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PREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1969

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 Supreme Court, U. S.
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In the Matter of:

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 DANIEL ROWAN, d/b/a AMERICAN :
 BOOK SERVICE, ET AL. :

Appellants

vs.

UNITED STATES POST OFFICE :
 DEPARTMENT, ET AL. :

Respondents

----- X

Docket No. 399

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

DANIEL ROWAN, d/b/a AMERICAN)	
BOOK SERVICE, ET AL,)	
)	
Appellants)	
)	
vs)	NO. 399
)	
UNITED STATES POST OFFICE)	
DEPARTMENT, ET AL.,)	
)	
Respondents)	
)	

The above-entitled matter came on for hearing at 10:10 o'clock a.m. on Thursday, January 22, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
 HUGO L. BLACK, Associate Justice
 WILLIAM O. DOUGLAS, Associate Justice
 JOHN M. HARLAN, Associate Justice
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice

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 Washington, D. C.
 On behalf of Respondents

1 come to be because the statute which, purportedly, was not
2 ambiguous, has now received the same interpretation of govern-
3 ment, as well as the Appellants herein. That interpretation
4 is contrary to the construction and interpretation given by
5 the U. S. District Court. This is a new twist, if you will;
6 a matter which has occurred at the time of this appeal.

7 Q How was that last; I didn't hear what you said?

8 A I said this is a matter which has now occurred
9 at the time of appeal. Prior to that time, Mr. Justice, the
10 government, and more particularly, at the time of their motion
11 to affirm, attempted to adopt the view and interpretation of
12 the U. S. District Court which, incidentally, was by way of
13 two votes with one interpretation, another vote for another
14 construction.

15 Q In the District Court did the Government take
16 the position as to the meaning and construction of the statute
17 that it used here, or did it invite the District Court to take
18 the position that that court took?

19 A Mr. Justice, in answer to your question, the
20 Government did take the view that they take here today in the
21 District Court. However, upon examination by one of the three
22 judges, the government did become somewhat -- took a dual role,
23 if you will. But, I will have to answer: they did adopt the
24 views they adopt today, in the District Court.

25 Q But during the presentation of the case the

1 counsel perhaps saw which way the wind was blowing and trimmed
2 his sails a bit; didn't he?

3 A I would believe that to be a fair statement, Mr.
4 Justice.

5 Q By "dual," you mean alternative positions, or --

6 A In answer to your question, Mr. Justice, I feel
7 that the government took a very strong position in their
8 argument and therefore I cannot feel that it was an alternative
9 position, per se. I think that would be my distinction. They
10 were quite positive in what this legislation meant. They were
11 quite conscious of the legislative history and the plain
12 meaning of the statute.

13 The statute itself involves the mailing of materials
14 or advertising, which may be turned off by a recipient if that
15 recipient, in his sole discretion determines that it is eroti-
16 cally arousing or sexually provocative. Upon making such a
17 discretionary determination the recipient may obtain the pro-
18 hibitory order from the Post Office Department, issued against
19 the mailer, his assigns or his agents. That order, or the
20 contents of the order are set forth in the statute.

21 Three things must be placed in the order. We say
22 "must," in a mandatory sense, because the statute calls for
23 "shall." The Postmaster General "shall." We say "must," in
24 the mandatory sense, because the statute calls for "shall."
25 The Postmaster General shall and he shall order the mailer to

1 not mail anything further to such a complaining recipient.

2 "He shall direct the mailer to remove from any list
3 in his possession or under his control or under the control of
4 its agents or assigns, the name of such a complaining
5 addressee."

6 Thirdly, "this order shall direct the mailer to not
7 sell, transfer, exchange or rent any list containing the name
8 of the complaining addressee. This order then is served upon
9 the mailer."

10 The difficulty --

11 Q This is an accurate form in the back of your
12 opening brief; right?

13 A Mr. Justice, that is Exhibit A to the Appellant's
14 opening brief. It is an exact order and it is an order arising
15 out of the case reference in the appendix of Lee J. Winkler,
16 which appears at page 22 of the appendix and is in connection
17 with matters set forth there.

18 The first principal problem, as I say, relates to
19 the First Amendment. Appellants contend that you repose with-
20 in an addressee the discretionary power to say, "I do not want
21 anything that you send to me, any mail." Appellants submit
22 that is a direct violation and in complete derogation of the
23 First Amendment.

24 Q That's the case; isn't it, right there?

25 A Mr. Justice, that is certainly one of the

1 principal issues. I think, in conjunction therewith, we have
2 a secondary aspect of the First Amendment, and that is,
3 namely: the further mailing of any materials," which, in that
4 aspect, becomes a prior restraint. It not only is a prohibi-
5 tion, but it is an inhibition, depending on which interpreta-
6 tion this Court might involve itself with or look at, for the
7 statutory construction.

8 Q Well, is it your view that this statute is
9 broad enough so that it could reach Sears, Roebuck catalog, or
10 Montgomery Ward catalog?

11 A Mr. Justice, it has reached the Sears, Roebuck
12 catalog, it has reached the "Family Heritage Bible;" it has
13 reached various organizations and I think that is the subject
14 of one of the amicus briefs here before this Court.

15 Q And you think a citizen has no right to say to
16 Sears, Roebuck or Montgomery Ward, "I don't want your catalog;
17 don't send it to me."

18 A That certainly is one of the principal issues
19 in this case, and in answer to that, Mr. Justice, I believe
20 there are several facets.

21 I believe that under the First Amendment the free
22 expression through the mails is a more paramount right, a more
23 fundamental right within the society. So, hence, if we must
24 create a blurring between what has been termed as the "right of
25 privacy," which I believe you allude to, the answer of

1 Appellants is that free speech is far more paramount and must
2 override that aspect of the recipient saying, "I do not want,"
3 or "I have a right not to receive."

4 In addition, we submit, however, and I think this is
5 more fundamental, that assuming, arguendo, that a recipient
6 does have such a right, this statute goes too far, too fast
7 and, hence we are never met by that issue. I submit that this
8 is an issue created by the government insuring that right of
9 privacy is now being polarized with free speech, but I believe
10 there are too many pitfalls before we arrive at that point.

11 Q Do you place this on a higher plane or a more
12 preferred position than the right to address oral communica-
13 tions?

