ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
RICHARD A. LYNG, SECRETARY OF AGRICULTURE,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 86-1471
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, U.A.W, et al.	)	

Pages: 1 through 46

Place: Washington, D.C.

Date: December 7, 1987

Heritage Reporting Corporation

Official Reporters
1220 L Street, N.W.
Washington, D.C. 20005
(202) 628-4888

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RICHARD A. LYNG, SECRETARY OF AGRICULTURE,
Appellant,
V.
INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL.

No. 86-1471

Washington, D.C.

Monday, December 7, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

LAWRENCE S. ROBBINS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Appellant.

RICHARD WALKER MC HUGH, ESQ., Detroit, Michigan; on behalf of the Appellees.

C O N T E N T S

P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 86-1471, Richard Lyng v. International Union.

Mr. Robbins, you may proceed whenever you're ready.

ORAL ARGUMENT OF LAWRENCE R. ROBBINS, ESQ.

ON BEHALF OF APPELLANTS

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

In the 23 years since the Food Stamp Act of 1964 was enacted, Congress has many times considered and several times enacted measures designed to restrict the availability of food stamps to households with members who were on strike.

In 1981, the 97th Congress enacted an amendment to the Food Stamp Act now codified at 7 U.S.C. 2015(d)(3) whose Constitutionality is at issue in the case this morning. That amendment generally provides that households that contain strikers are not eligible for food stamps by reason of the loss of income occasioned by the strike. It provides moreover that households eligible for food stamps prior to the strike will retain their eligibility but will not receive any additional food stamps by reason of that loss of income.

QUESTION: What is the purpose of that exception do you think, Mr. Robbins?

MR. ROBBINS: I think, Justice Blackmun, that

Congress sought to strike what I would call a balance of competing interests. By retaining the eligibility, households were placed in no worse position by virtue of the strike. Congress simply sought not to permit the loss of income occasioned by the strike itself to increase the eligibility for food stamps. So in that sense, it doesn't deprive households of an eligibility that vested prior to the time the strike began.

QUESTION: Mr. Robbins, is there any evidence in the legislative history that one of the purposes was to somehow effect or establish national labor policy in any way? Was this just a budget device to save money, or was the exception in there to further some labor policy of the government?

MR. ROBBINS: I think, Justice O'Connor, Congress sought to promote three objectives, and it articulated those objectives in the accompanying Senate report, I believe it's 97-35, that accompanied the _____ legislation in 1931. Those three purposes are first, as Your Honor mentioned, to achieve what Congress wished to be dramatic changes in its words, in the Federal spending policy. Congress sought to reduce the overall cost of the Food Stamp program and the Congressional Budget Office estimated in fact that the amendment actually adopted in 2015(d)(3) would save approximately $165 million in food stamp outlays over the three year period 1982 to 1984.

But there were two other objectives as well, apart

from simple saving of revenue. First, Congress believed that it was tying the receipt of food stamps to the ability and willingness to work. It thought that was consistent with the balance of the food stamp scheme. It believed and said, that strikers have foregone available employment voluntarily and that union strike funds should be the principal source of benefits during a work stoppage.

Finally and more clearly I think directed to Your Honor's question, Congress attempted to promote additional governmental neutrality in labor disputes. It believed that providing food stamps to striking workers is an incentive to wait out management, in the Senate Committee's words, rather than to reach compromises. And it decided that it wished to withdraw that incentive from labor management's disputes.

Now, the District Court for the District of Columbia recognized that these were rational goals and that the legislation enacted in 2015(d)(3) is, to use the District Court's words, "rationally related to legitimate legislative objectives" but it struck the statute down anyway. Applying a rather loose amalgam of rational based and heightened scrutiny, the Court found that the statute irrationally discriminated against strikers, unlawfully impinges on their free association rights as well as the rights of their families and their unions to free association and exacts an excessive price for the protected right to strike.

We believe each of these conclusions to be mistaken

and we ask this Court this morning to reverse.

Let me turn first, if I might, to the equal protection claim in the case. It is common ground that Section 2015(d)(3) as social welfare legislation survives equal protection scrutiny if it is rationally related to a legitimate legislative purpose. We have no doubt that it is. But let me say at the outset that we proceed in this argument on the assumption that Congress articulated its real purposes for the statute when it enacted it.

I mention that seemingly uncontroversial point because the amicus party in this case has suggested that Congress' articulated purposes are in fact a camouflage for the anti-labor and anti-union animus that ostensibly in reality motivated the enactment. But that claim is manifestly false, resting as it does on remarks made in years past by opponents about precursors of the current legislation.

We prefer to take Congress at its word, and I turn directly therefore to the reasons that Congress actually articulated as rational bases for the distinction that it drew in the statute.

Let me start with the cost savings goal. In 1981, Congress confronted an economy that it believed to be in considerable financial distress. It therefore resolved to make across the board cuts in a great many Federal programs. Several of those were made in the Food Stamp Program, and Section 2015(d)(3) reflects one of them. Now, appellees do not

dispute that the Government may legitimately pursue cost savings, but they argue that savings alone cannot justify irrational distinctions. And we agree.

Distinctions that are otherwise irrational are not made rational simply because they save the Government money. But the need to conserve funds makes distinctions inevitable. And when distinctions must inevitably be made, it is equally inevitable that some persons, often with a great deal in common, will fall within and without the favored circle.

Here, Congress drew a dividing line rationally grounded in the determination that strikers at least have a job to go back to and have union strike funds to rely on. In those critical respects, Congress reasonably concluded that strikers may more easily than other persons absorb the necessary reduction in available benefits. Once it is seen that Congress drew a rational line in its effort to conserve funds, this Court's decision last term in Bowen against Gilliard instructs that the Statute that it enacted --

QUESTION: Excuse me. Did I hear you to say that a man without a job is better off than a man with a job?

