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In the

Supreme Court of the United States *et al*

Neal R. Wooley, Etc., Et Al.,

Petitioners,

v.

George Maynard Et UX,

Respondents

No. 75-1453

Washington, D. C.  
November 29, 1976

Pages 1 thru 48

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IN THE SUPREME COURT OF THE UNITED STATES

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NEAL R. WOOLEY, ETC., ET AL., :  
Petitioners, :  
v. : No. 75-1453  
GEORGE MAYNARD ET UX, :  
Respondents :  
- - - - - x

Washington, D. C.

Monday, November 29, 1976

The above-entitled matter came on for argument at  
2:15 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  
JOHN P. STEVENS, Associate Justice

APPEARANCES:

ROBERT V. JOHNSON, II, ESQ., Assistant Attorney  
General of New Hampshire, Concord, New Hampshire, 03301  
for the Petitioners.

RICHARD S. KOHN, ESQ., Suite 526, 733 Fifteenth St.,  
N.W., Washington, D. C., 20005, for the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1453, Neal R. Wooley against George Maynard.

Mr. Johnson, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT V. JOHNSON, II, ESQ.

ON BEHALF OF THE PETITIONERS

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

I appear on behalf of the Chief of Police of Lebanon, New Hampshire, the Director of the New Hampshire State Police and the Commissioner of the New Hampshire Department of Motor Vehicles, all three of whom are the Appellants herein.

This case presents to this Court two general issues, the first dealing with symbolic speech, the issue being whether consistent with the First and Fourteenth Amendments the State of New Hampshire may prohibit by criminal sanction the knowing obscuration of the State motto, "Life free or die," on the license plates of registrants of motor vehicles in New Hampshire.

The second issue is whether or not the Appellees herein, prior to the utilization of the United States District Court for the District of New Hampshire, were obligated or should have exhausted their State appellate remedies.

In 1809, General John Stark of New Hampshire wrote a letter to his Vermont comrades declining, for reasons of health, to attend the thirty-second reunion of the 1777 Battle of



Bennington, Vermont, in which General Stark had commanded the Continental troops in the decisive victory against the British and Germans.

At the conclusion of his letter, General Stark wrote to his comrades a proposed toast for the reunion. The proposed toast was, and I quote, "Live free or die. Death is not the worst of evils," end quote.

The toast, obviously, was reminiscent of the words of Patrick Henry back in 1775, "But as for me, give me liberty or give me death."

One hundred and sixty-eight years after the battle of Bennington, Vermont, the New Hampshire General Court or Legislature adopted the words, "Live free or die," as part of our official, or as the official State motto of the State of New Hampshire.

QUESTION: A hundred and what?

MR. JOHNSON: A hundred and sixty-eight years after those words were said.

In 1969, our Legislature directed the Director of the Division of Motor Vehicles to place on all passenger vehicles, registered in New Hampshire, the State motto, "Live free or die."

QUESTION: If you had kept it just "scenic New Hampshire" you would have avoided this litigation, wouldn't you?

(laughter)

MR. JOHNSON: I am not so sure, Justice Rehnquist. Those purists -- those environmental purists may be sitting here on my right saying that since New Hampshire is no longer pure we are evading their First Amendment rights.

MR. CHIEF JUSTICE BURGER: You might also have some copyright problems with Patrick Henry and Virginia on plagiarism -- his concept.

(laughter)

QUESTION: General Johnson, why did it take the General Court one hundred and sixty-some years to arrive at this conclusion? Usually, they are more traditional than that in New Hampshire, aren't they?

(laughter)

MR. JOHNSON: We adopted, in New Hampshire, a State song, a State seal, a State flower and a State tree, as well as a State motto, in accordance with the format of most States.

While New Hampshire was one of the original signatories of the Declaration of Independence, I don't know the reason for the delay in the adoption of the State symbols, but I think that they were adopted at a simultaneous period of time with the adoption by other States of State symbols.

Whether our conservative nature had anything to do with it or not, I don't know.

QUESTION: Does your case depend upon this having

been declared the motto of the State, officially, by the Legislature?

MR. JOHNSON: I think, Mr. Chief Justice, that it does have some bearing because, by the Legislature's having so declared this to be the official State motto, the Legislature has, in effect, said that the motto is of importance to the State of New Hampshire.

Which brings me to the interests of the State of New Hampshire in having the motto on its plates, on its license plates. The motto not only symbolizes the heritage of New Hampshire, it fosters an appreciation --

QUESTION: May I interrupt, Mr. Johnson, before you get to the State interests, do you challenge?

Do you challenge the District Court's finding that the Appellees' motivation was based on a fundamental religious belief?

MR. JOHNSON: Yes, Mr. Justice.

QUESTION: You challenge that as clearly erroneous and ask us to set it aside, do you?

MR. JOHNSON: Yes, Mr. Justice.

QUESTION: Do you argue that in your brief?

MR. JOHNSON: We, in our brief, questioned the sincerity of the Appellees and you will find, in the transcript of the hearing, evidence that Mr. Maynard, while he purports to be a Jehova's Witness, has been disfellowshipped from the

Jehova's Witnesses and, in fact, one of the Jehova's Witnesses churches had, at one time, one or more criminal prosecutions against him.

So, a, we question Mr. Maynard's sincerity and --

QUESTION: Well, on his sincerity, he went to jail, didn't he?

MR. JOHNSON: That is correct.

QUESTION: Well, do usually non-sincere people -- they go up to the closing of the door, but they usually change, don't they?

MR. JOHNSON: Well, the matter of sincerity, I think, is two-barrelled. The first is the question which a moment ago was placed to me. We have some doubts as to his sincerity, but even accepting his sincerity, we then get to the next issue which is, was what he communicated a particularized statement, capable of being understood as this Court held it must be in Spence v. Washington?

