OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: NATIONAL CREDIT UNION ADMINISTRATION, Petitioner v. FIRST NATIONAL BANK & TRUST CO., ET AL. and AT & T FEDERAL CREDIT UNION, ET AL., Petitioner v. FIRST NATIONAL BANK & TRUST CO., ET AL.

CASE NO: No. 96-843, 96-847, cf

PLACE: Washington, D.C.

DATE: Monday, October 6, 1997

PAGES: 1-61

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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL CREDIT UNION :

ADMINISTRATION, :

Petitioner :

v. : No. 96-843

FIRST NATIONAL BANK & TRUST CO., :

ET AL.; :

and : CONSOLIDATED

AT&T FEDERAL CREDIT UNION, ET AL., :

Petitioner :

v. : No. 96-847

FIRST NATIONAL BANK & TRUST CO., :

ET AL. :

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Washington, D.C.

Monday, October 6, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

SETH P. WAXMAN, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Federal Petitioner.

JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf of

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SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
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the Private Petitioners.

MICHAEL S. HELFER, ESQ., Washington, D.C.; on behalf of the Respondents

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 86-843, National Credit Union Administration v. the First National Bank and Trust Company, and a related case.

General Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE FEDERAL PETITIONER

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

Congress enacted the Federal Credit Union Act to foster the development of strong and stable, cooperative credit institutions so that persons not being served by banks could obtain credit at non-usurious rates. Credit union proponents advocated including the common bond provision because experience had shown that credit unions organized around preexisting, cohesive groups were most likely to form economically strong cooperative institutions.

The banks lack standing under the APA to challenge the NCUA's interpretation of the common bond provision because Congress enacted that provision as an organizing principle to promote financially viable credit unions and not to impose substantive restrictions or

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constraints on competition. Thus, the banks' competitive interests are not within the, quote, zone of interests Congress sought to protect.

QUESTION: Well, how do you reconcile that petition -- position, Mr. Waxman, with our decision in the Clarke case?

GENERAL WAXMAN: Well, Justice Rehnquist, in Clarke, this Court determined that the plaintiffs, the security industry, had standing because it found that Section -- Sections 36 and 81 of the McFadden Act, which were the substantive provisions at issue there, had been enacted to reflect a, quote, congressional concern to keep national banks from obtaining monopoly power over credit and money through unlimited branching. And, therefore, Congress -- the Court found, Congress had arguably legislated against the very competition that the securities interest was seeking to challenge.

In this case, the common bond provision, in particular, and even the Federal Credit Union Act in general, was not enacted with any thought to restrict or control competition in any way. It was enacted in order to provide a means for strengthening the development of credit institutions.

QUESTION: Well, Mr. Waxman, the -- the Investment Company Institute v. Camp case was enacted, of

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course, to restrict competition. And we found standing there, didn't we?

GENERAL WAXMAN: You did, Justice O'Connor. And I think it's fair to acknowledge that that case, at least in our view, represents the outer limits of where this Court has gone in zone of interest.

QUESTION: Yeah, I think that's the -- the closest case for the standing argument. I mean, how do you get around that?

GENERAL WAXMAN: I -- I -- I -- I think -- I think it is -- and I think it's important and can be readily distinguished in three ways. First of all, although the Court acknowledged that the principle reason for enacting Section 16 of the Glass-Steagall Act had been to protect banks from engaging in investment activities of their own sake, the Court, both in the opinion in Investment Company Institute, and subsequently in Clarke, also noted that Congress had been concerned with, quote, the danger to the economy as a whole. So it wasn't the only reason.

But, more importantly, the basis for the holding in Investment Company Institute was that Section 16 of the Glass-Steagall Act was legislation against competition. The Court found in that case that Congress had legislated against the competition that the petitioners sought to

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challenge. So even if you construe that case in the broadest possible way -- and I would simply adopt Justice Harlan's characterization of the majority opinion in that case in dissent -- he said, if Congress prohibited entry into a field of business for reasons relating to competition, then a competitor has standing to seek observance of the prohibition.

Now, he thought that that was a holding that was not warranted by the Court's prior precedence. But even if that is what Investment Company Institute v. Camp stands for, that's not this case. The common bond provision, and, indeed, the FCUA in general, have nothing to do with competition. They were not -- there was not a reason for enacting the common bond --

QUESTION: But in order to find out the answer to that question, what was the reason for enacting the common bond, must we go back into the legislative history?

GENERAL WAXMAN: I think you do, because prudential -- the prudential standing inquiry this Court has taught is an analysis of what Congress intended; that is, the interest -- to quote Association of Data Processors -- the interest sought to be protected by the complainant must be arguably within the zone of interest to be protected by the statute.

QUESTION: So this is --

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GENERAL WAXMAN: So you must determine what the zone of interest to be protected by the statute was. And here it was clearly an intent to foster the development -- the rapid development of stable and strong credit unions, because -- and I think it's also important to -- to understand this -- in 1934, when Congress was considering enactment of the Federal Credit Union Act, the country was beginning to come out of the Great Depression. That --

QUESTION: Well, it just came out of the Great Depression and the War.

GENERAL WAXMAN: The banks -- it was in the Great Depression.

QUESTION: Yeah.

GENERAL WAXMAN: The banks had failed in great numbers. But, for the past 10 or 15 years, there had been developed state-chartered credit institutions, many -- most characterized by the existence -- or formed around a common bond. And Con -- the legislative history is replete with recognition that notwithstanding the banks' record during the Great Depression, not a single state-chartered credit union had failed. And what Congress wanted to do, in enacting the Federal Credit Union Act, was replicate the success of the state-chartered institutions.

QUESTION: Mr. Waxman --

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QUESTION: But isn't it --

GENERAL WAXMAN: Wow.

(Laughter.)

QUESTION: You might want to start at the end and work down.

(Laughter.)

GENERAL WAXMAN: Justice Ginsburg.

QUESTION: If we go to the zone test, which is you're arguing that -- that the banks are outside the zone, I believe that test was first introduced in an opinion by Justice White, where he said, it's only arguably within the zone. So I would assume one need not consult the legislative history. One could see if a lawyer could construct a good argument.

And further, didn't Justice White say that this was not a -- a difficult test to meet?

GENERAL WAXMAN: Well --

QUESTION: He was, in that opinion, expanding standing beyond what it had been up until then. And he explained that this test was rather easier to meet.

GENERAL WAXMAN: Justice Ginsburg, the zone of interest, which I believe was first articulated in the Data Processing case, was a case that was decided with explicit reference to the legislative history in order to determine Congress' purpose; that is, who Congress

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intended to benefit. The substantive statute at issue in this -- in that case was Section 4 of the National Banking Act.

