

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

AGRAMONTE,

Appellant,

-against-

NO. 26

LOCAL 461,

Respondent.

20 Eagle Street
Albany, New York
February 15, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

ARTHUR Z. SCHWARTZ, ESQ.
ADVOCATES FOR JUSTICE CHARTERED ATTORNEYS
Attorney for Appellant
255 Broadway, Suite 1902
New York, NY 10007

Hanan B. Kolko, ESQ.
COHEN, WEISS AND SIMON LLP
Attorney for Respondent
909 3rd Avenue, 12th Floor
New York, NY 10022

Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Matter of Agramonte v. Local 461.

3 MR. SCHWARTZ: I'd like to reserve five minutes
4 for my rebuttal.

5 CHIEF JUDGE WILSON: Five minutes.

6 MR. SCHWARTZ: Thank you very much. Your Honors,
7 the - - - I'm trying to think about where to start with
8 this because we have a situation where the court can either
9 try to interpret, as other courts have done for seventy
10 years, what this court, 1950, meant in the Martin case. Or
11 revisit the Martin case, which has been mentioned many
12 times over the years whenever this issue has come before
13 the court. We - - -

14 JUDGE RIVERA: We addressed it ten years ago,
15 Palladino.

16 MR. SCHWARTZ: And you said that it may - - - it
17 may require revisiting but we're not going to do it here.

18 JUDGE RIVERA: Yeah. But the legislature has
19 heard this over and over and not acted on it.

20 MR. SCHWARTZ: Right.

21 JUDGE RIVERA: And one would think they would if
22 they thought we - - - we're interpreting their intent
23 incorrectly.

24 MR. SCHWARTZ: Even so. We - - - we have a
25 situation here where we have a - - - in the Polin case,

1 which is older than the Martin case, this court said that
2 the union constitution is a contract between the member and
3 the union. We now have, according to the First Department,
4 a contract that's not enforceable. What is a contract if
5 it isn't enforceable? It's not enforceable. Because when
6 a union official violates the union constitution, whether
7 it be around an election or anything else, he's not doing
8 it - - - he's not doing it - - - it's not all the members
9 have voted to do that, it's the union official who's doing
10 that. So we have a contract. The court says there's a
11 contract. It's been enforced as a contract in a hundred
12 cases since 1920, but it's not enforceable.

13 CHIEF JUDGE WILSON: How - - - how many of those
14 hundred cases are cases involving - - - I'm right in front
15 of you, directly.

16 MR. SCHWARTZ: Sorry.

17 CHIEF JUDGE WILSON: How many of those cases
18 involving interpretations of union contracts are cases in
19 which the union was an unincorporated association?

20 MR. SCHWARTZ: Almost all except LaSonde. Every
21 - - - everyone except Lasaint - - - for some reason the - -
22 - the correction officer is incorporated as a - - - as a
23 not-for-profit corporation. Every other one, they're an
24 unincorporated association. I represent two dozen unions.
25 They're all unincorporated because- - -

1 CHIEF JUDGE WILSON: I just want to - - - I may
2 have missed something, but from - - - I tried to look
3 through every one of the cases that you cited to determine
4 whether they were unincorporated associations or corporate
5 - - - corporations. And I could not find one that clearly
6 was unincorporated. There were some you couldn't tell, and
7 there were others you could tell were corporations.

8 MR. SCHWARTZ: Well, Your Honor, I representing
9 to the court that other than LaSonde, where they say in the
10 decision that it's an unincorporated association and labor
11 - - - labor union, that's a very unusual structure for a
12 labor organization. They're all unincorporated
13 associations except a very, very, very small percentage.
14 I'm saying that as a forty-five-year labor lawyer, that's
15 absolutely how it goes. What we have here in this is a
16 setting where with respect to union - - - union elections,
17 until 1959, and Professor Summers, in his article talks
18 about all the cases before. Well, he talks here - - - it
19 was a '59 article, so he's talking about everything before
20 1959. All litigation around union elections occurred in
21 the state courts, private sector unions, public sector
22 unions. People were unhappy about the nomination
23 procedure, how the election proceeded, who got to vote, who
24 was qualified. It all went on in the state courts, and
25 there's a plethora of decisions about union elections and

1 where the courts had to interpret union constitutions. In
2 1959 - - -

3 JUDGE CANNATARO: Counsel, I'm sorry. Just
4 jumping ahead a little. What union constitution provision
5 specifically is alleged to have been violated here?