QUESTION: That's a different question.

QUESTION: I just want to be sure you disagree and there is evidence, which you point out, that may cast doubt on the District Court's finding. But is there not some evidence in the record which would require us to accept the finding as being clearly erroneous? Didn't he testify that there was a religious belief, and so forth? Or can we go behind the District Court's findings?

MR. JOHNSON: There is evidence both ways. The State

QUESTION: Well, if you concede that, don't we have to accept the finding?

MR. JOHNSON: I do not concede the matter of sincerity.

In Spence v. -- Well, again, I think the two questions are intertwined. The sincerity of Mr. Maynard, at the time he undertook this act; -- I think there is evidence both ways as to whether or not he was undertaking this act on a religious, conscientious basis or whether it was a mere act of whimsy or bizarre activity. I think there is evidence both ways.

QUESTION: As Justice Marshall suggested in one of his questions: Do people ordinarily go along and spend five days at a time in jail just to pamper a whimsy? That is some evidence of sincere belief, however misguided one might think it is.

Do you rest on the fact that he is departed from the particular faith, that he is a dissident, as undermining his sincerity?

MR. JOHNSON: No, I don't believe and I don't want to make this particular issue greater than it is necessary to the Appellant's case.

While we question the sincerity of Mr. Maynard, I would submit that his sincerity is not going to resolve the



issues before this Court.

While I say that there is evidence both ways, assuming arguendo the sincerity of Mr. Maynard, I would then argue that his conduct is not, in fact, symbolic speech.

QUESTION: Do you think the State of New Hampshire could require citizens to carry signs, picket signs, "Support the United Nations," in a sincere belief by the Legislature of the State that it was very important to support the efforts and work of the United Nations?

MR. JOHNSON: My answer to that is no, and for a variety of reasons. The first is that your hypothetical is a more poignant message, in my mind, than the motto, "Live free or die."

Secondly, the motto, "Live free or die," and its requirement that it be placed upon motor vehicle license plates has to do with the registration of motor vehicles, the use of the highways, an efficient registration system of motor vehicles and other recognizable interests of the State of New Hampshire which, I think, are more important than those that I could enunciate to support your question, Mr. Chief Justice.

QUESTION: Couldn't the State, just as well, offer its citizens, its automobile owners, an option that if they did not want that motto on the license, it could be omitted?

MR. JOHNSON: This matter was raised at the District Court and the Commissioner of the Department of Motor Vehicles

testified, in effect, that it would raise havoc with the printing of the motor vehicle registration plates, which is one of the --

QUESTION: Where are these plates made? In the State prisons, aren't they?

MR. JOHNSON: That is correct, Mr. Justice.

QUESTION: Kind of an irony, isn't it?

(laughter)

MR. JOHNSON: It is. On the other hand, if the penalty for violation of our statute relative to the obscuration of the motor vehicle license plates were to be the death penalty, perhaps sincerity of persons would be more questionable.

QUESTION: You mean that if we rule in favor of the Appellees that everybody will tape it over?

MR. JOHNSON: This is another matter, Mr. Justice Marshall, that --

QUESTION: If everybody is in favor of getting rid of it, you ought to get rid of it.

MR. JOHNSON: This is not a burning issue within the State of New Hampshire. And this is one of the bases on which I would distinguish this case from the flag cases.

Mr. Chief Justice Burger, in remarks this past summer, I believe, at a commencement address at one of our national universities --

MR. CHIEF JUSTICE BURGER: I was speaking all alone there. I didn't have eight colleagues to consult about my position.

(laughter)

MR. JOHNSON: I believe it was at the University of Pennsylvania in which you drew the distinction between the strong dissent of the 1960's and the world peace of today.

This is not a burning issue, Mr. Justice Marshall in New Hampshire.

Prior to this particular case, there were two combined cases before the New Hampshire Supreme Court cited in the State's brief, State v. Hoskin and Ely, in which the defendants therein had taped over the State motto.

QUESTION: Then, I understand the Attorney General's office doesn't have anything else to do, that's why they brought it up here.

MR. JOHNSON: We have sufficient work in New Hampshire.

QUESTION: Is it important in the State of New Hampshire or not?

MR. JOHNSON: It is very important, Mr. Justice Marshall.

QUESTION: But it is not a burning issue.

MR. JOHNSON: It is not a burning issue from the standpoint that when one goes to New Hampshire one sees the motto taped over.

If I may introduce a piece of evidence not before the Court. In my travels around the State of New Hampshire since this case first was instituted, I personally have yet to see within the State of New Hampshire a license with the State motto either cut out or taped over.

QUESTION: Since you are speaking as an individual, the first time I noticed the motto was after this case was filed. I hadn't ever paid any attention to it. I noticed New Hampshire license and I'd say, "Well, there's somebody from New Hampshire," but I didn't live or die about it.

(laughter)

MR. JOHNSON: Well, most people in New Hampshire don't either. They accept it as the fact that it is required to be placed on their license plates by the Legislature in New Hampshire, which is one of the fundamental bases upon which the State, the Appellants herein, say that by no stretch of the imagination can the Appellees be said to agree with the State motto merely because it is required to be placed on their license plates. Every --

QUESTION: What if the Legislature had required them to take a choice or to put on the license plate, "Ban all busing."? You would regard that as somewhat controversial, wouldn't you?

MR. JOHNSON: Certainly.

QUESTION: Suppose, on the other hand, it was,

"Busing is beautiful." Would you think that was controversial?

MR. JOHNSON: There would certainly be people who would be here before this Court holding that it was controversial.

QUESTION: What difference does it make if the particular person finds it obnoxious and objectionable or whether it's approved by a majority and disapproved by only a small minority?

MR. JOHNSON: I think, then, we get down to a balancing issue, balancing the interests of the State versus the eccentric feelings of a very small minority.

