OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ET AL., Petitioners v. TIMOTHY A. BROWN

CASE NO: 89-1330

PLACE: Washington, D.C.

DATE: November 27, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

- X

INTERNATIONAL ORGANIZATION OF :

MASTERS, MATES & PILOTS, :

ET AL., :

Petitioners :

v. : No. 89-1330

TIMOTHY A. BROWN :

- X

Washington, D.C.

Tuesday, November 27, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

W. MICHEL PIERSON, ESQ., Baltimore, Md.; on behalf of the Petitioners.

PAUL ALAN LEVY, ESQ., Washington, D.C.; on behalf of the Respondent.

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General,

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

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 89-1330, the International Organization of Masters, Mates & Pilots v. Timothy A. Brown.

Mr. Pierson.

ORAL ARGUMENT OF W. MICHEL PIERSON

ON BEHALF OF THE PETITIONERS

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

This case involves the interpretation of Section 401(c) of the Labor Management Reporting and Disclosure Act, which places a duty upon unions to distribute, on behalf of candidates for union office, campaign literature upon their reasonable requests. In posing the issue of how to determine what is reasonable request, the case raises issues involving the competing policies underlying LMRDA, which are the furtherance of union democracy and the prevention of unnecessary interference with the internal affairs of unions.

We submit that the holding of the Fourth Circuit, which held that the MM&P's election procedure was not entitled to consideration in determining whether Respondent's request to distribute literature was

reasonable, not only unduly impairs the MM&P's right to govern its own affairs, but also ultimately is contrary to union democracy.

The case arose in the summer of 1988 when Brown, stating that he wished to be a candidate for president in the upcoming election of MM&P officers, made a request to the union to be permitted to disseminate literature prior to the convention, which was scheduled for August of 1988. The union denied the request based upon its longstanding election procedure set forth in its constitution, which provides that the right to mailing begins only when the ballot committee of rank-and-file members that runs the election is elected at the convention.

Brown brought suit under section 401(c). The case was heard 2 weeks later on a motion for temporary restraining order, and the district court held in favor of respondent. The court not only held that the focus should be on whether the request was reasonable, but that the rule itself was unreasonable. The case then went to the Fourth Circuit, which affirmed, expressly distinguishing precedent from other circuits, and the case came to this Court on petition for writ of certiorari.

Now, in determining how to construe section --

QUESTION: Mr. Pierson, I take it that the court of appeals did not reach the question of whether the

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district court was correct in finding the union rule unreasonable?

MR. PIERSON: It did not. The Fourth Circuit's opinion speaks only in terms of the legal issue, finding that it should consider --

QUESTION: And if we thought the rule were unreasonable, I guess we would --

MR. PIERSON: Well I, I submit that this is not the proper forum to determine the reasonableness --

QUESTION: You think it should be remanded --

MR. PIERSON: Yes.

QUESTION: -- to the court of appeals for that determination if, it has to be taken into consideration?

MR. PIERSON: That is correct. It seems to me that the proper course would be to remand to the Fourth Circuit for further proceedings consistent with this Court's opinion, because one of the subsidiary questions involved, assuming the Court does hold that the union's rule is entitled to be respected --

QUESTION: Well, apart from the rule, do you think there is anything unreasonable about the respondent's request to communicate before the convention?

MR. PIERSON: Our position in this case is based solely upon our election procedure, and we contend that the request --

QUESTION: Well, my question is do you think there is anything unreasonable about that request, apart from the union's rule?

MR. PIERSON: If we were litigating this case in another union that did not have that provision in the constitution, then -- well, let me back up for a moment, because this gets to one of the problems in the distinction between the Fourth Circuit's approach and the Third Circuit's approach, which is that a request is not reasonable or unreasonable in a vacuum. It seems to me that it is reasonable or unreasonable in the context of the union's elections procedures. So that I think a more appropriate answer to your question, Justice O'Connor, might be that it's not possible to answer the question of whether a request is reasonable or unreasonable, except as --

QUESTION: Well, if the union didn't have a rule, I suppose it certainly is possible to answer that question.

MR. PIERSON: If -- that is correct.

QUESTION: And my question to you is, absent the rule, is there anything unreasonable about the request?

MR. PIERSON: The -- we do not take the position in this litigation that we -- his request is unreasonable separate and apart from its relation to the union's rule.

QUESTION: What level of scrutiny do you think we need to apply in evaluating the union's rule, if it has to be taken into consideration?

MR. PIERSON: It seems to me that the Court should look at the circumstances of the promulgation of the union's rule, the circumstances of the union's election procedure, that is, whether there has been abuse of the type that LMRDA was intended to combat, entrenched incumbents who abused channels of communication with the membership, and also --

QUESTION: Well, is it a level of scrutiny of rationality, in effect? I mean, is there anything in particular about this scheme that requires any special level of scrutiny?

MR. PIERSON: Well, I would say that rationality is one aspect of it, but I would also say that if there is a showing that the rule was adopted solely to impair the rights of candidates to communicate with the membership -- now, I suppose that's an aspect of rationality because it goes to the question of what were the reasons for adoption of the rule and the circumstances of the adoption of the rule. But I would not see any reason for heightened scrutiny. It seems to me that the basic rationality test would be adequate.