6 MR. SCHWARTZ: Well, we - - - we alleged here
7 that there was a provision, the particular provision that
8 said that you can maintain your membership without paying
9 dues for six months - - - you maintain your membership for
10 six months after the last time you pay dues. That was a
11 major underlying argument we made, and we said that in this
12 particular case, the last time they had gotten paychecks
13 was in December. Dues had been taken out. The election
14 was in February. I made that argument to the general
15 counsel of DC37. The communications are in the record.

16 JUDGE CANNATARO: What constitutional - - -
17 because I - - - my understanding of that that dues
18 provision is it allowed you to maintain your membership
19 through some sort of a waiver process.

20 MR. SCHWARTZ: There were two different
21 provisions. One which said that you maintain your
22 membership for six months after a layoff, second was you
23 could also extend that by requesting a waiver.

24 JUDGE CANNATARO: Okay.

25 MR. SCHWARTZ: Two different provisions.



1 JUDGE CANNATARO: Okay.

2 MR. SCHWARTZ: So we had all these - - - the
3 whole - - -

4 JUDGE CANNATARO: These members were past six
5 months - - - the - - - right?

6 MR. SCHWARTZ: So we have a situation where there
7 are 1,175 summer lifeguards and 25 year-round lifeguards.
8 They all pay dues to the union. They all work under the
9 union contract. So the ones that work in the summer work
10 May, June, July, August, September, and then they get some
11 vacation pay and bonus pay in December. The others work
12 year-round at pools - - - the twenty-five other people. So
13 the fundamental - - - so this is not about - this is how
14 you interpret the constitution and whether if under prior
15 case law if the courts are interpreting union
16 constitutions, they ask for fair dealing. The
17 interpretation that was being put on the constitution by
18 the union was 25 people get to vote, even though they
19 govern 1,200 people. We think that that's an unreasonable
20 - - - that's not fair dealing.

21 JUDGE CANNATARO: That's not really - - - I mean,
22 that's the effect of the interpretation. But the - - - you
23 know, the interpretation seems to be, at least on some
24 literal level, good standing, dues-paying members get to
25 vote and not - - - non-dues-paying members don't get to

1 vote.

2 MR. SCHWARTZ: But they ignored the part about
3 the six months, which we allege nobody ruled on it. It
4 didn't - - - it wasn't been ruled on in the lower court.
5 It wasn't ruled on in the appellate court.

6 JUDGE CANNATARO: So as - as an allegation of
7 fact in this case, you're saying that there were members
8 who had paid dues within the last six months who were
9 denied the right to vote?

10 MR. SCHWARTZ: Yes, absolutely. Hundreds,
11 hundreds, and hundreds.

12 JUDGE SINGAS: Doesn't it have to be twelve
13 months, or am I misreading that? The prior twelve months?
14 So even if you give you the six - - -

15 MR. SCHWARTZ: No. If - - - they were people who
16 had paid dues May, June, July, August, September, December;
17 and the constitution said that you - - - after you have not
18 paid - - - haven't paid your dues, you get six months - - -
19 There - - - there's a six-month period in which you
20 maintain your membership in good standing.

21 JUDGE TROUTMAN: Do you automatically get it or
22 do you have to request it?

23 MR. SCHWARTZ: Well, that's - - - no, you don't
24 have to request it. That's not - - - that's what the
25 international constitution says. The local constitution -

1 - - then it also has a procedure for asking for it beyond
2 that, because some people are laid off, they want to
3 maintain their membership. They may be on workers' comp,
4 they may be injured and not getting workers' comp, they may
5 not have any income; they don't want to lose their union
6 membership, they can ask for it. We also had people in
7 this case who asked for it. We - - - there was no way to
8 contact the locals, so I sent them to the general counsel
9 of the parent union and said, here, these people want it
10 and they were sending their notices and they were ignored.

11 JUDGE GARCIA: Counsel - - - I'm sorry.

12 MR. SCHWARTZ: There were never - - - there were
13 never factual findings made on either of those questions,
14 because the court never got beyond the Martin question.

15 JUDGE GARCIA: And I'd like to go back to Martin
16 for a minute. So assuming we don't revisit Martin, what
17 would your argument be under the Martin, Madden, and
18 Palladino cases?

