OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SUMMIT HEALTH, LTD., ET AL., Petitioners

v. SIMON J. PINHAS

CASE NO: 89-1679

PLACE: Washington, D.C.

DATE: November 26, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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SUMMIT HEALTH, LTD., ET AL., :

Petitioner :

v. : No. 89-1679

SIMON J. PINHAS :

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Washington, D.C.

Monday, November 26, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

J. MARK WAXMAN, ESQ., Los Angeles, California; on behalf of the Petitioner.

LAWRENCE SILVER, ESQ., Los Angeles, California; on behalf of the Respondent.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; amicus curiae on behalf of the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 89-1679, Summit Health, Limited v. Pinhas.

Mr. Waxman.

ORAL ARGUMENT OF ROBERT J. MARK WAXMAN

ON BEHALF OF THE PETITIONER

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

The principle to be applied in this case is that jurisdiction under a Section 1 of the Sherman Act requires an allegation and if controverted proof that the restraint alleged to have been imposed by the defendants has as a matter of practical economics a not insubstantial effect on interstate commerce. Accordingly it is not sufficient to allege for jurisdictional purposes has Dr. Pinhas has only that either the plaintiff or the defendants are engaged in interstate commerce. Petitioners believe this principle stems from the plain language of the act, the purposes for which it was enacted, the case interpreting the act including the claim, and the extent of congressional power under the Commerce Clause.

We start by looking at the plain language of the act. Section 1 prohibits those conspiracies in restraint of trade or commerce among the several states. The

purpose of that language at the time it was enacted was to allow the Federal Government to supplement the acts of state in regulating anti-competitive activities which individual states could not, namely anti-competitive activities which went beyond the state and went from state to state.

As this Court held in its early decision Apex Hoisery, the addition of the words were commerce among the states was the means to relate the prohibited restraint of trade to interstate commerce for constitutional purposes so Congress could penalize restraints involving or affecting interstate commerce which it perceived as the reach of its power under the Commerce Clause.

As this Court went on to note in the Frankfort Distilleries case, this results in an obvious distinction between a course of conduct wholly within a state often referred to a purely local and conduct which although local in an inseparable element of a larger program which depends for its success upon activity which affects commerce among the several states.

The import of the precise language of Section 1 has been highlighted in a number of decisions by the Court. Most notably in Gulf Oil Corporation v. Copp Paving, a case which the Court relied upon in its subsequent decision in McLain. In that case, the Court

drew a distinction between the language of Section 1 of the Sherman Act and the language of the Clayton Act. It held that the words, restrain of trade or commerce among the states, meant that the jurisdictional reach of Section 1 was keyed directly to effect on interstate markets and the interstate flow of goods. And the import in that case was Justice Marshall's concurrence in Gulf Oil where he noted that the phrase, among the several states, embraces all commerce save or except that which is confined to a single state as it does not affect other states.

In so holding the Court went on to state that as a result of its provisions, a jurisdictional inquiry under the Sherman Act was to be a particular one focusing on the facts and circumstances presented in each case. The reason for that particularized determination was the need to identify a specific restraint because Congress was regulating restraints which were among the states. That need would not exist if all that was required was to point to something that was called a line of commerce or a class of activities to create jurisdiction. It would be as if this Court simply read out of the act the words or -- among the states and commerce among the states and simply said that this was an act to prohibit restraints of trade period. That is not what the act says and its plain language requires more.

It is the language of Section 1 which also distinguishes its reach from other cases where Congress itself, other statutes where this Court has considered, that Congress itself has defined the specific persons and activities that affect Congress and therefore, their effect -- excuse me -- they affect commerce and therefore require Federal regulation.

If we look at cases such as Perez v. United States, Russell v. United States, even Heart of Atlanta, Wickard against Filburn, those are all cases where Congress has engaged in specific fact finding to find that the cumulative effect of some particular evil has an affect on interstate commerce. A general statute such as the Sherman Act has not been accompanied by specific congressional findings to the effect that a class of activities in particular has an effect on interstate commerce. And that's why under Section 1 of the Sherman Act, it is required to engage in a case by case review of particular allegations and particular complaints to see whether in fact there is a restraint which significantly, substantially, and adversely affects interstate commerce.

QUESTION: Mr. Waxman, what, what do you do about our opinion in McLain? Didn't we say there that all that had to be shown was a logical connection, not, not between the particular activity at interstate commerce but

that between -- I mean the particular offense, but rather between the business activity in general and interstate commerce, namely brokeraging*?

MR. WAXMAN: Well, I don't real McLain that way.

QUESTION: You don't?

MR. WAXMAN: I think the way I read McLain is that the Court looked at a situation which involved a brokerage for four years in New Orleans and looked at an alleged conspiracy to fix commission rates which are part of the price. And the price would affect the volume of sales and the Court engaged in some detailed fact finding actually based on a real record to say that that volume of sales affected interstate commerce as a result of financing from out of state or title insurance that came from out of state. So I think factually one can distinguish McLain on that basis.

Admittedly there is language in McLain which we find to be ambiguous, for example, and does talk about general activities in the brokerage business or the general activities of one of the parties. However, I don't believe that that is the actual test that McLain established. Indeed, Chief Justice Burger at the time specifically towards the end of the opinion restates the Federal jurisdictional requirement that there be as a matter practical economics a not insubstantial effect on

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interstate commerce by the restraint that has been allegedly imposed by the defendants.

So in the case McLain the restrain that was allegedly imposed by the defendant was a conspiracy to fix an inseparable part of the price of real estate and that price fixing activity would affect as the Court found by looking at the actual facts in question that title insurance coming in from out of state in very significant volumes of commerce. This was a case that involved real estate brokers throughout New Orleans over a period of 4 years.

