In the

Supreme Court of the United States

JOHN HILL, ATTORNEY GENERAL OF TEXAS, ET AL.,

Appellants

v.

PRINTING INDUSTRIES OF THE GULF COAST ET AL,

No. 74-456

Washington, D. C.
April 15, 1975

Pages 1 thru 45

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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JOHN HILL, ATTORNEY GENERAL OF TEXAS, ET AL., Appellants	:	
v.	:	No. 74-456
PRINTING INDUSTRIES OF THE GULF COAST ET AL.	:	

Washington, D. C.

Tuesday, April 15, 1975

The above-entitled matter came on for hearing at 1:22 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

JOHN W. ODAM, ESQ., Executive Assistant Attorney General of Texas, P.O. Box 12548, Austin, Texas 78711
For Appellants

GERALD M. BIRNBERG, ESQ., Suite 606, 5959 West Loop South, Bellaire, Texas 77401 For Appellees

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-456, Hill against Printing Industries.

Mr. Odum.

ORAL ARGUMENT OF JOHN W. ODAM, ESQ.

ON BEHALF OF APPELLANTS

MR. ODAM: Mr. Chief Justice, and may it Please the Court:

I am Executive Assistant Attorney General of Texas and I am here today representing Appellants' Attorney General John Hill and Texas Secretary of State, Mark White and Mr. Carol Vance, the District Attorney of Harris County, Texas.

This appeal was taken from the judgment of the three-judge United States District Court for the Southern District of Texas that was entered on August the 20th of 1974. This was an action brought by several printers seeking to prevent disclosure of their names on certain political advertising that they were employed to prepare.

They challenged the constitutionality of a portion of Article 1410(B) of the Texas Election Code which states, "All printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising."

QUESTION: When was that law enacted in its present

form?

MR. ODAM: The law was enacted, your Honor, in its present form on -- the amendment became effective on June 14th of 1973.

QUESTION: And when was this lawsuit brought?

MR. ODAM: This suit was filed on September 11th, 1973, at which time local political races were being conducted in Houston, Texas.

QUESTION: Had the Secretary of State made any determination or made any public announcement as to how he construed it or how he proposed to enforce it?

MR. ODAM: No, your Honor. The Texas Secretary of State had not done so, nor had there been any prosecutions initiated or even attempted or even considered to that time as evidence and the record will demonstrate.

QUESTION: Haven't statutes of this kind been in effect in other states for many years?

MR. ODAM: Yes, your Honor, there are approximately 33 to 36 states that have similar statutes to the one under consideration by the Court today.

The statute we have under consideration, however, is unique in that only a very small number of states, I believe three, have statutes that require that the printer also be identified.

The statute is generally similar, however, to 18

USC, Section 612, which I'll refer to later.

QUESTION: That is requiring a sponsor to be identified.

MR. ODAM: That is correct, your Honor.

QUESTION: Umn hmn. But only three require the identification of a printer.

MR. ODAM: Yes, your Honor.

The three-judge court held that --

QUESTION: This, I suppose, among other things, enables the reader to trace back the material to its source, even if the names of the sponsors are either fictitious or meaningless to the reader. Is that part of it?

MR. ODAM: Yes, your Honor. We would reach this point, I believe, in the compelling state interest, one of them being, as Chief Justice points out, the ability of the voter or the candidate or any interested citizen to be able to determine by looking at the piece of political advertising who printed it and then go to the printer whose address and name is indicated on the piece of political advertising and find out exactly who submitted it for printing and that is one of the very main reasons why the statute was enacted.

QUESTION: Some of the statutes require the costs also to be indicated, do they not?

MR. ODAM: Yes, sir. They do --not in the Texas

statute, but in other states. That is correct, your Honor.

QUESTION : Are there -- I don't know whether these statutes include them but aren't there other types of statutes which require, for example, an indication by an insignia whether or not the printing is done by a so-called "union printer" that is an organized printer?

MR. ODAM: Yes, your Honor.

QUESTION: Does Texas have such a statute?

MR. ODAM: I don't believe so, your Honor.

QUESTION: But then, in any event, if there are, they are independent or separate reach from this type of statute.

MR. ODAM: That is correct. That is correct.

The three-judge court held the foregoing language requiring the identification of a printer to be unconstitutional in that it infringed on Appellees' First Amendment freedoms of speech, freedom of press and the right to assembly and said that there was no compelling state interest.

Also, the court held that the statute was void in that the phrase, "person paying for the advertising" was so vague that men of common intelligence would differ as to its meaning and application.

We present basically four fundamental points to the Court today.

First, that the commercial printer's actions do not

constitute speech that is protected by the First Amendment and even if it is protected, the First Amendment rights to freedom of speech and freedom of the press do not guarantee to them the right to print political advertising anonymously.

Second, the portion of the statute in question does not substantially infringe upon the commercial printers and publishers' rights to association of privacy and to the extent that there may be infringement, which we deny that there is or was shown in the record in the Court below, that the state's interest in disclosure is sufficient to justify any infringement.