19 MR. SCHWARTZ: So our - - - so our argument is
20 that this court saw fit in Madden to say this is going to
21 be an exception given certain circumstances. The Second -
22 - - the Second Department in Madden had already granted
23 injunctive relief despite Martin, but then they had denied
24 damages because of Martin. And this court said in Madden
25 that - - - that they were going to allow - - - they didn't

1 even - - - they didn't have to address the injunctive
2 relief part because nobody had appealed it. But that was
3 there. And then they allowed damages and they said - - -
4 they said in that case that if we don't do this, that
5 unions can - - - leaders can run amok. This is not a
6 quote. They can run amok and undercut legitimate
7 democratic opposition by disciplining people unfairly. And
8 there would therefore be no - - - soon you would have no
9 union democracy left. I'm paraphrasing, but that's
10 basically - - -

11 JUDGE GARCIA: And that seemed to be, as you say,
12 in the damages section of Madden, right?

13 MR. SCHWARTZ: That was just with respect to
14 damages. Injunctive relief didn't even come up because it
15 wasn't appealed. And it had been granted by the Second
16 Department. The - - - in this situation, if a member of -
17 - - particularly in a - - - it's either public or private
18 because you can't enforce a local union constitution in
19 federal court. You can't - - - you have to go to state
20 court. The federal courts let you enforce international
21 union constitution - - -

22 JUDGE GARCIA: Are you asking for monetary
23 damages here?

24 MR. SCHWARTZ: No. We were not asking for any -
25 - -

1 JUDGE GARCIA: So why do you get to part two of
2 Madden at all?

3 MR. SCHWARTZ: Well, all I'm saying is this court
4 didn't see Martin as this wall that said no relief. This
5 court - - - the Second Department had already allowed it.
6 This court didn't say, oh that might be an error, we have
7 to even discuss it. They actually went further and said,
8 we need to allow damages in order to deter this if it's on
9 - - - on concept. But we're not - - - this is a case for
10 injunctive relief. This is a case where we said to - - -
11 to the judge, Judge Kelly, I believe it was. We want to
12 stay the election. He had issued a stay, but we didn't
13 know about it until the next morning. And then we asked
14 him to overturn it after we exhausted internal union
15 remedies, which had upheld what had gone on. Not - - - the
16 - - - the only money that potentially could have flowed out
17 of it, and that's still an open question, I think, in - - -
18 in the courts is where there would be attorneys' fees at
19 the end. All we sought was injunctive relief.

20 So you now have a situation where a union
21 official leading a union - - - because they can decide not
22 to have an election. We can't sue about it. I just had a
23 case with the Amazon Labor Union, where I represent the
24 opposition guys, where the president wouldn't schedule an
25 election, even though the constitution said there had to be

1 an election three months after the NLRB certified the
2 union. He said, nope, not having it.

3 JUDGE HALLIGAN: Can I - - -

4 MR. SCHWARTZ: I couldn't go to state court. I
5 had to come up with - - - concoct a federal theory, which
6 was really not - - - the judge wasn't too happy with it.
7 And luckily, we settled because it was getting messy.

8 JUDGE HALLIGAN: Can I - - - sorry.

9 CHIEF JUDGE WILSON: Of course.

10 JUDGE HALLIGAN: Yeah. Thank you. Just to make
11 sure I understand the scheme here, it looks to me, if I'm
12 understanding correctly, that there are two questions,
13 right? One is, were the two individuals eligible to run?
14 But I take it you were also raising a question about
15 whether the seasonal individuals, some or all of them were
16 entitled to vote. Is that correct?

17 MR. SCHWARTZ: Yes.

18 JUDGE HALLIGAN: Okay. And so it looks to me
19 that the - - - in order to run, you have to have been in
20 good standing for a year? And there's some question about
21 six months - - -

22 MR. SCHWARTZ: Yes.

23 JUDGE HALLIGAN: - - - and when it runs. And I
24 see in both the local and the AFSCME constitution language
25 about six months and being in good standing. Do you have

1 to - - - what in the constitution speaks to what the
2 requirement is in order to be eligible to vote, not to hold
3 office? Is it just to be in good standing?