And in analyzing the standing question, the Court looked, basically, to two sources: first, the legislative history and the extensive comments in the legislative history that showed that Section 4 was -- and I am quoting the Court now -- a response to the fears expressed by a few senators that without such a prohibition, the bill would have enabled banks to engage in non-banking activity, and thus constitute a serious exception to the excepted policy which strictly limits banks to banking.

Now, the other --

QUESTION: -- extensive -- such extensive legislative history -- if legislative history is the proper source of this, I suppose all you would need is a couple of statement by individual senators, who could -- who could cause the statute to be broader than it otherwise would. Surely one or two senators can render it arguably within the zone of interest.

GENERAL WAXMAN: Well, I -- I think, Jus --

QUESTION: That just puts an awful lot of weight on legislative history.

GENERAL WAXMAN: I -- I -- I did not mean to --

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to suggest that a tremendous amount of weight ought to be put on legislative history. But, nonetheless, the Court has, on occasion, looked at legislative history to determine Congress' intent.

But I think, Justice Scalia, in response to your point, it's also very important, in looking at the Court's opinion in Data Processing, which is the landmark case that established the zone of interest test, it -- the Court made explicit reference to two of its prior decisions in competitor standing cases: The Acheson-Topeka Railway case and Hardin v. Kentucky Utilities. And it characterized its decision in Association of Data Processing as an extension, or consistent with those prior competitor standing cases.

And it's very instructive, I think, if I can just beg the Court's indulgence for a moment, to recite what this Court stated in Harden v. Kentucky Utilities in its 1968 opinion. It said:

This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. And it cited a line of cases between 1880 and 1940. But competitive injury provided no basis for standing in the above cases simply because the

statutory and constitutional requirements the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule, at least since the Chicago Junction case, decided in 1924, that where the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest the injured competitor has standing to require compliance with that provision.

And that, Justice O'Connor, is the precise rationale on which this case is distinguished from Investment Company Institute v. Camp.

QUESTION: Suppose that --

QUESTION: Well, do you -- do you agree --

QUESTION: Suppose that we could establish by the legislative history that we would accept this dispositive, or by judicial notice, that if the agency's interpretation of the statute had been intended by the legislature or put into the statute in explicit terms, that the banks would have actively opposed it on the grounds of it being a compet -- a competitive injury, does that -- would that change this case?

GENERAL WAXMAN: It -- I don't think it does. I don't think it could be established, because --

QUESTION: Because it seems to me that that's quite a plausible in -- inference.

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GENERAL WAXMAN: The legislative history -- to the extent the legislative history reflects anything at all about the banks' interest in this, it reflects two things. One, with respect to the --

QUESTION: But I'm assuming that it does establish the proposition that -- that I put forward, that the banks would have been very active in opposition to this bill had this interpretation been written explicitly into the statute.

GENERAL WAXMAN: Well, then, I think the answer is that the banks would have the same remedy now that they would have had then, which is to go to Congress and ask for a legislative adjustment. If the statute is -- in turning to the merits -- if the statute is, as we argue, ambiguous -- that is, that the phrase "groups having a common bond," can just as easily be interpreted to mean groups, each having its own common bond or groups all sharing a single common bond, the agency's interpretation must be given deference. And that, I sus -- I -- I would submit to the Court, is the position that the banks would be in had they believed at the time that this would be given the interpretation it was and objected. That is, they would have had a legislative remedy.

Congress, for whatever reason --

QUESTION: What if I don't -- what if I don't

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agree with you that it's at all ambiguous? And if I thought any banker or, indeed, beer salesman, who read this -- this language would come to the conclusion that -- that each member of the group had to have a common bond with the others, then -- then what would your response to Justice Kennedy's argument be?

GENERAL WAXMAN: Then, it seems to me, the banks are out of luck on standing grounds. That is --

QUESTION: No, but his argument is they -- they would have opposed it. The -- the language seems to limit these -- these credit unions to a particular field, and the banks surely would have come in against it if they weren't limited in -- in this way.

GENERAL WAXMAN: Justice Scalia, Chevron says, as I understand it, that if an agency's interpretation is not in conflict with the plain language of the statute, deference is due. And if the plain language of the statute, for whatever reason -- inadvertence by Congress or a conscious choice to leave the decision to the agency -- persists, what this Court must do in response to a challenge by the banks, if they have standing, is look to determine whether the agency's interpretation is a permissible or reasonable one.

And here --

QUESTION: General Waxman, my -- I just want to

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be clear on one point. Is, essentially, your standing argument that there could be no challenger to this in the court; that, essentially, the logical challenger, the banks, are out; so this would be, essentially, immune from judicial review, accepting your view of standing?

GENERAL WAXMAN: Not at all, Justice Ginsburg.

QUESTION: Who could challenge it?

GENERAL WAXMAN: We think the logical challengers are in fact the same kind of parties that have been challenging chartering decisions. And that is members of credit unions. The common bond provision was enacted to protect the strength and stability of credit unions, and therefore to protect the members of the credit unions.

And in the cases that we cited in our principal brief, there are instances in which members of credit unions have sued either the NCUA or the State chartering agencies, saying, you're trying to add disparate groups or you're trying to add more groups than we think is safe and sound.

QUESTION: Could a competing credit union have standing to challenge?

GENERAL WAXMAN: I think -- I think a competing credit union might have standing if it was challenging a decision that the agency had made under Section 1754 of

the Act, which requires that the -- the NCUA ascertain that economic advisability of the proposed -- of the proposed chartering or proposed merger, but not --

QUESTION: Why doesn't that open it to -- why doesn't that open it to banks?

GENERAL WAXMAN: Well --

QUESTION: That -- economic advisability sounds to me something like a competitive possibility.

GENERAL WAXMAN: Here -- here's the reason. Because the agency has interpreted economic advisability, the statutory term, to mean, quote, that it will be a viable institution, and its chartering will not materially affect the interest of other credit unions or the credit union system.

QUESTION: Yeah, but that's -- that's a two-part standard. And it seems to me the first part is -- is equally open to the banks to raise.

GENERAL WAXMAN: In any event, Justice Souter --

QUESTION: Isn't it? I don't know what --

GENERAL WAXMAN: No, I --

QUESTION: -- viability is a wonderful word, but it -- and I'm not sure what it means, but it says something about economic feasibility. And that's a product of competition. And that implicates banks in general, doesn't it?

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GENERAL WAXMAN: Justice Souter, the banks, number one, have not challenged the determination of economic advisability here. But if they had --

QUESTION: But what about the answer to my question?

GENERAL WAXMAN: -- if they had, I would argue that they do not have standing, because the evident purpose of that statutory provision was to make sure that when the NCUA charters a credit union, it does so, taking cognizance of the interests of other credit unions and the credit union system, not the banks.