If we begin with the words of the statute, the

statute speaks in terms of reasonable requests, and by fashioning that standard the statute imposes a duty upon unions to measure requests to determine whether they are reasonable or unreasonable. In performing that duty, we submit that it is far preferable for the union to have a rule that governs all requests. It eliminates any possibility of discrimination, it provides advance notice to all candidates of the conditions under which distribution of literature can be made, and it prevents manipulation of the election procedures by the incumbents in the granting or denial of requests. So that in terms of the statute itself, the statute does not preclude the adoption of a reasonable rule, and therefore we must look at the policy underlying the statute to resolve this question.

Now, it is certainly true that one of the policies underlying LMRDA was the prevention of abuse by entrenched incumbents, and Congress passed LMRDA in order to further union democracy in the face of evidence that was presented to the McClellan Committee of abuse by entrenched incumbents in a sample of unions that the committee examined. But the fact that that was one of the purposes of the statute does not necessarily say anything about the construction of section 401(c). There is nothing peculiar about section 401(c) in terms of

incumbents or insurgents. In fact, the entire statute, all of LMRDA, was passed for this very reason, that is to prevent abuse by incumbents because of evidence that incumbents had abused their advantages in a number of ways: not holding elections, disenfranchising significant portions of the membership, everything to violence.

Nonetheless, the balance of LMRDA, the sections other than 401(c), make repeated reference to union rules and union constitutions. In fact, throughout the statute there are no less than eight references to union constitutions. The statute requires labor organization to adopt constitutions. The statute provides that labor organizations may not impair members rights under the constitutions. The election procedures themselves make repeated reference to union rules that regulate the election procedure.

One of the ways that Congress intended to combat abuse by entrenched incumbents was by requiring adherence to union constitutions and union rules of procedure, and that is apparent from the structure of the entire act. So there is nothing peculiar about section 401(c). Section 401(c) is not the only section that affects the rights of insurgents or the power of incumbents to preserve their position in office.

QUESTION: Mr. Pierson, here we're talking about

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a very small fraction of what would be covered by union rules. We're talking about reasonable request of any candidate to distribute by mail or otherwise, at the candidate's expense, campaign literature. Since it's entirely at the candidate's expense and there is no monetary burden on the union, it's very hard for me to see how that could be an unreasonable request.

MR. PIERSON: Well, the -- the union power to regulate the election procedure might affect campaign requests in a number of ways. And it might affect campaign requests in a number of ways that could conceivably impose a burden upon one seeking union office. It seems to me that it is not sufficient to say that the only question in construing section 401(c) would be will it benefit the candidate or not.

QUESTION: Well, but, what -- what burden would there be on the union?

MR. PIERSON: In this particular case, Your Honor?

QUESTION: Yes.

MR. PIERSON: Well, this case is not simply about, from the MM&P's standpoint, Brown's request for literature. Brown --

QUESTION: Well, it is. We may lay down a more general rule, but it very definitely is about Brown's

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request. We decide the cases on the facts before us.

MR. PIERSON: I know, but what I mean to say is this, that Brown was not the only candidate running for office in the 1988 election, and the presidential election was not the only election being held there. The -- the election procedures in the MM&P constitution govern elections for all offices, that is, all the vice presidents, the convention delegates, and the procedure was set up to govern all of those contests. So that it may always be true in looking at a single request that one might say that granting this request will not burden the union. That does not, however, contradict the fact --

QUESTION: Well, what sort of -- let's apply a (inaudible) rule that you have to -- the only thing you can claim for yourself is what others could claim equally, without hurting anybody. What hurt would come to the union if numerous candidates requested mailing information and mailing at their own expense?

MR. PIERSON: Simply that it would impose a greater burden upon the union to grant those requests at a time before it has made the determination as to who is a bona fide candidate.

QUESTION: Well, so -- you're saying that, what, is it time spent by union employees that would be the burden?

MR. PIERSON: That's not -- no, we're not saying that's the sole burden, Your Honor. We are also saying that the union has an interest in ensuring that its literature distribution provisions are used only by bona fide candidates. And that is one of the things that was specifically in the legislative history and resulted in the section 401(c) being passed in the way that it was.

QUESTION: How do you define bona fide candidate?

MR. PIERSON: We would -- the MM&P constitution requires that candidates meet a number of requirements at the time they are nominated in order to be eligible. They have to -- there is a continuous dues payment requirement, so that a member must have paid his dues continuously in advance for the 2 years preceding the nomination. There is a requirement that a member serve under his license for a period of 180 days during the period.

QUESTION: Well, but these candidates, people who don't qualify, will ultimately be filtered out at some stage of the proceedings. I still don't see why, even if -- if a person who perhaps isn't ultimately going to qualify for the nomination, if that person wants to circulate campaign literature at his own expense, what harm that does to the union.

MR. PIERSON: Well, it seems to me that there is

an institutional interest in seeing that the right is not abuse. Now, the Department of Labor regulations provide that the union is not entitled to censor campaign literature and it is not entitled to see campaign literature before it goes out. So that if the -- if there were no rule regulating the distribution procedure and we simply provided that anybody at anytime, regardless of how close it is to an election, could come in and request distribution of literature, then that would be a way that would harm the union's interest in limiting use of the distribution procedure to bona fide candidates.

Now --

QUESTION: Well, you say, in other words, that only someone who can meet all the union's rules for nomination is entitled to have the campaign literature distributed?