MR. ROBBINS: I think what I certainly intended to say, Justice Marshall, is that Congress could rationally have decided that a person with a job to go back to when he chooses to is better off than someone who has no job prospects at all. And that we think is one of the determinations that Congress made in enacting this Statute.

And we regard it as a reasonable and rational one for Congress to have made.

QUESTION: What about the voluntary quitter?

MR. ROBBINS: Well, Justice White, the voluntary quitter is treated differently under the Statute in certain respects but Congress could rationally have decided that that distinction was warranted.

QUESTION: He's off the food stamps what, for ninety days?

MR. ROBBINS: That's correct.

QUESTION: And the striker is off for as long as he's on strike?

MR. ROBBINS: That is correct, Justice White. And there are we think several reasons why that distinction survives equal protection scrutiny.

QUESTION: And isn't it also true of just the deadbeat who doesn't want to work at all?

MR. ROBBINS: No, that is not equally true. There are work registration requirements that must be satisfied. The law provides equally that someone must take available work at the applicable minimum wage, and the failure to do so disqualifies both that deadbeat and his household.

QUESTION: How about the voluntary quitter, does he have to take a job, another job to stay on food stamps?

MR. ROBBINS: Well, yes he does. He is disqualified for ninety days and when that ninety-day disqualification has

lapsed, he too must register for work and take it if it's available. And that really tells us, I think, precisely why this distinction that's been drawn and that very much persuaded the District Court really misdirects the eye.

QUESTION: What about the quitter for cause? Someone leaves a job because there are some unacceptable demands made upon him. Is he treated the same as a voluntary quitter?

MR. ROBBINS: No, he's not, Justice Scalia. There is a distinction drawn in the Statute that permits a voluntary quitter to leave for cause and not absorb the ninety-day period of ineligibility.

QUESTION: Well, the strikers think they have cause.

MR. ROBBINS: They do, and they also have a job to go back to and that we think makes all the difference in the world.

QUESTION: Well, so does the quitter for cause, or he had a job that he could have gone back. The fact that it isn't there is his choice.

MR. ROBBINS: That's true, but he severed the relationship. In both cases, they have made a choice, it's true, and in both cases the choice may equally derive from a believe that they have good cause. But we think that Congress could rationally decide that the two persons, one who quit for cause and one who struck for cause are not similarly situated in one critical respect.

One of them has severed that employment relationship

and that job is gone. He can't waltz back in when he's decided that his cause was either not the right cause or not a compelling enough cause. He's left his job. There is not a job waiting for him to return to.

And there's yet another distinction. Congress obviously was trying to serve several ends at once, and one of the ends that it articulated in the Committee Report was the goal of labor neutrality. We thin that Congress could rationally decide that extending food stamps to persons who have quit does not implicate the government in the support of one side of an on-going labor dispute.

QUESTION: Well, Mr. Robbins, I gather that when the household is disqualified, also the children in the household are disqualified, are they not?

MR. ROBBINS: When the household is ineligible, all members of that household by definition are ineligible.

QUESTION: Yes. Now, how in Heaven's name does that serve the objective of neutrality?

MR. ROBBINS: Of neutrality?

QUESTION: To disqualify the children?

MR. ROBBINS: I think the answer to that, Justice Brennan, is that the Food Stamp Statute, like many other Federal statutes, is predicated on a household categorization, a household categorization that this Court recognized and accepted two terms ago in Lyng against Castillo. It is not the intent of the Statute in particular to visit special burdens on

the children uniquely, as for example, this Court considered in the Plyler against Doe case. Rather, it makes a judgment about household income and because the Statute, like many other statutes, like the Statute in Dandridge against Williams, like the Statute in Bowen against Gilliard, because those statutes, like many social welfare statutes operate and attach consequences --

QUESTION: That doesn't tell me how that serves the objective of neutrality.

MR. ROBBINS: I think, Justice Brennan --

QUESTION: Under this Statute.

MR. ROBBINS: I think the answer is that Congress believed that by funding by replacing the household income given up by a striker which Congress thought to be given up voluntarily, it was withdrawing a subsidy that it thought impaired the free flow of labor negotiations. Now, by necessity, when you refuse to replace income to a household, it has harsh implications in particular cases.

Even, we suggest, were you to look at this only as income not replaced to the individual striker, that wouldn't change the fact that it has implications for his entire household. The fact is that this statute, like many others, operates on a household basis. And consequences visited to individuals have consequences for their families.

That is a decision that Congress looked square in the eye and decided was outweighed by the goals it sought to

promote.

QUESTION: Couldn't Congress have looked it square in the eye and made a proviso that this shall not apply to children?

MR. ROBBINS: They could have, Justice Marshall. They certainly considered explicitly.

QUESTION: Well, they should have.

MR. ROBBINS: Justice Marshall, I am unwilling as a policy matter to second guess a judgment that its quite clear Congress had before it. There was testimony about the consequences and indeed --

QUESTION: Congress decided to deprive children of milk?

MR. ROBBINS: I don't think that's what Congress meant to do at all. I think Congress meant to do what it said it was doing and it did so in the face of a sure recognition that there were adverse consequences for the families of strikers.

QUESTION: Including children without milk.

MR. ROBBINS: Including children without milk.

Congress has debated proposals like this for twenty years, and for a great many years the opponents of this legislation held sway, articulating precisely these kinds of consequences. These kinds of consequences, however, Justice Marshall, are present every time Congress makes changes in social welfare legislation. It was equally true in Dandridge,

it was equally true in Castillo, it was equally true in Bowen against Gilliard, and it's true today as well.

