OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 751 Petitioner v. BROWN GROUP, INC., dba BROWN SHOE COMPANY

CASE NO: No. 95-340

PLACE: Washington, D.C.

DATE: Tuesday, February 20, 1996

PAGES: 1-51

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED FOOD AND COMMERCIAL :
WORKERS UNION LOCAL 751 :
Petitioner :
v. : No. 95-340
BROWN GROUP, INC., dba :
BROWN SHOE COMPANY :

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Washington, D.C.

Tuesday, February 20, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

LAURENCE S. GOLD ESQ., Washington, D.C.; on behalf of the Petitioner.

ALAN JENKINS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

THOMAS C. WALSH, St. Louis, Missouri; on behalf of the Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 95-340, United Food & Commercial Workers Union Local 751 v. The Brown Group doing business as Brown Shoe Company.

Mr. Gold.

ORAL ARGUMENT OF LAURENCE S. GOLD

ON BEHALF OF THE PETITIONER

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

Last term, this Court in North Star Steel Company summarized the basic aspects of the WARN Act, which is the statute which generates this case as well. We set out the pertinent portion of the Court's opinion on page 9 of our opening brief, the blue brief, and very simply stated as the Court noted WARN is a statute which puts a condition on employers on plant closings and mass layoffs.

The employer is supposed to notify, among others, each representative of the affected employees if the facility is one in which the employees have an exclusive representative.

An employer who violates the notice provision is liable for penalties by way of a civil action that may be

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brought in any district court, and as the court concluded by noting, the class of plaintiffs includes both aggrieved employees or their unions as representatives, who may collect back pay for each day of violation not to exceed 60 days.

In this case, the union brought a WARN act case concerning a plant closing, alleging that Brown Group had proceeded without providing the proper notice. The Eighth Circuit held that the union did not have standing to bring and prosecute that lawsuit and to seek the statutory remedy.

We believe the standing holding of the Eighth Circuit is plainly wrong. We begin from --

QUESTION: Mr. Gold, what is the actual injury to the union?

MR. GOLD: The --

QUESTION: The failure to get the notice?

MR. GOLD: Right, the violation of its right to get the notice --

QUESTION: Well, how does giving a recovery to the employees redress that injury to the union?

MR. GOLD: The nature of the notice right is not one which inures to the union as an institution, as a person. The point of the act, as the sponsors noted, and we quote this on page 10 of our reply brief, is that as

the collective bargaining agent, the exclusive representative, whether it be an international union, a regional union, or a local union, has the responsibility and authority to address changes in terms and conditions of employment, the effects of a plant closing, and cooperative efforts at worker readjustment.

So the union gets the notice in order to facilitate employee readjustment, retraining, job location, to deal with the employer in ways which may even alleviate the entire problem, and as -- what Congress saw is that if the employer does not provide the notice, the union is harmed by losing the opportunity to provide those representative services.

And what Congress determined was that where the notice isn't provided, and where employees do not get the opportunity to have this period of readjustment with assured income, the closest that was appropriate, because Congress particularly made the judgment that injunctive relief would not lie, that the closest that was appropriate was, in essence, a form of specific performance. You will get 60 days with this assured money at some point, and have the opportunity, some opportunity for readjustment in that way.

So the union, by providing the substitute, is redressing the injury that it suffered by this invasion of

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its legal right.

Now, certainly we would not have balked, and I am certain that we lobbied for institutional direct relief as well, but the proposition that this is not relief that redresses the lost opportunities that are generated by the violation of the union's legal right seems to me to be without substance or reason. This is a form of redressing this particular form of legal right.

QUESTION: The damages sought are back pay?

MR. GOLD: Correct. They are in an amount of back pay. They're not exactly back pay as we normally understand that term. It's a formula term. It's a formula. Every day without notice generates a certain amount per employee, whether or not that employee actually found another job or -- it's a formula.

QUESTION: Liquidated --

MR. GOLD: Liquidated damages or penalties is what was referred to.

QUESTION: Mr. Gold, what is the standard procedure in these cases? It struck me that if you had joined one worker suing on behalf of herself and others similarly situated, that you would have obviated this problem, and I was wondering, since it appears later several workers came forward to make claims, why that wasn't done from the beginning.

MR. GOLD: I can only say that at the time -- this was 1992 -- people who brought the case read the statute and proceeded in the way that they believed was right.

I think one of the reasons Congress did what it did is that for people who are thrown out in the job market, and so on, to be the named plaintiff in this kind of suit is something of a burden. You're going to get a certain disinclination among individuals to do that, and this was a purposely simplified approach.

I quite agree that you could, and maybe, in the fullness of hindsight, might wish to do a belt and suspenders approach, and both have the union sue and have an individual sue as an aggrieved employee and as a class representative.

That's going to complicate the proceedings some, and I can only say that we don't believe it is what Congress required here, any more than it would be required where a union brings a suit of comparable character under a collective bargaining agreement.

QUESTION: Mr. Gold, you're in one different position here, I suppose, from the CBA situation, because you're union is in effect a statutory representative, so the fact that you don't have a union member as a party doesn't really prevent you from arguing that this is

essentially a class action.

And while it's true, I suppose, that because there's no union member who's a party, there's no one who's a named plaintiff who is going to get damages, but I don't know that that's an Article III problem, so you can still argue that it's like a class action.

MR. GOLD: Oh, absolutely. I mean, we believe that in this kind of case, as in a case like EOC and General Telephone, you have the union acting for and on behalf of these individuals.

QUESTION: Isn't that the easy way, in effect, for us to decide this case, or the easiest, you might say?