MR. PIERSON: I am saying that the rule in this case, because it provides for the distribution right at a time when the ballot committee, an independent organization of rank and file members, has determined who is a candidate, that it is reasonable to draw the line there. That a line that is drawn in terms of the union's election procedure is more reasonable than -- what I'm saying is we're not talking about an arbitrary rule that somebody made up just to draw a bright line. Now, I am

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saying that that is one of the interests that the union has in enforcing its rule.

Another interest that the union has in this case is in enforcing a rule that was not made up by the officers, but was adopted as part of the union's constitution that was approved by the entire membership and is part of a detailed set of election procedures for regulation of the election and fits in with those. So that it really is a matter of extracting from that detailed procedure this one rule and carving it out, and that denies the interest that the union has in enforcing the entire election procedure.

QUESTION: Mr. Pierson, I -- do you -- is it your position that it's not even a close question, that the language couldn't be interpreted the way Mr. Brown wants to interpret it?

MR. PIERSON: The language of the statute?

QUESTION: Yes. I mean, it does say all reasonable requests. It just says shall comply with all reasonable requests of any candidate, and the difference is you say that means reasonable in light of the union rules, and Brown says it means just all reasonable requests, union rules or not. Now, I will concede that your interpretation is plausible. Is the other one not even plausible? And if it is -- just so you'll know where

I'm leading you, if it is plausible --

MR. PIERSON: I appreciate that.

(Laughter.)

QUESTION: -- why shouldn't we take the Secretary's interpretation, which I -- which I gather has been consistent, and why shouldn't we simply apply Chevron to his interpretation of this provision?

MR. PIERSON: Well that requires us to answer the question of what is the Secretary's interpretation. The Secretary wrote a letter at respondent's request concerning the request that was made in this case. That letter was not necessarily compelled or required by anything that's in the Secretary's regulations. In fact, the Secretary's regulations simply say that a union may not adopt a rule forbidding all requests. Well, that seems apparent from the express language of the statute itself that the union must grant reasonable requests. That the union should give advance notice to all candidates of the conditions under which distribution should be made -- will be made, which we submit furthers the idea of having a rule in order to give advance notice, and provides certain things regarding bona fide candidates, which regulation is based upon the Yablonski case, in which Yablonski needed the support of people in order to be nominated. And the Secretary, based on that,

phrased a regulation that said that a candidate may distribute literature before nomination. So that we submit that there is no consistent interpretation that governs the precise issue in this case.

QUESTION: The Secretary has filed a brief here that supports Mr. Brown. Do you deny that the Secretary has any business giving an interpretation of that provision, if he is asked. It comes within his administration, doesn't it?

MR. PIERSON: It does come within his administration, Your Honor. But I submit that the Court may determine the policies underlying the statute, and those policies have been determined and applied and identified by this Court in a number of cases, beginning with Calhoon v. Harvey, continuing through the Glass Bottle Blowers case, and all the way up through Sadlowski. And that the Court has clearly identified the policies, and this is not the date at which that history should be rewritten. The competing policies of LMRDA are clear.

QUESTION: Mr. Pierson, one of the points made on the other side was that Mr. Brown wanted other potential candidates to know in advance that he was serious in running himself, so that others in effect might stand by and not declare themselves, as long as they knew someone who espoused their position was going to run. Do

you take exception to that as a factual claim?

MR. PIERSON: That is certainly a possible interest of a candidate --

QUESTION: All right.

MR. PIERSON: -- in requesting a right to distribute literature. I --

QUESTION: So that the -- I'm sorry.

MR. PIERSON: I do take exception to any factual findings in this case because of the nature in which the case was tried in the district court and the fact that the district court would not permit us to put on evidence. But I don't take exception to that factual possibility.

QUESTION: Okay. All right.

The right, then, to circulate literature at the time Mr. Brown wanted to, would tend, or have a tendency to limit the possible field of candidates who come forward to challenge the incumbents, then. That would be fair to say, wouldn't it?

MR. PIERSON: That would be fair to say, Your Honor, yes.

QUESTION: So, the upshot of those two points is that if Mr. Brown and others like him are allowed to come forward and circulate literature at the time that they want to do it, there is reason to believe that challenges to incumbent union leadership will be stronger challenges,

and conversely, that the union leadership would have an interest in preventing challenges of such strength by the very rule that we have in this case. Isn't that fair to say?

MR. PIERSON: It is fair to say that the incumbent leadership would have an interest in denying such challenges.

QUESTION: They want a scattering of candidates rather than one or two strong candidates against them.

MR. PIERSON: But we -- where I take exception to your question, Justice Souter, is when you say "by the very rule that was applied in this case." We submit that what this case is about is the fact that this rule was not adopted by the incumbents, but is part of the union constitution. And that the very reason that we want this rule enforced is to prevent manipulation by incumbents.

QUESTION: But it's still the case, isn't it, that the -- that however adopted, this rule tends to favor incumbents, as against the rule, or lack of rule if you will, that the petitioner would have?

MR. PIERSON: Any type of rule might favor incumbents or favor insurgents.

QUESTION: But this one in fact has a definite tendency to do that, doesn't it?

MR. PIERSON: I don't know that that's a finding

or a conclusion that the Court can reach upon the state of this record. It seems to me that there is really insufficient factual development to say that this rule was adopted for or has that effect.

QUESTION: Well, I'm not saying that it was necessarily adopted with that motivation on the part of any individuals or segment of the union, but it seems to me that that is its natural tendency, and I'm not sure that we need fact finding for that purpose.