QUESTION: Well, that certainly is included. But it seems to me that in this argument -- and I -- and I thought in the argument you were -- you were making earlier, you are making the assumption that there can only be one purpose, or that there is at least a predominant purpose, and that controls. And is -- is there authority in our cases for that? In other words, why -- why, for example, in this case, could it not have been both the purpose of Congress to -- to assure the -- the -- the kind of community soundness of these credit unions and to protect regular banks from their competition? Why can't it be both? And if it's both, why isn't there standing to the bank?

GENERAL WAXMAN: The -- the answer to your

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question is your cases, most recently, Bennett v. Spear, do recognize that Congress can have two purposes. But in this case, there was none. There was no purpose reflected in the legislative history and the '34 Act to benefit --

QUESTION: Well, but that isn't the only --

GENERAL WAXMAN: -- banks from competition.

QUESTION: But let me ask you this. Let's assume we had a case in which the legislative history was totally silent. Would we not -- and -- and let's assume that were the case here -- I realize that's not your position -- wouldn't it be fair in that case for us to infer that the purpose of this limitation, or at least one purpose of this limitation, was in fact the protection of neighboring banks from competition. Would that be legitimate?

GENERAL WAXMAN: It would not be fair. Even if the legislative history itself, the debate --

QUESTION: Well, then, how would we ever decide the standing question?

GENERAL WAXMAN: Well, I think maybe then it goes to who has the burden of proof. The plaintiff has the burden of showing that it is within the zone of interest that Congress sought to protect.

QUESTION: Right. And why wouldn't the plaintiff have a perfectly sound argument to say, look,

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this seems, among other things, to protect us from competition. Why, therefore, may we not infer a -- a purpose for standing doctrine?

GENERAL WAXMAN: The -- the accepted purpose -- and the -- and the Court of Appeals, the court below, specifically found that it would be anomalous, in light of the available evidence, to suggest that this provision had been intended.

QUESTION: No, but I'm -- no -- you're changing the question, I think, with respect. I'm saying let's assume the -- the record is silent. We don't have any legislative history. All we have is what's on the face of the statute. Would it not be a legitimate inference that the protection of banks against competition was at least a purpose of this limitation?

GENERAL WAXMAN: I think it would not. Because the way that the common bond provision works is not to set up any sort of substantive picket line or bar or entry restriction. It is purely to determine which individuals in the United States get to belong to which credit unions. There's no allegation in this case that there is any individual member who belongs to a credit union which, if the banks win, will not be able to belong to some other credit union. This is purely an internal governing device for the industry to decide who belongs to which credit

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union.

May I reserve --

QUESTION: But it is a limitation of some kind, isn't it? I mean it is a limitation on --

GENERAL WAXMAN: It's --

QUESTION: -- the -- the credit union.

GENERAL WAXMAN: It -- it is. It is expressed as a limitation, at the urging of the proponents of the credit union industry to --

QUESTION: But it -- so it's meant to be confining to --

GENERAL WAXMAN: It is meant to be confining in the sense that the statute requires something that the -- the proponents of the credit union movement desperately wanted, which is to maximize success, that these groups be organized around -- that credit unions be organized around groups having a common bond.

May I reserve the balance of my time?

QUESTION: Yes. Thank you, General Waxman.

Mr. Roberts.

ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE PRIVATE PETITIONERS

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

I would like to pick up with Justice Kennedy's

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question: If the banks had known about this interpretation, they would have objected. First of all, that's beside the point. You don't get standing under the zone of interest test simply because you objected. Congress may not have accepted your objections.

QUESTION: Well, I -- I don't know that it's beside the point, because the way you're arguing, it's something of -- of a trap. Let's assume that the most plausible interpretation of this regulation is -- is the interpretation that the banks now advance. If they were satisfied that that's what the statute meant, you know the bankers' lobbyists -- I assume they bankers had lobbyists in 19 -- in the 1930's?

MR. ROBERTS: They did --

QUESTION: I'm sure they did. And -- and -- and if --

(Laughter.)

QUESTION: And -- and they would have been all over this statute --

MR. ROBERTS: But --

QUESTION: -- and all over the Hill had it -- had it been given the plausible interpretation that you're now arguing for.

MR. ROBERTS: I -- I think they would not have been for the simple reason that banks were not in the

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business of making small consumer loans in 1934. That was the very reason you needed a Federal Credit Union Act in the first place, because nobody was competing to provide these loans other than loan sharks. And Congress had no interest in protecting their competitive status.

Banks were not in this business. That's why you needed the Act. Their competitive interests were not in Congress' mind. Even if it had the interpretation that it has today, they were still not in that business. This was not what they were about. And simply because they would have objected doesn't mean Congress took their interest into account. This was a Congress that was not particularly sympathetic to the interests and concerns of banks --

QUESTION: What is your basis for saying that banks were not into this business in the 1930's?

MR. ROBERTS: It -- it resounds throughout the legislative record. They say the reason we need this statute is because no one is in a position to provide small consumer loans. The small consumer couldn't put up adequate security for the bank to provide the loan. And it was usually in amounts too small for -- for the banks to bother with. Over time, they have become competitors with credit unions.

But the question is, did Congress view them as

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competitors in 1934? And did it enact the common bond provision to protect their status as competitors? And it is clear that they did not.

QUESTION: Do you agree that a member of a credit union would have standing to establish -- to -- to attack this --

MR. ROBERTS: Certainly. The purpose of the provision is to ensure the strength and stability of the credit union. It's a cooperative enterprise.

QUESTION: Then -- then it seems to me we're really enforcing something of -- of a fiction on our standing doctrine; that the most interested challenger in this interpretation, the most injured person or entity is the bank.

MR. ROBERTS: I think that --

QUESTION: And so we're having a credit union member front for the banks' interest. That doesn't make much sense to me.

MR. ROBERTS: Well, I think the argue -- the line -- that line of argument confuses the Article III standing inquiry and the prudential standing inquiry. If it is enough to simply show competitive harm and a regulatory effect to establish prudential standing, then there's no difference between Article III standing and prudential standing. This Court has made clear -- most

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recently, in the Air Courier case -- that there is a difference, and Article III injury is not sufficient to establish prudential standing.

QUESTION: Well, no, it wouldn't show that there's no difference. It would just -- just say that -- it would just show that -- that when you have a regulatory provision, competitive injury is -- is one thing that will establish -- will establish both Article I and prudential standing. But there are a lot of other injuries that -- that wouldn't satisfy prudential standing even though they'd satisfy Article I.

MR. ROBERTS: The Court has told us that the prudential standing inquiry turns on congressional intent, not simply effect. Every time Congress imposes a limitation on a regulated entity, it's not necessarily acting with competitive concerns in mind.

QUESTION: Mr. Roberts, what will we presume the congressional intent to be? These are hard questions. And I -- I personally am not going to comb through the legislative history to find a statement by a couple of senators that will render this arguably within the zone of interest. That does not seem to me an intelligent way for this Court, or even a -- a banking lawyer, to try to figure out what the answer.