MR. GOLD: We believe that this is a direct standing case. I don't know whether -- I'm on the verge of discussing whether this is a true class action in Rule 23 terms.

QUESTION: Well, we know it's not absolutely like it, but we're worried about Article III here, and --

MR. GOLD: Right.

QUESTION: And it's, the analogy is, I suppose, close enough for you to say it's, for Article III purposes you ought to treat it just like a class action.

MR. GOLD: Absolutely. I mean, our overall point in meeting the arguments of the Eighth Circuit is that there is a range of representative litigation of this

kind that situations of a pure association member kind is only one example, and that this, like the collective bargaining contract situation, or the third party beneficiary situation, is a different form of representative or --

QUESTION: Mr. Gold, do you think the reasoning of the Eighth Circuit was that, conceding that Congress has authorized this, it violates Article III to authorize it, or simply that it was not clear that Congress had authorized it?

MR. GOLD: No, I -- we understand the Eighth Circuit to have said that Congress couldn't proceed this way. They said that Congress formulated the employer duty and the union right, as the statute plainly does, that the union had the right to bring suit, but that the union didn't have standing to seek the only remedy for the violation of this legal right that Congress had created.

QUESTION: Mr. Gold, why is the injury in this case the failure to give notice? Had there been a failure to give notice and the plant never been closed, there would have been no problem, I assume, right?

It seems to me the injury is the closing of the plant, isn't it, without having given the notice beforehand? Had the plant not closed, there would have been no violation, no injury.

MR. GOLD: Well, there is --

QUESTION: You see, I have a sort of instinctive resistance to the notion that you can create purely abstract procedural rights, like the right of everybody in the world, or the right of a particular union to "notice" without any substance behind the notice.

What I see to be the violation, here, is not the failure to give the notice but the closing of the plant. That's what hurt people, isn't it?

MR. GOLD: It is the conjunction. Employers have no duty to give notice unless they're closing or engaging in a mass layoff.

This is not an abstract situation. I agree with that. If the employer never closes the plant there's no lawsuit, but --

QUESTION: So you have no objection to my considering the injury in this case to be not the failure to receive notice but the closing of the plant, without having done that beforehand, of course.

MR. GOLD: Right.

QUESTION: Oh, but it's both, I take it.

MR. GOLD: Yes. I was going to say, in conjunction, the -- there is no obligation under this statute to provide abstract information that has -- about something that has no direct effect on the people getting

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the notice. It is the conjunction of an intention to close or engage in a mass layoff.

QUESTION: Let me ask another question.

MR. GOLD: Yes.

QUESTION: If you want us to pursue the theory that Justice Souter was asking you about of representational capacity on the part of a union, I'm -- again, my problem is I'm reluctant to acknowledge that for Article III purposes Congress can make anybody the representative of anybody else and just say, you know, for purposes of vindicating this right, you know, John Doe shall have standing to sue.

Most of the representational cases I know involve a plaintiff who is incapable of suing, so his executor sues, or his trustee.

MR. GOLD: Well, but in the trustee situation --

QUESTION: The trustee owns the property.

MR. GOLD: All right, but --

QUESTION: -- so the person really interested can't sue.

MR. GOLD: The beneficiaries aren't incapable, and in this situation you do have a situation that Congress took very much into account.

The union is selected by the group of affected employees through a Government-regulated process as their

exclusive representative. A union, as such, cannot bring the suit, only an exclusive representative selected by the employees.

QUESTION: And it is not an organization formed just for the purpose of this suit. It has some independent --

MR. GOLD: Right.

QUESTION: -- representational existence.

MR. GOLD: Right, and it has -- one of its representational existences is to negotiate collective bargaining agreements and bring suits like this, if there is a breach, to collect back pay and other remedies for the individuals.

The notice runs to the union, as the passage I indicated to you indicates, so that the union can carry out these representational functions, so you're well into the central area of the kind of representative that Congress certainly can authorize to bring this kind of lawsuit.

QUESTION: Mr. Gold, you don't concede, do you, that in the associational standing cases the members of the association are incapable of suing?

MR. GOLD: No.

QUESTION: No.

MR. GOLD: No.

QUESTION: So they're in the same boat as the --

MR. GOLD: Right.

QUESTION: -- union members here.

MR. GOLD: That was yet another -- that is yet another example of the fact that these -- that representational litigation is not so narrowly defined as to be for people who are incapable.

QUESTION: What do you make of the argument that to determine the compensation the employees must come into this lawsuit as individuals?

MR. GOLD: I don't think that -- first of all, Congress purposely simplified the remedy here so that it is according to a formula and based on back pay.

Beyond that, I don't believe that the individuals have to come in in order to perfect their rights. If the union proves that there's a closing without the notice and shows the payroll records and who worked and who didn't, it has proved up the case and the liability.

QUESTION: Thank you, Mr. Gold.

Mr. Jenkins, we'll hear from you.

ORAL ARGUMENT OF ALAN JENKINS

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. JENKINS: Mr. Chief Justice, and may it

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please the Court:

Petitioner has standing to sue under the WARN act both in its own right and as a representative of terminated employees. Under direct standing principles, there's no dispute that Congress, through the WARN act, imposed a legal duty on respondent to give petitioner 60 days' notice of the shutdown of the Dixon plant. Petitioner has alleged a breach of that legal duty and, in doing so, has established a direct and personal injury to itself.

That injury is neither hypothetical nor speculative. This is not a case in which an abstract violation occurs and anyone in the universe has standing or even a cause of action to challenge it. This is a situation where the union itself was denied the notice that it has a right to under the statute.

QUESTION: But Mr. Jenkins --

MR. JENKINS: Pardon me.