Third, assuming arguendo that the printers possessed such rights and that they are, in fact, infringed upon, the purposes that are served by the reasonable disclosure requirements of Article 1410(B) further the compelling state interest of protecting the electoral process.

And, fourth, the term "person paying for the advertising" is not unconstitutionally void because when you consider the statute in its entirety, any reasonable person exercising common sense can sufficiently understand and comply with the requirements.

Now, before expanding on these four basic points, I believe it will benefit the Court if I very breifly comment more on the background of the statute being challenged.

From 1967 until 1973, a period of six years, Texas

law required that political advertising, as defined in Article 1410(B) reflect the name and address of either the person paying for the advertising or the printer or publisher of adver ising.

I might note at this point for the benefit of the Court that in the Appendix which is supplied to the Court at page 65 is a full copy of the article as it appears at the present time.

Significantly, not during the period of six years, not once during that time, was challenge made to the term, "person paying for the advertising" as being unconstitutionally vague.

In 1973, as a result of experiences by the officers and the people of the State of Texas in which unethical and illegal conduct in political campaigns could not be effectively traced and thus not immediately prevented or prosecuted, the Texas Campaign Reporting and Disclosure Act was passed, designed to inform the public about the financing behind communications intended to influence their votes.

Among other reforms, the legislature changed the disclosure requirement from the disjunctive person paying or publisher or printer to the conjunctive, that being disclosure to the public of the name and address of the printer or publisher and the person paying for the

advertising, is the change by our legislature of only this one word from "or" to "and" that brings us before you today.

As previously pointed out in response to Mr. Justice Rehnquist, the amendment that we see before us today was enacted on June 4th of 1973 and the suit was filed on September the 11th of 1973.

There was no evidence presented to the court below that the candidate or political organizations had declined to use the plaintiff-appellees' commercial services, nor that as a result, with compliance with the statute, that the printers had been harassed or had been intimidated or had declined to undertake any commercial political advertising for fear of reprisal or loss of other business.

No political candidates appeared before the Court below as parties or as amici. In fact, the only evidence before the Court was the affidavits of individual printers swearing to their fears of a possibility of a reaction if they were to comply with the disclosure requirement.

No evidence was presented that prosecutions had been initiated or even considered, nor evidence of how the Act would be interpreted nor enforced by the Appellant Secretary of State, Mark White, who is charged with the responsibility of enforcing the uniform application of the Texas election laws.

Parenthetically, a reading of the testimony of the

Appellees, only two live witnesses at the hearing at which the temporary restraining order was denied by Judge Singleton reveals that the testimony falls far short of establishing any likelihood of a chilling effect upon First Amendment rights.

To use Mr. Justice Marshall's phrase from this morning, the Plaintiff's counsel support their allegations out of the clear blue sky.

They are not supported by the evidence that is in the record in the case we have before us.

In sum, the Plaintiffs have failed to meet their burden of proving to the court below or to this Court to declare the disclosure provision unconstitutional.

Our first point is that the commercial printers actions do not constitute speech as protected by the First Amendment and even if such speech is protected, the First Amendment freedoms of speech and freedom of the press do not guarantee to them the right to print political advertising anonymously.

The First Amendment protects, not the written or spoken word itself, but the expression of ideas concerning the social policy, political views and religious beliefs.

Speech or conduct, however, that expresses nothing of political or social importance is not subject to First Amendment protection.

As Judge Bue points out in his specially-concurring opinion below, these printers, by their actions, express nothing. They do not argue that they are denied the right to print anonymously their own views in support of or in oppostion to a particular candidate.

To the contrary, they seek the right to print anonymously that for which they have no feeling one way or the other.

Indeed, they seek to avoid expressing any type of conviction. They seek constitutional protection to avoid expressing only their name.

Nor do the printers seek to distribute ideas. They merely receive orders from their clientele and return the finished product to the person that has hired their services.

The Appellees ride very heavily on the Talley versus California case to support their position. We submit that the Talley decision does not, in fact, support them and is distinguishable from the instant case in several very important aspects.

First, the Los Angeles ordinance requiring identification on all handbills was struck down because of overbreadth as to time, as to place and as to circumstance and the lack of any relation to any ongoing Governmental interest or responsibility.

The challenged language of Article 1410 applies

only in very limited terms, that being during a campaign and only to certain groups, those printing material for such campaigns for profit.

It clearly does not eliminate anonymous discussions of public matters of importance at all times or even during an election campaign.

The purposes articulated by Mr. Justice Black from prohibiting an absolute ban on anonymous printing are far from applicable in the case at bar.

The Appellee printers have no such lofty purpose for seeking anonymity. Rather, they seek only profit in private.

Even if this were speech that were protected under the First Amendment, as Mr. Justice Clark pointed out in his dissenting opinion in Talley, the Constitution says nothing about freedom of anonymous speech, nor does freedom of the press, as illustrated in the Lewis Publishing Company case, provide any such anonymity.

The Branzburg decision also illustrates that freedom of the press does not guarantee an absolute anonymity, especially where substantial, compelling public interests are shown and demonstrated.

As will be discussed in a later point, here the state's interests are compelling and when weighed in the scales of justice against any possible infringement, they tilt in favor of the voting rights which our state so

firmly attempts to protect.