4 MR. SCHWARTZ: Can I answer that on my rebuttal
5 so I could go flip through the pages?

6 JUDGE HALLIGAN: Okay. And maybe answer one
7 other question as well. It looks to me that in article - -
8 - in article 3 of the AFSCME constitution section 9, I read
9 it as saying that the member is entitled to the six-month
10 credit upon request. And I thought you responded to one of
11 my colleagues that you didn't have to ask.

12 MR. SCHWARTZ: I'll check that too, Your Honor.

13 JUDGE HALLIGAN: Okay. Thank you.

14 MR. SCHWARTZ: But I think - - - I think what's
15 really important here, there is this particular election
16 and how you're going to apply it and whether those rules
17 meet some standard of fairness, that, I think, can be an
18 issue in New York State. That's - - - the relief with
19 respect to that election. But the Agramonte decision
20 itself doesn't say because of the facts here, we're not
21 going to let you go to court. It says it establishes now
22 it is the law. And I've had it cited against me in several
23 other cases. You can't sue over union - - - a union
24 election. And if this court lets Agramonte stand without
25 addressing that question, even if it finds that on the

1 merits we can't get anywhere, then - - - then that's it. A
2 union president can say we're not having an election. A
3 union president can say the only people who can run are
4 incumbents. And there'd be no relief, absolutely no relief
5 available.

6 And what I was telling you about the Amazon union
7 thing was the president said, I'm not having an election.
8 And three years ago, I would have gone in - - - three and
9 a half years ago, I would have gone into state court taking
10 the provision that said there shall be an election in three
11 months and said enforce it, judge. Now I can't do that.
12 And I had to come up with some federal theory. And the
13 federal courts say, unfortunately in the Second Circuit,
14 that if everybody is denied rights - - - because in the
15 federal courts, it's a right to an equal right to vote.
16 And the Second Circuit has said if everybody is equally
17 denied the right to vote, it's not a violation of the
18 LMRDA. So - - -

19 CHIEF JUDGE WILSON: Thank you.

20 MR. SCHWARTZ: - - - we're left with nothing. I
21 see my red light is on. Thank you.

22 CHIEF JUDGE WILSON: So Counsel, can we start
23 right there?

24 MR. KOLKO: Sure.

25 CHIEF JUDGE WILSON: And particularly, why should

1 we read Martin to pose any sort of an obstacle to a suit
2 that doesn't seek damages?

3 MR. KOLKO: So thank you, Judge. At the time
4 that this court issued the Martin decision in 1951, where
5 it explicitly said that its interpretation of General
6 Associations Law, Section 13 applies to contract claims.
7 Equitable relief was a well-established form of relief
8 available to plaintiffs in contract cases. And so I've
9 just got a couple of cites for you on that point because I
10 thought that you might ask that question. There is the
11 Butler v. Wright case 186 NY 259. There is the Wirth,
12 W-I-R-T-H, v. Hammond Book - - - Fair Booking, 192 NE 297
13 at 300. There is the Haffey v. Lynch 39 NY 298. That's an
14 1894 case. So the law of contracts at the time that this
15 court issued Martin, was that equitable relief was
16 available in a contract claim. This court in Martin said
17 it applies to contract claims. The only conclusion has to
18 be that when Martin said the General Association Law 13
19 applies to contract claims, it was holding that it applied
20 to contract claims regardless of the relief that the
21 plaintiff was seeking. And the well-established precedent
22 from the Third Department in the 1982 Munteer v. Bayly
23 case is that in union election cases, Martin precludes the
24 issuance of injunctive relief. That case has stood for
25 forty-two years. The Second Department in the Cablevision

1 case, the 2015 Cablevision case, cited to Mounteer for the
2 proposition that the Martin interpretation of Section 13
3 applies to claims for injunctive relief. So we think, Your
4 Honors, it's clear that the First Department got it right
5 and applied Martin to claims for injunctive relief.