MR. PIERSON: It seems to me that it also could be said that any rule that places any restriction upon the right to distribute literature could favor incumbents. If you take respondent's argument to its greatest extent, which is done in one of the amicus briefs, I think, any rule that would prevent an incumbent from distributing literature 8 years in advance -- I mean an insurgent from distributing literature 8 years in advance would have an effect that might favor incumbents.

The statute, I submit, is not to be construed solely in terms of that, but in terms of the entire question of whether the rule promotes democracy or subverts democracy. One element in that is whether there is an undue advantage afforded to incumbents by virtue of the union procedure. But that is only one element, and I submit is not the only element that the Court should take

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into account. And it does seem to me that this would be -- - the advantage of the union's test would be that -- the first question would be is the rule unreasonable. We have never said that any rule should be enforced, regardless of whether it is reasonable or unreasonable.

Our position is we start with whether the rule is reasonable or unreasonable, and then it's up to the candidate to make some showing, a factual showing, that the rule either was adopted for the purpose of favoring incumbents, or that the rule has the effect of inhibiting democracy within the union, or that there is something else that is defective about the circumstances of promulgation or application of the rule.

QUESTION: Mr. Pierson, you carefully leave out "or the rule has the effect of favoring incumbents," because I take it in your response to Justice Souter you take the position that any rule favors incumbents. Is that -- are you really making that argument? I don't -- it seems to me if the rule simply said in the language of the statute, the union shall distribute the literature at the candidate's expense whenever a reasonable request to do so is made. That wouldn't favor incumbents.

MR. PIERSON: Well that, that would have other problems, though, because such a rule would then place in the hands of the incumbents, that is the union's officers,

the duty of determining on a case-by-case basis whether a request was reasonable or unreasonable.

QUESTION: Well, what's so hard about that? I mean, if he's not a bona fide candidate, you don't distribute the literature. If it is, and there's no particular problem, you distribute it. I don't see the problem.

MR. PIERSON: Well, it does seem to me that no one in this case, including the respondent and the United States, has contended that there are not some unreasonable requests, that the statute does --

QUESTION: Sure, I say there are, but you don't have to distribute then. But you have to decide whether the request is reasonable. The statute compels you to do that.

MR. PIERSON: The statute compels you to do that.

QUESTION: Right.

MR. PIERSON: The statute does not tell you how to do that, but the statute does compel you to do that.

QUESTION: That's right.

MR. PIERSON: Yes.

QUESTION: I don't understand your point. It seemed to me you were saying to Justice Stewart -- Justice Souter, that any rule would favor incumbents. I don't

follow that.

MR. PIERSON: Well, what I was saying was that there are a number of ways in which a determination could favor the interest of an insurgent candidate, but that democracy is not simply equivalent to whether the insurgent candidate is hindered or helped. And that has been made the sole constructional factor in the statute by the approach that has been taken by the respondent in this case. That it's simply a question of does this help the insurgent, and if so, that is the way the statute has to be construed.

QUESTION: I don't understand them to -- arguing that. I thought if they say it's a perfectly neutral rule, that either incumbents or non-incumbents can make reasonable requests, and when a reasonable request is made it shall be granted, regardless of whether it's an incumbent or an insurgent. I don't think it has to be pro-insurgent.

MR. PIERSON: Well, they are saying that any rule -- that any interpretation of the statute that gives any sway to a union rule necessarily favors incumbents. They are saying that the focus cannot be on the union rule, and that if it is it favors incumbents.

With the Court's leave, I respectfully wish to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Pierson. Mr. Levy, we'll hear now from you.

ORAL ARGUMENT OF PAUL ALAN LEVY

ON BEHALF OF THE RESPONDENT

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

The question here is this. In deciding whether a union has satisfied its statutory duty to, in the words of section 401(c), comply with all reasonable requests from any candidate to mail campaign literature at the candidate's own expense, should a court focus, as the lower courts did and as the Secretary of Labor agrees they should, on the question whether the request itself is reasonable in light of all the circumstances, or does the case stand or fall on a determination of whether the request satisfies a union rule, and whether that union rule is reasonable in its general application.

QUESTION: Mr. Levy, in your first suggestion as to how the rule should be -- the statute should be interpreted, you say that is the request reasonable in the light of all the circumstances. Would one of the circumstances be the existence of the union rule?

MR. LEVY: I think there are circumstances in which the existence of a union rule is something that it would be useful for the court to consider, and indeed,

although the district court focused squarely on the reasonableness of the union rule, even the court of appeals took note of the union rule and also noted that it had an adverse effect on the ability of insurgents to run for office.

QUESTION: I mean, supposing there's a request for literature distribution as of July 1, and the union rule says we're not going to distribute any until July 10, and the election is a year away. That might affect the reasonableness of the request, might it not?

MR. LEVY: I don't know that the existence of the rule would affect the reasonableness of the request. It may be that one would look to the circumstance of how far away the election is in determining the reasonableness of the rule, the reasonableness of the request, although I would say, I would argue that the fact that the election is a year away would not necessarily make the request unreasonable, regardless of the existence of the union rule. But I don't think, in square answer to your question, that the mere existence of a union rule on that question would provide much if any assistance to the court in deciding whether the rule was reasonable.

On the other hand --

QUESTION: What if the union rule says requests to distribute -- it's a big job -- requests shall be in

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writing to prevent any confusion, and a particular candidate comes up and orally tells the president of the union I'd like to have this mailed out?

