, anyway, they did -- there are some who exhausted.

MS. BERZON: Well, exhausted administrative remedies. The distinction I wanted to make is the only people that would be faced with res judicata were the very, very few who went to state court and got a judgment against them. There were a few, but there were very, very few.

QUESTION: Well, there are some states who apply res judicata to their administrative proceedings

if you don't appeal.

MS. BERZON: We would maintain that this case would have to be recognized as adequate to satisfy any appeal requirement if it were in fact applicable.

QUESTION: Well, that is down the road, I suppose.

MS. BERZON: My very point, Justice White, is that it is down the road, and that what we have here is an extremely threshold issue. We were dismissed in the Court of Appeals for none of the reasons that we are discussing now, all of which would be opened on remand, but instead, on the representation, on the conclusion that the UAW simply could not prosecute this case at all.

Looking at that issue, the basic purpose of a standing inquiry is to be sure that the party that is in court can present the case in a proper, traditional adversary manner. As Flast v. Cohen says, it focuses on the party seeking to get his complaint before the Court and not in addition on the issues he wishes to have adjudicated.

QUESTION: Ms. Berzon, are there cases you can point to on which a union has been granted associational standing when it challenged conditions that are not on-the-job conditions of employees?

MS. BERZON: Yes. We cite at the beginning of our opening brief a number of such cases, including a number in this Court. For example, in Duke Power Company, one of the litigants was a union. In United Public Officers v. Mitchell, although the standing issue was not decided there, and there a number of others of -- there are a number of OSHA cases in this Court which were litigated by unions.

QUESTION: Well, but I think that conditions of safety on the job or health standards or discrimination are job, on-the-job conditions, and I'm curious how this fits in.

For example, would the union have standing, in your view, to file a suit to secure Food Stamps for employees who are substandard in income or something like that?

MS. BERZON: I think it would depend not on whether the name of the organization was union, but on what the organization, whatever it was called, defined as its own purposes, and in this case we have an explicit declaration of purpose in the UAW constitution, we have a long tradition of involvement with this particular program and with government benefits for unemployed people in general. In this case, this union was very --

QUESTION: Well, then, how about Food Stamps? Would the union be able to have associational standing to bring --

MS. BERZON: I think it would depend on whether that could be construed as being within the purposes of that organization, as governed by its history and by its governing documents, and not by whether the name of the organization was union.

In this instance I think there is no doubt that these particular benefits were squarely within the union's purposes, and indeed, there is express authorization and indeed some measure of responsibility upon the union to represent members with respect to unemployment benefits.

Indeed, the decision to act collectively here was one that came from the involvement of this union in the Trade Act for a while, from the fact that it was representing individuals throughout the country in obtaining benefits, and from the fact that it turned out that the single reason for denying benefits was recurring repeatedly, and when inquiry was made, we discovered that there was a directive from the Secretary of Labor that was in fact governing the benefits, and in addition, discovered that the biasing of the state administrative assistants were going on, and it was for

that reason that the members of the UAW joined together to do something that none of them could have done on their own, and that was to bring a major federal lawsuit challenging the Secretary of Labor.

This joining together to enhance the voice of individual members is within long political tradition and constitutional tradition of this country, and this is a perfect example of that process.

Consequently, when the Court of Appeals held that the UAW did not have standing in this case, it was going against a long line of cases in this court summarized relatively recently by the Chief Justice for this Court in Hunt v. Washington State Advertising Commission. In Hunt, the Court stated three requirements for finding that there -- an organization can in fact represent its members, and in this case, the conclusion that we were satisfying all three of those prongs of the Hunt inquiry is really relatively simple. First of all, the first requirement is that the individuals have standing.

There is really no question here as to that if looked at as it properly should be as a standing inquiry. There was direct injury to thousands of our members that were denied this money, and money is the most concrete sort of injury that one can imagine.

Similarly, only I think I covered the second germaneness requirement of Hunt in answer to Justice O'Connor's questions; and the third prong of Hunt, therefore, is the focus, it seems to us, of the Court of Appeals' concern. That prong is whether there is any need for individual participation either with respect to the claim for relief or with respect to the belief itself.

And in this instance it seems that there were several things bothering the Court of Appeals, none of which have any validity as a reason why individual participation is necessary.