6 If I may answer a question that Justice Halligan
7 raised, and I think Your Honor asked where in the
8 constitution it addressed voter eligibility, and you would
9 find that on page 37 of the record, it's article 6, section
10 10 of the Local 461 constitution. But what I would ask
11 Your Honors to do is to look at two other parts of the
12 record with regard to that. Because one of the two big
13 arguments that the appellants make is that the Local
14 improperly denied people the right to vote. First of all -
15 - -

16 JUDGE HALLIGAN: Sorry, Counsel, did you say
17 section 6?

18 MR. KOLKO: It's - - - it's article 6, section
19 10. It's at the bottom of page 37 - - -

20 JUDGE HALLIGAN: I see.

21 MR. KOLKO: - - - Your Honor.

22 JUDGE HALLIGAN: Thank you.

23 MR. KOLKO: So you will see in the record, at
24 pages 76 through 79, the waiver requests. And the AFSCME
25 constitution - - - AFSCME is the parent of Local 461. And

1 the AFSCME constitution allows a member to request a
2 waiver. But you've got to ask for it. And by the way, the
3 language requiring a waiver to be asked for is at page 43
4 of the record. It's the top of page 43 of the record. And
5 you will see that there are only two people who made
6 requests, Mr. Butler and Mr. Ozcan. And you will see those
7 requests in the record at pages 76 through 79.

8 Now, AFSCME is the parent of Local 461. AFSCME
9 has got an appeals process called the judicial panel;
10 people call it the JP. The JP heard an appeal from the
11 Locals' decision on the election, and it said that there
12 were three people who made a request. So maybe there was
13 two, and maybe there were three people who made a request.
14 But you will see in the record at page 576 and 577 the
15 tally of votes, the narrowest spread was seventeen votes.
16 So even if all three of those people made a request and it
17 was granted and they voted, it would not have changed the
18 outcome of the election. So in fact, the issue of voting
19 is not really an issue because the well-established
20 principle in federal labor law - - - and we think it makes
21 sense here - - - is that if you allege a violation and it
22 could not have affected the outcome of the election, then
23 there will not be anything done as a result.

24 Now, with regard to the second argument that the
25 appellants make, which is candidate eligibility. There are

1 two candidates at issue here. Both of them were seasonal
2 candidates, Petitioner Ozcan and Petitioner Sequiera. The
3 only one who made a request for that waiver was Ozcan.
4 Sequiera didn't even ask for it. Again, I urge you to look
5 at the record, page 76 through 79. So Sequiera made no
6 attempt to render himself eligible. Ozcan, he did make the
7 request. But again, there were factual findings made by
8 the supreme court - - - and you will see that in the record
9 at pages 15, 16, 17, 18, supreme court made explicit
10 findings that basically said you had to have twelve months
11 of good standing in order to run for the office, that both
12 those Ozcan and Sequiera ran for. Neither of them had
13 twelve months of good standing.

14 First of all, assuming that they both made a
15 request, they didn't do it until February 22nd of 2021.
16 And so they were asking for it retroactively. But
17 obviously, if you're asking for it retroactively, then you
18 weren't in good standing at that moment you need it
19 retroactive. But second of all, the record - - - this is
20 both from the lower court's decision and then the AFSCME
21 judicial panel decision is that at most, they were paying
22 dues for ten months, assuming that you give them the six
23 months, that's not enough to have twelve months of good
24 standing. I want to address an argument that the
25 appellants made, and the argument was if you don't read

1 Martin to allow these suits, then there will be no remedy.
2 In this case, AFSCME, the parent union of Local 461,
3 afforded these appellants a meaningful remedy. If you look
4 in the record, you will see at page 53, the October 2020
5 decision of the AFSCME judicial panel.

6 JUDGE HALLIGAN: But isn't that different than
7 having some outside independent, you know, entity or court
8 able to review those kinds of claims?

9 MR. KOLKO: Your Honor, it absolutely is
10 different. And if I may? So in the federal system, which
11 is what the appellants often cite to, there are a number of
12 differences. First of all, here, the appellants sued the
13 night before the election. In the federal system, there is
14 no lawsuit available under the Landrum-Griffin Act, the
15 Labor Management Reporting and Disclosure Act until after
16 the election. Second of all, in the federal system, the
17 only person who can sue to upset a union election is the
18 Secretary of Labor. And the Secretary of Labor does that
19 post-election. And it does it - - - and it does it
20 pursuant to a detailed statutory and regulatory scheme.
21 And the difference between this case and federal cases - -
22 - and I go back to Palladino. Justice Rivera, I think you
23 mentioned Palladino. In 2014, this court said, we reject
24 policy arguments with regard to General Association Law 13,
25 that is, for the legislature to consider. The legislature

1 has not done that. And what I would urge Your Honors to do
2 is reject the attempt by appellants to legislate from the
3 bench. But beyond that, to send it back to trial courts to
4 have standardless reviews of union elections. And I say
5 that because one of the arguments that the appellants make
6 - - -

7 JUDGE GARCIA: But isn't the standard your
8 constitution?

9 MR. KOLKO: Your Honor, so that's true. But one
10 of the arguments appellants make is that even though the
11 constitution says the election should have been in
12 February, appellants strenuously argue it should have been
13 done in June.