QUESTION: -- it does seem that the remedy granted is not particularly designed to redress the union's injury, if it's back pay for all the members.

MR. JENKINS: We think it is, Mr. Chief Justice. Congress provided unions right to notice precisely in order to facilitate their role in the readjustment and retraining process. That process -- pardon me, that role

is frustrated by the lack of notice, and it's vindicated by an award of back pay to injured employees.

QUESTION: Well, why is that? I mean, ordinarily you think if the party who is wronged by -- the union in this case, wronged, as you say, by the lack of notice, that the damages ought to be measured by what harm that is done the union, rather than what harm is done its members. .

MR. JENKINS: We think that's correct, but the nature of the injury in this instance is a harm, a frustration of the union's ability to participate in its statutory role and in its organizational role, to participate both in the retraining and readjustment process which Congress found notice to be relevant to, and its ability to function as a collective bargaining representative under the labor laws.

QUESTION: Yes, but these damages are not going to affect that in this -- in a given case. Don't -- aren't you reduced to saying that the sense in which there is a vindication of the union's right by giving damages to employees is essentially on a deterrence theory, that if you give the damages to the employees in this case, the next employer is going to know it, and is going to give the notice?

Isn't that as close as you can come to a

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vindication of the union's interest in receiving the notice?

MR. JENKINS: I don't think so, although I do think that deterrence is certainly one of the goals that Congress had in mind.

But I think in this instance, for example -- a union doesn't receive notice. The plant shuts down. Damages to the union would not speak to the union's role in aiding the employees that it represents in the work place, nor would an injunction reopening a plant years after it's closed, even if that were feasible, speak directly to the union's lost opportunities and lost ability to speak to the financial stability of the employees that are represented.

QUESTION: What would speak to it would be an injunction against the plant closing, and that is specifically what Congress withheld.

MR. JENKINS: Well, but it -- that would be one remedy that would speak to that harm, but under Article III the requirement is simply that the remedy sought be likely to redress the injury, not that it necessarily be the best remedy to redress that.

QUESTION: No, but the injury, as I understand it, is the injury to the union in depriving it of a capacity either to negotiate about the actual decision to

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close, or to retain those who are going to be put out of work, and the only -- I should think the only remedy that is going to redress or vindicate the union's interest in failing to receive the notice would be a remedy that gives them the statutory amount of time to do that, and that remedy would be an injunction against closing the plant short of 60 days for the union to do whatever it wants to do.

The union absolutely cannot get that, so aren't we faced with a situation in which redress for the -- I keep saying this -- vindication of the union's interest as such simply cannot be given without an injunction unless you in effect take a long-term deterrence analysis and say, well, if it -- if the union can make it hurt this time by getting damages for a third party, the next employer won't do it?

MR. JENKINS: I -- Justice Souter, I don't think that's the only way to tie this right to the remedy that's imposed.

The Congress recognized that terminated employees are much better able to participate, work with unions and other resources for retraining and job adjustment, if they have the financial stability to do so and, of course, that makes sense, that if someone's receiving a paycheck, they can go out, obtain additional

education, learn new skills, look for jobs. It's much easier to do that, and the union's role in that process is greatly facilitated.

QUESTION: But they don't -- as a practical matter, they don't get the money during the time in which they would want to be doing this, do they?

MR. JENKINS: Well, no, Your Honor, but I think for many employees --

QUESTION: You're talking -- you're making a very practical argument. You're saying the employee who is getting the paycheck can afford, in at least two senses, to go to school and do the -- and get the retraining, but in fact the employee is not going to get the paycheck until some period considerably down the road when the lawsuit finally grinds to an end, isn't it?

MR. JENKINS: Well, I don't think so, Your Honor. Certainly temporally that's true, but I think the WARN act is aimed in particular at large-scale layoffs in communities that are dependent upon particular industries, and so those employees will still be around, and the union will still have the ability, as will the State dislocated worker unit and the unit of local government, which also have a right to notice under the statute, will have the ability to work with those employees. I think that was what Congress --

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QUESTION: So you're saying it may take a long time to get the money, but it's going to take a long time to retrain and get another job.

MR. JENKINS: I think that's right, Your Honor.

QUESTION: So that they ultimately can match.

MR. JENKINS: I think that's right.

QUESTION: Isn't the consequence of that argument that any organization which has the interest of others at heart can be given standing to sue for injuries to those others, because, after all, that's the organization's function?

MR. JENKINS: I don't --

QUESTION: So I suppose the American Civil Liberties Union could be given standing to sue for any deprivation of civil liberties to anyone in the country, because their whole ratiocination is to serve those people and prevent those injuries.

MR. JENKINS: I don't think so, Justice Scalia, for two reasons.

QUESTION: Well, why is this different?

MR. JENKINS: The first reason is that unions are unique in that they have a right to notice under the statute. The ACLU, general people out in the community don't have a statutory right to notice. They also don't have the statutory relationship.

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QUESTION: Well, yes, but that's just to say that Congress has created it here, and I'm saying Congress could also create it for the ACLU.

MR. JENKINS: Well, that's correct. Then there would still be a --

QUESTION: So what's your other argument? Why else is it different?

MR. JENKINS: There would still be a requirement under Article III that there be a tangible effect on the plaintiff through the union of the layoff. A simple ideological disagreement with an abstract violation of law doesn't satisfy Article III.

QUESTION: Well, the tangible effect here was that it was unable to provide the kind of assistance to the people served that it wanted to, right?

MR. JENKINS: That's correct, but this Court has frequently recognized that that type of impairment of an organization's ability to carry out its functions not simply a disagreement or an ideological conflict with action taken is sufficient to provide an injury in fact for Article III purposes.

