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Supreme Court of Texas.
The City of Round Rock, Texas and Round Rock Fire Chief Larry Hodge
v.
Jaime Rodriguez and Round Rock Fire Fighters Association.
No. 10-0666.

December 8, 2011.

Appearances:

Douglas W. Alexander of Alexander Dubose & Townsend, LLP, for Petitioners.

Craig Deats of Deats, Durst, Owen & Levy, PLLC, for Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in our second cause, 10-0666, the City of Round Rock v. Jaime Rodriguez.

MARSHAL: May it please the Court, Mr. Alexander will present argument for the Petitioners. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF DOUGLAS W. ALEXANDER ON BEHALF OF THE PETITIONER

ATTORNEY DOUGLAS W. ALEXANDER: May it please the Court, in my opening 15 minutes, I tend to do two things. First, I intend to tackle the amicus brief that was submitted by the labor organizations recently. That brief makes a very powerful case for the proposition that the Texas Legislature in 1899, its intent in 1899 was to in a very expansive fashion grant a whole set, a whole panoply of protections to both public and private employees in Texas. Through the assistance of a PowerPoint, I am going to demonstrate that actually the intent of the legislature in 1899 was much more restricted. It was important, indeed it was progressive for its time in 1899, but its intent was to grant this protection. It was the right of employees to band together to organize labor unions without that being regarded as unlawful activity. That is what I will demonstrate. The second thing that I will do during this time is to demonstrate why this Court should not follow the decisions from all of the other jurisdictions upon which Rodriguez relies for his argument. Those decisions are virtually all of them either decisions of state labor boards or courts following decisions of state labor boards in states which make labor policy, labor law in the public sector in a fundamentally different way than it's done in Texas. In those states, the law is truly made by administrative bodies which are delegated policymaking authority. In this state, we don't

do that. The sole policymaking authority in this state is the Texas legislature and if protections are going to be afforded to employees in the public sector, that is done through the legislature. So let's now turn to my first point and that is the amicus brief. Again, that brief, in masterful fashion, by looking at the history of labor organizations in Texas, develops the argument that the intent of the Texas legislature in 1899 was to grant this full panoply of protections to employees both public and private. Actually, the intent was more limited and that is to make clear that in 1899, employees could band together to organize labor unions, form trade unions without that being unlawful and let's go ahead and turn to that.

JUSTICE DEBRA H. LEHRMANN: Excuse me, let me ask you. You do admit that the statute's pretty broad, right?

ATTORNEY DOUGLAS W. ALEXANDER: It is broad in terms of who it is that it protects.

JUSTICE DEBRA H. LEHRMANN: And so where in that statute does the legislature express its intent to exclude public employees?

ATTORNEY DOUGLAS W. ALEXANDER: Well, actually I don't think it does.

JUSTICE DEBRA H. LEHRMANN: So how do you address that?