Appellants contend that the case more properly fits within the rationale of the Insco case and the Scott case discussed in our brief dealing with the similar federal statute, 18 USC Section 612 which requires identification of persons responsible for distribution or publication of political advertisement.

Our second point deals with the asserted right of associational privacy. The portion of the statute in question does not substantially infringe upon the commercial printers and publishers rights to associational privacy.

The printers main reliance on this point is the NAACP versus Alabama and the Bates versus City of Little Rock cases.

Now, this reliance is misplaced for at least two reasons.

First, the rationale in support of the right of associational privacy, as they pointed out in their brief, is to protect the right to associate, to advocate and promote political, social and economic actions, the right to freely associate for the purpose of advancing ideas and airing grievances.

Ironically, the commercial printers do not seek to protect their rights to associate with the political candidates for any such reasons, as made the basis for NAACP

versus Alabama and Bates but, to the contrary, they seek to conceal their identity for fear that someone might think that they do associate with their customers and thus damage their commercial enterprises.

Secondly, and more importantly, the holding both in the NAACP versus Alabama and in the Bates decision was that in each instance the law in question imposing some burden on a First Amendment right was not shown to have a relevant or substantial correlation to the state interest sought to be furthered.

In the case at bar, the substantial and compelling interests are shown by the state in the limited disclosure requirement of Article 1410.

The NAACP versus Alabama and the Talley case both recognize that disclosure may be required when, as here, the state shows good faith efforts to protect a fundamental interest.

QUESTION: Why does the state need the name of the printer?

MR. ODAM: Why does the state need to know the name of the printer? We feel, your Honor, that there are about five reasons why the state needs to know the name of the printer, all of which go to protect the voting rights of the public.

First of all, we'd say that they need to know the

name of the printer in order to give the candidate or any other citizen a right to fairly reply to what the political advertising is, not as prohibited by the Miami Herald case, via access in the press.

QUESTION: Well, I mean, the man says, "My name is Joe Doakes" and I put Joe Doakes on the bottom. That doesn't mean I have got to print what you bring me -- what somebody else brings. Does it?

MR. ODAM: You mean --

QUESTION: You put the name of the printer, that is all I am talking about, why do you need the name of the printer?

MR. ODAM: Your Honor, if the candidate or any person has the name of the printer on a piece of political advertising, he can look to see who made such statements.

He can look at the piece of political advertising and say, who made the statement? Who caused this to be?

QUESTION: You mean the printer? He didn't make the statement.

MR. ODAM: No, your Honor, but the requirements of the statute are that the printer keep at his shop the name of the individual that came to him and submitted it for publication.

QUESTION: Which his name is printed too.

MR. ODAM: That is correct, your Honor, but the

name that is printed --

QUESTION: So you get both -- you come to him and say, "Is this the name?"

MR. ODAM: No, your Honor. The printer would publish, number one, the name of the person that is paying. That name might not necessarily be the same name as the individual who submitted it to him.

For example, the name that he might put on a piece of political advertising might be the "Citizens for the Election of John Doe," the name submitted to him by the individual.

If you, a person out in the community, wanted to see who submitted that on behalf of the Citizens for John Doe, knowing who the printer is, you could go to the printer and he would have on record who submitted it.

He would have the name of the individual.

QUESTION: He would have the name of the man that his name is on there. That is the only name he would have.

MR. ODAM: No, your Honor. Under the statute he is required to have the name of the individual which might not necessarily be the name of the person paying.

QUESTION: Where is that in the statute?

MR. ODAM: It is in the portion in Article 1410 --

QUESTION: What page?

MR. ODAM: -- B, which is at page 66 of the Appendix.

QUESTION: Is this it?

MR. ODAM: The Appendix to the jurisdictional statement at page 66.

QUESTION: I have got a jurisdictional statement. This is it?

Now, what page is it?

MR. ODAM: Page 66, your Honor.

QUESTION: It is the first sentence with "the," isn't it?

MR. ODAM: Yes, your Honor. It would be starting about --

QUESTION: And then it is the second.

MR. ODAM: -- signed by the individual contractor and therefore, and showing his full address and if he is an agent, the name of the candidate, political committee or business enterprise.

In other words, the name that is printed on a piece of political advertising might be political committee, which is "Citizens for John Doe."

QUESTION: Right.

MR. ODAM: And if you want to find out who submitted it --

QUESTION: I think then the printer should have objection to doing the Government's business for them.

Suppose the statute said, before you file a

political advertisement, you shall file with the Secretary of State or something. That would be one thing.

But this is getting the printer to do it.

MR. ODAM: Well, your Honor, by having the printer do it, it allows the entire public during a political campaign, to know who distributed by knowing who submitted it to the printer.

QUESTION: Is the printer required to show that to anybody that wants to see it?

MR. ODAM: Yes, sir, your Honor.

QUESTION: Okey-doke.

QUESTION: Well, you said there were five reasons. Now, that is the first one. What are the other four?

MR. ODAM: The second reason, your Honor, is that it allows the voter to be better-informed in casting his ballot.