QUESTION: Yes, but the remedy given is not the remedy of providing the people what the people are entitled to. It is, rather, a remedy directed to the organization.

MR. JENKINS: Well, that's correct, Justice Scalia.

QUESTION: Mr. Jenkins, is it relevant to this inquiry that the union is not stepping forward as a union? It has standing under this statute only as exclusive bargaining agent of the employees, isn't that so?

MR. JENKINS: Well, I don't think that's entirely so, Justice Ginsburg. I think it's true that the union has its own independent injury.

QUESTION: I thought that the workers get the notice, personally, when the union is not representing the plan.

MR. JENKINS: That's correct.

QUESTION: But when the union is, that only the union is entitled to notice under the statute and the workers aren't.

MR. JENKINS: That's correct.

QUESTION: But does that distinguish the situation of the union that has this preexisting representational obligation from an organization that is merely a do-good agency?

MR. JENKINS: We think certainly so, and that was my point in saying that there's a right to notice here, and as you pointed out, it's an exclusive right to notice. It would not be sufficient for respondent to have

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simply notified some employees but not the union. The union must be notified to satisfy the WARN act.

QUESTION: What about a plant where there is no union representing the employees? To whom does the notice go then?

MR. JENKINS: The notice goes directly to the employees under that circumstance, Mr. Chief Justice.

QUESTION: It would seem odd that if notice were also required to the employees that you would have a weaker case.

MR. JENKINS: I'm not sure that I follow --

QUESTION: Well, you said one of the reasons the union has standing here is because the union is the only one to get notice, and I observed it would be a rather odd statutory scheme if the notice also went to the employees that you would then have a weaker representational argument.

MR. JENKINS: Well, perhaps it would be weaker in that narrow respect. I don't think Article III standing would be lacking as long as a union has a legal right that's been breached, and there are practical consequences of that right, and in addition the union has been affected in a way that distinguishes it from the public at large.

It would not be enough. It would be comparable

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to the Lujan case if everyone in the world had a right to challenge an employer's failure to give notice. Here, there are certain specifically designated parties who are affected in a practical way, and therefore have a right to notice in a cause of action under the statute.

QUESTION: Mr. Jenkins, does this statute provide for fees to the plaintiffs? Who pays the cost of litigation?

MR. JENKINS: May I answer?

QUESTION: Yes, go ahead.

MR. JENKINS: There is a fee-shifting provision and I believe it's discretionary with the district court.

Thank you.

QUESTION: Thank you, Mr. Jenkins.

Mr. Walsh, we'll hear from you.

ORAL ARGUMENT OF THOMAS C. WALSH

ON BEHALF OF THE RESPONDENT

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

On a number of occasions in the past 20 or 30 years this Court has reiterated what it has called the irreducible constitutional minima for standing to sue in the Federal courts, and two of those minimal requirements are involved in this case, in our opinion.

The first, of course, is injury in fact. this

Court's cases require that the injury claimed by the plaintiff be concrete, real, immediate, palpable, not speculative, not conjectural, not abstract, and that injury must be to a legally protectable interest.

The second element that's involved in this case is that of redressability, which requires that relief from the injury must be likely to follow for the plaintiff from a favorable decision, and it must redress the injury to the complaining party even though the judgment may benefit others collaterally.

QUESTION: What's the relationship between that requirement and our associational standing cases, because in the associational standing cases, the association doesn't necessarily get any relief. It's movers that do. Does that -- is the consequence of that that the relationship between redressability and redressability to the named plaintiff is not an Article III requirement?

MR. WALSH: No. In the associational standing cases, and that's the Hunt v. Washington Applegrowers line of cases, the requirement is that an association, in order to sue on behalf of its members, must show three things, first that some of its members have injury; second, that the lawsuit is germane to the association's interests; and thirdly, that the participation of the individuals is not required for complete adjudication. Now --

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QUESTION: Right, but none of those requirements say that there has got to be a redress flowing directly to the association. Not that -- there's no requirement that the association in a damages case get damages.

MR. WALSH: Well, the law has been universal that an association cannot sue for damages to its members.

QUESTION: Well, I don't think there is a case in which they have done so.

MR. WALSH: Correct.

QUESTION: But in the cases in which there has been equitable relief, the benefit of the equitable relief has always been for the members of the association, hasn't it?

MR. WALSH: Well, it's been for both, I think, Justice Souter. I think when you're talking about declaratory or equitable relief in an associational context, I think the analysis is that that is a communal type of relief which redresses what's deemed to be a collective injury, so there is injury of the members that's attributed to the organization, and therefore --

QUESTION: But the organization without that attribution does not, in fact, have an interest which would be vindicated if it alone sued.

If the applegrowers, whatever the association was, walked into court and said, we are not representing

the members of our association -- this is just us, Applegrowers, Inc., or whatever they were called -- there wouldn't have been any relief that they would have been entitled to, I suppose.

MR. WALSH: Well, in that case actually they did have an interest because they claimed that they were losing -- they would lose dues if the --

QUESTION: Oh, they were reaching in --

MR. WALSH: -- said statute were not overturned.

But they could not walk in and say, we are suing on behalf of our members for their lost profits, for instance, or their damages, and that's the disconnect --

QUESTION: Well, they never have. I mean, we --

MR. WALSH: That's correct.

QUESTION: -- haven't held that they couldn't, and that's what you want us to do here, I realize, but we never have.

QUESTION: I don't understand why it wouldn't follow. I mean, you say their members have been injured, and that's enough, that their members have been injured. You acknowledge that -- for injunctive relief.

