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In the
Supreme Court of the United States

BOARD OF REGENTS OF THE
UNIVERSITY OF TEXAS SYSTEM,

Appellant,

vs.

NEW LEFT EDUCATION PROJECT,
et al.,

Appellees.

No. 70-55

Washington, D. C.
December 6, 1971

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NEW LEFT EDUCATION PROJECT, :
et al., :
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Washington, D. C.,

Monday, December 6, 1971.

The above-entitled matter came on for argument at
1:46 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

W. O. SHULTZ II, ESQ., Assistant Attorney General of
Texas, P. O. Box 12548, Capitol Station, Austin,
Texas 78711, for the Appellant.

DAVID R. RICHARDS, ESQ., Clinton & Richards, 600 West
Seventh, Austin, Texas 78701, for the Appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 55, Board of Regents against New Left Education Project.

Mr. Shultz, you may proceed whenever you're ready.

ORAL ARGUMENT OF W. O. SHULTZ II, ESQ.,

ON BEHALF OF THE APPELLANT

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

I am W. O. Shultz, Assistant Attorney General from the State of Texas, and represent the Board of Regents, in this case, this morning.

Initially, since this Court postponed jurisdiction until argument, I will address myself briefly to this jurisdictional question. The only objection which appellee raises in his brief to the jurisdiction of the Court concerns itself with the fact that there is a coordinating board in the State of Texas, and the appellant contends that is a higher authority that has Statewide jurisdiction, and the Board of Regents is somehow under it with regard to its rules and regulations.

I submit to the Court that this is not so. The Act creating the coordinating board makes it precisely that, a coordinating board. Its primary purposes are to coordinate the degree programs through the institutions in the State of Texas. Our higher education setup, several of them colleges, have their own board of regents. The University of Texas, of course,

has a systemwide campus setup. We have campuses in El Paso, Arlington, Dallas, Odessa, Midland, Houston, Galveston, Port Aransas, San Antonio. These are all under the direction of the Board of Regents.

The primary purpose of the coordinating board is to coordinate degree programs in all the colleges. And before a college can institute a new degree program, they must get approval of the coordinating board. The Act creating the Board specifically says that it shall have only such powers as are given to it in the Board -- I mean in the Act, and any powers which one of the governing boards of an institution of higher education has that are not specifically delegated to the coordinating board, the coordinating board does not have.

And there's no provision in the Coordinating Board Act which gives them the authority to promulgate rules and regulations which are applicable to any of the campuses with regard to the day-to-day operation of those campuses.

Now, at the last session of the Legislature, there was a codification of the various education Acts; they were put into an education code. And this Coordinating Board Act was incorporated in the education code.

Now, at the same time, the same session of the Legislature, there was an Act passed applying specifically to the Board of Regents of the University of Texas System. It's Article 2585e, Vernon's Civil Statutes, and has just recently

been codified as such.

Section 1 of that Act reaffirms the power of the Board of Regents to promulgate rules and regulations applicable systemwide, and if I may quote briefly, it says: The Board has authority "to promulgate and enforce such other rules and regulations for the operation, control, and management of the University of Texas System and the component institutions thereof as the Board of Regents of the University of Texas System may deem either necessary or desirable."

Section 5 of that Act says, and I quote: "This Act is cumulative of all statutes relating to the University of Texas System, or any of the component institutions of the University of Texas System except where such statutes may be in conflict with this Act. If any such conflict arises, the conflicting statute is hereby repealed to the extent of that conflict."

So here we have, I think, all doubt removed as to any paramount authority in the Coordinating Board as to its regulatory power, veto power over the rules and regulations of the Board of Regents.

Now, under Texas law, our Texas Supreme Court has held that the regulations and rules of the Board of Regents of the University of Texas are equivalent of statutory enactments; they are laws.

I think that since these regulations are systemwide,

and cover a substantial area of the State, they are --

Q Are there any State-supported universities and colleges to which these regulations do not apply?

MR. SHULTZ: Yes, Your Honor, there are. They are not part of the University of Texas System, however.

Q Well, let me put it another way: Do these rules and regulations apply to all units, all colleges and universities within this particular system?

MR. SHULTZ: They apply to all schools and institutions within the University of Texas System, Your Honor.

Q Are those the ones in the communities you mentioned, Galveston, et cetera?

MR. SHULTZ: Yes.

Q How many, in all? How many institutions?

MR. SHULTZ: Well, I think they -- they say that they have 17 component institutions in the system.

Q And they are all part of the University of Texas System?

MR. SHULTZ: That's correct, Your Honor. There's a University of Texas at Austin, a University of Texas at El Paso

Q Yes.

MR. SHULTZ: -- a University of Texas at Permian Basin, a University of Texas at Dallas, a University of Texas at San Antonio. Then there's the University of Texas Med School in Galveston, the Tumor Center and School in Houston, the

Southwest Med School in Dallas, Nursing School in Houston, the Institute of Marine Sciences in Port Aransas.

Q And they are all the University of Texas, is that it?

MR. SHULTZ: That are all in the University of Texas System.

Q And these other State-supported colleges and universities are -- what? Are they --

MR. SHULTZ: Some of them have their own individual boards of regents. We have a North Texas State University; it has its own board of regents, by itself. We have Texas Women's University; it has its own board of regents, by itself. They have one campus only.