MR. ROBERTS: See, our --

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QUESTION: So we -- we have some presumptions. And -- and -- and Congress should be aware of those presumptions. Surely a reasonable presumption would be, when you have a regulatory statute, any provision in that regulatory statute that was designed to limit the scope of activity of the regulated entity can be sued upon by someone who is -- who is within the regulated industry and a competitor.

MR. ROBERTS: Well, then that's -- that's a new exception to the zone of interest test. If, for example, Congress passes a law, saying, we're restricting late-night flights into National because of the noise, that might benefit bus and train companies who provide late-night service. But they wouldn't have standing to sue if the FAA changes the definition of when late-night begins. They would be injured as competitors. But the intent of Congress was not to protect competition --

QUESTION: Change the statute a little. I mean, by saying "late night," you make it obvious that the purpose of the statute is to -- is to hold down noise. But suppose the statute is: We are reducing the number of flights into National, period?

MR. ROBERTS: Then, as the Court has said in all the other prudential standing cases, you look to see what the intent of Congress was. You start with the language

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of the statute, as --

QUESTION: You don't have to find the intent. You have to find what was arguably the intent.

MR. ROBERTS: Arguably --

QUESTION: Does arguably within the zone of interest mean you have to identify -- you have to identify the purpose for sure, and then the question is whether this is arguably within that purpose? Or does arguably within the zone of interest mean this was arguably the purpose and this is arguably within it?

MR. ROBERTS: Arguably -- arguably doesn't mean you just sort of have to get in the neighborhood. Arguably is in the case because it's a standing inquiry. It's not a determination on the merits. It means that you don't have to make a final decision on exactly what the statute was designed to do, as you would in deciding the merits of the case, but appreciate that it's just a standing inquiry. But you do have to decide. If there is going to be a difference between an Article III standing test and a prudential standing inquiry, you do have to decide what the intent of Congress was. And here --

QUESTION: Mr. -- Mr. Roberts, the zone test came up in a case where the Court recognized that there was standing. And it was stated in that case, and then it's been discussed in -- in other cases. It's a little

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hard, isn't it, for you to extract from a case that found standing all these results where there would be no standing? Because you're using a case that said there was standing, and then say, but we can find certain language in it, instead of saying, well, the Court dealt with the zone test, and it would elaborate on it in a further case. It seems to me you're taking a lot of negative out of a case that was positive on standing.

MR. ROBERTS: Well, the Court found standing in the Data Processing case, but it has, on other cases, other articulated a test for determining whether there's standing, and it said you looked to congressional intent. And the one thing that's clear here is that this provision was not put in to protect banks. It came from the credit union proponents.

QUESTION: Mr. Roberts, I -- I know you're still trying to address standing, but, so far, nobody has even talked about the merits.

MR. ROBERTS: Well, I'll turn to that right now, Your Honor.

The test is that the banks must show that Congress unambiguously expressed its intent on the precise question at issue. The precise question at issue is, may the multiple groups in a Federal credit union each have their own common bond or must they share a common bond?

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The language simply says: Federal credit union membership shall be limited to groups having a common bond. There is no way to tell from that, as a matter of common parlance or technical grammar, whether each group must have its own common bond or whether all of the groups in a Federal credit union must share the same common bond. It is simply ambiguous language.

QUESTION: Well, in light of that second geographical limitation clause, it -- it's awfully hard to give it this broadest reading of groups, each of which could have a common bond. Why would you need the geographical limit, then? I mean, it's just in -- in the second part of the sentence.

MR. ROBERTS: In the community -- the community --

QUESTION: Yeah.

MR. ROBERTS: The phrase is --

QUESTION: It just seems like -- like such -- interpretation.

MR. ROBERTS: There are two different types of credit unions. The occupational credit union isn't confined to a well-defined neighborhood. Only the community credit union has that limitation. And although the court below said this gives different meaning to the -- to the word "groups," it doesn't. In each case,

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"groups" means more than one group.

QUESTION: You couldn't have a single group? You couldn't have a credit union composed of only a single group?

MR. ROBERTS: You can --

QUESTION: It has to be composed of groups that have a common bond. So there -- there must be more than one group in every credit union under your reading?

MR. ROBERTS: No, I -- I don't think that's a -- if it is a plausible reading, it's not the only plausible reading of the language.

QUESTION: I don't think it's a plausible reading, but it's your reading.

MR. ROBERTS: Our -- our reading is that --

QUESTION: It shall be limited to groups having a common bond. So it seems to me you can't have a single group, because that would not be a group having a common bond with other groups.

MR. ROBERTS: I think the plural -- as 1 U.S.C. 1 provides -- the plural includes the singular. So that groups could be read to -- to include group.

QUESTION: The plural includes the singular?

MR. ROBERTS: 1 U.S.C., Section 1, the Dictionary Act, says, unless otherwise compelled by the language --

QUESTION: You see, you could have -- you could have one credit union to which every person in the United States belongs, who is employed, but for sole proprietorships?

MR. ROBERTS: The cred -- nothing in the common bond provision would prevent that. There are other provisions in the statute --

QUESTION: Well, then, I mean, this wasn't much of a limitation of anything, if that's so, isn't it? I mean you could have -- you could have 200 million people in one single credit union. I don't know why Congress bothered with this.

MR. ROBERTS: As the agency interprets it, it's still a significant distinction. You cannot walk down the street and turn into the nearest credit union and say, I want to make a deposit, or, give me a loan. You have to be a member of a group that has joined that credit union as --

QUESTION: But I mean everyone except for sole proprietors, who is employed, works with at least one other person. And, therefore, those two people -- two people anywhere in the United States, could join a credit union. I mean, is that a plausible interpretation?

MR. ROBERTS: Nothing in the common bond provision prohibits it. If a court determines that's

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unreasonable under step 2 of Chevron, it may be invalid. But not because the language is unambiguous under step 1.

QUESTION: Thank you, Mr. Roberts.

MR. ROBERTS: Thank you, Your Honor.

QUESTION: Mr. Helfer.

ORAL ARGUMENT OF MICHAEL S. HELFER

ON BEHALF OF THE RESPONDENTS

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

Congress expressly limited membership in Federal credit unions in the except clause, and the whole clause is critical. It reads, except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, and it then goes on, or to groups within a well-defined neighborhood community or rural district.

We submit that the first thing you do in making the standing determination under the cases is look at the text and what it does. What does the common bond requirement do? It limits the persons to whom a credit union can offer its banking services. That's what it does. That's the effect of it. The first thing you look at is the text.

It's just like the Clarke case. In Clarke, the McFadden Act limitations limited the locations at which a

bank could market its services to other people. It has the same effect. So the presumption -- to go back to Justice Scalia's question, the presumption, then, ought to be that a limitation of that kind that has that effect is intended as a competitive limitation, particularly in the context in which the legislation was passed.