14 JUDGE GARCIA: Yes. That's one of their
15 arguments, but they have different arguments about failure
16 to comply with the terms of your constitution. Isn't that
17 what courts do all the time? Is interpret the rules?

18 MR. KOLKO: Your Honor. In fact, courts often
19 interpret contracts; that is a hundred percent correct.
20 But what I would respectfully say is, first of all, Martin
21 made clear that with regard to unincorporated associations,
22 it bars contract language - - - pardon me. It bars
23 contract actions. And second of all, again, I think the
24 federal system is a good way to look at this. That is
25 there is a recognition there that unions are special

1 creatures. And actually, although, it's outside of the
2 record, he's been practicing labor law for fifty years.
3 I'm old. I've got grey hair.

4 MR. SCHWARTZ: Twenty-five.

5 MR. KOLKO: Sorry, about that. I don't want to
6 age you, Arthur. But I do think that it is a specialty.
7 It is a special world. And so when the federal system
8 passed the Landrum-Griffin Act to govern union elections,
9 it provided courts and the parties with a detailed statute.
10 And there are now detailed regulations. And so those types
11 of line-drawing decisions are what this court said in
12 Palladino are to be made by the legislature.

13 JUDGE GARCIA: There's a case in between, right?
14 Palladino and - - - and Martin is Madden. And Madden opens
15 things up somewhat. Right?

16 MR. KOLKO: Actually, Your Honor, respectfully,
17 no. So here's the key factual difference between Madden
18 and this case. First of all, as this court recognized in
19 Palladino, Madden is a narrow exception, only applicable to
20 expulsion cases. But second of all, the facts in Madden
21 made the case. In Madden, the record was clear. Expulsion
22 from the union meant that the plaintiffs could not work in
23 their chosen profession. They were harbor officers in the
24 Port of New York. Union membership was a prerequisite to
25 working in that job, and the decision is replete with

1 references to the fact that when the people were expelled,
2 they could no longer make a living. So what Madden said
3 is, if the union is going to expel you and take away your
4 right to make a living, we will provide relief. There's
5 nothing like that here. Since the federal system has
6 issued the Janus decision, you don't have to be a union
7 member to work.

8 And so the facts that underpinned the Madden
9 decision simply are not present here. And so there is no
10 reason to expand Madden beyond where it is. And indeed,
11 after Madden was issued, the legislature had the
12 opportunity to modify General Association Law, Section 13
13 to expand it, to expand Madden. It hasn't done that. In
14 2018, the legislature modified the Taylor Law, which is the
15 law that governs public sector labor unions in New York
16 State. It modified the Taylor Law to modify a union's duty
17 of fair representation. It didn't modify the Martin rule.
18 So I think that the only conclusion to be drawn from all of
19 that is that the legislature has chosen to not overrule
20 Martin. This court was correct - - -

21 JUDGE HALLIGAN: Can I ask you, counsel, your
22 adversary on pages 27 to about 30 of his opening brief has
23 a list of cases in which he says relief has been granted
24 and these are New York court cases to address union
25 constitutional requirements. And I take it your response -

1 - - and I'm looking at pages 22 to 23 of your brief - - -
2 is that some of these cases are not ones in which the
3 question of Martin's applicability is teed up. And so - -
4 - but are you contesting that the courts are involved in
5 making decisions about these elections? I'm trying to
6 understand what your response to that is.

7 MR. KOLKO: So actually, Your Honor, you are a
8 hundred percent right. There are cases where state courts
9 interfere in union elections. However, I think our
10 argument on that - - - we make a couple of arguments.
11 First of all, none of those cases that are cited in the
12 appellants' brief address Martin. And I think that the law
13 is clear - - -

14 JUDGE HALLIGAN: Currently, because - there was
15 some view that it was not - - - you'd have to assume - - -
16 perhaps there was a view anyway - - - that that was not a
17 winning objection to make.