Q What's the relationship of these other State universities -- State-supported universities and colleges, to the University of Texas System?

MR. SHULTZ: None other than that they all get their money from the appropriations from the Texas Legislature. They are --

Q There's no common board of education for all of them?

MR. SHULTZ: Not as far as regulating the hiring and firing, the day-to-day operation of the school, the rules and regulations --

Q But there is, for that purpose --

MR. SHULTZ: Pardon?

Q Is there an over-all agency?

MR. SHULTZ: To do -- that has this power?

Q That supervises -- that has something to do with every State-supported college and university?

MR. SHULTZ: The Coordinating Board has, to the extent it has power, to try to coordinate the degree programs. It was primarily established to -- we had rather a hodgepodge in our higher education system, frankly -- to try and keep duplication of degree programs and efforts at the various schools to a minimum, by requiring approval for institution of new degree programs or the establishment of a new college or school within the particular university.

They sit there, the supreme power, and say, Well now, this school already has a pretty good program in that field, now, do we need one at this school?

Q How about Texas A&M?

MR. SHULTZ: That's a matter of dispute, Mr. Justice Marshall. Our Constitution said that Texas A&M is a branch of the University of Texas. But it has operated under its own Board of Regents for many, many years. The only common thing they share is that Texas A&M University gets a part of the permanent endowment fund that was set aside to the University of Texas under the Constitution of 1876.

Q Well, isn't Texas A&M separate and distinct from

the University of Texas as of today?

MR. SHULTZ: It is as far as its operation is concerned, Your Honor.

Q And yet it is not covered by this order?

MR. SHULTZ: That's true. This is not a part of the University of Texas System.

Q Well, then, how can it be a Statewide order?

MR. SHULTZ: It applies to every institution under the control of the Board of Regents of the University of Texas System.

Q The Board of Regents does not control all of the institutions of higher learning maintained by the State of Texas.

MR. SHULTZ: No, Your Honor, we've never made that contention.

Q Well, don't you have to get a three-judge court?

MR. SHULTZ: I don't think so, Your Honor. Once the rule or regulation itself is applicable to all the institutions under this Board's control, and those boards are Statewide --

Q Well, suppose it controlled two schools. Would it be a three-judge court matter?

MR. SHULTZ: I think it would. It's not --

Q Well, suppose it controlled two of the 300 schools maintained by the State of Texas, would you say that

was Statewide?

MR. SHULTZ: Possibly not. But that is not the case -

Q Well, where's your line?

MR. SHULTZ: Well, I don't think we're called upon to draw the line in this case because we have gone so far on the other side of the line I think it's unquestioned; whether we would draw it at 5, 6, 7, or 8, I don't know. But here we've got a board with control over 17 institutions. And at the University of Texas at Austin alone, there are 40,000 students, and over 7,000 employees on a 265-acre campus.

When you include all the other campuses and institutions, I'm hard put to say how many people are involved; but many, many thousands. And they are placed under these regulations, and they have the undoubted force and effect of a statute according to the pronouncement of the Texas Supreme Court.

That is our basis for the jurisdiction of this Court, on a direct appeal from a three-judge Federal Court.

Now, if I may address myself to how this case came about: It was born out of an effort of the Board of Regents to enforce this solicitation rule on the campus at the University of Texas at Austin, against a group known as the New Left Education Group and a number of individuals that were selling on the campus a newspaper known as "The Rag", not in conformity with the rules applicable to the sale of newspapers.

Now, the Regents, after local administration at the campus, after repeated efforts in warning these people to stop, asked the Attorney General's Office to institute a civil injunction proceeding in the State District Court in Travis County, to enforce their rules.

We filed this injunction suit, and shortly thereafter the self-same defendants in the State court action went to the United States District Court and filed an action there, asking that the rules be declared unconstitutional, that the Regents be enjoined from enforcing them, and that the prosecution of this civil injunctive suit in the State court be enjoined.

We pointed out to the court, by pleading, that 2283 in our estimation, the anti-injunction statute, prohibited this very action in the United States District Court.

Immediately thereafter, the pleadings of the plaintiffs in the United States District Court were amended to bring in Young Democrats and seven or eight individuals.

Now, reading that pleading as a whole, and the motion I think it's undoubted they all claimed to be members of a common class of people who claim that their constitutional rights are being infringed by the enforcement of this rule.

Now, the group of individuals, I don't think ever presented a case or controversy for the court to act upon. They merely said in the pleading that: We are interested in the free flow and dissemination of information on the campus of the

university.

There was never any evidence introduced, or any stipulation or any affidavit filed by them that showed in any manner how these rules had been enforced against them, or how they had prohibited them from obtaining any specific article, printed matter, or hearing any speech that they desired to hear. There simply was no factual basis in the complaint. There was never any adduced to show that they presented any justification for controversy with regard to these rules.

So, consequently, they stand largely ignored throughout this entire proceeding.

Shortly after the Young Democrats intervened -- beg your pardon, they didn't intervene; they came in by way of the First Amended Complaint. They asked for the same relief that the original party plaintiffs asked for, with the exception they didn't ask that the State court proceeding be enjoined.