14 A I don't believe, Mr. Justice, that there are any
15 planes; I don't believe that there is a ladder within the
16 First Amendment. I believe that each mode of communication,
17 as this Court has said, in a sense, spins upon its own
18 peculiarity or in its own way it must be looked at. I believe
19 in this complex, urban society in which we reside the mails
20 are a very important vehicle. I do not, in any way, deter-
21 mine which is a higher form of communication. I think communi-
22 cation is protected by the First Amendment, per se.

23 Q Then it would follow that your clients could
24 stand outside of the mailbox on the premises and make a speech
25 and require the occupant to listen to it, if there are no

1 differences in the planes.

2 A This particular aspect, again, goes back to the
3 enunciations that have been made previously: each mode of
4 expression, each form of expression, rather pivots upon its
5 own. The situation of standing outside of one's home and
6 making a speech has the element of a helpless, inescapable
7 recipient.

8 Q There is a little bit of trespass in there;
9 isn't there?

10 A There could well be; there could well be, but
11 then again, there is always trespass whenever we have speech
12 in the sense that there is always someone who does not want to
13 hear what the other person says and I suppose that there is a
14 trespass in the sound of one's voice or the wave-lengths that
15 bounce off his ears, but in the society which has preferred
16 free speech, that trespass must give way to the greater right
17 embodied within the constitution.

18 Q Well, assuming that a citizen does not like
19 certain kinds of literature. He doesn't want it in his house
20 and is abhorred by just the presence of it in his house. How
21 can you stop him from finding that literature through his mail
22 slot, in his house? How can you stop that? How can you pro-
23 tect his "privacy?"

24 A Mr. Justice, I believe that inherent in that
25 question would have to be the concession that there is a right

1 of privacy involved at that juncture. It is Appellant's
2 position that under this statute and under that question,
3 there is no right of privacy.

4 Q You mean I have no right to keep that type of
5 paper, literature out of my house?

6 A I would say under this statute there is no
7 right.

8 Q Oh, under this statute there is no right?

9 A I am attempting to limit my answer to the
10 statute. I believe the statute goes too far in its encroach-
11 ment to give that right, in answer to the question.

12 Q Well, my question was: How can that citizen
13 prevent that literature from coming through his mail slot
14 into his house?

15 A There is only one way that I know, Mr. Justice,
16 that a citizen may prevent the transmission of third class
17 mail to his home, and that's under a Post Office regulation,
18 which I believe is 39C.F.R. 44.1. I believe I am quoting it
19 correctly.

20 As far as picking and choosing mail per se, that he
21 does not want, or, as this statute does in its second aspect,
22 any mail, regardless of its content, the second mailing,
23 whether it be political, religious or that type of speech which
24 has been time-honored by this Court, that a citizen should not
25 have the right to exclude, without determining what the

1 content of the material is, because the right of free speech
2 is greater.

3 Q So, my right -- this man's right of privacy is
4 already gone? Is that your position?

5 A Mr. Justice, my position is that under these
6 circumstances, there never has been a right of privacy, or in
7 the alternative, if I must, that right of privacy, under this
8 circumstance, in the face of the statute as drawn, and the
9 First Amendment --

10 Q Well, this person has a real conscientious
11 feeling about it; he's just -- there is no way out.

12 A I think the answer of Judge Frankel of the
13 District Court probably states it more eloquently: "The
14 distance from the mailbox to the ashcan is a short distance in
15 the light of the First Amendment."

16 Q Why should he have to walk it if he doesn't want
17 to?

18 A Because in a complex society, as we reside in,
19 certain things give way, and speech is paramount and speech is
20 the --

21 Q Paramount over what?

22 A Paramount, virtually to every right, everything
23 we do within our society, and it is within that framework that
24 we balance --

25 Q Would you go so far as to say that the First

1 Amendment would require the, would give your client, for
2 example, a right to compel the recipient of his publications
3 to read them?

4 A Mr. Justice, no; we do not. He certainly may
5 throw that away. No one can compel any person to read any-
6 thing.

7 Q But you do claim that it's a constitutional
8 right to have the material that he objects to placed in his
9 mailbox or if he has a slot in the door for his mail, you
10 claim the constitutional right to place the mail in his house?

11 A Yes, we do, Mr. Justice, whether it be in the
12 slot in the door or the mailbox standing out on the --

13 Q By the way, why do you really want to deliver it
14 to him if you know for sure that he won't read it? And, he
15 says, "I won't read it; I don't want it," and so on.

16 A I think there are several aspects to that answer.
17 Pragmatically, I think one of the problems, to be candid, is
18 that there is a tremendous burden, there was an onerous burden
19 within this commercial realm of distribution, of removing these
20 names from lists. The burden was spelled out in Appellant's
21 opening brief, as well as in the amicus brief.

22 Q So, really one facet of it is that it is a
23 financial burden?

24 A It is a financial and business burden; that is
25 only one facet.

1 Q And it -- which hasn't too much to do with
2 speech, ~~does it of~~ communications?

3 A That is certainly the position of the govern-
4 ment, Mr. Justice. I do not believe that commercial communica-
5 tions deserve a lower rung, if there be a ladder in the First
6 Amendment, than any other form.

7 Q That isn't the point. I could accept that for
8 purposes of this discussion, but the value you are protecting
9 is your pocketbook, in terms of not having to take the name
10 off, rather than being able to communicate, because you are not
11 going to communicate anyway with these people, because they
12 just aren't going to accept your communication.

13 A That may well be, but as I rephrased my answer,
14 there are several aspects to that. I think certain aspects --
15 probably the most troublesome aspect of the statute, I might
16 add, is the fact that no further mailing of any kind, whatso-
17 ever may be made by a mailer, regardless of content --

18 Q Let's assume that the statute would be construed
19 to be limited to forbidding only similar mailings of the very
20 kind that is perfectly obvious that the addressee is not going
21 to read. He is going to the ashcan with it.

22 A If the statute were so construed, in spite of
23 the fact that the legislative history is contrary to that con-
24 struction, and that was the construction of the court below,
25 the problem would become, certainly clearer; it would become

1 more in the realm of constitutional regulation, but I would
2 then submit to the Court that any type of regulation of speech
3 must be carefully scrutinized and I believe this particular
4 avenue is one which should be left open.