First of all, the Court mentioned that the relief granted might affect different members differentially, and that is, of course, true, but it is true not only in any organizational standing case but in any 23(b)(2) class action, and this Court expressly noted in Califano v. Yamasaki that it is one of the strengths of collective litigation of this kind that it is possible to focus only on the joint uniform problem and to leave the individual adjudications to an administrative system, which is what happened here.

Similarly, the fact that monetary relief was involved is of no consequence. This Court in Schweiker v. Gray Panthers expressly recognized standing to obtain monetary relief, there in the form of future prospective

benefits on behalf of members. Similarly, the fact that the relief is in some sense retrospective in that it reopens old claims or it regards claims that have already once been decided is again not relevant to the standing inquiry. It is not relevant to the standing inquiry because, as Warth noted, the basic question is whether or not the Court will have to determine any of the individual matters involved, and as Warth also noted, it would therefore even be possible to award retrospective damages if the damages could be equally divided or divided in some way that does not get the Court involved in the dividing up of the benefits, and that is what happened here.

Finally, the government tries to support the Court's retrospectivity finding on the grounds of this Court's recent case of Green v. Mansour. Green v. Mansour, as its language confirms, is deeply imbedded in the Eleventh Amendment and has no viable existence outside of the Eleventh Amendment context here, there is no Eleventh Amendment consideration because we are dealing with purely federal funds, a purely federal program and purely federal defendants.

I would like to reserve the remainder of my time.

QUESTION: May I ask you question before you

do?

I'm a little -- I just can't remember. I thought the Court of Appeals had an alternative ground of decision, namely, failure to join the state agencies as necessary or indispensable party.

MS. BERZON: It did. It came to that conclusion on the basis of a construction of 239(d), which the government is now -- has abandoned and is not defending. The government does claim that there is some other reason, although it doesn't mention Rule 19, which is the governing rule, why the states have to be joined, but in fact, there is no functional reason why the states should have been joined. The states were simply agents of the Secretary of Labor, as the statute says repeatedly, and the Secretary had full authority to grant the relief requested.

QUESTION: Well, if we thought that 239 was a jurisdictional bar to federal court jurisdiction, of course, concessions by the government or you or anybody else wouldn't matter, would it?

Those questions could be raised at any time, and even by the Court itself.

MS. BERZON: That's certainly true, but as I said before, I think there is no doubt that there is no jurisdictional bar to this case, and in particular, I

note that this Court in cases such as Chic Employment Security Division v. Hodory, New York Telephone Company v. New York Department of Labor, and a slew of other cases, both in this Court and lower courts, have in fact adjudicated state unemployment insurance cases. It would make no sense for those cases to be able to go forward in federal court but for cases that deal with a solely federal program not to be bale to go forward in federal court.

We don't think Congress intended that, and we think that the fact that the statute was passed after Christian allowed that kind of case to go forward on identical language confirms that.

QUESTION: Of course, Christian didn't raise the question at all of whether --

MS. BERZON: Christian did raise the question of whether there was federal court jurisdiction. The Court decided that there was.

QUESTION: Yes, but it didn't raise the question of whether this is a proper use of federal court jurisdiction.

MS. BERZON: It seems to me that if this case is not governed by the language of Section 239(d), that it certainly is a proper use of federal court jurisdiction because it has been done repeatedly in --

QUESTION: Well, we have a number of cases that say you can't use a declaratory judgment, you can't use an injunction every time there is federal court jurisdiction under 1331. Wycoff v. Public Service Commission.

MS. BERZON: But --

QUESTION: You can't split up a claim.

MS. BERZON: In this instance it doesn't seem to us that we are splitting up a claim. What we are doing is adjusting the relief to the circumstances, the best resolution of the circumstances, that is, that we are litigating a federal issue in federal court and we are designing relief which affords both the state administrative system its authority to the largst extent possible and the individuals their ability to control their individual circumstances to the largest extent possible. It doesn't seem to us to be a matter of jurisdiction or of splitting causes of action, but rather, of designing effective and sensible relief in a proper federal question case.

Thank you.

CHIEF JUSTICE BURGER: Ms. Kuhl?

