In the

Supreme Court of the United States

STATE OF CALIFORNIA, et al.,

Appellants,

v.

ROBERT LaRUE, et al.,

Appellees.

No. 71-36

Washington, D. C.
October 10, 1972

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STATE OF CALIFORNIA, et al., Appellants, v. ROBERT LaRUE, et al., Appellees.	No. 71-36

Washington, D. C.,

Tuesday, October 10, 1972.

The above-entitled matter came on for argument at 10:05 o'clock, a.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

L. STEPHEN PORTER, ESQ., Deputy Attorney General, 6000 State Building, San Francisco, California 94102; for the Appellants.

HARRISON W. HERTZBERG, ESQ., Los Angeles, California; and
KENNETH PHILIP SCHOLTZ, ESQ., Gardena, California; for the Appellees.

C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments now in No. 71-36, California against LaRue.

Mr. Porter.

ORAL ARGUMENT OF L. STEPHEN PORTER, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This case involves two regulations of the California Department of Alcoholic Beverage Control, which provide that a California State on-sale alcoholic beverage license may not be held on premises for the sale and consumption of alcohol where certain sexually oriented acts, conduct, or visual displays are employed on the premises. The regulations were enacted after legislative hearings before the California Department of Alcoholic Beverage Control.

Now, it was developed at these hearings, first, that alcohol acts as a depressant upon the control centers of the brain, which normally inhibit the so-called base behaviors, in that persons consuming alcohol may and do engage in acts and conduct which they would not engage in if not drinking.

Secondly, it was developed that persons under the influence of alcohol are more likely to be sexually

stimulated by viewing sexual material, sexual conduct and acts, and that they are more likely to engage in sexual activity or conduct on premises which afford or offer such sexually oriented entertainment.

Thirdly, --

QUESTION: Now, how did this litigation arise? Was there action for judgment, an injunction, or what?

MR. PORTER: By certain licensees attacking, both in the State and Federal Courts in California, the regulations on the basis that they were invalid as infringing upon the First Amendment rights that the --

QUESTION: The licensees were the plaintiffs, in other words?

MR. PORTER: The licensees and certain employees, dancers at some of the licensees, were the plaintiffs.

QUESTION: Asking for a declaratory judgment that these regulations are invalid?

MR. PORTER: Invalid, and they be enjoined --

QUESTION: And they enjoin their enforcement?

MR. PORTER: That's correct.

QUESTION: Have there been any license revocation proceedings --

MR. PORTER: No --

QUESTION: -- against any of these plaintiffs?

MR. PORTER: -- the regulations become effective

a number of days after their promulgation enactment or placement in the California Administrative Code. Before their effective date, these actions were brought, both in the State Courts and in the Federal District Court. The Federal District Court in Los Angeles withheld any action, pending action by the State Courts.

The California State Courts refused to hear the cases, refused to enjoin the regulation.

QUESTION: I wonder if there were a Younger problem in this case, Younger v. Harris; are you familiar with that case and its companions?

MR. PORTER: Not completely. There was no -- I'm not familiar with it.

QUESTION: But when it's set in the State Courts, you -- what -- render a declaratory injunction, or a declaratory judgment or injunction?

MR. PORTER: Yes, the action for declaratory relief and injunction was brought in the State Courts, the State Courts refused,the plaintiffs went to the California Court of Appeal, California --

QUESTION: You say they refused to hear the dismissed proceedings?

MR. PORTER: These were on petitions. Regulations and/or decisions of the California Department of Alcoholic Beverage Control are reviewable either by petitions for

writ of review in the California Appellate Courts, or under a tight of hybrid writ of mandate proceeding, which would be similar to declaratory relief, to check the validity of the regulations. But it's discretionary with the California Appellate Courts, whether or not they entertain.

QUESTION : And discretion was exercised against entertaining the proceedings?

MR. PORTER: Against entertaining --

QUESTION: And on appeal that was sustained, is that it?

MR. PORTER: The plaintiffs then went to the California Supreme Court and our office requested that the State Supreme Court take the case and take the challenge and decide it. The State Supreme Court refused, denied hearing the case.

QUESTION: Well, then, I take it, that the case is here so far as the action of the three-judge -- opinion of the three-judge court is concerned. There is no pending State proceeding, and can be none because the State Courts have refused to entertain one, is that it?

MR. PORTER: That's correct.

QUESTION: Mr. Porter, do you draw any inference whatsoever from the refusal of the California Courts to take these cases up?

MR. PORTER: Only one perhaps, in all honesty.

Just prior to these regulations being enacted, there was a case in the California Courts, Boreta Enterprises vs. Alcoholic Beverage Control, a case decided by the California Supreme Court. That case, which came up before these regulations, involved the employment of topless waitresses in a San Francisco bar.

QUESTION: In that case, as I understand it, they, in effect, invited the Department to issue, to formulate regulations of this kind.

MR. PORTER: That's correct. They were disturbed, according to their decision, by the fact that there was no evidence, there were no regulations, just a sterile stipulation that topless waitresses were employed.