5 Q Mr. Taback, I gather you see no relevance of
6 Valentine and Chrestensen to this problem?

7 A Valentine versus Chrestensen gave me a great
8 deal of trouble, Mr. Justice; however, I justify and I review
9 the matter in this fashion: (1) I think the subsequent pro-
10 nouncements of this Court: Times versus Hill, Times versus
11 Sullivan, have swept the Valentine case aside. On reflection,
12 the Valentine case, I say, is too broad.

13 Secondly, the Valentine case dealt with --

14 Q I thought the Times and Sullivan opinion -- am I
15 wrong -- made some references to indicate that Valentine and
16 Chrestensen was not, at least as of that time, disproved.

17 A I believe it did, but it went on to note that
18 the fact of commercial use in itself will not take speech out
19 of the First Amendment.

20 Secondly, I believe that the Valentine case, like
21 so many of the others speech regulation cases, dealt with a
22 situation of the public streets within the confines of local
23 government. I think, under these circumstances, the weight
24 was given to that local regulation, keeping the streets open,
25 which is as important, in any sense, as that particular speech

1 involved.

2 So, I am not, at this point, burdened by Valentine.

3 Q Do you see a connection between what the court
4 had to say in Ginsberg about the pandering aspect and the
5 limitations here?

6 A Mr. Justice, I do not; and I do not because of
7 this reason: I believe this Court in the Ginsberg case, ad-
8 dressed itself to a completely different problem and that was
9 the problem of whether the advertisement connected with the
10 actual material could be used as evidence in determining whether
11 the material itself was obscene. The connection, if I do find
12 one, or in the words of several of the Justices on this Court,
13 said that possibly pandering statutes would be created if they
14 were not ambiguous. The allusion to the fact that it would be a
15 very difficult item by which to regulate and a very troublesome
16 one.

17 But, again, the defining of pandering within that
18 confine, as it was done, I feel, related only to the ultimate
19 issue of whether that material for the first time, could be used
20 in discerning and determining whether the material itself, was
21 obscene.

22 Q Do you think Congress would have been inhibited
23 in any way from passing a statute that, upon the request of a
24 householder, no mailman could set foot on, or could put any mail
25 into the box or on the premises of the householder? He said,

1 "I don't want the mailman here. Just cut me off." Do you see
2 a constitutional objection?

3 A Yes, I do.

4 Q Well, what is it?

5 A I believe, again, that by being a citizen within
6 this society, he subjects himself to communication from certain
7 ordinary living aspects. The mail is so basic and so critical
8 that that mail must be delivered.

9 Q But assume he does not read it, even if he
10 doesn't want it?

11 A Receiving it, per se, in his hands, is not the
12 crux. Reading it is the problem. He always has that free
13 choice, unfettered, to throw it in the ashcan. To keep the
14 mailman away is to close this individual off, to create the
15 situation where communication would be clogged.

16 Q Well, then, it would follow that if you put a
17 high wall and a bunch of very disagreeable dogs out to keep
18 people away, somehow or other the householder would be violating
19 the First Amendment right of all the potential mailers.

20 A No, Mr. Justice, I do not submit to that. What
21 we have here is if the householder chooses to take his individual
22 action, he may, but here we have a government intervening, the
23 government issuing a prohibitory order and mandatory language
24 that no further mail, regardless of content, shall be forwarded.

25 Q Then you mean I can violate your client's First

1 Amendment rights but the government, as a whole, cannot; I, as
2 an individual citizen?

3 A An individual citizen, I think, would have
4 great difficulty under the law in violating First Amendment
5 rights. However, interaction between individual citizens may
6 involve the First Amendment.

7 Q What you say is, I gather, that governmental
8 action cannot assist an individual from exposing himself to any
9 mail that anybody wants to send him?

10 A No, Mr. Justice Harlan, what I am saying is
11 that when governmental action involves itself, and certainly to
12 the degree of quantum necessary, we have a different matter. I
13 do not say that the government cannot assist. I am certain that
14 the government can, certainly constitutionally, but when it
15 does the escape hatch that is individual action, personal action,
16 is closed. We now have a governmental intrusion. It must be
17 viewed far differently than citizen against citizen.

18 Q Well, that's what I'm saying. I thought that
19 was your position.

20 A I beg your pardon, Mr. Justice.

21 Q The government can assist as far as this kind of
22 thing is concerned, a man who wants to protect himself against
23 mail that he doesn't want to receive.

24 A To this point I disagree, Mr. Justice, for the
25 following reasons: It is the government that issues the

1 prohibitory order. It is the government who lays down what
2 cannot be done. It is a government that picks up a cudgel for
3 a second hearing in the event of a second mailing, regardless of
4 content. It is a government that conducts that hearing. It is
5 the government who will set down the rules and regulations for
6 the conduct of that hearing and it is the government who will
7 enforce --

8 Q Well, all this is triggered by the request of
9 the individual.

10 A Indeed, and I think when we begin to sift, to
11 coin a word of this Court, we find that there is much governmen-
12 tal action and therefore it does become the governmental intru-
13 sion. It is the government who is empowered and directed if
14 they so find, the sentence or cite the individual for contempt.

15 We start off with but an individual triggering, but
16 the involvement, the participation, is governmental participa-
17 tion --

18 Q I agree it's governmental action; there's no
19 question about that. The question is whether it is permissible
20 governmental action.

21 A Under this statute, in this context, I submit
22 it is not.

23 One of the more telling points with regard to this,
24 again, is the plain meaning of the statute, the legislative
25 history of the statute, the reports of the Committee before the

1 Senate and House, as to what this statute meant. I emphasize
2 again, that Congressmen involved, Senators, in hearing the
3 matter, clearly demonstrated that they wanted no administrative
4 participation or as little as possible, no judicial review, and
5 in fact, within the statute they eliminated judicial review and
6 they removed the latter from the Administrative Procedure Act.

7 People testifying before the Senate, the former
8 Attorney General, questioned its constitutionality. General
9 Counsel for the Post Office asked that the statute not be passed.
10 The American Mailer's Association, the American Publisher's
11 Association -- the list goes on, all asking that the matter not
12 be passed, including the American Association, pleading
13 that we are retrograding, we are going backwards by removing a
14 procedure so critical from the Administrative Procedure Act, if
15 the statute was passed.