QUESTION: Now, how in the world would the name of the printer do that? Any more than the name of a secretary who typed a manuscript?

MR. ODAM: Your Honor, if you know who the printer is -- it allows, by knowing who the printer is, which ties very closely into the other point, to know who submitted the material to be printed. For example --

QUESTION: Well, that is the first point.

MR. ODAM: Well, the first point allows a candidate

to reply to whatever it is.

My second point is, it will allow any individual voting in the campaign to know who submitted it.

In other words, under the first point, the candidate would know who submitted it and be able to reply more directly by knowing where the piece of political advertisement came from.

The second point is that any candidate would be better informed by knowing exactly who submitted it to the printer.

They are more or less one and the same, but the first is to protect the candidate or any other citizen who might be discussed in the piece of political advertising and the second is to allow the voter, when looking at the piece of political advertising, to be able to evaluate accordingly.

In other words --

QUESTION: Not just by looking at it. He has to go to the printer -- to the printer's office and get it --

MR. ODAM: That is correct, your Honor. But absent that, he is not able to totally evaluate it.

QUESTION: Well, all right. You say those are two points, with a difficulty. What are the other three, then?

MR. ODAM: The third point, your Honor, is that the disclosure will greatly deter one from attempting a

falsely-attributed smear, as in the Donald Segretti case or in the Insco cases that were discussed in our brief.

The reason for this, I would submit, is that if a candidate for political committee or business entity is required and knows that they will state on a piece of political advertising who printed it, it will deter them from putting out a smear sheet in the first place because they know it can be tracked down or at least, the first line of defense is allowed by going to the printer and finding out who put out the --

QUESTION: How can it be tracked down if they don't put either name on it?

MR. ODAM: I --

QUESTION: Well, it can't be. That's the point.

MR. ODAM: That is correct. I am saying that both --

QUESTION: This isn't automatic, you know.

MR. ODAM: No, your Honor, but it allows at least to know who the printer is to go to find him in the first place, not necessarily --

QUESTION: Now, there are scurrilous printers that will print anything for money.

MR. ODAM: Well, the point, your Honor, is --

QUESTION: Your answer is, you are not going after them. You will go after them criminally. That is your answer, isn't it?

MR. ODAM: Well, other remedies would be available.

QUESTION: You would go after them criminally.

MR. ODAM: We are not talking about going after the --

QUESTION: The criminal.

MR. ODAM: We are talking about going after the candidate or political committee who intended --

QUESTION: Who is not a criminal.

MR. ODAM: -- to have it distributed in the first place.

QUESTION: Right.

QUESTION: All right, your needs one, two and three are that they allow anybody interested to go to the printer's office and find these names that are required to be kept there as a matter of record by the printer.

MR. ODAM: That is correct, your Honor.

QUESTION: And whether it be a member of the public or a candidate or somebody who suspects dirty tricks, that is really all the same need in which I fully understand your point. Now, what are your last two?

MR. ODAM: The last two, your Honor, is that it will greatly assist the officials, in checking the accuracy of expenditure, as required to be reported under other provisions of the Texas Campaign and Disclosure Act.

By this, candidates in Texas must, as in many states, submit in Austin or at the district level of the

county exactly what expenditures they may.

Well, there is no way to check that out, if they are registered in Austin, as to what they are and when they say they have made these expenditures, you have to take their word for it unless you have some other way of checking it out.

This is not only available to state officials but to any public official, whether they are a candidate or anyone else, to determine exactly how much was expended and to verify whether or not that is correct.

And the fifth point, your Honor, is that before the 1973 amendment, the printer was required to retain the name of the contracting party. That requirement was virtually meaningless because, until this point, you wouldn't know who the printer is who is required to make the disclosure or retain the information in the first place.

Now, taking -- or assuming that that is a valid consideration, that is, that the printer be required to keep the name of who submitted it to him, it is meaningless unless you are able to find out who the printer is in the first place.

QUESTION: So that the name of the printer is important only because it is tied with the requirements of subsection B here on page 26 in that, through the printer you can get the sponsors.

MR. ODAM: That is correct, your Honor.

QUESTION: And that is its only importance.

QUESTION: Well, I suppose, too, that under Texas libel and slander laws, the printer might be liable in some circumstances for printing something that was grossly and maliciously false, might he not?

MR. ODAM: That is correct, your Honor. But our purpose in passing this statute is not to enhance, necessarily our libel or slander laws. We are concerned by informing the public at the time a political election is going on not to --

QUESTION: No, but that might act as a deterrent to the publication of libelous and slanderous statements.

MR. ODAM: Well, I believe, Mr. Justice, that simply because that there is --

QUESTION: Well, no, but the idea would be, would the printer want to be cautious about what he agreed to print with his name on it?

MR. ODAM: I don't believe that is correct, your Honor, because we are not only concerned about items that would fall as far as being libelous or slanderous, but we are talking about in a campaign where a slight difference --

QUESTION: In any case, you don't argue that to deter the publication of libelous and slanderous statements, the requirement of putting the printer's name on the

publication, that may assist it. You don't argue that?

MR. ODAM: No, your Honor.

QUESTION: Very wisely.