QUESTION: So, to get back to my other question, can you draw any inference from the denial of hearing this by the State Courts?

MR. PORTER: That perhaps they had just had a case where there was no evidence in the record, no regulations involved, and they did not want to take on a subsequent case in the absence of what they might have thought was an absence of an evidentiary record.

QUESTION: You don't infer that in the eyes of the State Court, the regulation is perfectly valid, do you?

MR. PORTER: That's possible. I would not --

QUESTION: Would not violate it?

MR. PORTER: -- would not violate it.

QUESTION: Mr. Porter, do you regard this case as essentially a licensing case or an obscenity case, per se?

MR. PORTER: Licensing, Your Honor.

As indicated, the legislative hearing before the Department of Alcoholic Beverage Control developed the effect of alcohol upon persons imbibing in it, and also developed, through the testimony of various law enforcement officials in California, through Department investigators, that where this type of sexually oriented entertainment is provided on premises where alcoholic beverages are sold and consumed on the premises, that their resultant problems on such premises, including overt sexual acts between the employees, the entertainers, and the customers, B-girl activity, as indicated by officials from San Francisco Police Department, where, in 1964, they had almost come to nil on B-girl activity, and the introduction of the sexually oriented entertainment in on-sale bars in San Francisco, that caused B-girl activity to reach almost epidemic proportions.

Prostitution increased around such premises, where you have this mixture, the prostitutes congregating where you have the sexually oriented entertainment, sexually stimulating entertainment, plus the customers imbibing in alcoholic beverages.

Narcotic and drug crimes increased, at or near such

premises, violent crimes, exploitation of customers, overt sex crimes, drunkenness and intemperance, serious and extensive law enforcement problems, which we've set out in the brief.

Accordingly the California Department of Alcoholic Beverage Control adopted these regulations in order to try and prevent the serious problems and offenses that were occurring on licensed alcoholic beverage premises in California.

Now, as indicated, the regulations were attacked by various licensees in the Los Angeles and Southern California area in both the State and Federal Courts, and when the State Courts refused to entertain these cases, the three-judge Federal District Court in Los Angeles heard the case.

On a two-to-one decision, the lower court held, relying on Roth and other cases, decisions by this Court, the lower court held that the sexual acts and conduct, and visual displays that were proscribed by the department regulations were protected expression under the First Amendment and the State could regulate them only on the grounds of obscenity. That inasmuch as the department regulations do not deal with obscenity, did not require standards of proof as to obscenity, the regulations must fall.

In addition, you will note that it is clear that, when one reads the lower court's decision, they took the

position that regardless of the alleged purpose of the department in enacting the regulations, that they assumed and determined that the department's motive was to circumvent the obscenity laws, and not to try and prvent the problems which the legislative record had shown.

Now, the Department of Alcoholic Beverage Control argument is threefold.

First, that the sexual activities and sexual conduct regulated by these regulations are not and do not constitute symbolic speech, they are not and do not constitute expression, and are not within the protection of the First Amendment.

Secondly, that even if this Court should determine that they are within the First Amendment, that a State may regulate First Amendment activity on grounds or interests other than obscenity, that obscenity is not the sole touchstone the State is required to use in attempts to regulate First Amendment activity.

QUESTION: Mr. Porter, in your argument here, is it based at all on the Twenty-First Amendment, dealing with the State authority over regulation of alcoholic beverages?

MR. PORTER: Based to the extent that if we are in the First Amendment area, then as far as balancing the State's interests, we submit that both the traditional power that a State has had over the conditions surrounding the sale of

alcoholic beverages and the power given to the States under the Twenty-First Amendment must be considered in balancing the State interests, that these are substantial and important State interests, where we're talking about the conditions surrounding the sale and consumption of alcoholic beverages.

We have never argued, nor would we ever argue, that the Twenty-First Amendment would automatically override the First Amendment, or any other part of the Constitution. We only urge that --

QUESTION: Well, it has been held that the Twenty-First Amendment overrode a great deal of the commerce clause, hasn't it?

MR. PORTER: Well, --

QUESTION: And it does, by its terms.

MR. PORTER: That's correct; but I --

QUESTION: And it has been held that the Twenty-First Amendment overrode a good deal of the equal protection clause of the Fourteenth Amendment, hasn't it? It was in the Younger case.

MR. PORTER: Yes, but I would submit that -- or I would, myself, attempt to temper that somewhat, to the extent I think it shows an overriding State interest in weighing between the commerce clause and the Twenty-First Amendment, where you get up in equal protection, where you get up into the First Amendment or some so-called, alleged,

preferred amendments of the Constitution.

As I said, we do not argue that it overrides the First Amendment. If we're dealing in a First Amendment area, that great weight should be given to the State's interest and power under the Twenty-First Amendment, in balancing and weighing, the State interest outweigh the State interest to be protected under the First Amendment.

QUESTION: But I gather, Mr. Porter, that that viewpoint, at least, is now a tentative argument, your basic argument is that there is no First Amendment right involved here at all?

