OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-184

TITLE J. B. STRINGFELLOW, JR., ET AL., Petitioners V. CONCERNED NEIGHBORS IN ACTION, ET AL.

PLACE Washington, D. C.

DATE January 20, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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J. B. STRINGFELLOW, JR., ET AL. :

Petitioners :

v. : No. 85-184

CONCERNED NEIGHBORS IN ACTION, :

ET AL. :

- -x

Washington, D.C.

Tuesday, January 20, 1987

The above-entitled matter came on for oral argument before the Supreme Ccurt of the United States at 1:43 o'clock p.m.

APPEARANCES:

DAVID L. MULLIKEN, ESQ., San Diego, Calif.;
on behalf of Petitioners

PAUL J. LARKIN, JR., ESQ., Washington, D.C.;
on behalf of Respondent United States
in support of Petitioners

JOEL R. REYNOLDS, ESQ., los Angeles, Calif.;
on behalf of Respondents

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: Mr. Mulliken, you may proceed whenever you're ready.

ORAL ARGUMENT OF

DAVID L. MULLIKEN, ESQ.

ON BEHALF OF PETITIONER

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

The sequel of events leading up to this proceeding began with the district court's entry of an order in February 1984, almost three years ago, denying the Concerned Neighbors in Action intervention as a matter of right upon a finding that their interests were adequately represented by the governmental plaintiffs and the private party defendants in this case.

The trial court simultaneously determined that permissive intervention was appropriate and placed certain limitations on that intervention, primarily designed to effectuate case management concerns, those conditions including a preclusion of the intervenors participating in cost recovery claims, which they had no interest in, a limitation on adjudication of various state claims that would have been brought in under pendent jurisdiction, what we euphemistically characterize as toxic tort claims, toxic tort claims

which today are being vigorously adjudicated in a state court proceeding among over 5,000 plaintiffs and over 100 defendants.

The other two material conditions imposed in that order were conditions relating to conduct of discovery and the conduct of motion practice. Essentially, the intervenors needed to get permission of any other party before initiating discovery and the permission of any other party in the case before initiating motion practice of any sort.

That order was appealed to the Ninth Circuit. We challenged that appeal on the grounds that it was a non-appealable interlocutory order, and the Ninth Circuit agreed, wrote an opinion on the issue in which it cited the Brotherhood of Railroad Trainmen case decision of this Court, as well as the decisions of two other circuits which had grappled with exactly that issue, and dismissed the appeal.

On rehearing, the Ninth Circuit vacated its opinion, went ahead, considered the merits of the case, reversed Judge Lucas' trial court decision on the merits, and merely noted that the question of appealability of this interlocutory order seemed conclusively determined by its former holding in California versus Block, did not further discuss or

analyze that issue.

This Court in granting certiorari has limited its inquiry to the threshold question of the appealability of that order, and we address that question. Our position I think is very straightforward. We think for four different reasons that the Ninth Circuit erred in concluding that Judge Lucas' order was appealable.

First, the Brotherhood of Railroad Trainmen case itself certainly offers no support for the proposition that the order is appealable at this juncture, where the intervenors, CNA, are in the case in fact and have been and have acquired as a result the right of appeal from any final judgment that may be entered in the case.

Secondly, we think that the order clearly does not fit within the collateral order exception to the final judgment rule as enunciated in Section 1291, because it simply -- the order simply does not meet the test for the collateral orders exception as enunciated in this Court's decision in Cohen and Coopers & Lybrand.

Thirdly, we think that the order of Judge Lucas here was by no stretch of the imagination a practical denial of an injunction warranting immediate

appellate review under 1292.

And finally, we think that the balancing of the equities test offered to you by CNA in this proceeding as a means of resolving the question of appealability of this interlocutory order is both unprincipled and threatens to subsume the final judgment rule itself, the very fear that I think you addressed in Coopers & Lybrand when you very carefully limited the Gillespie decision that had been rendered several years earlier.

Let me just emphasize and elaborate on each of those points very briefly if I might. With respect to whether or not Brotherhood of Railroad Trainmen accords right of appeal immediately, the rationale for according a right of appeal, immediate appeal, in that case was I think abundantly evident.

The parties had petitioned for intervention of right, they were denied, and they were left out of the case. Hence, they would obviously have no right of appeal following the entry of final judgment.

In this case, while it is true that Judge Lucas denied intervention of right, he simultaneously accorded the intervenors permissive intervention. Hence, he put them into the case, giving them the rights of appeal that any other party would have. He didn't

purport in any way to limit that appeal right.

That clearly is the distinction that was seen by the First Circuit in Kartell, the Second Circuit in the Shore decision, the Fifth Circuit in the Wheeler decision, and, ironically, by our own Ninth Circuit in what perhaps we might call Stringfellow I, the opinion that it initially rendered which was subsequently vacated when it had occasion to deal with this issue.

With respect to whether or not Judge Lucas' order fits within the collateral order exception to 1291's final judgment rule, here again we submit that it simply does not. And perhaps for analytical purposes it might be helpful to segregate Judge Lucas' order into two component parts:

First, that portion of the order granting permissive intervention and putting CNA into the case; and then secondly, that portion of the order imposing various limitations and conditions on that permissive intervention.

With respect to the permissive intervention order itself, applying the Coopers & Lybrand test for the collateral order exception, I think it's fair to assume that without any change in the law that that question, the question of the right of intervention to be in the case, is I think conclusively determined, at

least within the meaning of I think footnote 14 in Justice Brennan's opinion when you grappled with this question.