QUESTION: Well, in that context, are you going to address Mr. Roberts' point that not merely as legislative history but as a matter of real history, there simply was no competition at that time as between banks and credit unions for the kind of business that the credit unions served?

MR. HELFER: Yes. I'll be happy to answer that, to respond to that point.

In the first place, the banks did testify at the hearings on the D.C. Credit Union Act, which was the precursor to the Federal Credit Union Act, and which Mr. Berengren, who was the -- Bergengren, pardon me, who was the chief credit union advocate, has described as a copy -- that the Federal act is a copy of the D.C. act. The banks testify, and they testified about their competitive concerns with the act.

Congress made a change relating to demand deposits, and Congress then carried forward that change into the Federal Credit Union Act.

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With respect to the precise question of the -- were the banks providing these services, banks were viewed -- the NCUA brief at 5, and again at 21, tells us that banks were viewed as an alternative to credit unions when the FCUA was passed. Congress wanted --

QUESTION: Were they alternatives for deposits, or alternatives for loans, or both?

MR. HELFER: They would be alternatives, I believe, for both.

Not all -- banks were not failing to make any loans at all. What Congress wanted in the Credit Union --

QUESTION: Well, loans to the small borrower.

MR. HELFER: I'm sorry. I meant loans to -- we're talking about consumer loans, yes --

QUESTION: Yes.

MR. HELFER: -- Justice Souter. When Congress -- what Congress wanted was more sources of credit. When you read what they were talking about, they wanted more sources of credit. The banks weren't doing enough. The loan sharks were paying -- were charging very high prices. The banks, of course, had been through a very difficult time and were asking for a lot of security and other things. Congress had just passed -- to go to the historical context --

QUESTION: Wait, I assume there are two clients

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of banks, aren't there, the people who put money in and people who take money out? I mean, those who make deposits, and those who make loans.

MR. HELFER: Yes.

QUESTION: And even if it were true that banks were not competing with credit unions for loans, they might still -- it would seem would still be competing with them for depositors, no?

MR. HELFER: Well, that's a very fair point. I'm sorry, I was focusing on loans coming out of Justice Souter's question. The focus in the legislative history was on getting money back in to get the economy rolling again.

Congress of course didn't want to take away the source of deposits in banks, which were making commercial loans as well as some consumer loans, but making commercial loans. It wanted to get the economy going again. That's why it passed the Glass-Steagall Act and the Federal Deposit Insurance.

In June 1933 -- to put it in its historical concept, in June 1933 Congress passed the Banking Act of 1933, which included Glass-Steagall and Federal Deposit Insurance, and it was during that month that the hearings were held on the Federal Credit Union Act, and there was an inquiry, not surprisingly, about what the position of

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the banks was with respect to the bill, and Mr. Berengren, having laid the groundwork, said the banks weren't opposed.

It's clear that the banks were in the picture, and the concerns of the banks were in the picture.

QUESTION: Were bank rates regulated, the interest that a bank could pay on a deposit?

MR. HELFER: I don't believe their --

QUESTION: At that time?

MR. HELFER: At that time, I don't believe so. Reg Q came into effect later on. They were not interest rates at that time.

QUESTION: How about State regu --

MR. HELFER: They were straight limitations, I believe, at that time.

QUESTION: You're not saying there was no State regulations?

MR. HELFER: No, I'm sorry, there certainly was State regulation on the usury side, on the lending side. I'm not familiar, Your Honor, although I haven't looked carefully at whether there was State regulation that might have been applicable on the deposit side.

QUESTION: Mr. Helfer, the court below, the CADC, in finding standing for the bank, relied on a suitable challenger test for finding standing. Do you

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defend that test here, or should we look to the zone of interest test?

MR. HELFER: I believe that under this Court's decisions the question is the zone of interest. What the D.C. Circuit --

QUESTION: So you do not defend the D.C. Circuit's suitable challenge test?

MR. HELFER: Well, I do in this sense, Justice O'Connor. What the D.C. Circuit does is, in trying to implement zone of interest, carry out this Court's decisions, it's divided its thinking, its verbal formulation, into intended beneficiary and suitable challenger, but both are ways of determining whether or not the zone of interest test is met, and the zone of interest test --

QUESTION: Well, there isn't much left of the zone of interest test if you rely on the suitable challenger notion.

MR. HELFER: Well --

QUESTION: That seemed a little odd to me.

MR. HELFER: Well, that formulation is one which I think this Court doesn't have to reach. This Court's formulation has always been zone of interest.

Judge Wald, in concurring in the decision below, actually criticized the suitable challenger test as

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implemented by the majority in this case and others as too narrow, as not fully carrying out the zone of interest test, and so we -- but we think that test is the zone of interest test, and that's what Clarke and Camp and the other cases show.

QUESTION: You would -- if -- there would be standing for the banks if the provision, instead of the one we had before us, said that the credit union has to have its offices in the same building that the employer has its offices, and then they want to open an office next door. Could the bank say, hey, you're getting too big?

MR. HELFER: Well, I think if that were part of this test, that sounds very much to me like the McFadden Act limitations on where a bank can put an office that were at issue in the Clarke case, Justice Stevens, and so I think on that basis I would conclude yes.

QUESTION: You think there would be standing?

MR. HELFER: I think so, because that sounds to me just like McFadden.

QUESTION: What if the provision limited the people who could serve on the board of directors of the credit union --

MR. HELFER: Well --

QUESTION: -- so you have to have two appointed by management and two employees and a third party, or

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something like that?

MR. HELFER: I think there, when you look at that kind of a statute, you would conclude, I think, that it isn't a competitive boundary. It isn't a competitive limit.

Now, a bank might come in and say, well, if they say they pay their

QUESTION: It might limit the number of associations that could do business.

MR. HELFER: It might do that. You'd have to make that assessment. The question would be, of course, whether there'd be Article III standing in the first place where you could show a direct --

QUESTION: Well, you'd have a proliferation of credit unions that didn't qualify on the director standing. They're just all over the country taking a lot of loans that the banks would otherwise get.

MR. HELFER: Well --

QUESTION: If they could demonstrate that factually, that they just -- for some reason it's a lot easier to organize them quickly if they don't have to go through the red tape of appointing all these directors.

MR. HELFER: I think that is harder than a clear competitive boundary like this one on who you can serve, and in that one I --

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QUESTION: It's who can serve, not only who you can serve.

MR. HELFER: That's right. But what if --

QUESTION: That would identify what unit can serve, which is also what happens here.

MR. HELFER: What affects the bank's competitive interest is, as shown --

QUESTION: The proliferation of credit unions.

MR. HELFER: Is the -- is taking away customers, and --

QUESTION: And wouldn't that mean that any time a restriction affected the number of credit unions out in the market, the bank could have standing to challenge that restriction?