ATTORNEY DOUGLAS W. ALEXANDER: I address that as I say that I think that you will be persuaded when I'm done with this presentation that the 1899 statute applies to both public and private employees. Now we have left that open as an unbriefed issue in our case and we said, if we were going to leave for another day whether that would be decided, but I think what you're going to find is is that in 1899 what the Texas Legislature did was to say employees in Texas, all employees in Texas, you can lawfully form a labor union whether you're public or whether you're private, you have that right, but that's all it did. It applies to both. I think you will conclude when I'm done with the presentation that it applies to both, but that's a restrictive right. Let's go ahead and look at it. This is the 1899 statute. Now I'm not going to drag you through all of its language. This is the predecessor of the labor code provision that we're dealing with today, but I'm going to focus in on language that is overlooked by the amicus brief when it made its presentation. This is the opening language that from and after the passage of this act, it shall be lawful. It shall be lawful to form trade unions. Now that suggests was it perhaps unlawful at the time? Was there reason to fear that that might be unlawful at the time? Answer yes. Let's go, let me back up and erase that highlighting and let's go to our next slide. This is the case of McNatt v. Lawther, which is not mentioned in the amicus brief. It is the first decision after 1899 to actually examine the 1899 statute and interestingly enough, it was a suit involving firemen working for the city of Dallas. This should sound familiar given our case, who were fired because they joined a labor union. So what did they argue? They argue well you can't fire us. The 1899 statute gives us all these protections. We have the right to be a member of an organization and so the court examined the purpose of the statute. It was probably the purpose of this legislation to make it clear that the early decisions which held labor unions under certain circumstances to be unlawful and our own laws against trust and combinations did not apply to labor unions and so it's saying that the purpose of the 1899 statute was to make it lawful in Texas to band together to form a labor union. Now to fully understand this because this is so foreign to our current thinking, English decisions. What are they talking about? I want to spend about three minutes going through quickly 500 years of English history regarding labor unions. So let me go ahead and clear this, get my pencil and go to a different color, take that off and here we go. 1348, the Black Death, let me just say that down in the state law library, you have books that lay out this history, but let me just pound through it. The Black Death, the Plague, what happened in 1348 was one-third to one-half of the population of England was decimated and it included the workers. What that had the effect of is that demand for their services did not go away, but the supply was greatly diminished. The natural result was that wages spiked. The powers that be at the time says, we cannot have this and as a result, in 1349, they enacted the Ordinance of Laborers and in 1351, the Statute of Laborers, unbelievable statutes. What they did was this was basically a maximum wage law. It says that, in England after the Black Plague, we are going to restrict everyone's wages to the levels they were at three years before the plague hit so it was an artificial, governmentally insti-

tuted repression of wage rates. 1562, with the Elizabethan statute of apprentices, this is the first comprehensive labor code in England, which continued the same thing although we brought in judges. Judges were involved in setting wage rates, but again, the government was involved in repressing rates. Now naturally at the time, those who were wage-earners fought against this. It was government artificially reducing wages and so they wanted to band together to be able to better their lot, but there was restrictive laws that prevented that from occurring and ultimately what happened was in 1721, these various legal theories coalesced into the notion of criminal conspiracy. It was considered a criminal conspiracy in England for workers to band together in unions in much the same way that our antitrust laws work today. That is to say we allow individual businesses to set their prices, right? But if they band together to try to fix prices, unlawful. The same theory was used with respect to labor unions. That is to say you could individually by this point bargain with your employer for increasing your wage, but if you banded together collectively and did that, that was considered a criminal conspiracy. Now, that was not officially done away with in England definitively until 1875. Criminal conspiracy finally goes away with the Conspiracy and Protection of Property Act, but what devolved out of that ever creative solicitors and barristers and they devised the notion of the civil conspiracy that if you banded together and injured an employer, you could be liable in tort for that conduct. Now what's important about this is that that was not done away with until 1906 with a Trade Disputes Act in Texas in 1906 and so until 1906 in England, you could be held civilly liable for forming a labor union. Okay, now why is it important? It's important because our statute was in 1899, okay? So what Texas did in 1899 was to make lawful that is coming together to form unions without fear of civil or criminal conspiracy allegations, something that was not done in England until seven years later. Now how do we know that? Let's go back and look at the McNatt case. Again, the first case decided after 1899 and it says, the 1899, this is the firemen, remember, we're back to the fire fighters who were fired. The court held, I'm sorry, the 1899 act merely announced that there was no prohibition of law against unions, but on the other hand, it did not preclude an employer from prohibiting his employees from becoming members of such trades and you notice on pain of discharge in the case of violation. So remarkably enough, the fire fighters were fired and had no legal recourse. Why? Because although they had the right to organize, they did not have the right to work. They did not have the right to work. That right now, now mind you, let's stop and consider this. If the 1899 statute was this broad grant of rights and if this Court in 1920 in reported decisions take a very limited view of it and the legislature thought that that was wrong, why didn't it change it? Well, it could have done that in the next legislative session, but it didn't. It didn't that one, the next or the next one. It wasn't until 1947 that was addressed. This is the current codification of the 1947 law, an individual may not be denied public employment because of the individual's membership or non-membership in a labor union. So when 1920, if you wanted to join a labor union, if you wanted to form a labor union, you could do that without fear of civil or criminal liability, but you could lose your job. It was a restricted right that was granted. It was not this panoply of rights that was given. You had the right to work finally until 1947. You had the right to organize given in 1899 and this brings us to the point of this case and that is in the state of Texas, if you want to get protection for public employees, what do you do? You go to the Texas Legislature and get it. That's what occurred in 1947 and if you go, it's absolutely fascinating to me, if you go now and I urge you to do it, I don't know who drew the black bean for this case to write it, but if you go to the government code and the local government code, click through that, just click on the statutes that relate to rights or limitations. I mean they will tell you, Justice Wainwright, that if you want to fly in a plane, you can't fly first class or that if you, because you're a public employee, or how much mileage you can get. It is absolutely that's the way we do it in Texas, which brings us to the second point as I see the yellow light, got a couple minutes here, but the second point is is that in this state, if you want to get protections, you go to the legislature. If you're in the 18 or the other states that, they rely upon, what do you do? You go to an administrative body, a public employees' relations board and you bring a case and you say, you know, we need the Weingarten right now and a public employee relations board, which has policymaking authority will then examine its own laws typically modeled after the NORA and would say, okay, we'll grant that right.