And perhaps that order is likewise totally separate from the merits of the case. But in all events, it flunks the third prong of the Coopers & Lybrand test because, insofar as it merely puts the CNA into the case, it clearly is appealable at the conclusion of the case.

To shift focus for a moment and talk about the conditions that were imposed on that intervention, do we get any different result when we look at those conditions? I submit that we don't, and I think the reason we don't is because we flunk not merely one, but I think we flunk all three prongs of the Coopers & Lybrand test or, I should say more, CNA flunks all three prongs of the collateral order exception test.

First of all, I don't think we can say that the conditions, conditions relating to discovery, conditions relating to motions practice, I don't think we can say with any degree of confidence that those conditions in fact have been conclusively determined. They're case management conditions. If they prove unwieldy, it is entirely reasonable and foreseeable to expect that under local rule 7 --

QUESTION: Whether the intervention was permissive or mandatory?

MR. MULLIKEN: Justice White, you might perhaps ask the same question of the Government. But I can unequivocally answer on behalf of the Petitioners. The difference it makes to us is that we are convinced that permissive intervention accords the court substantial latitude to impose conditions of the sort that it did here on CNA's participation to ensure that the case is manageable.

QUESTION: Which as of right would not?

MR. MULLIKEN: If I might, you're anticipating my answer in part, Justice White. I think that intervention -- I think the mere fact that intervenors are accorded the status of intervenors as of right doesn't preclude the court from imposing conditions on them.

But I think the law is much less settled on the question of how broad those conditions might be and, rather than venture on partially uncharted waters and have to make a case, which I think I can make, that conditions can be appropriately imposed on intervenors as of right, I am much more comfortable with the certainty of permissive intervention, where I have absolutely no question --

QUESTION: I suppose if they intervene -- if the case came out exactly the way the intervenors wanted it to, they would never have any chance to claim that they should have been as of right?

MR. MULLIKEN: Well, I guess I would disagree, because I think that if they thought that their classification or characterization as intervenors as of right made a difference to the outcome of the case --

QUESTION: Well, I said if it came out exactly the way they wanted it to.

MR. MULLIKEN: Well, then I think that's precisely what the -- that's what the final judgment rule is designed to avoid, is unnecessary and perhaps advisory piecemeal appeal or review by the appellate courts.

QUESTION: But if the case came out short of what they wanted and they appealed, they could raise the fact that they should have been --

MR. MULLIKEN: They should have been intervenors of right.

QUESTION: And the proof of the pudding is the case didn't come out as well as it should and the conditions imposed are the reason.

MR. MULLIKEN: Well, perhaps.

QUESTION: And they can argue that.

MR. MULLIKEN: It would have to be a more -- they can argue that indeed, although I think their arguments are going to have to be more particularized arguments than that.

QUESTION: But this is why you say that all of -- that they can always satisfy their claim on appeal?

MR. MULLIKEN: Yes, sir, at least in this context, because again, applying the Coopers & Lybrand test, that even of the question has been conclusively determined at the trial stage, there's no evidence that the order of the court --

QUESTION: Well, what if the Court of Appeals on this, in my last example -- what if the Court of Appeals affirms on the merits and says, well, this case came out just right below and you, Mr. Intervenor, wasn't entitled to prevail on the merits, but we agree with you that you should have been accorded intervention as of right.

What do we do, reverse and have a new trial, or what?

MR. MULLIKEN: I guess I think you'd take advantage of the prejudicial error test in determining whether or not a retrial was necessary. And even though you might conclude that the trial court was wrong, if it didn't constitute prejudicial error you would not accord

it a retrial.

By the same token -- I mean, I think that, as I understand the essence of the final judgment rule, the final judgment rule under 1291 clearly accommodates some degree of erroneous decisions by the trial court.

QUESTION: So I take it you say then the merits on appeal, the merits of the case and the intervention issue are exactly the same?

MR. MULLIKEN: Well, they may or may not be.

QUESTION: Well, if he affirms they are.

MR. MULLIKEN: Indeed. And if he can -- in that case, I think really it's a no harm, no foul situation.

QUESTION: And if he reverses, I suppose he can say these people should be accorded intervention as of right.

MR. MULLIKEN: Indeed. And that perhaps the limitation on discovery or the limitation on motions that they could bring had materially prejudiced their position and had altered the outcome of the case. But I don't think you could make that determination until the conclusion of the case.

QUESTION: Mr. Mulliken, how do you distinguish your case from Carson Brands, or American Brands, Carson versus American Brands?

MR. MULLIKEN: Well, I think it's fairly easily distinguishable, Chief Justice Rehnquist. As a general proposition, I would say Carson is acknowledging the appropriateness of interlocutory review under 1292, the practical denial of injunction.

I look to Carson -- and again, we take our three-pronged test that was effectively enunciated there is whether or not the trial court's order is a practical denial of an injunction, whether or not it causes serious or perhaps irreparable injury, and thirdly, whether or not it's effectively unreviewable.

I submit we get to the first prong of the test and we stop. Carson, I think it was manifestly evident that there's a practical denial of an injunction involved there, that the consent decree which the parties were prepared to enter into I guess I would characterize in the nature of a stipulated injunction, if you will.

That is, there was a commitment to undertake certain activities in the context of that case and the trial court's decision refusing to approve that consent decree was a practical denial of injunction. And the facts of that case I think convincingly demonstrated that the second and third prongs were met as well, that there was irreparable injury and that it couldn't be

effectively remedied.