QUESTION: So what you're saying is that it was a change in the political climate that brought about the '81 amendment?

MR. ROBBINS: I would hesitate, Justice Blackmun, to assign any special factor to that decision. I think there has been considerable support for this legislation for many many years.

QUESTION: But it never was passed over the years.

MR. ROBBINS: It was never passed by both Houses over the years. And whether it's the fact that the political climate changed, or Congress recognized that the economic crises that it perceived in 1981 had grown too great, that the peril that it thought it was addressing by a broad-based package of legislation now merited some important changes in many programs. All of those factors may have entered into it.

QUESTION: The practical consequence for the children is that the father has to leave home, isn't it?

MR. ROBBINS: No. I think that's no more true in this case, Justice Blackmun, than it was in Castillo and in Gilliard or certainly in Castillo when precisely the same argument was made and rejected by this Court.

I think the same logic suggests that the impact for purposes of dissociating families is no greater here than in those cases.

QUESTION: Of course, the pro rata possibility could have been considered and was considered in other elements of the statute, wasn't it?

MR. ROBBINS: The possibility of?

QUESTION: Of just reducing the food stamp allocation for the striker individually and preserving the food stamps for the children. This kind of thing is present in other aspects of the Statute?

MR. ROBBINS: That's correct. There are certain parts of the statute that attach a consequence only for the person who has taken certain action. For example, the fraud provision has that aspect. Although I might add, Justice Blackmun that many many other parts of the Statute attach consequences for the whole household. The refusal o register, the refusal to take a job at the minimum wage, the refusal to provide certain kinds of reported information on an annual basis, all of those things attach consequences on a household basis. And this is consistent with all of those.

Yes, it's true to answer your question that Congress could have cut the line more finely, but it is only Constitutionally required to do so when there is a basis for heightened scrutiny for either the inference of a suspect classification or the inference of a fundamental right.

There is neither in this case and this Court's decisions make quite clear that in the absence of a constitutional warrant for heightened scrutiny, there is

accordingly no reason to require the Congress to divide its distinctions more finely.

QUESTION: Mr. Robbins, I think you argued earlier that one of the concerns is that the government would be subsidizing strikers, wasn't it, if they were not disqualified for food stamps.

MR. ROBBINS: The concern was for additional governmental neutrality.

QUESTION: Yes. Well just how much money was involved? Didn't that 1975 study by GAO show that 89 to 96 percent of all strikers -- this is before the '81 Amendment -- did not participate in the food stamp program, and further the cost of what there was in '75 was only .2 to .3 percent of all non-public assistance food stamp households.

Isn't that right?

MR. ROBBINS: Well, I think, Justice Brennan, when the statute was finally passed, the empirical evidence was a little b it more equivocal than it was before the Congress when it refused to pass the statute many years earlier.

QUESTION: Well, it's not so many years. Those figures I thought were 1975, isn't that right, and the statute was 1981?

MR. ROBBINS: That's correct, Justice Brennan. The fact is, however, that by 1981, the Congressional Budget Office was estimating that this particular amendment would engender savings on the order of $165 million over a three-year period.

The Senate Report, I might add, noted the prior findings of the General Accounting Office. It indicated that it found the evidence somewhat ambiguous as to which estimate was correct, that it varied over the lot.

It considered the various empirical findings including the one to which you refer, and in the end it went with the estimate from the Congressional Budget Office. That is a classically political judgment. The decision about whether the empirical evidence is persuasive enough is precisely the kind that this Court has consistently said is consigned to the political process, and justly so.

QUESTION: Congress might also have thought that putting a pinky on the scale is no better than putting a thumb on the scale.

MR. ROBBINS: That's correct. The view about neutrality is of course that involvement of the Government at all is unwarranted and it wished to withdraw that support, which may not turn precisely on how powerful that support is.

QUESTION: Mr. Robbins, you assert that the striker is in a different situation from others because he can go back to work.

The respondent's brief contests that, at least in some situations, or the appellees' brief, I should say. It says that, "in many instances, a struck employer will not operate during a strike."

Now, what happens in that situation?

MR. ROBBINS: It depends on how it is and why it is that the struck employer does not operate. If it's a lockout or if it's the permanent replacement of a striker, that does not trigger the provisions of the statute. In that event, the striker is no longer deemed to be on strike and is intended to receive benefits under the Statute.

QUESTION: Including permanent replacement, because that's the other example that the appellees give.

MR. ROBBINS: Including permanent replacements. And the evidence that that is the Secretary's policy was before the District Court. If, however, the plant closes because it is simply no longer economically feasible to maintain it because of the strike, that does not change the ineligibility provisions. In that event, the striker has by his voluntary efforts together with the rest of his union ensured that there's no longer a job available, just like the plaintiffs did in the Hodory case and in Baker against General Motors.

QUESTION: What can he do then if he wants to get back on the rolls, what does he have to do, quit?

MR. ROBBINS: He can quit.

QUESTION: Suppose he doesn't quit, he just presents himself for work? He says, I'm no longer on strike, I'm willing to work. Your plant is closed but that's not my fault any more at least?

MR. ROBBINS: Well, under those circumstances obviously there isn't the option, under your hypothetical, of

taking the job because it's not available right then. On the other hand, it's still the culmination of a voluntary effort and to that extent there is still the distinction between the striker who has together with others engendered this state of affairs than other persons who have voluntarily left work.

QUESTION: And he continues to be disqualified even though he is no longer a striker?