JUSTICE NATHAN L. HECHT: Does the Ft. Worth amicus brief accurately set out teh pros and cons, mostly cons, of the Weingarten right in this context in your view?

ATTORNEY DOUGLAS W. ALEXANDER: Yeah, although I'll tell you one other place to go and I think if you go to the City of Round Rock decision itself, it cites IBM Corporation, which is an NLRB decision, which

really lays out I think in a very special way, the concerns about the Weingarten right in the workplace. Now they're dealing with a private workplace, but I think it applies here. What they point out is is that since 9/11 particularly, employers are under greater burden, well for many reasons, employers are under greater burdens today to do investigation because of sexual harassment in the workplace, violence in the workplace, threats of terrorism in the workplace and so that the concern that and you can take that to the public employee sector as well, the concerns that employers have is that it can burdensome to them with respect to that. So I think that the IBM Corporation case gives the other side of the argument. As for arguments as to why Weingarten is a good thing, you can go to the U.S. Supreme Court's decision. It gives perfectly good policy arguments on the other side and but at the end of the day, this Court doesn't do that. This Court does not weigh those policy considerations. It makes the determination because and again, in this state, the policy decisions of that type are made by, drum roll, the Texas Legislature. You would go to the Texas Legislature and you would there is nothing to prevent labor unions from going to the Texas legislature and lobbying for the Weingarten right. Labor unions go to the Texas Legislature every time it's in session and that's totally okay. I mean that's how we make our public employment law in Texas and then it is up to the legislature to weigh those rights, the perfectly good reasons for the Weingarten rights that set out in the U.S. Supreme Court decision, the perfectly legitimate concerns are laid out in the IBM Corporation case and make the decision. I see I have the red light.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any questions? Thank you, Mr. Alexander. The Court is ready to hear argument now from the Respondents.

MARSHAL: May it please the Court, Mr. Deats will present argument for the Respondents.

ORAL ARGUMENT OF CRAIG DEATS ON BEHALF OF THE RESPONDENT

ATTORNEY CRAIG DEATS: May it please the Court, I will immediately cede the technological advantage and ask the Court to rely on my rather paltry by comparison handout that hopefully has been provided.

JUSTICE DAVID M. MEDINA: Do you remember the year of the Black Plague in the video?

ATTORNEY CRAIG DEATS: Decades ago, the U.S. Supreme Court found that the literal language of a textually similar labor statute protected the right of private sector employees to union representation in job-threatening interviews. The overwhelming majority of state courts that have considered this question under their own similarly worded labor laws have likewise found such protection for their public employees. The lone Texas court ever to have considered this question, albeit in an unpublished decision, agreed that Texas public employees have this right under Texas law as well. Today--

JUSTICE PAUL W. GREEN: Where do they get that right out of the statute?

ATTORNEY CRAIG DEATS: Your Honor, they get that right out of the statute and specifically Labor Code 101.001 and here I would refer the Court to the earlier version statute 5152 because some important words are left out and they give a little bit more nuance to the protections provided, but it's the right to associate themselves together and form trade unions for the purpose of protecting themselves and their personal work.