Shortly after this, by a Motion to Intervene, a group known as the Young Socialist Alliance were allowed into the case. They adopted the prior pleadings as their own.

Now, it's our position that all of these parties, at this point in the proceeding, plead themselves to be members of a common class of people on the university campus at Austin, who desired to solicit in violation of the Regents' solicitation rules, and that their rights under the First Amendment were being infringed, and asked for the same relief, every one

of them, that the rule be declared invalid and it be enjoined.

The next event that occurred was a hearing before the United States District Court, three-judge panel, at which the arguments were made concerning 2283. And that court then entered what I considered to be a rather strange order. It divided this class of plaintiffs in the United States District Court into two groups, and denominated them as Class A and Class B. And never did say that they had distinct and individual claims or causes of action, that their actions were different. It just divided them into two groups within the class, Class A and Class B.

And it said: Class A, you're the people that are defendants over in the State court action; now, we're going to dismiss you to go back over to the State court. We're going to dismiss you almost; they said: we're going to retain jurisdiction in the event they do something to you over there in the State court that can't be condoned, then you can come back here and ask for relief; we'll retain jurisdiction to that extent.

So, with things in that posture, we proceeded to the State court and obtained a temporary, after a full hearing, and the record reveals that in the State court the parties defendant and the parties plaintiff in the Federal Court plead and raised the same constitutional objections that they were pleading in the Federal Court, if you please: violated

First Amendment rights, protection under the Fourteenth Amendment.

These were argued to the State District Court, after a full hearing on temporary injunction, witnesses testified; counsel for all parties in the Federal and State court proceedings were the same. The State District Court then entered a temporary injunction, specifically finding that the rules were constitutional, and temporarily enjoining the defendants and all others acting in concert with them from soliciting by means of the newspaper known as "The Rag" on the University of Texas campus at Austin, other than in conformity with the solicitation rule.

We next --

Q Mr. Shultz, is the New Left before us here?

The New Left Group?

MR. SHULTZ: Yes, Your Honor.

Q In what way? They were the ones that were dismissed out with the little tag end that you mentioned.

MR. SHULTZ: The New Left, together with a group of individuals who were members of the New Left organization -- there were some individuals, six or eight individuals --

Q They were all dismissed out. And how are they here, then?

MR. SHULTZ: Well, Your Honor, we claim that they are here by virtual representation of the rest of their class

that they left over in the Federal Court.

Q Only as a member of a class now? They've taken no cross-appeal?

MR. SHULTZ: No, Your Honor.

Q Maybe I should ask your opposing counsel as to their presence here.

MR. SHULTZ: All right.

But they're -- our contentions with regard to the relation between these two segments of the class are essentially -- it's essential to refer to them in this case, and it's essential to our contention that we keep reference to them here because our contention is, first, that the State court judgment, the temporary injunction, was res judicata as to the remainder of the class that stayed in Federal Court.

They were admittedly part of the same class. We got a temporary injunction in the Federal -- in the State court, which held the provision's constitutional.

Now --

Q Now, your opponent draws a distinction between a temporary injunction and a permanent one, for res judicata purposes. Would you comment on that?

MR. SHULTZ: Yes, Mr. Justice Blackmun.

Under Texas law and under the federal law, even on a temporary injunction hearing, if issues which go to the very heart of the merits of the case are decided on that

temporary injunction, then that judgment is final as to those purposes.

Now, I'm sure that it must be obvious to everyone concerned in the matter that on a -- if we go back to the State court and have a hearing on a permanent injunction or to make this temporary injunction permanent, the court is certainly not going to reconsider and pass on the constitutionality under the First Amendment and Fourteenth Amendment again. He's already done that. He said these rules are constitutional.

It couldn't be any more final on the question of constitutionality, whether it be temporary or not.

We feel that under England vs. Louisiana Medical Examiners, where the group went to the State court, didn't reserve their federal question, came back to the Federal Court and they said "you're precluded".

It's our contention that under the Atlantic Coast Line Railway v. Engineers case, 2283 is a specific bar, because here the Regents are enjoined from enforcing this rule. Could we go back to the State court now and ask them to hold these people in contempt? I'd be leery of doing it, because I think we'd be right back in Federal District Court, being held in contempt ourselves.

We've got a direct conflict between the jurisdiction of the two courts, the decision of the two courts in complete conflict. Now, they had an adequate remedy: appealing that

decision of the State court. It was entered before the Federal Court ever undertook to decide the issue.

It's our contention that the Federal Court should have left the matter alone, to be proceeded through the State court and eventually up here. As it is, the District Court there sat in a review of what the State court did, so to speak.

Q Is the temporary injunction on the State side appealable?

MR. SHULTZ: Yes, Your Honor, it is.

Q That was never appealed and is --

MR. SHULTZ: Still in effect. Under our procedure, though, there is a way to go in and make a motion to set it aside, or open it and modify it.

Q So there's no -- in effect, there's no time limitation --

MR. SHULTZ: No, as far as their remedy to it; they may have it -- try to have it set aside. In other words, it hasn't become irrevocably final in that respect.

Q And they can move to have it set aside, and if that's denied, then they can appeal that denial?

MR. SHULTZ: That's correct.

Q Yes.