QUESTION: Do you think it is likely that either of the hypotheticals put to you by the Chief Justice would be adopted by the New Hampshire Legislature as the State motto?

MR. JOHNSON: No, Mr. Justice Rehnquist. We have adopted our motto and I don't believe it would be changed.

QUESTION: Mr. Attorney General, a minute ago you said it would be very troublesome to issue license plates without this on it.

I saw a license plate from New Hampshire a week ago that had the letters "ER" on it, or "AB" or something with two letters. Well, that was printed specially, wasn't it? Wasn't that stamped specially?

MR. JOHNSON: Each plate has its own numbers and each plate has its own letters.



QUESTION: But I mean they go from one to nine thousand. That's a machine job, but the letters "ER" is not a machine job. No computer runs out "ER."

MR. JOHNSON: In a sense -- or I believe that it does because the letters in New Hampshire stand, generally, for our nine counties. And so the counties do have significance.

QUESTION: But this didn't have any numbers behind it. It just had letters.

MR. JOHNSON: Well, then, that is what is called in New Hampshire a vanity plate.

QUESTION: Yes.

MR. JOHNSON: And that --

QUESTION: Couldn't you make a vanity plate for this man, if he paid for it, and leave the --

MR. JOHNSON: Unfortunately, all vanity plates in New Hampshire have the State motto on it.

QUESTION: Yes, but couldn't you make a vanity plate without the motto?

MR. JOHNSON: Well, then, we come to the issue of whether the State of New Hampshire is obligated to do so, the Legislature having authorized the motto to appear on all passenger vehicles.

QUESTION: All I am saying is: It wouldn't be any harder than to set the vanity plates. I am not arguing the law about it. I am arguing the hardness of it.

MR. JOHNSON: The State has conceded, Mr. Justice Marshall, in its brief, that the State of New Hampshire can undertake a workable system of motor vehicle registration without having the motto on its plates.

QUESTION: All right.

MR. JOHNSON: We concede that. But we are here on the more fundamental constitutional issue as to whether or not, in this day and age in the 1970's, the State motto may not be required to be placed on motor vehicle license plates.

On the front of this particular building, is a slogan, is a motto, "Equal justice under law," and I would submit to this Court with my utmost respect that the work of this Court may go on without that motto being on the front of this building, in the same way as I concur with Mr. Justice Marshall that the State of New Hampshire may undertake a workable motor vehicle registration system without having the motto on our license plates.

QUESTION: General Johnson, just to give you a question somewhat like the one the Chief Justice asked: Supposing the State of Utah adopted a motto, "The Mormon State," and then tried to put that on its licence plates. Would that be permissible? And if not, why not?

MR. JOHNSON: I think that it would be a closer issue, the reason being that I would submit the words, "Live free or die," do not have the significant meaning that the

words, "The Morman State," have.

QUESTION: I suppose if one were a Christian Scientist and didn't believe in death it might have --

MR. JOHNSON: That is correct. And I would point out that almost every State in the Union has mottoes or slogans on its license plates.

QUESTION: Are there any other States that have mottoes that profess a belief in death? And why is a belief in death any different from a belief in the Mormon religion?

MR. JOHNSON: With respect to the first portion of your question, no, there is no other license plate professing a belief in death.

With respect to the second aspect of your question, I think that the more particularized the message becomes, then perhaps the more weight has to be given to the State interests.

QUESTION: Well, you could do like we do in Virginia. We don't have it on our license plate but we have a sticker I see a lot of people paste on the bumpers, "Virginia is for lovers," but they didn't put it on the license plates. You could buy the sticker and say what you want.

MR. JOHNSON: This is exactly another fundamental --

QUESTION: And in that case, the Appellee here wouldn't have had any trouble, would he?

MR. JOHNSON: Well, the Appellee herein is a printer by trade and one of the arguments of the State of New

Hampshire herein is that the statute under which he is being prosecuted does not penalize him for any disparagement of the motto of the State of New Hampshire, other than a physical act upon a license plate which is, in a sense, still property of the State of New Hampshire. There is nothing in our statute which precludes Mr. Maynard from verbalizing, either by the spoken or written word, his objections and dissent to the State motto. There is nothing whatsoever to prohibit him from doing anything other than merely taping over or cutting out the State motto on our license plates.

And with respect to other statements on license plates, I could run through the variety of them as appear on the license plates of various States.

Nebraska, "The cornhusker State." Does everyone seeing a vehicle from Nebraska reasonably believe that the registrant of that vehicle necessarily himself believes that Nebraska is a cornhusker State, or that everyone in Nebraska is a cornhusker?

QUESTION: What about the New Jersey license, "The garden State." Do you think any resident of New Jersey believes it is?

(laughter)

MR. JOHNSON: I certainly would be hesitant, having driven through New Jersey, with all due respect to New Jersey.

(laughter)

MR. JOHNSON: A license plate hangs out at the end of the vehicle and nobody can reasonably say that this is an affirmation of faith, a required affirmation of belief on the part of a registrant of a motor vehicle.

It is different than a flag-burning case. It is different than other symbols and mottoes. It doesn't have the emotional charge of a flag or even the emotional charge of a draft card.

And the Appellants herein would ask this Court to draw an analogy between the burning of a draft card in the O'Brien case and the destruction of a duly issued motor vehicle registration plate by the State of New Hampshire in the instant case.

QUESTION: The flags in the flag-burning cases were all the property of the person who burned them, were they not?

MR. JOHNSON: That is correct, Mr. Justice Rehnquist.

QUESTION: General Johnson, there are some New Hampshire plates that don't carry the motto, aren't there?

MR. JOHNSON: There are.

QUESTION: And what is the explanation for that?

MR. JOHNSON: The preliminary statement --

QUESTION: Defendant's Exhibit 8 on page 66 of the record --

MR. JOHNSON: That is correct.