JUSTICE PAUL W. GREEN: Well, I understand that and from that you can extrapolate this right to have a union representative at a termination hearing?

ATTORNEY CRAIG DEATS: Your Honor, I would not go that far. The question, of course, is whether having a right to union representation in a particular instance actually furthers the employees or the employees' generally interest. In that situation, the courts have held, in fact, that because you're just being given a disciplinary decision and there's a lesser role for the union to play, the balance strikes not in favor of protecting that right.

JUSTICE PAUL W. GREEN: Well, I understand it might be a good idea, but whether it's required or not by the statute is what we have to look at, do you agree?

ATTORNEY CRAIG DEATS: Exactly, Your Honor, and I would agree and in doing that, I think that it's important to analogize to the federal law because the two statutes are textually similar, number one and number two because this Court and other Texas courts routinely have utilized federal labor case law in deciding issues from similarly worded Texas statutes and-

JUSTICE PAUL W. GREEN: Well in that case, the Weingarten, of course, the Supreme Court was looking at an interpretation of the statute by a labor board and we don't have that in this case so why would we import that to our system here?

ATTORNEY CRAIG DEATS: Your Honor, the labor board is an administrative agency that has specialized expertise with regards to labor matters. These words like concerted activity, mutual aid or protection, associate themselves together, protect themselves in their jobs, they have specialized meaning in the context of labor relations. So it relies on that board.

JUSTICE PAUL W. GREEN: So the federal labor board may look at our statute and say the same thing, but there's not such a counterpart in this state that has said, so.

ATTORNEY CRAIG DEATS: Your Honor, there is not a counterpart in this state that has said, so except for the Texas court of appeals in Austin, which has said, so twice now, but I would point out that when faced with similar problems of interpreting Texas laws in the past, this Court and other Texas courts have analogized a federal labor law, much of emanating from the National Labor Relations Board in interpreting similar Texas statutes. You have to give some meaning to the statutes and it's important to understand what Mr. Alexander left out of his presentation about the lead up to the 1899 statute was that that statute didn't simply protect the right to form, join and assist unions. That's more akin to the New York statute that they rely on, but this statute did something more. It specifically identified a purpose that those unions served. Those unions served the purpose of allowing employees to associate themselves together for the purpose of protecting themselves in their personal work.

CHIEF JUSTICE WALLACE B. JEFFERSON: Does that mean that 101.001 itself gives you a right to have a union representative in any disciplinary proceeding or hearing or meeting? Is that what you're saying?

ATTORNEY CRAIG DEATS: Your Honor, those words in that statute have not been interpreted so broadly. They've been interpreted to allow for a union representative in an investigatory interview when that representative can have a meaningful effect in balancing the playing field and making sure that the employee's statement is presented adequately. It has not, in fact, been extended even by the National Labor Relations Board to meetings, for example, where you're simply being given disciplinary consequences that have already been decided.

JUSTICE NATHAN L. HECHT: But if you don't appreciate the pros and cons of the policy issues involving those different settings, it seems to me very difficult to tell which ones are in and which ones are out of a very broad statute.

ATTORNEY CRAIG DEATS: Your Honor, it is a broadly worded statute and of course, there are in labor circles, there are simply reams of documents and decisions that go to the ins and outs of what these particular types of words mean, but at the same--

JUSTICE NATHAN L. HECHT: It reminded me of the Sherman Act a little bit. It doesn't really tell you the details of what you need or what the law's going to be like so many statutes do. It's almost a policy statement to me.

ATTORNEY CRAIG DEATS: It doesn't flush out the details, but it does specifically identify one activity that unions are to be able to address and that is to help the employees protect themselves in their personal labor. We talked a moment ago about how the Supreme Court in Weingarten was deferring to the National Labor Relations Board, but of course, they did much more than that. They also found that the right to a union representative at this type of investigatory interview inherent in the literal language of the statute itself, the language that they focused on had absolutely nothing to do with collective bargaining and I want to make that clear. Nothing to do with collective bargaining. It had everything to do with these words in the federal statute that gave persons a right to engage in concerted activities for mutual aid or protection. I want to focus-

JUSTICE NATHAN L. HECHT: But I just wonder how the Supreme Court could have reached that conclusion without the benefit of the board interpretation of the statute.