I think it's also note worthy in looking at the McLain decision itself, several things to indicate that McLain did not attempt to set a new rule. I think some commentators have suggested that it did set a new rule.

First of all, the cases relied upon by McLain are for example Gulf Oil, Goldfarb, Trustees of Rex, were clearly no nude* rule was at work in those cases. In addition, the Chief Justice at that time judge -- joined Justice O'Connor's concurrence in Jefferson Peers* v. Hyde* which in footnote 5 specifically says that there's got to be an effect on commerce for there to be Section 1 jurisdiction.

In addition, I think that the practice this Court has engaged in over time is to stand by a settled*

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authority which would say that you leave statutory interpretations with respect to jurisdictional scope in place and leave the task of modifying that scope to Congress. There's no indication in the decision in McLain that this Court was attempting, if you will, to supplant Congress and in Petitioner's view amend the statute to read out the words, among the states. So I would distinguish McLain first by say I think it is distinguishable from the facts of this case.

Second, I think the plain reading of McLain and the activity that was actually engaged in by the Court shows that the Court simply didn't identify real estate brokerage activities as an activity and say, we need go no further. The Court I think went through great pains to say the activity we're focusing on is price fixing and how does price fixing affect real estate transactions. So I don't believe McLain stands for a position contrary to that which is being urged by the Petitioners in this case.

QUESTION: Price fixing in general or price fixing in this particular case with respect to these particular real estate transactions?

MR. WAXMAN: I'm not sure I understand the import of the question. What was the focus of that case was price fixing in commissions by all the brokers in New Orleans for a period of 4 years. So they focused on that

particular transaction and found, in at least my reading of the case, found that that was part of setting the price. So if the brokers commission is part of the price and if you're going to affect the price, you're obviously going to affect the volume of sales. And the Court felt -- inclined even to go beyond that and say, well, what difference did it make? The difference it made were hundreds of millions of dollars of out-of-state financing, title insurance, and so forth. So it obviously went further than that to reach the result.

As I mentioned I think that McLain also is consistent with the cases that preceded it and the 2 cases of great import that preceded were Goldfarb and Trustees of Rex Hospital.

Now in Goldfarb the Court went to great lengths to examine the particular transactions in question, that was the legal services involved in that case, to find that those specific legal services were coincidental with the interstate real estate transactions in terms of time, more importantly in their view, in terms of continuity.

The critical reason for that determination was the need to distinguish essentially local restraints which would have nothing to do with interstate commerce and the specific real estate services provided in that case which did affect interstate commerce. And this conclusion I

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believe is made clear by the language in Goldfarb which specifically recognizes that there may well be legal services which have no effect on interstate commerce. If one need only identify legal services as a line of business or a class of activities that affect commerce, there would have been no need to first trace the particular relationship of the activities in question in that case with interstate commerce or to go on and say that there may well be legal services which may have no effect on interstate commerce.

QUESTION: Mr. Waxman, I, I want to ask you a question on McLain, following up on Justice Scalia's question. There is some rather specific language there at page 242 of 444 U.S. -- it says, petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates. And the sentence before that says, it, it's enough if you're showing a substantial effect on interstate commerce generated by the brokerage activity. Now, it seems to me those 2 sentences certainly are, are not themselves ambiguous, that you, you can show it by showing the activity that the plaintiffs, rather that the defendants are in. You don't have to show that the actual restraint affected interstate commerce.

MR. WAXMAN: Well, I read that language in the

context in which the case was brought. Brokerage activity was the activity which was affected by the conspiracy in that case. It was the activity which was the price fixing conspiracy itself. In addition, I also read the language to focus on a slightly different point which is that in order to make the jurisdictional showing you need not prove your case. You need not prove that there was an actual effect or a specific, particular effect which was successful. And read in that context, I don't believe that this language changes the position that the Petitioners are espousing.

QUESTION: Then you think the Court has a different thing in mind for a jurisdictional showing as a, as opposed to the, the showing you have to make on the merits?

MR. WAXMAN: I believe that the Court -- I believe that it's not required for jurisdictional purpose that you prove that the conspiracy would be, would have been successful. And in that sense, it is different. Jurisdiction is more of a threshold inquiry.

QUESTION: But would you have to -- improving your case on the merits you wouldn't have had to show the conspiracy was successful, would you?

MR. WAXMAN: In proving your case on the merits, I still believe that you would have to show that there was

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a substantial effect on interstate commerce which is exactly what the Court goes on to state that towards the end of the decision where it indicates that either side -- - for example, it says, that trial respondents will have the opportunity to make their own case contradicting this factual showing. It goes on to indicate that they may be able to show then in fact significant amounts of interstate commerce are not required -- were not affected or that they were. It said, petitioners at trial may be able to show that respondents' activities have a not insubstantial effect on interstate commerce. So the Court apparent found that for the substantive offense there may be some further showing before there's a resulting violation. For jurisdictional purposes, however, the Court was not going to require the same, if you will, degree of showing to show that jurisdiction existed in the first instance.

QUESTION: Does that really make a lot of sense do you think?

MR. WAXMAN: The same language applies to the jurisdictional finding as to the ultimate offense involved. In my view the Court may wish to preliminarily examine jurisdiction before concluding that there is in fact a violation. The Court may not want to have the parties go through he entire discovery process in order to

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determine whether in fact it has jurisdiction in the first instance. So in my -- there is some reason to go about that process. And it appears that McLain in fact looked at the case that way.