MR. HELFER: Well, I think you have to -- when you look --

QUESTION: And if not, why not? Why wouldn't that be enough?

MR. HELFER: I think that the -- at some point the relationship between the nature of the limitation and the --

QUESTION: I'm suggesting that maybe the limitation has to be on -- one on conduct, rather than one on who may do business.

MR. HELFER: And in response to that I would say

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that Clarke is a case -- Camp is a case on who may do business, what business you can do. That's a Glass-Steagall case.

But Clarke is a case on where you can do business. It's not an activities case. It's not a Glass-Steagall case, it's a McFadden Act case, which is why I answered your -- the first --

QUESTION: Well, a movement from where to who?

(Laughter.)

MR. HELFER: Where to --

QUESTION: I'm just wondering if your test wouldn't require us to say, any restriction that limits the number of entities that may do business by meeting certain qualifications would be subject to challenge by a competitor.

MR. HELFER: Well, I think that if the limitation affected the competitive authority of a regulated entity in --

QUESTION: Well, it affects number, and number always affects competition.

MR. HELFER: Well, if number always affects competition and -- it seems to me that the principle is that in a regulated marketplace limitations on your competitor are limitations that it's sensible to believe that Congress would permit the other competitors to meet,

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and if that's that kind of limitation, then I would agree that they would have standing.

QUESTION: There's standing any time you have a limitation on the number of entities that may enter the business.

MR. HELFER: Well, there's --

QUESTION: Or that may, by its natural tendency, limit the number of entities.

MR. HELFER: I think it is true that the first thing you look at is the text, and what it does, and if it has the effect of limiting one competitor in a regulated marketplace, which is what this is, that cases like Data Processing, which involved data processors, Arnold Tours, which is about travel agents coming in, even though the Court said there was no indication at all that the Court was concerned about data -- about travel agents, would permit standing under those circumstances, what --

QUESTION: I'm -- go ahead, please.

MR. HELFER: I'm sorry. Just to finish up on that, what we're doing here, what's involved here on the standing side, the cause of action comes from section 10 of the Administrative Procedure Act. The question is carrying out Congress' intent in the Administrative Procedure Act. The Court has interpreted Congress' intent as being to facilitate judicial review. It makes it

presumptively reviewable.

It's not an especially demanding test. These are all the terms in Clarke in carrying out Congress' intent in section 10. Then you only deny standing in carrying out section 10, congressional intent, when the interests are simply not implicated by or are inconsistent with the statue. That was Air Courier, the postal employees in Air Courier. They're just separate from the statute, but it is congressional intent in section 10 which is critical, and when you combine that with the clear congressional intent to limit credit unions, who they can serve --

QUESTION: Would it be a different case if Congress had made an express finding that the sole reason for making this requirement is that we think this will maximize the number of credit unions that can succeed in the marketplace?

MR. HELFER: It certainly is true --

QUESTION: If they'd made such a finding, would there be standing?

MR. HELFER: If they'd made such a finding at some point you're going to get close to a case like Block v. Community Nutrition.

QUESTION: I don't want another case. What about my case?

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MR. HELFER: Okay. I'm sorry. I'm just using that to discern the principle that would be applicable.

When Congress manifests an intention that a particular group -- it was -- in Block it was the milk consumers -- not be allowed to get judicial review, either by what it says in the statute or by the way it structures the statute, then you don't have standing under section 10.

QUESTION: When I -- or, does that mean in the hypo I gave you you'd say there was standing, or was not standing?

MR. HELFER: In that hypothetical, I think if Congress clearly said in the statute this is the sole and only purpose of it, then that would be a manifestation of congressional intent that other people not sue, but legislation --

QUESTION: It's your understanding there'd be no standing.

MR. HELFER: There would be no standing, I'm sorry, yes, but -- I'm sorry. I didn't mean to -- I didn't want to duck it, but yes. Yes, there would be no standing.

But legislation is almost never passed for one purpose. They always have multiple purposes. You know, here, to come back to a point on the legislative history

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of the act, a ponit was made by my colleagues that the banks didn't say anything about the common bond provision.

Well, they didn't say anything about the common bond provision because it was in the bill from the beginning. It was -- the very point that they made, that the trade union advocates had put it in, the banks didn't have to ask for a common bond provision.

The -- there is an indication in one of the NCUA studies that's cited in the brief that suggests that one hypothesis was that the common bond was designed by Mr. Filene, who was a credit union advocate, and others to assure that the banks would not object to the bill. That's at page 4 of the NCUA study in Federal credit union member --

QUESTION: Mr. Helfer --

MR. HELFER: -- charter --

QUESTION: Mr. Helfer, do I understand correctly that the language, common bond, was originally in State provisions before there was a Federal?

MR. HELFER: Yes, it was in State provisions, and in a model provision as well.

QUESTION: And in that line I'd like to know whether any States have interpreted their legislation using the same language, groups having a common bond, to mean what the Government and their credit unions are now

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asserting. Have any States --

MR. HELFER: Attorneys merits -- no.

QUESTION: -- interpreted that language?

MR. HELFER: None is cited in the briefs, and I'm not aware of any, Justice Ginsburg.

QUESTION: Can --

QUESTION: But do I also understand that if the legislation that's now pending, the proposed legislation with respect to defining precisely groups having a common bond, if that legislation passed, this case would be moot?

MR. HELFER: If that legislation passed, parts of this legislation might be moot. It would depend, because it would not -- I guess there is actually some legislation which might moot the whole case, because it would eliminate the common bond requirement completely, and if that happened --

QUESTION: It says that members of any Federal credit union shall be limited to one or more groups, each of which have within such group a common bond. If that's -- if that were passed --

MR. HELFER: If that legislation were passed, it would eliminate -- yes, it would eliminate our argument that the statute now requires one common bond for all of the members.

QUESTION: I'd like to ask you a couple of

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questions.

MR. HELFER: Certainly.

QUESTION: I assume that the basic standing question -- this is the assumption -- is whether you, your clients, the plaintiffs, suffer the kind of injury that Congress or that this statute intended to protect these kind of people against. That's basically the question of standing, isn't it?

Are they -- and then you have to add the word, arguably, and once you add the word arguably, it becomes a problem. I don't know if you have, but I never, in 17 years of being a judge, have found a position that a lawyer couldn't plausibly argue for.

(Laughter.)

MR. HELFER: Well, and I think that Justice --

QUESTION: Am I right? I'm just asking -- that's the assumption on which my question -- I take it you basically agree with that assumption.

MR. HELFER: Yes, Justice Breyer, with -- although it is not necessary to show under the cases that there was a spec -- an intent to benefit the particular --

QUESTION: I'm saying we have to interpret a statute, the object -- the question is, is, are the plaintiffs suffering the kind of injury that this statute seeks to protect these kind of people against, or

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compensate them for, or prevent in the future?