ORAL ARGUMENT OF MS. CAROLYN B. KUHL, ESQ.

ON BEHALF OF RESPONDENTS

MS. KUHL: Thank you, Mr. Chief Justice, and

may it please the Court:

The principal issue in this case, of course, is whether Petitioner United Auto Workers has standing to bring the suit and to seek the relief requested here. But because this Court has inquired about Christian and because the Petitioners make so much of that case, perhaps I should first explain that Christian does not hold that the sort of claim splitting that was done here can be undertaken. Christian first of all is a classic collateral order type of case within the meaning of Mathews v. Eldridge. The principle at issue there had to do with procedure. More than that, it didn't just have to do with state procedure, it had to do with a procedure that the federal agency would have to go through with respect to redetermination or reasons why persons were tried.

QUESTION: Wasn't Christian a mandamus?

MS. KUHL: That's another basis for distinguishing it, Justice White. The question -- the jurisdictional question that was raised there and is articulated in that case and discussed is whether mandamus jurisdiction is available with respect to a suit against a federal officer, not on the basis of the Constitution.

Furthermore, in that case the Court also

suggested on remand that the Court might want to hold the case open and let the state administrative process go forward to further ripen the suit, so that for all those reasons we don't believe that Christian, et al. is some kind of a sweeping holding that under 239(d) cases issues can be plucked out of state proceedings and taken into federal court.

Because the United Auto Workers has alleged no injury to itself as an organization here, it must satisfy the requirements for representative standing that are set forth in Hunt v. Washington Apple Advertising Commission. In our argument we show, first, that the Petitioner has not satisfied the Hunt requirements, and in the alternative, we suggest that the Hunt test does not really fully address the concerns raised by the standing issue in the context of this case, and that the Court might wish to look to class action principles to inform its representative standing doctrine.

As has been stated, returning to Hunt, the Hunt test has three parts: first, whether members would be able to sue in their own right; second, whether the interests that the union seeks to protect are germane to the organization's purpose; and third, whether the claim asserted and the relief requested require the

participation of individual members in the lawsuit.

And we have argued that the Petitioners have not satisfied any of the three prongs of Hunt.

Turning to the first prong of Hunt, then, whether members can sue in their own right, we have shown in our brief that no member would have been able to bring an action similar to this case. Petitioners' primary argument in rebuttal is that we have gone too far in asking that someone actually be able to come into court and bring suit. They say that it should be enough that some member show injury to itself. But actually, the Petitioners' own assertions in their brief disprove their argument because in their reply brief they have disclaimed any desire to represent those persons who went through the state administrative process and then went to state court and were denied benefits in state court and say we have no desire to represent those people here. That certainly suggests to us that they are admitting that something more than just inquiry is required under the Warth test, and that Warth really looks to whether someone could bring a justiciable case -- and those are -- that is the language of Warth. It requires that a justiciable case be able to be identified with respect to a union member.

QUESTION: Well, Ms. Kuhl, are you sugesting

that there is not a single member of the union who would have a potential claim of this kind --

MS. KUHL: That's correct. That is what we are suggesting.

QUESTION: -- that would be valid?

MS. KUHL: I'm sorry?

QUESTION: It just seemed to me that that was a rather extreme position to take, and that surely there were some members of the union who themselves individually would still have a valid claim to make --

MS. KUHL: Well --

QUESTION: At least would have standing.

MS. KUHL: Well, but what we are saying is that what Warth requires goes beyond injury. It requires that someone, there actually be some member who could come into court and bring suit, and we have actually narrowed it down now to two groups of people that the Petitioners suggest among their members would be able to come into court. First, they suggest that members who pursued their claim through the state administrative process but did not go to court would be able to come in, and secondly, they suggest that members who began but did not complete the state administrative process would be able to come in.

But both those groups include persons, first,

who would be estopped by administrative collateral, collateral estoppel, because they would have let their -- they would have intentionally abandoned their claims, having gone to the administrative process, they would have dropped out at some stage.

QUESTION: Am I incorrect that some state proceedings have been held in abeyance pending our esolution of this case, and so that there are probably some individual members cut there who still have a valid claim?