MR. PORTER: That's correct.

And thirdly, we argue that a Federal Court may not enjoin or invalidate otherwise valid regulations, on the grounds that it believes a bad motive influenced the regulations.

Now, first of all, as to this not being First Amendment activities, we submit that public and commercial acts, such as masturbation, oral copulation, sodomy, exposure of the genitals, do not constitute symbolic speech or expression, and that such acts and conduct do not contain a recognizable, significant speech element entitling them to First Amendment protection.

And assuming that dancing is protected by the First Amendment, which is the main argument of the licensees

in this case, we submit that the licensees may not make such a lax in conduct, visual displays, dancing by merely calling it dancing, or the fact that such acts or conduct engaged in, with music being played, or that they may do some dance steps up to the act, or dance away from the act, does not make these acts, the sexual acts, sexual conduct, dancing; sexual conducts and acts are sexual conducts and acts.

Furthermore, we would submit that if the live sexual acts or conduct or displays are not speech, it does not seem rational to us to say that by merely putting such acts and conduct on film that they are transformed into speech the minute they are put on the film and visually displayed by film rather than live.

QUESTION: Well, a murder might not be speech, I suppose we would agree that it isn't, and yet the depiction of a murder, in a movie or a play, simulated, certainly is protected by the First Amendment, isn't it?

MR. PORTER: Yes, but here we're dealing with regulations that do not want the sexually oriented entertainment, whether it be on film or whether it be live, and we're not looking to the context. I suppose if one just showed a murder and nothing more --

QUESTION: Well, take Othello. Or take countless works of drama through the ages, they're certainly protected by the First Amendment.

MR. PORTER: Well, all right.

As to that, we would say that if it is within the First Amendment, that the State here can show a proper, more significant interest, a more outweighing interest, in preventing the display of such films on premises where alcoholic beverages are being consumed, conceding that it would be First Amendment film -- protected by the First Amendment.

We believe the State can properly restrict such films from premises where alcoholic beverages are being sold and consumed.

QUESTION: Then the Twenty-first Amendment does encroach upon the First?

MR. PORTER: Well, it would encroach in the sense that that is the interest of the State involved here, over the control of conditions surrounding the sale of alcoholic beverages. So the Twenty-first would be in the State's traditional power. Absent the Twenty-first over conditions surrounding the sale of alcoholic beverages.

QUESTION: Do the regulations prohibit the selling of books?

MR. PORTER: I submit if the legislative -- no, the regulations do not.

QUESTION: The point is, do you have to go as far as you're going? That's my only point.

MR. PORTER: Yes. Well, --

QUESTION: I think you're going a little far.

MR. PORTER: -- Mr. Justice Marshall, the regulations do not prohibit books. If the legislative hearing record before the Department shows that books were sold on such premises, where you had sexually oriented books visually displayed, combined with persons drinking alcohol, that you had these bad results occurring, then I assume the Department would promulgate, as part of their regulations, the prohibition against sexually oriented books being sold on the premises.

QUESTION: That would only be under the Twenty-first Amendment?

MR. PORTER: No, I submit that it would be under the State's traditional broad police powers over alcoholic beverages, in that --

QUESTION: Well, do you assume at the present time there are some books that cannot be prohibited for sale in California?

MR. PORTER: Do I assume that there are books that cannot be prohibited from sale? Yes.

QUESTION: But the books may be prohibited from the bar and no place else?

MR. PORTER: If there was a proper basis for it, yes.

QUESTION: Well, what is that under, then, if not the

First Amendment?

MR. PORTER: Well, under this Court's decision in United States vs. O'Brien, I suppose if it was shown that whenever a certain book or certain types of book were presented on a bar, that it would result always in breaches of the peace. That there is a book on protest of war, and that when people were drinking in bars, that the record showed that nine times out of ten where they had this book in a bar and people were drinking, you automatically had a breach of the peace.

QUESTION: Do you recognize the difference between tearing up a draft card and selling a type of book?

MR. PORTER: Yes.

QUESTION: Thank you.

QUESTION: It seems to me, Mr. Porter, that -- and I had this feeling reading through the briefs, that you've got this case turned around. The California Department of Alcoholic Beveral Control has not prohibited these things going on in the State of California anywhere, it simply prohibited the sale of liquor by the drink; and that's its function, its jurisdiction. And I should think that you could validly argue, whether -- you could make the argument that under the very broad autonomous police power given to the States under the Twenty-first Amendment and historically, that California could prohibit selling liquor

by the drink in a bookstore if it wanted to, or within a hundred feet of a church if it wanted to, without violating either the freedom of free press or freedom of religion. You're dealing with liquor by the drink, you're not prohibiting these things from going on, you're prohibiting liquor from being sold. Isn't that true?

MR. PORTER: Well, I would endorse that, yes.

QUESTION: Well, you don't say that anywhere in your brief very clearly.