MR. LEVY: It seems to me that that kind of a rule goes to the union's administrative burden in dealing with a request and possible ensuing litigation --

QUESTION: Right. And so do some time rules, the one that the Chief Justice just posited. We don't -- we want to make as few mailings as possible, and --

MR. LEVY: We want to make as few mailings as possible, I would argue, is not an admissible reason for not making particular mailings. On the other hand, if --

QUESTION: I see, so some rules are okay and some rules are not okay? You can have rules that limit -- that limit the request. You would have to comply with the rule that it be in writing, even though the request is otherwise reasonable, it would have to comply with that rule?

MR. LEVY: I believe that with respect to that hypothetical, that given the union's need to be sure -- I don't know what the union's argument for that particular rule would be.

QUESTION: So it depends on how good the union's argument is. So if the union has a good enough argument

for a time limit, then that would be all right too?

MR. LEVY: No, our position is this. That if the union can point to particular administrative burdens which have to be satisfied with respect to any rule, I would not have the Court let the union decide whether there are such administrative burdens. That, it seems to me, is a question for the Court to decide itself in judging the reasonableness of the request.

But if we hypothesize that there's an administrative burden, for example, an amount of time to put out a mailing, so that the union says we need a request 2 days in advance. And the union says this is the way we are going to deal with the administrative burden, and there are a variety of ways we can deal with the administrative burden, each of which makes it somewhat more difficult or delays the making of the request. And the union announces in advance, this is the way we are going to do it. And the candidate ignores the union's announcement in advance that this is the way we're going to handle this kind of problem, I would allow the union, perhaps, to make the judgment that this, as opposed to that equivalent way of meeting the burden of making requests, is appropriate. And the fact that the union had announced its procedure in advance would be of assistance to the court ultimately in deciding whether the request

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was reasonable.

Now, I'm not sure how I would apply that to the particular rule that you hypothesize in your question, because I'm not sure what the administrative burden argument is that the union -- in either case, whether it's a reasonable rule or a reasonable request, the court is going to have to decide is the request reasonable. But I'm not sure what argument the union would make in favor of that particular procedure, whether it be called the union rule or otherwise, in advance of making a request.

I don't know if I have answered your question.

QUESTION: I don't know either.

(Laughter.)

MR. LEVY: One point before I turn to how I would answer the question that I posed at the beginning with respect to the factual posture of the case. We filed the motion for a preliminary injunction and a motion for a temporary restraining order. We put in affidavits; they put in affidavits. At the beginning of the preliminary injunction hearing -- and I might add one of the points made in the affidavit which is uncontradicted to date was that one of the reasons Brown wanted to do his mailing at the time he did was to tell other people that he was running.

At the beginning of the hearing the union said

we may be able to solve -- resolve this case on the record as it is, but if there are factual conflicts we reserve the right to put on evidence. The union never disputed that fact, it never disputed the fact that the union, the incumbents had used the union newspaper, not abused it, just used the union newspaper to communicate their views and exclude the views of others.

So we don't think that to the extent that the Court finds it necessary to get to the question of whether the rule is reasonable, we don't think that the state of the record is a bar to the Court's deciding the case on the record as it stands.

The union also, although Mr. Pierson, I don't know whether he finally answered your question. It certainly attempted to equivocate in answer to Justice O'Connor's question, the union has never argued in this case that the request is unreasonable except insofar as it contradicts a rule which it regards as reasonable.

We think that the language of the statute decides this case. The statute does not require members to comply with, quote, "reasonable union rules." It requires unions to comply with all of a candidate's reasonable requests. We think this language of the statute could not be clearer, particularly in light of the fact that there are, as Mr. Pierson points out, other

parts of the statute which do refer to reasonable union rules and which subject rights to reasonable union rules. Congress chose not to do so here.

The union makes a variety of arguments about why it would be a good idea to focus on the reasonableness of the union's rules, but the fundamental objection to that argument is that that is not what Congress said to do. And what they really want the Court to do is to rewrite the statute in that respect.

Moreover, focusing on the reasonableness of the request rather than on the union's rule is also supported by Congress' purpose in passing this part of the statute. Congress recognized that union candidates have special problems in communicating with the voters, and it enacted section 401(c) to help candidates overcome those disadvantages. And to understand why it's appropriate to look at the reasonable -- inappropriate, excuse me, to look at the reasonableness of the union rule in deciding when the right to do a mailing should be limited, it is important to appreciate the serious communications problem that an insurgent candidate faces.

Unlike a public election, the complete list of voters is secret. Only the union has it. And unlike a public election, the union leaders, in addition to being in constant contact with the membership in the course of

their duties, also control the union newspaper, which they use to communicate their views on union affairs and to trumpet their successes on the members behalf, which they do year in and year out. Union newspapers do not provide campaign coverage, as the public press does with respect to public elections. And, at least in most unions, a candidate cannot buy advertising space in a camp -- in a union publication.

Finally, the union members are widely dispersed through the general population. Admittedly in this union the problem of dispersion is somewhat extreme, but the problem exists to some extent in every union. And to reach all the voters by -- through the public media, a candidate would have to buy space or time in media which are disseminated to the general public, and particularly in a national election, that would be a prohibitive cost. So it can --

QUESTION: All of that goes to show that this is an unreasonable union rule.

MR. LEVY: No. It goes to show that, but it also goes --

QUESTION: Isn't that your real complaint here? Given, especially given the nature of your union, which, many of its members being off at sea for months at a time, that this is an unreasonable rule?