16 It was clear that the sole discretion of the individual
17 was to be the target.

18 Q Are you suggesting the American Bar Association
19 took the position on substantive merit of the statute itself, or
20 just the procedural aspect?

21 A The American Bar Association took a primary and,
22 I believe, singular position, only with regard to the procedural
23 aspects, and that was the fact that it had been removed from the
24 Administrative Procedures Act.

25 The legislative history, again, clearly calls for what

1 the government interprets the statute to be. The individual is
2 to reign free. It is his discretion and we are somewhat sur-
3 prised to find that the government retreats to a position, if,
4 in fact, we cannot save the constitutionality by its interpre-
5 tation, to a point, let us then examine and review the
6 addressee. Let us determine whether he has acted in good faith.

7 This flies in the face of the governmental or legisla-
8 tive history and intent.

9 Time is fleeting. At this juncture I merely wish to
10 comment and point to the Court that the procedures embodied in
11 the hearing that is involved in this statute, falls a far dis-
12 tance from the Fifth Amendment. There is no right to confront
13 your complainant; there is no adversary procedure and constitu-
14 tional issues cannot be raised. I have attempted on numerous
15 occasions -- it is the subject of an affidavit within the appen-
16 dix, starting at page 22 -- and all affidavits in the record
17 below were uncontroverted. Nothing was forwarded; nothing came
18 in contravention to those affidavits.

19 One comment: the amicus brief of the Direct Mail
20 Advertising Association clearly said that unless you can inter-
21 pret this matter our way, which is namely, the finding or ad-
22 ministrative procedure ex parte, if you will, that the material
23 is pandering, the law is too broad, it is too sweeping. The
24 court below, quote: Judge Hoffstadler said, "We can only
25 salvage this statute by meticulously construing it and shrinking

1 it down to constitutional size," and the interpretation given by
2 that court below, "in salvaging," is contrary to the position
3 taken by the government, contrary to the legislative history and
4 hence, it must fall. It is contrary to the Appellants.

5 It was clearly the view of Congress that this matter
6 be a subjective determination, unfettered and uncontrolled, and
7 in the face of the First Amendment, this cannot go in that
8 fashion.

9 The right of privacy -- one last note on that -- has
10 always or more traditionally involved the government attempting
11 to discover something about someone else. We do not have this
12 here; we have merely an envelope going to someone.

13 I call to the Court's attention, Exhibit B attached to
14 the affidavit found at page 22 of the appendix, which, entered
15 into evidence and was uncontroverted, a notice to recipient that
16 "If you do not want this, just hand it back to your Postmaster."
17 This is what has been done and yet the statute went far afield
18 and found it necessary to build in a contempt proceeding,
19 ultimate jail sentence if necessary, and we say, taking the
20 entire matter together like its, if you will, sister statutes,
21 40008, 40006, is as unconstitutional as those prior statutes.

22 Thank you.

23 Q Well, one problem I have is that you said a
24 minute ago it would be very expensive to take the names off the
25 list and you now say that you invite the people to send it back

1 so that you can take the name off the list.

2 A There is a method by which it can be taken off
3 the list at a more reduced cost and this is what we mean, Mr.
4 Justice. If the envelope with the label is returned, there is
5 a better chance of doing it, because the label usually in com-
6 mercial distribution, has a code. The lists themselves, are
7 not alphabetized; there is no way to go through the As or Bs.
8 If you have the coded label at least you are giving a reference
9 point to a commercial mailing list. Without that envelope,
10 without that label, there is an undue and onerous burden, in
11 sifting through 100,000 or 200,000 names that may pass from --

12 Q Well, if the Post Office sent you that label
13 you would lose that complaint.

14 A It would certainly assist.

15 Q You would lose that part of your complaint.

16 A It would assist. I'm not saying that it would
17 not create a burden. It would help and reduce the cost and
18 burden. It would not eliminate it completely.

19 Q But you want to put the burden on the taxpayer,
20 the recipient, to walk to the garbage pail or whatever to dis-
21 pose of it. Collectively, that burden is a large burden if
22 you have 200,000 people on your mailing list, isn't it?

23 A I don't believe that it is a burden that is
24 unwarranted. I think we are dealing with a First Amendment
25 right and if that be a burden, the shift of the burden should be

1 in that direction as opposed to failure or inability to mail
2 anything.

3 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Taback.
4 Mr. Ruckelshaus.

5 ORAL ARGUMENT BY WILLIAM D. RUCKELSHAUS,
6 ASSISTANT ATTORNEY GENERAL
7 ON BEHALF OF RESPONDENTS

8 MR. RUCKELSHAUS: Mr. Chief Justice and may it please
9 the Court: Since, at the outset there seems to be some concern
10 about just precisely what the Government's position is, either
11 below or in our motion to affirm or in our brief, let me make it
12 perfectly clear precisely what the government's position is.

13 It is our position that Congress has said when an
14 individual in our society receives through the mail, material
15 which in his sole discretion he believes to be a pandering ad-
16 vertisement and he again find in his sole discretion, this
17 material to be erotically arousing or sexually provocative, he
18 can tell the sender "Don't send me any more material, period,"
19 and the addressee enlists the support of the Post Office in in-
20 forming the sender of his desire. And if the

21 And if the sender persists after one prohibiting order
22 from the Post Office, he may be enjoined from continuing to send
23 the material to an unwilling recipient. If he still persists he
24 may be held in contempt by the court which has issued the injunc-
25 tion, for violating the court's order.

1 We believe that Congress has sought to protect a man
2 in his own home. Congress knew, I think it is clear, from the
3 legislative history --

4 Q Excuse me, Mr. Ruckelshaus. Does the statute
5 reach any addressee or only one's home? That is, would it reach,
6 for example, mail addressed to a business establishment?

7 A Yes, I take it it would, Mr. Justice, although--

8 Q Any addressee at all?

9 A Yes.

10 Q You don't see any difficulty in that?

11 A Well, I would take it that the alternative to
12 attempting to limit this to a man's home would be extremely
13 difficult, if not being easily discernible where a man would
14 live, for instance, or where could object to this kind of thing
15 or anything coming into his home.

16 We think that the purpose of the statute, obviously,
17 was to protect the man in his own home and if there was language
18 in the statute which extended that purpose, it was necessary in
19 the circumstances.