QUESTION: You say here there was no practical denial of an injunction?

MR. MULLIKEN: No, sir, there wasn't, and for several reasons. First of all, remember that the intervenors CNA are still in this case on each of the statutory injunction claims. And if you look to their complaint in intervention you discover those are the only four causes of action where they specifically seek injunctive relief.

The fact that other state claims which perhaps could have illuminated the contours of the injunction in their speculation have been left out is immaterial to that, I think. They simply have not been denied an injunction, and if you compare the prayer for relief in the proposed complaint in intervention with the one that was actually filed several months later, you discover dot for dot it's the same.

QUESTION: You say they have not been practically denied an injunction because they were allowed in the case and they could press for an injunction?

MR. MULLIKEN: Precisely, number one. Number two, they haven't sought any injunction here. In fact, their complaint doesn't seek any preliminary

injunction. They haven't brought on the motion. I find that somewhat curious and I think in some respects it belies their assertion that this important injunctive right that they seek to protect here is as yet unexercised, even though they have the capability to do that within the contours of this case.

In that regard I might observe that their complaint that the conditions effectively constitute a practical denial of injunction I think again is belied by the facts. We've had over 100 days of deposition in this case, and to the best of my recollection they haven't showed up for so many as one day of that deposition.

They haven't requested any of the parties to support discovery of their own, much less had it refused. Same thing on the motions. They've participated in every motion that's occurred in this case. They have made no request of us to initiate a motion, much less have us refuse that.

So the notion that these conditions are constraining them is just, it's speculation, it's abstract speculation. It doesn't comport with the facts of this case. So I think they can't show the irreparable injury. They suggest it might occur, but they haven't made a showing that there really is.

QUESTION: Counsel, is there a separate state court suit pending?

MR. MULLIKEN: Well, Justice Brennan, I think -- excuse me. Justice Blackmun, I think that at the -- I shouldn't say I think. At the time the complaint in intervention in the federal proceeding was filed, there was no state court proceeding pending.

The complaint in intervention was actually filed, I think, in August of 1983. In February of '84, the trial court entered its order here. Then it went to the Court of Appeals. The Court of Appeals initially in September of '84 dismissed the appeal.

About that point in time, through mid and late '84, several independent state claims, toxic tort claims, were being filed, claims that were subsequently in early '85 consolidated, restyled, and dramatically expanded, to get to the point where we are now with over 5,000 plaintiffs and 100-plus defendants.

QUESTION: Well, my question gets down to what is the status of that suit?

MR. MULLIKEN: The status of that suit is that it is moving forward vigorously and being vigorously litigated at a very intense pace, and has been for the better part of the last couple years.

In any event, I have taken more time than I

wanted and Mr. Larkin's ready to go. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mulliken.

Mr. Larkin.

ORAL ARGUMENT OF PAUL J. LARKIN, ESQ.

ON BEHALF OF RESPONDENT UNITED STATES IN SUPPORT OF PETITIONERS

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

I have only a few brief points I think I'd like to add. Our position in this case basically boils down to three propositions:

First, the essential question in this case is whether Respondents should be entitled to obtain interlocutory appellate review of the conditions imposed on their participation in this case;

Second, an intervenor must satisfy the same criteria that apply to any other party to the case in order to obtain interlocutory appellate review;

And third, the Respondents in this case haven't met those criteria.

At the heart of this dispute really are the conditions that were imposed on their participation, not just the denial of their right to intervene in this case. It's only the conditions that can prejudice their

ability to protect their interests.

Had the district court denied their motion to intervene as of right, but imposed no conditions whatsoever, I doubt that this case would be here now. Similarly, had the district court entered two orders, one denying their motion to intervene as of right but letting them become a party to the case, and a second order later on at some point in the litigation imposing these same conditions, I doubt the Respondents would have appealed only the first order.

So it truly is the conditions, we believe, that is at the center of the dispute here at this time on the question of appellate jurisdiction. It is our position that an intervenor has no greater right to obtain interlocutory appellate review of such conditions than any other party to a case.

Rule 24 certainly doesn't provide any such right, either in terms or in purpose. The rule was designed to allow someone to enter a case in order to protect his interests, but it does not in any way provide for greater appeal rights than might otherwise exist if he were a party either by filing the complaint or being named in it.

And from a practical viewpoint, it doesn't necessarily mean that Respondents will be prejudiced.

After all, they intervened in a case which the United States had brought, in which the United States is attempting to seek a complete cleanup for this particular site.

It may be that the Respondents will be able to obtain the complete relief that they want simply by virtue of the actions of the United States even if the conditions that are imposed in this case had been -- are unchanged hereafter.

Now, the particular reasons as to point three that we give in our brief as to why this is not an appealable order, such as it's not appealable because it's a denial of intervention, it's not appealable as a collateral order, and it's not appealable as a denial of injunctive relief, I believe are set out in our brief and our rely brief in sufficient detail, and we'll not go through those here.

What I would like to at this point, though say is that, even if there were any doubt that Respondents would be able to protect their interests or that parties in Respondents' shoes would be able to protect their interests before this type of order were entered, that doubt should be dispelled by the new act that was adopted.

The new act that Congress adopted this summer,

the Superfund Amendments and Reauthorization Act, establishes a comprehensive administrative and judicial procedure for the resolution of claims of this type.

QUESTION: Are attorneys fees available for prevailing plaintiffs in this kind of a case?

MR. LARKIN: I don't know exactly, Your Honor, and so I would have to say my gut reaction would be I believe they probably would be, but I can't answer that affirmatively one way or the other.