MR. ODAM: Your Honor, these, we submit, are the five reasons which all go to the compelling state interest which we feel is indicated here.

In other words, if you have the freedom of speech to say that it exists or this speech is protected, to say that it has been infringed upon for all these reasons which you have just discussed, we in Texas are attempting to protect the public's voting rights to have a fair and honest and open election.

We have cared nothing about trying to help someone later on have a civil libel suit against someone, but the help with the election at the time it was going on.

The states of the union are vested with a primary responsibility for the regulation of election processes within their boundaries for both federal and state Congressional elections.

The importance of the responsibility is underlined by Article one, section four in the United States Constitution that the states have a compelling interest in preserving the integrity and the orderliness of the election process cannot be a matter of dispute.

The interest has its foundation in the rights of all

citizens, voters and candidates, to choose their governmental representatives in an orderly, fair and democratic process.

QUESTION: Does Texas have any statutes that require comparable identification of television commercials, political commercials or radio and things like that?

MR. ODAM: Yes, your Honor, but I think that the point on that is that the -- by identifying on a piece of political advertising exactly who the printer is -- they are put in actual, practical parity with the television station. This particular statute would require --

QUESTION: How about newspaper advertisements? Do they -- what has to appear on them?

MR. ODAM: Your Honor, as I recall, there is an exemption that is put out that is the one exception to what Mr. Justice Rehnquist asked me earlier about newspapers, that they would not be required -- since it obviously speaks from its face who is putting it out.

But with the newspapers, you can look at the newspaper and go to the source. You can look at the television set and go to the source.

QUESTION: Well, when it simply says, "Committee for John Jones," that is all that the newspaper advertisement carries, that doesn't tell who paid for the advertisement, does it?

MR. ODAM: No, your Honor, but the newspaper --

QUESTION: Does the newspaper have to keep comparable information?

MR. ODAM: Yes, your Honor. What I mean by an exception is they are not required at the bottom of a political advertisement --

QUESTION: No, no, but they have to keep the same kinds of records that the printer has to keep.

MR. ODAM: That is correct, your Honor.

QUESTION: And I gather that is both to monitor, as you suggested earlier, the compliance with whatever the expenditure laws of the state may be and also so it is possible to find out who, in fact, is behind a given advertisement. Is that it?

MR. ODAM: That is correct, your Honor, and they are covered in Article 1410B under publishers or printers referred to there.

I do not have time to go into our last point of ideas with the void for vagueness, but I am sure they will cover that and perhaps I'll have a little bit of time left to respond to questions.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Birnberg.

ORAL ARGUMENT OF GERALD M. BIRNBERG, ESQ.

ON BEHALF OF APPELLEES

MR. BIRNBERG: Mr. Chief Justice, and may it Please the Court:

To respond, generally, to the statements which have been made and some of the questions which would be asked, I'd like to start with the overall concept of what is the purpose of Article 1410B? Why do you need the name of the printer?

You need the name of the printer, so the State of Texas tells us, printed on the surface of political advertising so that individuals receiving that political advertising can go to the printer's place and receive a copy, a signed copy of the statement required also by Article 1410, though not in this particular, challenged provision.

I want the Court to understand very distinctly that the printers have not in any way challenged the record-keeping provisions of the Act. All that the printers have challenged and attacked is that provision of the Texas Election Code which requires the printers to print their name and address for public dissemination -- for public dissemination on the printed material.

Now, with regard to what information the public can then get once they get to the printers, they get the information on the form provided by Article 1410. That

That information requires that the printer keep a signed copy of the ad, signed by the person contracting there for.

Now, in answer to the question posed by the Plaintiffs below, what does the phrase, "The person paying for the advertising," mean? The Defendants, the Secretary of State and the Attorney General of Texas answered in their brief below at page four of the brief that it was very easy to tell who was the person paying for the advertising.

The person paying for the advertising is the individual contracting there for and such individual's full name and address must appear and so forth and so on.

So in other words, the only information that you can get by going to the printer is the information which the state maintains must be on the face of the political advertising itself, apart from the printer's name, namely, the name of the person paying for the advertising.

QUESTION: Why does the printer object to free advertising?

MR. BIRNBERG: The printers object because, as you will note on the record in this case, Mr. Justice Marshall, their experience has been that when an individual sees their name and address associated with particular political positions, particular political advertising, that has dire reprisal effects to them, that they have been exposed to various forms of -- as we have gotten in the record --

physical reprisal, property damage, economic reprisals and various forms of harassment and so forth when people identify the printers with supporting by at the very least not refusing to undertake the -- advertising.

QUESTION: I was just wondering that nine out of ten of these briefs here, the printer always prints his name down there. He loves to advertise.

MR. BIRNBERG: Absolutely, Mr. Justice Marshall. However, the chances of the members of this court or any other court reacting in a manner as some Texas voters do, is not really substantial and, indeed, that is, in fact, the problem, the identification of the printer during the heat of a political campaign particularly, is calculated to cause tempers to fly, hard feelings to be felt and those sorts of things to take place.

Now, there is no evidence --

QUESTION: Has that happened to any newspapers in Texas?