QUESTION: That was the purport of my question to you, whether this was a licensing case or an obscenity case. It's a licensing case relating to the sale of liquor, as Mr. Justice Stewart emphasized. And what else, what other business is transacted in conjunction with that is a matter for the State police power of California.

At least so I would understand the State's position.

MR. PORTER: Yes.

Well, aside from that position that the State is merely licensing liquor by the drink and just saying where it may be sold, I would like to point out that nonetheless, assuming that it should be found that the conduct, the acts, the displays that are prohibited by these regulations from being performed or being offered on on-sale alcoholic beverage premises are within the First Amendment, and there is a question as to the State, that the State is

actually trying to regulate First Amendment activity and not trying to do something in furtherance of alcoholic beverage control.

We submit that a State may regulate on grounds other than obscenity, that the decisions relied on by the lower court were often the obscenity cases, and relied on by the licensees, deal solely where a State is proceeding against acts or conduct on the premises, that they are obscene.

And, as we have indicated, that is not the State's interest here.

This Court set down the criteria in United States vs. O'Brien. We have indicated in our brief how we feel that is met by the State's regulations.

QUESTION: Mr. Porter, counsel for the appellee has argued that these regulations, whatever else may be said for them or against them, are overbroad and vague. Would you care to comment on that before you conclude your argument?

MR. PORTER: We submit that they are not overbroad and vague, they proscribe specific sexual acts, specific sexual conduct, they are limited --

QUESTION: I thought they proscribed the sale of liquor on certain premises. Don't they?

MR. PORTER: In their form, the regulations state that an on-sale license will not be held on premises which

offer these --

QUESTION: Liquor by the drink shall not be sold in certain places.

MR. PORTER: Certain places that offer this, these specific acts of conduct.

QUESTION: Now, isn't that under the same power that the State might exercise if it prohibited sale of intoxicating beverages within 500 yards of a school?

MR. PORTER: Yes.

QUESTION: It is basically the same power?

MR. PORTER: Yes. Yes.

QUESTION: I didn't mean to interrupt your answering Justice Powell's question, but I --.

MR. PORTER: No, sir.

And in that respect, they are specific, they are not overbraod, in that the regulations do not proscribe the holding of a license on premises that offer any entertainment, or they do not proscribe such entertainment may not be offered on any premises in California. It's limited to on-sale alcoholic beverages, where the customers are drinking.

Unless the Court has other questions, I am through.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Hertzberg.

ORAL ARGUMENT BY HARRISON W. HERTZBERG, ESQ.,

ON BEHALF OF THE APPELLEES

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

These rules set forth grounds for disciplinary proceedings against an Alcoholic Beverage Control licensee. These rules say, in effect, that if you permit entertainment, which entertainment has these acts, specific acts, that's grounds to discipline you, suspend or revoke your liquor license.

It's our contention that as a condition of the exercise of that license, you cannot deprive an individual, be he or she a dancer, as are the plaintiffs in this case, or a licensee, the foregoing of their First Amendment rights.

QUESTION: You think a State could probably say that no liquor by the drink should be sold in bookstores?

MR. HERTZBERG: I don't think a State could validly say that liquor by the drink should not be sold in drugstores.

QUESTION: How about across the street from a school?

MR. HERTZBERG: I believe they could say across the street from schools. As a matter of fact, the State of California says within 600 feet of a school, or a church.

QUESTION: How do you distinguish that from the kind of police power they're exercising here?

MR. HERTZBERG: I say that's merely an --

QUESTION: An environmental decision in each case, is it not, on the part of the State?

MR. HERTZBERG: When you say that liquor cannot be sold in a bookstore, you're saying no differently than you can't read a book in a bar.

I don't think you -- I think you're doing indirectly that which a State cannot do directly by prohibiting free speech. In other words, --

QUESTION: Well, couldn't the State say that liquor in our State is only going to be sold where only liquor is sold and nothing else goes on? No other commodities are sold.

MR. HERTZBERG: Well, first of all, these rules don't say that.

QUESTION: No, but I pose the question just to test you.

MR. HERTZBERG: As Your Honor, Mr. Justice Stewart, said, the rules are turned around. In this case, they are bad and overbroad. However, traditionally in this country you've had political discussions, you've had entertainment in bars where liquor is sold, which is part of and inherent in, I think, the First Amendment rights.

QUESTION: You don't have them in many counties in many States, because you don't have any bars. And there's

no question about the power of a State, in its entirety or in some of its counties, to not have any bars whatsoever.

MR. HERTZBERG: Well, Mr. Justice Stewart, if you limit and you proscribe that liquor cannot be sold in a bookstore, you're discriminating against those people who want to read books and exercise their First Amendment rights while drinking and those that do not.

When you have a monopoly State and don't permit liquor to be sold anywhere in that State, you're treating all people alike, and you have a very serious Fourteenth Amendment problem, with the type regulation which you specify.

QUESTION: Well, what about this lack of limitation which Justice Stewart is pressing on? Could they validly prohibit the sale of gasoline and liquor in the same establishment? In other words, selling liquor at a filling station.