QUESTION: Is it because they have to designate



commercial or tractor or junk or whatever it is, thereon?

MR. JOHNSON: There are general rules, motor vehicle regulations, relating to different types of vehicles, and that is one of the basic reasons why some plates are designated commercial or some plates are designated tractor. A commercial vehicle or an agricultural vehicle, for instance, may travel only 15 miles from its usual place of resting.

QUESTION: Yes, but a commercial vehicle, a big truck van, might go to California.

MR. JOHNSON: That is correct, but it is designated as commercial and has to pay highway useage taxes, and so forth, which a passenger vehicle does not. In other words, the various designations are in response to various motor vehicle laws relative to those particular types of vehicles.

QUESTION: Mr. Johnson, you have devoted your argument, up to this time, to the constitutional issues. Are you going to address the Younger-Huffman issue that you raised in your brief?

MR. JOHNSON: Thank you, Mr. Justice Powell.

The State relies primarily on Younger v. Harris and Huffman v. Pursue.

In this particular case, we do not believe that there is any necessity for the Federal District Court having become involved. The Appellee Mr. Maynard in each of the three cases in which he appeared before the lowest of our

courts in New Hampshire, had the alternative of having an appeal by trial de novo before a jury in the Superior Court of asking that questions of law be transferred to the New Hampshire Supreme Court, and he undertook none of those available remedies.

In Huffman v. Pursue, this Court held that even where a criminal action has been commenced and has terminated, Federal intervention carries with it all those disadvantages that it would if a criminal proceeding were still ongoing.

Federal intervention in this particular case, for example, is an aspersion upon the abilities of the courts of New Hampshire to resolve constitutional issues.

Mr. Justice Brennan in May, before the New Jersey Bar Association, pointed out that in this day and age the State courts are protecting the rights of citizens to even a greater extent than the Federal Courts.

And I would submit to Your Honors that the courts of the State of New Hampshire are just as capable of interpreting the Federal Constitution and our own Constitution as the United States District Court for the District of New Hampshire.

QUESTION: With that jurisdictional issue, are not the husband and the wife here in somewhat different positions? The husband has already been prosecuted and that case is closed. All appeals are no longer available. But the wife

has never been prosecuted, has she?

MR. JOHNSON: The wife has never been prosecuted.

I would point out --

QUESTION: Would it not be reasonable for her to assume that she may be subject to the same kind of prosecution as her husband?

MR. JOHNSON: I would submit that under Doran v. Salem Inn, Inc. and under Ellis v. Dison that there is no controversy pending and that the parties are so closely related that they should be treated as one entity.

I would respectfully request that my remaining minute or two be reserved.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Kohn.

ORAL ARGUMENT OF RICHARD S. KOHN, ESQ.

FOR THE RESPONDENTS

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

I would like to address the Younger abstension issue first.

The purpose behind Younger v. Harris and other cases that the Court has decided, expanding Younger, has been to permit State Courts to try cases free from the interference of the Federal Courts.

In this case, there was no interference with any State

litigation. At the time the suit was filed in Federal Court there were no pending prosecutions.. This was not a collateral attack on any of Mr. Maynard's prior convictions, and it was not an attempt to use the Federal Courts --

QUESTION: Although the latest proceeding hadn't terminated yet, had it?

MR. KOHN: That's correct, Your Honor.

I should say --

QUESTION: Was the suit aimed at that latest proceeding, or not?

MR. KOHN: No, sir. As a matter of fact at the time I filed the Federal suit, I did not know about the third conviction for which Mr. Maynard had received a disposition of continued for sentence. I didn't find out about that until --

QUESTION: Is that still at stance now?

MR. KOHN: Yes, sir, but at the hearing before the three-judge court, the State stipulated that under New Hampshire practice that is a final disposition, and --

QUESTION: Your assertion is that this suit was wholly prospective. It wasn't aimed at any pending criminal proceeding and didn't attempt to upset any past ones.

MR. KOHN: That's absolutely correct, Your Honor.

QUESTION: And certainly didn't purport to try to enjoin any State proceeding.

MR. KOHN: No. Only we asked for prospective

relief, but there was no --

QUESTION: You asked for declaratory and injunctive relief.

MR. KOHN: That's correct, Your Honor.

QUESTION: Then, why was this a case or controversy in the Federal Court under -- what was that companion case with Younger from the 7th Circuit?

MR. KOHN: Samuels v. Mackell?

QUESTION: Samuels v. Mackell, I guess.

MR. KOHN: Well, Samuels v. Mackell, Your Honor, was a case where the Federal plaintiffs were seeking a declaratory judgment that the statute was unconstitutional --

QUESTION: Yes.

MR. KOHN: -- at the same time that there was an on-going State prosecution.

QUESTION: No, I'm thinking of the case where there was no prosecution on-going.

QUESTION: Boyle v. Landry?

QUESTION: Boyle v. Landry, was that it?

MR. KOHN: I believe so, Your Honor. Yes, Your Honor, and the Court did address the question of standing in that case. But in Boyle the Court characterized the plaintiff's standing as a search through the statute books to try to find a statute to attack, if I remember the case correctly.

In this case, Mr. Maynard had been prosecuted. At the



time I filed the Federal action, I knew at least two times. There was no question that he was not going to alter his religious beliefs and that unless we filed the suit and got an injunction he would either not be able to use his car or be subject to more criminal prosecution.

Mr. Maynard was in a situation where because of his religious beliefs he was going to be subject to a series of repeated prosecutions unless the Court intervened and stopped it.

QUESTION: You alleged that in your complaint, did you?

MR. KOHN: Yes, Your Honor, I believe I did.

QUESTION: Mr. Kohn, in Dyson there was attempt in the prayer, as I recall, to expunge a prior conviction.

MR. KOHN: Yes, sir.