MR. ROBBINS: Well, he's still a striker in a sense - -

QUESTION: No, he doesn't. He says, I'm ready to work now. I'm no longer on strike.

MR. ROBBINS: But by virtue of the decision he made earlier, the employer can no longer maintain the plant, and in that event, although he doesn't have the job available, certain other purposes that Congress was also seeking to promote are still applicable in that event, such as the decision not to become involved in an on-going labor dispute, the goal of neutrality and the goal of voluntary unemployment.

Let me turn since my time is almost at an end to the First Amendment challenge in this case.

We think that the First Amendment claim founders on two central misconceptions. First, we believe that appellees exaggerate the range of protected conduct effected by the Statute. Like the District Court, they analyze the statute as if its provisions were triggered by the exercise of any of a wide array of First Amendment rights. In fact, however, it is

only the exercise of the right to strike that is at issue, and the right to strike consistent with its rather subordinate place in the Constitutional hierarchy has historically been subjected to considerable regulation by Congress.

Second, appellees overstate the way in which the statute actually affects the right to strike. The statute, after all, does not prohibit it, does not state the occasions on which it may be offered or may be exercised. All it does is restrict food stamp eligibility for households that contain members on strike and it does so only for the length of the strike. That we think is a difference of constitutional proportions.

QUESTION: Mr. Robbins, they tried to get this amendment through in 1977, did they not?

MR. ROBBINS: That's correct, Justice Brennan.

QUESTION: And they failed, didn't they?

MR. ROBBINS: They did fail.

QUESTION: And didn't the report then say the reason it failed was that the real purpose of the amendment was not to restore some government neutrality allegedly lost because strikers are eligible for food stamps, but on the contrary, to use a denial of food stamps as a pressure on the worker, or more accurately his family, to help break a strike. The amendment was an effort to increase the power of management over workers using food as weapon in collective bargaining.

That wasn't true in '81?

MR. ROBBINS: Justice Brennan, Congress is not frozen in time. Part of the political process allows for the possibility that Congress can change. In 1977, the proponents of this Statute were defeated. In 1981, the opponents of this statute were defeated. That is something that happens all the time in the political process.

And we do not believe that a claim made by an opponent of the legislation about its precursor is a legitimate way in which to account for the reasons that moved a Congress four years later to do something very different.

Now, let me just say about the First Amendment claim --

QUESTION: Is it possible that the 1977 Committee Report was false?

MR. ROBBINS: Was false?

QUESTION: Was false?

MR. ROBBINS: It could be that it was wrong, it could be that it was overstated, it could be that like some other Committee reports, it exaggerates the strength of its arguments, and it could be that what was true then is no longer true about what moved a subsequent Congress to do something that a prior Congress rejected. That wouldn't be surprising, I think, and it wouldn't be the first time.

There are two reasons why the First Amendment claim in this case fails. And the two reasons are defined by this Court's decision in Gilliard at the tail end of last year's

term. And the reason is that the First Amendment free association claim is only implicated when it is a statute whose "design and direct effect is to intrude on those First Amendment interests."

In this case, of course, neither of those standards is met, first because it is surely not the design of the Statute to impair free association claims. It is first of all not triggered by a significantly protected First Amendment right. The right to strike, as we've outlined in our Reply Brief, has historically been, as Justice Jackson put it in the UAW case, more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining.

Indeed, the history of labor law is largely defined by an on-going process of adjusting the competing claims of strikers, their employers and the public at large. And that historical process is only possible by virtue of the fact, and indeed it reflects the fact that the right to strike is not graven in some First Amendment stone. And second, the statute does not as in the words of the Bowen against Gilliard case directly impair that First Amendment right. Because like the decision, like the decision in Harris against McRae and the decisions in Castillo and in Gilliard, it simply withdraws funding where it does not affirmatively fund the protected right.

QUESTION: Do you think your position draws strength

from Harris against McRae. Do you really think that?

MR. ROBBINS: I think it draws considerable strength, and indeed, I think this is a stronger case, Justice Blackmun.

QUESTION: Because there it was an extension of benefits that was sought. Here, it's just the opposite. Well, I disagree with you, I'd mention.

MR. ROBBINS: Well, I think in that case, Congress decided not to include a certain kind of constitutionally protected conduct within the aegis of the Medicaid Statute. Here, there's not even the same kind of claim, we don't think, that the right to strike has anything close to the kind of constitutional protection that was recognized in Harris against McRae, and it's simply a failure to fund, just as it was there.

QUESTION: Mr. Robbins, what about Moreno?

MR. ROBBINS: I think, Justice Brennan, that the Moreno case which after all was also a rational based case, even though the Statute was triggered by an associational claim, is different in that this Court was able to find in the legislative history, statements by the proponents of the legislation that it was animated by anti-hippie animus, that in fact, this was an effort to penalize an historically disfavored and insular minority.

There's no such evidence in this case.

QUESTION: Why do you say historically disfavored? The hippies weren't historically disfavored, were they?

MR. ROBBINS: Well, I think this Court thought in

Moreno that this was a group that had been certain kinds of -- within the political process, had been given certain kinds of disadvantages and that this statute reflected that.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Robbins.

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

ORAL ARGUMENT OF RICHARD WALKER MCHUGH, ESQ.

ON BEHALF OF APPELLEES

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

The 1981 amendment to the Food Stamp Act in issue here treats strikers and their households uniquely. No other Food Stamp provision sanctions individual actions by disqualifying an entire needy household by the full duration of their need for food stamps. Whether examined under a Fifth Amendment rational basis test, or under the First Amendment's requirement of a substantial justification, and a narrow tailoring the statute in the words of District Judge Oberdorfer, fails to pass constitutional muster.