MR. HERTZBERG: If you can show that the State of California has scientific evidence of some kind in a legislative hearing that would constitutionally permit them to find that there were some logical and reasonable correlation between the sale of gasoline where liquor is sold, then I would say yes.

But more so in a First Amendment rights situation. That's what we have here.

Going back to the legislative hearings in this case, I contend -- we contend -- that the State of California must

show some logical and reasonable correlation between the drinking of liquor while watching a nude girl dance or a movie or even a television -- which some of the shows on television today would be prohibited by these rules, and a crime that occurs outside the premises. And I say that for this reason, Mr. Chief Justice, that each and every act complained of in the parade of horribles listed in the brief of appellant herein is either proscribed by California statute today -- none of the plaintiffs that I represent, there's over twenty of them here, obviously carry on this kind of conduct, were judged by -- they were judged by the normal rules of obscenity. And that's all they ask this Court to do, is to judge it no differently than they would judge any other First Amendment right.

QUESTION: How does prostitution get under obscenity?

MR. HERTZBERG: Well, --

QUESTION: That's one of the acts that you commented on.

MR. HERTZBERG: Well, I submit, Your Honor, Mr. Justice Marshall, that these hearings, if the Court will refer to the entire text of them, you'll find that they invited every law enforcement officer, or practically every one, district attorney, city attorney, and attorney general to testify, and police officers --

QUESTION: Well, isn't it a regulation in California, that a bar that sells liquor that has prostitution inside the bar, that they lose their license?

MR. HERTZBERG: You can lose your license for --

QUESTION: No, just on this.

MR. HERTZBERG: Yes, yes, there is.

QUESTION: Has that ever been contested in court? Have you ever gone after that regulation?

MR. HERTZBERG: No, I've never gone after that regulation. Because the appellant herein could contend --

QUESTION: Well, then, they do have some power over the bar, don't they?

MR. HERTZBERG: Oh, they have a lot of power over the bar. But I don't think they have the power to dispel your entire First Amendment right.

QUESTION: Well, isn't it a denial of equal protection, that the only place they're seeking out is the bar? They don't seek out the bookstore that has prostitution.

MR. HERTZBERG: Well, there's no question but that there's a greater police power over a bar than there is over a bookstore.

QUESTION: Or over any other establishment.

MR. HERTZBERG: I couldn't stand here and deny it, Mr. Justice Marshall. I don't think that the power is

that strong, and in this instance here, after three days of hearings, the record will reveal that since this entertainment commenced in Los Angeles, in the entire State of California, they established outside of the premises that there were four indecent exposures, one attempted rape, one actual rape by alleged patrons, and two general statements that crime was on the increase. And that's after three days of testimony, inviting every law enforcement officer in the State to testify.

Each and every one of the parade of horribles here is grounds for disciplining the license of the licensee. There is no need, as these rules in this case before this Court at this time, to take away the First Amendment rights, which we feel will be taken away as a condition of the exertion of a privilege, because here we are not talking about the type of conduct, as the appellant alleges occurred in O'Brien. This is directly communicative activity.

I don't stand here and ask this Court to think or believe that every bar in the State of California carries on the type of activity which the appellant picked out and chose to put in his brief in this case. These are by far the exception.

If, in California, or any State I would believe, any activity occurs of this nature, any contact between a patron and an entertainer, it would be proscribed in addition

thereto. If it's the liquor, if the liquor is the added element in this case, which appellant seeks to use to invade the constitutional right, then why not remove the liquor if we can, to the best extent, from the bloodstream of the patron? And we do that in California by saying -- we've cited Section 647(f) -- that you're not permitted to remain on the premises if you're under the influence.

Well, if you're not under the influence, you're no different than anybody else. So you shouldn't be there in the first place. And if they're going to be inside the bar, to police it, to determine whether there's been any violation of the alleged rules, they might as well just take the people that are under the influence and get them out of the bar.

QUESTION: Mr. Hertzberg, do you think the State validly forbid the sale of liquor in the lobbies of all theaters? Or the sale, up and down the aisles of all theaters?

MR. HERTZBERG: My brother Scholtz will probably argue that point, in that we feel that the State could not validly exclude the sale of alcohol in the lobbies of all theaters.

On the same theory that we argue here, because there's no rational or scientific showing that the drinking of that alcohol will result in any criminal activity.

QUESTION: Do you have any case on that?

MR. HERTZBERG: I have no case on that, except this Court decided, in its variable obscenity cases, the Sam Ginzburg case, in which --

QUESTION: Well, what has obscenity got to do with selling liquor in the lobby of a theater?

MR. HERTZBERG: Obscenity really has nothing to do with selling liquor in the lobby of a theater. We just feel that if a man has a liquor license and he operates a theater, and the sale of the liquor is a necessary element to his operation, then what you're doing is, you're placing upon the patrons of that theater and the owner an unconstitutional burden, and carving away the First Amendment rights of what he can show if you --

QUESTION: Well, how do you get the First Amendment right in the man taking a drink in the lobby of a theater which is showing Othello?