20 Q Well, I take it then that something just ad-
21 dressed to General Motors Corporation, Detroit, Michigan, if
22 General Motors didn't want to receive it, it's not addressed to
23 an individual, just the General Motors Corporation, this statute
24 would apply.

25 A I, under the broadest possible interpretation, I

1 assume that it could. But, it was obviously aimed at an indi-
2 vidual, although if you send it, the statute itself said if
3 you send it to an address listed only "to occupant," that that
4 is a violation of a prohibitory order against that address. So,
5 I imagine the same thing would apply.

6 We think that Congress said that a man in his own home
7 has a right to be unreasonable. They also sought to protect
8 the unreasonable man in his own home.

9 Q Mr. Ruckelshaus, does this statute cover obscene
10 or alleged obscene material that doesn't carry with it any ad-
11 vertising content? Supposing some outfit just sends dirty
12 pictures through the mails?

13 A No, it has to be a pandering advertisement, Mr.
14 Justice; the statute is clear on that, I think. The advertising
15 nature of the material is sought to be controlled here.

16 Q I suppose if it carried the publisher's name
17 even without more on the dirty picture, why you might be able to
18 infer advertising.

19 A Yes, you might. I take it there would be some
20 gray area as to precisely what an advertisement was.

21 Q But, it does cover only advertisements?

22 A Yes, that's right.

23 Q And it is terms of only pandering advertisement
24 which the addressee believes to be erotically arousing or
25 sexually provocative, but as I understand it, your point is

1 that and your construction of the statute is that if the
2 addressee, John Smith, thinks that an advertisement from a
3 furniture store is erotic or sexually arousing, he can prevent
4 any further mailings to him from that furniture store, in his
5 absolute and unfettered discretion; is that correct?

6 A Yes, Mr. Justice, he can notify the post office
7 although he would be, himself in violation of the obvious intent
8 of the statute, nevertheless --

9 Q I thought the obvious intent of the statute was
10 to make him the sole judge.

11 A Yes, but assuming again, that it had some rela-
12 tion to the pandering advertisement, as far as the individual
13 was concerned. I think that given the purpose of the statute,
14 which was dual; Number one, to leave it in his discretion, as to
15 what he should refuse to receive, and, secondly, to get the
16 Administrative Branch and the courts out of the business of
17 determining whether he was rational in that exercise, it's
18 necessary for him to also be able to say, "This is in my own
19 home; as far as I am concerned, I don't want to receive this;
20 it's erotically arousing."

21 Q And I don't want to receive any further mailings
22 from this center.

23 A Yes; that's right.

24 Q Of whatever nature.

25 Q Well, that means if a Safeway store sends to my

1 home an advertisement: "We're selling Maine potatoes this week
2 at 50 cents a peck." The language of pandering in the statute
3 is quite meaningless, because if, in my subjective judgment it's
4 erotically arousing. The Post Office has to issue an order at
5 my request to Safeway not to deliver any more advertisements for
6 Maine potatoes to my house; is that right?

7 A That is the interpretation which I think must
8 be given to the statute, given the Congressional history and
9 intent.

10 Q Well, then what's the significance of the pandering
11 language in the statute?

12 A Well, I think the significance is that this
13 language is, as evidenced by the pamphlet that the Post Office
14 itself has put out, the language was to tell the individual,
15 "This is what we're trying to give you a chance to refuse to
16 receive in your home."

17 Q But, if the Post Office can't say to me, well,
18 "An advertisement by Safeway to sell Maine potatoes is not some-
19 thing under the statute that you can refuse to receive, or at
20 least require us to tell Safeway not to send to your home any
21 more.

22 A If the Post Office could make such a determina-
23 tion we submit that it would frustrate the second purpose of
24 Congress, which was to get the Post Office out of the business of
25 censorship.

1 Q Well, again, what possible significance does the
2 attempted limitation to pandering advertisements have?

3 A Well, I think, Mr. Justice, it was to tell the
4 individual in his own home that this is what Congress intended,
5 was to allow you to get pandering materials out of your home,
6 and in spite of the Direct Mail Advertisers in its amicus brief,
7 there is nothing before this Court that the purpose of the
8 statute is being widely abused by individuals in their home.

9 We have, as we have noted in our brief, some 368,000
10 complaints in the Post Office. At the Justice Department, at
11 the end of last month, we had filed some 2,100 complaints. We
12 have not filed any complaints in an effort to enforce the
13 prohibitory order that don't have anything to do with some sexual
14 orientation.

15 Now, I think what Congress was recognizing, that if
16 they are going to get the courts and the administrative branch
17 out they have to give this discretion to the individual, even
18 to be unreasonable, in his own home.

19 Q Well, Mr. Attorney General, I take it you would
20 be making the same argument if Congress had passed a statute
21 that said, "Anybody who wants to stop any mail being sent from
22 anyone, can do so."

23 A There is a regulation that the Post Office now
24 has which, in a footnote to the Lamont case, and in the regulation
25 itself, has been so interpreted that an individual could notify

1 the Post Office and say, "I don't want to receive any more mail,
2 period."

3 Q Well, I know, but let's assume this statute,
4 instead of having a limitation on it concerning pandering ad-
5 vertisement, just simply said that this procedure was available
6 whenever an addressee of mail didn't want to receive any more
7 mail from that sender.

8 A I don't think there would be any constitutional
9 difficulty with that.

10 Q Isn't that the same argument --

11 A Precisely the same argument. I think that the
12 reason that the pandering advertisement is in the statute, even
13 in this context, is to notify the individual. This is what we
14 meant, and not to have the individual use his powers to prohibit
15 somebody from coming in his home and communicating with him,
16 indiscriminately and unreasonably. And that really what we have
17 here is very analogous to the right that an individual has to
18 turn off the television set, turn off the radio if he's listen-
19 ing to a speech in a part, to simply walk away from the speech.
20 He is here using the Post Office to --

21 Q What right do you think, would you offer is
22 being asserted on behalf of the homeowner?

23 A I think that it's a broad right, Mr. Justice,
24 of privacy and that --

25 Q What amendment do you, is there some

1 place in the constitution where you find that right?