MS. KUHL: Well, some state proceedings, I believe it was a state court proceeding, though, that was held in abeyance, not the administrative proceeding, and they have suggested that people who go to state court are not the people -- that people who are in state court are really not the people that they are interested in representing. It is the people in the administrative process.

QUESTION: But if there is someone in a state court somewhere in the 50 states who is challenging this thing, I would think that that person would have standing under the traditional definition.

MS. KUHL: No, we don't believe so because that person would not be able to forgo the state process and then leave that and go into federal court to make

this sort of a challenge.

Precisely because of the considerations of comity, that the Wycoff case and Green v. Mansour suggest.

QUESTION: But from the standing point of view, I would think the only inquiry would be is the state court proceeding going to be over by the time this person gets a decision from the federal? If the state court is deliberately holding up its decision to as to wait to hear from the federal district court, that probably is not a good enough reason to say that the district court can go ahead and give a declaratory judgment, but I think it would at least establish standing.

MS. KUHL: Well, but the state court may be waiting to hear, but we think that it was inappropriate for the state court to stay its processes pending some federal process.

QUESTION: But that doesn't -- I don't -- it doesn't seem to me that goes to standing.

MS. KUHL: Well, it is our view that, again, that Warth v. Sullivan requires something more than that someone be out there injured, but rather, that there be a real person, real union member who would be able to under all considerations of ripeness and various

considerations of justiciability, would be able to actually come into court.

Warth itself --

QUESTION: Well, to say, to take your position that no individual member would have the right to come into federal court with this kind of a claim that's presented here, you have to argue, I guess, that there is no subject matter jurisdiction at all in the federal court and therefore no one can come, and yet you have said, I thought, that you weren't arguing that point.

MS. KUHL: Well --

QUESTION: So it just seems like you are.

MS. KUHL: Well, first of all, we certainly don't concede in this case in any way that there would be subject matter jurisdiction other than of a sort of a collateral Mathews v. Eldridge type. But the Court granted certiorari in this case on the issue of standing, and therefore, we have briefed and argued this case in the context of standing. But our reading of this Court's cases is that when the first Hunt inquiry is made as to whether any individual would be able to come into court, that that goes beyond some sort of determination of injury. Warth itself looked to rather a member of the housing association, whether a member applied for a variance and had a ripe claim. One member

of the association had applied for a variance at one tie, but his claim was stale.

So we read Warth and Hunt as requiring something more than that there be a member there with injury, but rather, that there be something who can be pointed to who would be able to come into court.

The decision of the district court here is quite a serious affront to principles of comity. It requires that 73,000 claims be readjudicated, and it ignores in our view the congressional mandate that these sorts of claims under 239(b) be taken care of in the state administrative process. It also overriedes --

QUESTION: But do you interpret the order differently than Ms. Berzon does. Does it just enable individual adjudications of these claims in the state courts, or does it require the state courts to grant them?

MS. KUHL: Well, we belive that it is open on, well it wouldn't exactly be remand, but on reprocessing, if you will, for our defenses to be raised, that people had, for example, forgone their right to raise the particular issue here previously, and we detail in our brief a number of the issues that we think would be able to be raised again.

And this is important, really, from two

standpoints, for purposes of our argument. First, it points out that the very retrospective nature of the relief that is prayed for here, even if someone could -- there is some individual who could come into court, that it is inappropriate for the district court to be ordering all of these closed state proceedings to be reopened. And --

QUESTION: Well, it certainly ordered that they be reprocessed without regard to the process. At least that much is --

MS. KUHL: That's correct, and that they be reopened, and this reopening is going to be, in many cases, the district court is disregrding state procedures that give certain requirements for having cases reopened, where you've got certain -- Michigan, for example, has a rule that cases can only be reopened for one year for good cause.

QUESTION: May I ask a kind of a basic question that is running through my mind? As I understand, the underlying issue on the merits is whether certain weeks of disability -- or compensation account is employment for purposes of eligibility, and a large number of these 73,000 people may be affected by that determination.

Supposing that early in the program the

secretary was concerned about the validity of its own policy and recognize that there's some ambiguity in the statute, and thought it would be helpful to get a declaratory ruling out of a federal court or out of an appropriate court deciding whether its policy was right instead of having 73,000 different individual cases litigated.