QUESTION: Excuse me. I thought the Government had given some examples of how the chief wage earner's failure to provide necessary information in order to get the stamps, for example, would disqualify the entire family. Isn't that true?

MR. MCHUGH: I'm not aware of any other food stamp disqualification that would act to disqualify the family for the full duration of its need, basically for the length of the

strike in this case. I think the example he was referring to is when he referred to the head of household refusing work or refusing to accept a job for minimum wage, that's a sixty day disqualification or until the head of the household complies. I think that's also true in the need for information.

QUESTION: Sixty days or until the head of the household complies?

MR. MCHUGH: Complies, right, whichever's shorter.

QUESTION: Whichever is shorter.

But if the head of the household just refuses to work although work is available, the whole family's disqualified?

MR. MCHUGH: For sixty days, that's correct, Justice White.

QUESTION: Well, I know, but what about the person who just decides he doesn't want to work anymore, ever?

MR. MCHUGH: I am not sure what that situation is but I believe you would have a continuing requirement to register for work and to be available for work, and I suppose --

QUESTION: Well, then, as long as he won't work, the household would be disqualified.

MR. MCHUGH: That would be a single act. That would be a series of acts that triggered the sixty-day disqualifications.

In any event, I don't think it's --

QUESTION: Well, that makes hash out of the work requirement.

MR. MCHUGH: No, I think they would continue to assess sixty-day penalties, but it would be for separate refusals. In other words, you would have sixty days to register and comply and if you didn't, at the end of that and you continued to refuse, then at that point, they would assess another sixty day disqualification.

QUESTION: But it's the whole family though that would be disqualified.

MR. MCHUGH: If the work is suitable and if the person is the head of the household.

QUESTION: Well, that is a provision, then that disqualifies the whole family because of conduct of the head of the household.

MR. MCHUGH: That's correct.

QUESTION: You could consider this to be a series of acts, as well. The worker who is on strike refuses day by day to go to work.

MR. MCHUGH: Well, if the plant is either operating and the person can go back, or if the person has not been permanently replaced. I think that the permanent replacement situation is, I would disagree with my opponent a little bit on that.

QUESTION: That's different.

MR. MCHUGH: The District Court made a specific finding that the length of the disqualification was indeterminate for the length of the strike and found that there

were numerous instances in the record where people had been permanently replaced and remained disqualified.

The policy that the Government is relying on here is a letter from the USDA officials to other regional USDA officials. The manual material -- that's the State welfare manual material that the workers use, we put in the record material from Kentucky and Michigan, and there was no mention of a permanent replacement, and in fact there's no instance in the record where somebody permanently replaced did get stamps as a result of this alleged policy.

It's not in regulatory form, and I don't think that the Government can really rely on it here to save the constitutionality of this statute.

QUESTION: Well, Mr. McHugh, do you think the Constitution prohibits Congress from disqualifying for food stamps, families of voluntary quitters?

MR. MCHUGH: I think that that's a very important consideration in this case. As was pointed out --

QUESTION: Well, does it, or not? Does the Constitution forbid Congress from disqualifying families for food stamps of voluntary quitters?

MR. MCHUGH: I think that the Constitution prohibits Congress from doing that when similarly situated families of voluntary quitters or refusers of work are not treated as punitively as the families of strikers. For example, voluntary quitters have the opportunity to show good cause and there are

many situations when people on strike go on strike for identical circumstances as would be good cause for voluntarily quitting, and their families would have no penalty imposed, but since the member of their household is on strike, they're taken off the stamps completely for the duration of the strike.

So I think it's the similarly situated comparison that makes it unconstitutional, not just taking the families off per se under the equal protection theory.

QUESTION: I guess I just don't understand your answer. Suppose all we had in front of us was a provision that said if you voluntarily quit work, you and your family are not eligible for food stamps. Is that unconstitutional?

MR. MCHUGH: I don't think so.

QUESTION: Well, then why can't strikers be treated the same?

MR. MCHUGH: Because voluntary quitters are not treated that way. Voluntary quitters have a ninety-day disqualification at the worst, and then they are eligible even though they turn their back on income just like the strikers did, and even though they walked away from income and made themselves eligible for food stamps.

And I think that this Court has made clear, in Castillo, for example, that similarly situated individuals have to be treated similarly to satisfy the rationality requirement of the equal protection clause. And so --

QUESTION: Yeah, but ninety days they're

disqualified, they and their families?

MR. MCHUGH: That's correct.

QUESTION: Then they have to register?

MR. MCHUGH: That's correct.

QUESTION: And if they don't register and take work, they are off food stamps again?

MR. MCHUGH: That would be true, but I think in a typical case --

QUESTION: Meanwhile for sixty days, they are back on food stamps.

MR. MCHUGH: No. If they refused at the outset, and they went in and on their application they didn't register, they wouldn't be eligible.

QUESTION: And so that would be just like the striker, then?

MR. MCHUGH: Well, it would be the same effect in terms of food stamps, yes.

QUESTION: Yes. Well, if they engaged in the same conduct the striker did saying, I'm not going to work, they would be off?

MR. MCHUGH: I think what you're asking me to do --

QUESTION: Is that right, or not?

MR. MCHUGH: Yes. I think what you're saying is that not only do I have to show that it doesn't comparably treat voluntary quitters, but that it doesn't similarly treat voluntary quitters who also refuse to work, which I think is a

pretty heavy burden to carry under the rational basis theory.

QUESTION: But traditionally under rational basis, people attacking a law on equal protection grounds have a heavy burden to carry.