The Act sets up a variety of different procedures to take care of the cleanup of these sites, to allow interested parties to participate in a variety of different ways. Interested parties can participate in the administrative process in which the EPA decides whether and how a particular site should be remedied.

If the United States brings an enforcement action thereafter, interested parties can intervene in the case under the conditional right of intervention that was granted them by the Congress in Section 113 of the new Act.

At that point, they would be able to litigate the case under the terms set by the district court. We don't believe that the new statute forbids the district court from reimposing these types of conditions. In fact, we believe the new statute contemplates that such

conditions could be imposed.

For example, the House report that we cited in our opening brief in this case speaks to the type of conditions and limitations that can be imposed. Alternatively, if the United States brings a suit to recover its costs, after having attempted on its own to clean up a particular site, parties are able to obtain relief in another way. They would be able, through the citizen suit provision of the Act, to sue the EPA to ensure that the EPA complied with the cleanup standards that had been set forth in the new Act.

Ultimately, therefore, in one way or another, Congress in this new statute has made -- has taken care of parties such as Respondents or other interested parties by allowing them to participate in the various processes that are set up for the cleanup of these types of hazardous waste sites and to seek the relief that they believe is necessary.

It's been our position throughout this case that Respondents should be a party. It's also been our position that the condition and the only condition that we sought, which was the limitation of the claims to those that had originally been presented, should be preserved.

Our primary concern in suits of this type is

not to allow suits that are an attempt to clean up a hazardous waste site to become toxic tort suits. It's clear that that type of action would slow up the ultimate remedy for the site and Congress wanted to make clear that it would not be slowed up.

But in any event, even with that type of condition imposed, Respondents we believe will be able fully to, in the new statute, seek whatever relief they believe is necessary.

Unless the Court has any questions, I have nothing further to add.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Larkin.

We'll hear now from you, Mr. Reynolds.

ORAL ARGUMENT OF

JOEL R. REYNOLDS, ESQ.

ON BEHALF OF RESPONDENTS

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

The issue that precipitated this appeal is whether the persons most directly affected by the toxic releases from the Stringfellow acid pits hazardous waste dump site may intervene as a matter of right in the litigation of the site's cleanup.

The residents of the adjacent community

requested intervention as of right in the district court. The district court denied that right, and we appealed the denial to the Court of Appeals. The Court of Appeals reversed, holding that the residents were entitled as a matter of right to intervene in this case.

Now Congress with the new Superfund amendments has confirmed the correctness of that decision by codifying the right of intervenors to intervene in an action such as this.

Before getting to the jurisdictional issue, I'd like to make just a couple of comments on the issue raised in our supplemental brief regarding whether, in light of these amendments, there is a change in the significance of this appeal and what its implications might be for the underlying issue on this appeal.

Because Section 113(i) of the statute grants a right to community residents to intervene in cleanup actions. We believe that any real doubt regarding our entitlement to intervention as of right no longer exists in this case.

The Government conceded in its reply brief that we will on remand be entitled to intervene. In a letter this morning, it now has qualified its position on that.

QUESTION: The issue, the only issue we took the case on, is the appealability of the order. We didn't take the case on whether or not the issue or the order was providently entered by the district court.

MR. REYNOLDS: That's correct, Mr. Chief Justice. And my only point in raising this very briefly is to suggest that the significance of that issue for this case really depends to a large extent on the significance oif the controversy surrounding the underlying issue.

I think what the new enactment by Congress does is to remove to virtually an entire extent the controversy that exists. Based on a statute that was word for word in the Court of Appeals, the Government ha conceded that we would be entitled to intervene as of right, and the legislative history of the new Act indicates that it was intended specifically "to assure that persons living in close proximity to the subject of the Government-initiated action will be able to intervene as of right."

QUESTION: And presumably, however we decided the issue presented in the petition for certiorari, should we decide the order was not appealable, you could present your arguments to the district court, and the district court might, whatever district judge you're

before, could change the ruling on the basis of the new legislation.

MR. REYNOLDS: That's correct, that's correct.

I will turn now to the jurisdictional issue.

QUESTION: Mr. Reynolds, before you even get to it --

MR. REYNOLDS: Yes.

QUESTION: -- suppose you had been granted intervention as of right, but the same conditions to which you object had been imposed. Would they have been immediately appealable?

MR. REYNOLDS: Well, that's obviously a different case and it's perhaps a more difficult question in terms of jurisdiction. I think if pushed to answer it, the answer would be that we could not appeal it, because the right which is the basis for our claim of appealability in this case, the right was granted.

QUESTION: Well, but what's your harm? That seems like a very strange result, to say that if the court had granted you intervention as of right, but denied you the same material benefits which are the whole source of your grievance here -- that's really all you're complaining about; you couldn't care less whether the intervention is called as of right or not as of

right.

What counts is what goes along with it. And you're telling me that so long as they say you have intervention as of right, but deny you these same benefits, that would not be appealable; but because they denied you intervention it's appealable.

Why should it make any difference as far as the appealability is concerned?

MR. REYNOLDS: I think your question points up very precisely the difference between intervention as of right and intervention by permission. If an applicant is accorded the status of an intervenor as of right, they effectively are accorded -- they enter the litigation on the same status as any original party, and the courts have consistently so held.

If, however, an applicant enters the litigation only at the discretion of the court, only based on the grace of the court through permissive intervention, there is essentially no limit on what conditions might be imposed.