MR. WALSH: Yes. It depends on the relief being sought.

QUESTION: Well, if you attribute their members injuries to the association, why not attribute their

members compensation for the injuries to the association? I mean, doesn't the one follow from the other?

MR. WALSH: I don't think so. When you're talking about damages, Justice Scalia, you can't have the collective type of analysis that you have when you're talking about injunctive relief, that all together there, everybody's suffering the same wrong. It's attributed to the organization by reason of it happening to the members, but when it's damages, it's clearly --

QUESTION: The wrong can be a very individualized wrong that the injunction is addressed against, for example, not paying a certain level of wages, which the association claims each individual employee is entitled to. You get a mandatory injunction requiring that additional --

MR. WALSH: Well, if that were the case, that each union or association member were entitled to a different form of relief, then I think you would have the same kind of problem with that as you would with a damage case.

QUESTION: But it is the case that the union and the association members are not suffering the same harm.

MR. WALSH: It depends on --

QUESTION: In the example you gave, the applegrowers' case, the association is saying, we're

losing members.

That isn't what the members are saying, so you can't say that the -- I don't think you can properly say that the analysis depends upon everyone suffering the same wrong and hence everyone, association and members, getting the same benefit from the injunction and, therefore, if it makes sense to say that they have a kind of representative standing, then that representative standing depends upon their asserting something that the association itself could not or would not assert.

MR. WALSH: Well, as the Court said in Warth and in Brock again, the ability --

QUESTION: Let me -- well, I want to be sure, but just on the terms that I just gave you, doesn't it follow that you can't make the argument that they are all in the same boat?

MR. WALSH: That's probably true.

QUESTION: Okay.

MR. WALSH: But where they are close enough to being in the same boat that the relief sought will remedy the communal wrong, that's the rationale for allowing associational injunctive cases and for disallowing damage cases, and --

QUESTION: Why doesn't it help the union to give the employees their money? I mean, the whole point of the

act, isn't it, is to give the union, just as Mr. Gold said, notice so it has some time to arrange for the employees to get training or other benefits?

It lost that time. It failed in its duty to the employees because they didn't get notice. Well, at least it can get money for them.

I mean, isn't that something that unions are there for, to help the employees by getting them money, by getting them training, by getting other things, and a failure to get notice inhibits that obligation of the union, which is what its purpose is.

Why can't Congress under the -- what in the Constitution prevents Congress from saying -- Congress wants to say we'll restore the union not completely, but we'll restore the union roughly to where it might have been, not by giving the employees training, we can't, but at least we'll give them some extra money?

Where in the Constitution does it say that Congress can't make that judgment?

MR. WALSH: The problem is, Justice Breyer, that there's no evidence anywhere that Congress made such a --

QUESTION: Well, what about the statute?

MR. WALSH: The statute is silent on the purpose of the notice.

QUESTION: The statute says that a union can

come in, sue when it doesn't get notice, and collect liquidated damages in an amount equal to the number of days times the average wage, which presumably it pays to the workers, so the workers then think, well -- I don't know, does it pay it to the workers or not?

Maybe it just -- I don't know what happens to it, but I think the workers might feel better about it if the union has it rather than the employer.

(Laughter.)

MR. WALSH: There is nothing either in the legislative history or in the statute itself which suggests that that is the so-called injury that's being redressed.

QUESTION: Oh, well then --

QUESTION: The union -- the money doesn't go to the union, does it? I thought the money went to --

MR. WALSH: The money would go to the individuals.

QUESTION: It goes directly to workers.

MR. WALSH: Right.

QUESTION: Well, but how does that follow from the statute? I mean, if the union is the plaintiff, the thing doesn't even go to the union as a trustee, the award is directly to the individuals?

MR. WALSH: Well, they have filed here on behalf

of -- that's the language of the complaint, on behalf of the individuals.

Now, that, to me, means the check that we would have to cut if we lost would be payable to the individuals probably, but the union also on the check.

QUESTION: In that respect it would be no different than if one employee had stepped forward and sued on behalf of the 276 similarly situated.

MR. WALSH: The statute does contemplate class actions, Justice Ginsburg.

QUESTION: But --

MR. WALSH: But I don't think that could apply to the damage part of the case for the same reasons that we've discussed --

QUESTION: The question I was trying to ask is, why isn't the remedy aimed at redressing a real harm to the union, namely, its inability to help its workers by arranging for some interim relief for the workers?

What this does is, it gives the workers some money. That isn't precisely what the union would have arranged for, though it might have done. Rather, it's roughly the kind of benefit the union could have arranged for, so the statute says, pay them that. At least that's what I read the statute as doing, irrespective of the statute's motive.

All I'm looking for is, is that helping a little bit to redress a harm, and my question is under the Constitution, why doesn't that help redress somewhat a harm that the union really suffered?

MR. WALSH: Well, because first of all, with all due respect, Justice Breyer, there's nothing in the statute that suggests that that's the injury that's being redressed.

There are two other statutes that were enacted at approximately the same --

QUESTION: The injury that is being redressed is the failure to get notice.

MR. WALSH: The lack of notice to the union.

Now, there's another statute which requires notice to the local job partnership, the State job partnership, and there's a statute that says that that's the organization that is supposed to bring the parties together once the plant closing is announced.

It's supposed to notify the union within 48 hours of it being notified, so even if the union didn't get notice here, it's required to get notice under that statute, and that's the one that determines all these rights and remedies that the union's talking about here, the relocation.

There's also the Job Training Partnership Act,

which was enacted at about the same time.