MR. MCHUGH: Well, that would be true, Your Honor, and I think that we can carry this burden in this case because it's not the same case as Gilliard or Castillo, which this Court decided in the last two terms.

QUESTION: But the voluntary quitter at the end of 90 days, he has to register, but if it's evident that he won't work, he stays off food stamps, doesn't he?

MR. MCHUGH: That's correct.

QUESTION: Just like a striker?

MR. MCHUGH: Well, except that strikers are not always able to waltz back into their job, as my opponent said. There are many cases where -- there are cases in the record. Johnie Blake was permanently replaced. The union offered to go back to work. The employer refused to take them back because he had permanently replaced them, which he's entitled to do on economic strikers, and she still continued to be disqualified for food stamps for months after that, her and her grandchildren and her children.

In other situations, they're not operating and counsel has conceded that even in those situations, people are still going to be disqualified.

QUESTION: But you would want to be treated better

than the voluntary quitter?

MR. MCHUGH: No. All we need to do is be treated the same as the voluntary quitter.

QUESTION: Well, the voluntary quitter if he doesn't want to work is going to stay off food stamps.

MR. MCHUGH: These people, even if they seek other types of work --

QUESTION: And furthermore, your striker doesn't have to go and register for work elsewhere.

MR. MCHUGH: Yes. Prior to 1981, strikers had to register for work and be available for other work, but not the work at the struck plant.

QUESTION: What about now? Do they have to register and be available for work elsewhere?

MR. MCHUGH: Well, now they're just simply not available.

QUESTION: Exactly.

MR. MCHUGH: I mean, they're not eligible.

QUESTION: But under your thesis, the striker would have to do what?

MR. MCHUGH: Under our comparison, what we would say is if they treated strikers exactly like voluntary quitters, that would be --

QUESTION: So strikers are off food stamps for 90 days?

MR. MCHUGH: If it's the primary wage earner?

QUESTION: Ninety days.

MR. MCHUGH: Right.

QUESTION: And then he has to register for other work?

MR. MCHUGH: Right, and be available for all other work except the struck work.

QUESTION: But if he said I don't want to work because I'm on strike, he's off for good?

MR. MCHUGH: Right, but that would be fine because I think he should be subject to the same comparable requirements of the food stamp program which requires that you be available for all work except work that's vacant due to a labor dispute.

Only in the case of strikers and their households is the Government saying we're going to take that additional step and provide that economic incentive for someone to have to cross their picket line, and that doesn't seem to me that that's advancing neutrality, which is the rationale that the Government is trying to argue.

QUESTION: Mr. McHugh, do you concede the Statute would be constitutional if it merely disqualified strikers for 90 days, and their families?

MR. MCHUGH: Yes, I don't see how we could come before the Court and make a similarly situated argument.

QUESTION: Even though, during that 90 day period, it took the milk away from the children and the family. So you're really not relying on the First Amendment associational right

at all, as I understand you now. Because that would apply in the 90 day period. The arguments about infringement of the right of association both with the union and with members of the family would equally apply to a 90-day disqualification, and I understand now you're abandoning those arguments.

MR. MCHUGH: I think that where the associational freedom must come in is if we compare the food stamp treatment of voluntary quitters and those who strike. A person who voluntarily leaves for a number of reasons that amount to good cause under the Statute has no penalty. However, if they leave to express their disagreement with their employer in concert with other individuals, then they are penalized.

It seems to us that that shows what's triggering the disqualification is not the individual leaving work, but the fact that they're leaving work in concert with others. And that's the reason there's an associational right here. Now, under your hypothetical, you're saying we're going to treat even under associational purposes, it seems to me, there's that discriminatory element. If you're going to treat voluntary quitters and strikers alike, even though one is leaving for reasons of association and one is leaving for his own individual reasons, I'm not sure that that is going to create a constitutional problem, I guess.

Although it may still create a constitutional problem if there's no substantial justification.

QUESTION: So really it seems to me in bottom, you're

making an equal protection argument, rather than a First Amendment argument? It seems to me that's the heart of your case?

MR. MCHUGH: Well, I think that the equal protection argument is a narrower grounds for the Court to affirm the District Court.

QUESTION: Well, it really seems to me that you've abandoned the First Amendment argument because you seem to agree that if it were limited to a 90-day disqualification that it would be okay to disqualify people, even though you're taking milk out of the mouths of the babies in the family.

MR. MCHUGH: And I'm not sure I need to make that concession because it seems like if it is a right of association, then it seems like to me that the interest that the Government has put forward are not the substantial interests that are necessary under the First Amendment. They haven't even tried to justify it in the First Amendment context.

QUESTION: Well, it seems to me it makes a big difference in remedy, too, because if this is the correct theory, the District Court presumably should have just enjoined the enforcement of the Statute insofar as it disqualified strikers' families for the 90-day period, for a period beyond 90 days, I mean.

MR. MCHUGH: Right. And so presumably the District Court disagreed with me earlier, I think.

QUESTION: Mr. McHugh, it seems to me that a good many of the laws in the labor-relations area can be said to burden association rights. For example, there are laws under Taft-Hartley directly restricting the freedom of employees to engage in various kinds of concerted activity. And we've not held that those violate the First Amendment. So it's a little odd, anyway, to argue that in this context you can't indirectly do the same thing you can do directly as Congress in restricting associational right.

MR. MCHUGH: I think that where the governments cases dealing with the pervasive regulation of the right to strike in labor relations context really fail is there you are regulating striking as an economic activity viz a viz employers.

QUESTION: Well, the government argues that that's one of the purposes of this. It's a form of labor regulation in effect. Now, I specifically asked them that at the outset of the argument. Now, to that extent, I guess this could survive under traditional labor law analysis under First Amendment claims.