ATTORNEY CRAIG DEATS: Your Honor, not only did they rely on the board interpretation of the statute, but they also as Mr. Alexander pointed out gave several policy rationales for finding that protection to in here in the literal language of the statute that gives you the right to engage in concerted activity for mutual protection.

JUSTICE NATHAN L. HECHT: Were those rationales derived from the board also or did the Supreme Court come up with--?

ATTORNEY CRAIG DEATS: Your Honor, to some extent, those rationales may have been utilized by the board as well, but the Supreme Court itself articulated the rationales that it found to be compelling. Those rationales included helping to prevent unjust punishment, allowing representation of the employee at a time when it is most useful, not later when the employee's made up his mind, assuring that a scared or inarticulate or unsophisticated employee is not prevented from providing accurate information or extenuating circumstances and even to help the employer get to the bottom of things. Ft. Worth in its amicus brief has pointed out some things that it thinks would be impediments to employers. I respectfully disagree with that very much. I think, in fact, the statute does not, in the private sector, we've had this right for decades. Many state jurisdictions, they've had this right for decades. There was absolutely no showing, no empirical evidence that there has been any significant impediment to the ability of employers to discipline their employees simply because they have a right to a union representative at investigatory interviews. On the other hand, the benefit to employees is very, very clear. Obviously an employee and this case provides a perfect example. This employee was required to meet, this fire fighter was required to meet alone and unaided with his chief, his assistant chief, and his battalion chief and so he's in that room. What are the chances he's going to be nervous or inarticulate or forget something that's important to say? Clearly, an essential right with regards to the employee, but as to the employer, the impediments are very slight. The employer can make sure that it's the employee that does most of the talking, etc. When you get to the policy rationales, it's very clear, but of course, my job is to convince the court that they need to get there from the language of the statute itself.

JUSTICE DEBRA H. LEHRMANN: Let me ask you, the legislature has enacted lots of legislation that deals with the rights of policemen and fire fighters and so can you come up with anymore specific statutes that could provide assistance or that deal with assistance or representation during the interview process in the context, in other words, in linking those statutes with 101.101?

ATTORNEY CRAIG DEATS: Your Honor, there are some, you know that the Civil Service Act pertains to fire fighters and police is a rather Byzantine Act because it has various sections that apply only to, for example, Houston or there's one that applies to Austin and Ft. Worth. There are some sections in those that pertain to investigations. However, those do not deal specifically with the right to a union representative in investigatory interviews. They really don't deal with that aspect of it at all so we do need to look to Section 101.001 for that protection. Now the City, of course, the Petitioners attack our contention that you can find this protection in the literal language of the statute as did the U.S. Supreme Court and they point out that the wording of the two statutes is not identical. The state statute unlike the federal statute doesn't utilize the word mutual aid or protection,

doesn't utilize the word concerted activities. However, the state statute that was found by the Austin Court of Appeals in 1982 is textually very similar. For example, the relevant portions of the statutes, the federal statute uses the word labor organization. The state statute uses the word trade unions. Obviously, the concept is the same. In like manner, the federal statute protects the right of employees to engage in concerted activity while the state statute in its original ideation protects their right to associate themselves together. The federal statute authorizes such group activity for mutual aid or protection. The state statute in turn authorizes it for purposes of protecting themselves in their personal work. The language differences make connote two statutes that were adopted some 36 years apart, but they all obviously connote that the same concept of using this for protection and it's important to note that the Supreme Court in finding that the literal language of the federal statute protected concerted activity for mutual aid or protection, they noted that a fundamental purpose of the law was to eliminate any quality of bargaining power between employers and employees. As our historical analysis and the amicus historical analysis shows, it was clearly recognized in 1899 in Texas and other places that this inequality exists not only when the employee is bargaining for wages and hours, but also when the employee faces interrogation and possible job loss at the hands of the employer. The representational role was a role that obviously was played. Now the Petitioners claim, of course, is that the legislature in Texas in 1899 could not possibly have intended to convey this sort of representational right and they presented a PowerPoint that indicates it simply didn't make labor unions illegal. It's telling, I think, that they rely on McNatt v. Lawther, a case that clearly would have constitutional problems today and a case which the Texas Legislature clearly overruled with its legislation in 1947 when they made sure that employees could not be fired because of union membership. So I think that it is not a fair comparison and I would point out that their argument, in fact, is based on a false premise that the Weingarten decision in 1975 created a wholly new representational right. It did not. Both the federal statute and the Texas statute predated the Weingarten decision by decades. As covered in our brief and the amicus brief, the common understanding of labor unions and what they did for their members was that they provided collective bargaining, but also a representational role in the workplace. This understanding predated both the federal and the Texas statutes.