MR. SHULTZ: That's the way it works.

Q But no such efforts have been made? As I understand it.

MR. SHULTZ: No. No. They never have. They merely proceeded over to the Federal Court and moved for summary judgment, and on our cross motion to dismiss, the court entered summary judgment in their favor and denied our motion to dismiss; overruled all these contentions we made about the --

Q Yes. Well, the court didn't really issue a summary judgment in their favor. That is, the defendants in "The Rag" case, as you've already told us.

MR. SHULTZ: No, but in the --

Q That the A group --

MR. SHULTZ: It's our contention --

Q -- and the B group --

MR. SHULTZ: But it's our contention that they are part and parcel of the same group.

Q Well, I don't understand what you're --

MR. SHULTZ: The A group made the same contentions. They returned in the guise of the B group, with the same counsel, and argued the same questions.

Q The court said that it dismissed the New Left Education Project plaintiffs; dismissed them as plaintiffs.

MR. SHULTZ: Yes --

Q So that there would be no interference with the State judge's adjudication.

MR. SHULTZ: If Your Honor will --

Q I'm reading from page 165 of the Appendix, which

is the -- from, I think, the final memorandum opinion of the three-judge court.

MR. SHULTZ: Right, Your Honor. But if you will look at the order entered, which is -- begins on page 41 -- on page 42.

Q Yes.

MR. SHULTZ: "The court finds that it should not at this time exercise its jurisdiction as to that part of Part A that requests injunctive relief against the proceedings pending in the 167th Judicial District Court of Travis County, Texas, because the extraordinary circumstances required by Machesky ... for this type of relief are not presented at this time. Similarly, the court concludes that the prayer of these plaintiffs for declaratory relief, considered separately ... should be denied at this time in the exercise of the court's discretion."

Dropping on down, it says, "Accordingly, those portions of these plaintiffs' complaint requesting declaratory relief and injunctive relief against the state proceeding are dismissed, so that there will be no interference ... This court, however, retains jurisdiction over that part of the case which requests further appropriate relief against the defendant should such relief become necessary. Moreover, the dismissal ... is done without prejudice to their right to return again under Machesky ..."

Q That's sort of --

MR. SHULTZ: So it's kind of "we did and we didn't."

Q -- double-talk, isn't it?

MR. SHULTZ: Yes, Your Honor. "We did and we didn't."

Q They dismiss, but then they say: No, no, we don't dismiss.

MR. SHULTZ: "We dismiss for one purpose but not for the other."

Now, if I may address myself briefly to the merits of this case, it will --

MR. CHIEF JUSTICE BURGER: You have just about four and a half minutes left.

MR. SHULTZ: All right, sir.

There's no showing in this case that there has been an arbitrary assignment of places on the campus at the University of Texas at Austin for the distribution and sale of newspapers from vending machines. The stipulation shows that there are 12 newspapers currently selling from these designated places, from vending machines, without any problems.

These people haven't shown that unless they can go around over the campus, free at will, that they're going to go out of business. They haven't shown any irreparable injury. As a matter of fact they for a while sold at one of these locations, out of vending machines.

This is a highly congested campus. There's evidence in the record that students, one student who made her affidavit said that she had been accosted by these people on the campus, they bothered her in the free use of the campus. There's evidence that solicitations in the laboratory buildings and classrooms had disrupted classes. The same thing occurred in the dormitories on previous occasions.

Now, with this background, the Regents certainly had the authority to authorize the administration to designate where the administration felt that these things could be sold from vending machines without interfering with the operation of the university.

Now, this Court has recognized, in Adderly and Cox, that where a public property is dedicated to a special use, that rules and regulations can be maintained, even though they infringe upon First Amendment rights in order to maintain that property for that use.

And that's all it's done here. There has been no showing whatsoever of any disadvantage by virtue of the place designated.

Q Mr. Shultz, do you understand that the appellees contend for the right to solicit only in the free-speech areas of the Austin campus, or beyond that?

MR. SHULTZ: Your Honor, there's only one free-speech area of the Austin campus, and that's a patio out by the Union

Building that's designated as such. They maintain that the malls of the university are free-speech areas; but our affidavits show that they have never been maintained as free-speech areas on the campus. There are no speakers, stump speakers there.

Q Well, what is it you feel they're asking for, to go everywhere and beyond the free-speech area?

MR. SHULTZ: Anywhere they want to go, that's what they've been doing, roaming free at will over the campus. Along with other people. Since this case has been decided, we've had all sorts of people out there selling their newspapers and their pamphlets, and running --

Q Is that all that's involved here? Whether or not the university or the Regents may specify the places where these papers may be sold?

MR. SHULTZ: From a vending machine. Just as this Court --

Q I mean, is that all that's involved? I had the impression that one of these also had something to do with the --

MR. SHULTZ: Solicitation of dues.

Q -- solicitation of what?

MR. SHULTZ: Dues, for campus organizations.

Q Yes, that's it.

Q They can't do that through a vending machine,

can they, very well?

MR. SHULTZ: No, sir; but there's another regulation that says they may do it at registration or they may do it at their meetings on the campus; but they can't just set up booths and start -- we have over 400 registered student organizations on that campus. And if all of them started soliciting their dues and membership up and down the halls, freely at will --

Q Yes.