MR. MCHUGH: Well, in those areas, the Court was concerned about employers' property rights and the public interest involved in regulating strikers. They haven't put those interests forward in this case, and I guess I would disagree that you can read the legislative history of this provision as being Congress acting in the labor relations context.

I think what they said was in the context of a social welfare program, we think this advances neutrality by withdrawing the support from strikers and their families, but I don't think that they said, we're doing this as part of an addition to the Taft-Hartley Act to regulate striking or any of the other Federal legislation that this Court has upheld.

So it seems like the First Amendment basically limits government, and when government acts viz a viz the individual in a social welfare program and triggers that action based upon the associational nature, it seems like to me you've got a completely different type of situation.

QUESTION: Well, it depends on whether we view it as a social welfare program or as a form of labor policy.

MR. MCHUGH: Well certainly the explicit objects of the legislation are to promote the agricultural economy and to alleviate hunger by providing assistance to families whose need is so low that they can't afford to purchase an adequate diet, and it doesn't say that they're also accomplishing labor-relations type activity.

QUESTION: Mr. McHugh, we haven't examined the provisions of the National Labor Relations Act, and specifically the provisions that render unlawful or impose certain adverse consequences for particular types of strikes, we haven't reviewed those under a strict scrutiny standard, have we?

MR. MCHUGH: No, I don't believe you have, Your

Honor.

QUESTION: Well, now, why wouldn't we if --

MR. MCHUGH: I don't know of any cases --

QUESTION: Well, I don't know of any.

MR. MCHUGH: I'm not sure you've reviewed them at all in the First Amendment light, I guess.

QUESTION: Oh. You think that the Taft-Hartley Act, in all of its provisions relating to strikes would have to be scrutinized strictly?

Because you have the same factors here if you're relying on the insular nature of the labor union movement and traditionally subjected to disfavorable treatment, as you say, we have --

MR. MCHUGH: Well, the District Court, I think at that point was really trying to make the case more like Moreno and less like Castillo, and it seems like to me what the District Court was doing there was looking at the part of Moreno where the Court said that the bare desire to harm a politically unpopular group was not a legitimate government activity.

Now, we're not arguing that the disqualification of strikers would not be a legitimate government purpose. What we're arguing is that the way they've accomplished it is irrational when you compare it to the treatment of strikers.

QUESTION: Well, irrational, I have no problem. If you're just doing ordinary scrutiny, that I understand. But I

thought you were urging strict scrutiny here?

MR. MCHUGH: No, we've never argued strict scrutiny before this Court or before the Court below. I think that in an effort to make us look more like the decisions that you reversed in Castillo, the solicitor has attempted to say that this is a strict scrutiny case or that we want it to be a strict scrutiny case. But certainly under equal protection what we have indicated is that a rational basis test is enough.

QUESTION: So your argument is essentially the equal protection argument here?

MR. MCHUGH: Under the First Amendment, I think there are two discrete independent grounds that the District Court held the Statute unconstitutional.

QUESTION: Yes, I realize that. But I thought perhaps you weren't making exactly the same arguments that appealed to the District Court in its opinion. Am I wrong in that?

MR. MCHUGH: You think that I'm not making exactly?

QUESTION: Yes. Are you supporting all of the District Court's opinion in your argument here?

MR. MCHUGH: If the District Court in the equal protection context applied more than a rational basis test, I don't think that we need to do that. I think that under Moreno, this case, Moreno is very applicable to this case, I think.

QUESTION: But then, do I gather that separate from

your equal protection argument which you've just made, you're also making a First Amendment attack on the statute?

MR. MCHUGH: That's correct.

QUESTION: And you just haven't gotten to that, yet?

MR. MCHUGH: That's correct.

QUESTION: Okay. Well, maybe we should give you a chance to do it.

MR. MCHUGH: I'll accept your invitation, Chief Justice Rehnquist.

This Court has held in a long line of cases that while the Government is free to deny a benefit or privilege for any reason, there are some reasons that it can't deny a benefit or privilege. And these would include the First Amendment limitations on the right of the Government to impose conditions on the receipt of a benefit which would burden the exercise of First Amendment rights.

I think that if you look at the comparison of the treatment of voluntary quitters who quit for good cause for reasons of in opposition if they leave because of discrimination, because of unsafe working conditions or for other unreasonable working conditions, they escape penalty completely.

People who leave in concert with others under the very same conditions --

QUESTION: Well, this strikes me as more equal protection, but perhaps I'm wrong.

MR. MCHUGH: Well, I think the case that best shows the associational nature that this Court has looked at is Citizens Against Rent Control v. City of Berkeley. Now, in that case, this Court examined an ordinance which limited individual contributions to committees to oppose ballot provisions of $250. However, an individual could contribute as much money as he wanted as an individual to the cause.

And the Court said well, since you're limiting only contributions from groups, it's obviously a regulation of associational activity. Now, it seems to me the same analogy holds here. What is triggering the disqualification is not the economic activity of striking or turning your back on employment. It is turning your back on employment with other people.

QUESTION: But in Citizens for Rent on the contributions, we had held in Buckley v. Moreno, as some people have said, that money is speech, and therefore there was probably an independent First Amendment ground in Citizens Against Rent Control to analyze the thing in First Amendment terms since it was regulating something that was the form of speech.

Now, do you think that those same grounds are here?