MR. BIRNBERG: I assume that -- yes, your Honor. I don't know that we have any evidence of that in the record and I wouldn't suggest to the Court any particular factual case but, indeed, for example, the main Plaintiff, Marion Coleman, experienced in becoming publicly affiliated, publicly associated, publicly known as a Republican in the South Texas area, she was beaten up and had various other

forms of reprisals directed against her.

As a result of all of that, she undertook to formulate, once Article 1410B was announced, she undertook to formulate for her company a policy: Our company will not undertake political advertising so long as we must publicly identify ourselves and publicly disclose that we support particular political candidates because it is dangerous. It causes all sorts of problems and we are not going to do it any more.

Now, that meant that with the advent of Article 1410B --

QUESTION: So we have got to cut out a special rule for Texas, hmn?

MR. BIRNBERG: I'm sorry, I don't understand your point, Mr. Justice.

QUESTION: For Republicans in Texas.

QUESTION: We'll exercise a special rule for Republicans in Texas.

MR. BIRNBERG: Well, in addition, of course, to REpublicans, Mr. Justice Marshall --

QUESTION: I don't know how you can do that.

MR. BIRNBERG: No, of course not, but if you consider it in even the more dissonant political situations, the individual who prints for the Socialist Workers Party

or the American Nazi Party or the Communist Party or the John Birch Society or any of the more dissident political groups that the more dissident the political expression, the less likely the printer is going to be to undertake that advertising in the first instance if he must associate himself openly and publicly.

Now, all we have asked is, through this suit, aren't there means less restrictive on the printers' rights to associational privacy -- aren't there ways to accomplish each and every one of these admittedly legitimate state interests without imposing upon the printers' rights to political privacy, associational privacy, at least to as severe an extent as Article 1410B does.

QUESTION: Meaning some code designation or somethin ?

MR. BIRNBERG: Precisely. For example that, Mr. Justice Brennan. We suggest the code --

QUESTION: Well, would would printers have to do, then? They'd be required, I take it, with some public official?

MR. BIRNBERG: They could be required. They could choose to register.

QUESTION: And get a number or a button or something.

MR. BIRNBERG: Right and if they chose not to register, not to get that number, they could, in that circumstance, print the name and address.

Another thing, on the political advertising -- but that would be no more restrictive or no more of a licensing or a registration statute than requiring printers in the printing business to get employer identification numbers for internal revenue purposes so get just get a number and use a coded bug so there is not this widespread public dissemination of the identity of the printer doing political work for particular individuals.

QUESTION: Does Texas have a Freedom of Information Act?

MR. BIRNBERG: Texas does have a public record statute.

QUESTION: Well, then, someone might come in off the street and say to the Secretary of State, "We want to know what printer has code number 2341."

MR. BIRNBERG: Certainly. And there are two alternatives. They might --

QUESTION: Then why is that any less intrusive?

MR. BIRNBERG: It is less intrusive for two reasons, Mr. Chief Justice. First of all, Texas, in designing such a coded bug system could very well put in some sort of safeguard. I am thinking in terms of the Bank Secrecy Act case, for example, where such information would not be available except on a showing of it being in furtherance of or necessary to achieve one of these

legitimate state interests which has been expressed.

A second reason is because in that situation you would have only the person who was legitimately interested in ascertaining that information for whatever purpose or reason, to track down a scurrilous piece of campaign literature or whathaveyou instead of, every single person who receives any piece of political advertising. Now --

QUESTION: Do you concede that it is a proper state interest to track down, as you put it, a piece of scurrilous campaign literature?

MR. BIRNBERG: Oh, I certainly think that that is a legitimate state interest and I think that they can pursue that legitimate state interest only within bounds which are -- which do not transgress First Amendment rights of the printers or anyone else, for that matter.

QUESTION: Your argument is only on behalf of the printers?

MR. BIRNBERG: Yes.

QUESTION: You don't suggest that there is anything wrong about the Texas requirement that there appear in the advertisement itself the name of the person who pays for it?

MR. BIRNBERG: Except for the vagueness argument, Mr. Justice Brennan. We are only asserting the rights of the printers in this particular case.

Now, we are not suggesting necessarily that leaving

the name of the person paying for the advertising is constitutional.

QUESTION: Is anyone here representing -- or is there any party to this?

MR. BIRNBERG: There is no such party in this particular lawsuit, Mr. Justice Brennan. This lawsuit --

QUESTION: That issue is really not here, is it?

MR. BIRNBERG: That issue --

QUESTION: That part of it.

MR. BIRNBERG: That issue is not before the Court in this particular case. But there -- another less restrictive thing that Texas could do, it seems to us, would be to pass a law making it illegal, making it a crime to put out falsely attributive campaign literature or scurrilous campaign literature or libelous campaign literature or otherwise to prohibit that.

QUESTION: Well, don't they have such laws?

MR. BIRNBERG: No, Mr. Justice Marshall, Texas does not. Texas did have a criminal libel law until January the 1st of 1974, at which time it was effectively repealed and at this time, Texas has no law making it a crime to put out a piece of so-called campaign dirty tricks in any form or fashion.