2 A I don't know that we have to find such a right
3 existing in the constitution. I think if you take Judge
4 Cooley's statement in his Law of Courts, "Simply the right to be
5 let alone, is a common-law right, not necessarily a constitutional
6 right," or as Mr. Justice Goldberg suggested in Griswold against
7 Connecticut, if the right itself emanates, "from the totality
8 of the constitutional scheme in which we live." I think, never-
9 theless, it has become more and more important in our society
10 that we recognize a right simply to be let alone.

11 Q Do you think a person has a right to read or
12 listen to only what he wants to read or listen to?

13 A Absolutely. I think he has that right.

14 Q It's a First Amendment right; isn't it?

15 A Well, the right -- certainly the right to see
16 is just as important as the right to communicate, and has been
17 protected under the First Amendment.

18 Q Well, how about the right not to receive?

19 A Well, I think that's a corollary, certainly, of
20 the right to receive. In these in-the-mail cases the right to
21 receive has been recognized by the Supreme Court and I think
22 there is a corollary of it: the right not to receive. And I
23 think in this society that we live in shrinks, and as communica-
24 tions become more and more widespread and the variety of ideas
25 and thought in our culture become less and as the population

1 grows and as we come together a little closer in cities and as
2 we talk about not only air and water pollution, but also noise
3 pollution, that this right to be let alone is a right that needs
4 to be recognized in our law and needs to be recognized by this
5 Court.

6 Q Well, there may not be. I don't think you need
7 to -- I suggest that perhaps you don't need go so far as to imply
8 that there is any Federal right, any constitutional general
9 right to be let alone. That, generally, is considered to be
10 a right recognized by the Law of Torts, and protected by state
11 law, like other property rights. But, all you need do, the
12 only Federal right involved here I should think, in this aspect
13 of your case, is the First Amendment right, the right of choice
14 and the right of choosing what a person wants to see or what he
15 wants to hear and it also involves his right to close his eyes
16 or to stop up his ears; isn't that about it?

17 A That's -- I think that that certainly is a
18 corollary to the right to receive whatever you want to.

19 Q Yes, the right to choose what you want to read
20 or what you want to see, involves the right to say, "I don't
21 want to see it; I don't want to even see what it is."

22 Q Of course, that's counter to a big chapter in
23 American history involving compulsory public school attendance.

24 A I think that the compulsory public school atten-
25 dance, Mr. Justice, is not necessarily --

1 Q I was just thinking in terms of closing the
2 door, shutting your eyes, shutting your ears off and just be-
3 coming isolated from the whole world. Maybe that's a good con-
4 stitutional doctrine, but we've never yet decided it.

5 A No; I think that's right; we have not, this
6 Court has not, under the constitution, decided that a man has
7 the right to close his eyes or refuse to hear.

8 Q Well, Breen against Alexandria, if I have the
9 name of that case correct, the people, the captive audiences
10 on the buses.

11 A The Breen case involved a door-to-door agent --

12 Q Well, I'm thinking of a different one.

13 A Pollack.

14 Q Yes, Pollock.

15 A The Pollock case involves the -- but again, this
16 was not -- in this case the Pollock case said that the bus
17 company did have the right, pursuant to a District of Columbia
18 ordinance, to play music on the bus and the right of privacy
19 did not --

20 Q Well, now, suppose adults could not be compelled
21 to go to school every day and listen to things and teachers they
22 didn't want to listen to, either, could they, under the constitu-
23 tion?

24 A I think that where we're dealing with these kinds
25 of right we have to be careful to delineate each one were

1 discussing. In this instance, I think clearly the right to
2 receive has the corollary of the right to turn off unwanted
3 material and that's what we're talking about in this statute.

4 Q Mr. Attorney General, is there any -- going back
5 to Mr. Justice Douglas's point, is there any Federal authority
6 that can make anybody go to school anywhere, any time?

7 A No --

8 Q It's a matter of state.

9 A That's right, Mr. Justice, it's the states which
10 have laws that provide that up to the age of 16 --

11 Q And I suppose some states might say you have to
12 go to school until you are 12 and others might say 14 and others
13 might say some other age.

14 A Yes; that is, there is no constitutional right
15 that -- constitutional mandate that people have to go to school
16 up until a certain age.

17 Q And we've never found, so far as I know, have
18 we, any Federal constitutional barrier to a state's requiring
19 the students to go and listen, as Mr. Justice Douglas suggested?
20 to teachers and to attend school? Has the question ever been
21 brought here?

22 Q I read it in the Pierce case, the Sisters case
23 from Oregon. A phase of that was here, the parent's right to
24 an education, control --

25 A Well, I think this is what we are talking about

1 here, the parents right --

2 Q I'm not belaboring the point, I was just sound-
3 ing a caveat on this big, general principle you are trying to
4 get us to embrace.

5 A Well, I think that the principle itself has to be
6 delineated on a case-by-case basis, but I think the principle
7 itself, as suggested in the amicus brief, that the right to
8 privacy is only the right to control knowledge about one's self
9 is and will become a considerably broader concept, than the way
10 they would attempt to limit it in that case.

11 Now, as far as the First Amendment provision itself
12 is concerned, I think that we have a basic distinction in what
13 Congress sought to do in this statute and the exercise of First
14 Amendment rights that have been upheld in previous mail cases
15 and previous cases in this Court, and that is that here, where
16 an individual decides he wants no further communication from a
17 mailer, his decision affects only himself, and I think this is
18 the prism through which the First Amendment claim has to be
19 viewed.

20 In all other cases when an individual or an agency
21 or governmental unit decided that they did not like what was
22 being communicated, their attempt to stop the communication did
23 not affect even a single individual or the majority; it affected
24 everyone. And there is a great distinction between this case
25 and those kinds of cases. We're not talking about a case where

1 the Postmaster General would say, "You can't send any more mail
2 -- any more of this kind of material or magazines or books
3 through the mail to anyone. He's simply saying, this individual
4 in the society has told me, "I don't want to be communicated
5 from the sender any more and he is notifying the sender of that
6 individual's desire, which has nothing to do with the sender's
7 right to communicate to everyone else in the society.

8 If you're talking about a chill on First Amendment
9 rights, there is no evidence in this case that anyone else has
10 been inhibited from receiving that material if that's their
11 desire, nor is there any evidence that there is any change in
12 the material that is being sent out, that it is precisely the
13 same kind of thing that is being distributed.