MR. HERTZBERG: Mr. Justice Marshall, it is true, the way you pose your question, it doesn't meet identically the rules in this case. This case is a different case than your question.

However, I believe it would indirectly create the identical result, and that is, if you say to a man he can't sell liquor in the lobby of a theater, and he sells liquor in the lobby of the theater, he will either lose his license or he will be criminally prosecuted.

QUESTION: Is this equal protection you're arguing, or First Amendment?

MR. HERTZBERG: First Amendment, sir.

Now, --

QUESTION: Well, suppose the State says you can't sell liquor in the entrance to an iron foundry. I'm trying to get something away from the First Amendment. We agree the iron foundry is away from the First Amendment?

MR. HERTZBERG: Yes, Your Honor.

QUESTION: Well, could they do that?

MR. HERTZBERG: I would agree to that.

QUESTION: The State could do it?

MR. HERTZBERG: With no First Amendment right, the State could do that.

QUESTION: Well, is there any other reason they couldn't do it?

MR. HERTZBERG: Well, other than the fact that it may discriminate against iron foundry workers under the Fourteenth Amendment. Probably if they could lick that, probably they could do it.

QUESTION: Well, doesn't the two o'clock closing law discriminate against workers at night?

MR. HERTZBERG: I think that's a reasonable discrimination.

QUESTION: All right.

MR. HERTZBERG: Of course, historically -- well, we have to argue at this time the regulations as they come before this Court.

Briefly, in answer to Mr. Justice Stewart's initial Younger vs. Harris argument, we filed this action originally on behalf of the plaintiffs in the Superior Court of the County of Los Angeles in declaratory relief, and requested an injunction in the Superior Court, which is the lower trial court. We were denied hearing.

We petitioned the District Court of Appeals for writ of mandate and were denied a hearing.

We petitioned the Supreme Court of the State of California, and were denied hearing. Both on behalf of entertainers, dancers, and bar owners.

QUESTION: Mr. Hertzberg, then the California courts assigned no reason for their refusal to consider your petitioner. None of them did, is that it? Is that right?

MR. HERTZBERG: No, Mr. Justice Rehnquist, merely a postcard saying "denied".

As the appellant herein says, he requested a hearing along with us in the Supreme Court, and it was denied on both sides. The dissent in the Federal District Court below did feel that there was a Younger vs. Harris problem, but we went through every court in the State and didn't get heard.

QUESTION: Mr. Hertzberg, do you have any comment on that refusal, do you draw any inference from it, or is it a routine procedure in California?

MR. HERTZBERG: Well, I very honestly state, Mr. Justice Blackmun, I know one thing that the California Supreme Court, like this Court, doesn't like to give advisory opinions. And whether that was their theory or not, it would merely be conjecture on my part.

However, in California, you can only contest a disciplinary proceeding on a liquor license by going through certain administrative procedures. We filed the complaint in this case prior to the effective date of the rules, to enjoin -- I believe it was prior, it may have been concurrently therewith -- to enjoin their enforcement on the theory that it would be irreparable damage, of which the appellant agreed. They were going to enforce them. And that the loss of these licenses would be irreparable.

We did not wait until the licenses were revoked there, until disciplinary proceedings had been instituted.

QUESTION: Does California have a procedure whereby one can get a judicial review of administrative rule-making which, I take it, is what you sought here rather than administrative adjudication?

MR. HERTZBERG: I would answer that question in this regard, but I would refer the answer to Mr. Scholtz, I

believe on declaratory relief we probably could.

We would submit, further, that the way the rules are drafted, they are overbreadth the Smith vs. California problem, which Mr. Scholtz will take up with the Court, are such that, or in a manner that, they do deny the licensees herein the proper exercise -- the licensees and dancer plaintiffs the proper exercise of their First Amendment rights as a condition to the owning of a liquor license. No different than NAACP vs. Button and those line of cases, requiring the foregoing of an oath, et cetera, to maintain your license.

That's the basis of our argument herein.

The District Court below said that if it's not obscene, there's nothing wrong with it; and they can't take your license away. Because obscenity has been the standard since 1957, as decided by this Court in Roth.

But to accept these rules, taking things out of context and merely saying if an act simulates an act of intercourse, simulates -- whatever that may mean -- that's grounds for disciplinary proceeding. Even if it's in a picture on the wall. Because it involves movies, still pictures, and entertainment of any kind and nature whatsoever.

The injunction granted in the Federal District Court in this case specifically excepted any contact between any entertainer and a patron, a person in the bar. Which are

90 percent of the parade of horribles listed in the briefs, in the brief of the appellant herein.

We submit that from time immemorial, dancing, entertainment of that kind, as this Court said in Stanley vs. Georgia, the line is too elusive to draw between conveying ideas in entertainment, that whether it's vulgar or whether it's refined, whether it's ugly or whether it's elegant, it receives the same protection, and that test is the obscenity test that's been laid down so strong and hard.