QUESTION: You didn't seek that relief in this case?

MR. KOHN: No, Your Honor. Dyson, in effect, looked backwards. They were seeking an expungement of arrest records. They asked for an injunction to accomplish that. They also asked for a declaratory judgment which looked to the future. Our case looked only to the future, and that's the distinction between ours and Dyson v. Ellis.

The exhaustion requirement that the State would have the Court engraft onto 1983 action, under these circumstances, in effect, would bring the exhaustion requirement that's

presently applied in habeas corpus actions into the 1983 area.

Our response to that is to say that in the habeas corpus area, it makes sense to require a litigant to exhaust his State remedies because he is seeking release from confinement.

This Court has recognized that the State Courts should have the first crack at resolving any constitutional difficulties along the way.

But again, that is not the situation in our case. We are in no way attacking or impugning the ability of the State Courts to resolve these issues and we are not seeking any relief with respect to prior convictions.

QUESTION: Why didn't you take the first case up?

MR. KOHN: Well, Your Honor, I did not represent Mr. Maynard in the State Court proceedings.

QUESTION: Well, why didn't Mr. Maynard take it up?

MR. KOHN: After his first conviction on December 6th, the sentence was suspended. There was no reason to appeal that. His second conviction occurred on January 31st and he was again ordered to pay a fine. The judge then walked out of the courtroom, and Mr. Maynard explained that -- And at that point the judge advised Mr. Maynard that he had a right to appeal. The judge then left the courtroom. Mr. Maynard explained to the clerk that he could not pay the fines out of conscience --

QUESTION: No. He did not intend to pay them.

MR. KOHN: That's correct, Your Honor.

And at that point, the judge returned and sentenced him to fifteen days in prison and he was immediately taken to jail.

QUESTION: Couldn't he have appealed that?

MR. KOHN: Your Honor, under New Hampshire law, notice of an appeal to the Superior Court for a trial de novo must be filed at the time sentence is declared. There is a provision for a late appeal which may be filed within three days after sentence is declared. And there is a further provision that you can petition the Superior Court for permission within thirty days after sentence is declared.

QUESTION: The man says he could have gone through all of the courts.

MR. KOHN: He didn't have a lawyer -- He could have, Your Honor, but for one thing he didn't have a lawyer and he --

QUESTION: Because he couldn't afford a lawyer -- with two automobiles?

MR. KOHN: Mr. Maynard told the judge that he wanted to represent himself. He did not say that he could not pay for a lawyer.

QUESTION: Well, he still had them all available to him and eventually when he decided to abandon the New Hampshire courts he found a lawyer to get him into the Federal Court.

MR. KOHN: I don't think that's accurate, at all,

Your Honor.

The fact of the matter is that when Mr. Maynard got out of jail he made attempts to contact the American Civil Liberties Union. I think, up until that point, he believed --

QUESTION: Well, what's that got to do with this case? The point was that when he needed a lawyer he got one.

MR. KOHN: Well, he had made attempts to contact the Civil Liberties Union which were unsuccessful.

QUESTION: I don't see how we can take all of this into effect.

I am merely asking you: He had remedies available in the State Courts. Rather than to use those he used the Federal Court.

And I am not asking you a question I am telling you what he did.

MR. KOHN: I think that I would agree with Your Honor that once I was retained we chose the Federal Court as our forum.

QUESTION: I don't care one thing about you being retained. I am talking about what the record shows.

MR. KOHN: Well, there is nothing in the record that suggests that Mr. Maynard, with his ninth grade education, would have known how to take an appeal up through the New Hampshire State Courts.

QUESTION: There is something in the record that the

judge did advise him and that statutes did provide for it.

MR. KOHN: That is correct, Your Honor.

QUESTION: So, he had available to him a direct appeal in the machinery of the State Courts.

MR. KOHN: That may be true --

QUESTION: May be? Is it or not true?

MR. KOHN: The statutes were on the books, Your Honor, that there was an appeal mechanism.

QUESTION: And the judge advised him.

MR. KOHN: Yes, sir.

QUESTION: What else was the State required to do?

MR. KOHN: Well, Your Honor, for one thing, taking his appeal up through the State Courts would not have solved Mr. Maynard's problem. His problem was to obtain injunctive relief so he could drive his automobile.

The New Hampshire system of appeals is a two-tier system which this Court is thoroughly familiar with, where after your conviction in District Court you can appeal for a trial de novo in Superior Court. From Superior Court, then you can go to the State Supreme Court.

I have never heard of a case where a lower court in a criminal prosecution is issued an injunction against the State to prevent them from enforcing the statute which is at issue.

QUESTION: There is also a transfer proceeding in



New Hampshire, isn't there ---

MR. KOHN: Yes, there is.

QUESTION: --- on a constitutional question.

QUESTION: If New Hampshire said the statute was unconstitutional, surely, the New Hampshire prosecutor wouldn't continue to enforce it.

MR. KOHN: That is correct, Your Honor, but that would have been after a substantial period of time.

When Mr. Maynard got out of jail on February 28th of '75, he didn't use his car until the Federal Court action was filed. And he would not have used his car until the constitutional issue was resolved in some court. That could have been a matter of many months.

And there is testimony in the transcript on our motion for a temporary restraining order that this nonsense affected his ability to earn a livelihood. And that was the critical thing for Mr. Maynard.

QUESTION: When you say "nonsense," who are you talking about?

MR. KOHN: That these repeated arrests of Mr. Maynard for taping over his license --

QUESTION: Well, how about his repeated violation of the law?

MR. KOHN: Yes, that is correct.

QUESTION: That could be nonsense, too, couldn't it?

MR. KOHN: Yes, sir.

I'd like to respond to Mr. Justice Stewart's question about the transfer. There is a transfer procedure in New Hampshire, and if the justice of the District Court so permits, you can transfer a case direct to the State Supreme Court.