QUESTION: How would you know where it came from if you simply got it and it was falsely attributed, unless

there was some requirement like this?

MR. BIRNBERG: Well, there are at least two things that I can think of, Mr. Justice Rehnquist. One of them is, some form of a less-restrictive printer identification requirement such as the coded bug system, such as requiring that the printers -- and, again, I come back to the Bank Secrecy Act case present copies of their political advertising to the Secretary of State who has a copy of each piece of political advertising there in his office in a central repository sort of a scheme.

QUESTION: With a record showing who the printer was?

MR. BIRNBERG: Certainly, with records showing who the printer was --

QUESTION: Not even a coded bug or anything else on the material itself.

MR. BIRNBERG: Without any coded bug or anything else on the material itself.

Another thing is, presumedly, if the piece of campaign material is false, libelous or otherwise a subject of controversy in the context of a political campaign, and if the printer knows that he has been identified appropriately to state officials, then presumedly that printer may well come forward and say, this was done by me. I was the person who printed it and it was paid for by John

Doe or whoever else happened to be the person paying for it. But notice, Mr. Justice Rehnquist --

QUESTION: Wouldn't he be the subject of the same reprisals that you say your client would be?

MR. BIRNBERG: I'm sorry, I didn't understand.

QUESTION: If he comes forward voluntarily under the pressure of this alternative system that you urge, won't he be subject to the same sort of reprisals that you say that your client is, under the existing law?

MR. BIRNBERG: Probably that one printer in that one case would be, but all of the other printers who had undertaken to do political advertising for various individuals would not be exposed to the great extent, to the devastating extent that we have under the present law.

All the printers are desirous of doing is isolating the infringement on their constitutional rights, if you will, is trying to tone down the devastating effect of this 1973 amendment. I might point out --

QUESTION: Mr. Birnberg, I am a little disturbed by your approach on the less-restrictiveness. Is this always the constitutional measure, that something might have been done a little less restrictively?

MR. BIRNBERG: Mr. Justice Blackmun, whenever the legislature has sought to achieve a legitimate state interest in a manner which infringes upon the exercise of First

Amendment rights, then the legislature may do that only in the way which is the least restrictive on those rights, only in a way which is absolutely necessary in the furtherance of the achievement of that legitimate state interest.

QUESTION: Of course, any imaginative lawyer can always come up with something that is a little less restrictive.

MR. BIRNBERG: Well --

QUESTION: May he not?

MR. BIRNBERG: I am not sure that is necessarily the case because, obviously, Texas had a lot of imaginative lawyers working on this particular case and they did not suggest --

QUESTION: Are you not saying that is an impossible-to-achieve standard, when you take this position?

MR. BIRNBERG: Is it possible to achieve what?

QUESTION: Impossible to achieve.

MR. BIRNBERG: Oh, I certainly don't think so, Mr. Justice Blackmun. It seems to me that if --if the presence --

QUESTION: You mean, there is never a better way to do it?

MR. BIRNBERG: There may always be a better way to do it and in each case, the Court must consider and balance whether or not the rights which have been infringed upon

have been so substantially infringed upon that some less-restrictive means must be adopted to accomplish the legitimate state interest. That is what we are urging.

So, easily, the State of Texas could have done and could do in this very case.

QUESTION: What you are really saying, I guess, is that if there were no other possible way of furthering this state end, you would have a much weaker case than you now have because there are many other possible ways --

MR. BIRNBERG: Certainly.

QUESTION: -- that are much more tolerable.

MR. BIRNBERG: I would go further than that, Mr. Justice Stewart and say if there were no other reasonable way to --

QUESTION: Right.

MR. BIRNBERG: -- do it, then, certainly, our position would not be as strong as it is.

QUESTION: Right.

MR. BIRNBERG: But there are several other reasonable ways to accomplish each of these legitimate state interests without burdening the printers' rights to political --

QUESTION: Which you argue would be much less intrusive upon your First Amendment rights?

MR. BIRNBERG: Absolutely, Mr. Justice Stewart.

QUESTION: Are you going to address your friend's argument that the act of printing is -- if I understood him correctly -- the act of printing these documents is conduct since it doesn't express any ideas of any kind of the printer?

MR. BIRNBERG: Well, yes, Mr. Chief Justice, two ways. First of all, I will address the Court to the very lengthy and, I think, scholarly dissertation of Judge Singleton on that precise issue, with all of his citations in the opinion for the court below on which the three judges unanimously declared the law unconstitutional. Secondly --

QUESTION: Except that I gather that Judge Bue didn't think of the First Amendment rights of the printers as much as the First Amendment rights of those who were responsible for having the --

MR. BIRNBERG: That is certainly true and the result, of course, Mr. Justice Brennan, is still the same, that --

QUESTION: It may be, but --

MR. BIRNBERG: -- in Mr. Justice Bue's opinion, this law is an unconstitutional infringement on --

QUESTION: Yes, but he didn't think there were any First Amendment rights of the printers.

MR. BIRNBERG: Of the printers. He certainly did not. We disagree with that view.