To sustain the rules in this case would take us back to Hicklin, prior to Roth.

The activity, the dancing, is direct communication. This is not, as I previously said, an O'Brien case. In O'Brien this Court held that when speech and nonspeech elements are combined in the same course of conduct, a sufficiently governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

But the Court further went on, in O'Brien, and stated, referring to Stromberg vs. California, the red flag waving case, "since the statute there in San Bernardino, California, was aimed at suppressing communication, it could not be sustained as a regulation of noncommunicative conduct", citing Brandenburg vs. Ohio, which required the incitement to action.

We submit that the conduct here, or the content of the conduct here, cannot be changed from speech to symbolic speech or nonspeech merely by changing the name.

QUESTION: Mr. Hertzberg, is it a fair summary of your position, or is it not fair, to say that you're contending that what the STate -- because the State can't prohibit something in a theater, it can't prohibit it in a bar either?

MR. HERTZBERG: That is correct.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hertzberg.

Mr. Scholtz.

ORAL ARGUMENT OF KENNETH PHILIP SCHOLTZ, ESQ.,

ON BEHALF OF THE APPELLEES

MR. SCHOLTZ: Yes, thank you.

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

I think it's clear that this case involves a conflict between the State's police power to control alcohol and the First Amendment. I think it's clear that these rules would be overbroad, overbroad and vague under the First Amendment, if there were no question of alcohol involved, in that they prohibit -- well, I could tick off a list of movies that couldn't be shown in a bar under these rules, from "Catch-22" to "Summer of '42". I could tick off a list of master works of art, including probably

half of the output of Picasso, that couldn't be shown.

So let me ask a rhetorical question: Could a State require bars to be racially segregated? After holding hearings wherein police officers testified that fights between persons of opposite races are more likely to occur when they're drinking, and therefore the State says that bars are required to be racially segregated.

I say it could not do so. That would be an impermissible conflict between the Fourteenth Amendment and the State's police power over alcohol.

Similarly, I think, in this case, the State cannot make an unconstitutional discrimination against exercise of First Amendment rights, simply because alcohol is involved.

To respond to Mr. Justice Burger's question at the beginning, let me distinguish this between a rule that says a bar cannot be located, say, within 600 feet of a church, as California does --California says you cannot put a bar within 600 feet of a church -- but California does not say, and I submit it could not say, that you cannot put a church within 600 feet of a bar.

And California does not say that if you have a bar at a place and a church comes in within 600 feet that the bar has to go.

Because, I would also say this, that the rule respecting, for example, the distance to churches, is intended

to protect the persons who go to the churches. These rules are intended and expressly intended to control what the people do inside the bar, without regard to where it is located, without regard to what effect it may have on anyone else outside the bar.

So there is a clear distinction here between this type of a rule which directly applies to the conduct inside of a bar, which directly restricts what can go on inside a bar.

QUESTION: Well, again, perhaps it's according to how you put it. But I thought this had to do with places where liquor could be sold, not to what conduct goes on inside of a building, but whether or not liquor could be sold there.

MR. SCHOLTZ: Well, --

QUESTION: In other words, it's similar to a State saying no liquor shall be sold by the drink in a church.

MR. SCHOLTZ: I don't think it is.

QUESTION: And the question is --

MR. SCHOLTZ: I don't think it is.

QUESTION: -- would that violate the person's freedom of religion.

MR. SCHOLTZ: I don't think it is. Suppose the church had that type of a rule.

QUESTION: No, I'm talking about the STate having it.

MR. SCHOLTZ: All right, the State having the rule. No sale of liquor in a bookstore or in a church. That does

not mean that a bar automatically becomes a bookstore or a church because it happens to sell a book or because it happens to conduct religious services. It's a question of where the classification starts.

QUESTION: It's a question of how you put it, but --

MR. SCHOLTZ: No, I think it's a question of where the classification starts.

QUESTION: -- this particular State agency has to do with regulating the sale of liquor.

MR. SCHOLTZ: That's correct. And I think that --

QUESTION: And that's all it's purported to regulate, isn't it?

MR. SCHOLTZ: No, I don't think so. I think this really purports to regulate the content of entertainment at a bar.

QUESTION: Places where liquor can be sold.

MR. SCHOLTZ: What this rule says, and I think this is important, I don't think it's just a case of how you put it. This rule discriminates between types of entertainment. It says entertainment can take place inside a bar, except that the entertainment can't have this, and it can't have that, and it can't have something else.

I think this is an unconstitutional discrimination between types of entertainment, and that I think the Constitution would require that type of discrimination, made

on the basis of obscenity.

QUESTION: Is this the Fourteenth or First?

MR. SCHOLTZ: First.

QUESTION: Well, the test would be the Fourteenth also, wouldn't it?

MR. SCHOLTZ: Well, the First and Fourteenth.

QUESTION: That is, in the State of California --

MR. SCHOLTZ: First and Fourteenth.

QUESTION: -- not the federal government.