Would there be any way in which the Secretary could have filed a proceeding against anybody to get the question answered under your view of the law?

MS. KUHL: Well, I think probably what the Secretary would have done would have been to ask the state agencies to litigate that question --

QUESTION: Just all 50 states?

MS. KUHL: In the states.

QUESTION: You would have to go to each of the 50 states and --

MS. KUHL: I believe so. I mean, and there may be something I'm missing here by way of declaratory relief, but I would, I would think that particularly

QUESTION: Kind of an inefficient way to get a question of general applicability resolved, isn't it?

MS. KUHL: Well, except that Congress has chosen this 50 state process.

QUESTION: You think Congress intended that

the question of that kind be resolved this way.

MS. KUHL: Well, any time you are going to have a process going through the 50 states, there are going to be differnet decisions on rules of law as you go along as a matter of course.

QUESTION: Well, even if you went to federal court on it, there are a lot of district courts.

MS. KUHL: There are a lot of -- and courts of appeals as well, that can make different rulings.

Turning then to the second prong of the hunt test, whether the interests that the union seeks to protect are germane to the organization's purposes, the petitioner states in its reply brief that the Secretary and this Court may not define for the union what its purposes are, but that assertion on their part seems to run contrary to the second, what is required by the second prong of the Hunt test.

Moreover, the -- I think that it is quite unclear, certainly unclear from the complaint in this case, as opposed to the UAW constitution which has come in only in the reply brief, that union members would have expected the union to be bringing this kind of action on their behalf, and Congress in particular, I believe that the congressional scheme should inform this germaneness inquiry because Congress has explicitly

provided for union standing to seek certification, to seek the certification of groups of workers as part of the earlier stages of this trade reallowance or readjustment allowance.

But Congress has created quite an individual process for the part where workers go into the state administrative process to actually get their money, so that under Block v. Community Nutrition Institute where Congress has set up a detailed mechanism for review at the behest of a particular group of persons, in this case, the workers applying themselves, it may be found that review by others is impliedly concluded, and that the union should not be able to come in.

The third prong of the Hunt test, of course, asks whether individual members of the association must participate in order to provide the relief requested, and as I think was clear from the questions that Justice O'Connor was asking of Petitioners' counsel, it is quite an individual process that is going to be required here. The reprocessing cannot be expected to be without question. Individuals are going to have to be heard with respect to their respective claims, and the district court's order, I think, really obscures what is going on. The district court has treated it as a simple matter by simply ordering that the reprocessing

take place, but this should not obscure the actual remedial process that will be applied.

QUESTION: Well, of course, the district courty can't bind the state agencies because they weren't parties, I take it.

MS. KUHL: That's correct, Justice Rehnquist, and that is a reason why the district, or the court below, the Court of Appeals was correct with regard to requiring the joinder of the state agencies.

The Secretary can direct the state agencies, and state agencies are by contract agents of the secretary, but what is going to be required here is that a lot of state manpower be marshalled and files gone through, and if the state agency does not comply, the Secretary can order and can ask and maybe can take over the process, but there is not going toi be any kind of ability for direct control by the district court here.

Although we believe that we should prevail under the three-part Hunt test, it has seemed to us that the Hunt test leaves unaddressed some very important issues that arise in this litigation and that have arisen in other cases. This case has evolved to raise some very difficult issues concerning adequacy of representation and collateral estoppel effect of the judgment, and I hasten to add that by adequacy of

representation I certainly do not mean to refer to the quality of Petitioners' counsel's presentation for which we have nothing but respect, but the problem that we are referring to is that certain groups who were covered by the district court's order are no longer being represented in this court.

The district court's order covers non-UAW members as well as UAW members, but the Petitioner now disclaims any desire to represent non-UAW members. Furthermore, the district court order also covers UAW members who continue through the administrative process to state court, and who then in state court were denied benefits. The district order covers those persons. But the petitioner in this case now for the first time in this court has disclaimed any desire to represent this group.

Thus, we have two groups of individuals who simply have been dropped almost unnoticed from the case --

QUESTION: but that's a benefit to the government, isn't it? Isn't that something you desire? You don't want to give money to any of those people.