The --

QUESTION: May I ask -- may I ask you a question? I'm a little puzzled about what you -- supposing they allege a brokerage conspiracy such as you describe. They prove that the defendants all got together in a room and agreed on a fixed rate of brokerage and then 2 weeks later they all decided they would abandon the agreement. They didn't do it -- but for 2 weeks they had this agreement in place and it just never affected a single transaction. Would a crime have been committed or not?

MR. WAXMAN: I don't believe jurisdiction would exist under the Sherman Act if nothing ever happened. That's because there's a requirement that there actually be some sort of restraint on interstate commerce.

QUESTION: So you really have to prove more to prove jurisdiction than you do to prove the crime, because it's kind of a horn-book* law that the conspiracy itself is the heart the offense under --

MR. WAXMAN: The conspiracy would be the heart of offense. I don't have any quarrel with that. The

question is if the conspiracy never -- didn't go anywhere, didn't affect anything whatsoever, then in my view you wouldn't have jurisdiction.

QUESTION: Why do you -- why do you have to take that view? Couldn't, couldn't you take the view which is still a good deal short of what the Government proposes that the test it whether the conspiracy, if successful, would have actually affected interstate commerce?

MR. WAXMAN: Because I agree I don't have to take that view. And one could stop significantly short of that position both in this case and in other cases that the Government might suggest. I don't believe the view is required. I was answering the question I guess in the context of my views on jurisdiction --

QUESTION: But you --

MR. WAXMAN: -- as opposed to the successfulness of the offense.

QUESTION: Your view is that there actually has to be an effect on interstate commerce, not, not what -- it's just not that if it were successful there would have been an effect?

MR. WAXMAN: No, I think my view -- no, my view is not that you have to go to the success of the particular conspiracy that's alleged, but that its logical conclusion would have resulted in a restraint which

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substantially affects interstate commerce.

QUESTION: Well, then what you're really arguing is not the thing must allege an effect, but that they must allege a tendency to affect, isn't that true?

MR. WAXMAN: Well, I'm not, I'm not sure I would know the, the real difference between a tendency to affect --

QUESTION: Well, a tendency that may not be realized.

MR. WAXMAN: No, I think I would have to back up somewhat from what I said and indicate that what they actually would have to allege is that, is that there would be a logical connection between success, if you will, and a substantial effect on interstate commerce to create the Section 1 jurisdiction.

The Government's view, however, is significantly different than that. According to the Government, one need only show that the anti-competitive behavior occurs within something they call a class of commercial activity which affects interstate commerce or that the defendants are in a line of business which affects commerce for Section 1 jurisdiction to be established. Notwithstanding the fact that that's not what Section 1 says, one can envision that virtually ever activity that you engage in on a daily basis actually from eating to clothing

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yourself, to delivering a service or providing for shelter, inevitably has some role as a class of activity or line of business which would affect interstate commerce in the aggregate.

Accordingly, the Government's views appear too broad without limitation and certainly without placing in credence in the notion that the Commerce Clause does not have unlimited power. Moreover, if the Government's views were correct, this Court's analysis in Yellow Cab, Goldfarb, Trustees of Rex Hospital, and even the language of McLain, finding a real commercial relationship between the anti-competitive conduct and interstate commerce would have been totally unnecessary, because legal services, real estate sales, hospital building in and of themselves, obviously as a class of activities significantly affect interstate commerce.

Acceptance of the plain meaning of the statute also doesn't mean as the United States and as the various states that filed an amicus brief have said that for some reason anti-competitive activities will go unchallenged. Anti-competitive activity meriting attack on a truly local level is still the subject of enforcement activity at that level. It's well to remember that the purpose of the passage of the Sherman Act was to supplement state anti-trust enforcement efforts, not to supplant them. This

Court has already recently held in California v. ARC America Corporation that the Federal anti-trust laws do not supplant but may be supplemented by other local state government enforcement efforts.

Now the principle to be applied in this case requiring a restraint which has a not insubstantial effect to interstate commerce, also mandates that the holding of the Ninth Circuit on interstate commerce be reversed for a number of reasons.

First, without any factual record before it or even a factual allegation by the plaintiff, the Ninth Circuit apparently made findings that peer review proceedings in and of themselves have an effect on interstate commerce and peer review proceedings affect the entire medical staff of a hospital and, therefore, interstate commerce is affected.

Now both of these statements as I indicated are unsupported by any record. All we have is a complaint and actually they're incorrect. Congress, in passing the Health Care Quality Improvement Act, noted that peer review is not essentially commercial activity in the typical case and would not have an adverse effect on interstate commerce certainly in every case as the Ninth Circuit seemed to be positing.

Second, the conclusion that a medical staff

proceeding or even a series of medical staff proceedings affect either the hospital's entire medical staff in every case or the hospital's interstate commerce in every case no matter who was or was not actually affected, no matter what the scope of the peer review proceeding might have been. Again, it's simply a factual assertion that is nowhere in the record and is not the case, in particular by the illustrations by the amicus hospital associations*.

I think the Ninth Circuit's conclusion is analogous to say because I'm a member of the California Bar Association which is mandatory in California that I am somehow affected by every state bar disciplinary proceeding no matter what the subject was, no matter what its result was, whether I knew about it or I didn't know about it. There is no decision where the court has gone that far or even suggesting that somehow interstate commerce is implicated every time someone is excluded from a medical staff, an organization, an association, or some other membership and for that reason, the Government's views and the Ninth Circuit's views are simply too far.

In short, I think the Ninth Circuit decision under any test whether it's a Government's test or whether it's a test that petitioners believe should be applied, should be reversed.