MR. HELFER: Or prevent them from suffering?

QUESTION: Yes, right.

MR. HELFER: Yes.

QUESTION: Right. Okay.

MR. HELFER: Yes, essentially --

QUESTION: Now, that's the question, all right, and the answer is, how do we decide if it's arguably so.

Now, what I don't understand, and this is my question, and I got this very much from Justice Stevens, I think, what he was trying to do, is say, why do we answer this question through the use of presumptions? It's going to be pretty tough.

We'll make up a presumption, and then in the 400,000 pages of statutes and regulations we're going to find some cases where a presumption doesn't work, it mixes up the lawyers, they forget it -- why don't we just answer that question exactly like we answer any other statutory question and if, in fact, we use legislative history, fine, and if in fact we don't, fine, but it's a typical statutory question that should be answered without the use of presumptions that will be good for this ticket and day only.

That's basically my question.

MR. HELFER: I don't think that you need to have

any presumptions here. I think if you use the traditional tools of statutory --

QUESTION: Okay. Then if you do not want us to use presumptions and think we don't have to, my next question would be, right here we have some language that restricts this to groups. From looking at the language I have no reason at all to think this was done to protect banks at a time in history when, in fact, people were passing this kind of statute to protect depositors, lenders, and get out of the Depression. They wanted -- all right.

Now, so the language doesn't help me. I personally sometimes find legislative history useful, and when I go to that legislative history I do not find one word that suggests that this statute was designed to help competing banks, and therefore whether I use legislative history or whether I don't use legislative history, without any presumption coming in, which I don't know what it would do elsewhere, I find it difficult to see how your clients have standing.

MR. HELFER: Justice Breyer, the reasons that we have standing are that the statute -- the effect of the statute, what the statute does is to limit who the credit unions can sell their banking services to. That's the first thing you look at.

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The second thing you look at when you look at the legislative history is that, with all respect, you do find that the banks were involved, and that they were concerned, and that they were there, and that --

QUESTION: All right, good. So where is that? Now, will you tell me that were in the legislative history --

MR. HELFER: That is in --

QUESTION: -- that would be helpful.

MR. HELFER: That is in -- you have to start with the legislative history of the D.C. Credit Union legislation, which was passed in 1932, okay.

At the hearings on that act, Senator Kean said, I agree with the President that we ought to go very slowly with anything that will interfere with banks at the present time. That's in the 1932 hearings at page 31. At those same --

QUESTION: But that's on a different -- a different provision. I mean, you're referring us to what happened in a whole different law.

MR. HELFER: Justice O'Connor, this law, and my colleagues agree, is the precursor to the Federal Credit Union Act, and Mr. Bergengren, who was the sole witness on the Federal act, referred to the D.C. act as a copy. That's at 1933 hearings at page 29.

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So this is not some separate and different law that we're looking at. It is the exact precursor that Congress passed before it passed the Federal Credit Union Act --

QUESTION: And it had the groups language in it?

MR. HELFER: Yes, it did. It had exactly the same groups language --

QUESTION: Was Senator Kean still alive?

MR. HELFER: -- the same common bond limitation, exactly.

QUESTION: Was Senator Kean still alive when the act we're looking at was enacted?

(Laughter.)

MR. HELFER: I'm sorry, Justice --

QUESTION: We don't really know, do we?

MR. HELFER: I'm sorry, Justice Scalia, I don't --

QUESTION: Never mind.

(Laughter.)

MR. HELFER: I don't know.

QUESTION: I don't want you to stop before you've said -- I have page 31 of the '32 act. Is there anything else?

MR. HELFER: Well, you also have the bankers testifying in -- on -- in the proceedings on the '32 act

about their competitive concerns, particularly with respect to deposit-taking by the credit unions, and you have that, Congress changing the act in that respect to accommodate the bankers' concerns, and you have that change carried forward to the Federal Credit Union Act as well.

You do not have the banks complaining about the common bond provision, because the common bond provision, the common bond restriction was in the act already. There just wasn't any need to say anything about it or to ask for it.

Now, not in the legislative history but in the record here let me point out something else. Mr. Filene wrote an article in the American Bankers Association Journal in 1925. It's in the lodged materials, lodged by the Government, at tab 2, at page 24, in which -- he wrote it in the Bankers Association Journal to reassure the banks that the credit union system wouldn't be a competitor because -- and this is a quote now -- "credit unions are organized within specific groups" and have to meet the common bond requirement.

So I think the fair reading of the overall history -- and I emphasize, Justice Breyer, that Filene article is not in the legislative history technically, but it is in the materials before the Court.

The overall reading is that the credit union advocates wanted the common bond for their own purposes, recognized that it would help to make sure that the banks didn't oppose the bill, at a time in which -- the congressional goal was not to injure or hurt the banks. The goal was to restore the banking system to health, which is why they passed the Banking Act of 1933.

QUESTION: At least arguably, you say.

QUESTION: I recognize this --

MR. HELFER: At least arguably, yes.

(Laughter.)

MR. HELFER: I find it persuasive, but I -- but at least arguably.

QUESTION: I -- we're talking about Federal law here, but there is some law in the States on the position. There are a number of States that have provisions regulating medical practice, that dentists and optometrists cannot use certain procedures or administer certain drugs. I take it under your theory that, if those were changed to expand the functions and the privileges of an optometrist or a dentist, that any doctor could sue.

MR. HELFER: Any doctor who was injured by that. I think the same principles that have been used in the standing cases would lead to that result.

QUESTION: Is that the law in the States

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generally?

MR. HELFER: I'm sorry, Justice Kennedy, I simply can't answer that question over --

QUESTION: Unauthorized practice of law actions are largely based on that sort of re -- actual research.

MR. HELFER: And are permitted, yes, Chief Justice.

QUESTION: Probably not --

MR. HELFER: If I may turn to the merits -- I'm sorry.

QUESTION: Just a little -- one tiny question on history. Am I correct in assuming that the '32 statute involving the District of Columbia was enacted during the Hoover administration, and this statute was enacted after a rather dramatic change in the status of the Government?

MR. HELFER: That's -- that is correct. The statute was -- '32 and then '34. That's absolutely correct.

On the merits, we think that Congress -- that the question here -- the Chevron question is not what General Waxman, as General Waxman described, about unambiguous language used by Congress. The question is, is the congressional intent clear, and you determine congressional intent largely by looking at the language, to be sure, but by using all of the tools of statutory

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construction.

QUESTION: Well, I guess we have to ask if the statutory language is ambiguous. Is it ambiguous?

MR. HELFER: We -- I submit --

QUESTION: If it is, then we would defer to any reasonable interpretation by the agency.