MS. KUHL: Well, it's not a benefit for the government, Justice Stevens, when we don't know what the collateral estoppel effect is going to be, particularly

with regard tc the UAW members whc -- ncn-UAW members, excuse me, who had a judgment on the merits in their favor which might be overturned on remand. We are not sure what the collateral estoppel effect --

QUESTION: How would it be overturned on remand, if you asked to have it overturned, maybe?

MS. KUHL: Well, on remand, the merits --

QUESTION: You are objecting because your adversaries don't have counsel. That's a strange argument.

MS. KUHL: Well, on remand, the district -- the Court of Appeals has not yet ruled on the merits of the interpretation of the statute, so the district court's order might be overturned on the merits.

QUESTION: I just don't understand how that can hurt the government.

MS. KUHL: Well, this case really cries out for a class certification. If the --

QUESTION: Did you ask for a class certification? I guess --

MS. KUHL: No, we did not.

QUESTION: You don't want these other people. I don't undertand your argument here.

MS. KUHL: Petitioner thought petitioners must move for certification.

QUESTION: In order to protect the rights of the nonmembers.

MS. KUHL: That's right.

QUESTION: Whom you say should lose anyway.

MS. KUHL: But that has been benefits for the government as well because it sets up a collateral estoppel effect that benefits the Defendants. And that is quite important.

If in this case there had been a focus early on on who was being represented and what the different arguments were with respect to subgroups who were having arguments made on their behalf, we would not have this problem at this point of having many threshold issues unresolved.

QUESTION: Well, couldn't you suggest on remand, assuming you do lose, that the district court hold open the possibility that one of these people who is not a union member be allowed to designate a class of nonunion members to get the benefit of the judgment. There are certainly procedures to pick them up if you are really concerned about them.

MS. KUHL: Well, we have argued that the -- that class certification should not be opened on remand because there was -- the Petitioners did not move in a timely fashion for certification.

But it's not just the Plaintiffs who are, who are benefitted by clear procedures and issues of law that are defined from the outset of litigation. All litigants benefit from that, and we think that the representative standing doctrine addresses to some extent the issues that come up in class certification; it looks to germaneness. That is sort of a little bit like whether there is adequacy of representation.

But we think that there are some issues that get glossed over by the representative standing inquiry that could be dealt with more efficiently under a class certification basis.

QUESTION: Did the government make this kind of an argument in either of the courts below? It just struck me as kind of a new suggestion in the case.

MS. KUHL: Well, it is a new suggestion. Of curse, Justice O'Connor, we did not argue standing at all in the Court of Appeals, and the Court of Appeals decided this case on its own motion on standing grounds, and of course, in this court we opposed certiorari, and so we really didn't have occasion to develop very fully the standing issue on our brief in opposition.

And so the first time we have had a full opportulnit --

QUESTION: Well, it seems like kind of a poor

vehicle or opportunity to consider something of that magnitude when there has been no resolution of it below and no consideration of it.

MS. KUHL: Well, of course, the whole standing issue, there was certain language --

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

(Whereupon, at 12:00 o'clock noon, the Court recessed, to resume at 1:00 o'clock p.m., this same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: You may resume, Ms. Kuhl.

ORAL ARGUMENT OF MS. CAROLYN B. KUHL, ESQ.

ON BEHALF OF RESPONDENT -- Resumed

MS. KUHL: Thank you, Mr. Chief Justice, and may it please the Court:

As I was discussing before lunch, the lunch break, with Justice Stevens with regard to our somewhat broader argument that class certification procedures should be looked to in cases of this sort, there is a benefit to the government going into litigation and knowing what is at stake in the case, and there is also a benefit to the government at the end of the litigation to have some assurance that there will be a collateral estoppel effect with regard to the outcome of the litigation.

We also think that there is a benefit to litigants generally to having litigation conducted in a way that assures some adequacy of representation with regard to different groups whose interests are at stake.

This case really cries out for class certification to have defined the interests of the various subgroups at the outset of the litigation.

Persons, groups of persons have been dropped out with any focus on their rights, and --

QUESTION: Let me just ask you one question about that.

What is the class that you think should have been certified?

MS. KUHL: Well, of course, we would have --

QUESTION: And in what form?

MS. KUHL: -- opposed class certification here. We would --

QUESTION: Yes, but then I don't understand how you say it cries out for class certification if you would have opposed it.