Those deal with the kinds of concerns that have been mentioned here. This is simply a failure to give notice and a remedy to the union, which in legislative history and in the statute and in the pleadings, I might add, there is no articulation of --

QUESTION: Mr. Walsh, may I ask you a question that's concerning me?

Supposing WARN, instead of being a statute, was all spelled out in a collective bargaining agreement that provided exactly the same remedies and notice requirements and all the rest, and the employer failed to give notice to the union of an intended plant closing, and the agreement provided in that event the union could sue for back wages payable to the employees, just as it -- measured by, just the same remedy here, would you think there would be an Article III problem on allowing the union to enforce that contract?

MR. WALSH: No, I do not.

QUESTION: What's the difference between a contract and a statute?

MR. WALSH: Because the union there is a party to the contract. A breach of the contract --

QUESTION: Well, here it has a statutory right, there it has a contractual right. In terms of injury to

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the union, what's the difference?

MR. WALSH: The injury to the union is that it is a party to a contract that has been breached.

QUESTION: Well, but it has a statutory right that's been breached here. What's the difference?

MR. WALSH: Well, before with that --

QUESTION: Why is a contract right entitled to greater protection than a statutory right?

MR. WALSH: Because the union is not designated as the litigating agent of claims, statutory claims for its members. It is under section 301 and under the National Labor Relations Act the litigating agent for breaches of the claim --

QUESTION: But under this statute it's the litigating agent for the same people. I don't understand the difference, in terms of constitutional terms. Why is one injury redressable and the other not?

MR. WALSH: Because as the party to the contract that has been breached it has an injury. In this situation --

QUESTION: Is it different from the statutory injury in this case?

MR. WALSH: We contend there is no statutory injury in fact.

QUESTION: You've admitted there's a statutory

violation of a duty to the union.

MR. WALSH: But that creates a procedural injury, in our view, to the --

QUESTION: Then why isn't the contractual thing a procedural injury, then?

MR. WALSH: Because it's a breach of a substantive right under the contract to notice in your hypothetical.

QUESTION: I -- isn't your --

QUESTION: A statutory right would be on even a higher order. It certainly seems to me that if the parties by contract can, in effect, confer standing, that Congress by a specific statute can do the same thing, which is the thrust of Justice Stevens' point.

MR. WALSH: Well, Congress certainly can create rights the violation of which will justify Article III standing, but it has to be a real right, it has to be a substantive right, and the violation of it has to create an injury in fact, and merely saying that you have to give somebody notice does not, in our opinion, create anything more than a procedural right where it's not --

QUESTION: Surely it cannot be true that any right which could be acquired by contract, any right to sue which could be acquired by contract can, since it can be acquired by contract, be conferred by Congress without

violating the separation of powers.

I mean, I can acquire contractual rights to do all sorts of good things for all sorts of people. Does this mean that Congress can, when I have not entered such a contract, give you the right to sue on behalf of those people?

MR. WALSH: I'd say you couldn't enforce that contract --

QUESTION: It's the end of the doctrine of standing, I would assume.

MR. WALSH: I would think so.

QUESTION: Then you couldn't enforce that contract in a diversity case.

MR. WALSH: I don't know.

QUESTION: Right, I've a different question, which is -- the question that I'd have would be, what about the associational standing? Why, in a contract case, I take it a supplier and a company could get up a contract and a measure of damages for the breach of the contract might have to be what the company had to pay all of its employees, right? You could have such a contract case, of course.

And now you don't have to bring the employees into court. They aren't a necessary part of the case, so why do you say here that the measure of damages, which

happens to be the wages that would be paid to the employees, makes the employees under Washington Apple necessary participants in this case?

MR. WALSH: Because each of the individualized determinations of damages for these employees depends on a number of variables, including his wage rate, his piece rate, how many days he was entitled to notice but he didn't get it, what his benefits were --

QUESTION: But the same would be true in a contract action. The same could easily be true in an action for breach of contract, or some kind of trust action, where the measure of damages turns on precisely the same matters that you're just describing.

MR. WALSH: But if I am the party to the contract, then I have a substantive right to enforce that contract and collect damages for those who are properly aligned with me. Now, I can't collect damages for the whole world, but --

QUESTION: No, no, no, but I mean, my point is, why does it require the employee to come into court or to be a participant in the case, any more than in a breach of contract action where the measure of damages is wages paid to individual employees, any more than that kind of case requires an employee to come into court?

It might, but you might prove it from paper, or

you might prove it in a hundred ways. It might not even be disputed.

MR. WALSH: Well, that is the Hunt test, and the Hunt test is, the third prong is based upon the fact that in that situation, in the absence of a contract or other substantive right, the association as such does not have an injury. The association is not itself injured, so it is not permitted to assert others' rights in trying to prop up its own right.

Now, the Government tries to say that this is a prudential requirement, but that --

QUESTION: Well, we've called it that repeatedly, haven't we?

MR. WALSH: Well, I --

QUESTION: And don't we -- let me ask you a related question. Don't we have to treat it that way, or we're going to be in trouble in class actions?

MR. WALSH: No, Justice Souter, I don't think so.

First of all, the Government has mischaracterized this prudential limitation, which it says is underlying the third Hunt factor.

QUESTION: Before we get into the question of characterization, do I understand that nothing more would be required than payroll records to determine the

compensation due here? It's not a question of credibility, just a question of how many hours, how many days.

MR. WALSH: Some of these piece rates, I'm told, Justice Ginsburg, vary from day to day, from hour to hour, even, so it takes an incredible amount of calculation and actually interviews probably with the individual employees to determine what they're entitled to from hour to hour and day to day, so it is a very highly --

QUESTION: I can understand that it might be a complex formula, but I don't understand why the testimony -- if you have time records, why the testimony of the employee would be necessary.