Understand also that there are two First Amendment rights that we are talking about here. One of them is the right to print anonymously and I think that is the issue to which my colleague is addressing himself and suggesting that the printers have no such right, that they are merely commercial conduits and we point out that as a practical matter and as an historic matter, if the printer -- if the person who operates the printing press does not have First Amendment protection coexistent with that enjoyed by the author, that the whole purpose and scheme of the First Amendment is frustrated. Secondly, however --

QUESTION: Well, the issue is nonetheless the right to print someone else's views anonymously that you are claiming.

MR. BIRNBERG: We are claiming -- yes, Mr. Justice Rehnquist, the right to undertake to print what we choose to print and not to choose what we don't want to print.

That is, a statement of our name and address. That is, the printer's name and address. That raises, of course, a Tornillo-type issue where the state has told the printers you must print your name and address on political advertising.

So we point out to the Court, by the way --

QUESTION: Well, what about the newspaper? What about the federal statute that requires that a newspaper -- every newspaper to print the name of the publisher and so

forth?

MR. BIRNBERG: Mr. Justice Rehnquist, that is only to the extent that the newspaper desires and chooses to avail itself of second class mailing rights and --

QUESTION: Well, but Justice Holmes long ago said the Government has a right to run a mail service but it doesn't have a right to run it in violation of the First Amendment. I wouldn't think that is any distinction.

MR. BIRNBERG: I believe that the case that upheld that law is Lewis -- the Publishing Company versus Morgan a 1913 case and that is precisely the problem is that Mr. Justice Holmes' position was not accepted in that case but the Court said in that case that Congress has, under Article I Section 8, plenary power to control the postal service and, therefore, anyone choosing or desiring to avail themselves of lower postal rates -- lower postal rates may be required to forego to some extent First Amendment rights and I think --

QUESTION: Hasn't that been swallowed up by the obscenity cases on the mailing problem?

MR. BIRNBERG: I certainly think it has, Mr. Chief Justice.

QUESTION: Well, then your point vanishes.

MR. BIRNBERG: Well, whether the point vanishes -- the point is that there is no constitutional -- there is no

judicial pronouncement of the efficacy of that law that exists and is viable today.

Lamont versus Postmaster also seems to have suggested that that 1913 ruling is no longer viable law.

I would ask the Court, I would direct the Court's attention to the fact that political advertising in Texas is very broadly construed. It is saying anything that -- it is any form of expression -- anything published in a newspaper, magazine or journal or any pamphlet, handbill or other printed matter or anything broadcast over a radio or television station or displayed on a billboard in favor of or in opposition to any candidate for public office or other office of a political party or in favor of or in opposition to the success of any public office holder or in favor of or in opposition to any proposition submitted to a vote of the people, whether it has been previously submitted, whether it is to be submitted some time in the future, whether it has been proposed to be submitted.

So, virtually, any discussion about political matters which is reduced to printed or published form must carry the printer identification requirement.

I would suggest to the Court that Mr. Hamilton -- Alexander Hamilton -- would have to have had the name and address of his printer printed on the Federalist Papers. I would suggest to the Court that -- that John Jay would

similarly have had to.

I would therefore urge the Court to affirm the ruling below of the three-judge district court.

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

You have three minutes left, Mr. Odam.

REBUTTAL ARGUMENT OF JOHN W. ODAM, ESQ.

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

QUESTION: What about the alternative methods?

MR. ODAM: YOur Honor, as far as alternative methods are concerned, I believe that --

QUESTION: Well, would the state's interests, all five of them, be as well-served by a coded --

MR. ODAM: Your Honor, I would fear to hear what Mr. Birnberg's suggestion would be if the State of Texas were to require printers to come in and identify themselves before they undertake any type of registration.

I believe that you have more serious constitutional problems a s far as prior registration if a coded bug system were to come into play.

Another alternative, as they suggest, is a -- some type of central repository where every type of political advertising from throughout the entire State of Texas -- a copy of such is sent somewhere.

Legislature certainly has a right in considering

alternative methods -- if they want to have such central repository, are allowed to have to the voter -- which we are most concerned with, a compelling state interest to protect the voter's right, to let the voter know when he looks at a piece of political advertising who printed it.

Now, that is what we are concerned about, the alternative means, therefore, to answer your question would not accomplish this purpose.

QUESTION: I suspect that if they had this coding system that we'd be confronted with an argument that this was, in effect, a disguised licensing of printers.

MR. BIRNBERG: I am sure that that would be the case, your Honor. It would -- again, the bug system, the coded system, would not avail to the voters to know -- and as the Chief Justice points out, it would come into the licensing, prior licensing before they could even go into effect.

The only two closing points I would make, your Honor, would be, number one, that the evidence before this Court such as opposing counsel has referred to, was not a part of the record at the three-judge court.

The reference is made to the problems that the lady had with regard to her feelings about supporting a Republican candidate. That was at the temporary restraining order but was not a part of the record at the three-judge

court hearing.

Again, this record is void of law to support the position as well as the facts as developed in this record, when considering the record as a whole and therefore, we respectfully pray that this Court reverse the decision of the three-judge court below.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:09 o'clock p.m., the case was submitted.]