MS. KUHL: Well, but that's looking just at the outcome and not the process. Of course we think that the government should have prevailed here. We think it should have prevaild on any number of grounds, and we think that it should have prevailed on the merits, but we think that as a procedural matter this case is in a very awkward process.

QUESTION: But what class would you think was appropriate to certify because as I understand you the litigation must proceed in state court, so you are saying there should be 50 state -- 50 different classes.

MS. KUHL: Well, here's what would have happened in the proceeding, I believe. The -- an individual member of the UAW --

QUESTION: Right.

MS. KUHL: -- should have been named as the Plaintiff, and that member would have sought a class either of everyone who was -- had been subjected to this interpretation or --

QUESTION: Yes, but would that have been a nationwide class, in your view?

MS. KUHL: Well, they probably would have sought a nationwide. I'm not saying it was proper, they probably would have sought a nationwide case --

QUESTION: In a state court proceeding.

MS. KUHL: Well, look, I'm saying what happened in this case in federal court.

QUESTION: But you're telling me what you think should have happened, I thought.

MS. KUHL: Well, what should have happened is that individual members should have moved for class certification. If that had been done, it is our contention that the Court would have been required to focus early on, as happens in some of these Social Security cases that come to you, on the different subjects that people should have exhausted, the people

who got to the end of the process and have res judicata effect with regard to their claims.

Now, we think we would have prevailed as to all of these subgroups, and we also would have made our jurisdictional argument, but as the litigation proceeded, at leas you would have known which people the district court would have certified, which it had dropped out. If it had blocked out various groups for a particular reason, a representative of that groups could have intervened and sought to appeal the denial of certification as to that person.

So, you know, we don't feel that this is a particularly parochial argument we are making here. We have looked at this probelm as it is has evolved in this case, and we think that the class certification procedures really have a lot to offer in dealing with cases of this sort.

There's also another anomaly that I think the Petitioners' brief points out. As I mentioned earlier, they seemed to chafe at the second prong of the Hunt test of a judicial inquiry into the appropriate purposes of an organization, and there's something to their discomfort with that because the organization should be able to define its own purposes.

If a class action procedure were used,

however, you wouldn't have a judicial inquiry into the organization's purposes. What you would have is a complaint by an individual which sets for the issues that they plead and that they wish to present to the Court, and then a comparison can be made with regard to other persons in the universe and the extent to whigh their interests share in the interests that are asserted in the complaint. It doesn't require a sort of a going into, as I say, judicial inquiry into the organization's proper purposes.

And in closing, I might just say that I think what we are proposing here is not a particularly radical concept nor one that would disadvantage to any particularly great extent litigants, organizational litigants because it would only require that they can't litigate, that they can't have their name as the plaintiff in the case. They would have to join an individual member, they would have to go through the class certification process. If the interests are very cohesive in the organization, it may well be able to be a (b)(2) class, and then there's --

QUESTION: Well, that certainly is substantially more burdensome than what the association would have to do today to bring a suit.

MS. KUHL: Well, Justice O'Connor, I'm not

sure that it's substantially more burdensome because they still have to make the showing which may turn into a factual showing with regard to the three-pronged Hunt inquiry. The notice requirement, if there is one, may not be in the (b)(2) class. It is a (b)(3) class. The notice requirement may be able to be met quite easily by an organization. In fact, in this case the union says tha it used its magazine, Solidarity, to let its members know about this case. An organization might well have routine ways of communicating with its members, and that might be utilized by the court to lessen any burdens of a class notice procedure.

So e really don't believe that what we are arguing here is that burdensome or that radical, but rather, a refinement of what Hunt searches for but perhaps doesn't quite get to.

Unless the Court has any further questions, thank you.

CHIEF JUSTICE BURGER: Ms. Berzon, do you have anything further?

ORAL ARGUMENT OF MS. MARSHA S. BERZON, ESQ.

ON BEHALF OF PETITIONERS -- Rebuttal

MS. BERZON: Yes, I do.

I think I might clarify some of the subject matter jurisdiction questions in this case, to look at

the way an actual unemployment insurance cases raising similar issues can proceed, and in fact has proceeded in this case, in this Court.