14 And I think, by the same token, in the Bantam Books
15 case, where we had a censorship board and what the censorship
16 board did to the individual book distributors in Rhode Island
17 is not the same situation as we have here, because it then
18 affected everyone, and here it only affects an individual.

19 And I think the reason for the difficulties in other
20 cases is that the decision of the majority or a single man,
21 could affect what every man wanted to receive and that situation
22 does not happen here. We have a situation where we're simply
23 turning off speech and as has been suggested, I think that the
24 right to receive has the corollary right of not to receive.

25 Q And you regard it as no different, basically,

1 constitutionally, from turning off the radio or the television,
2 the twist of the dial?

3 A I don't see any distinction because I believe
4 that the individual obviously has this right, and he can't turn
5 off the mail without some assistance from the Postmaster.

6 Q Well, the only difference would be that the
7 Appellant claims that it is expensive for him to be turned off.

8 A Well, I think that claim of expense is there,
9 because in the past there was no concern as far as the senders
10 were concerned, about the sensibilities of the addressee and
11 what Congress has said is, "This is going to have to become
12 your business. Addressee is offended by material that you send
13 him and he has the right to tell you not to send him any more."

14 Q Well, there is a very, great big difference
15 between turning off the radio or television and writing to some
16 sender of mail and saying, "Please never send me anything again,
17 ever, through the mail, and this statute, because in the first
18 example, government is not implicated, whatsoever. This is
19 purely an individual, personal action, the exercise of free
20 choice. Here the Government of the United States is implicated
21 and that is the only reason this case is here.

22 A I think that's right, but the only reason the
23 Government is not implicated as a censor, or as an inhibitor or
24 prohibitor of First Amendment rights; they are implicated simply
25 because this is the only way it can be turned off.

1 And what Congress has done, in implicating Government,
2 and I agree that that's really why it is here, is simply to use
3 them as the hand that turns off the radio and the television.

4 Q The other difference is that you turned the
5 radio on. In this case you didn't turn that mail, he turned
6 the mail on.

7 A Well, I mean --

8 Q Well, I mean if he turned it on he shouldn't
9 cry about having to pay to turn it off. He's the guy who
10 mailed it.

11 A I see your point, Mr. Justice and I think it
12 was Congress's point that the cost involved is simply a recog-
13 nition that he has to give to the sensibilities of the recipients.
14 And I don't believe that that should render this statute with
15 any constitutional difficulty.

16 Q Is there anything in this record about the
17 sender's having a pattern of sending some of his materials to
18 11 or 12-year-old, seventh and eighth grade people, so as to
19 be able to get an outlet in the schools?

20 A There is a great deal of testimony to that
21 effect in the Congressional Record and in the legislative his-
22 tory of this statute. This is obviously what Congress was
23 attempting to get at. There is no evidence in this record that
24 this is what these plaintiffs or appellants here were doing or
25 the Direct Mail Order; as Congressman Waldie, I think, said on

1 the Floor of the House, the man who gave the shape to this
2 present statute, he said, "I am the Supreme Court in the par-
3 ticular household in which my children reside, and from my
4 decision there is no appeal." And I take it that this was what
5 Congress was attempting to do, to say that a man in his own home
6 can refuse to receive material because it might have a deleter-
7 ious effect on his children, as far as he was concerned, and
8 this was his decision in his own home and the legislative
9 history is replete with the kind of testimony.

10 Q What kind of an order does the Attorney General
11 have to make, or the Postmaster General have to make?

12 A What kind of an order, Mr. Justice?

13 Q Yes.

14 A There is a reprint --

15 Q Pandering material, pandering advertising. Who
16 decides whether it's pandering?

17 A The individual himself in his sole discretion.

18 Q I don't read the statute that way.

19 A Mr. Justice, the statute, as we have discussed,
20 I think, at some length in our brief, can be said to be ambi-
21 guous. The court below seemed to --

22 Q Surely it's ambiguous as far as that's con-
23 cerned. It seems to me that what he's supposed to do is order
24 that no such pandering material -- now, who decides whether it's
25 such pandering material?

1 A I think that's what Section A of the statute
2 says, Mr. Justice. It also says in Section C of the statute:
3 "The order of the Postmaster General shall expressly prohibit
4 the sender and his agents or assigns, from making any further
5 mailing to the designated addressee."

6 Q What kind of mailing?

7 A Any mailings, whatsoever, Mr. Justice.

8 Q They are forbidden to send anything to him.

9 A That's right. Any further mailings whatsoever.

10 Q Yes. Well, I can understand that, but A
11 bothers me a little because --

12 A Well, I think A can only be understood --

13 Q To assign to the Postmaster General the duty to
14 define what was pandering, and I would have great difficult,
15 myself.

16 A Yes, and I think the Postmaster General is
17 equally concerned about that, about having that onus upon his
18 shoulders and in the administrative pamphlet which has been put
19 out and the order that he sends out, he sees this statute as
20 being precisely what Congress itself saw it as meaning, and that
21 is that he had no discretion to determine what was, and what was
22 not pandering.

23 Q I wonder why, if they wanted to just enable the
24 householder to keep any company from sending something, it just
25 didn't say that.

1 A Because I don't think that's what they meant.

2 Q Why did it get mixed up with pandering?

3 A Because, Mr. Justice, the legislative history
4 shows that isn't what they tried to do. They tried to do two
5 things: They tried to give the individual the right to decide
6 in his own discretion what was and what was not, pandering, or
7 whether sexually arousing --

8 Q I can't find where the statute says that. Left
9 him the power to determine what was and what was not pandering.

10 A Well, I think if you read Section A as having
11 pandering advertisements being modified also by "in his sole
12 discretion," in a way in which it can be read, it is clear that
13 this is what Congress intended. The legislative history shows
14 that it's clear that this is what Congress intended.

15 Q If they hadn't attempted to define it by
16 "pandering," and had left it that he could decide what company
17 should send him mail, I could understand it better.

18 A Well, I think the reason they did not want to
19 do that was because there is a lot of controversy within Cong-
20 ress over the merits or demerits of so-called "junk mail."