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MR. LEVY: As we argued in opposing cert in this case, this case can be disposed of on the ground that it is a patently unreasonable rule, and maybe you should wait for a better case to decide this question of whether you look at the reasonableness of the rule or the reasonableness of the request.

But the points I am making also go to the question of how you should construe the statute. What we're arguing is that because section 401(c) was a remedy for the problem that I have just described, it should be construed in a way which helps to even the playing field. Adoption of the union's approach, we submit, would make it far more difficult for union members to exercise the right to do campaign mailings. And there are three reasons why that is so.

First, the union concedes that its approach establishes a presumption that the union's rule is proper, and it is up to the candidate to establish that the union's rule is unreasonable. So under the union's rule, approach, which they set forth in their reply brief at page 11, some requests which are otherwise reasonable could be denied because the union has a rule which is reasonable in its general application. The fact that a particular candidate has particular needs could not be considered.

And so the question is whose interests should receive deference in the close cases, which we submit this is not. In the close cases, whose interests should receive deference? It's close cases where deference makes a difference. Should it be the interests of the union leadership in denying a mailing, or should it be the interest of the candidate in having it done?

And what we argue is that because it is so clear that this part of the statute was meant to favor challengers by providing them with a vital means for overcoming the advantages of incumbency, and because the market provides a strong incentive for candidates not to make unreasonable requests. They have to pay for the mailings, so they're less likely to make a request for mailing where they don't really need it. It is most consistent with the congressional purpose in those circumstances to tip the balance in favor of the challenger, and hold that it is the challenger who has the power to make any request within the range of reasonableness, rather than that the union has the power.

QUESTION: Mr. Levy, the Secretary says that she is entitled to deference in interpreting the statute, and yet one of her regulations says that in order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of

the conditions under which distribution will be made, and promptly advise them of any change in those conditions. Now, does that, in your view, enable unions to establish a range of conditions that have to be considered in evaluating the reasonableness of a request?

Some of them might include the things mentioned by the Chief Justice, for instance, 2 days' notice so we can assemble a list, or, as Justice Scalia suggested, in writing. And maybe another could be payment in cash in advance of the mailing of the cost that we determine it will entail. Now, are those things subject to union rule, if you will? And must those things be considered in evaluating the reasonableness of the candidate's request?

MR. LEVY: Let me answer that question in two ways. First with respect to how I understand the Secretary's rule and, second, a more general response.

I understand the Secretary's regulation to say that unions, to the extent that they have established procedure, should provide notice of those procedures. But the Secretary does not anticipate fixed, unchanging rules, because the very same regulation says, and if you change the procedures, be sure you send out notice. So it doesn't -- the Secretary obviously doesn't anticipate a fixed, unchanging rule, but rather procedures --

QUESTION: Well, that might mean if you change

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your rule, let us know.

MR. LEVY: The second point -- the second point is that, with respect to the kinds of procedures or rules, if you were, that you are describing, those kinds of rules, because they deal with administrative burdens which have to be handled some way in connection with any request, given the statutory, for example, requirement of payment for the mailing, my arguments about adopting a non-deference to the union rule approach because it would disserve the purpose of the statute would not apply to those kinds of rules. But with respect to the rule which says you simply can't, no matter how much notice you give us, do a mailing at a certain amount of time before, more than, say, 10 days before the ballots go out, or the few days which are allowed by the current union rule. With respect to that kind of rule, the argument that I make fully applies.

I don't know if I --

The second problem with the union's approach is that every time a union member wanted to challenge the denial of a mailing request he would have to show that the union's system with respect to mailing requests as a whole was unreasonable, or he would have to show that the rule had been misapplied, subject, at least according to the union, to the rule that you defer to the incumbent's

interpretation of their own constitution.

Now, especially because the union member has to hire his own lawyer -- the union, of course, is defended by union counsel at union expense -- it would be very difficult to make that kind of proof in the context of a preliminary injunction hearing. with the election looming, these burdens would make it difficult, in our judgment, for the court to, in Senator Javitz's words, act and act in time, except in the most egregious of cases, which again, I would emphasize we think this is.

So that's another way in which the union's approach, focusing on the reasonableness of the rule, disserves Congress' purpose of helping challengers to make mailing requests when they need them.

QUESTION: You would rather have the challenger fight each request case by case instead of being able to proceed under a rule which, if he complies with, he knows that his request will be deemed to be reasonable?

MR. LEVY: There is going to be a rule in either case.

QUESTION: Why is there going to be a rule?

MR. LEVY: Whether it is --

QUESTION: If I were -- if I were union management with the bad motivations that you posit, I simply wouldn't have a rule, and say okay, you want to do

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it this way, we'll judge case by case whether it's reasonable. Go hire a lawyer each time.

MR. LEVY: There is going to be a rule in either case because the rule is going to be set by the union leadership, or the rule is going to be set by common law adjudication of all of these cases, or the rule is going to be set -- the rule of what is reasonable is going to be set perhaps by the Secretary's regulations. The question is do you give deference to the union in adopting a particular rule.

If a union wants to cabin the incumbent's discretion, it can do that. That is to say prevent the incumbents from enforcing or adopting a rule which would make requests otherwise reasonable -- excuse me, requests otherwise unreasonable, permissible. The union could do that.

What the union can't do is use the power to make rules, at least under our approach, to prevent candidates from making requests which would otherwise be reasonable.