18 MR. KOLKO: Well, actually, Your Honor, I don't
19 know what was in the head of the lawyers. I don't know
20 what was in the head of the judges. I do know that this
21 court in the Global Reinsurance case said that a case is
22 precedent based on what was decided. So none of those
23 cases are precedent. And the single case that addressed it
24 is the Third Department's Munteer v. Bayly case.

25 CHIEF JUDGE WILSON: So may I ask you about that

1 same collection of cases, the same question that I asked
2 your adversary? Would you agree that those are cases in
3 which those unions were all unincorporated associations?

4 MR. KOLKO: No. So LaSonde v. Seabrook, which is
5 the First Department case, there it was a not-for-profit.
6 With regard to the unions in the other cited cases, I
7 simply don't know whether they were unincorporated
8 associations. Some of those cases aren't applicable
9 because there the unions were plaintiffs, in particular,
10 the Ballas v. McKiernan case. And some of those cases were
11 disciplined cases, so they were within the ambit of Madden.
12 Thank you very much.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. SCHWARTZ: Just quickly with respect to what
15 I promised to answer. So the - - - the international
16 constitution did set forth a requirement of making a
17 request. And - - - but what we alleged in the complaint
18 and in the supporting affidavits is there was no clear
19 manner in which to make a request, and that the letters and
20 correspondence show that I wound up forwarding these to the
21 general counsel of the union because the local union didn't
22 have email, telephone, office or any way to make any sort
23 of - - - any sort of request. But it also article - - -
24 the - - - the constitution also says that if you - - -
25 sorry. If you - - - if you have not after - - - after two



1 months of not paying dues by the 15th of the month, you
 2 become ineligible. And we allege that they'd all paid dues
 3 in December and they were all not given notice or whatever
 4 about the meeting in February. The two months hadn't
 5 passed. So there was an allegation there. We did not - -
 6 - the judge - - - the Supreme Court Judge Perry did not - -
 7 - it was a motion to dismiss. It wasn't a motion for
 8 summary judgment. There was no litigation of the facts.
 9 It was a motion to dismiss based on - - - on Martin and
 10 whatever findings the judge made were not based on a
 11 contested set of facts and or testimony or whatever. So
 12 I'm not sure that those findings were anything more than
 13 sort of background.

14 The one thing I jumped up immediately when - - -
 15 when counsel said in - - - the federal courts do not allow
 16 for pre-election cases. It expressly states in the Labor
 17 Management Reporting and Disclosure Act at 29 U.S. Code,
 18 Section 483, all right to pre-election litigation is
 19 preserved. Only after an election is conducted do you have
 20 to go through the Secretary of Labor. And - - - so lots of
 21 the cases that get brought, even to this day, in private
 22 sector unions - - - - or at least until now, have been
 23 lawsuits to enforce rights under union constitutions in - -
 24 - in the state courts, because you can't enforce union
 25 constitution - - - local union constitutions in the federal

1 courts. You only have jurisdiction - - - they only have
2 jurisdiction under 29 U.S. Code, Section 185 over
3 international union constitutions because of the way that
4 statute is worded.

5 So here - - - we'd have a state that, where the
6 federal government has preserved your right knowing
7 Professor Summers helped write the LMRDA, knowing that
8 there'd been forty, fifty years of litigation since Polin
9 in the New York State courts. And they would put a
10 provision saying, you can go to court here pre-election,
11 but there's no right - - - after this decision, there's no
12 right to go to court.

13 I also would urge you, judge, despite what you
14 said, you addressed it in Palladino, if one goes back to
15 the General Associations Law, because in 1950, this court
16 in Martin was looking at a - - - a union official, had
17 libeled somebody and the somebody sued the whole union.
18 That's - - - that's what had happened there. That's what
19 they were addressing. But if you go to the General
20 Associations Law and the wording of the General
21 Associations Law, there's a lot of "or"s in - - - in it.
22 It - - - I cite it on page 20 of my brief. It says that
23 any action may be maintained against the president or
24 treasurer - - - you have to sue the president or treasurer.
25 "For any cause of action for or upon which a plaintiff may