In Hornry v. Ohio Security, Employment Security Division, the situation was basically the same as what it is here. A group of employees were denied unemployment insurance benefits based on a state statute which they claimed violated federal law. They took that claim in a class action into federal court and they obtained from the district court, which this Court reversed, an adjudication of the substitute federal issue, if they had one, and the order of the district court was precisely again what it was here, and that was to send the claims for reprocessing under a proper federal standard to the state agencies from whence they had come.

There are, in addition, lots of similar cases, both in the unemployment insurance field and in other government benefit programs. In the lower federal courts there have been welfare cases in this Court, there have been food stamp cases in this court. Indeed, the reason where there is not retrospective relief in this point in the bulk of benefit programs is that most of them, unlike this one, are cooperative state/federal programs which operate with state funds under state law,

and under Edelman v. Jordan and its progeny, there is, because of Eleventh Amendment reasons and not for any other reason, an inability to grant retrospective relief. But on the arguments that the government is making here today there would have been no federal jurisdiction over those cases whatever aside from the Eleventh Amendment. The Eleventh Amendment would have been irrelevant. Edelman v. Jordan would never have had to be decided.

In addition, this Court in Migra v. Warren City School District has now decided that state actions covering 1983 matters are res judicata in federal court. What that means is that if these individuals had done what they were invited to do and go back to tens of thousands of individual state court proceedings instead of this single federal case to litigate their federal issues, they never would have gotten to the federal courts on their federal issue. You would have had 70,000 separate state court determinations that would --

QUESTION: Well, they could seek certiorari here from an adverse decision of the highest court in the state.

MS. BERZON: They certainly could, they certainly could, but there is --

QUESTION: Well, are you suggesting that there

is some requirement in simple litigation that one who has a federal question somewhere involved in their claim automatically have access to a federal district court?

MS. BERZON: No, I'm suggesting that it is at least unlikely, in light of this long line of federal cases treating other government benefit programs in exactly this way that I am describing, that Congress in 1974, when writing 239(d) of the Trade Act in some very inefficient and inarticulate way, because the language does not say this, intended to set that requirement to set up a situation in which the only recourse in a purely federal benefit program is the chance of this court with your certiorari, and also to set up the situation in which 70,000 separate claims have to be litigated in order rather than one. At least it is both inefficient and unlikely, and the language just simply won't support it.

With respect to the state joinder on related issues, Wycoff has been cited, which was a ripeness case and one in which there as no injury. Here we have injury. We have a situation in which the states are operating solely as the state agents -- as the federal agents, federal government's agents. They are, of course, bound by the federal court decision, just as any agent would be.

To say that the states have to be sued is equivalent to saying that the clerk in the benefits office of the Secretary of Labor would have to be sued in a -- or else there was no relief against, no effective relief, and no finding of fact. That simply isn't the case. And the Secretary of Labor, moreover, has efficient resources within this administrative scheme to assure that the states conform to any order that he gives them pursuant to this relief.

Finally, the two main arguments on the standing question that the government makes, first of all, attempt to import all manner, not of this jurisdictional question but strictly procedural questions into the standing inquiry. I think this case shows why that's inappropriate because one ends up with nonjurisdictional issues that have never been adjudicated below popping up for the first time in the Court of Appeals and the Supreme Court and being called a standing issue. They haven't been explored below, and they should not be explored now.

Finally, the suggestion has been made that somehow there are members, there are people dropping ouit of this lawsuit or we are refusing to represent people we said we were representing and so on. The Complaint in this case says that we are suing on behalf

of UAW's members. The relief granted was conceivably broader than that. The government did not object to that relief either before it was granted or by a petition for reconsideration in the district court. Perhaps it was an error. More likely, the government would just as soon grant relief to everyone as to go through and figure out who the UAW members were. But that really gets to problem of structure of this lawsuit.

Thank you very much.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

We will hear arguments next in United States v. Dion.

(Whereupon, at 1:12 o'clock p.m., the case in the above-entitled matter was submitted.)

# CERTIFICATION

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

#84-1777 - INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, ETC., ET AL
Petitioners V. WILLIAM E. BROCK, SECRETARY , UNITED STATES DEPARTMENT OF LABOR

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)