MR. SHULTZ: -- we wouldn't have much free access for everybody else. Can you imagine them jumping out there, harassing every passerby, "Join our organization here, here's how much our dues are"?

Q Well, according to your brother counsel on the other side, there is a good deal of activity there, balloons and all that.

MR. SHULTZ: Your Honor, those are one-shot organizations -- they are university connected. One of them was the A Cappella Choir, trying to raise some money for --

Q Right.

MR. SHULTZ: The other was to go to the East Austin --

Q The poor people of East Austin.

MR. SHULTZ: -- poor people.

Now, we have conceded in here that the rule which allows solicitation for charitable and benevolent purposes is invalid in that respect, because it does meet with that --

Q That's right, you made that concession in your brief.

MR. SHULTZ: Correct. We don't defend that rule in that regard. It does have the --

Q What do you do about the political elections for offices on the campus?

MR. SHULTZ: They have different regulations about that, for posting of signs. Certain candidates. They have to have permission to post the signs, and they post them in specified locations.

Q They don't care how many candidates, do they? They don't restrict the number of candidates?

MR. SHULTZ: No, I don't think they do; no.

Q So you can have 400 people running up and down the mall, can't you?

MR. SHULTZ: No, sir.

Q Why not?

MR. SHULTZ: They restrict those activities under a different rule. They have places that -- where they can put up a sign for a definite period. They can keep it there, and it's a different rule entirely.

Q You mean in a heated campus election you can't talk to anybody in the classroom or the dormitory?

MR. SHULTZ: Well, Your Honor, I don't think that they can talk to them in the classroom, take over the

classroom and start making a lengthy speech.

Q I didn't say take over the class, I said in the classrooms, in the hallways.

MR. SHULTZ: In the hallways --

Q If it is, it's --

MR. SHULTZ: In the hallways, I'm sure they can, Your Honor.

Q And the dormitories and all the other places that these people want to go?

MR. SHULTZ: No, I'm not sure that it's that free. But that question isn't involved here, and that rule --

Q Well, it's a different campus from any I've ever heard of, because when they get a hot election, that's all anybody talks about.

MR. SHULTZ: We have a very small percentage of people that even vote in our elections on that campus. They're not --

Q In Texas?!

MR. SHULTZ: That's correct.

My time is up.

MR. CHIEF JUSTICE BURGER: Mr. Richards.

ORAL ARGUMENT OF DAVID R. RICHARDS, ESQ.,

ON BEHALF OF THE APPELLEES

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

This case presents a series of initial procedural and

jurisdictional questions. If they are ever answered suitably, then the case presents a rather clear First Amendment question regarding the extent to which a State university may restrict the legitimate First Amendment activities of student political organizations on campus.

Q Do you agree with your friend that they can restrict some First Amendment rights?

MR. RICHARDS: I agree that a balance may be struck and that clearly the rights are not absolute and that the right to maintain the institution and to operate it still may -- or at least may even be paramount, if not, certainly it must be given sway.

We say --

Q Well, what, specifically, are we concerned with?

MR. RICHARDS: Specifically, we're concerned here, as we understood the First Amendment issue. We have two organizations that are here before the Court: the Young Democrats and Young Socialists, registered student organizations and long-time participants on the campus. They have sought the right to solicit membership dues in the same areas of the campus, to wit, the malls, in which --

Q That is not solicit membership?

MR. RICHARDS: Membership and membership dues, excuse me. Membership and membership dues. Because I say this advisedly, because the nature of the regulation is such

that they are now permitted, under the regulation, to establish a booth. They may maintain a booth on the mall. They distribute literature. But, they say, the organization may not, at the same time, say to that person: "Join our organization; here's a membership card; pay us two bucks". They say that's commercial, falls under the commercial regulations.

So, really all they're saying is that we want to carry out the full range of our activities, which are legitimate, that is solicit membership dues, in the same locations where we're permitted to carry out other kinds. They can set up a booth, set up -- circulate a petition --

Q In other words, are these two organizations satisfied, No. 1, to limit the places to where the regulation says it may have booths, and No. 2, to solicit both membership and the payment of membership fees at that place?

MR. RICHARDS: This has been the position from the outset, as I understood what we've argued. Essentially we're looking -- well, let me, I shouldn't -- we also argued for the right to sell political literature from that same booth.

Q But you don't ask to roam --

MR. RICHARDS: We have never asked the right to roam the campus, and never suggested that that was necessary. The malls are wide and open, there's movement there all the time. There are other activities of a comparable nature, and

all we wanted to do was to flush out our entire activity by at least soliciting dues. It's the only logical place to do so, frankly, the only place we see the students to whom we appeal.

Q Let me see if I've got this clear in my mind.

MR. RICHARDS: Yes, sir.

Q Are you content if your booth is set up and you have some of your people behind the counter in the booth who can receive and solicit -- receive dues from people who want to come there to pay it, and solicit people who are walking by? Or does your claim go that they may send their people outside of the booth and go all up and down the mall?

MR. RICHARDS: It has never -- our contention has been the former. That is, that we sought to do, to perform these activities in the same areas, from the same type booth we're now functioning from, for other purposes. We are, and other organizations. We've never sought the right to stroll about the campus selling -- selling literature or hawking or soliciting dues; never sought the right to solicit them within dormitories or within the physical facilities of the campus.