In think in conclusion the Court should reverse

that portion of the Ninth Circuit decision holding the the existing allegations of the complaint were adequate to assert Sherman Act jurisdiction. I think the Court should reaffirm the standard required for Section 1 jurisdiction is an allegation and of controverted proof that anti-competitive restraints must be shown as a matter of practical economics to have a non-insubstantial effect on the interstate commerce involved.

Mr. Chief Justice, I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Waxman.

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

ORAL ARGUMENT OF LAWRENCE SILVER

ON BEHALF OF THE RESPONDENT

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

Certiorari was granted in this case to resolve the conflict in the circuits in its interprets -- in the interpretation of McLain. We have the ninth in Western Waste, the third in Cardio-Medical Associations, the fifth which no one cited in their briefs, Parks, El Paso Board of Realtors and the Eleventh Circuit in Shahawy all deciding that under the clear language of McLain that Justice Scalia and Justice Stevens referred to provided a general business activities' test.

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The remaining numbered circuits except for the fourth which has thus far avoided a determination of the issue have determined that the McLain reading is much more narrow and implies an affected activities' test.

What this -- this case is controlled by McLain. But I think we have to take one step back if we can to the Rex Hospital case. No one calls it the hospital building case, but the Rex Hospital case which came before it, that's a plaintiff's case. McLain is a defendant's case and the Pinhas case is a plaintiff/defendant's case and allow me to explain, if I may.

In Rex Hospital a hospital sued for anti-trust violations against another hospital. It asserted that the second defendant hospital interfered with its activities to expand its interstate commerce. The amicus in that case represented by Weissburg and Aronson asserted quite compellingly in this Court in the unanimous opinion by Mr. Justice Marshall determined that the plaintiff's purchase of medicines, that the plaintiff's receipt of money from Medicare and Medicaid from the Federal Government, that the plaintiff's receipt of supplies from out-of-state sellers, that the plaintiff's insurance receipts from out-of-state insurance companies, and the plaintiff's treatment of patients from out of state was sufficient basis in interstate commerce to justify jurisdiction.

We then come to McLain, the next case that the Court deals with. Although Goldfarb is in the middle, Goldfarb is an in commerce*. It didn't have to be I don't think, but the plaintiff's alleged an in commerce. So Goldfarb is a problem in terms of -- in fact the lower court judge in McLain misunderstood that. In Goldfarb they alleged in commerce rather than affecting commerce.

In McLain, you had a defendant's case. Plaintiff's -- financial* people who wanted to sell their houses. Everywhere they went there was a uniform 6 percent I think, rule for commissions. Plaintiffs had no interstate commerce. They just wanted to sell their house. They had to rely for jurisdiction on the defendant's activities and only the defendant's activities. If it was the defendant's activities that were not involved, there was no jurisdiction.

This Court found jurisdiction and in so finding, it found that and looked at two things. One, the plaintiff need to show a -- interfered with activity as well as demonstrated substantial effect on interstate commerce generated by the brokerage activities.

In Western Waste, the Ninth Circuit, the first circuit to interpret McLain, said that these activities could be independent of the violations in Western Waste. The Tenth Circuit filed a decision much later that's

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different in some respects. But what the Court -- there is a claim by the way in the commentators, apparently -- I think there is no ambiguity in the opinion in McLain. I think that McLain clearly holds that if you show those two things, you have jurisdiction. You may have an offense in some other portion. You may have your case in some other portion.

In indeed, if I may just for a moment, depart in answer, if I may, I think Justice Stevens' question. If you had those 2 weeks of unaffected* violations, Justice Stevens, the plaintiff, the harmed party, would certainly want an injunction against those 2 weeks ever occurring again. And it seems to me to say that unless you have an effect, you cannot get injunctive relief. Now certainly the Government would be heard adversely to that. Once you have a conspiracy, an attempted conspiracy, a criminal activity, a civil plaintiff would certainly want to be able, if you were able to show that, to have injunctive relief and if the intended effect or as Mr. Justice Souter says, the tendency toward* to have an effect, would certainly give the Court jurisdiction.

If there is an ambiguity, and I don't think there is, but if there is any ambiguity, the way you resolve an ambiguity in language is to look at what the court did. It looked at -- all the commentators say 3

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things -- I think you looked at 4 things: mortgage money, secondary mortgage market, title insurance, and there's one phrase in the opinion that appears that one of the plaintiffs in the claim arranged for an out-of-state relocation with one of the defendants in the claim.

Now what logical implication did -- was there between those 4 things? Mortgage money came from out of state. Secondary mortgage market -- some of the mortgages that were procured by the sale of real estate which the commission for the sale was price fixed were sold to out of state. Title insurance companies, some of which to insure the title of the houses that were sold as a result of the commission were from out of state, and by the way, the record was some. The mortgage money was some. There was no specific definition and then we have the one instance in terms of relocation.

Was there a nexus requirement that this Court said that the affected activity must have some nexus to that activity upon which you found jurisdiction? I think if you examine what you looked at and what Chief Justice in writing his opinion looked at, the answer is clearly no.

QUESTION: Mr. Silver, what's the, what's the activity here?

MR. SILVER: The affected activity? Peer review

proceedings, Your Honor, and, and peer review proceedings. Were it -- improperly motivated peer review proceedings is the affected activity.

QUESTION: General -- in general? I mean there are peer review proceedings in universities in, you know, all sorts of areas of professional life.