MR. HELFER: That's right, and I submit that the -- and the courts, both the Sixth Circuit and the D.C. Circuit, held that the legislative intent, as expressed in this language, was not ambiguous, shown in two ways that I will summarize here.

QUESTION: I would hope we would look at the language of the statute to answer the question of whether it's ambiguous, not at some legislative intent.

MR. HELFER: Well, the --

QUESTION: Let's look at the language. Is the language ambiguous?

MR. HELFER: The -- we submit that the language is not. Chevron says that the intention, congressional intention is the law and must be given effect, but the language is not ambiguous in terms of what the statute intended for two reasons.

One is that the except clause, the whole clause that we've been talking about, is an exception that both limits credit union membership and limits the NCUA's broad

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authority at the beginning of the statute. They get very broad authority to determine who can be a member of any credit union. Then they go on and -- Congress goes on and says, except that credit union membership shall be limited to groups having a common bond.

If -- the limit has to be, we submit, and as the Sixth Circuit and the D.C. Circuit held, has to be one common bond per credit union, because if it isn't, if a credit union can join together an infinite number of distinct groups, then the credit union, or then the common bond limitation would not have its intended limiting effect.

Mr. Roberts conceded that point. He said --

QUESTION: Mr. Helfer, aren't there other limitations that would prevent this infinite progression?

MR. HELFER: There are at the -- there are other limitations that the agency has imposed in its discretion, like not letting credit unions compete with one another. Those are not statutory.

But the key point, Justice Ginsburg, is that, as Mr. Roberts admitted, the way they read the statute, the common bond limitation has no effect. It allows everybody who is employed to join AT&T Credit. This clause, the except that credit union membership shall be limited to groups having a common bond, has no limiting effect, and

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that's what the Sixth Circuit said. There's no reason to have that clause if you read it the way the NCUA reads it right now.

QUESTION: Well, we know the agency considers the language ambiguous, and we know that some Members of Congress do, too. What credit, if any, should we give to that?

MR. HELFER: Well, the agency and its predecessors interpreted the common bond clause to require one common bond per credit union from the time of enactment until 1982, nearly 50 years, and from the time of enactment and for that long is strong evidence about what the clarity of the original intention was. It's a Chevron I relevant point.

With all respect, Congress is in the business of determining what the law is going to be, this Congress is, and its views about whether the law ought to change are views that are entitled to respect going forward, but not about what this law means.

QUESTION: But they did say --

MR. HELFER: This case is like --

QUESTION: They did say this is a bill to clarify the existing law and ratify the NCUA interpretation.

MR. HELFER: Well, I think I can say with all

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respect the credit unions have lobbyists, too, and the --

(Laughter.)

MR. HELFER: And that we ought to look at what the -- at what this text says. In this respect --

QUESTION: Who said that? Do we know who said that, that particular quote? Was that Senator What's-his-Name, too?

(Laughter.)

MR. HELFER: If he was still alive, I'm sure he would have.

QUESTION: That's why I thought it might be relevant if States having the same language interpreted it the way the Government is urging us.

MR. HELFER: Yes, absolutely, and the Government doesn't cite any such interpretations, and I'm not aware of any, Your Honor.

This case is a lot like Dimension, the Dimension case, where the Fed came in and wanted?

QUESTION: What case?

MR. HELFER: I'm sorry, Chief Justice, the Dimension case, Dimension v. Board of Governors.

QUESTION: I thought you said dementia. You said this case is a lot like dementia.

(Laughter.)

QUESTION: That's arguable, too, I suppose.

(Laughter.)

MR. HELFER: Perhaps I ought to skip Dimension and go on to parallel clauses.

(Laughter.)

MR. HELFER: The -- in Dimension, in any event, the agency came in and said, we need to construe the definition of bank in the Bank Holding Company Act so as to reach institutions that are so-called nonbank banks, and that there were strong public policy reasons to do it.

The agency here says there's strong public policy reasons to have a multiple unlimited common bond requirement provision, and that's properly addressed to Congress, as in Dimension, where Congress, after this Court's decision, made the change.

Going back to the parallel clauses for one moment, the community credit union clause, the agency agrees, does require every community credit union to have a single common bond of community, but it says the preceding and parallel clause in the statute permits this unlimited number of members, and we submit, with all respect, that doesn't make any sense.

Both clauses are doing the same work in the statute. Both clauses are limiting the groups that can join any one credit union. The difference, we're told, is the difference between within, which is a restrictive

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prepositional phrase, and having, which is, we are told, an explanatory participle phrase. That just isn't reading the statute. That's an overemphasis on the grammatical -- on the King's English, not what Congress intended.

QUESTION: I suppose under the agency's interpretation, if there is only one group in a credit union, the people in that group don't have to have any common bond at all. It's only groups that have to have a common bond, right? So if you had --

MR. HELFER: I think that's the --

QUESTION: You know, AT&T and other companies, all those other companies have to have a common bond.

MR. HELFER: I think that's a logical conclusion, Justice Scalia, but they do --

QUESTION: Either that, or you can only have groups, and you can't have one company.

MR. HELFER: That's right, but they do in fact permit one company, one group there. They do permit those kinds of credit unions, in any event.

That's not at all -- let me just finish up by saying what AT&T is. AT&T here, so you can get a sense of what it is, is a $500 million tax-exempt conglomerate, and it has more than 300 distinct employee and associational groups in it. That means it has more than 300 separate common bonds inside it. Its range is truly enormous. It

has picked up employee groups that are as small as eight workers, so it is capable of going around the country and drawing in virtually everybody who is.

QUESTION: How does it compare in size to your client?

MR. HELFER: It compares in size as follows, Your Honor. Randolph State Bank, of Asheville, North Carolina, is one-third the size of AT&T Credit.

Thank you very much.

QUESTION: Thank you, Mr. Helfer.

Mr. Waxman, you have 1 minute remaining.

REBUTTAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE FEDERAL PETITIONER

GENERAL WAXMAN: Thank you.

Justice Ginsburg, in response to your question about the States, the amicus brief submitted by the parties in support of our position advised us that 36 or 37 of the States permit -- State regulators permit multiple groups within a single common bond and multiple groups with different bonds.

There -- of the five States that have the exact language that the Federal statute has, either two or three have already interpreted that statute to permit the interpretation that the National Credit Union Administration has.

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QUESTION: Was that after the Federal interpretation, or was it before the Federal --

GENERAL WAXMAN: I don't know, but it's referenced, Justice Scalia, at page 3 and 4 in the amicus brief of the National Association of State Credit Union Supervisors.

QUESTION: I mean, it may be a copy cat kind of thing. I'd be more impressed --

GENERAL WAXMAN: The --

QUESTION: -- if it came sooner rather than later.

QUESTION: Your time has expired.

(Laughter.)

GENERAL WAXMAN: Thank you, Mr. Chief Justice.

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

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BY Ann Marie Fedrico

(REPORTER)