QUESTION: To determine a constitutional issue.

MR. KOHN: That's correct, Your Honor. But District Courts in New Hampshire are not courts of record. You would have to go to the State Supreme Court without a record, which in view of the State's consistent attacks on Mr. Maynard's sincerity in the Federal Courts, I think would have been a very poor mistake.

This Court has many times stated in its opinions that constitutional issues take on color from the factual surroundings in which they arise.

QUESTION: Mr. Kohn --

MR. KOHN: Yes, sir.

QUESTION: -- the Attorney General's brief states that the constitutional issue was raised at the initial trial and was resolved in favor of the validity of the statute, against this Appellant. Is that correct?

MR. KOHN: I believe it is incorrect, Your Honor, and the three-judge court said that it was incorrect.

QUESTION: If it were correct, would you be out of court here?

MR. KOHN: Not on Younger principles, Your Honor.

I think then the --

QUESTION: How about res judicata?

MR. KOHN: Res judicata, which is what I think the State is really arguing in this case. Their whole Younger argument is really dressed up as res judicata.

But our answer to that is that it was waived. Res judicata and collateral estop are affirmative defenses that have to be raised by the State and they did not do so in this case.

QUESTION: What if the State doesn't raise them but the District Court, nonetheless, passes on them, as the District Court did here?

MR. KOHN: Well, the rules provide -- First of all, Your Honor, the District Court did not pass on them. The District Court --

QUESTION: I would have read its opinion to pass on them.

MR. KOHN: I read its opinion as being strictly over the dictum, that if the State had raised that argument they would have rejected it. But I think that the burden is on the State, or the defending party, to raise his affirmative defenses in conformance with the Federal rules of civil procedure.

QUESTION: We have lots of cases where, under our

rules, you must have raised a point at the earliest possible point in State proceedings, but, nonetheless, we've also held that if a State Supreme Court passes on the point, even though it didn't have to, then the issue is open for us.

MR. KOHN: Yes, sir.

I've stated my position, but I would ask that if the Court feels that you want that -- the issue of whether res judicata and collateral estoppel apply to 1983 actions, that you direct the parties to brief that, because the State hasn't briefed it and we haven't responded to it. It is a question of infinite complexity that should receive briefing.

QUESTION: I am a little puzzled about the res judicata argument, because I don't understand you to be attacking the judgment, any of those judgments that have been entered.

MR. KOHN: That is correct, Your Honor. Res judicata wouldn't apply in any event, and they did waive that. They did raise collateral --

QUESTION: Well, if they didn't waive it, you are not attacking those judgments.

MR. KOHN: That's correct. They did raise a collateral estoppel argument in a motion to dismiss in the District Court when we began the case. And Judge Bownes --

QUESTION: But does collateral estoppel apply to issues of law?

MR. KOHN: I have assumed that in my brief, Your Honor, although I know that some courts say it only applies to issues of facts. There are Federal Courts that have applied it to questions of law. But, in any event, the State has not pursued that issue. They raised it before Judge Bownes. He decided against them. They did not raise it again before the three-judge court. As I note in my brief, there is a question as to whether Judge Bownes should have denied that particular motion the way he did, but the fact of the matter is that the State abandoned it and the only time they have mentioned it since is in its brief and not its jurisdictional statement that was filed with this Court.

I would again ask that if the Court feels that issue should be reached in this case that we should be able to brief it.

There is an additional question which the State, sort of, combined with its Younger argument which we feel is a separate question and that goes to the permanent conjunctive relief that the District Court answered.

Again, this is an issue we feel the State has waived and the District Court said that the State did not dispute it, that the Federal Court could issue an injunctive relief against threatened arrests and prosecutions. And that is what they did in this case.

I would want to point out that there were no



prosecutors or judges as defendants in this case. The reason we asked for injunction against arrests and prosecutions is that in New Hampshire frequently police officers initiate prosecutions in District Court, and the injunction that the Court issued only runs to those individuals.

This was an extremely narrow injunction. It was nothing like the injunction that was issued in Rizzo v. Goode which involved the internal workings of a police department. All this injunction directed was that the Maynard's not be arrested or prosecuted for the offense of taping over the motto on their license plates.

The State has briefed another issue with respect to Mrs. Maynard. They have argued that her action be dismissed, based on some language in Doran v. Salem Inn, that she and her husband were so closely intertwined that if he is barred by Younger then she must be.

At common law, husband and wife were one and the husband was the one, but that is no longer the case.

Mrs. Maynard's action was not a subterfuge to circumvent Younger considerations. She had standing on her own. She was threatened with prosecution. She shares her husband's religious beliefs, and there is no question but that she had Article III standing.

We would argue that irrespective of whether Younger governs Mr. Maynard's case, Mrs. Maynard's must proceed to the

merits.

The central question in this case is whether the action of the Maynard's in placing reflective tape over the State motto on their license plates is protected by the First Amendment as symbolic expression, and whether the State's interests are substantial enough to override that expression.

QUESTION: Aren't there two rather separate First Amendment issues here? First, the one that you've just summarized, --

MR. KOHN: Yes, sir.

QUESTION: -- whether or not this was affirmative symbolic expression on the part of your clients.

And, isn't the second issue whether or not a person can be compelled to advertise a belief in which he does not believe?

MR. KOHN: That's correct, Your Honor.

As a matter of fact --

QUESTION: And aren't they rather separate and separable?

MR. KOHN: Definitely. And I would argue that there is a third separate issue which involves the Free Exercise Clause because Mr. Maynard's belief and Mrs. Maynard's belief is religiously based. And I would see those as three separate arguments.

QUESTION: What's the third? I want to be sure --

MR. KOHN: The Free Exercise Clause, Your Honor.