MR. SILVER: There are. And in this case if the peer review activity is improperly motivated, it then gives rise to a cause of action. But it seems to me what we have said and what we have alleged in the complaint is that the peer review proceedings or the door by which you get into the hospital to practice and that that is the nexus to getting to the interstate commerce, the hospital --

QUESTION: So it's, it's just hospital peer review proceedings that's, that's the relative activity?

MR. SILVER: That's hospital peer review proceedings. Yes, Your Honor.

QUESTION: In general or just the peer review proceedings -- not just the peer review proceedings of this particular hospital.

MR. SILVER: Peer review -- hospital peer review -- peer review proceedings provide in its entirety the, the affected activity that allows the door to be closed.

QUESTION: By hospital peer review proceedings,

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you mean peer review proceedings in all hospitals throughout the United States?

MR. SILVER: Yes, I do, Your Honor.

QUESTION: That's no geographic limit at all?

MR. SILVER: No, Your Honor, none. That in terms -- in testing what is the relevant market, the relevant market is the delivery of surgical ophthalmological services at a hospital. Midway Hospital, before it was a hospital, was a piece of ground they built the hospital and before they could allow physicians to practice there, they had to have peer review proceedings. Some of which resulted in admission. Some of which resulted in non-admission. That is the nexus between -- that is the door to get to the market and that's --

QUESTION: Why isn't there -- I mean once you depart from the particular context of the particular offense, I don't know where you define the area. Why couldn't the relative activity be hospital services or, or ophthalmology services more limited or ophthalmologic surgery?

MR. SILVER: Those are the relevant markets.

QUESTION: But that's not the relevant activity?

MR. SILVER: The relevant affected activity is bad peer review as distinguished from the market of the general business activity. That's why he -- the closing

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account my brother Waxman suggested we have not alleged a nexus. We have alleged a nexus. The Ninth Circuit found that we alleged a nexus. I'm suggesting we didn't have -- even have to allege the nexus under, under McLain. But we did. We said that you have bad peer review proceedings, that is, an affected activity when it's badly motivated and you use that peer review proceedings to stop the delivery of surgical ophthalmological services. We alleged the nexus. We alleged the affected activity and we alleged the economic service that is precluded. We can allege more. We were never given that opportunity. We certainly can allege more.

QUESTION: And what's, what's the test for whether there is jurisdiction under the, under the Federal anti-trust laws?

MR. SILVER: In, in my view under McLain?

QUESTION: Yes.

MR. SILVER: You determine whether or not the defendant -- one of the things is that the plaintiff's activities involve interstate commerce that are now -- involve interstate commerce. And we have alleged and we can allege more, but we have alleged Dr. Pinhas receives medical -- Medicare patients from out of state. It is obvious that we haven't alleged it that he has medical supplies that come from out of state, inner-ocular lenses

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that are very expensive from out of state and those types of things, so we have allege some. We can allege more in terms of the plaintiff's activities.

That would bring us under Rex Hospital. In terms of under the defendant's activities we have all of the defendants of various states in which they are involved. Those are the activities which are -- that show interstate commerce and which I think give us Federal court jurisdiction under a general business activities' test.

If you are looking for an affected activity it is peer review in general or peer review and specific in this case. I think peer review in general is sufficient to satisfy. We don't need it. The Ninth Circuit found that peer review in general -- Justice Scalia if you have one ophthalmologist who is wrongfully remove by anti-competitive purposes from this hospital, other ophthalmologists at that hospital will benefit. Other physicians may also benefit.

And consequently, when the Ninth Circuit said there was a nexus because the peer review proceeding in general in my view or peer review proceeding, a bad one in an alternative view, affects the hospital and its delivery of interstate commerce activities because it eliminates one competitor from that market for competing for

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ophthalmologic surgery rooms, for general surgery rooms, for general beds, et cetera.

And the Ninth Circuit made a determination. They made a fact finding. They found what was alleged in the complaint. They made a determination that once you have an anti-competitive peer review proceeding, you can remove that -- when you remove one surgeon from the hospital, it affects the whole hospital or it affects their interstate commerce, and therefore, you pass any of the McLain tests in any of the circuits. We're happy to be in the Ninth Circuit, but we could meet the circuit -- any of the circuits that have spoken.

In this -- I think that the Court in, in various opinions -- that it has written especially in McLain, has indicated that 2 things are important to consider. One, expanding concept of the Commerce Clause is the expanding concept of jurisdiction under the Sherman Act.

In addition, expanding and changing concepts of business as Mr. -- as the Chief Justice said in McLain and changing concepts of business are also considered under the Sherman Act. It is, if I may paraphrase two* Justices* Marshall, it is both a constitution and magna carta upon which you are expounding.

The Constitution that says that when you interpret the Sherman One* Act jurisdiction you are

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interpreting the Commerce Clause because of all of your cases which both parties have cited in the briefs. So you've said that. In addition, to the extent that you limit access to the Federal courts, in anti-trust cases you limit the Magna Carta that Mr. Justice Marshall so proper called I think Magna Carta free enterprise in Topco.

In terms of the facts, the specific facts of this case, the outrageous conduct to the defendants in this case was to when they found that the -- Dr. Pinhas would not agree to the surgical sham contract they wanted to do instead of the assistant surgery rule -- and think of the anomaly of it by the way. Here they are in February saying, you're such a great guy. We want to pay you $60,000 to be a consultant. And then in April, when he won't return the contract, they summarily suspend him and basically kick him out of that hospital and impair his rights to get into other hospitals.