It's been a very limited and, as I understand the nature of the court's order below, that the nature of which --

Q Well, but what happens on the mall where, I gather, all these booths are located? Would your folks stay within the booth, or do they --

MR. RICHARDS: Really it's a misnomer, actually, because no one has had that much money. All they have is card tables, and they set them up, and they sit behind the card tables.

Q And people come to the card tables?

MR. RICHARDS: Sure. That's what they do now.

Q And it isn't that representatives go up and down and buttonhole students walking across the mall?

MR. RICHARDS: Well, I guess I shouldn't hold myself out as an expert on what really transpires. We described our relief narrowly in terms I am now indicating to you. That is, we wanted to be able to do the same kind of activities that other organizations were doing in those same areas, and we didn't want to have our activities limited by simply the label that it's commercial. And so we've really sought parity. That's all. With respect to the kinds of activities that other student organizations are doing under the guise of being -- for which they have approval.

Now, the record reflects the young people selling balloons from a booth on the campus. We assume that our conduct in a similar location would be no more disruptive in the similar areas, and that we ought to be permitted to do so. That's all.

Q How long is that permit good for?

MR. RICHARDS: Well, actually, the record reflects, and this is a narrow period of time, and this is the rule that

permission is sought for a specific time or times. The responses to the interrogatories I think will reflect in the record the kind of permission that's sought. Some people seek -- my clients have -- for a week to maintain a booth on the mall for such-and-such purpose, and have done so.

They still seek permission, and we haven't even quarreled with that to this extent. We've conceded that there are legitimate concerns for congestion, that the university may well say, We can't tolerate more than 15 or 20 booths on this area, it's got to be first-come-first-served, and that there's going to be a limit in terms of time. We've conceded that to the court below, and I think the court below conceded that in its opinion.

The stipulation is that there are frequently as many as 15 booths erected along the West Mall, as it's called, of the university campus, soliciting -- distributing literature, and matters of this kind. We've simply sought to -- as I say, simply sought parity here.

And I think that's all the court below did. I think their opinion fairly gives the Regents and the responsible university administrators full authority to maintain their institution, and --

Q Mr. Richards.

MR. RICHARDS: -- do it according to their contract.

Yes, sir?

Q I was interested in your response. You carefully referred to the Young Democrats and the Young Socialists, but made no reference whatever to the New Left. I'll ask you what I asked your friend: Is the New Left before us?

MR. RICHARDS: Not in my judgment they're not.

Q Then you are not representing the New Left at this juncture?

MR. RICHARDS: I am not representing the New Left at this juncture.

Q Even though your brief states you are the attorney for the appellees, and they are named as an appellee?

MR. RICHARDS: Well, I guess we're caught up in sort of a -- I didn't print the brief, but -- I didn't print the style of the record; the record still carries them, and I assume that's a matter of nomenclature and so forth in the clerk's office. The case was never restyled below when the New Left was dismissed. But that was simply a matter of policy in the clerk's office.

Excuse me?

Q I'm sorry, Mr. Richards, to keep questioning you, but --

MR. RICHARDS: That's quite all right.

Q -- I just don't have a clear picture of what it is that goes on.

MR. RICHARDS: All right.

Q Had your clients, the Socialists and the Democrats applied for a permit at a booth "merely to distribute political literature", would that have been granted?

MR. RICHARDS: Yes, sir. It has been granted and granted commonly, as the record so reflects.

Q Well, what you added to it was, not only did you want at that place to distribute political literature but also to be allowed to solicit membership and solicit the payment of membership fees; is that it?

MR. RICHARDS: Yes, Your Honor.

Q And those are the two things that were denied?

MR. RICHARDS: The sale also of political literature. Let me add that. That the Young Democrats had bumper stickers that, on one occasion, they wanted to sell from that same booth. Political bumper stickers.

The Young Socialists --

Q They'd give them away if they could, is that right?

MR. RICHARDS: That's right. We could give them away. In fact, they did give them away when they were -- found that they could not sell them. But, of course, the financing of political parties being such as it is, they need to exact a price if they can.

Q So, really, what it comes down to, then, what

you're suggesting is that all we have before us is a regulation which denies these organizations the right to solicit membership and to solicit fees, and to sell that political literature?

MR. RICHARDS: That's right, Your Honor.

Q Is that all?

MR. RICHARDS: That's all, as I understand it.

Let me say that the regulation is couched in the guise of a prohibition against commercial solicitation, and the Regents, by their application of it, have swept up this kind of political activity in the embargo against commercial solicitation.

Q Well, you don't deny, in a sense, it's commercial --

MR. RICHARDS: It has commercial aspects.

Q -- in aspect, but you say it's political expression and for that reason it's protected by the First Amendment?

MR. RICHARDS: That's our contention, yes, Your Honor.

The Appendix, at 137 through 141, has some indication of the kinds of literature and the organizations that are engaged in distribution of literature in these very areas all throughout the year.

Let me -- inasmuch as we have maintained throughout that this matter was not one that required the convening of a

three-judge court, we realize of course that it's not our position to have to carry that burden. It's been our view from the outset, we opposed the convening of the three-judge court, and we still assume that this matter could have been disposed of amply by a single judge sitting in Travis County.