MR. SCHOLTZ: It's not a direct application of the First or the Fourteenth.

QUESTION: You reject the position of the State that this is a licensing case rather than a First Amendment case?

MR. SCHOLTZ: Well, it's obviously both.

It is both a licensing case and a First Amendment case.

It involves, as I said earlier, the conflict between the First Amendment and the licensing power.

As I've said, I don't think this is a mere question of terminology and how you put it.

QUESTION: Well, do they have a rule about lighting in the bars in California?

MR. SCHOLTZ: I think there's just a general rule that says that the bars have to have sufficient light -- for

the investigators to see what's going on when they walk in.

QUESTION: Does that interfere with his First Amendment right?

MR. SCHOLTZ: That would be different, because that is not -- that would be an example of an incidental restriction on a First Amendment right. Of the O'Brien type.

QUESTION: Isn't entertainment incidental?

MR. SCHOLTZ: No. I don't think entertainment is incidental. I think entertainment is a direct First Amendment activity.

QUESTION: Well, isn't it incidental to the selling of whiskey?

MR. SCHOLTZ: Not necessarily. In many of these places it may be, and in others --

QUESTION: Well, do you know anybody that goes to the bar to see entertainment that doesn't buy a drink? If he doesn't, the owner is going to put him out.

MR. SCHOLTZ: Oh, I would agree with that, Justice Marshall.

QUESTION: Right? Am I correct?

MR. SCHOLTZ: That's correct, Justice Marshall.

QUESTION: So it's incidental to the selling of whiskey.

MR. SCHOLTZ: Well, I would say this: they're incidental to one another.

QUESTION: And if it's incidental to the selling of whiskey, it's a part of the business of the Alcoholic Beverage Control Board.

MR. SCHOLTZ: I would agree with that.

I don't agree with that. I disagree with --

QUESTION: You do or don't?

MR. SCHOLTZ: I don't disagree with that proposition. But I do disagree with the proposition that the Department of Alcoholic Beverage Control can do whatever it pleases, without regard -- without regard -- to the First Amendment rights of the participants.

I don't think that the Department of Alcoholic Beverage Control could condition the issuance of a license upon the applicant taking the oath, that this Court held was unconstitutional in Speiser vs. Randall. I don't think the Department of Alcoholic Beverage Control could condition the issuance of a license upon the licensee filling out the questionnaire that this Court held unconstitutional in -- I forget the name of the case -- in the Arkansas case. The Arkansas schoolteacher case.

I don't think --

QUESTION: Shelton v. Tucker.

MR. SCHOLTZ: Right. Shelton v. Tucker.

I don't think there's any question that the State couldn't do that. I don't think the State can condition the

issuance of a license upon the refusal of the licensee to exercise his First Amendment rights in a manner which discriminates, the way this rule discriminates, the way this rule discriminates between types of entertainment.

I don't think a State can say, "You can show 'Bambi', but you can't show 'Summer of '42' inside the bar." That's what I think is unlawful discrimination.

QUESTION: Mr. Scholtz, early in the argument of your brother on the other side I asked about the Younger problem. I'm interested now in another preliminary question in this case. I've read Judge Ferguson's opinion before I got here, and I've just glanced over it again now. I have a hard time finding, in his opinion, any conclusion that the remedy at law was inadequate or that there was irreparable harm. That, of course, would be necessary as a condition to the issuance of this injunction.

MR. SCHOLTZ: I don't think there was, the joint pretrial statement, I think, contained those elements: that there was irreparable harm, or there would be irreparable harm from the enforcement of these rules, and that the remedy at law was inadequate.

QUESTION: There's no finding, however, that I can -- unless you can find it in this discussion of Blount v. Rizzi and Freedman v. Maryland, I suppose by implication.

Otherwise, this was impermissible, wasn't it, the

injunction?

MR. SCHOLTZ: No, I don't think it was impermissible.

QUESTION: Why?

MR. SCHOLTZ: If the Court refers to the record, there was a joint pretrial statement filed, joined in by all parties and the Court, in which the statements that there was irremedial harm here, and that this would exist if there was no injunction.

Now, if Judge Ferguson neglected to put that in his opinion, I don't think that removes the jurisdiction. That is in the record.

It's also the case that the State Courts, as we've said, did refuse to take the case.

In answer to Mr. Justice Rehnquist's question earlier, there is a type of declaratory relief remedy available, and that is what was done in this case, because the State of California, in a liquor case, requires you to go to the appellate courts rather than to the trial court level; and the appellate courts apparently have the discretion to refuse to take the case, which is what they did.

QUESTION: This is a discretionary denial for relief, but it can be available under California law?

MR. SCHOLTZ: That's right. It's a discretionary denial of a relief that can be available. And then there was no place for us to go.

So that the attempts to take the State remedy have been exhausted.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Porter?

MR. PORTER: No, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well. The case is submitted.

Thank you, gentlemen.

[Whereupon, at 10:59 o'clock, a.m., the oral arguments in the above-entitled case were concluded.]