They then have this sham peer review proceeding with no right of counsel, cross examination, preclusion of witnesses, ordering me off the hospital grounds under threat of arrest, threatening witnesses, and low and behold, with all of those adverse things and Dr. Pinhas standing with another ophthalmologist -- you can read this record and see how well they did cross examination and of

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other things, they won 6 out of the 7 charges. And do you know what this hospital did? They filed a false report with the, with the Federal -- with both the state and the Federal saying that the summary suspension had been upheld. And as a result, Dr. Pinhas has had peer review proceeding problems at other hospitals as a direct result we've attached as Exhibit B to our appendix.

I wanted to tell you that the 805 report of which I am making reference was not available when we filed the first amended complaint. It is not part of this record. I filed a request and a motion with the Ninth Circuit to have the Ninth Circuit take judicial notice of it. I don't know whether they did or they didn't. They never ruled on the motion to take judicial notice. It is part of your record.

As I have indicated I think that the McLain did establish the general business activities' test as a result of what you looked at in terms of the situation. If it involved an affected activities' test -- and I believe by the way that Judge Wiggins did not apply Western Waste. I believe that he applied in a much more narrow standard we fit the affected activities' test. Even the particularized test that no court has adopted, no circuit court has adopted but which is argued I believe by the Petitioners here. We can mee* that view with leave to

amend this complaint. We can allege a variety of things which can occur. Needless to say I do not think there is any justification for the particularize which we would have to show that, according to the particularized test, that interstate commerce was adversely affected by the specific removal of Dr. Pinhas from the staff. No circuit has ever gone that far. But even so amendment to the complaint dealing with the implications of that clearly can be done.

What has happened is a result of this peer review proceeding is nation wide through the national reporting statute under the Health Care Quality Improvements Act reports regarding Dr. Pinhas go nation wide. Reports go to the Board of Medical Quality Assurance. Under state law they're required to be distributed to every hospital which he is a member.

I see that I have 5 minutes left and I would like dedicate that 5 minutes to the Government if I may -- unless anyone has any questions.

QUESTION: Very well, Mr. Silver. Mr. Wallace, we'll hear now from you.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING THE RESPONDENT

MR. WALLACE: Thank you, Mr. Chief Justice, and

may it please the Court:

The way the courts of appeals have described the conflict that has developed in applying McLain is something of a false dichotomy. They generally say that on the one side some courts have held that the relevant inquiry is whether any of the defendant's activities or the defendant's general business activities affect commerce and on the other side, courts say the question is whether the challenged conduct, the allegedly illegal conduct in itself affects commerce.

The relevant inquiry for analyzing a Sherman Act claim is what is the line of commerce or the line of business activity being restrained by the alleged violation and it is in our view that line of activity that must satisfy the interstate commerce nexus, whether or not the defendant is also engaged in additional business activities that affect commerce and whether or not the alleged unlawful conduct in itself also affects Congress.

And when McLain is read in that light, we believe that it contains no ambiguity. In that case, the complaint was about a price fixing conspiracy among real estate brokerage firms. The court did not have before it whether some of the defendants were also engaged in other business activities, property management for example, because those activities would have been irrelevant to the

restraint being alleged and in that light, the -- two sentences from the opinion that we have set forth on page 8 of our brief to which Chief Justice Rehnquist has already alluded seem entirely clear to us.

The court first says it would be sufficient for Petitioners to demonstrate a substantial effect on interstate commerce generated by Respondent's brokerage activity. Petitioners need not make the more particularized showing of an effect on commerce caused by the alleged conspiracy to fix commission rates or by those other aspects of Respondent's activities alleged to be unlawful.

QUESTION: But it does say, Mr. Wallace, Respondent's brokerage activity, not brokerage activity in general.

MR. WALLACE: Well, I --

QUESTION: It at least does insist. It's, it's not the whole line of commerce. It's that portion of the line of commerce engaged in by the Respondent.

MR. WALLACE: Respondent's brokerage activities and then there, there is a further question whether their effect on commerce should be looked upon in isolation or as one of a class of activities that Congress can regulate, but before that question arises I want to refer to language appearing later in the McLain opinion which

some courts have used to inject ambiguity into the opinion and this appears at page 4 -- 246 of 444 U.S. and the sentence is at the very top of the page, to establish Federal jurisdiction in this case, there remains only the requirement that Respondent's activities which allegedly have been infected* by a price fixing conspiracy must be shown as a matter of practical economics to have a not insubstantial effect on the interstate commerce involved.

In context, it seems to us clear that Respondent's activities which have been infected refers to the brokerage activities. If this sentence is to be read consistently with what the court so clearly said just a few pages earlier rather than to read this sentence circuitously to contradict what the court had already said without ambiguity.

And so it seems to us that the Court in McLain did what it was striving to do in the context of the argument that was before it which was to reconcile its interpretation of the Sherman Act with the general trend of this Court's Commerce Clause jurisprudence. The Perez case had already been decided at that time and features very heavily in the arguments before the Court and the Court was well aware of the generous scope of the commerce power that has been recognized in the jurisprudence.

Now in the case at hand the alleged restrain

enforced through the sanction of peer review is on the provision of hospital ophthalmological services. The complaint alleges that the sanctions were adopted to prevent the Respondent physician from providing more efficient services to patients through faster operations and through elimination of a an assistant surgeon in attendance at the operations. It is a charge therefore of anti-competitive practices, of injury to competition in a particular market and the provision of these ophthalmological, surgical services.

What if instead a nurse had complained that she had been excluded from providing services in this activity, services which she seeks to provide in the same manner that they are provided by other nurses? That would seem on the face of it to be a less substantial anti-trust complaint. But that is so it seems to us not because the nurses employment relationship with the hospital is beyond Congress' power to reach under the Commerce Clause. It obviously can be reached by the Fair Labor Standards Act, the National Labor Relations Act, OSHA, the Aged Employment -- the Age Discrimination and Employment Act, et cetera.