We do not consider that the regulations have the general and Statewide application that this Court spoke of in Moody vs. Flowers, and hence, as our brief points out, I think the Texas statutes to which we refer will demonstrate, there are some 40 or 50 or 60 various institutions of higher learning in Texas; and, as Mr. Shultz concedes, these rules we talk about apply to only a portion of those, albeit the University of Texas is the most substantial.

Q Well, are all the others fully supported by the State, to the extent that the University of Texas is?

MR. RICHARDS: Yes, Your Honor. I think -- as I say, we refer to Article 2919e of the Texas civil statutes lists what I consider to be, or at least at that point, all the State-supported institutions of higher education, both junior college and senior college. And I think reference to that, I think, would put in perspective the --

Q And there are how many, roughly?

MR. RICHARDS: I think I said 40-odd in my brief. I haven't had a chance to count them.

Q All right.

MR. RICHARDS: But it's --

Q And I think we were told that there are 17 units in the University of Texas.

MR. RICHARDS: Some of which are yet to be open, but, nevertheless, they will be open soon.

Q I'm a little confused on one thing, now, Mr. Richards, maybe you can clear it up.

MR. RICHARDS: I'll try, sir.

Q Are you now permitted, or have you been permitted in the past, to sell political pamphlets and papers and documents?

MR. RICHARDS: On campus?

Q On these -- at these booths, or tables as you call them?

MR. RICHARDS: No, Your Honor. That has not been permitted in the past.

Q You can only give them away?

MR. RICHARDS: Give them away.

Q And that's under --

MR. RICHARDS: There's been no restriction on giving them away, except -- but they have not been permitted to be sold.

Q Is anyone permitted to sell anything other than balloons along there?

MR. RICHARDS: Well, university-sanctioned publica-

tions are sold along there, as the stipulation in the record reflects. These are purely university-sanctioned --

Q You mean school papers and things like that?

MR. RICHARDS: Well, school papers or magazines. The -- well, the Student Association is authorized to sell insurance to the students, which of course, again it's university related; but it certainly has a very substantial commercial aspect.

There are regular activities on the campus of the kind, like motion pictures that the public can come to and pay to see, entertainments of various sorts. The campus is, as Mr. Shultz indicates, a rather substantial size and number, it now houses the Lyndon Johnson Library, which has become one of the major tourist attractions in our part of the world, and it's a place that embraces all manner of activities of very much to a commercial aspect, both directly related to the university and the spinoffs that are common.

Q Thank you.

Q Mr. Richards, looking at the judgment on page 176 of the record, I understand your position now, your only real complaint is that you can have the booths and do certain things, but they wouldn't let you do these other things. But doesn't this judgment declare these rules and regulations invalid on their face?

MR. RICHARDS: It declares them invalid, but the

text of the opinion makes clear, as I understand it, that the -- well, it does declare them invalid, yes. And enjoins their enforcement as to these two plaintiffs, the Young Democrats and Young Socialists.

Q Isn't that rather more relief than you were entitled to? I mean, is the university now without any regulations at this school at all? Under the judgment.

MR. RICHARDS: They -- unless they have supplanted them, they are without regulations at this school.

Q Was that required to give you the relief you wanted?

MR. RICHARDS: I think it was not essential to give the relief I asked; that's correct, Your Honor.

The judgment runs only as to the plaintiffs, who are the Young Democrats and the Young Socialists --

Q Yes, I notice that --

MR. RICHARDS: -- it does not run to the world at large. And the injunction -- if you read -- the judgment appears at 176 and 177.

Q Yes, that's what I'm looking at.

MR. RICHARDS: And in paragraph 2, "the Court declares that the activities engaged in by the plaintiffs", and this is, by reference, the Young Democrats and the Young Socialists -- "in solicitation of membership ... and ... sale of literature constitutes speech and associational activities..."

Q Yes, but look at paragraph 3. It says:
All the defendant's agents, et cetera, are enjoined from further enforcement against the plaintiffs of the rules and regulations. Do you think that's as far as it goes?

MR. RICHARDS: Well, I suppose it's a matter of construction in the trial court's judgment, and I think there may be a certain inconsistency there. At least I confess I had thought of it as running over to the plaintiffs, and running the kinds of activities I have indicated; but you're quite -- I guess it could be construed by another trial court in -- and a more clear judgment could be construed more broadly by them.

Q Well, what do you say to Mr. Shultz's problem about, they might violate the federal rule and you might violate the State order, and who violates what?

MR. RICHARDS: Well, let me -- I'll come to that and try to speak to it, because I don't want to be caught off in the notion that we all are here together, that the people who were sent back to the State court and the Young Democrats and Young Socialists.

I may preface my remarks by saying that I don't want -- Mr. Shultz has alluded from time to time to the fact that everybody has all been represented by the same counsel. But the explanation of that, I think, is sufficient to say that that's true of most civil liberties cases in that part of Texas,

and I don't think you can make judgments about -- or that that really makes weight in terms of who's here. But "The Rag" plaintiffs, as they were called, were severed and sent back to the State Court and remained there. They never sought to return to the State -- to the Federal Court.