JUSTICE PAUL W. GREEN: There are other rights that are granted to organizations that are more clearly spelled out than this wouldn't you agree?

ATTORNEY CRAIG DEATS: Your Honor, there are rights that are provided to various organizations by the Texas Legislature and statutes that are more clearly spelled out, but there are also rights that are vaguely worded. That's not uncommon in legislation. The 1899-

JUSTICE PAUL W. GREEN: Looking at Weingarten, in the absence of an NLRB board interpretation, what would be the basis for the Supreme Court to come to the conclusion that this right existed?

ATTORNEY CRAIG DEATS: The statute itself, Your Honor. The Weingarten decision itself.

JUSTICE PAUL W. GREEN: They could look at the statute like you're asking us to do here and find this particular right in this statute. What other rights are there that maybe we're not thinking of that's not part of this case. I mean can you just make up any right that we want?

ATTORNEY CRAIG DEATS: No, Your Honor, as this Court has done in the past, obviously the court should be informed of various decisions that have interpreted similarly worded labor laws in the past. It's important to understand, we're not really asking for the creation of a new right. For decades now, it's been understood that this representational right exists under this type of statute. The U.S. Supreme Court in the Weingarten decision although they clearly were receiving a case that came up originally from the NLRB, they found that that literal language, literal language of the statute protects the right that we're affording. They noted all of the policy rationales in place for finding that that right existed under the literal language of the statute.

JUSTICE NATHAN L. HECHT: Let me come at it this way. If you were arguing this case in 1965, this would be a much harder argument to make it looks like or not?

ATTORNEY CRAIG DEATS: Your Honor, if we were arguing this case in 1965, of course, you would not have the entirety of the body of case law that the Supreme Court had 10 years later, but we would have most of it, and so sure without this precedent, but then again I think it's important that in one respect what the Petitioners really are asking you to do is to say that Weingarten was not correctly decided, that they got it wrong, that you can't find these words in the literal language of the statute, that you should not be informed by the federal court decisions that have interpreted this language in this statute. That you shouldn't be informed by all of the other states that, have found in their own similarly worded statutes this type of protection for their public employees and just sort of chart a new course. We're simply asking the Court to find that this right that is well established and understood in labor circles inherent in exactly the type of statutory language that we find is present in Labor Code Section 101.001. It is there and as we've covered the concepts connoted by the two statutes are identical. So we're simply asking this Court to reaffirm a right that almost every jurisdiction that has considered the question has found to exist under this type of labor statute.

JUSTICE DON R. WILLETT: There are parts of the Labor Code as you know that reference and express, sort of aim to advance the interest of federal law like the TCHRA, there's expressed language saying look we fully intend to advance the purposes of Title VII. What we make of the absence of similar language in that part of the Labor Code in this case and the presence of such language with regard to other federal employment related or acts like Title VII, etc.?

ATTORNEY CRAIG DEATS: Your Honor, if we had that sort of language as you have in the Human Rights Act, of course, we would have an additional argument, but in urging this Court nonetheless to use federal labor law precedent, I think we're trotting down a pretty well-worn path as we've pointed out in our brief, at least as early as the 1950s, this Court was utilizing federal labor law to guide its interpretation of similarly worded Texas statutes. That is something that the courts have repeated down through the years as we've noted in our brief and so I don't think that we're asking the Court to chart a new or a dangerous course in utilizing that federal case precedent. Certainly, all of the other jurisdictions almost all of the other jurisdictions that have looked at this question, have looked at their own labor laws and found that sort of thing to be persuasive. I do want to point out--

JUSTICE DALE WAINWRIGHT: Should that be our guide in determining what other rights and benefits attached to 101.001, that is when the majority of other states have done it?