QUESTION: And why? Because --

MR. KOHN: Because Mr. Maynard's beliefs are religiously based and that the imposition by the State of this motto upon him, which is offensive to those beliefs, violates his -- the Freedom of Exercise --

QUESTION: Well, that's really the same as the second, except one is involved on the free expression and the other on the free exercise of religion.

MR. KOHN: That's correct, Your Honor.

QUESTION: It is compelling somebody to advertise a belief in which he doesn't believe, either because -- to which he doesn't subscribe either because of religious reasons or political or philosophical reasons.

MR. KOHN: That's correct. Yes, sir.

QUESTION: Well, could the State compel a person to advertise a neutral concept that did not offend the religion clauses?

MR. KOHN: I think that would fall within -- You know, most of the mottoes that appear on State license plates -- If a State wants to advertise --

QUESTION: You are not conceding that they are all valid, are you?

MR. KOHN: No. Absolutely not.

North Carolina's is "First in freedom," and I know

there have been problems with that.

But, nevertheless, most of the slogans that appear on license plates advertise a State as a vacation land, or a sportsmen's paradise, or its a tourist attraction, or something that is neutral.

QUESTION: What if Nevada's said, "Gamblers' paradise"? And a Nevada citizen said, "I am just very fundamentally opposed to gambling."

MR. KOHN: I think that's right. I think that if he taped over the "gambling," that would be an exercise of symbolic expression.

And, I think that before the issue of the environmentalists came up, if the State advertises itself as a garden State or a scenic State and someone is deeply offended by that, I think that is symbolic expression.

Our case is much stronger because Mr. Maynard's beliefs are religiously based.

QUESTION: Mr. Kohn, then you don't agree that the license plates belong to the State.

MR. KOHN: That is correct, Your Honor.

QUESTION: I assume so.

MR. KOHN: That is correct. As a matter of fact, seven States, North Dakota, South Dakota, Vermont, Delaware, Puerto Rico and North Carolina, specifically say in their statutes that the State retains title to the license plate

while it is in the possession of the individual.

New Hampshire does not.

QUESTION: That still wouldn't avoid the problem of the power of the State to compel a citizen to carry picket signs.

MR. KOHN: No. And I wouldn't want to suggest that if someone came into this Court next week with a North Carolina license plate, that the case should turn on whether the State asserts title or not.

Yes, sir.

QUESTION: Do you think an atheist could cross off the words or tape over the words, "In God we trust," on American currency?

MR. KOHN: Well, Your Honor, I think that --

QUESTION: Have a constitutional right to do that, is what I mean.

MR. KOHN: There are at least two answers to that, Your Honor.

First of all, the statutes which make that a crime require a fraudulent intent, so I don't think there would be a violation of law, at least under the present statute if that were done.

QUESTION: Well, let's assume the statute was --

MR. KOHN: Secondly, if someone chose to -- who really objected to the motto, "In God we trust," and put tape



over it the way Mr. Maynard does with license plates, I do not think he could be criminally punished for that because --

QUESTION: There is a statute on mutilating currency.

MR. KOHN: This is not mutilation, Your Honor. This is exactly what the Court was talking about in Spence.

QUESTION: If you cut out the words with a razor blade, "In God we trust," would that be mutilation?

MR. KOHN: I think it might, Your Honor, yes. Well, I know it would be mutilation and I think the State could probably make that a criminal offense. That's not this case.

QUESTION: Didn't he deface the plate?

MR. KOHN: In the beginning, yes, Your Honor. He used to tape the motto over and neighborhood children would cut out the words -- neighborhood children would pull the tape off. So, eventually, he cut out the words, "or die," and then put tape over the whole thing.

But, when we filed our suit, he had just been issued new plates for 1975 and we have never suggested that he be able to cut out or actually physically mutilate the license plates. That is not an issue.

QUESTION: There is one other thing that I am a little confused, in the record, because it seems to me it is inconsistent. Were the Maynard's willing or unwilling to purchase a vanity plate?

MR. KOHN: They stated that they were willing to

purchase a licence plate that did not contain the motto, "Live free or die."

QUESTION: But they did not.

MR. KOHN: They were not offered that opportunity by the State, Your Honor.

QUESTION: Well, wasn't anyone privileged to do that?

MR. KOHN: Well, the vanity plates in New Hampshire, as they are currently printed up, all contain the motto, "Live free or die," and it would have required removing the die that says, "Live free or die." And there is testimony in the transcript that that could be done without a lot of difficulty, but the State never said that that could be done.

As a matter of fact, I think they said it couldn't be done.

I believe I am accurately stating the State's position.

The first issue under the symbolic speech question is whether there is an intent to convey a particularized message and whether that message is likely to be understood.

Contrary to what the State has represented here, this issue of "Live free or die" on the license plates is a very hot issue in New Hampshire. It has been to the New Hampshire Supreme Court. This very case was delayed for eight months while the Legislature considered a bill that would have made inclusion of the State motto optional. People are well aware

in New Hampshire about the controversy around the motto and there is testimony in the record, on page 29, for example, by Mr. Maynard, that people would stop him when they say the tape over his license plate and that would give him an opportunity to talk to them about his beliefs.

I don't think there is any question but that this was -- that he had a particularized intent and that people would understand the message.

The State interests that have been advanced by New Hampshire, pride, individualism, history and tourism, as the District Court held, are not unrelated to the suppression of expression, for the obvious reason that it's only by conveying the message that the State gets the point across, whatever the point may be.

Orthodoxy of thought can be fostered not only by penalizing those who are deviant in their expression, but also by granting special privilege and special status to messages that meet the State's approval.

This is very much like the Shact case, where there was a statute that permitted the American uniform to be worn in theatrical productions that glorified or praised the military but not otherwise.

And that is what the State has done here. They've selected a message which they want to project. They select a billboard -- it has to appear on all license -- noncommercial

license plates in the State and then they make it a criminal offense to cover that over.