Q But this was their lawsuit.

MR. RICHARDS: They initiated the lawsuit, and until they were dismissed from it, it was their lawsuit.

Q Well, then, as we've already seen, there's some question about whether or not they were dismissed from it.

MR. RICHARDS: Well, let's -- I take it that the court's order that appears is explicit that they consider them dismissed, that they could go back -- the State court was in fact told it was free to proceed against them; with the reservation that Mr. Shultz refers to, I'm not certain. I assume that that's the kind of reservation that was contemplated, perhaps, with the notion that if they didn't raise federal constitutional issues in the State court that they might later come back. I think it could be construed in that fashion.

But the sequence of events, I think, is material here. Mr. Shultz has compressed, I think, the time factor.

The suit was filed, that's correct, by what was called the New Left Education Project, in the Federal Court.

Thereafter, as the record reflects, the Regents

changed their rules again and caught up the Young Democrats in the rules and said, for the first time, that they could not solicit membership dues at registration time; which has been a traditional right of theirs.

At that point the Young Democrats filed, refiled again, we filed a motion to amend to join them. The Regents opposed, urging, among other things, that there should be severance. This was all argued at one time. The court issued its order supporting the Regents with respect to the three-judge court, severing out the initial plaintiffs, the New Left plaintiffs, and sending them back to the State court and saying that they would retain the action as to the Young Democrats for further proceedings.

Three months later the Young Socialist group filed a motion to intervene, and were permitted intervention finally, and it was in that posture that the case came on for final decision.

The arguments with respect to class, with respect to res judicata, are murky, but, at best, the Texas class action rule is the old Federal rule; that is, it was spirited from the Federal rules, the motion was of a spurious class, and it was not binding as a matter of res judicata, unlike the new Federal rule.

Although a grant of a temporary injunction is appealable, it's only reversible on a clear abuse of discretion,

that's governing Texas standards; so I don't think there's finality in the Texas State Court judgment that would sustain res judicata.

And, finally, these parties, albeit having similar interests, were never in the State court. They were told, in fact, by the Federal Court that they were free to remain there and litigate their issues; and this they did.

Now, I think, but for the birth of the case and perhaps that's -- I take full responsibility for that. I guess it's just a matter of judicial economy, or economy in the office or something. We didn't file a separate suit on behalf of the Young Democrats. The case was already, at that stage, going to be considered by three judges on several issues, and so, rather than do another one and have another three-judge court appointed, we did it this way.

But I think all that really says is that we had, at one point, two parties who sort of crossed in the night on this litigation and really had nothing to do with each other, since then.

Q What about Mr. Shultz's question: What does he do with the parties that he has in the State court?

MR. RICHARDS: I -- the Federal Court has said -- excuse me, I don't mean -- I didn't mean not to respond to it, Your Honor. The Federal Court has said that he was free to proceed against them, and I assume that he has been free to do so.

Contentions have been made with respect to their activities, which are entirely different, frankly, from that of the Young Democrats and the Young Socialists; contentions are being made of harassment, of verbal abuse, this kind of thing, all of which might have sustained injunctive relief as to that kind of conduct. But none of that was present with respect to my clients who are here before this Court, the Young Democrats and the Young Socialists.

No suggestion that they've engaged in anything more than just a simple organizational, First Amendment conduct.

Q Your suggestion is that analytically this thing will simplify itself if we look at this as two separate lawsuits, and forget all about those A plaintiffs; is that it?

MR. RICHARDS: I think it would certainly be --

Q Because really it is.

MR. RICHARDS: That's what I think.

Q The A plaintiffs brought this lawsuit to enjoin a State action --

MR. RICHARDS: They were dismissed.

Q -- and to sell newspapers.

MR. RICHARDS: Right.

Q And your present clients --

MR. RICHARDS: Don't have anything to do with --

Q -- are not involved in the State action and don't want to sell newspapers.

MR. RICHARDS: That true; don't want to sell --

Q They are two separate lawsuits, then.

MR. RICHARDS: Well, that's the way I have always viewed it, except it's been caught up, as I say, in sort of giving numbers and names to it to make it appear all one; but it certainly is different.

Q I see Mr. Shultz is a little concerned --

MR. RICHARDS: Well, I think the answer to that is -- and I was going to come back to it; I don't want to be unfair. Actually the Young Socialists do have a paper they'd like to sell, called the "Militant". So I don't mean to say that embraced within their activity was not the sale of a political newspaper or any -- Mr. Shultz is quite right about that.

I think the first -- I've tried to state that the First Amendment issues, I think, in opening argument -- I would add only this, that we are now dealing with the 26th Amendment's enactment, but the student body, to all extents and purposes, as I looked at the figures, only one percent now of the student body is under 18 years of age, and we're not dealing with -- we're dealing with citizens whom we have now accorded the full right to vote. We're dealing with them in the area in which their interests are normally debated.

It would be, it seems to me, consistent with that First Amendment, or the freedom of their voting right, that at least political issues, the activities of traditional political

organizations be permitted to flourish in a non-disruptive manner on the university campus in the one place that these young people can be reached.

If there are no further questions, thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Richards.

I think all the time has been consumed.

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:38 p.m., the case was submitted.)