So that if, in the hypothetical that you pose, the district court -- if at some point the conditions were a problem, the intervenor as of right would have other options available to it that are available to an original party, such as for example the right to seek

mandamus.

We don't believe that those, that conditions that are imposed on us in this case, would ever be imposed on an original party or would ever be imposed on an intervenor as of right.

QUESTION: Do you think you could seek mandamus as a permissive intervenor?

MR. REYNOLDS: We could always apply for mandamus. The problem is that it's an extremely narrow and extraordinary avenue of judicial relief, and if you are in the case only as a matter of discretion the right of the district court to limit your participation to whatever extent the district court deems appropriate is virtually unlimited. And the reason is this --

QUESTION: But what we're talking about is error, and you have to assume that, even if you had been admitted as of right, the district court could make error in granting you whatever is supposed to go along with that.

Now, I don't see why that kind of an error should not be immediately appealable. He says: You're in as of right, but I'm not going to let you do anything. You say, that can't be immediately appealable. You wait until the thing's over and then you complain about it.

However, if he says, youu're not in as of right, you're in permissively, that can come up right away.

MR. REYNOLDS: The difference --

QUESTION: Why would one want to structure a system where you have that kind of different result?

MR. REYNOLDS: Well, the difference is that any original party to the case -- presumably if the district court decided to impose those sorts of limitations, it would have to exercise whatever rights were available to the original party.

An intervenor as of right is on the same level, the same status, as an original party and therefore is not entitled to any further rights of appeal than the original party.

QUESTION: He may be entitled to them, but not if the court doesn't give it to them if you have an obstreperous district court that says, I'm not going to give them to you. So long as both have the right to appeal -- and it's not questioned that you have that here -- aren't the two in exactly the same position, the one who is granted intervention as of right, but denied what's supposed to go along with it, and the one who is only granted permissive intervention?

MR. REYNOLDS: The critical difference is that

the permissive intervenor has no other option. The permissive intervenor is there only as a matter of discretion.

So for example, if we were to go and seek to mandamus the judge, there would be no clear and undisputed right that we were asserting, because as a matter of discretion the judge can impose whatever conditions on our participation that the judge might want, and properly so, because the essence of permissive intervention is that the applicant really has no interest, no significant interest, that might be impaired in the case.

But if we are intervenors as of right, we have the statutory right under the federal rule and under each of the environmental statutes. We can go and we can say: These conditions violate our statutory right, just in the way that any party to the case could go and seek mandamus if they were to be in that position.

So I guess what this highlights really is the basic point of --

QUESTION: I don't understand your references. I don't understand your reliance on the right to mandamus, because what you're claiming is a right to appeal without asking for an extraordinary writ, which would also be the same case of a party. A

party couldn't appeal these conditions.

MR. REYNOLDS: Right, and the difference is that in the Brotherhood decision and a number of other decisions the denial of the right to intervene was deemed appealable, because that is a qualitatively different kind of a decision or order than any of the other orders that typically come up in the litigation.

The reason is -- at least, our position is -- that it sets the stage for whatever participation may follow in the case. And so if you're denied the right to intervene, you necessarily have to have the right to appeal that so that you will be on the same footing with any other party.

QUESTION: And you're saying, following that up, that since the intervenor as of right could have mandamus to review conditions which he didn't like imposed to him and an intervenor by grace, so to speak, permissive intervenor, should have a right to appeal since he won't have mandamus?

MR. REYNOLDS: There is really no other option. And if an original party cannot appeal, as we are not disputing, there is no reason that an intervenor as of right could be able to appeal.

QUESTION: Why should any of these people be allowed to appeal?

MR. REYNOLDS: Because the denial of intervention as of right essentially deprives the applicant for intervention of the tools that are necessary to protect his or her interests.

QUESTION: Well, you mean under the Brotherhood, the right to appeal from the denial of intervention?

MR. REYNOLDS: That's correct, that's correct. And a lot of stress is placed on the Brotherhood decision by Petitioners and the Government in this case, and they note particularly the fact that, the suggestion that since the applicant there was out of the case, there would be no right to appeal at the end of the case.

The fact is I think that they are placing too much stress -- they're reading too much into that decision. What that decision considered was the differences between the right to intervene and the permissive intervention.

Basically what the court concluded was that, because an intervenor as of right has no other option but to be in the case in order to protect his or her interests, an appeal is required. Permissive intervention, on the other hand, was so insignificant that an appeal of its denial was not even required,

because essentially there was no significant interest to be protected and there was no need for an appeal.

I think it is inconsistent with the rationale to argue, as Petitioners and the Government do, that that right to intervene recognized by the court in Brotherhood can effectively be in some way undermined or watered down or made less final by an order which through the discretion of the court allows some unspecified limited right of participation in the case.

Under the Government's theory, we are invited to a very anomalous situation, namely that a person entitled to intervention as of right who is denied that right can be denied the right to an immediate appeal that he needs to protect his interests simply by a grant of district court intervention by the district court, which may include no rights whatsoever in the case at the trial court, but only the right to appeal after the case is over.

We would suggest that that simply makes no sense, and that the finality of our decision, the finality of the denial of our right to intervene, is no less final simply because the district judge has allowed us essentially to remain in the courtroom and at some point at the end of the case appeal the denial of our right to intervene if we can show, somehow show

prejudice.

QUESTION: But that was a fact that wasn't true where your denial of intervention as of right was denied outright. Those people would not have been able to appeal later.