21 Q And it's junk mail for the sender. As I under-
22 stand it the theory is that the sender, the recipient has the
23 right to determine whether he wants it or not and so why not let
24 him determine it and just say that he can't get any more mail
25 from those people? Why do they mix it up with the definition of

1 pandering. That I do not understand.

2 A Because they, the evil at which Congress was
3 attempting to direct itself was the mailing in to the individual's
4 individual's home of material that was 'Pornographic, or was
5 obscene or whatever you want to call it. And, Congress had a
6 second purpose, which was to get the Administrative Branch and
7 the courts out of the business of making this determination.
8 And, therefore, they put pandering advertisements in the statute
9 and left it to the sole discretion of the individual to decide
10 it, hoping that --

11 Q Not whether it was pandering. I didn't think
12 so.

13 A Well, I think that Section A --

14 Q I thought the Postmaster General had to deter-
15 mine it.

16 A This is not the Postmaster General's interpre-
17 tation and it is not interpretation and we don't believe it's
18 what Congress intended from the legislative history and I think
19 the statute can be rationally read and meaning that all further
20 mail was to be prohibited and that the only discretion the
21 Postmaster General had was to decide whether there had been a
22 mailing that was objected to by an addressee that was an adver-
23 tisement. And when he sends this information back to the sender
24 and says no further mailings are to be sent, this is precisely
25 what the order says, as reprinted in the back of Appellant's

1 opening brief,

2 Q I have just read it.

3 A It says, "No further mailings whatsoever," not
4 any similar mailings.

5 Q But it says, "Such mailings."

6 Q Well, do you mean to say that if the addressee
7 concludes that one thing he received was pandering, he could
8 have that stopped and therefore stop everything coming from the
9 same sender, even though it might not be pandering on the second
10 or third or tenth, or hundredth mailing?

11 A That's right, Mr. Justice, because the alterna-
12 tive was to make the sender decide what was pandering, have that
13 decision reviewed by the Administrative Branch and then again
14 reviewed by the courts, and Congress saw that as getting us right
15 back into the problem that existed before.

16 Q Well, Mr. Ruckelshaus, you do concede, or do
17 you, that the Postmaster has to decide before he issues an order
18 that the material is an advertisement?

19 A Yes. I think he can decide that very easily.

20 Q I know, but do you concede that he does have to
21 decide that? He has no authority to order anybody not to mail,
22 based on a nonadvertisement mailing.

23 A No. I think the statute --

24 Q Well, I know, but here you have two words:
25 "pandering advertisement," and you say the Postmaster General

1 cannot issue an order unless it's an advertisement, and so he
2 has to decide in his own mind whether it's an advertisement.

3 Now, where do you get -- on what do you base your
4 argument that while he can decide what's an advertisement, he
5 has no authority to decide what's a pandering advertisement?

6 A Well, I think, because of the obvious difficul-
7 ties in deciding what is pandering and what isn't, and the more
8 objective standard that can be used in deciding what is an adver-
9 tisement.

10 Q He must base it then, just on the legislative
11 history, rather than the words of the statute.

12 A We have, I think, discussed in our brief that
13 there are some apparent difficulties with the language of the
14 statute, but I think when you read Section A in conjunction with
15 B and C it's clear that what the Congress intended and what the
16 statute says, is "any further mailings."

17 Q Now, let's assume that the Postmaster General
18 issues the order; there are further mailings of the same kind,
19 or just any further mailing, and he goes into court for an
20 order.

21 A Well, he's authorized to request the Attorney
22 General, who is --

23 Q All right, the Attorney General goes into the
24 court for an order and on that hearing for an order to stop
25 mailing it's clearly proved, (a) that it was an advertisement,

1 all right, but that no man in his right mind would call this a
2 pandering advertisement. Let's assume it was, as Mr. Justice
3 Brennan said, a potato advertisement from Safeway. Now, do
4 you think the Court is going to issue the order?

5 A I don't think the court will ever have such a
6 case before it, Mr. Justice, and if it does, I believe that
7 given the --

8 Q I know, but you are going to have a lot -- you
9 would have a lot of cases where the sender would say, "This is
10 not pandering advertisement and does the court have to decide
11 whether it's a pandering advertisement?"

12 A It does not. I don't think that this is -- this
13 is exactly what Congress wanted to keep the courts from having to
14 do, was to make this determination again. In this instance --

15 Q Well, take the potato advertisement. Would the
16 court issue the order?

17 A Assuming that the Attorney General brought such
18 a case, I think that the court --

19 Q Well, if the Attorney General doesn't bring it,
20 he's deciding in his mind then, that this is not a pandering
21 advertisement.

22 A Well, it says he's authorized to bring the case --

23 Q So, there is some Administrative discretion?

24 A But, it's way off on one end, Mr. Justice, and --

25 Q The Department of Justice isn't way off on one

1 end.

2 Q In terms of literature it might not be way off
3 on one end.

4 A Well, I think if there was an abuse of an --
5 an obvious abuse of a lower court's decision in issuing, which
6 is basically an equitable proceeding, an injunction, that there
7 might be some grounds for appeal from that decision, but I --
8 we had used the standard in our brief as the suggested standard
9 of a good faith standard. Any standard that you use you have
10 difficulty with, because how can you determine good faith if
11 the addressee is not present in court, and he may well not be
12 present in court, if he's at the other end of the country.

13 So that I think that to the extent that the court
14 would receive one of these things that obviously was an adver-
15 tisement; it had no relation whatsoever to pandering or sexually
16 oriented material, that a court could, in its equity power,
17 refuse to exercise its discretion in entering an order. Just as
18 the Attorney General, where it says he's authorized to bring
19 such a case and where it says in the second stage the Postmaster
20 General is authorized to request the Attorney General --

21 Q But I take it that you would say that the Dis-
22 trict Court, when it's asked to enter that order, when it looked
23 at that advertisement it could issue the injunction in its dis-
24 cretion and you're saying that the statute, apparently will
25 authorize the District Court to issue that injunction and that it

1 would be no violation of the statute to order a person to quit
2 sending potato advertisements.

3 A I don't think that we need go that far. I think
4 it may well be if its potatoes that the court, on appeal, could
5 be said to have abused its discretion.

6 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney
7 General.

8 Thank you for your submissions. The case is sub-
9 mitted.

10 (Whereupon, at 11:12 o'clock p.m. the argument in the
11 above-entitled matter was concluded)