1 maintain such an action or special proceeding against all
2 the advocates by reason of their interest or ownership, or
3 claim of ownership, either jointly or in common, or their
4 liability thereof, either jointly or severally." The court
5 didn't talk about the severally. So the General
6 Associations Law is allowing a lawsuit if there's liability
7 and it - - - it does say liability, it doesn't say if - - -
8 unless you read injunctive relief as a form of liability.
9 It says liability jointly or severally. And what's amazing
10 is that since Martin, you can sue a union for - - - for
11 negligence. In fact, Hanan and I are on the same case.
12 We're on the same side where somebody is suing a - - -
13 where they sued a union for libel, got dismissed, but then
14 they sued the union for negligently hiring or electing the
15 president. Negligently hiring. And the court there said
16 no negligence is allowed under Martin. Why would
17 negligence - - - you can sue a union for - - - for
18 negligently hiring. Or if the president drives his car
19 into your car you can sue the union.

20 JUDGE CANNATARO: Counsel, why isn't the Mounteer
21 interpretation of section 13 with respect to that language
22 controlling in a case like this? Specifically, I mean,
23 their interpretation that this tells you that you can name
24 an individual member, but it still requires several
25 liability of the membership. It's just a way to make - - -

1 make the job of commencing an action easier.

2 MR. SCHWARTZ: But here's where - - - where I
3 think a lot - - - and I can't cite the case now. One of
4 the things that the court said, I believe - - - I believe
5 it was in - - - in - - - in - - - not necessarily in
6 Martin. But if the members delegate responsibility - - -
7 the members delegate responsibility - - -

8 JUDGE CANNATARO: Yes. I remember that case too.

9 MR. SCHWARTZ: They delegate responsibility. If
10 they - - -

11 CHIEF JUDGE WILSON: Yeah.

12 MR. SCHWARTZ: If they delegate the
13 responsibility to some officer, then they are taking an
14 action as a group to allow that officer to make a decision.
15 So union elections generally, a hundred percent, the
16 constitution says the election shall be conducted by - - -
17 and usually it's an election committee, either elected,
18 selected by the president, or whatever. So here in this
19 case, there was an election committee - - - we never knew
20 who it was. There was an election committee that ran the
21 election. In any union election, there is somebody - - -
22 sometimes in elections I run, it gets delegated to a
23 neutral. But somebody is delegated - - - designated by the
24 members. Either the members ratified the constitution, or
25 they voted at a meeting to elect an election committee. To

1 say then that every action that election committee takes,
2 no matter how unlawful, can't be sued upon unless every
3 single member has approved it, which - - - it can never
4 happen because the person whose rights are being violated
5 won't have ratified it. So therefore, there could be a
6 vote of 998 to 2, and Mr. Kolko can come into court and
7 say, well, it wasn't - - - it wasn't ratified by hundred
8 percent of the members, therefore it's lawful. It is so
9 critical that this court, without even getting into the
10 facts which need to be developed in the - - - in the - - -
11 in that particular election case. And by the way, I think
12 they're having their election next week - - - Mr. Agramonte
13 is here. I think it's next week. So it's three years - -
14 - we started this all three years ago. Unless this court
15 doesn't say that there's a remedy for violation of a
16 contract called a union constitution in - - - at least in
17 the union election context, just like we said it's in the -
18 - - in the - - - in the context of a expulsion. And they
19 didn't say only an expulsion. This court didn't say only
20 in situations where - - - where the court - - - where the
21 person might be barred from employment. Because the
22 language is pretty - - - is pretty broad as to what this
23 court said in the Madden case. It said - - - and I'm - - -
24 I will end with this. It said, "As is manifest and already
25 remarked, a contrary result would have far-reaching



1 consequences if one wrongfully expelled," - - - not
2 wrongfully kept from employment - - - "if one wrongfully
3 expelled has no redress for damage suffered, little more is
4 needed to stifle all criticism within the union." If you
5 can't sue over a union official undercutting what it says
6 in the constitution about a union election, there won't be
7 opposition because unions will start declaring, well, we're
8 putting it off for a year, we're putting it off for two
9 years, and it's not going to be anything you can do about
10 it. And some unions don't have parent unions at all, and
11 some have parent unions that don't really uphold the law.
12 Thank you.

13 CHIEF JUDGE WILSON: Thank you, Counsel.

14 (Court is adjourned)

15

16

17

18

19

20

21

22

23

24

25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Agramonte v. Local 461, No. 26 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: February 23, 2024