MR. REYNOLDS: Well, under a strict finality analysis that denial should have been held until after final judgment. It was not a final judgment in the case under strict interpretation. So if you apply that doctrine, the appeal itself should have been held to the end.

QUESTION: Well, if the district court had made the necessary findings it would have been a final judgment, wouldn't it?

MR. REYNOLDS: If findings under Rule 54(b) had been made. But no such findings were made, nor have any such findings been made in other cases.

So what the court recognized there was that the right to intervene was so significant an appeal, the right to appeal, could not be deferred, but it was a final judgment for all purposes under 1291. We would submit that our situation, the denial of our right, is not made any less final simply because we have some discretionary right to participate in the case.

And I think that the very importance of this

right, the inadequacy of appeal at the end of the case, is graphically demonstrated by our case. The residents whom we represent have a range of interests in this case, from the health and safety of their families to the very existence of their communities.

Those interests will be affected by the irrevocable resolution of a number of specific issues in this case, such as the extent of the cleanup at the site, the timing of the cleanup of the site, the degree of interim relief to protect their health and safety, and perhaps even the liability of certain parties for cleanup.

The resolution of those issues will significantly affect the interests of the residents of the community, right down to the quality of the water that they drink. For the Government and Petitioners now to say that they have to wait five years or however many years down the road it may be to appeal that denial seems to me --

QUESTION: Mr. Reynolds, don't you have an -- you get notice of every motion that's made in the case and every order that's entered. Don't you have a continuing opportunity to make arguments on these vital issues as you see the need to do so?

MR. REYNOLDS: And we have been participating

in that way.

QUESTION: So you're not quite the same as a total outsider.

MR. REYNOLDS: No, that's absolutely right.

QUESTION: And of course you get notice when the final orders are entered, so you know exactly when to appeal, whereas if you'd been denied any intervention at all you'd have a much more difficult time folowing the litigation in an efficient way.

MR. REYNOLDS: But the essence of intervention as of right is the ability to protect your own interests. And in this case, we're simply unable to do it because we cannot assert our own interests.

What the Court of Appeals concluded was that each of the other parties to the litigation have an interest that is adverse to ours, and therefore that points up the reason why we have to be able, at whatever point it becomes necessary in the case, to represent our own interests.

Now, for example, there are a number of remedial options which are being considered for cleanup of the site, and I think that they demonstrate why an appeal at the end of the case simply will be useless. At the present time, the remedy is planned in phases. Certain aspects of the remedy for the site will be

implemented and will be ongoing even before final judgment in this case is reached.

For example --

QUESTION: Do you want to take over the litigation?

MR. REYNOLDS: We have no interest in taking over the litigation.

QUESTION: Well, what is your problem?

MR. REYNOLDS: We are --

QUESTION: What happens if you want to file a motion and they do not? What happens?

MR. REYNOLDS: We are precluded.

QUESTION: Sir?

MR. REYNOLDS: We are precluded from filing the motion.

QUESTION: If you intervene?

MR. REYNOLDS: No, under the district court's order.

QUESTION: If you were in as an intervenor --

MR. REYNOLDS: That's correct.

QUESTION: -- and you wanted to file a motion and the other side didn't, what happens?

MR. REYNOLDS: We would be entitled to file the motion.

QUESTION: You'd file the motion.

MR. REYNOLDS: Yes.

QUESTION: So what --

QUESTION: But not under the conditions under.

MR. REYNOLDS: Not under the district court's order, but under the Court of Appeals, that's correct.

QUESTION: Well, what would you have other than chaos otherwise?

MR. REYNOLDS: If we were to be able to file the motion?

QUESTION: If one side files one thing -- if you have four different motions filed by four different parties plaintiff, is that anything less than chaos?

MR. REYNOLDS: I don't think that there's been any suggestion -- in fact, our participation in the case, even under the Court of Appeals' order, I think any party to the case would tell you, is that we have been throughout the case very eager to work with all parties.

In fact, we're very supportive of the Government in this case as it's prosecuting the case. Our only concern, the only reason --

QUESTION: You haven't gone to any hearings, have you?

MR. REYNOLDS: I'm sorry?

QUESTION: You haven't been to any of the hearings, have you?

MR. REYNOLDS: Yes, we have. In fact, Mr. Mulliken --

QUESTION: I thought it was said before that you didn't.

MR. REYNOLDS: That's totally incorrect, that's totally incorrect.

But our participation has -- our reason for the intervention is solely to be able to protect our own interests. Now, if remedial measures are taken before final judgment which would preclude other options which are necessary to protect our interests, for example a containment strategy on site versus total removal of the wastes, or a water extraction technique, which has the effect by creating more fissures in the rock of spreading the contaminants, would preclude total removal.

An appeal after final judgment would be completely useless in that circumstance. And that's why, that's a demonstration of why, in this case it's very important to be able to appeal the denial of the motion to intervene prior to final judgment.

And it simply makes no sense at this point, given the finding by the Court of Appeals that we're

entitled to intervene as of right and the recent enactment by Congress recognizing it, to conclude now that we have to go back to the regime instituted by the district court.

We would contend that, for the same reasons that intervention as of right was required and appeal was required in Brotherhood, an appeal is required in this case immediately, so that our interests can be protected.

Now, these same interests also underlie the collateral order doctrine, which is another ground for appellate jurisdiction in this case. Under that doctrine, certain collateral orders can be appealed where no effective review could be had after final judgment in the case.

That's precisely the situation here. Not only does the district court's order not allow us to meet the interests of intervention, but the conditions imposed effectively preclude us from making the record that we would need to pursue an effective review after final judgment.