QUESTION: But don't you want to concede that the rule should be given deference so long as the rule does not have a tendency to disfavor insurgents?

MR. LEVY: I don't know that it's the tendency to favor -- to disfavor insurgents that's necessary, because if that's the rule, then every time somebody comes

in with a challenge to your denial they have to prove the tendencies are the general rule in the context of a preliminary injunction hearing.

QUESTION: Thank you, Mr. Levy.

Mr. Feldman, we'll hear now from you.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

The position of the Department of Labor in this case is that section 401(c) of the LMRDA means what it says when it states that unions, quote, "shall be under a duty to comply with all reasonable requests of any candidate to distribute by mail or otherwise, at the candidate's expense, campaign literature." One thing I'd like to point out that is something as an aside to the argument so far is that that language was in the original version of the LMRDA that was reported out of the Senate Committee. It was later embodied by Senator Javitz with other language that he added that became the current section 401(c). But the particular language that is at issue in this case was from the original bill that was reported out of committee.

QUESTION: Mr. Feldman, I hope in the course of

your remarks you will tell us exactly what it is we need to defer to the Secretary on, and whether there is room in this scheme for union regulations of such things as all requests will be made in writing, they will be made 2 days in advance of the date for mailing, and it will include -- you will have to pay us in cash or postal money order, or something of that sort, in advance.

MR. FELDMAN: Okay, let me take the first question first. The Secretary's view that the focus of the statute, as the statutory language indicates, is on the reasonableness of the request, is a consistent view that, as the materials that we have lodged with the Court show, dates back as long as 1960. Now, it's true that at that time the particular issue of whether a reasonable rule can trump an otherwise reasonable request had not yet arisen.

But when that particular application of the general principle arose, starting in the mid-1980's, the Secretary took the position, for instance in the Third Circuit Donovan against Carpenter's case, that the issue, the ultimate issue, the one and only test that section 401(c) imposes is whether the rule -- is whether the request is reasonable. And then it indeed formed the basis of letters that the Secretary wrote in this case and the briefs that we filed in this Court.

Now that position -- really the only substantial argument that that is not a clear position is that there is another regulation, 29 CFR 452.67, that says, quote, "It is advised that a union inform all candidates in advance of the conditions under which distribution will be made." First of all, that doesn't speak specifically of rules. And secondly, the purpose of having unions give such advice to candidates, it can serve a number of different functions under the statute. For one thing, and I think that's extremely important, it can provide a safe harbor to everybody involved to know under what circumstances a candidate can get --

QUESTION: Well, the fact is it's desirable for everyone to know requests have to be made in writing or not, they have to be accompanied by payment or not, they have to give at least X number of days' or hours' notice or not. That's important, isn't it?

MR. FELDMAN: Yeah, well --

QUESTION: Now, does the Secretary leave room for a union to establish those administrative requirements by rule?

MR. FELDMAN: I think the answer is yes. In other words --

QUESTION: And if so, and a court is faced with, or a union, with deciding whether a request for campaign

mailing is reasonable, should it take into consideration the existence of that kind of rule?

MR. FELDMAN: I think the existence of the rule can be helpful in a number of different ways. First of all, insofar as there are genuine administrative constraints that a union is operating under, and if the union -- if the union rule points attention to that -- to those constraints, then indeed a court will certainly take notice of those constraints and will take the rule into account in judging whether a particular request is reasonable.

QUESTION: And the Secretary thinks that's appropriate?

MR. FELDMAN: Yes.

QUESTION: And is not asking us to not interpret it -- well, is not telling us that those kinds of rules may not be considered.

MR. FELDMAN: In fact we are not saying -- we are saying all rules can be considered. The question is what exact way, and how are they, do they fit into the calculus. Our answer to that is, first of all they can provide a safe harbor to let people know how they can get requests granted. Secondly, they can also -- there is nothing in the statute which prohibits a union from granting requests that a court might find were

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unreasonable, so long as it operates on a non-discriminatory basis. So unions --

QUESTION: Let's take a concrete case. Suppose, somebody gave this instance earlier, of somebody who wants a mailing sent out on July 1, and the union rule says we won't send out anything until July 5th.

MR. FELDMAN: I think --

QUESTION: You know, I'd say, gee, that's pretty unreasonable. You know, the union says we'll send it the 5th, you want us to go through this whole separate mailing just for 4 days' worth. Don't be unreasonable; let us send it out on the 5th. Isn't that -- can you use the rule that way?

MR. FELDMAN: I think -- well, in each case the question is whether the request was reasonable. If the election were being held on July 6 --

QUESTION: Well, the request is thoroughly reasonable if the rule doesn't exist, but given the rule, it seems unreasonable.

MR. FELDMAN: The question -- I think that first the question is whether the -- if the election were held on July 6th, such a rule --

QUESTION: No, no, no. The election is in the fall. It's in October.

(Laughter.)

MR. FELDMAN: If you're talking about the election --

QUESTION: The election is in October. He wants it mailed on the 1st.

MR. FELDMAN: Well, if there is a genuine administrative constraint that the union is operating under --

QUESTION: No administrative constraint --

QUESTION: I don't think you're answering these questions, Mr. Feldman, either from Justice O'Connor or from Justice Scalia. You have been asked twice is the union rule a factor that may be taken into consideration in deciding whether the request is reasonable. Now that can be answered yes or no.