But on the face of this complaint she has not claimed an injury to competition in any line of commerce, just an injury to herself which is at most an injury to a

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particular competitor rather than to competition, not what the anti-trust laws are designed to protect.

So --

QUESTION: If there were an on going boycott by the employer because they didn't like this nurse and they black balled her at other hospitals. Would that be the injury to competition that would suffice?

MR. WALLACE: She might be able to build --

QUESTION: Is that, is that where we're --

MR. WALLACE: -- enough of an allegation to surmount a motion to dismiss, but it's, it's questionable whether even with the elements you have added, Mr. Justice, that that's still -- would allege an injury to competition in any line of commerce, whether she could show that anyone other than herself is affected by it.

QUESTION: Well, why, why again, Mr. Wallace, is the doctor case different from the nurse's for anti-trust purposes?

MR. WALLACE: Because his complaint is that competition in the provision of ophthalmological services has been the very object of the peer review sanction that was applied against him. He said that he performs the operations faster than other physicians at the hospital, thereby saving the patients from risks that are inherent in these corneal transplant operations from greater

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exposure.

QUESTION: I take it a nurse might allege -- make the same allegations that she assists faster at operations than the other nurses and she's been discriminated against for that reason.

MR. WALLACE: It could happen. But, of course, the case I posited was one where she just claims she wants to provide services in the same manner that they are being provided by others. And another key part of the doctor's complaint was that he thought it was unnecessary to have an assistant surgeon and this was adding an element of great cost to the operations.

So what was involved in this complaint was a fairly classic allegation of injury to competition. Our, our point here in showing that the nurses employment relationship really is within the scope of the commerce power even though her complaint may not allege an injury to competition is that the interstate commerce requirement of the Sherman Act should not be distorted into an improper and ill-fitting tool with which to try to perform the substantive screening operation of identifying insubstantial anti-trust complaints.

QUESTION: But there's almost no line of commerce that isn't, you know, within the reach of the Federal commerce -- as I understand your argument, you're

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saying if the, if the activity in question is within the reach of the Federal Government with the commerce power and if there is a restriction of competition within that regardless of whether the actual restriction itself impedes commerce, then it's covered. Is -- that's your position?

MR. WALLACE: That is our position and that is the point made by the 22 states that have filed an amicus brief in this case, agreeing with our position and pointing out that at least one state doesn't have any state anti-trust laws at all and pointing out deficiencies in other state anti-trust laws and that, as a matter of fact, there is great reliance on the Sherman Act as protection.

QUESTION: Let's, let's assume I believe that that was not the original intent and that it was thought that Valentine acts and other state acts were going to continue to apply. What would be left that, that would be within the jurisdiction of the states but not within the jurisdiction of the Federal Government? Can you think of any restriction upon competition that doesn't affect commerce in the, in, in the broad sense that the constitutional provision uses?

MR. WALLACE: Well, one hypothetical we have discussed is an agreement among teenage baby sitters to

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fix prices. That could possibly be an example. On the other hand --

QUESTION: You don't think Congress could pass a law regulating teenage baby sitters? You think we would strike that down these days?

MR. WALLACE: Perhaps not. Perhaps not. Certainly if there were two agencies that agreed to fix prices between themselves, it might be shown to be affecting attendance at the theatre and at sports events and at concerts and could have an effect on Congress. The commerce power is very far reaching. It did reach the extortion involved in Perez which were not themselves interstate in nature.

QUESTION: The act does say in restraint of -- in restraint of commerce among the several states, not in restraint in a field of commerce that happens to be among the states.

MR. WALLACE: We're not painting on a, a new slate here in interpreting that language. This Court has said numerous times that that provision was intended to reach to the utmost extent of Congress' power under the Commerce Clause.

QUESTION: But that, that could simply mean that what is meant by commerce is broadest meaning of commerce, but it still has to be in restraint of commerce. It's

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just like saying if Congress passes a law saying nobody can kill a ladybug in interstate commerce, interstate commerce if given the broadest possible meaning, but you still have to kill the ladybug.

MR. WALLACE: With all respect, I do not believe that is a fair reading of those cases which said that the protection that Congress afforded reached to the utmost extent.

QUESTION: Well, that's usually dicta anyway in those cases.

MR. WALLACE: It, it, it, it, it could be considered that, but it has been the basis for expanding the reach of the Sherman Act repeatedly as the court's notion of the reach of the Commerce Clause have similarly expanded because the, the act has been interpreted to afford the protections to whatever is the currently accepted notion of the reach of the commerce power. So it's a form of dictum that could arguably part of the ratio decidendi of those case.

And another lesson of this Court's Commerce Clause decisions such as Wickard against Filburn is that the substantiality of the effect on commerce is not to be belittle by viewing an individual instance in isolation without regard to the aggregate affect of similar restraints on individuals or the deterrent effect of the

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sanction applied to this one individual, the deterrent effect on others of similarly attempting to increase efficiency by similar activities if they see that this doctor can be sanctioned for trying to eliminate the assistant surgeon from this procedure.

And these cumulative effects which can be wide spread but relatively minor in the individual infractions are important to our enforcement programs as we've accounted on page 15 of our brief.

QUESTION: Thank you, Mr. Wallace. Mr. Waxman, do you have rebuttal.

MR. WAXMAN: I do.

QUESTION: You may proceed.