MR. MCHUGH: I think that there are other areas where you've looked at associational rights where it's not as clear. For example, in Speiser v. Randall, which I guess to some extent was a due process case, but has later come in, it seems

to me, to the First Amendment, that was the denial of a tax exemption -- and I don't think you particularly have a First Amendment right to get a tax exemption -- you just have a First Amendment right not to have the tax exemption conditioned on the foregoing of the exercise of First Amendment rights.

And I think that's where the Government misstates what the state of the law is. In terms of they are saying that since there's no direct prohibition on striking or on associational rights, it only regulates striking. Then the indirect effects, if you can call them indirect in the sense that they aren't on the face of the Statute, can be ignored. And I don't think that the District Court felt that that was true, because he recognized it even though it was burdening more than just the right to strike. It was burdening this associational -- the right to express your disagreement with your employer by leaving in association with others.

QUESTION: Mr. McHugh, I still don't understand whether you're urging just ordinary scrutiny or strict scrutiny when you begin talking First Amendment and associational rights, that doesn't mean anything different to me than just talking equal protection, unless what you're implying by that is that we have to examine with strict scrutiny whether the justification for this particular provision is valid.

You can burden associational rights, the Government can, if the reason is significant enough, but we will subject that reason to strict scrutiny. And that's what you want us to

do, isn't it?

MR. MCHUGH: I think I would like this Court to say that there's an associational element here and that the Government would have to show a substantial justification.

QUESTION: Strict scrutiny.

MR. MCHUGH: And they haven't even tried to do so.

QUESTION: So you are urging strict scrutiny, which brings us back to my prior question. Why don't we apply strict scrutiny to the National Labor Relations Act?

MR. MCHUGH: Well, one reason would be there you are not discriminating among certain kinds of associates, you're not saying that we are disapproving of a type of associational activity, you're only setting up a framework that's basically neutral or helping at least in adjusting the relationships between employers and employees.

But in this situation, you are dealing with a situation where it's the government viz a viz individuals and I think that that is perhaps one difference in the sense that the First Amendment primarily goes to limit governments and doesn't apply to the same extent when you're talking about the adjustment of relations between private parties. Because then you have other interests such as property interest, antitrust and other things that the Court has pointed to in the Lincoln Federal Labor case and other cases that the Government cites for this pervasive regulation of striking.

So it seems like to me that's what makes this case

different.

You have definitely indicated in your cases that where the Government does something directly in terms of acting on people in the associational context that that is different from where it's doing it by just letting it happen between private parties. For example, you've said in Thornhill v. Alabama, the Court said that it's one thing for the State to regulate the give and take of industrial combatants; it's another thing for the government to come in and limit the rights of speech in the area of industrial controversies.

And it seems like to me that that's the same distinction I'm trying to make here.

QUESTION: Does that suggest that all labor relations type laws of the first category have to be put in the same statute, and that Congress can't in another statute perhaps, a bill sent in by another department, they couldn't have a regulation of labor relations?

MR. MCHUGH: No. I just think this is not a labor relations statute and that was not really the purpose that Congress had. What they apparently were concerned about was -- or at least the proponents of this amendment were -- that people might be able to be at a better advantage and not have to settle labor disputes more to the liking of employers. But I don't think that that makes it a labor relations regulation just because it impinges on strikes.

Healy v. James is another case I think in the First

Amendment area is similar in terms of going to this indirect direct distinction that I'm discussing. There the Court looked at the non-recognition by a State university of a student organization and said that the fact that they couldn't use the meeting rooms or the bulletin boards at the University was enough of an impermissible burden on the right of association to be a serious constitutional problem.

In effect, what happened in Healy v. James was similar to the Government's subsidy argument, the University basically just declined to make available to the student organization, the same facilities that it normally made available to other student organizations.

I want to touch before my time is up on the subsidy funding argument. It seems to me that there are two things that make this case different from the medicaid abortion cases which the Government attempts to rely on. First of all, when you look at the comparison between voluntary quitters who quit for good cause and strikers who quit for identical reasons, there is no plausible explanation for that distinction other than the Government's disagreement with the viewpoint that's being expressed by the people who quit in concert with other people. And this is a First Amendment element that the Court has not permitted even in the subsidy area.

Secondly, in the abortion cases, the Court said that while government is under no obligation to remove obstacles not of its own making when people want to exercise protected

rights, in this case the obstacle was poverty. The Court still recognized in those cases that the government could not turn around and put an obstacle in the place of somebody because they exercised a protected right. And it seems like to me that that's a fundamental distinction that this Court recognized both in Mahere and in Harris v. McRae.

Clearly this is the situation here where the striker provision is triggered by the exercise of associational rights and is an obstacle placed in the path of strikers based upon their exercise of associational rights.

QUESTION: I don't understand your second distinction. Why is it different from the abortion disqualification is triggered by the fact that you're getting an abortion?

MR. MCHUGH: Well, the Court in the Harris case made the distinction basically saying that you have a range of medical services that are potentially available and the government simply withdraws funding from one of those but doesn't disqualify the woman from medicaid generally, that's different from the situation in Sherbert v. Verner where the person lost all their benefits. The Court made that distinction in footnote 19 of the Harris opinion.

And similarly here this really isn't a decision to --

QUESTION: In other words, this would be different if in addition to food stamps, you also had some other forms of subsidy like free hospital care and free bus ride and things

like that, then that would be like Harris against McRae?

MR. MCHUGH: Yes. I think if there was a range of services and one was being withdrawn it perhaps would fit more under Harris v. McRae. But this isn't really a situation --

I see my time is up. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. McHugh.

The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

DOCKET NUMBER: 86-1471

CASE TITLE: Richard A. Lyng v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America

HEARING DATE: December 7, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court and that this is a true and accurate transcript of the case.

Date: December 11, 1987

Margaret Daly

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