MR. FELDMAN: The answer is yes. Let me -- let me try to explain it this way. Insofar as -- the question is whether the -- the question in each case is whether the request is reasonable. Now, if the union rule, for instance, serves a purpose of publicizing a administrative constraint that the union might be operating under, and if there is some reason why the union -- well, is the question whether -- I'm not sure I understand the question.

QUESTION: There's no constraint. It just has -- the union doesn't want to have to come in and prove a

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constraint. It just says we -- it's easier for us, we can live with the -- we could do the July 1, yes, of course. But it's easy for us to know that we get geared up for July 4th. And this fellow is just, you know, for whatever reason, his horoscope or anything else, he says July 1 is when the mailing has to go out.

And you, if I understand what you have been saying to both me and Justice O'Connor, the rule in and of itself cannot be taken into account. It is only the constraints that justify the rule that can be taken into account. Isn't that what you have been saying?

MR. FELDMAN: That is right.

QUESTION: Why don't you say it clearly?

MR. FELDMAN: Okay, but with one exception. That the union, occasionally there may be rules that by publicizing a certain constraint may make the difference between the judgment of whether a request is reasonable or not. For instance, we give the example in our brief of where a union maintains its membership lists on cards, and needs to take those cards out to send out the election ballots during a certain period of time.

Now, in the absence of a rule it may be perfectly reasonable, where no one knows what that time period is, for a candidate to request that a mailing be done during that time, especially if it's close to the

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election. Where the union has a rule, publicizes that fact, in that case the candidate reasonably wouldn't rely on getting his mailing done during that period and the request may be unreasonable. So the union can serve -- the rule can serve the function of publicizing a condition that exists, and therefore affect the reasonableness of a request.

But in each case the ultimate question is whether the request is reasonable, and in each case, there is no case -- well, there is no case in which a request which is reasonable is made unreasonable just by the fact that a union has adopted a rule. It's, the fact that it's publicized may make a difference.

QUESTION: Well, if we determine that you look first to the reasonableness of the request, that's the focus of the statute, and that one factor in the calculus of reasonableness is to look at the union rule and to look at its reasoning and its purpose, if that's what we hold, do we have to remand in this case?

MR. FELDMAN: I am not sure -- if you agree with us that the --

QUESTION: Well, as I understand the court of appeals, it said we look just to the reasonableness of the request. We don't look to the reasonableness of the rule, even as one of the determinants in evaluating the

statutory sufficiency of the request. Now, if we disagree with that and say that the rule is one of the factors you look at in this calculus of reasonableness, then don't we have to remand?

MR. FELDMAN: I don't think you have to remand, and I guess I also don't read the court of appeals' opinion to quite have said that. I think the court of appeals said the ultimate question is the reasonableness of the request, and there is no doubt that in this case that request was reasonable, no matter what factors would have been shown about the rule and its application in other cases. And therefore there is nothing left to decide on a remand.

And I think that is perfectly consistent with what the district court did. In fact, the district court, I thought, summarized the issue up clearly. It said, "Although a union certainly may, indeed should, adopt a rule known to all candidates in advance setting forth the terms and conditions under which mailings will be made, in evaluating the validity of the rule a union must inquire not simply whether the rule may be said to be reasonable, but whether its application results in the rejection of a reasonable request."

QUESTION: Thank you, Mr. Feldman.

Mr. Pierson, do you have rebuttal?

REBUTTAL ARGUMENT OF W. MICHEL PIERSON

ON BEHALF OF THE PETITIONERS

MR. PIERSON: Yes, Mr. Chief Justice.

The argument in the district court in this case, it is clear from a review of the transcript, proceeded solely upon the legal question of how to determine whether a request was reasonable, that is by reference to the rule or otherwise. And in fact, the first thing that the union tried to show at the time of the hearing was that respondent had made other communications with the membership and had other channels of communication, and then the case immediately went off on the discussion of how to construe the statute.

We therefore submit that if this Court should agree with our position a remand is necessary, and that this Court cannot determine the reasonableness of this rule upon the face of this record.

With respect to the test in terms of the statute itself, it seems to me that two things are apparent. Number one that, and I do not mean to equivocate in answer to a question, but the argument that there is an intersection between reasonable rules and reasonable requests, and that applying the union's approach will result in the denial of reasonable requests because of the rule, really is not the way that the section intends.

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What I mean is this, that it is impossible to determine whether a request is reasonable or unreasonable without looking at the context of the union's election procedure, and therefore it is meaningless to talk about whether a rule is reasonable in the abstract. And that what the district judge did in this case was meaningless, because he said I find per se that this request is reasonable.

Second, it also seems apparent that any rule that can be posited could work a disadvantage to an insurgent candidate, regardless of whether it's a rule that deals with the timing of requests, regardless of whether it's a rule such as in the Provision House case from the Ninth Circuit that says that requests have to be in by a certain date in order to mail literature. Any rule, no matter what the reasons for that rule, may have some impact upon the candidate's ability to conduct a campaign. That, however, is not the only factor in determining whether the statute is complied with or not.

And the test we propose that looks at the rule first, that permits the candidate to show that it is unreasonable, based upon a variety of factors, effectuates not only the union's reasonable interest in governing its own elections, but also the candidate's interest in that he permits -- it permits him to show that somehow there has been abuse or somehow the rule does unfairly impede

democracy.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pierson.

The case is submitted.

(Whereupon, at 11:07 a.m., the case in the above-entitled matter was submitted.)

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BY Rodgerstuart Hunter

(REPORTER)