And this is very different than any of the other cases that have been presented and considered by this Court and deemed not to fall within the collateral order doctrine.

QUESTION: Are you resting, then, almost entirely on the conditions?

MR. REYNOLDS: No, Justice White.

QUESTION: You would still be here making the same kind of arguments, not the same arguments, if you were just denied intervention as of right, but were let in the case on a permissive basis without any conditions?

MR. REYNOLDS: Just so I understand the hypothetical, if we were allowed in permissively with no conditions would we have the same concerns? At that point, as a practical matter I don't believe that we would have concerns, because there would as a practical matter not be a reason to.

QUESTION: So that you are relying entirely on the conditions that were imposed.

MR. REYNOLDS: No, I think that all of the -- under each of the theories, it's critical that the order -- that the application to intervene was denied.

QUESTION: Well then, you would say that you would have the same right to appeal if no conditions at all were imposed, so long as the right was referred to as permissive. And that has absolutely no practical consequence.

MR. REYNOLDS: The reason is simply this. I

think as a practical matter, if one were denied intervention as of right, granted permissive with no conditions, as a practical matter there would be no reason to appeal and it probably wouldn't happen.

In fact, in the Ninth Circuit where that would follow that has not --

QUESTION: That may be so, but how about the appealability of an order like that?

MR. REYNOLDS: I think strictly speaking the denial of the right to intervene is what gives jurisdiction. I think that's what flows from the Brotherhood decision.

QUESTION: So with or without conditions, the order would be appealable?

MR. REYNOLDS: The conditions in and of themselves, I think that the Petitioners and the Government are correct, do not give rise necessarily to an appeal, unless they can meet the collateral order doctrine.

But under Cohen, obviously one of the grounds was it had to be an important right. It's not something that's merely imposed as a matter of discretion. So if the district court were to impose case management limitations based on its discretionary authority, that's a very different situation from the standpoint of

appealability.

But where the conditions are premised solely on the denial of the right to intervene, then an important right has been denied and that is what gives rise --

QUESTION: And what was involved in Brotherhood?

MR. REYNOLDS: Brotherhood was a situation where there was an application to intervene in a proceeding based on a particular statutory --

QUESTION: As of right?

MR. REYNOLDS: As of right, yes.

QUESTION: And denied and appealed, and it was held appealable?

MR. REYNOLDS: It was held appealable, that's correct.

QUESTION: Do you think that covers just a denial entirely of a motion to intervene not as of right, but permissively?

MR. REYNOLDS: If a party applies simply to intervene permissively, no, it does not. And that's the distinction.

QUESTION: So that would not be appealable?

MR. REYNOLDS: That would not be appealable, because there's no right there and there is no -- by

intervening permissively, basically what you're saying, applying to intervene permissively, you're saying we have no interest that will be impaired in this case.

QUESTION: Right.

MR. REYNOLDS: And therefore the need for the appeal simply doesn't exist. In Brotherhood this Court recognized that intervention as of right was qualitatively different?

QUESTION: Brotherhood was decided before the collateral order doctrine was spoken about, wasn't it, in Cohen?

MR. REYNOLDS: Yes, it was, that's correct.

QUESTION: Would it be correct to say that in all borderline cases the district judge could avoid appellate review by granting intervention of right and then setting down a hearing on what conditions should be imposed in 40 days and then imposing conditions a little later? You'd never get review, would you?

MR. REYNOLDS: If there was intervention as of right?

QUESTION: Just he's not sure whether it's permissive or as of right, so he just decides he'll allow it to be termed intervention of right and then he decides to impose, at a later date he imposes the conditions that he would have imposed if it was

permissive.

MR. REYNOLDS: Well, if he grants intervention as of right, it's our position --

QUESTION: Then you're dead.

MR. REYNOLDS: It's our position that there would be no right to appeal. The only right of appeal --

QUESTION: So he could have accomplished the same practical result he did in this case by granting intervention of right and then imposing the same conditions.

MR. REYNOLDS: The difference would be there that the intervenor would have the rights of an original party.

QUESTION: Except they're limited by the conditions, the same way that you're limited.

MR. REYNOLDS: Well, if, for example, a party were to be limited in that way, they would have to pursue whatever options are available to a party, such as -- and I don't want --

QUESTION: You make the mandamus argument, yes. But that doesn't -- they're not appealable orders.

MR. REYNOLDS: That's right, and we would say that for an intervenor -- an applicant who applies to

intervene as of right, if that application is granted that gives them the same status as any original party.

QUESTION: Yes, but it's limited by precisely the same conditions you're limited by, so there's no practical difference.

MR. REYNOLDS: Except that they have remedies. They would have other options that they could pursue that as a permissive intervenor are simply not available.

QUESTION: Well, the option is to ask the judge to lift the restrictions, the same thing you could have done.

MR. REYNOLDS: We could certainly do that. But if the judge would refuse -- and presumably once the judge has imposed them --

QUESTION: And they still couldn't appeal.

MR. REYNOLDS: Exactly. But at that point, if the judge refuses to lift the restrictions, then mandamus would lie because it's such an outrageous limitation.

QUESTION: If it were outrageous in your case, mandamus would lie.

MR. REYNOLDS: Except that we don't have any right that we can go to a court and say our right is being violated here.

QUESTION: Well, if it's outrageous some right's been violated.

MR. REYNOLDS: Because we are permissive intervenors.