ATTORNEY CRAIG DEATS: Your Honor, no.

JUSTICE DALE WAINWRIGHT: In similarly worded statutes?

ATTORNEY CRAIG DEATS: Not solely, Your Honor, but when you're interpreting language in a statute, that is similar to language in many other statutes that has been interpreted by the federal courts and the other state jurisdictions, then, yes, I say that that is persuasive in terms of the technical usage of the terms in the statute as it is understood in labor circles and for that reason, it is persuasive. Obviously, this Court is interpreting a Texas statute and this Court has the authority to do that as it sees fit.

JUSTICE DALE WAINWRIGHT: So if other states have not engrafted other benefits and rights that may come up here, then we should take guide from that as well?

ATTORNEY CRAIG DEATS: Your Honor, that's certainly possible.

JUSTICE DALE WAINWRIGHT: Good for the goose, then it's got to be not good for the goose and the gander too at the same time, right?

ATTORNEY CRAIG DEATS: Your Honor, every rule that is established obviously can cut both ways.

JUSTICE DALE WAINWRIGHT: So does that mean we're ceding part of the development of public policy to the majority of other states rather than the specific words of a statute or amendments by a legislature, our legislature?

ATTORNEY CRAIG DEATS: I don't think that you're ceding any authority at all, Your Honor. I think you're being guided by interpretations that are well reasoned and that I think are important. I would point out the only state jurisdictions that really and this gets back to the handout that have not found this right to inherit and this type of language are states like New York where it clearly--

CHIEF JUSTICE WALLACE B. JEFFERSON: Can I ask about that? So would your argument be different if there were a period after organizations in 101.001?

ATTORNEY CRAIG DEATS: Your Honor, our argument would be much more difficult to make perhaps not impossible. New Jersey looked at a statute almost identical to the New York statute and nonetheless found the Weingarten right. However, this Court need not go there because our statute unlike the New Jersey and the New York statutes clearly does provide for trade unions and other organizations for the purpose of protecting in your personal labor and so we have exactly the kind of language that court after court has found to convey this representational right and we're simply asking this Court to affirm that understanding almost universal understanding of what this statutory language means.

JUSTICE DALE WAINWRIGHT: Which word or couple of words in 101.001 most directly supports your argument for a Weingarten right?

ATTORNEY CRAIG DEATS: Your Honor, I would point out to the words in red and green in TCRS Article 5152, the right to associate themselves together and form trade unions for the purpose of protecting themselves in their personal world. We're saying that that language mirrors the operative language of the federal statute, which was found to convey the same right engaging concerted activities for mutual aid or protection.

JUSTICE DALE WAINWRIGHT: So if the argument can be made that a right in the union context to protect an employee that this right will protect employees, then it should be adopted? That's the touchstone.

ATTORNEY CRAIG DEATS: Your Honor, I think--

JUSTICE DALE WAINWRIGHT: Trying to find out what the principal guide limitations are to your argument.

ATTORNEY CRAIG DEATS: If it furthers the purpose of using labor unions for the purpose of protecting one and one's personal work, then that is the touchstone and again, there is a body of case law that assists the Court in making that sort of determination.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Deats. Your time has expired. Are there any further questions? Thank you. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF DOUGLAS W. ALEXANDER ON BEHALF OF PETITIONER