So it is not unrelated to the suppression of expression and unless the State can come up with some compelling need, or unless they can show a clear and present danger that their interests cannot be served otherwise, then that is not a valid justification.

The other interest they advance is that it helps their system of motor vehicle registration. But the motto is nonfunctional. It does not serve any purpose on the license plate, unlike the numbers or the name of the State or the date.

And it is our position that the State lacks the power to require its citizens to bear this sort of motto.

And, as the Chief Justice was asking before, I think that if the Court were to uphold this sort of thing, then the State could require all citizens to wear a pin or an armband, or they could require you to have a plaque on your door next to your address saying, "Live free or die."

I am sorry. Did you have a question, Your Honor?

And beyond that, there is evidence in the record that -- at least with regard to the Maynard's plate there is no duplicate plate in the State of New Hampshire, so it would not present any problem of identification.

This is not an O'Brien case, as my brother counsel

said before. O'Brien involved the war power, one of the most pervasive powers that you could imagine under our system of government. Also, O'Brien destroyed and mutilated his draft card. That was the whole point to the exercise.

Mr. Maynard is not destroying the plate. The war power is not involved here and --

QUESTION: Do you think the State is more limited in the exercise of its residual powers than Congress is when it is exercising the war power, each when confronted by the same constitutional guarantee?

MR. KOHN: Well, Your Honor, I just think that the interests that the State has advanced, in this particular case, come nowhere near the war power. It may be that the State has other powers under its police power, or powers dealing with the welfare of its citizens that could be equatable with the war power as compared with the national government.

But, certainly, in terms of the interests that the State has advanced in this case, there is no comparison.

QUESTION: Would you think all your arguments would apply with equal force if the motto on the license plate was "Don't litter."

MR. KOHN: I think that would be --

QUESTION: Do you think everyone would agree with that?



MR. KOHN: That would be a tough one.

I think everyone would agree with that.

QUESTION: Maybe some people would think the right of privacy permits any person to throw any garbage or junk anywhere he wants to.

MR. KOHN: Yes, sir. I think that you do reach a point -- I mean, I am sure my brother counsel would argue that some people would disagree that -- I don't know -- some State is a vacation land or that Mississippi is the hospitality State.

I guess I would have to say that if someone has a conscientious opposition to this, thinks it isn't true, that it would be a case of symbolic expression if they taped it over.

Unless the State can show some overriding need for that motto, then there can be no criminal penalties attached.

I should make another point in connection with that. It's essential to understand this case that it is criminal penalties that are involved here.

QUESTION: How about the licenses that say, "Wear seatbelts."

QUESTION: I think it involves liberty.

MR. KOHN: I suppose it does, Your Honor. I suppose it does. It does involve liberty and I think that probably it would be protected expression if someone covered it.

In any event, I would argue that the motto in this particular case is so different from these that it almost stands, sui generis, aside.

"Live free or die," or "The Mormon State," or "Amnesty now," or any politically loaded message that is bound to offend sensibilities cannot withstand a First Amendment attack.

With respect to the Barnett issue which Mr. Justice Stewart mentioned, the State's response to this -- and they didn't actually brief this, but they relied on the New Hampshire Supreme Court decision in Hoskins, was that, well, everybody knows that the State motto is required, therefore it can't offend the Barnett principle.

But I find that totally understandable. Barnett, itself, could have been explained on those grounds. Everyone knows that children have to salute the flag, so it doesn't matter.

Well, that's not the issue in these cases. The issue is whether it is an affront to the particular individual's deeply held beliefs.

I think that that concludes my presentation unless there are some questions.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, counsel.

Mr. Johnson, do you have anything further?

REBUTTAL ORAL ARGUMENT OF ROBERT V. JOHNSON, II, ESQ.

ON BEHALF OF THE PETITIONERS

MR. JOHNSON: Briefly, Mr. Chief Justice and Justices.

During my direct remarks, I was inquired as to whether the State of New Hampshire is before this Court seriously.

We are here seriously.

There are many mottoes which we have in this country, and I think that this is an important case.

"In God we trust," is upon our coins and currency.

"E pluribus unum," is upon our coins and currency.

"Equal justice under law," is upon the edifice in which we appear today.

I think there is something to be said for the preservation of certain slogans and mottoes.

Next, I would point out that we lawyers are required to be members of bar associations in many States. And yet, by that requirement, it is not implicit that we agree with what the bar association in each State says or stands for.

When we place postage stamps on our envelopes, those postage stamps contain symbols and mottoes.

"Liberty depends on freedom of the press," issued November 13, 1975, by the United States Government, and I am not sure whether every member of the Judiciary, necessarily, would believe in that particular motto.

And, certainly, if a member of the Judiciary were to

place a stamp bearing that motto, "Liberty depends on freedom of the press," upon a letter, no one reasonably would believe that he necessarily concurs with the sentiments --

QUESTION: Usually, we don't put stamps on letters.

(laughter)

MR. JOHNSON: But, if your secretary, Mr. Justice Marshall, placed such a stamp on a letter, I don't think that if I were to receive the letter I would necessarily believe that you believe in that particularly motto merely because it was upon your letter.

I think it is important in this case also that the defendant mutilated the license plates. He cut out the words.

I think, finally, it is important that there was no particular message enunciated by the conduct of the Appellees.

The District Court found that by his conduct he expressed a particular message, a message which indicated his objections.

I would submit that if you were to examine the Plaintiff's Exhibit Number 1, which is before this Court, the particular license plate, in its condition, and ask yourselves what message was conveyed by this act of whimsy, that you would find no message conveyed.

And for these reasons, the State would ask you to reverse the judgment of the District Court of the State of New Hampshire.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:12 o'clock, p.m., the case in the above-entitled matter was submitted.)