QUESTION: You don't have to be a party to seek mandamus. I don't really understand your mandamus argument. Anybody can seek mandamus.

MR. REYNOLDS: Well, let me explain it in a little more detail. Mandamus is a very exceptional remedy, as this Court has found. It basically lies only where there has been a usurpation of power, and any right asserted must be clear and indisputable.

And the essence of intervention as of right is that you have a right, just as a party does, to participate in the case. A permissive intervenor has no right to participate in the case. The permissive intervenor is there as a matter of discretion.

QUESTION: He does after he's been allowed to intervene, he has a right to participate to the extent that the judge will allow him to, the same as a party does. There can be conditions on it. If they're outrageous conditions, you go to the appellate court and get mandamus. But they'd have to be pretty outrageous.

MR. REYNOLDS: Now, I understand what you're saying, Justice Stevens, and I just want to make sure

that my response to that is clear. It is that when intervention is granted it's a very different thing whether it's granted as of right or by permission. If it's granted as of right, it's a recognition of a statutory right to be there, of interest that will be impaired if you're not.

If intervention is granted permissively, there's no recognition of a right to be in the case, there's no recognition of interest that might be impaired. It only recognizes that the district court as a matter purely of discretion has permitted you to be in the case.

So for a permissive intervenor to go seek mandamus is entirely unrealistic, because mandamus simply won't lie.

QUESTION: No, because even in his mandamus petition he'd say: Furthermore, the judge made a gross error in not giving me intervention as of right. He can make out, make the same statutory argument.

The fact that the district judge who presumptively has already committed egregious error on two or three issues made another error isn't going to affect the Court of Appeals.

MR. REYNOLDS: Okay, let me respond to that because I think that's a very, very good point. The

problem is that to go that extra step, in other words to say that in fact, although I'm characterized as a permissive intervenor, in fact I'm really an intervenor as of right, that determination is one that in any given case may be a fairly close question.

It's not the kind of thing that one can go to another court and try to mandamus a judge on. The difference is that if you go and you say, I'm an intervenor as of right and these conditions have been imposed on me, that's a very, very clear difference.

QUESTION: Whether you are an intervenor as of right or not is a clear question? Well, I've seen a lot of cases where that's --

MR. REYNOLDS: No. I think if I said that I misspoke. What I said was whether or not you're an intervenor as of right is the close question, but if that's been established by the judge and then the judge proceeds to impose --

QUESTION: If the judge had wrote an opinion saying, I think it's a very close question, but I'll opt for calling it as of right, would you be any better off if he just did it as -- I mean, he could identify it as a close question.

MR. REYNOLDS: The finding on the right to be in the case is the significant one, because that's what

puts you on the same level as any other party. As a permissive intervenor you don't have that.

QUESTION: Puts you on the same level as any other party, provided he doesn't impose any conditions, because if he imposes conditions that he doesn't impose on other parties you're not on the same level.

MR. REYNOLDS: Okay, I don't mean to beat a dead horse.

QUESTION: I shouldn't either, I'm sorry. I'm taking up too much of your time.

MR. REYNOLDS: But basically, I definitely understand your position and I respectfully disagree. I think that it's a very significant status and I think that that's what underlies this Court's decision in Brotherhood. And that's the reason it was found to be appealable.

And we would submit in this case the same considerations that led to that conclusion that an appeal was necessary to protect the intervenor's interest, we believe that that also requires a similar conclusion in this case and accordingly that the Ninth Circuit's decision should be affirmed.

QUESTION: Mr. Reynolds, before you sit down, I didn't get your answer before to the questioning as to whether you would be here if the conditions hadn't been

imposed. Was it yes or no? If you had been granted intervention discretionarily, not as of right, but no conditions imposed?

MR. REYNOLDS: As a practical matter, Justice Scalia, I think that we never would have bothered with the appeal because we would have had the rights to participate in the case.

QUESTION: Would you have been entitled to appeal?

MR. REYNOLDS: We would have been entitled to appeal, that's correct.

QUESTION: Your right had been denied.

MR. REYNOLDS: My right had been denied, yes.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Reynolds.

Mr. Mulliken, you have seven minutes remaining.

REBUTTAL ARGUMENT OF

DAVID L. MULLIKEN, ESQ.,

ON BEHALF OF PETITIONERS

MR. MULLIKEN: Mr. Chief Justice: Having listened to the argument of Mr. Reynolds, I'm satisfied that we've adequately addressed the issues here. If Mr. Reynold's position is that it's the conditions that are troubling him, then I think the burden was on him to

show that those conditions are such that they warrant application of the collateral order exception under the Coopers & Lybrand test or, alternatively, that they warrant application of the practical denial of injunction exception as articulated in Carson.

I haven't heard that in either case. I've heard some speculation, but I've seen nothing in his papers and there's certainly nothing in the record that suggests that he has in fact been materially prejudiced by those conditions.

And your questioning has hit right on the mark, that he's a party to this proceeding at this juncture and he stands in the same shoes as anyone else as a party.

There's been no injunction request, there's been none denied. There's been no irreparable injury. I think that's the end of the case. Unless you have any other questions that we could answer, we're prepared to submit.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mulliken.

The case is submitted.

(Whereupon, at 2:37 p.m., oral argument in the above-entitled case was submitted.)

CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the upreme Court of The United States in the Matter of:

#85-184 - J. B. STRINGFELLOW, JR., ET AL., Petitioners V.

CONCERNED NEIGHBORS IN ACTION, ET AL.

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BY Paul A. Richardson

(REPORTER)