ATTORNEY DOUGLAS W. ALEXANDER: I want to go straight to the question that was raised by Justice Hecht because I think it really gets to the nub of the problem and I want to drill down on the point that he made and that is the NLRA really does read like a statement of policy and that's by design. It was enacted in 1935. It was amended in 1947, amended one more time in 1959 and that has been left untouched. The other thing that the NLRD they did though importantly was created the NLRB. If you go to Westlaw, I told you to go to Westlaw and look at all these government code and local government code provisions in Texas, do the same thing for the NLRA. Highlight all of the sections of the NLRA and it's very fascinating. It fits on about half your page

on the Westlaw screen, but Section 158 is repeated 11 times. Section 158 appears 11 times and that's because that is the annotations of the decisions by the NLRB. What the NLRA is is it's a skeletal act, which then the NLRB puts the flesh on by design. The labor law is made at the federal level by an administrative body given policymaking authority and that's important because that's what happens to these other states as well and let me illustrate it with the IBM Corporation case that I discussed. You go to the City of Round Rock case, click on IBM Corporation and it will take you there. Absolutely fascinating decision because it demonstrates how it is that the NLRB operates by design. But what was being decided in that case was does this Weingarten right apply only to unionized employees or does it cover all employees, okay? In other words, do you only have the right to bring in a union representative to assist you or can you bring in a co-worker to assist you? Interestingly enough, the NLRB flip-flopped about three or four times on that very point over the years. It went one way, then the other, then the other, then the other. It's all described in the IBM Corporation case. How could that be? What happened to stare decisis? It doesn't work in that context and the court says, by design. This is the way the NLRB works. It takes a statute like the Section 157 that we're dealing with here and what it does is it takes that statute and it comes up with permissible constructions. That's the term, of art that's used.

CHIEF JUSTICE WALLACE B. JEFFERSON: I'm going to ask you a slightly different question.

ATTORNEY DOUGLAS W. ALEXANDER: Okay.

CHIEF JUSTICE WALLACE B. JEFFERSON: Do you think the legislature intended to permit private or public employees to bar union assistance in disciplinary matters?

ATTORNEY DOUGLAS W. ALEXANDER: The Texas Legislature?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes.

ATTORNEY DOUGLAS W. ALEXANDER: No. What do you mean?

CHIEF JUSTICE WALLACE B. JEFFERSON: That they intended to say okay, employers, you can have unions. The employers, you may have the unions, but you may also prohibit a union rep from assisting or protecting an employee in a disciplinary proceeding.

ATTORNEY DOUGLAS W. ALEXANDER: Interesting question that come it from the negative side. I don't think that they've addressed it. I think that the way it's approached is that if you're going to get a right in the workplace in Texas, the Texas Legislature provides it, okay, and unless it's given, you don't have it. That's the way it works and so it's not a negative thing of having the statute that says, you are hereby forbidden. That's not the way we do it. We do it by in terms of right to work, right to organize and I think that--

CHIEF JUSTICE WALLACE B. JEFFERSON: Well can, but, yeah, but can an employer, the Labor Code says, it's lawful to have unions. You can form together, etc., okay.

ATTORNEY DOUGLAS W. ALEXANDER: Right, yeah.

CHIEF JUSTICE WALLACE B. JEFFERSON: But can a, could an employer in Texas say yes, you many unionize, you can be part of this trade organization, etc., but we prohibit any union activity at our place of employment.

ATTORNEY DOUGLAS W. ALEXANDER: No because for instance, the Texas legislature has given a particular right to unions to present grievances on behalf of their employees. So--

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay so, but if you have the right to union activity, why wouldn't the representation at a hearing as in this case be associated with that union right?

ATTORNEY DOUGLAS W. ALEXANDER: Because it's not granted. Again, the way that our system is set up is by a series of grant. You do have the right to present grievances. That's given to you, but you don't have this other right and let me go back to the IBM Corporation problem because I think it will help address the concern here. As I told you, the NLRB went back and forth on this issue several times as to whether it's unionized or non-unionized. Well, ask yourself in this case. What are they arguing it should be? Does this Weingarten right that they want for public employees to get, should that be given to just unionized employees such as the fire fighters in this case or should it be given to all public employees including employees of the Texas Supreme Court? NLRB has gone both ways on that question. It's an important policy question and the IBM Corporation it's explored who makes that decision in this case? Does this Court? Does some administrative body? No, we don't have in this state the entity to make that policy nuance decision the same way that these other states that, have 33 states that, have public employment relations board do. In those states, they can decide whether it applied just to unionized employees or just to nonunionized employees. We don't have that mechanism. It's a critically important question. We don't have anybody to do it except for the Texas Legislature. If you want it, you go to the Texas Legislature to get it. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Alexander. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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