REBUTTAL ARGUMENT OF J. MARK WAXMAN

ON BEHALF OF THE PETITIONER

MR. WAXMAN: I think that the principles that are involved here are distinguishing the Section 1 from other regulatory Commerce Clause type cases. We're fairly -- not fairly -- we're clearly articulated by Chief Justice Rehnquist in his concurrence in the Hodel* against Virginia Surface Mining case.

I think where the Chief Justice indicated that cases such as Perez, Russell, Heart of Atlanta, even Wickard against Filburn could be explained by what Professor Tribe* indicates is the cumulative effect

principle wherein those cases Congress engaged in specific fact findings, stressing the regulation of local incidence as an activity that was necessary to abate a cumulative evil affecting national commerce. Under that type of reasoning Commerce can clearly adopt, regulation which affect child labor laws, could adopt regulations which affect commerce and agriculture, could adopt many acts which govern specific areas such as the civil rights laws where Congress itself engaged in the fact finding which show that those activities affect interstate commerce.

But despite those holdings and as the Chief Justice notices some broad dicta in those holdings, there have to be limits and there are limits somewhere on the commerce power and those limits are contained in the language of Section 1 itself. Restraints of trade of commerce among the states. Neither the Respondents nor the Government chose to address, Justice Scalia, your question about what must that language mean, restraining of trade or commerce among the states.

QUESTION: But I'm saying even if there aren't any limits on the, on the commerce power, there may be limits to the Sherman Act.

MR. WAXMAN: I think one could read it either way. I think one could read it as there being limits on the commerce power but the court need not go that far.

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One need only look at the specific language of the statute itself and construe the statutory language to say jurisdiction under that statute requires the showing the Petitioners' request. The notion that the Government seems to concede the 2 teenage baby sitters to fix the price at which they render services would not be enough.

Petitioners agree that would not be enough although Congress could easily call this the line of commerce involving child and home care or the line of commerce involving care of children throughout the country which would obviously have significant import on an interstate commerce basis for the economy as a whole. I think that illustration is perhaps the illustration of why the principle that the Government seeks to enforce in this case goes too far. And the example --

QUESTION: Suppose, suppose hospitals -- all the hospitals in a metropolitan area agreed to admit only no more than an x number of new doctors to their staff every year.

MR. WAXMAN: I would suppose that the physicians collectively involved in that case would allege this had a significant affect on the --

QUESTION: Just one sues -- just one who applied is rejected, sues, and says there's a conspiracy to limit the availability of medical services in town and I've been

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hurt by the conspiracy. Has he -- an he says it's -- it affects the interstate commerce because it -- because people come from every where to get services.

MR. WAXMAN: I would assume that that one physician would allege that this conspiracy which affects more than one physician, namely any physician who might come from out of state and be on the medical staff of the hospitals collectively in that area.

QUESTION: So that would be enough in this case?

MR. WAXMAN: If, if --

QUESTION: He wouldn't have to show that -- he wouldn't have to show that just excluding him had any effect.

MR. WAXMAN: The allegation would be that using the example you gave is that more than this physician was affected. In fact, many physicians who may come from out of state were affected. This would affect their own medical practices involving their treatment potentially of out-of-state patients, purchases of supplies, purchases of equipment, purchases of products, the ability to render a large spectrum --

QUESTION: He wouldn't have to prove that excluding just him would have -- would affect interstate commerce substantially?

MR. WAXMAN: I'm sorry.

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QUESTION: He would have to show and prove that excluding only him had a substantial effect on interstate commerce?

MR. WAXMAN: He would not have to show given the example you gave that particular incident affecting him. He was the only physician --

QUESTION: You should answer my question yes or no.

MR. WAXMAN: No. If he was the only physician involved as the subject of that particular conspiracy and the affect of restraining him had no substantial effect on out-of-state patients, out-of-state of purchases of supplies, out-of-state products or equipment, then he would not be able to stay the case which created Sherman Act, Section 1 jurisdiction and that is the distinction that is important in requiring a substantial affect on interstate commerce as a result of these specific provisions of Section 1.

On that basis, the Petitioners believe that this Court should reverse the Ninth Circuit and affirm the dismissal based on the complaint which is before the Court which contains no allegations with respect to interstate commerce, no allegations with respect to purchases of supplies, equipment, financing, mortgage money, patients affected, or any of the other indicia that have been used

in any case involving restraints of trade among the states to find jurisdiction under Section 1.

QUESTION: What if they allege -- let me just be sure I get your point -- what if they allege that there was a conspiracy to require an assistant position in all cases and that conspiracy restrains trade because it imposes unnecessary costs on that line of commerce and then he alleges as a by-product of that agreement they won't let me have hospital privileges because I refuse to practice with an assistant. Does that state a claim?

MR. WAXMAN: I think that if one could allege and ultimately controvert* make the showing that the conspiracy to impose the assistant surgeon requirement had a specific effect on a volume of interstate commerce such as it affected the total volume of surgeries at a significant level of those coming from out of state, a total volume of supplies that would be involved in surgeries which could no longer be performed, a total volume of individuals --

QUESTION: But your answer is yes? Yes. What you're saying is yes?

MR. WAXMAN: Yes.

QUESTION: Yeah. Thank you.

MR. WAXMAN: Finally, the notion that the Court should expand the Sherman Act simply because concepts of

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commerce have expanded or that the Sherman Act is the -- the Magna Carta is no substitute for the specific congressional intent which is evidence in the act* itself which says restraints of trade of commerce among the states and the Court should not single mindedly decide as I indicated at the beginning to eliminate that phrase from the act.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman. The case is submitted.

(Whereupon, at 1:51 p.m., the case in the above-entitled matter was submitted.)

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