MR. WALSH: Oh, I think it's the participation of the employee that's the key.

The employee, because he is seeking his own damage remedy, has to come in and be part of the case because --

QUESTION: I thought you agreed with me before that you could have one class representative, only one named representative suing on behalf of all similarly situated, and that would do it.

MR. WALSH: I said for liability purposes only, but when you get to damages, then the individual determinations under Rule 23, in our opinion, would

outweigh the class deter --

QUESTION: Well then, for liability purposes, why shouldn't we say the same thing about the union?

MR. WALSH: Because the only remedy that's permitted under this act is this back pay remedy. There is no injunctive relief. There is no declaratory relief. It's either back pay for these members, or it's nothing.

QUESTION: Okay, now, third Hunt prong, I thought we had characterized that, number 1, as being merely prudential, and number 2, if we don't so characterize it, are we going to be in conflict, in effect, with class action cases?

MR. WALSH: No, sir. It has not ever been characterized as prudential. Where it has been discussed in Hunt and Warth and Brock, it has been discussed in the context of a constitutional requirement.

What is confusing about it --

QUESTION: And hasn't it been called prudential?

MR. WALSH: No. Actually, the actual prudential rule that the Government is referring to but which it mischaracterizes is one which says a plaintiff may not rest his legal claim upon the legal interests or legal rights of a third party, and that, of course, appeared in Warth v. Seldin, and the Court in Warth cited for that proposition Tilerston v. Oman, and Tilerston v. Oman was a

1943 case where a physician tried to claim that an act was unconstitutional in restricting access to contraceptives.

QUESTION: Warth came from a prudential error. I mean, anything you're basing on Warth has been superseded as far as principle is concerned by later standing cases. Was not Warth based on the proposition that the whole function of standing is to assure concrete adversariness? Isn't that the language that was in Warth?

MR. WALSH: Yes. Yes, sir. There were --

QUESTION: And that's been effectively overruled by later cases, which say its purpose is not to assure concrete adversariness alone, but rather that it has a constitutional component, which is what Warth explicitly denied, that it had any constitutional component.

MR. WALSH: Well, this --

QUESTION: So if you're trying to make your case from Warth, you're going to be in a lot of trouble because Warth says the whole thing is prudential.

MR. WALSH: Well, I don't read it --

QUESTION: So long as there's concrete adversariness, which there surely is here.

MR. WALSH: But this analysis was reiterated in Brock, and what it means is -- this prudential requirement that the Government is relying on means that I can't try to prop up my claim by asserting the constitutional rights

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of third parties. That's prudential. The court can allow me to do it, but it has not allowed me to.

But that's not what Brock is -- that's not what Hunt is about. Hunt is about an association asserting damage claims for members of that association without having any injury to itself.

That's totally different, and that's Article III material.

QUESTION: No, but the third prong -- I think we're talking about the same third prong, which is that it does not require the appearance of individual third parties to prove their damage -- supply the evidence for the specific damages that they have suffered, isn't that right?

MR. WALSH: It does --

QUESTION: Isn't that what we're talking about?

MR. WALSH: Yes. It does not require the participation of third parties.

QUESTION: Okay. Well, in a class action which includes a damage remedy, ultimately before the action is over the unnamed third parties have -- strike third parties. The unnamed class members who got to prove their damages, or there has got to be proof of their damages, right?

MR. WALSH: Yes.

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QUESTION: Okay. Why wouldn't that offend the Hunt prong if the Hunt -- if the third Hunt prong is constitutional?

MR. WALSH: Because in a class action, the plaintiff is a member of the class. The plaintiff is injured. The plaintiff therefore has the right, under Rule 23 --

QUESTION: Yes, but that's not the requirement we're talking about. We're talking about the third prong that says, you can't have associational standing if you have to bring in third parties, i.e., members of the association, to prove their claims, and the question is whether that's an Article III requirement.

If it is an Article III requirement, why isn't it by analogy an Article III requirement in class action cases, and it seems not to be.

MR. WALSH: Because in the class action, the plaintiff has his own injury. In the Hunt context, the association --

QUESTION: Well, he has his own injury, but before the class action is over, the injuries of other people have got to be shown, and those other people are in the same boat, aren't they, as the association members?

MR. WALSH: Well -- and in a lot of those cases, where the individual circumstances, damages if you will,

are diverse, courts routinely deny class action treatment.

QUESTION: For Article III purposes?

MR. WALSH: No, for --

QUESTION: No, and --

MR. WALSH: For manageability purposes.

QUESTION: Yes, but not Article III.

QUESTION: That is to say, prudential. Do you have any other reasons why associational standing won't wash here? It's just the third prong, that's the only objection you have to associational standing?

MR. WALSH: Well, there is a question, I think, about whether there's germaneness, but we haven't briefed that, but we do think -- the third -- the Eighth Circuit decided that the third prong of Hunt had not been met, and clearly it hasn't.

So the question then is, is it prudential, can Congress override it, or is it constitutional, and because it's based upon the lack of injury to the organization, and also because --

QUESTION: With respect, I'm missing that point. I don't see why the third prong is based on lack of injury. The third prong is a limitation on proof of other's injury.

MR. WALSH: It's not a rule of evidence, Justice Souter. It's --

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QUESTION: I don't know what it is. It's -- I'm concerned as to whether it's a rule of prudence or a rule of Article III standing.

QUESTION: Maybe you shouldn't concede, Mr. Walsh, that class actions are associational cases.

MR. WALSH: I don't think I --

QUESTION: You seem to have accepted that.

MR. WALSH: I don't think I did.

QUESTION: I mean, I thought in these associational cases the association cannot demonstrate any injury to itself, and it is relying entirely upon the injury to its members.

MR. WALSH: I don't think class actions are associational. I think the plaintiff is an individual --

QUESTION: So what we do with class actions has nothing to do with the third prong.

MR. WALSH: That's my view.

QUESTION: Yes, but it has everything to do with what Article III requires, which applies to class actions as well as associational standing cases, and if the same objection could be raised in the class action case that could be raised in the associational standing case, and it is not effective in the class action case, then it seems to me it has to follow that it's not an Article Third requirement in the associational standing case, isn't that

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correct?

MR. WALSH: Class actions are not associational actions. Class actions are --

QUESTION: I know, but they're both -- class actions in associational action cases are, standing cases, are subject to the same bedrock Article III standing requirement.

MR. WALSH: But the first question is, does the plaintiff --

QUESTION: And if it doesn't apply in one, then it can't be an Article III requirement for the other. That's the only argument I'm making, and I don't think I have an answer from you yet on that.

MR. WALSH: Well, I'm sorry, but I'm doing my best. The --

QUESTION: If I'd just be quiet and let you answer, I --

(Laughter.)

QUESTION: -- you'd have an easier time.

MR. WALSH: The -- in the class action context, the plaintiff is a member of the class who's been injured. He has his own claim, so he is in court, he's properly in court, and there's no Article III problem.

Then it's a procedural question whether he should be able to represent under Rule 23 others similarly

situated, but in --

QUESTION: Okay, and there's no problem in the fact that there has to be extraneous proof of the various damages for the various class members once he's in, right?

MR. WALSH: Well, there may be --

QUESTION: You know, it may make him nasty, and we may not certify the class for just that purpose.

MR. WALSH: Right.

QUESTION: But at least there's no constitutional problem.

MR. WALSH: But --

QUESTION: Right? No constitutional problem.

MR. WALSH: Well --

QUESTION: No Article III problem, standing problem.

MR. WALSH: I don't really know.

QUESTION: Well, we've never -- I don't -- and I will stand corrected if I'm wrong, but I don't think we've ever given -- our Court has ever given that as the reason. I think the reason has always been a manageability reason.

MR. WALSH: Generally that's correct --

QUESTION: Yes.

MR. WALSH: -- I would agree, but I think it could create a problem if one plaintiff would try to recover for mass tort victims, for instance, without

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joining those people in.

QUESTION: But concentrating on this case, if the union had joined one member, then you would see no problem and everything could go forward without Article III impediment?

MR. WALSH: If the union had joined one member, and that member had asserted a class action on behalf of himself, and he would be injured, on behalf of himself and others similarly situated --

QUESTION: That would be okay.

MR. WALSH: Then possibly that would be an appropriate determination of liability only.

QUESTION: Well, if that is so -- there would be no Article III impediment, I think you're agreeing -- then in view of the debate that has been going on here and among other courts, at the very least, shouldn't the union be allowed to amend its complaint to join a member, and then everything else follows.

MR. WALSH: The union refused, despite repeated admonitions in the lower court, to ask for leave to amend until after this case was decided by the district court. then, for the first time, they asked for leave to amend, came in and said we'd like to join the class members.

The judge said, "Where have you been for the last year-and-a-half? Denied." They contested that

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before the Eighth Circuit. The Eighth Circuit affirmed on that basis. They did not include that in their cert petition in this Court, and that is the law of the case at this point, so amendment of the complaint to join additional class members in our view is no longer appropriate.

QUESTION: Well, it's not before the Court.

MR. WALSH: That's correct. It's -- but a remand by this Court to allow that to happen would --

QUESTION: But it's not before this Court because it wasn't raised in the petitioner for certiorari, so we would ordinarily take no action with respect to any such assertion.

MR. WALSH: That's correct, yes, Your Honor.

The union has repeatedly based its claim here on the fact that Congress has acted and Congress has the right to create standing.

Now, Congress, indeed, has the right to create capacity to sue, but the party seeking the review must still be among the injured, and as Justice Kennedy said in his concurring opinion in Lujan, Congress at very least must identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

The only way that works in this case is if we speculate about what the injury was and how it relates to

the union, and it is not unprecedented for this Court to strike down statutes which purport to allow people to sue for a violation of Article III.

Back in 1911 in the Muskrat case, two individuals were authorized to sue to determine the title to some Cherokee Indian lands. The Supreme Court held that there was no case or controversy, that Article III will not permit advisory opinions --

QUESTION: Thank you, Mr. Walsh.

MR. WALSH: Thank you.

QUESTION: Your time has expired.

Mr. Gold, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF LAURENCE S. GOLD

ON BEHALF OF THE PETITIONER

MR. GOLD: Thank you, Mr. Chief Justice.

In terms of the Article III point that Justice Souter was pursuing, the Court has decided the General Telephone case, the Alamo case where the Government sues to enforce a public right and to get individual payments to people who were harmed.

If this was an Article III question, title VII, the Fair Labor Standards Act, as well as section 301 would all be beyond the Court's powers.

I would also note that what we have here is a determination by Congress that injunctive relief, which

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would keep the plan open, is not available. If injunctive relief had been provided and the union had sued, it would be plain to everyone here that the union had standing to bring a suit. This back pay is the substitute that Congress provided.

We don't believe that Article III means that the best is the enemy of the good in this sense and precludes Congress from making this kind of measured judgment, which is very much in the interests of defendants, I would note.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gold.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 95-340

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BY Ann Marie Federico

(REPORTER)